

COVID INQUIRY

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My Ref: MP:MP3515

Date: 28 May 2020

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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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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 far-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 than, 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,



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11 June 2020

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

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**

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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My Ref: MP:MP3515

Date: 15 June 2020

Dear Sir/Madam

Our client - Rev Ade Omooba et al
Your Reference: Z2006192/HHS/H017

We acknowledge receipt of your letter of 11 June 2020. We write this letter in response to your position and to request a meeting at your earliest opportunity, at a time no later than 19 June 2020. Given the urgency of the matter, we ask for acknowledgment of service by return and a substantive response within 2 working days following receipt of this letter.

We would like to further address the following matters in relation to your letter:

The Issues

- (1) We contest the manner in which the issues have been framed in your response and in particular:
 - (a) In relation to paragraph 2(a), the fact that the vast majority of churches have voluntarily shut down has no bearing on either the churches that have not voluntarily shut, or more importantly, on the importance and application of Article 9 to the interference suffered by these churches and their membership by the ongoing restrictions.
 - (b) To clarify our position in relation to church autonomy, which you seek to define in paragraph 2(b) of your response, we wish to make clear that church autonomy is not only protected by the *Magna Carta 1215*, but much more recently by the European Court of Human Rights, including several judgments of the Grand Chamber. To list just a few of those judgments: 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.

Criminal
Defence Service



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Response

Using the numbering in your letter.

- (2) **Firstly**, we do not doubt the challenge posed by the Covid-19 pandemic nor its seriousness. Like most everyone in the United Kingdom, our clients grieve for the lives lost and the families affected. Nor do we minimise the need to have in place measures to help prevent the spread of the disease, which we acknowledge is a legitimate aim within the meaning of Article 9(2) of the Convention. Our clients do not challenge the government's aim to protect the health and safety of the population, our client's challenge centres on the Government's interpretation of proportionality, in that your client is of the view that church attendance is not deemed an essential service, and the principle of church autonomy.
- (3) We would ask you to consider the recent South African High Court judgment challenging their coronavirus restrictions, in *Reyno Dawid de Beer et al. v. The Minister of Cooperative Governance and Traditional Affairs*, Case no. 21542/2020. We accept this case is not binding in the UK, nonetheless we suggest that the High Court provided an important interpretive framework when considering proportionality in the context of Covid19. It is clear that the proper standard of review is whether a restriction is constitutionally justifiable, the High Court disapproved of the South African Government's paternalistic approach. We suggest, without proper justification, the UK government's approach is similar to that of the South African governments.
- (4) The *de minimus* disclosure you have provided, is indicative of the paternalistic manner in which these restrictions have been imposed. The public have not been provided with any insight to whether genuine debate and study was undertaken to determine whether shopping at Sainsbury's etc is an inherently safe activity than attending church.
- (5) **Secondly**, while we accept that the right to life is of fundamental importance, it is not the only consideration for the Government. Nor is the margin of appreciation as wide as you suggest. Section 13 of the Human Rights Act provides a higher standard of review for any case which may affect the ability of a church to exercise their Article 9 rights. The European Court of Human Rights has said that the standard of review for Article 9 cases requires a level of "*very strict scrutiny*". ECHR, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 1354, § 44. Proportionality is judged on rational basis. If a church can be open as a food bank, why cannot it not be opened for prayer for more than one person at a time?
- (6) **Thirdly**, the fact that the restrictions are finite is largely irrelevant to the application of Article 9. A public authority either disproportionately, and therefore unlawfully, interferes with Article 9, or it does not. The length of time the interference takes place has no bearing on whether the Convention rights of churches and their members is violated. Our clients clearly understand the current restrictions apply to all religions and places of worship, the scope of this complaint is limited to the standing which they have, which is as leaders of Christian churches. However, that is irrelevant. Our clients have never claimed that your client's acts were limited to churches. It maybe that your actions unlawful actions extend much further than just the churches.

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- (7) **Fourthly**, given that your client has placed great weight on the scientific advice received from SAGE, this therefore falls to be disclosed. In any event, with the appropriate social distancing measures in place, and a limitation on the total number of people to be admitted to a church building, there is no reason why churches cannot open forthwith. Social distancing is perfectly possible in the vast majority of church buildings in the country.
- (8) **Fifthly**, we note your comments in relation to the taskforce. Our clients do not believe that the taskforce adequately represents the interests of much of Christianity in the church, in particular the growing churches and the BAME churches. Our clients would ask you to invite suitable representatives onto this taskforce that represent such interests.
- (9) **Sixth and Seventhly**, your response has failed to take into account the importance of freedom of religion to the life of a believer. *Cf. Hasan and Chaush v. Bulgaria* [GC], application no. 30985/96, judgment of 26 October 2000, §62. Article 9 is the only right which recognises the transcendent, making participation in the life of a church community wholly different than secular activities such as going to a gardening centre. Given this fact, as well as the emotional and psychological benefits of being part of a church community, church attendance should be viewed as essential.
- (10) We note that Swift J, in *Hussain*¹, decided only to reject the claimant's application for interim relief, but otherwise granted permission for judicial review. There is no indication in the judgment that the court had any scientific evidence before it when determining that church attendance was qualitatively more dangerous than going to a garden centre. The quote from the judgment you provide also omits the important qualifying phrase: "*it is possible to recognise...*", which clearly shows that this is obiter dicta and not a finding of fact.
- (11) As stated at the outset of this response, we believe that you have mischaracterised our position concerning the *Magna Carta 1215*. There has not been Government interference of the present nature for c.800 years. In any event, whether the relationship between the church and the government has evolved over time not germane given that the European Court have repeatedly held that the right to manifest one's belief in community is sacrosanct. In *Metropolitan Church of Bessarabia v Moldova*, the Court held that: "*the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary state intervention.*" ECHR, *Metropolitan Church of Bessarabia v. Moldova*, no. 45701/99, ECHR Reports 2001-XII, 13 December 2001, § 118.
- (12) Therefore, any constitutional justification on restrictions of freedom of religion must also take into account the importance of this principle, together with the heightened level of scrutiny enjoyed under Article 9. The term 'necessary', in relation to proportionality, 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,

¹ [2020] EWHC 1392 (Admin)



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2007)². If there are less restrictive means of promoting health while at the same time respecting freedom or religion, they should be utilised. The possibility of some churches might not respect social distancing measures, against whom appropriate law enforcement measures could be taken, should not affect the rights of churches willing to follow the appropriate health measures. Similarly, the government is not proposing that shops will be preventing from reopening next week for fear that a few may breach the rules.

ADR Proposals

- (13) Given the above, we make the following requests:
- (a) For the sake of transparency and to support your position that you are acting constitutionally justifiably, that our request for information and documents be reconsidered.
 - (b) That an ADR meeting be convened at the earliest opportunity with the attendance of all our clients (should they wish to attend) and their legal representatives, to prevent the effluxion of time making the point of the meeting moot and at the very latest by 19 June 2020 4pm.

Yours faithfully



Andrew Storch solicitors

² <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81067>



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IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
APPLICATION FOR PERMISSION FOR JUDICIAL REVIEW
BETWEEN:

HER MAJESTY THE QUEEN
(ON THE APPLICATION OF REV. ADE OMOOBA ET AL.)

Claimants

-v-

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

STATEMENT OF FACTS AND
GROUNDS FOR JUDICIAL REVIEW

References in square brackets are to the page numbers in the bundle submitted with the Claim Form.

Essential reading: *Statement of facts and grounds [16]; Defendant’s pre-action letter [96]*

Evidence: *Expert report of Dr Martin Parsons [119]; expert report of Ian Blenkarn [142]; supplemental report of Ian Blenkarn [158].*

Introduction

1. The proposed judicial review is against the blanket ‘lockdown’ imposed on all churches by *The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (“the Regulations”)* [37], and the failure to prioritise the re-opening of churches as part

of the Government’s ‘exit strategy’. Specifically, the Claimants challenge the following ‘decisions’:

(1) **Regulation 5(5)** of *the Regulations*, which provides: “*A person who is responsible for a place of worship must ensure that, during the emergency period, the place of worship is closed, except for uses permitted in paragraph (6).*”

(2) **Regulation 7**, insofar as it applies to church services and rites. Regulation 7(1) provides:

(1) During the emergency period, unless paragraph (2) applies, no person may participate in a gathering which takes place in a public or private place—

(a) outdoors, and consists of more than six persons, or

(b) indoors, and consists of two or more persons.

Para (2) then provides a list of exceptions, none of which apply to church services or 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 (“**the Strategy**”) [42].

(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’. (“**Failure to give assurances**”)

2. The Claimants bring this claim with great reluctance, having made extensive efforts to work constructively with the Government to achieve a mutually acceptable compromise, including under the pre-action protocol [96] and via the government-sponsored ‘taskforce’ and ‘roundtable’ processes. Regrettably, at the end of the 3-months time limit, this claim still appears necessary. Having preserved their position by filing this claim, the Claimants will continue their efforts to resolve the issues through constructive dialogue with the Government.

3. In summary, the Claimant’s case is that the relevant Regulations are:

- (1) 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
 - (2) *ultra vires* the Health Secretary's powers under *Public Health (Control of disease) Act 1984*.
4. The Claimants do not for a moment suggest that churches should have continued to operate as before notwithstanding the Coronavirus epidemic. Rather, the Claimants' 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.

The claimants

5. The Regulations obviously affect thousands of religious ministers and congregations in England. The Claimants are a group of Christian leaders, bishops and ministers, who bring this claim on behalf of themselves and also on behalf of their congregations and religious communities. Collectively, they represent many thousands of Christians.
6. Each of the individual Claimants is briefly introduced below. The first Claimant, Rev. Ade Omooba MBE, has been nominated with general consensus by the Claimants, as the lead Claimant. The other Claimants are listed below in alphabetical order.
7. **Rev. Ade Omooba MBE** is Co-Chair of *National Church Leaders Forum – NCLF, A Black Christian Voice*. He has been in full time social entrepreneurship and Christian ministry in the UK for over 32 years. He is a co-founder of several organisations/groups in addition to NCLF, namely; the Christian Victory Group - ICARE Projects, through which he has helped set up over 100 Social Action/Inclusion projects in the last 28 years; Christian Concern (CC), a UK Lobby/Campaign Group on Public Policy, and the Christian Legal Centre (CLC) addressing Christian liberty cases. He is a member of the leadership team of *HOPE Together* which seeks to resource and equip the Church for doing mission locally; a member of the Apostolic Team of Connection Trust, a global network of churches; an oversight member of the New Life Assembly. He was awarded an MBE in the Queen's New Year's Honours List 2019.
8. NCLF works closely with African and Caribbean churches, representing their voice and concerns to government and policy makers. Its 2015 *Black Church manifesto* was

endorsed by the government and the main political parties; there was a commitment by government to work with NCLF and Afro-Caribbean churches for the common good. NCLF believes this commitment has not been honoured in the present 'lockdown' of churches.

9. **Pastor Ayo Akinsanya** (Pastor/Regional Overseer) of Deeper Christian Life Ministry (Merseyside/Wales Region) and pastor of Deeper Life Bible Church, Liverpool, based in Toxteth. The church has about 300 members with a mix of children, youth, adults and seniors.
10. **Moni Akinsanya**, is the Regional Women's Leader of Deeper Christian Life Ministry.
11. **Rev. Derek Andrews** is the senior pastor of *The Presence of God Ministries* (TPOGM) based in Kerseley, Coventry. He has been serving in church ministries and communities for over 30 years. He has been a support worker in the community both in London and Coventry for over 24 years. He was officially ordained by *Apostolic Pastoral Congress*, as a reverend and an overseer for the Midlands Diocese under APC. TPOGM is a member of *Churches in Communities International*.
12. **Dr. Gavin Ashenden** is a former Honorary Chaplain to the Queen (2008-2017), former Anglican Bishop, and now a Roman Catholic theologian.
13. **Pastor Matthew Ashimolowo** is the Senior Pastor of Kingsway International Christian Centre (KICC). KICC is an Independent Charismatic Pentecostal Church with over 25 branches in the United Kingdom. It represents over 6,000 people.
14. **Bishop Lovel Bent** is the Presiding Bishop of the *Connections Trust*. Tens of thousands of people across the world have benefited from their international charitable work supporting churches, schools, orphanages, disaster relief, etc. Around 20 church communities in the UK are associated with the Connections Trust, and about the same number contribute financially to its charitable work. Its continuation depends on those churches. It runs food banks and other charitable projects in UK communities. Bishop Lovel Bent is also the founder and overseer of *New Life Assembly UK* with seven branches in the UK with approximately 1,500 members and NLA branches in Jamaica and the Philippines.
15. **Rev. Ian Christensen** is a Senior Minister of *New Life Christian Centre International* (NLCCI), and a Senior Leader in *Assemblies of God in Great Britain* (AoG UK). He is also an author with an International Travelling Ministry and a TV presenter on Sky TV.

NLCCI includes a multicultural English-speaking Church as well as a Brazilian Church and a Hindi speaking Indian church., NLCCI serves around 400 people from its building with several links and projects within the local community.

16. **Chris Demetriou** is the Senior Pastor and Founder of Cornerstone Church, Walton-on-Thames, Surrey. Cornerstone Ministries is a registered charity and has been in existence for over 30 years, the church has a membership of 600 people representing 41 nations of many colours and creeds. In addition to their successful Food Bank and other effective community programs aimed at helping those in need, the ministry has a radio station and a television network that communicates daily with over eighty thousand people (most of whom are in the UK).
17. **Professor John Durodola** is the National Chairman of Overseas Fellowship of Nigerian Christians (OFNC). OFNC was set up in the 1960s and now has a membership comprising of over 750 people of all age groups and walks of life in 23 cities in the UK. It is a non-denominational organisation of predominantly but not exclusively Nigerian members, drawn from over 250 churches around the UK. It encourages its members to be active participants in their own churches, while meeting at branch and national level OFNC events.
18. **Rev. Asif Gill** is a founder and a senior leader of *Ecclesia International*, since 2004. He was ordained by *Apostolic Pastoral Congress* (APC) and was appointed as an overseer for Midlands Diocese under APC. *Ecclesia International* is a church ministry that has been effectively engaged with various communities at several levels and has a strong network of pastors and organisations.
19. **Dennis Greenidge**, Senior Pastor, Worldwide Mission Fellowship based in West Norwood, London, a fast growing multicultural, multiracial church with members from over 20 nations.
20. **Rev. Alex Gyasi MBE**, is the Senior Pastor of the *Highway of Holiness Church*, and the CEO of the Highway House shelter in Tottenham which has provided daily shelter for over 1,000 homeless people for the past eleven years. He is also the convener of *The Kingdom Culture Alliance*, which is a forum for about 80 independent and denominational church leaders in the UK.
21. **Rev. Dr David Hathaway D.D.** is the President of *Eurovision Mission to Europe*. The organisation represents over 50,000 Christians across every denomination in the U.K.

and internationally, countless thousands across Europe and the former Soviet Countries. Dr Hathaway has worked personally with the churches in the former Soviet Union for 60 years, 30 under communism (1961 – 1991) then 30 years since. He is gravely concerned about the parallels between the developments in the Soviet Bloc and the recent developments in the UK.

22. **Pastor Thabo Marais** is the Senior Pastor of Christian Revival Church London - a non-denominational Pentecostal, charismatic and multicultural church that is part of an international movement called Christian Revival Church (CRC). CRC International is led by its founder and visionary, Pastor At Boshoff, who pastors the fastest growing multicultural church in South Africa today. Since Pastor Thabo's appointment as senior pastor of CRC London in 2009, the church has grown year upon year from 300 people to over 3,000 people. It currently has 3 church campuses in and around London with over 1,500 people attending Sunday services. It has planted vibrant CRC churches in the north of England in Manchester, Scotland in Edinburgh, Netherlands in Amsterdam, Poland, Pakistan, India & Namibia in the past 8 years. CRC London has a multicultural membership representing the cosmopolitan metropolis of London, including over 50 different nationalities.
23. **Canon Yaqub Masih MBE** is the Secretary General of *UK Asian Christians Fellowship*, and represents several churches in the UK.
24. **Dr David Muir** is a Co-Chair (with the First Claimant, Rev. Ade Omooba) of National Church Leaders Forum – NCLF, A Black Christian Voice. He is a Senior Lecturer in Public Theology at the University of Roehampton (UoR) and director of the Whitelands Centre for Pentecostalism & Community Engagement. Before joining UoR he was executive director of Public Policy & Public Theology at the Evangelical Alliance. He was an independent adviser to the Home Secretary and Police Minister from 2003-2008, as well as a member of the Advisory Board for Naturalisation and Integration. He is a member of the Kirby Laing Institute for Christian Ethics (Cambridge University) and a UK board member of the Transatlantic Roundtable on Religion and Race (TRRR).
25. **Bishop Michael Nazir-Ali** is the President of Oxford Centre for Training, Research, Advocacy and Dialogue (OXTRAD). He was the Bishop of Rochester, in the Church of England, for fifteen years and prior to that Bishop of Raiwind in Pakistan and

General Secretary of the Church Mission Society. As Bishop of Rochester, he had responsibility for 264 churches, around 100 schools and chaplaincies in schools, hospitals, prisons and industry.

26. **Rev. Dr Brad Norman**, Salvation for the Nations Intl. Churches. Herts International Church (HIC) is a multi-national, multi-generational church with over 40 different nations represented, based in North West London. It has approximately 1,200 people on its register. In addition to Sunday services, it runs many community programmes, including a Food Bank which supports over 100 families a week. It has initiated a Schools Programme, called Assemble Angels, which supports over 15,000 children a term, running school assemblies, individual support for students who have been excluded as well as a programme that prepares pupils for their move to secondary school. It also runs two, fully accredited, Theological Seminaries on site.
27. **Pastor John Quintanilla and Pastor Sally Quintanilla** are the pastors of *Hebron Christian Faith Church*, Coventry - a modern Pentecostal multi-cultural church with a congregation of 250 people.
28. **Pastor Paul Song** is the pastor of *London Shepherd Church*, a Pentecostal Christian AoG church in New Malden, South London.
29. **Pastor Adekola Taiwo** is the Senior Pastor of *New Wine Church*, headquartered in Woolwich, London, and with branches in other parts of the UK. It has over two thousand members, and has served many more thousands of people in local communities for over 26 years. It has been given a given a community leadership award by the London Borough of Greenwich in 2017.
30. **Rev. Melvin Tinker** is the vicar of St John's Church in Hull, International Speaker and Author. St John's Church, Church of England, Hull (a city which has the lowest church attendance in the country) has over 500 people in attendance on a normal Sunday with a racially diverse and socially mixed congregations - white working class, factory workers, teachers, doctors, university lecturers, over 50 Congolese, Chinese and a large number of Iranians. A large proportion of the congregation is under 40.
31. **Rev. Keith Waters** is an ordained minister and the pastor of *New Connexions Church*, Ely. It is a relatively small church of about 40 people, with a congregation from a wide variety of backgrounds and aged from very young children to 90+. It is representative of many churches of similar size across the UK.

32. **Bishop Alfred Williams**, is the Presiding Bishop of *Christ Faith Tabernacle International Churches* with over 3000 membership, and the President of *Prophetic Voice Ministers Fellowship* consisting of a number of independent churches across U.K. The churches are multicultural and multinational, with majority BME, comprising 65% under 40s.

Churches' response to the Coronavirus epidemic

33. The fact that the Coronavirus epidemic presents a serious threat to public health is not in dispute.

34. 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

35. The principle of Church autonomy is zealously protected in ECHR jurisprudence under Article 9 (see *Metropolitan Church of Bessarabia v. Moldova*, no. 45701/99, ECHR Reports 2001-XII, 13 December 2001, § 118). 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.

36. In English law, the principle of church autonomy is of a much greater antiquity, and has at least as important a constitutional status as under the Convention. It is enshrined in c. 1 of Magna Carta 1297. 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* but for the temporal powers of the Crown.
37. The 1559 Church-State Settlement still has legal force and is specifically affirmed by every English sovereign in their coronation oath. This sets out separate spheres for church and state. Broadly speaking, the state may not interfere in either the interpretation of Scripture or the sacraments i.e. in effect worship, while the church must be subject to the law in other matters. The government of the realm and the government of the Church were always distinct in the UK Constitution, despite the same Monarch being ultimately at the head of both.
38. *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*.
39. The Claimants rely on the *expert report of Martin Parsons [119]* explaining the history of the principle and the interplay between its theological and legal application.
40. 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.

41. 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 and/or sacraments.
42. 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 churches and denominations.
43. 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 (originally with three prescribed exceptions, and now with five such exceptions) does not meet those requirements.
44. 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

45. 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 class of persons interested in participating – 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.

46. By contrast, in a believer's worldview, church services are part of their means for achieving eternal salvation of the soul, which is infinitely more important than even the 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.
47. 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 salvation of immortal souls.
48. See further the *expert report of Dr Martin Parsons [119]*.
49. 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, or at least, have little understanding of the role, functioning, and ministries of the church.

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

50. 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.

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

52. 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 their 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.

53. 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.

54. 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.

55. 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.

Ground 1: The principle of church autonomy in domestic law

56. 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.

57. 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.

58. 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 Act 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.

59. 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.

60. 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:

- (1) 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 various others. 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.
- (2) 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.

61. For these reasons, the enabling provisions of the Public Health (Control of Disease) Act 1984 must be interpreted consistently with the wider statutory framework on Church governance, including in particular the Magna Carta and Church of England Assembly (Powers) Act 1919. It is submitted that the 1984 Act does not enable the Defendant to impose, by regulations, a blanket ban on religious services or rites. Such a ban could only be imposed by an express statutory provision, or alternatively, by a voluntary decision of the Church.

Ground 2: Disproportionate interference with Article 9 rights:

(a) generally; and

(b) the principle of Church autonomy

62. It is indisputable 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.

63. The forced closure of churches by the state is an extreme interference with Article 9 rights. That extremity is not mitigated by the exceptions in Reg. 5(6), which provides (as amended):

(6) A place of worship may be used—

(a) for funerals,

(b) to broadcast an act of worship, whether over the internet or as part of a radio or television broadcast, F8...

(c) 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 sessions or support in an emergency)

(d) for early years childcare provided by a person registered on the Early Years Register under Part 3 of the Childcare Act 2006.

(e) for private prayer by individuals, and for these purposes, "private prayer" means prayer which does not form part of communal worship.

64. Paras (a)-(d) allow the churches to remain open only for social welfare purposes. Far from mitigating the interference with church autonomy, 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. Para (e) is of minimal effect on Article 9 rights of Christian believers, and indeed illustrates the inadequacy of such micro-management of church life by secular authorities. The Christian faith places great significance both on (a) individual prayer and (b) the ability to gather for church services; and very little significance on the ability to attend a particular building for an individual prayer. The addition of para (e) is of negligible significance in terms of mitigating the interference with Article 9 rights. See further *the expert report of Martin Parsons* at [125 - 130].

65. Such a far-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*.

66. 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.
67. 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.
68. Proportionality under the Convention is an objective test for the Court to apply, not for the decision-maker: *R (British and American Tobacco and Others) v Secretary of State for Health* [2016] EWCA Civ 1182. It is for the Defendant to adduce evidence to justify interference as proportionate and necessary.
69. The wholesale manner in which churches were closed is anything but a narrowly tailored means of achieving the Government’s legitimate public health aims. For example (but without limitation), the following less restrictive alternatives were available (individually or in combination):
 - (1) Precautions recommended in the *expert report of Ian Blenkarn [142]* and the *supplemental report of Ian Blenkarn [158]*.
 - (2) Issuing advice to churches without imposing a blanket prohibition by means of binding legislation backed by a criminal sanction. That would have produced substantively similar epidemiological results but avoid a breach of the principle of Church autonomy.
 - (3) Providing for a mechanism for a case-by-case consideration of restrictions on individual places of worship, either by (i) empowering the appropriate authorities (e.g. local authorities or the police) to prohibit gatherings if, and only if, a tangible risk of infection is identified or (ii) enabling individual churches to apply for exemptions.

70. The proportionality of a similar ‘lockdown’ of places of worship was recently considered by the highest Administrative Court in France, the Council of State, in *MW et al.* The decision of the Court with a certified English translation is at [213]. The Court found that the blanket ban on religious services in France was a “serious and manifestly illegal infringement” of the religious rights under Article 9 and other French and international provisions. It is submitted that the reasoning of the French court in that case is unimpeachable.
71. The same issue was analysed by the Federal Constitutional Court of Germany in *F* (1BBQ 44/20), 29 April 2020 [235], a challenge by a Muslim religious association. The Court granted interim relief permitting Friday prayers in a mosque, on the grounds that a blanket ban with no mechanism to apply for exemptions was a disproportionate interference with constitutional rights.
72. Similarly, the Circuit Court of Oregon in *Elkhorn Baptist Church, et al v. Katherine Brown, Governor of the State of Oregon* [242] granted a temporary injunction suspending the ‘lockdown’ of religious services. The Court observed: “*The Governor’s orders are not required for public safety when Plaintiffs can continue to utilize social distancing and safety protocols at larger gatherings involving spiritual worship, just as grocery stores and businesses deemed essential by the Governor have been authorized to do.*” Again, it is submitted that this reasoning is unimpeachable.
73. A similar claim was brought in Texas by *Steven Horze et al (Case 20-0249)*. In response to the claim, the Governor of Texas issued the Executive Order which included churches in the list of “essential services” which were permitted to remain open. The claim was then withdrawn. [249]
74. A further insight may be gained from the decision of the High Court of South Africa in *De Beer v The Minister of Cooperative Governance and Traditional Affairs* (2 June 2020) [179]. The challenge was against the ‘lockdown’ generally. In analysing the proportionality of the interference with constitutional rights (similar to the Convention analysis in this jurisdiction), the Court found (para 7) that “in an overwhelming number of instances” (para 7.21) the regulations were not even ‘rationally connected’ to the legitimate aims. See in particular the observations in paras 7.5-7.6 in relation to funerals. Religious services were exempted from the South African ‘lockdown’ in the

first place (see para 8.1 of the judgment), but had they not been, similar criticisms would no doubt apply to the prohibition of religious services.

75. There is arguably an emerging international judicial consensus to the effect that a blanket ban on church services is a disproportionate interference with the freedom of religion.
76. It should also be noted that following the death of George Floyd in Minneapolis on 25 May, a number of mass political demonstrations took place in various UK cities in breach of Regulation 7 of the Regulations. It appears that the police took a deliberate decision not to enforce Regulation 7 on those occasions. Further, there has been no evident deterioration of the public health situation as a consequence. This strongly indicates that at least Regulation 7 is disproportionate and/or unnecessary. Church services cannot present a greater danger to public health than mass, and often disorderly, political demonstrations.

Ground 3: Irrationality

77. Even apart from the engagement of Article 9, the Regulations and other decisions under challenge are in any event irrational. This is because:
- (1) Rationality is to be assessed on the basis of the facts as they were at the time the decisions were taken, i.e. after the voluntary ‘lockdown’ of most churches. In those circumstances, the imposition of additional state regulations backed by a criminal sanction would achieve minimal or no benefit in terms of containing the epidemic. This is to be weighed against the grave constitutional and societal significance of state interference in church matters at such a scale.
 - (2) Compared to the alternative approach outlined in the *Expert report of Ian Blenkarn [142]*, the state-enforced ‘lockdown’ of churches does not help to contain the epidemic.
 - (3) The *supplemental report of Ian Blenkarn [158]* highlights the inconsistency and absurdity of the Government’s approach.
 - (4) The general lockdown of churches is similar to the measures which have effectively been found irrational in the High Court of South Africa decision in *De Beer*.

Relief sought

78. For those reasons, the Defendant's decisions imposing a continuing 'lockdown' on the Church are unlawful. It is submitted that the appropriate relief is as follows:

- (1) In relation to Regulation 5(5), a quashing order (to be stayed for a few days to enable an orderly substitution/transition).
- (2) In relation to Regulation 7, a declaration that it does not apply to church services and rites; and/or a mandatory order or an injunction to amend the Regulation.
- (3) In relation to 'the Strategy' and 'the failure to give assurances', a mandatory order and/or a declaration.

79. In the alternative, the Claimants seek further and other relief. In particular, if the Court is unwilling to quash Regulation 5(5), the Claimants seek a declaration and/or a mandamus to amend.

Application to expedite

80. The interference with the Convention rights of believers has been serious and took place at a mass scale. The fact that the restrictions will ultimately be lifted should not distract from the seriousness of the ongoing breach of Article 9.

81. The Government's announcements at present do not even include an indication as to when the ban on church services and rites may be lifted or relaxed.

82. The Claimants only bring this claim at the end of the 3-months time limit because, and only because, of the extensive efforts to resolve the problem in a constructive dialogue with the government. That approach is commendable, and litigants should not be discouraged from taking it by a refusal of expedition due to a delay of this nature. The hopes that a dialogue would lead to a reasonably speedy resolution have proved to be wrong. However, the serious and ongoing breach of Article 9 has to be remedied as a matter of urgency.

83. For those reasons, the Claimants request that this claim be expedited.

The Claimants believe that the facts stated in this Statement of facts and grounds are true

A handwritten signature in black ink that reads "Andrew Storch". The signature is written in a cursive style with a small flourish at the end.

.....

Andrew Storch solicitors

23 June 2020

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My Ref: MP:MP4017

Date: 26 October 2020

Dear Sirs

Our clients: Rev Peter Greasley 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:

- | | |
|----------------------------|---|
| 1. Pastor Kevin Berthiaume | Calvary Chapel, Cardiff |
| 2. Pastor Karen Cleverly | Bethel Community Church, Newport |
| 3. Dr Paul Corney | Immanuel Presbyterian Church, Cardiff |
| 4. Peter Davies | Treboeth Gospel Hall, Swansea |
| 5. Rev'd Edward Evans | Westgate Evangelical Chapel, Pembroke |
| 6. Darrin Gilchrist | Itinerant Minister, St Mellon's, Cardiff |
| 7. Pastor Peter Greasley | Christchurch, Newport |
| 8. Rev'd Timothy Hodgins | Sandfields Presbyterian Church, Swansea |
| 9. Rev'd Richard Holst | Emeritus Professor of New Testament
Exegesis and Biblical Theology |
| 10. Pastor Math Hopkins | Thornhill Church, Cardiff |
| 11. Rev'd Iestyn ap Hywel | Montgomeryshire Presbytery, Presbyterian
Church of Wales |
| 12. Rev'd Mark Johnston | Bethel Presbyterian Church, Cardiff |
| 13. Pastor Ewan Jones | Bethel Baptist Church, Bedwas |
| 14. Rev'd Dr Peter Naylor | Immanuel Presbyterian Church, Cardiff |
| 15. Chris Owen | Baptist Minister (Ret'd) |
| 16. Rev'd Clyde Thomas | Victory Church, Cwmbran |



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- | | |
|--------------------------------------|---|
| 17. Dr Ayo & Pastor Moni Akinsanya | Deeper Christian Life Ministry |
| 18. Pastor Oliver Allmand-Smith | Trinity Grace Church, Manchester |
| 19. Rev'd Dr Gavin Ashenden | Former Chaplain to Her Majesty the Queen |
| 20. Paul Brown | Sheffield Evangelical Presbyterian Church |
| 21. Pastor Ian Christensen | New Life Christian Centre Int, Wembley |
| 22. Rev'd George Curry | Elswick Parish, St Stephen and St Paul |
| 23. Pastor Christos Demetriou | Cornerstone the Church, Surrey |
| 24. Pastor Dennis Greenidge | Worldwide Mission Fellowship, London |
| 25. Rev'd Dr David Hathaway | President, Eurovision Mission to Europe |
| 26. Rev'd Nathan Hilton | Sunderland Evangelical Presbyterian Church |
| 27. Rev'd Matthew Jolley | Bury St Edmunds Presbyterian Church |
| 28. Pastor Thabo Marias | CRC International, London |
| 29. Rev'd Douglas McCallum | Cambridge Presbyterian Church |
| 30. Dr Brad Norman | Salvation for the Nations International |
| 31. Pastor Ade Omooba MBE | New Life Assembly, London |
| 32. Pastors John & Sally Quintanilla | Hebron Christian Faith Church, Coventry |
| 33. Rev'd Dr Matthew PW Roberts | Trinity Church, York |
| 34. Rev'd Dr Bill Schweitzer | All Saints Presbyterian Church, Newcastle |
| 35. Rev'd Aled Seago | Poynton Parish, Stockport |
| 36. Rev'd Melvin Tinker | Director of Theology, The Christ Church Network, Hull |
| 37. Rev'd Benjamin Wontrop | All Saints Presbyterian Church, Newcastle |

The proposed defendant: The Welsh Ministers

Defendant's ref: Coronavirus firebreak

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

Details of the matters being challenged:

On 19 October 2020, the First Minister announced the Defendant's intention to introduce a "firebreak lockdown" across Wales. The Defendant has published a guidance document titled *Coronavirus firebreak: frequently asked questions*, available at <https://gov.wales/coronavirus-firebreak-frequently-asked-questions> ("the Guidance"). The Guidance materially provides:

What are the rules for religious services?



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Places of worship will not be open to the public, other than for wedding or civil partnership ceremonies or funerals, where people can attend at the invitation of the organiser. Please see the guidance on funerals for more information.

Ministers may access the place of worship to broadcast (without a congregation) an act of worship or funeral, whether over the internet or as part of a radio or television broadcast.

It is anticipated that the formal legislation to that effect will be passed on or before Friday 24 October 2020. The proposed judicial review claim is against that legislation, insofar as it imposes a legally enforceable 'lockdown' on churches, and/or prohibits divine services in Wales.

The Issues

Introduction

1. In the event the Welsh Ministers carry out their stated intention to impose a blanket ban on church services in Wales, our clients intend to apply for judicial review of any such legislation on the grounds that it is (a) in breach of Article 9 ECHR and/or (b) *ultra vires* the powers of the Welsh Ministers, and/or the National Assembly for Wales, under the domestic constitutional law.
2. Our clients readily acknowledge the seriousness of the Covid-19 epidemic, and the need for extraordinary precautions to prevent the spread of the virus. However, our clients' position 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.
3. Our clients contend that, since the outbreak of Covid-19 in March 2020, the churches' response to the epidemic has been eminently responsible and cautious. Most of the churches introduced a voluntary 'lockdown' before a UK-wide 'lockdown' was introduced by the secular authorities in March 2020; and were slower to lift that self-imposed 'lockdown' in or after July 2020 than the secular authorities. All churches introduced drastic precautions against the spread of the virus. All legal requirements were followed by the churches, and all advice and guidance carefully considered and appropriately applied. There can be no suggestion that the churches' response to the epidemic has been in any way inadequate, so as to justify an interference from secular authorities by means of binding legislation (rather than reasoned advice or guidance).
4. In a series of judicial review claims which the UK-wide lockdown in March-July 2020 entailed, the Courts repeatedly warned that the limitations imposed by the secular government upon the ancient liberties of the Church were arguably unlawful in the circumstances.

Criminal
Defence Service



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Community
Legal Service



The principle of Church autonomy under Article 9 ECHR

5. The principle of Church autonomy is zealously protected in ECHR jurisprudence under Article 9 (see *Metropolitan Church of Bessarabia v. Moldova*, no. 45701/99, ECHR Reports 2001-XII, 13 December 2001, § 118). 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.
6. 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 in connection with Covid-19. Therefore, Article 9 applies to the government's anti-Coronavirus measures in the usual way.
7. The forced closure of churches by the state is an extreme interference with Article 9 rights. Such a far-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*.
8. 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.
9. 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.



10. Proportionality under the Convention is an objective test for the Court to apply, not for the decision-maker: *R (British and American Tobacco and Others) v Secretary of State for Health* [2016] EWCA Civ 1182. It is for the Defendant to adduce evidence to justify interference as proportionate and necessary.

Church autonomy under the domestic constitutional law

11. In the domestic law of England and Wales, the principle of church autonomy is of a much greater antiquity than, and at least as important constitutional status as, under the Convention. It is enshrined in c. 1 of Magna Carta 1297. The martyrdom of Thomas Beckett for that very principle is of enormous significance in the Anglican 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.

12. The 1559 Church-State Settlement still has legal force and is specifically affirmed by every English sovereign in their coronation oath. This sets out separate spheres for church and state. Broadly speaking, the state may not interfere in either the interpretation of Scripture or the sacraments i.e. in effect worship, while the church must be subject to the law in other matters. The government of the realm and the government of the Church of England were always distinct in our Constitution, despite the same Monarch being ultimately at the head of both.

13. *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 government of the Church of England is subject to its own constitutional law, currently governed by the *Church of England Assembly (Powers) Act 1919*.

14. The Church of Wales has been disestablished by the *Welsh Church Act 1914*. S. 13(1) of that Act relevantly provides:

“Nothing in any Act, law, or custom shall prevent the bishops, clergy, and laity of the Church in Wales from holding synods or electing representatives thereto, or from framing, either by themselves or by their representatives elected in such manner as they think fit, constitutions and regulations for the general management and good government of the Church in Wales and the property and affairs thereof”

15. The use of the words “nothing in any Act, law or custom” reveals the legislative intention (consistent with the pre-existing law on the Church-State separation of power) to protect the

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self-government of the Church of Wales from *any* form of interference by secular state authorities.

16. 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.
17. 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.
18. 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, Church of Wales, and various other churches and denominations.
19. 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 services does not meet those requirements.
20. 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



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21. 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.
22. 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.
23. 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, or at least, have little understanding of the role, functioning, and ministries of the church.

UK court decisions in relation to 'lockdown' of churches in 2020

24. The *Health Protection (Coronavirus Restrictions) (England) Regulations SI202/350*, as in force in March-July 2020, imposed a similar blanket ban on church services to the one currently proposed in Wales. Several judicial review claims against that aspect of the Regulations were given consideration by the High Court:
25. In *R (Hussein) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin), Mr Justice Swift granted permission for judicial review of the Regulations on the grounds that the Regulations were in breach of Article 9 ECHR.
26. Similarly, Mr Justice Lewis granted permission for judicial review in relation to the challenge to the church closure (albeit not other aspects of the national 'lockdown') in *R (Dolan, Monks et al) v SSHSC* [2020] EWHC 1786 (Admin).

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27. In *R (Omooba et al) v SSHSC*, which raised very similar argument to this pre-action letter, Mr Justice Swift observed that the claim “raises significant issues”, which required an proper response from the Secretary of State following consultation with church leaders within the framework of Places of Worship Taskforce.
28. Following those judicial decisions and observations, the Secretary of State amended the Regulations to lift the legally enforceable ‘lockdown’ on the places of worship, thereby rendering the claims obsolete. Our clients respectfully suggest that if any of the claims were to proceed to a full hearing, the chances of success are high.

Foreign judicial decisions in relation to ‘lockdown’ of churches

29. The proportionality of similar ‘lockdowns’ of places of worship in other jurisdictions was also repeatedly questioned by the relevant foreign courts.
30. In *MW et al* the highest Administrative Court in France, the Council of State, found that the blanket ban on religious services in France was a “serious and manifestly illegal infringement” of the religious rights under Article 9 and other French and international provisions.
31. The same issue was analysed by the Federal Constitutional Court of Germany in *F (1BBQ 44/20)*, 29 April 2020, a challenge by a Muslim religious association. The Court granted interim relief permitting Friday prayers in a mosque, on the grounds that a blanket ban with no mechanism to apply for exemptions was a disproportionate interference with constitutional rights.
32. Similarly, the Circuit Court of Oregon in *Elkhorn Baptist Church, et al v. Katherine Brown, Governor of the State of Oregon* granted a temporary injunction suspending the ‘lockdown’ of religious services. The Court observed: “*The Governor’s orders are not required for public safety when Plaintiffs can continue to utilize social distancing and safety protocols at larger gatherings involving spiritual worship, just as grocery stores and businesses deemed essential by the Governor have been authorized to do.*”
33. A similar claim was brought in Texas by *Steven Horze et al (Case 20-0249)*. In response to the claim, the Governor of Texas issued the Executive Order which included churches in the list of “essential services” which were permitted to remain open. The claim was then withdrawn.
34. A further insight may be gained from the decision of the High Court of South Africa in *De Beer v The Minister of Cooperative Governance and Traditional Affairs* (2 June 2020). The challenge was against the ‘lockdown’ generally. In analysing the proportionality of the interference with constitutional rights (similar to the Convention analysis in this jurisdiction), the Court found (para 7) that “in an overwhelming number of instances” (para 7.21) the regulations were not even ‘rationally connected’ to the legitimate aims. See in particular the observations in paras



7.5-7.6 in relation to funerals. Religious services were exempted from the South African 'lockdown' in the first place (see para 8.1 of the judgment), but had they not been, similar criticisms would no doubt apply to the prohibition of religious services.

35. There is an emerging international judicial consensus to the effect that a blanket ban on church services is a disproportionate interference with the freedom of religion. In these circumstances, an Article 9 ECHR challenge to the proposed legislation in Wales has high prospects of success.

Action(s) that the defendant is expected to take

For those reasons, we respectfully invite your client to desist from introducing any binding legislation banning or restricting church services in Wales as part of the proposed 'firebreak lockdown'.

For the avoidance of doubt, our clients do not dispute the right of your clients to issue advice or guidance to churches about the protection of public health during the epidemic. Any reasonable advice or guidance would be gratefully considered.

ADR proposals

Our clients have no specific ADR proposals at present, but are open to dialogue with your clients about the issues raised in this pre-action letter in whatever form your clients consider appropriate.

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

Please disclose all scientific and other evidence the Welsh Ministers rely upon to justify the proposed legislation under Article 9(2) ECHR.

Proposed reply date

We therefore request a substantive response to this pre-action letter as soon as possible, and in any event, by **4pm Monday 26 October 2020**.

In the event the proposed legislation is introduced, our clients intend to file the claim without further notice.

We look forward to hearing from you.



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Yours faithfully,



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Citygate
95 Southampton Street
Reading, RG1 2QU

National Assembly for Wales
Crown Building
Cathays Park
CARDIFF
CF10 3NQ

My Ref: MP:MP4017

Date: 29 October 2020

Dear Sirs

Our clients: Rev Berthiaume et al

We are grateful for your prompt pre-action response dated 26 October 2020. We do not propose to litigate this case in correspondence by answering each and every point in your letter of response. However, to avoid any misunderstanding of our clients' position, and to explore all avenues for an amicable resolution of this dispute, we make the following points by way of clarification:

Firstly, each of our clients is a Christian pastor or in an oversight position within their church closely involved and responsible for their congregations and outreach within their local communities. Many of the proposed Claimants are leaders within churches in Wales, some serving the most deprived communities in their midst. Their churches play a significant role within their communities. Some of the proposed claimants are church leaders from other parts of the United Kingdom, genuinely concerned about the important constitutional issues raised by this claim. We do not accept that there is any arguable issue over *locus standi*.

We attach to this letter some brief resumes of the leaders and churches in order to assist you in understanding the breadth and necessity of their work in their communities. We would be happy to provide more information about individual claimants and/or their churches, but at present, we are not clear what sort of information may assist your clients and/or help to resolve this dispute.



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Secondly, we acknowledge that the Regulations in their present form will expire after 16 days. However, the Ministers have made it clear that the ‘firebreak lockdown’ may be extended beyond that period, and/or re-introduced at a later stage, if the Ministers deem that necessary. In the light of those intentions, compatibility of the Regulations with the principle of church independence is by no means an academic issue but a constitutional one. Our clients’ concerns would be significantly alleviated by a reassurance from the Ministers that any future legislation would respect the principle of church independence, and in particular, would not impose a legally binding ban on church services. If there is a prohibition on our clients’ freedom to worship following the expiration of the index regulations, our clients reserve their position concerning future judicial review proceedings.

Thirdly, far from declaring any “intention to file a claim for judicial review immediately, regardless of the contents of any response”, our pre-action letter made it clear that our clients “are open to dialogue with your clients about the issues raised in this pre-action letter in whatever form your clients consider appropriate”. This remains the position. Our clients fully appreciate that the Regulations were introduced as a matter of urgency in response to a public health crisis, and any breach of the principle of church independence may have been unintentional. In those circumstances, it is not unrealistic to hope that the issues may be resolved in a constructive dialogue and without litigation. To achieve that, we respectfully invite the First Minister to meet our clients via an online conference call within the next 7 days, to ensure that the concerns of churches are taken into account in the Welsh Ministers’ Covid-19 policy, and the ancient constitutional liberties of the church are properly safeguarded and respected.

We look forward to hearing from you.

Yours faithfully



Andrew Storch solicitors



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- Appendix 1 – List of signatories
- Appendix 2 – Letter from Peter Naylor
- Appendix 3 – letter from Oliver Allmand-Smith
- Appendix 4 – letter from Iestyn ap Hywel - Minister of the Presbytery, Montgomeryshire Presbytery
- Appendix 5 – letter from Heath van Staden
- Appendix 6 – letter from Joel Morris
- Appendix 7 – letter from Clyde Thomas
- Appendix 8 – letter from Chris Owen

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Appendix 1

Signatories to the pre action letter re potential judicial review of church closure in Wales:

Welsh Ministers

- | | |
|----------------------------|--|
| 1. Pastor Kevin Berthiaume | Calvary Chapel, Cardiff [Lead claimant] |
| 2. Terry Bees | Immanuel Presbyterian Church – Cardiff |
| 3. Pastor Andrew Cleverly | Bethel Community Church, Newport |
| 4. Dr Paul Corney | Immanuel Presbyterian Church, Cardiff |
| 5. Peter Davies | Treboeth Gospel Hall, Swansea |
| 6. Rev'd Edward Evans | Westgate Evangelical Chapel, Pembroke |
| 7. Darrin Gilchrist | Itinerant Minister, St Mellon's, Cardiff |
| 8. Philip Haines | Minister, Ely Presbyterian Church, Cardiff |
| 9. Rev'd Timothy Hodgins | Sandfields Presbyterian Church, Swansea |
| 10. Minister Richard Holst | Christ Church Evangelical Presbyterian Church, Barry |
| 11. Pastor Math Hopkins | Thornhill Church, Cardiff |
| 12. Rev'd Iestyn ap Hywel | Montgomeryshire Presbytery, Presbyterian Church of Wales |
| 13. Pastor Ewan Jones | Bethel Baptist Church, Bedwas |
| 14. Dr Joel Morris | ED of Union in Bridgend and Trustee of Grace Church, Porthcawl |
| 15. Rev'd Dr Peter Naylor | Immanuel Presbyterian Church, Cardiff |
| 16. Chris Owen | Baptist Minister - Sandfields Presbyterian Church, Port Talbot |
| 17. Rev'd Clyde Thomas | Victory Church, Cwmbran |

- 18. Chris Rees
- 19. Heath Van Staden

Bethesda Chapel Narbeth
Liberty Church Newport

English ministers

- 20. Dr Ayo & Pastor Moni Akinsanya
- 21. Pastor Oliver Allmand-Smith
- 22. Rev'd Dr Gavin Ashenden
- 23. Paul Brown
- 24. Pastor Ian Christensen
- 25. Rev'd George Curry
- 26. Pastor Christos Demetrio
- 27. Pastor Dennis Greenidge
- 28. Rev'd Dr David Hathaway
- 29. Rev'd Nathan Hilton
- 30. Rev'd Matthew Jolley
- 31. Pastor Thabo Marais
- 32. Rev'd Douglas McCallum
- 33. Dr Brad Norman
- 34. Pastor Ade Omooba MBE
- 35. Pastors John & Sally Quintanilla
- 36. Rev'd Dr Matthew PW Roberts
- 37. Rev'd Dr Bill Schweitzer
- 38. Rev'd Aled Seago
- 39. Rev'd Melvin Tinker
- 40. Rev'd Benjamin Wontrop

Deeper Christian Life Ministry
Trinity Grace Church, Manchester
Former Chaplain to Her Majesty the Queen
Sheffield Evangelical Presbyterian Church
New Life Christian Centre Int, Wembley
Elswick Parish, St Stephen and St Paul
Cornerstone the Church, Surrey
Worldwide Mission Fellowship, London
President, Eurovision Mission to Europe
Sunderland Evangelical Presbyterian Church
Bury St Edmunds Presbyterian Church
CRC London, UK & Europe
Cambridge Presbyterian Church
Salvation for the Nations International
New Life Assembly, London
Hebron Christian Faith Church, Coventry
Trinity Church, York
All Saints Presbyterian Church, Newcastle
Poynton Parish, Stockport
Director of Theology, The Christ Church Network, Hull
All Saints Presbyterian Church, Newcastle

Immanuel Presbyterian Church
Heol Trelai, Caerau, Cardiff CF5 5LJ
Telephone 029 2040 5750
Website: www.immanuel.org.uk

Andrea Minichiello Willians
Chief Executive
Christian Concern, Christian Legal Centre
70 Wimpole Street
London W1G 8AX

28 October 2020

Dear Andrea

R (Berthiaume *et. al.*) v Welsh Ministers

My name is Rev. Dr Peter J. Naylor. I am a Minister of Immanuel Presbyterian Church. (I also hold the position of Adjunct Professor of Biblical Studies, Westminster Presbyterian Theological Seminary, Newcastle upon Tyne.)

Immanuel Presbyterian Church is a congregation of the Evangelical Presbyterian Church in England and Wales. This church is constituted upon the Westminster Subordinate Standards of 1648.

My congregation is situated in Caerau, a council estate in Cardiff that would generally be recognized as 'deprived' with many social problems – family breakdown, depression, suicides, drug abuse, antisocial behaviour. We serve the community first and foremost as a place of Christian worship, but also in many other direct ways, for example, by the provision of youth groups, a 'mums and tots' group, by food bank collections. We offer pastoral care to vulnerable individuals and needy families in the community. We have cared for those suffering with mental illness, and those who are bereaved and grieving the loss of loved ones. We have also had a mutually supportive relationship with the local police.

In joining in this matter, I am acting officially on behalf of the church.

Yours sincerely



Peter J. Naylor B.A. (Hons), D. Phil. (Oxon)

October 28th 2020

To whom it may concern.

We have been asked to confirm that we are a worshipping community of God's people based in the Bury area in the northern part of Greater Manchester.

We have been serving to our community for over 65 years and our highest priority has always been to maintain the worship of God and minister the word of God faithfully here. We also believe that meeting to pray for our community, nation and world are critical for the blessing of God upon us all.

Out of this worship, ministry and prayer come a wide range of other services that we have provided over the years, including:

- ✘ Children's clubs and youth meetings catering for 5 to 18 years and serving the local area including the nearby council estate.
- ✘ Coffee mornings, largely providing a context for the elderly to connect with one another in a church context.
- ✘ Marriage and relationship counselling.
- ✘ Family conflict resolution.
- ✘ Meals for the elderly.
- ✘ Support for the bereaved and those suffering with long-term illness.
- ✘ Visitation of the elderly, the lonely, those with mental health difficulties, those suffering from alcohol and substance abuse and many other difficulties.
- ✘ Mentoring, training and support for children and young families.
- ✘ Community outreach events such as Easter Celebrations, Family Fun Day, Bonfire Night and Christmas Carol Services.

During lockdown it has been extremely difficult to maintain these services to our community, and we believe that those who have suffered most are the elderly and the vulnerable – the very people that lockdown is intended to help.

If we are placed again in a position where our churches are unable to meet for worship, the ministry and God's word and prayer, we will find ourselves unable to fulfil our wider service of the community.

For this reason, we support the action being taken to call the Welsh Assembly to reconsider its closure of churches in Wales.

Oliver Allmand-Smith MA(Cantab), Pastor.

Rev. Iestyn ap Hywel
Machynlleth
Montgomeryshire
Powys
Iestyn.aphywel@gmail.com
28th of October 2020

To whom it may concern,

My role within the Presbyterian Church of Wales is as an ordained Minister of the Presbytery, Montgomeryshire Presbytery. This means that, as recognised by ecclesiastical authority and legal convention, I am called by God to this work and am to serve his church in this capacity.

My work includes ministering amongst three church centres in Machynlleth, Newtown and Llanidloes. I provide leadership and guidance to the elders and members of these and certain other congregations in the surrounding areas. I preach, minister the sacraments, provide pastoral care, and am responsible for coordinating and leading Welsh language ministry across the Presbyterian Churches of Montgomeryshire.

With an aim to further the Christian wellbeing and joy of every believer, equipping them for ministry and every good work in their local communities, I affirm that the weekly Sunday services are absolutely indispensable. Many of my congregants are acutely feeling the need for the restoration of the means of grace but are now also faced with the anxiety of legal restrictions upon the practice of their faith. The means of grace are integral to their happiness and health and I have witnessed a deterioration in both as a result of lockdown.

I hope this information is helpful to you.

Kind regards,

Iestyn ap Hywel

Heath van Staden
Liberty Church,
42 Bryngwyn Road,
Newport, NP20 4JT

29 October 2020

Dear Sirs

I write this letter in support of our letter before action. I can confirm that as a church the main effect of the pandemic we are seeing, is on families that are struggling with the church not opening, due to the lack of consistent input into whole family. As a church we are looking after 200 + families weekly. Sadly we are seeing marriage break ups, parenting issues, loneliness and suicides of fathers. Worship & gathering together is their lifeline.

Yours sincerely

Heath van Staden

Union
Union Campus,
Bridgend,
CF31 4DX, UK

29 October 2020

Dear Sirs

This letter is support of a pre action letter prepared on my behalf.

I would be honoured to be included in the cause.

I and the Executive Director of Union in Bridgend and also a Trustee of Grace Church,
Porthcawl
May the Lord bless your endeavours!

Yours sincerely

Dr. Joel Morris
Executive Director

Clyde Thomas - Lead Pastor
Victory Church
42 Bryngwyn Road
Newport
NP20 4JT

29 October 2020

Dear Sirs

This letter is in support of the pre action letter prepared on my behalf.

Victory Church is a local church with several sites serving some of the most deprived areas of Wales. Our worship services include people from all walks of life, and many lives are inspired and changed during these moments. Everything we do is an outworking of the message of Jesus, that includes drug and alcohol rehabilitation homes, Supported Housing for the homeless, day-to-day outreach and emergency support, a vast array of life-skills and practical courses. We are a community of believers, impacting the nation of Wales and beyond.

Yours sincerely

Clyde Thomas

*Showing
People Christ!*

A PLACE OF REFUGE,
PEACE AND
CHRISTIAN LOVE.



*For families and
singles; for all.*

**ON THE ESTATE,
FOR THE ESTATE.**

Western Avenue SA12 7LS 

I am a retired Baptist minister, who has served two churches in Wales, one in Splott Cardiff and another in Chepstow. I currently assist at Sandfields Presbyterian Church in Port Talbot. Half our congregation, many of these are the most vulnerable, cannot join in with any online service, so the lockdown has hit them severely.

My wife is a trained counsellor, and we need to meet in person in order to meet the spiritual and pastoral needs of people. Mental health is suffering during the lockdown and causing major concerns.

Chris and Heather Owen.

Tel: 0118 958 4407
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95 Southampton Street
Reading, RG1 2QU

Government Legal Department
102 Petty France
Westminster
SW1H 9GL

My Ref: MP:MP3515

Date: 2 November 2020

Dear Sir/Madam

Our client - 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: Please see the enclosed schedule of names and addresses (Appendix 1).

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

GLD's ref.: Z2006192/HHS/HO17 (HC Claim CO/2238/2020)

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

Details of the matters being challenged:

On 31 October 2020, the Prime Minister announced the government's decision to re-introduce a 'lockdown' across England from 5 November 2020. It is understood that the relevant legislation will be introduced in the House of Commons shortly, to be passed before that date. In the meantime, the Cabinet Office has published a guidance document titled *New National Restrictions from 5 November*, available at <https://www.gov.uk/guidance/new-national-restrictions-from-5-november> ("the Guidance"). Section 5 of the Guidance materially provides:

Places of Worship will be closed, unless they are being used for:

Funerals



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To broadcast acts of worship

Individual prayer

Formal childcare or where part of a school

Essential voluntary and public services, such as blood donation or food banks

Other exempted activities such as some support groups.

The Claimants intend to challenge, by way of judicial review, any legislation which enforces a closure of churches in England.

We are instructed to commence the pre-action protocol process at the stage, prior to formal legislation being passed, in view of the inherent urgency of this matter, the history of litigation between our respective clients in relation to the closure of churches in March-June 2020, and in the hope that a mutually acceptable compromise can be negotiated ahead of 5 November so that litigation would be unnecessary.

The Issues

We refer to the previous litigation between our respective clients in relation to *The Health Protection (Coronavirus, Restrictions) England Regulations 2020 (HC case CO/2238/2020)*. For ease of reference, we enclose our clients' Statement of Facts and Grounds relied upon in that claim as Appendix 2.

Our clients attended a large number of meetings with you client during April-June 2020 in an effort to resolve the dispute.

The order of Mr Justice Swift made on 26 June 2020 observed that the claim "raise[d] significant matters", some of which were similar to those in *Hussain* [2020] EWHC 1392 (Admin). Swift J declined to abridge the time for your client's Acknowledgement of Service, to enable your client to consider the issues properly and if necessary, take account of any further recommendation of Places of Worship Taskforce.

Following that order, on 4 July 2020 your client revoked the contentious provisions of the Regulations by the *Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020*. By letter dated 7 July 2020, you reassured our clients on behalf of your clients that "with effect from 4 July 2020, there is no legal restriction in respect of opening of places of worship, including churches". On that basis, our clients agreed to withdraw the claim by consent.

We are aware that similar claims by others in that period have also attracted a favourable reaction from the Court, and were resolved by the revocation of the Regulations. In particular:

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- In *R (Hussein) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin), Mr Justice Swift granted permission for judicial review of the Regulations on the grounds that the Regulations were in breach of Article 9 ECHR.
- Similarly, Mr Justice Lewis granted permission for judicial review in relation to the challenge to the church closure (albeit not other aspects of the national ‘lockdown’) in *R (Dolan, Monks et al) v SSHSC* [2020] EWHC 1786 (Admin).

Given this history, our clients are extremely disappointed that the government has now announced its intention to enforce the closure of churches again, without due regard to the constitutional issues highlighted by that litigation.

In the event such legislation is enacted, our clients intend to file a further claim for judicial review, on substantively the same grounds as in their first claim in June 2020 (see Appendix 2). In summary only, those grounds are:

- 1) The enforced ‘lockdown’ of churches, backed by a threat of criminal sanction, is in breach of Article 9 ECHR (in particular, without limitation, the principle of ‘church autonomy’ protected by Article 9); and
- 2) Any secondary legislation imposing such ‘lockdown’ would be *ultra vires* the enabling primary legislation, read in context of the constitutional liberties of the Church enshrined in c. 1 of *Magna Carta 1297*, *Church of England Assembly (Powers) Act 1919*, Article 37 of *Articles of Religion 1562*, and in the common law.

Assuming that your client intends to introduce the ‘lockdown’ by means of secondary legislation, our clients will seek a quashing order in relation to the relevant provisions, and/or a declaration, and/or a mandatory order.

In the event the ‘lockdown’ is introduced by primary legislation, our client will seek a *declaration of incompatibility* with Article 9 ECHR, under s. 4 of the Human Rights Act 1998, and/or a further declaration that the relevant provisions are overridden by Article 10 of the EU Charter of Fundamental Rights and as such, would be of no effect.

Our clients fully acknowledge the seriousness of the Coronavirus pandemic and the need for drastic precautions to prevent the spread of the virus, including in churches. However, such precautions may only be lawfully introduced by the churches themselves, taking due account of the government’s advice and guidance, not by binding legislation backed by a threat of criminal sanction. Our clients are gravely concerned about this infringement of the constitutional liberties of the church by the secular government.

Action(s) that the defendant is expected to take



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We respectfully invite your clients to ensure that any legislation intended to introduce a further 'lockdown' in England does not contain any binding prohibition of church services.

Our clients acknowledge your client's right, and good practice, of issuing non-binding advice or guidance to churches on the appropriate precautions to prevent the spread of the virus in churches.

ADR proposals

Our clients acknowledge the importance of your client's concern about preventing the spread of Coronavirus. Our clients are keen to resolve this dispute amicably if possible, avoiding the need for litigation.

For those reasons, our clients would be willing to meet with your clients as a matter of urgency to discuss (1) the appropriate precautions to prevent the spread of the virus in churches during the period of the new 'lockdown' in England during November and (2) the guarantees of preserving the constitutional liberties of the churches in the present extraordinary circumstances.

We consider that, to give negotiations any chance of success, such a meeting must be with the Secretary of State personally. Our clients have considerable experience of meetings with officials in relation to those issues, and value the fact that they were consulted in that way. However, the important constitutional issues raised in this dispute require a policy decision, and a precisely defined agreement which adequately protects the liberties of the church from any infringement by the government. It is therefore necessary for such negotiations to be carried out by those with the power to make the necessary policy decision.

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. However, in the hope that the issues may be resolved without litigation in a constructive dialogue with the Secretary of State, our clients are willing to afford your client to respond to this letter by **Thursday 5 November at 4pm**. This is without prejudice to our clients' right to apply to expedite any claim that may need to be made after that date.

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We look forward to hearing from you.

Yours faithfully,



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Deeper Christian Life Ministry

[REDACTED]
Liverpool L8 0TY

0151 709 4670

12th November 2020

Dear Christian Concern

I write as requested in support of a judicial review of the forced church closure in the UK. My name is Dr Ayo Akinsanya, the Pastor of the Deeper Life Bible Church (Solway Street East, Toxteth) Liverpool for the past twenty-eight (28) years, and the Regional Overseer for Merseyside & Wales. The Deeper Life Bible Church Liverpool, located in one of the most deprived area of this country (Toxteth), is one of several thousands of Churches worldwide under the umbrella of the Deeper Christian Life Ministry, and has over 80 branches here in the UK. With a background of Leukaemia research and innovative biotechnology spanning a period of over ten (10) years, I entered into full-time pastoral work in 2002. We have a growing membership of over 300 worshippers with regular meetings five (5) times in a week: twice on Sunday (am - Sunday Service & pm - Home Caring Fellowship); Tuesday Bible Study; Friday Revival Prayer meeting; and Saturday Leadership Training / Evangelism. The set up and dynamics of these meetings are vital to the church life and community such that virtual alternatives by streaming or broadcast of church services are very poor substitutes.

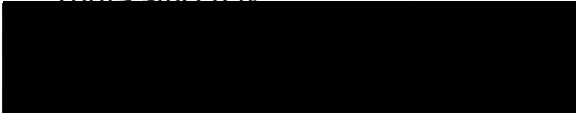
Apart from these meetings which are indispensable to the spiritual wellbeing of our members, our church also provide other essential services to members and the wider community. Such services include a Food Bank, a Homeless Ministry (offering cooked meals & clothing), and an Ofsted-registered After-School Club, operating within the church premises. For instance, since the March lockdown our church's Food Bank has served hundreds of individuals and families, whilst practicing social distancing and other changes to the way the service is delivered just to ensure the safety of clients and volunteers. We all know that crisis times are challenging times, and being able to practice one's faith at such times is a major determinant of spiritual, psychological and social wellbeing.

It is an established fact that the general rise in domestic abuse, loneliness, depression and mental wellness issues, job loss, anxiety, fear of the future, and other physical, psychological and spiritual problems will only grow worse under lockdown conditions. The church occupies a unique position in mitigating and solving these problems through prayers, counselling, uplifting sermons that offer hope, and the shared community that churches afford.

Since the advent of COVID we have taken drastic anti-infection precautions even before the first lockdown and have invested in the region of five thousand pounds (£5k) after the reopening in July. We carried out full scale risk assessments of our church building and put in place comprehensive reopening guidance policy. Floors / carpets have been visibly marked for social distancing with sanitation points indicated by fluorescent posters, and attendance records meticulously kept. It must be highlighted that since reopening we have not had a single incidence of COVID infection among our members. Really, in my opinion, the current forced lockdown of the church is unjustifiable as there is even no scientific evidence whatsoever to back it up as also recently admitted by the Government's scientific advisers.

It is only reasonable to expect that if our church can be trusted to safely operate services such as the Food Bank the Government should extend the same trust to the running of corporate acts of worship. Besides, the Government's action in shutting down the church is illegal and fundamentally challenges our Christian allegiance and devotion to God in a manner that violates the conscience. As we would prefer not to be forced into biblical civil disobedience, this matter must now be given the serious consideration it demands and the only sensible outcome is to have the church lockdown rescinded forthwith.

Yours sincerely



Ayo Akinsanya **BSc., MSc, PhD**
(Pastor / Minister-in-charge)

Tree of Life Family
BM BOX 203I
London
WCIN 3XX

To Whom It May Concern

My name is Benjamin Conway, and I am the founder and lead pastor at the Tree of Life Family. I represent a family of eleven churches and have been running this family of churches for the last ten years when I started our first church in Dagenham, Essex. Our attendance in all those churches is easily over six hundred. I have been in Christian ministry since 1997 when I started as the assistant minister of a church in Cheshire and have occupied a variety of roles until I started the first Tree of Life Church.

Our churches are in a variety of communities, estates, villages, across the United Kingdom. We have over forty nationalities every single weekend, and we have many families, young children, as well as many elderly people as well. All our churches have a service at the weekend, and then several house groups in the week. The weekend services provide a chance to reflect and learn about the Christian faith, engage in corporate prayer and worship, and to encourage and inspire each other.

Our weekly house groups are also an integral part of our church where people can show Christian love and service to one another and make genuine friends in a way that in a larger service is difficult. Not having those house groups since March has affected people's faith and their mental health. The lockdown has restricted our ability to help some of the most disadvantaged in society, and has prevented people whose lifeline is those small meetings, especially the elderly who often find it difficult to access the technology that enables online meetings. I would estimate at least 20% of our congregation are in a position where they absolutely cannot access our online services and have therefore been completely bereft of Christian teaching and friendship during what has been a trying and unnerving year.

Since the lockdown, I have had to organize online services, and to bring our equipment up to a specification where those services are watchable has cost several thousand pounds, and they are in no way as a substitute of actual services. We have also provided a telephone line to call for services, made over one thousand outgoing calls to our people, and fielded several hundred incoming calls.

In the gap between the first and second lockdowns, all our churches met again apart from one as the company that organized their venue went bankrupt. We took every precaution, got professional risk assessments, discussed what we could and could not do with our public liability insurance and our lawyers. It was a long, stressful process, and in

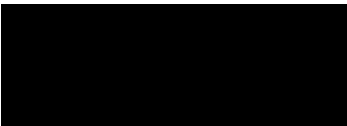
addition the venues we hire regularly have all had different instructions too, some of which have been contradictory.

We have not been able to meet during lockdown as there have been no venues that would allow us to hire them, and it would also invalidate our public liability insurance. Now we have found if anyone would drive to one of our services, they would no longer have valid driving insurance. Corporate prayer is an essential part of our faith and now it cannot happen, which has disquieted our people.

There are several people who have missed getting baptised, we have just cancelled yet another baptism service which was planned for November 14th. We also have had four couples who could not get married within the lockdown. I believe that our not being available in our respective communities is to the detriment of the community.

I represent eleven of the many churches in the United Kingdom that do not as yet own their own venue. Normally we can hire a venue for a few hours because it makes economic sense as we can all meet together at the same time and celebrate and worship and fellowship together, we can engage in corporate prayer and worship, and we can all encourage and inspire each other. To hire a venue for individual prayer would be utterly inefficient, not cost-effective and no one would hire it to us anyway. So, therefore not only has the current lockdown prevented us from corporate prayer, it has prevented us from having a safe space for individual prayer too. I would imagine thousands of churches across the UK have been restricted in the same way.

Kind regards,



Benjamin Conway, MA, PGCE

Lead Pastor, Tree of Life Family



To Whom it may concern,

My name is Alexander Gyasi MBE, I am the founder and senior pastor of Highway of Holiness church.

The church was founded in 1995 in Haringey, north London. In my 25 years of pastoral ministry I have gone on missions to Asia, Africa, America and Europe. I have also established supplementary schools for underprivileged children in Bulgaria, South Sudan, Ghana and Ethiopia. We support churches in India, Pakistan, Nigeria and Philippines who also are persecuted for their Christian faith. I am the convener of Kingdom Culture Alliance which is a ministry that gathers pastors and church leaders across the U.K, it is also active in Europe and Africa.

We have 100 members that attend regularly and hold 4 services on a weekly basis. The majority of our members belong to the BAME community. In addition to our services we run a youth club which we began in 2006, a homeless shelter since June 2009 and a day centre for the homeless, people on the verge of becoming homeless and people that live in isolation since February 2019. Throughout the first lockdown until date we provide meals 6 days a week to the homeless and one day a week to members of the community.

In response to the Covid-19 pandemic we undertook a risk assessment to identify what risk we had to mitigate in order to reduce the risk of transmission. This resulted in us taking the following steps:

1. Asking all members to remain seated in their cars once they arrived on site to be called in by an usher.
2. At the point of entry every family (bubble) sanitise their hands, puts on a face mask provided for the and have their temperature taken; their address and contact numbers are also recorded on the date they attended a service. We also created and posted up our NHS QR code in the venue as soon as it was available.
3. The chairs in the auditorium are distanced a metre and half apart between bubbles and people coming alone. The seating is organised prior to the start of the service.

4. Automatic hand sanitiser dispensers are dotted around the building to give people the opportunity to sanitise their hands throughout the building.

These same measures apply to homeless members of our community that attend our day centre. The amount spent on PPE, hand sanitizer and dispensers since March is about £800.

The consequence of being unable to worship together in person is that when we meet we draw inspiration, strength, guidance, teaching and instruction from corporate worship. We are also motivated to serve our community and we have the opportunity to fellowship and build our personal relationships and comfort one another which particularly negatively effects those that live alone, are vulnerable and or the elderly when this opportunity to meet it removed.

The closure of churches deprives members of the wider community of the opportunity to join in corporate worship and receive spiritual guidance. They would also loose the opportunity to meet people and make new friends who can care, empathise and support them.

Yours sincerely,



Rev. Alexander Gyasi MBE
Senior Pastor
CEO of Highway House



Rev. Iestyn ap Hywel

12th of November 2020

To whom it may concern,

My role within the Presbyterian Church of Wales is as an ordained Minister of the Presbytery, Montgomeryshire Presbytery. This means that, as recognised by ecclesiastical authority and legal convention, I am called by God to this work and am to serve his church in this capacity. I have been in my current position since November 2019. Previously I worked in full time ministry both at Immanuel Presbyterian Church, (EPCEW) Cardiff (2018-2019); and as Church Enabler and Overseer for Carmarthenshire Presbytery (2012-2018).

My current role includes ministering amongst three church centres in Machynlleth, Newtown and Llanidloes. I provide leadership and guidance to the elders and members of these and certain other congregations in the surrounding areas. I preach, minister the sacraments, provide pastoral care, and am responsible for coordinating and leading Welsh language ministry across the Presbyterian Churches of Montgomeryshire.

The above mentioned churches form a focal point in their respective communities and are a vital link for many. Crescent Church, Newtown, is involved with numerous community based projects that use the building as a hub on a weekly basis. At China Street Chapel, Llanidloes, the church has strong and active links with local schools and are active in upholding and furthering the positive influence of churches in the area by working ecumenically for the benefit of the town. At Maengwyn Chapel, Machynlleth, both members and attendees constitute a vibrant community of Welsh speakers who are culturally active in the area, and are an integral component of their rural market town.

Many believers from smaller, rural churches also worship and have close association with these three centres. The members, attendees and family members of these centres number several hundred.

With an aim to further the Christian wellbeing and joy of every believer, equipping them for ministry and every good work in their local communities, I affirm that the weekly Sunday services are absolutely indispensable and the loss of them has been devastating. Many of my congregants are acutely feeling the need for the restoration of the means of grace but are now also faced with the anxiety of legal restrictions upon the practice of their faith. The means of grace are integral to their happiness and health and I have witnessed a deterioration in both as a result of lockdown. Many are struggling deeply with their spiritual loss. According to the ancient Nicene Creed, and alongside all Christians everywhere we confess:

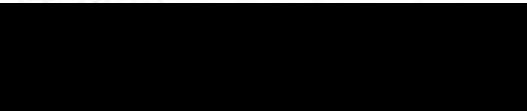
“We believe in one holy catholic and apostolic Church. We acknowledge one baptism for the forgiveness of sins.”

By its very definition a Church (Gk. ekklesia) is a gathered people, and it is only as a gathered people that the gifts of God in the sacraments are administered. Thus, being unable to meet together as the Church and administer the sacraments has proved to be an existential threat to the church.

From the outset we have been diligent in following Government guidelines when we were permitted to open. We have completed risk assessments and ensured that our meetings have been as safe as possible, according to the directions given to us. These measures included, but were not limited to, the use of hand sanitising stations, social distancing and mask wearing. However, by now the disease itself is not of primary concern when meeting together but rather the fear of possible legal repercussions.

I hope this information is helpful to you.

Kind regards,



Iestyn ap Hywel

HEAVEN
2020

CRC LONDON
BUILDING ONE CHURCH IN MANY LOCATIONS

REVIVAL CHURCH EUROPE | REGISTRATION NUMBER: 5328511 | CHARITY NUMBER: 1107956

Pastor Thabo Marais
Senior Pastor CRC London
46 Commercial Road
London
E1 1LP

Dear Jonathan Hough QC,

As requested, please see below information:

1. Your position within the church.

Pastor Thabo Marais, Senior Pastor of CRC London, UK.

2. A short background concerning yourselves, including a description of your experience of Christian ministry.

I grew up in South Africa before coming to London in November 1999. I was radically converted at the end of 2002, and immediately accepted the call of God on my life and forsook all to join the ministry full time.

I started my ministry training as an intern pastor at CRC London and completed my formal Bible School studies during this time. After being released as a Zone Pastor, I faithfully helped build and establish new campuses and was involved in many other church exploits.

I was released in 2009 as the Senior Pastor of CRC London, a non-denominational pentecostal church that is part of an international movement called, Christian Revival Church (CRC). CRC International is led by its founder and visionary, Pastor At Boshoff, who pastors the fastest growing church in South Africa today.

Since my appointment as senior pastor of CRC London, the church has grown year upon year from 300 people to over 3000 people attending Sunday services. Beginning 2020 we had 3 church campuses in and around London and have planted vibrant CRC churches in the north of England, in Manchester, and also in the nations of the Netherlands, Scotland and Poland in the last 6 years.



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I believe that to build a great church, is to keep Jesus, and a passion for building God's Kingdom, in the centre of everything. Together with my wife, Pastor Karen, and our 5 young children we are dedicated to cultivate this heart for souls in CRC London, the UK and Europe.

3. A brief description of your church - what type of community the church is in, how many members, how many services are held weekly, how many people attend regularly, what other services the church provides.

CRC London was initially planted in 2001. CRC is a global movement that started in South Africa with visionary leaders Ps At and Nyretta Boshoff 25 years ago.

CRC London has a multicultural membership representing the cosmopolitan metropolis of London, and at our last count over 50 different nationalities were represented as the church is truly home to all ethnic groups of our city's population. We reach people from all walks of life and all ages. Young and old, black and white, rich and poor, worship together at our services hosted on Sunday mornings and evenings at our relevant campuses.

The vision of CRC London is to build one church in many locations, and we are devoted to the cause and purpose of the Church of Jesus Christ according to God's kingdom principles found in the Bible, which includes the work of evangelism and the work of training and equipping of the believer to fulfill their God-given purpose.

Our current campuses in London are located in Bromley-by-Bow, and in Sevenoaks, Kent, with 4 services held on a Sunday. Our third campus venue, which was located in the West of London, in Gloucester Road, had to close in May this year, due to complications associated with Codiv-19. Our weekly attendance in person varies between 900 and 1200 per Sunday.

We are also meeting in small groups of 4-10 people on a weekly basis, with more than 160 groups across Greater London.

As part of a global vision, we are involved in various projects outside the UK as well as locally. We are the main supporters of feeding schemes in India and Pakistan, feeding over 400 people weekly. Each year we are involved in various social justice projects throughout the year, these include, JAM (Joint Aid Management) and Hope for Justice (anti human trafficking). We also drive a project called 'Bag of love' reaching prisoners and families in need with essential supplies and gifts.



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We operate a full and part time Bible School and vibrant Women's ministries. We also support various Israel charities on a monthly basis.

4. What are the consequences of being unable to worship together? The effect on the members and non-members, and what benefit has been lost from the inability to worship together.

We believe that the church, and meeting together as one for worship and instruction, is central and vital to the Christian faith, even as the Bible tells us in Hebrews 10:25 'not to forsake our meeting together as believers for worship and instruction, but to encourage one another; and all the more faithfully as we see the day of Christ's return approaching'. Jesus also said in Matthew 18:20: *"Where two or more are gathered in My Name, there I am in the midst of them."*

The fact that the government once again does not allow any (safe) meeting together of the church, when it is at the core of the faith to be together, seems to be a serious interference with the human rights of people of faith.

The church ministers to the whole being - spiritual, emotional (hope to hopeless, peace to the fearful, mental health, suicidal, domestic issues) and physical (e.g. needy people, loss of jobs). Being therefore unable to worship together, deprives Christians from this life source of fellowship, receiving instruction, encouragement, and ministering to the whole being as stated.

It also seems that the government does not view faith as essential to national life and is in fact interfering with the religious freedom of people and willing to sacrifice the wellbeing of millions of christians/people of faith in the UK, by neglecting the importance of faith at this time of crisis for the nation. I am concerned that the government does not view church as essential as ie. healthcare, but have chosen to categorise it with secular pastimes ie. going to the pub.

Churches, and certainly my church, CRC, are at the centre of communities offering counselling for real needs including mental health needs, support to the needy including providing meals for school going youngsters in poverty, prayer, comfort, hope and encouragement, in general but also particularly in difficult times as we are facing now. As COVID-19 restrictions and lockdowns mean that the Church can also not have their weekly small group meetings, it is even more necessary to be able to come together to worship on a Sunday.



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It is not only the Church and its members that suffer from being unable to worship together, but the whole of society are being affected, as there is no opportunity for those seeking God, to find Him, for those in distress, to be comforted and supported.

The church has an indisputably vital function to provide relief in dark times and spiritual guidance through these times, and it is alarming that the government has once again completely dismissed the essential role of faith to communities and the nation at large at this time. I am concerned that the government is creating a precedent for excluding churches in fulfilling its role in crisis times but also in general in the future.

5. The measures that you have put in place since the advent of Covid and the cost of these measures.

Closing down our worship places and not allowing our congregation to meet, meant a loss of community and support for individuals and families. This severely impacts and continues to impact the mental health of members and causes additional family pressures etc.

Not allowing meeting together as a church, when it is at the core of the faith to be together, is a serious violation of the human rights of believers, and results in a loss of trust in the government because of it.

Our church has made major progress in crossing cultural barriers in order to grow into the 'house of prayer for all nations' as God commands us to build in Isaiah 56:7. The isolation caused by the restrictions placed on the church by the government has actually created a vulnerability which caused many of our members to be severely affected by the narrative of the BLM movement. I strongly believe that we would have not felt this impact if we were meeting together regularly, in spiritual unity, to encourage each other as our custom is.

One of the biggest losses during this time was our venue in the west of the City (Gloucester Road) that had to close due to complications related to Covid-19. During our reopening of our worship places in July, having only 2 of our 3 campuses in operation, meant that members from these areas had to travel extensive distances to attend a service. This in effect had an impact on our weekly attendance and left our congregation living in those communities, without a local spiritual meeting place.

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Practical and Financial Implications:

Additional resources required for admin related aspects in preparing all relevant Risk Assessments for venues, offices and other spaces being used.

Additional resources required for all relevant training to ensure staff and volunteers operate according to strict government guidelines.

Consumables related to Covid Health & Safety requirements including specialised cleaning products, hand sanitizers, face masks, temperature meters, uniforms and other specialist equipment.

Media and printing resources including signs, posters, banners, floor markers, H&S manuals,

Hire of specialist equipment (fogging machines) for cleaning of certain furnishes in venues used.

Additional hire costs for broadcasting and recording during the first lockdown in order to broadcast services online.

Venue upgrades and equipment procurement for broadcasting purposes.

Equipment procurement to enable house churches to function.

Online registration system for all attendees and associate resources to effectively manage this.

The above measures roughly equated to £22,000.00

The biggest cost to the Church was (during the first lockdown) and is a loss of income - especially cash donations usually received during services.



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6. If you have continued to meet during the present lockdown, what have been and what could be the potential adverse effects to your church e.g. investigation by the charity commission, eviction by landlords, revocation of insurance, potential prosecution for criminal offences etc.

CRC London currently hires all of their facilities, which are government-owned buildings (Schools & Colleges), and as such, their management would not allow the facilitation of services during the present lockdown, as it would go against the Government's rules.

Should CRC London have had their own buildings, services would have continued in the present lockdown, and the risk of all above-mentioned would have been relevant, including potential prosecution and possible defamation of the name of CRC Globally.

7. The effect of not being able to perform baptisms, infant or adult.

The decision by an individual to be baptised after accepting Jesus as his/her Lord and Saviour, is a fundamental principle in the Christian faith, and withholding that from someone, is a violation of their free choice to follow in the doctrine and teachings as commanded by Jesus in the Bible.

8. Measures you have already taken to be 'Covid compliant'.

Please refer to point 5 for a list of these measures, as well as the *Assessment of Risk Document*, attached as an Appendix, setting out all methods currently being followed to ensure we are 'Covid compliant'.

9. The wider cost to the community of being unable to worship together.

As set out in point 4, it is important to understand the role and importance of the Church of Jesus in the wider community and general society. The Church is not a building, but the people of God, existing essentially for their 'non-members'.

As God's ordained vessel on earth, the Church gives hope, life, love, light and salvation to a broken world. The purpose of the Church is for the world to be blessed *through us*. The Church is the hope of the world!



Our Church is at the centre of communities offering counselling for real needs including mental health needs, support to the needy including providing meals for school going youngsters in poverty, prayer, comfort, hope and encouragement, in general but also particularly in difficult times.

People are looking to God like never before because of the calamity. During this time when many feel isolated and fearful, the Church plays a critical role to bring comfort and hope to their communities.

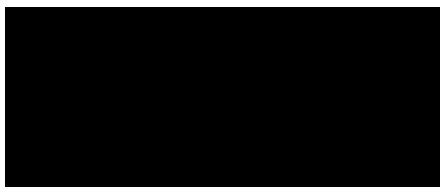
Withholding the church from being that place of refuge, the whole of society is being affected, as there is no opportunity for those seeking God, to find Him, for those in distress, to be comforted and supported.

10. Anything else of relevance.

Nothing to note.

I trust that the above information would be sufficient but please do not hesitate to contact me should you have any further queries.

Kindest Regards



Pastor Thabo Marais



Rev. Rich Owen



11th November 2020.

Dear Sir/Madam,

RE: Request for information: how a national lockdown has affected Worthing Tabernacle Church

I have been serving as Senior Pastor at Worthing Tabernacle Church for over 7 years and prior to this, as Assistant Pastor at City Evangelical Church, Leeds. Worthing Tabernacle was established in 1897 in the heart of our town and has, through two World Wars remained open for Christian worship and witness until this day. Our membership stands at over one hundred and eighty and we would regularly serve over two hundred people for Sunday morning worship, and around fifty for evening worship. Our membership is very well mixed in terms of age but does have a large number of elderly folks. Our church is affiliated to the FIEC and is in the Reformed Baptist heritage.

Our understanding of ‘church life’ according to scripture, is that human life is lived to the full in fellowship with God, and with the local church. Therefore, for us, what happens when we meet on a Sunday, and indeed throughout the week is *ultimate* in our lives. We view all of life as worship, and the weekly gathering with our church community is like entering heaven itself and the highlight of the new week. So many of the Lord Jesus’ commands (which we willingly obey) involve “one another” in the local church. The life and joy that we receive together in obedience to these commands, and under the preached word, and in taking the sacraments of baptism and the Lord’s Supper, are what flow out into Christian service, and that life lived to the full which defines our very being each day.

The result of us not being able to meet is that this life lived to the full is not possible. That which is ultimate, our life and soul, is being held back from us. It is so hard to obey the teaching of Jesus with respect to His “one another” commands when the ability to *be* with one another is highly regulated or forbidden. The lonely, the widow and the troubled are now further pushed back into their loneliness and trouble, for they are unable to be with the Christian family which voluntarily gives itself to care for them. We are commanded to sing psalms, hymns, and spiritual songs, so even when we have had restricted gatherings prior to this second lockdown, we have been deprived of the joy of singing to the Lord. We are unable to have a creche and our Sunday school has been temporarily suspended, due to the space we would need in order to set this up in a COVID secure way. This has made it very difficult for families to attend.

I have been restricted from and sometimes unable to visit dying members, at home, in care homes or in hospitals. I have had to conduct desperately sad funeral services with far fewer people present and have witnessed the sadness of families having to choose which people to exclude from services. The effects that this is having on my congregation is hard to express here and it is heart-breaking to put it into writing.

We have so many people who volunteer and serve through the church. For example, we run a community café, now closed due to COVID, a Christian bookshop which served the entire town, also presently considered non-essential and therefore closed. The café was a place many folks and charities would use through the week, and our bookshop an essential outlet for those who do not shop online, to find study notes, bibles, Christian greetings cards etc. We ran a mid-week toddler group two mornings a week serving nearly a hundred people, including many single mums for whom it was lifeline, but this also has had to close. We ran a lunch club for the elderly on a fortnightly basis, giving around forty people somewhere to come with their friends, this too is now closed. We have managed to continue running the Worthing Foodbank in partnership with another local church, but this has been far from easy. The community impact of lockdown is huge for us. Many of these things are part of our charitable objectives.

Nevertheless, we have worked incredibly hard to maintain the spiritual life of the church despite the lockdown. We have invested over £4000 in cameras and streaming equipment in order to provide something for our members to keep them engaged, taught and under the preaching of the scriptures while unable to physically attend. We are intending to send Christmas gifts to children and families who have lost contact with us due to lockdown. We re-opened in July as soon as we were allowed, fully compliant with government recommendations, including mask wearing, social distancing, sanitising, track and trace, one way systems round the church building, and very limited social contact, rule of 6 etc. We have spent over £500 on tape, hand sanitiser and other sundries. As a result of these efforts, many of our folks consider attending worship on a Sunday far safer than going to the shops, restaurants, or other civic spaces. We have not had a single case of COVID-19 in our membership, and therefore also no known transmissions as a result of us meeting for worship. I am utterly dismayed at the inclusion of places of worship in this present lockdown.

We have reluctantly closed again for the present four week lockdown and our prayer is that, for the sake of the spiritual and mental health our members and for the sake of all that we do to serve our community, we will never be *forced* to close our doors again.

Yours faithfully,

R. J. Owen

Rev. Rich Owen.

11th November 2020

Dear Sir/Madam,

I have been serving as pastor (and/or church planter) of North Church Leicester for three years now. Prior to this I was in an assistant pastor role at Christ Church Loughborough for three years.

We are a new and small Reformed Baptist church in a deprived area of Leicester, with only 8 members, and approximately 20-25 people attending church on an average Sunday. We began meeting together in our local community centre about two and a half years ago. In the beginning of this year we formally constituted as a church. Our practice as a church has been to meet weekly for Sunday worship, as well as holding mid-week bible studies and prayer meetings in homes, and holding various outreach events in the community.

The consequences for us of being unable to worship together have been many and serious. It is our conviction, from the bible (and this conviction is reflected in the Second London Baptist Confession of faith that we subscribe to), that public gathered worship of God is commanded by him, where his people gather in the presence of Christ to hear the word of God read and preached, pray, and participate in the ordinances of baptism and the Lord's Supper. We are made to worship him! Being unable to do this publicly has been troubling to my conscience, and the consciences of others in our congregation. Our theological understanding of church, worship, and what it means to be a human means that to replace this with online meetings is not an acceptable alternative.

In addition, I have spoken to members of our congregation who are really struggling with the lockdown in terms of their spiritual well-being and, what some might call, mental health. In the recent days of wider Covid limitations, church has been somewhat of an 'oasis in the desert' for most of us. Banning church means depriving people of genuine and essential Christian fellowship and communion with God through his means of grace. We believe that as we meet together, to hear the word of God preached, and pray together, and participate in baptism and the Lord's Supper, Christ himself is among us and does good to our souls in a unique and vital way. To be cut off from this does real disservice to the spiritual lives of our people.

This coming Sunday we were due to baptise a new believer in the Lord Jesus. For us, especially as a new and small church, this is a huge occasion. In baptism, God signifies to the person being baptised, and to those baptised persons witnessing, that we are united to Christ and belong to him; that he really has washed away our

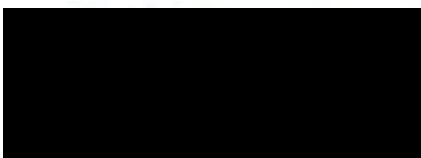
sins and granted us eternal life through faith in Jesus. This individual is unable to receive this great gift, now likely until the new year, and our church will be deprived of this great encouragement that we have been looking forward to for months.

We also have a number of people join us on Sundays who are not believers in Christ but who are exploring Christianity. They, too, have been cut off from this. For some of them, zoom and online communication is very challenging. But for all of them, they are unable to attend the primary means that God uses to reveal Christ to people: the preaching of God's word. By banning church, the opportunity for these people to know Jesus for themselves is severely hindered.

Because our church does not own its own building, we are dependent on renting our local community centre for Sunday worship. Since March, during the first lockdown, this facility has been closed and it is uncertain when it will reopen. When we were finally permitted to begin meeting again (August, here in Leicester) we were thankfully able to use another public space – a local youth centre – for our services. In meeting, we have taken the most care to do what is necessary to reduce the spread of the virus. The congregation has been extremely understanding and compliant. There have been no cases of Covid among church attenders as far as I know. Those who I have spoken to report to feeling safe in our services.

For a small church just starting, this lockdown and current ban on meeting has been a real struggle. I submit this to you in the hope that it will help to demonstrate the essential nature of the local church and public worship of God.

Sincerely,



Pete Petra
Pastor of North Church Leicester



11 November 2020

To whom it may concern,

I am the Assistant Pastor of Christ Church, Loughborough. After being a lay elder of the church for around 10 years, a little over two years ago I took up the position of Assistant Pastor. Christ Church has over 40 members, with a regular attendance at Sunday services of over 60 people. We hold one service on a Sunday (and ordinarily a monthly service in a local Residential Care Home), as well as Thursday evening teaching/prayer meetings and youth meetings on Friday evenings. The church is based in a multicultural area of Loughborough and we have good relationships with local residents of different backgrounds.

We are a people who take seriously the command of Romans 13, calling upon Christians to be in submission to the civil authorities, since they are instituted by God; however, the same passage makes clear that such government ministers are servants of God and thus forbidding what God commands is a clear overreach on their part. Members of the church are deeply troubled in their consciences by the inability under the law to obey the biblical command to gather for public worship. Not only that but legislating that churches are allowed to provide addiction support, food banks, blood donation etc., whilst explicitly forbidding worship of the God in whose Name such services are provided, is meddling in the affairs of the church in an inconsistent, ignorant and demeaning manner.

The consequences of being unable to worship together during this time are considerable. We are not just physical beings; public worship, as well as being biblically mandated, ministers to the spiritual needs of our members. As we gather together, God blesses his people through his ordained means of grace – we hear him speak and enjoy his presence as the Word is read and preached; we sing his praise and encourage one another to hold to the truth in so doing; we celebrate our union with Christ and fellowship with one another by taking the Lord's Supper; we participate in baptisms of new believers, bringing them into membership of the church and delighting in the good news of the gospel as lost sheep are found; and we pray as a corporate gathered body, ministering to one another's needs and difficulties at this uncertain and difficult time.

It is impossible to quantify the impact of losing all this as the government has made it a criminal offence to gather for these purposes. Certainly, we see our members hurt and struggling, not to mention the dishonour done to the Name of God, by such a decision.

In addition to all this, as a church, we are always concerned for those who are not members. To ban public meetings of the church where those who are struggling in the community can come to find hope, meaning, and forgiveness, has a devastating impact on the church's ability to provide support to those outside its membership – to do so at a

time when there is an increased risk of death is short-sighted; to do so whilst allowing garden centres, hardware stores and off-licences to remain open is disrespectful.

As a church, we have taken great care to put in place strict measures in order to reduce the risk of the spread of Covid at our services. We have carefully observed social distancing guidelines, even spreading the congregation across two rooms in order to do so; we usher households to and from their seats; we have shortened our services; we strictly observe the law concerning the wearing of face masks; we have insisted that members disperse straight after the service and do not stay and chat to one another; and we have been careful to take details to support the Track and Trace system. Many have noted that they feel safer at our church services than they do at *any other public setting*.

The cost of these measures has been significant. The fellowship that we enjoy as brothers and sisters in Christ has been all but removed. This has a negative impact for all our members, but is particularly painful and detrimental for those who live alone and are desperate for support in these times. The opportunity to meet with their church family, receiving encouragement and prayer, is a lifeline for those who are struggling spiritually.

Our members are fearful in light of the government's decision to criminalise public worship. They are concerned about receiving large fines or facing police action for seeking to obey the commands of scripture. The consciences of law-abiding citizens are being damaged. There is also the risk of division and disunity within the body of believers.

Furthermore, we also have some who have been attending the church who are now professing faith and have expressed the desire to be baptised. We have not been able to proceed with baptism classes or baptisms, and the cost of this has been profound. As well as the spiritual cost of not being able to celebrate their faith in obedience to the scriptures, the sense of exclusion as they have not been welcomed formally into the church, and not been able to join Members' Meetings, having votes on key decisions, has been palpable.

In spite of the significant costs, as outlined above, of the ban implemented by the government, it is my understanding that there is no evidence of the transmission of the virus in church settings.

I urge the government to reconsider the position that they have taken and to decriminalise public worship with immediate effect.

Yours sincerely,



Nicholas Pollock

HEBRON CHRISTIAN FAITH CHURCH

The Forum • Coventry • CV2 5HD • Tel. 024 7767 8523

Pastors John and Sally Quintanilla

Hebron Christian Faith Church



To whom it may concern

We are the senior pastors of Hebron Christian Faith Church, a multi-cultural, non-denominational charismatic church based in Coventry.

We have been in full time Christian ministry for over 20 years and came to Coventry to start a church almost 15 years ago. The church has grown to over 200 members today. The church ministers not only to the spiritual needs of the people but also to their emotional and physical needs. Our church has various arms of ministry in addition to our Sunday and mid week services - men, women, mother and toddler group, small groups, counselling, food hampers to those in need in our community. For the past seven years we have also put on a large Family Fun Day in a local park each year completely free of charge which attracts thousands of people from the community.

The New Testament mandates the church to meet together regularly. Being threatened with criminality by government if this is done has deeply grieved the conscience of our congregation and caused great anguish. We are extremely disturbed by the prospect of being forced to elevate government intervention in church affairs above our allegiance to God and one another. Of course, no decent Christian wants to endanger the lives of others, and where such danger genuinely exists (as we were told it did at the 1st lockdown), churches would likely be the first to voluntarily lead by example and close their doors (as many were at the 1st lockdown). But legal intrusion is a step too far and a gross violation of freedom of religion.

Our congregation is so much more than a group of people dropping in on a Sunday. It is a family and meeting together is a much needed lifeline for our people from the oldest to the youngest. Although we are doing our best to connect with our people via social media, emails telephone etc, none of these are feasible (or scriptural) substitute to meeting together in person. Further, the older folks are not as technologically minded as the younger and therefore have had their connection literally severed.

Church Office • 15 Primrose Drive • Bedworth • Warks • CV12 0GL

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HEBRON

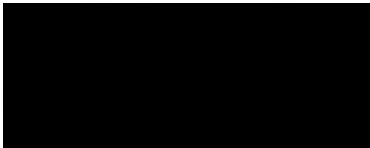
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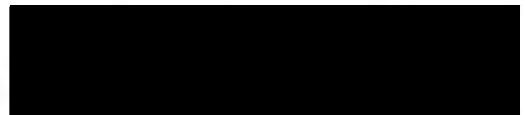
At Hebron we were careful to ensure that we rigorously implemented all the government health and safety guidelines, carried out numerous risk assessments, purchased sanitising stations, signage, masks and gloves. Our building can comfortably seat 500 so social distancing was adhered to throughout the building. We are ready to hold multiple services if necessary to accommodate our growing congregation safely. There is continual cleaning and disinfecting carried out throughout the building.

Whilst the vital role of the church may not be understood by those outside, it is more than an essential service to most Christians. Therefore, whilst many shops, colleges, work places are permitted to remain open, we very much oppose this discriminatory intrusion by the state into the affairs of the church.

Yours sincerely



John Quintanilla



Sally Quintanilla



WWW.CRCMANCHESTER.COM

CRC MANCHESTER
BUILDING ONE CHURCH IN MANY LOCATIONS

3301 South Tower, 9 Owen Street, Manchester, M15 4TT

11th November 2020

Dear Sir/Madam

My name is Stephen Ridgely. I am the Pastor of Christian Revival Church Manchester. I planted this Church in January 2018 under the leadership of Pastors Thabo & Karen Marais of CRC London & Europe. We are part of an intentional move of God that has approximately over 100 Churches internationally. We are also part of the International Federation of Christian Churches.

I have served in this ministry for 13 years and have been operating as a Pastor for 5 years. I am 35 years old and reside in Manchester with my wife and son. In the 13 years I have served in the ministry in many different capacities including practical/logistical running of Church and ministering & counselling thousands of people over this time.

CRC Manchester is based in the heart of the city centre of Manchester and is a very diverse group of over 50 people including many cultures and ages. We are focused to build and establish the Church in Manchester. Please find below some of the services we provide as a Church:

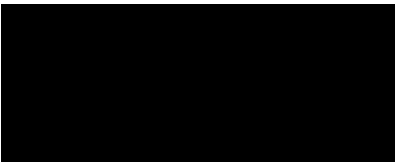
- Sunday morning service celebrations (Weekly, Including Kids Church)
- Leaders Meetings every Monday evening (Weekly)
- Bibleschool Tuesday evenings (Weekly)
- Homecell Meetings (Every Wednesday evening, smaller groups meeting within the local communities that make up Manchester)
- Various prayer meetings (Weekly)
- One to one counselling (Daily)
- Mens breakfast (Quarterly)
- Women's breakfast (Quarterly)
- Large scale outreach events (semiannual, aimed at uplifting members of the community)
- Social days for fellowship (Quarterly)

The consequences of not being able to be together are very visible and in plain sight for those that have given their lives to work with people and particularly they're wellbeing physically and spiritually. Many members are struggling mentally not being able to corporately gather together in the presence of God which is paramount to their spiritual well being. Many members feel like they are being robbed of their freedom that has been fought for by so many. Our Church has provided hope to many and in 3 years we have seen over 300 people give their lives to Jesus, not being able to meet is denying the people of Manchester the opportunity to experience truth for themselves. This truth that we share from the gospel has never left a person that accepts worse off but always better. The Churches doors open mean a healthier, more content, spiritually strong society which benefits all regardless of their beliefs.

Since the beginning of the Covid-19 Pandemic we have been more than compliant with every requirement to help stop the spread and to save lives. We updated our risk assessment and provided all the necessary protocols to keep every member safe that attends one of our services which include the purchase of all necessary PPE along with disinfectant and hand sanitiser. We have updated our protocol for all volunteers and have implemented a registration system that is filled in before Sunday to ensure everyones details are registered.

The brief time we had back together in services between the 2 lockdowns proved to be so necessary and beneficial for every individual. In this time we have seen over 30 new visitors to our Church that have been impacted positively. There is no denying the importance of the Church operating in communities. Many of our families and their children are building life long friendships that clearly benefit their lives and this time of being closed seriously hinders human relationship that we were designed for but also confuses our younger children that don't fully understand why we can't be together. There has never been a greater time in history for the Church to be open and fully operational, people need hope now like never before. The Church is the only middle ground between God and man through Jesus, always has and always will be. If a war can't stop the doors from opening it's an embarrassment that a virus can. Peoples safety is our number one priority which is exactly why the doors should never be closed by a political process.

Yours Faithfully



Stephen Ridgely

Ministers: Revd Dr William Schweitzer, Revd Benjamin Wontrop, Revd Florian Weicken
Elders: Mr. Jonathan Winch, Dr Christopher Richards

Revd Dr. William (Bill) Schweitzer is the founding minister of All Saints Presbyterian church, then Gateshead Presbyterian Church which was planted in early 2009. Benjamin was called back to All Saints as the minister for pastoral care in 2019 having previously served the church as a ministerial assistant from 2011 to 2016 and served as a minister at Bury St. Edmunds Presbyterian Church in Suffolk from 2017 to 2019. Jonathan was a founding member and elder of the church from the time it was planted, and Chris joined the eldership in 2017 as an additional elder.

All Saints Presbyterian Church was a plant of nearby Durham Presbyterian church. From the beginning, the church has sought to be a confessionally reformed church in the Gateshead/Newcastle metropolitan area. A church that would be faithful to the scriptures and the reformed faith alongside being a warm and welcoming community to those interested in knowing more about the Triune God and His Salvation through Jesus Christ. The congregation has seen significant growth reaching over a hundred members at times. However, the church has also been committed to planting other churches and has given up some of its members to form core groups for these new church plants. The church's first plant was in the town of Hexham in the Tyne valley, which began services in 2015. This was followed in 2019 by another church plant in the city of Sunderland. We are now in the process of sending another man to plant a church in Zurich Switzerland. The church also began a theological school for training new ministers: Westminster Presbyterian Theological Seminary – founded in 2013. In 2019, the church moved to the historic building of All Saints church on the quayside in Newcastle. This followed an intense restoration project of this building which is a treasure to the city and had been on a Historic England list for at risk buildings of historic significance. Plans are being developed to make this open to the public for tours after the COVID-19 crisis.

All Saints is a community, and this community is a lifeline for many through its meeting and pastoral care. This includes those who do not have natural family to support them and those struggling with significant mental health challenges. We ordinarily meet twice on a Sunday for corporate worship and fellowship. We also meet once in the middle of the week for Bible Study, fellowship and prayer. This is joined with regular one-on-one discipleship and support led by our minister of pastoral care.

The consequences of not being able to meet together have been grave. First and foremost we were made by for and by God. The cost to His glory in not meeting physically together is unmeasurable. Second, as Christians, meeting together physically for worship is an essential element of our faith. The denial of this means that we cannot practice our faith properly. Third, our ability to preach Jesus Christ and the hope that He has, is and will bring to the world is severely hindered. The preaching that the scriptures call us to is more than just the communication of information. It is to happen in the gathered company of God's people where it is joined to fellowship and discipleship, where those from outside the church may not only hear but be engaged and discipled. This is not possible over YouTube and is impaired – to the point of being fundamentally different – over Zoom and similar mediums. Fourth, the lockdowns have

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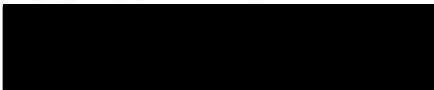
All Saints Presbyterian Church is a Charitable Incorporated Organisation registered in England. No. 1184509

taken a heavy toll on the people of our congregation who rely on weekly corporate worship, for mental and spiritual health.

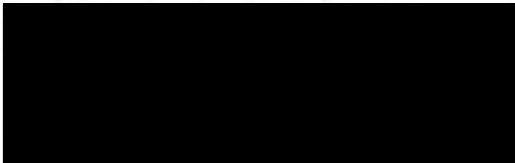
These new regulations also came as a particular blow to us after having spent a great deal of time and effort to ensure that our corporate worship was a Covid safe environment. In this we were helped by the fact that we have a building which seats over 1000 people as our congregation is about a 10th of that size. Through our risk assessment and the procedures we developed, we have sought to take every precaution we could in good conscience. You can find the procedures we developed for re-opening in July at the bottom of this letter. Our risk assessment can be accessed on our website: <https://allsaintspres.org.uk/covid-19-update/>.

As a church the corporate worship of God is at the core of who we are and what we do. It is essential for the glory of God and for our people, and it is commanded by the highest authority in heaven and on earth.

Respectfully yours,



Revd Dr William Schweitzer
(Moderator of Session)



Revd Benjamin Wontrop
(Clerk of Session)

The above ministers have signed on behalf of the session of All Saints Presbyterian Church

Reassembling Procedures

Before Coming To Church

1. **Inform us you wish to come.** This can be done via the provided google form or personally to Peter Lawley or Benjamin Wontrop, particularly tell us if your responses change from what you have told us already.

You will then receive instruction as to which door to attend:

Entrance:	Zone:
Accessible entrance (from graveyard)	Marble Zone
Main entrance (big steps)	Pew Zone
Side entrance (small steps)	Gallery Zone

2. **If you have not let us know you are coming; you can still come.** We will always seek to accommodate everyone, including visitors - it just helps us immensely if we know in advance. If you have not been pre-assigned a zone, come to the main entrance and a steward will assign you to one.

3. **What to bring with you:**

- A Bible
- Your own hymn books/psalm books or an app.
- A face-covering
- Alcohol gel & disinfectant wipes (these will be provided at the first service which you attend)

4. **Symptoms suggestive of Covid-19:**

- Cough
- Fever

- Shortness of breath
- Loss of sense of taste or smell

If you, or anyone in your household, has any of these symptoms, please join the livestream of worship rather than attending church physically. You should also obtain medical advice regarding testing and track and trace. Please also inform Benjamin Wontrop so he can coordinate the pastoral response to this.

When You Arrive

1. **Upon Arrival:** You will be greeted by a steward who will
 - Provide you with (disposable) **face-coverings**, if you have not brought your own.
 - Check that you have what you need for your **hand hygiene/cleaning** needs and help ensure hand hygiene is as effective as possible, thus reducing the risk of transmission to congregants.

On the first Lord's Day back, each family unit will be provided with a pack of disinfectant wipes and a bottle of alcohol hand gel. You are asked to take these home with you and bring them to each service you attend (we would suggest that you leave it in your car).

- If you do not have access to **hymnals or psalm books**, these can be provided by the steward and this copy will become yours for the duration of the current pandemic. It may be sensible to lightly pencil your names or initials in the front of the books for the duration. Please bring those books to any other services you attend subsequently (again, you may wish to leave it in your car).
2. **Put on Your Face-Covering:** This should be worn at all times when you are in the building. This only applies to those aged 11 and over. Face-coverings for children aged 0-10 will be left to the discretion of parents. If you have specific concerns about this policy please discuss them with Peter Lawley in advance of the service.
 3. **Seat Yourself:** You will then be asked to take a seat as directed by a steward, in general filling up the seats furthest from the entrances first.

During The Service

1. **Children:** Children must remain within their family units at all times.
2. **Face-coverings:** We are asking congregants (expecting those aged 0-10) to wear face-coverings at all times (except when eating the bread or drinking the wine/juice in the Lord's Supper).
3. **Social Distancing:** Please keep 2m away from other family units at all times. We do not anticipate the need for any family unit to come within 2m of another, except in the case of an elder serving the Lord's Supper, therefore the 1m+ advice will not apply, this is only for situations where 2m distances cannot be maintained.
4. **Symptoms:** If you develop symptoms suggestive of Covid-19 during the service, please leave immediately with your family unit and inform Peter Lawley via telephone.
5. **Toilets, Baby-Changing and Cry-Room:**

- **Toilets:**

The Accessible Toilet: This will be reserved for the use of those seated in the **Marble Zone only** (those with accessibility needs will always be seated in the Marble Zone), this is a further measure to reduce the risk to our most vulnerable members.

Regular Toilets: The regular toilets will be for the use of those in the **Pew and Gallery Zones**. Access to the toilets from the Gallery Zone is best achieved by exiting the building completely through the side door and re-entering via the main entrance to avoid moving through the Pew Zone. Access to the toilets from the Pew Zone or Marble Zone should be via the marble ramp as normal.

'One Family at a Time' and Cleaning After Use: If you require the toilet, please observe scrupulous hand-hygiene by hand washing using soap and water before and after using the facilities. Please also wipe down all touch-points with the disinfectant wipes provided. Children should be supervised in the toilets by a parent or guardian. Toilets should operate on a 'one family unit at a time policy' to ensure social distancing. Any queues for the facilities should also observe 2m

distancing. Please leave the external doors to the Regular Toilets propped open at all times.

- **Baby Changing:** The baby-changing facility has been relocated to the old cry-room.
 - **Cry Room:** The service will be relayed to the vestry and this will become the new cry-room for the time being.
6. **Kitchen:** Please do not use the kitchen for any purpose other than access to the new baby-changing facility - the sinks are not to be used for hand-washing.
7. **Sacrament of the Lord's Supper:**
- Two deacons will prepare the table together, to ensure that cleaning and hygiene rules have been scrupulously followed in preparation.
 - No 'pressure' will be placed on communicants to receive the Supper, given any health concerns they may have.
 - The elements will be served from the empty pew/row in front of where the communicants are seated. **The bread will be *dropped* into their hands.** The communicants should fully reach out their arms and open their hands flat to receive the bread. Under no circumstances must a communicant serve him or herself from the basket. Larger than usual gaps will be left between glasses of **wine and juice** to avoid the risk of communicants touching any glass other than the one they take. As was the case previously, the glasses in the middle of the tray will be grape juice rather than wine. The grape juice is usually a lighter colour.
 - Communicants will leave their face-coverings on while the elements are being served and will remove them when invited to partake by the minister.
 - The bread will be pre-cut into small pieces. One elder will serve each zone.
 - The minister and elders will sanitise their hands before touching the elements. It is suggested that Communicants do the same.

- Communicants are kindly asked to return their own empty glasses to the trays by the door they use to exit the building. Please do not touch other glasses in the process.
8. **Sacrament of Baptism:** The session is passionate about the continuance of baptism through this period. Plans have been made for the celebration of baptism, when required. If this is relevant to you, please contact one of the ministers.

12th November 2020

The Right Honourable Boris Johnson MP
Prime Minister of the United Kingdom
10 Downing Street
London
SW1A 2AA

Dear Prime Minister,

RE: Government Lockdown of Places of Worship

It is with the deepest concern that I write to you on behalf of the leadership and members of New Wine Church regarding your recent announcement that our places of worship will suffer a second lockdown from the 5th of November 2020.

We are strongly opposed to a decision that puts our places of worship in lockdown whilst allowing business enterprises and some other types of establishments to stay open. This selective approach reflects an awful devaluation of the value of our Churches to the lives of our members and to the wider local communities we serve.

New Wine Church in England has over 2,000 members and attendees at our weekly Church services and other events.

We are a multiracial, multicultural Church serving the various diverse communities within which we operate such as Woolwich, Dartford, East London, Maidstone, Gravesend and Manchester.

New Wine Church is a respected corporate citizen within the Royal Borough of Greenwich and we contribute significantly to the socioeconomic and spiritual well-being of our borough and beyond.

Below is a range of services we undertook for the benefit of our community before the lockdowns.

- We served approximately 40 people each week, providing them with a full English breakfast each Saturday and access to services that help get them off the street and back on their feet in terms of gainful employment, overcoming substance abuse, family reconciliations and active positive participation in community life.
- Over the last 18 years, we have undertaken our annual Christmas Hamper Campaign through which we have distributed over 29,700 Christmas hampers that have benefitted over 148,850 low income members of the community (including elderly, disabled, single parents) within Royal Greenwich and other London boroughs.
- Weekly study sessions and GCSE revision classes for secondary school children – improving their school grades and opportunities for higher skilled, better paying careers.
- Health and fitness classes for senior citizens – contributing to their increased wellbeing, self-esteem and ability to maintain their valued contributions to the society.
- Art & Craft sessions for primary school children – facilitating the children’s creative skills and offering an environment of innovative learning and safety during the school holidays.
- Summer Club for children – held during the school summer holidays, the children (Aged 5 – 12) enjoy a range of activities that expand their minds, stimulate their creativity and enhance their social skills. Activities include visits to museums, theme parks, craftwork sessions and games.
- Music Classes for children – weekly lessons to support the development of musical ability and offer a platform for the expression of their unique gifts.
- Career development workshops – Providing training in CV writing, job searching, interview skills and personal communication skills. These help to enhance the employability of the local populace and contribute to the reduction of local unemployment.
- Financial empowerment workshops – teaching personal finance skills that help people get out of debt, stay out of debt and manage their financial resources more effectively, thus easing the stress on themselves and their families.
- Health Awareness Conference – Our annual event bringing doctors, health and nutrition experts together to offer members of the community advice on preventive healthcare, diet, exercise, mental health and wellbeing.
- Prison Ministry – We offer support to inmates at local prison (HMP Thameside), helping them to improve on their personal skills and prepare effectively for life after prison.
- John Wilson Pantry – Our dry goods foodbank that provides groceries and support to many underprivileged or marginalised members of the community.

- Homeless Christmas Party – We host approximately 90 to 110 homeless people at an annual Christmas party, enabling them to participate in the Christmas festivities. We invite community leaders such as the Mayor or Members of Parliament to speak to them and help to convey a message of hope and empowerment for the future to the homeless persons.

In 2017, we were honoured to be given a civic leadership award by the Royal Borough of Greenwich for outstanding leadership and contribution to the community.

Suffice to say that as a result of the government's lockdown, we have been unable to provide most of our valued humanitarian services to the community, which has a debilitating impact on the thousands of people we serve each week.

The negative consequences include:

- The lockdown has adversely impacted the physical and mental health of the senior citizens who have been unable to meet with friends in their exercise classes.
- The homeless people unable to meet in their safe space on our premises for their meals and positive engagement to help them overcome the emotional and mental health challenges some of them face.
- The adverse impact on the spiritual and mental well-being of our Church members and their family who find attendance at our weekly church services a profound source of inspiration, encouragement and emotional release from the pressures of daily living
- The impact on children within the Church and the local community who would normally come together each week for fun-filled activities.
- The Church has had to invest significant time and financial resources including paid professional counselling to support our members in overcoming the traumatic impact of the lockdown on their mental health and family circumstances.

As a responsible corporate citizen, and without fear of contradiction, we have done as much if not more than many business enterprises, in our approach to maintaining the health and wellbeing of all visitors to our premises.

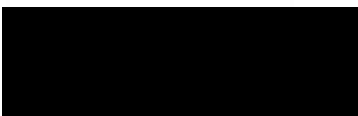
When we reopened for congregational worship services in August, we began and since then have operated a very high level of Covid-compliant practices during our weekly services such as having two (2) Metres social distancing, temperature checks, hand sanitization, regular cleaning and fumigation of our premises and constantly reinforcing the message about each individual's responsibility to help reduce the spread of the coronavirus and keep themselves and others safe.

We therefore find it particularly unfair that our Churches are being placed in lockdown whilst businesses can continue to operate at will.

Churches across the country, including New Wine Church, here in Woolwich and in other parts of England contribute significantly and positively to the mental health and spiritual wellbeing of our members, their families and our community at large. Being able to attend the Church services has played a tremendous part in the revitalized emotional resilience, family stability and general welfare of our members and we are keen for this to continue without government interference through another lockdown.

We would therefore ask that the lockdown of our places of worship be rescinded, **our Churches remain open for congregational worship and our fundamental rights to freedom of worship are not infringed.**

Yours sincerely.



Kola Taiwo

Senior Pastor – New Wine Church



12th November 2020

Dear Christian Concern,

I write to provide information as requested in support of a judicial review into the forcing of Churches in the UK to cancel all corporate worship services.

I have been a member of Kingsmead Baptist Church since 2009 and over the past 2 years it has been my privilege to serve the Church as one of its elders. We are a small Independent Baptist Church with 17 members and congregation of around 25 at our main Worship service on a Sunday morning.

We have 3 main services throughout the week, Sunday morning—worship service, Wednesday—Bible Study and Friday—Prayer meeting. We also run a Foodbank, which has recently expanded from one night a week to two because of the higher demand in recent months.

Much growth in the Church in the last few months has come from our Foodbank community outreach. A number of people have started to attend our Worship service and Bible Study because of this contact. These people have come from backgrounds of homelessness and drug and alcohol abuse and mental illness, and the Church has literally become a lifeline for them.

The effects of the original lockdown on these and others in our congregation has been very concerning. One gentleman who had been freed from drug addiction for a number of months, and had become a regular attendee and lately a member, shared how he was very close to returning to that lifestyle again because of the isolation he felt due to not being able to fellowship with us. Another lady who had mental health issues and who was being counselled by a lady in the church ended up being sectioned as her mental health deteriorated when her attendance at church had to stop due to lockdown.

Others within our congregation who are elderly and isolated literally pleaded with us not to close our doors this time. The Church is an essential lifeline for many in our congregation and in the wider community, and I am guessing that we are not alone in this.

We are not willing for that lifeline to be cut again and are currently continuing to make our Church available to share the love, compassion and mercy of our Lord Jesus Christ with those who need the fellowship more than ever in these uncertain and upsetting times that we are all living through. We do not do this lightly, The Scriptures command us to be 'subject unto the higher powers' (Romans 13) However it is our belief that the current legislation is in itself unlawful by making it a criminal offense to congregate and Worship our Creator, and that the Law of God calling us to do this (Hebrews 10:25) supersedes the law of man.

The Church has been acting on this law for thousands of years through wars and plagues and we feel the government has overstepped its bounds of governance in this matter.



We closed our doors in March and reopened them again on the 5th July. During that period and since then we have seen no COVID infections at all within our fellowship or within our immediate families, and I understand that this is a similar story across the country with minimal cases of COVID transmission being attributed to Church attendance. We have however seen the detrimental effects on our congregation caused by our inability to function as the body of Christ (the Church) both individually and corporately.

We have been called by the Creator of the universe to Worship Him, and to minister to one another in a way that He has ordained for good reason, and this has continued unabated for millennia. I believe what God has commanded for our good should not be allowed to be legislated against as evil by man.

In our Saviour Jesus Christ,

Gavin Taylor

Elder



IMMANUEL

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Registered Charity No 1172044

Wednesday, 11th November 2020

Dear Sir/ Madam (c/o Christian Legal Centre),

I am the church leader of Immanuel, which runs Immanuel School as one of its ministries. I have grown up in and around the church as my father was the previous minister before it was handed on to myself to lead. I also went through our school. I have been involved in ministry for approximately 27 years, with 20 of those being as an employee of Immanuel London, which is the name of the CIO that the church and school come under. I have been a church leader for 18 of those years.

We are an independent church that is a member of the Evangelical Alliance and has relationship with other local churches as well as some further afield. We are situated in Collier Row, North Romford and mainly serve people from the local community as we are very relational in our nature, so most of the church members tend to live close to one another. Most of the children from the church attend our school, although not all, so are in one of the two bubbles we have within the school as part of our COVID-19 safety measures and risk assessment.

We have one morning service on a Sunday and fortnightly an evening service. We also have numerous midweek groups that meet as follows:

- Children's Club (fortnightly)
- Youth Group (fortnightly)
- Home Group for support (fortnightly)
- Marriage Support Group (monthly)
- Exploring Creativity (monthly)
- Various Prayer Groups (weekly)
- Men's Breakfast (monthly)
- Various team meetings for planning (monthly)
- Various community engagement activities (ongoing) – support and food parcels

We have approximately 60 adults and 34 children with most being regular attenders.

We are a close-knit church community with many adult members having been so for 30-50 years and many of the children going to the church run school as I have already said. Therefore, to suddenly find ourselves in a place where we can no longer meet within the church context, but also outside as many of our members would have done regularly, has had an adverse negative effect on people's mental health. Many are expressing feeling low and heavy and are clearly struggling with being 'locked down' and unable to meet up with friends and family for coffee, dinner or a social gathering. The church is multi-generational in that we have grandparents, parents and children from the same family all attending church services and groups. This dynamic has impacted some families more than others, especially where for a variety of reasons they are not in the same support bubble either. Our single people have also struggled in lockdown and so valued when the first lockdown was over and we could meet as church family again. As many were key workers, they only got to see friends or family on a Sunday at church.

Our community engagement activities have been hindered considerably what with lockdowns and social distancing, although we have been able to support a number of elderly people in the local community as we leafleted the area at the beginning of the first lockdown to offer help and assistance. This continued even after we came out of the first lockdown. We also started offering regular food parcels and are serving a number of people and families with this service too.


At this time of year, we would also have done a number of other community engagement projects or events, one of which we cannot do due to the restrictions. This event we call the 'Christmas Feast' and is where we invite poor or needy families, couples or individuals from the local community and bless them with a Christmas dinner, presents for the children and a large hamper for the family. We are finding ways to distribute hampers this year, but many people that attended also came because this time of year is normally very hard or lonely for them.

As we run Immanuel School, we have had to be thorough on our COVID-19 safety measures, procedures and risk assessment, so making the church COVID-19 compliant too was straight forward, especially as we use the same premises, so have the infrastructure in place already. Our risk assessment, procedures and guidance for worshippers was all sent to our insurance company, Ecclesiastical, who approved them as they did for the school.

We wanted to continue to meet during the present lockdown, but stand to lose a lot if we do from what we have been told. Firstly, our insurance is likely to be revoked and secondly, the Charity Commission could potentially investigate us and remove our charity status. Both of these measures would not only impact the church greatly, but also the school we run, which is heavily dependent upon both of those things.

We have had adults ask about being baptised, but have been unable to do those in a manner we feel is acceptable to how we believe it should be done.

Yours


Peter Taylor
(Immanuel Leader)

12th November 2020

Judicial Review

I have been an ordained member of the clergy of the Church of England for 37 years and Vicar of St John Newland, Hull for 26 years. I served as a Vicar in Manchester and prior to that was Anglican Chaplain to the University of Keele in Staffordshire. I am now the Director of Theology of Christ Church Network in Hull, and author over 14 books and over 60 theological articles. The Christ Church Network is an Anglican network comprising of three churches with over 500 adult members and over 100 children. It has a staff team of 10 full time paid workers and a large number of voluntary assistants. Five services are held across the network each Sunday. This is a significant number of people in what is the most unchurches City in the United Kingdom (less than 1% attendance).

The churches provide mid-week activities for numerous children, Toddler groups for small children and their carers, provision of seniors, activities for University students and asylum seekers as well as offering a foodbank in the community.

The inability of not being able to worship together has resulted in the loss of cohesion of the church community, a diminution of energy, inability to properly care for those who are in special need (e.g. the bereaved), prevention of carrying out fully responsibilities such as weddings and funerals and severely restricting our ability to serve the local community spiritually and practically which we consider is vital in the present circumstances.

The measures put in place since Covid 19 have included, multiple services to enable social distancing in meeting, social distancing for smaller groups, provision of hand sanitation and masks, the taking of temperatures on entry to services and meetings, track and trace arrangements. There has also been the streaming of services, the provision of zoom contact for business meetings, and regular phone calls to the pastorally needy.

In line with the view of many leading sociologists, we believe that there are three essential requirements to ensure a stable and flourishing society: effective government, sound economy and a coherent religious base. For the UK the latter has been and is provided by the church, in the

case of the Church of England, 'by law established.' The present Covid restrictions are threatening and weakening this third element in our society. Accordingly we would ask the government to reconsider its present actions.

Melvin Tinker

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November 11th 2020

I am a Christian pastor, a member of the F.I.E.C. Pastor's Network and have served in both F.I.E.C. and Countess of Huntingdon Connexion affiliated Churches.

In every church I have ministered the care and shepherding of the church family, ensuring opportunities for worship, prayer teaching and genuine care for the whole person has been core. However, it is important to note that churches do not just care for our own members but share Christ's love and care with our wider communities. The closure of churches is therefore devastating for the communities we serve, as well as the communities we are.

I have had the experience of moving church during the pandemic and can speak therefore on behalf of two separate churches. These churches are in two very different settings but being part of Christ's church are very similar in both their needs and service to their communities. Meeting together for worship, fellowship, mutual support, teaching and prayer is central to what church is and what church does. Certainly we are still the church when we are not together, but Christ calls His Church to gather together.

Alongside the gathering for church worship services, we provide opportunities for prayer, bible study, pastoral care (including one-to-one care and counselling for a wide variety of needs), hospitality, and we also keep in touch with people by way of telephone where physical meeting is difficult.

We have, of course used technology to fill some of the gaps that church closures have caused, but it is wholly inadequate to meet the majority of our needs. Additionally, the use of technology is not open to all; many do not have the tools to access technology, and others are extremely uncomfortable with it.

Church closures are causing significant and real suffering and they are particularly exacerbating the suffering of the lonely, the addicted, the elderly, and young adults, and many with previous mental health issues.

But as well as the above the lack of regular gathering together is a cause of suffering for the whole of our church family.

This Government action is forcing us to choose between obedience to God and obedience to our rulers – the bible is clear, that where there is a conflict, we must obey God over and above our rulers. To find ourselves put in such a difficult position is a significant cause of suffering and upset.

We are further perplexed by the fact that as a Church we have worked tirelessly to ensure our buildings are COVID secure and have provided online services to discourage those most at risk from attending. We also believe that there is no record of any church in the UK being the cause of any local outbreak. Yet despite all of this the government has branded the Christian Church non-essential.

Yours Sincerely



Rev. Keith Waters



Rev. Joshua Williamson
Newquay Baptist Church

Tel. [REDACTED]

NewquayBaptist.org.uk

I am a husband, and father of three who has been called to serve as Pastor of a Reformed Baptist Church in Newquay, Cornwall. Behind all the glamour of the tourism season, Newquay is a community that is lacking hope and as such is in desperate need of physical, mental and spiritual care.

As a church, we have been serving the community of Newquay for 200 years, and by God's grace we will continue to do so. Every Lord's Day (Sunday), we have between 40-45 people attend our services. In normal circumstances we would also have several other events and services throughout the week; including a monthly lunch for the elderly, a chapel service at a care home, prayer meetings, Bible studies and other community focused events.

As the shepherd of this congregation, I am deeply concerned for the well-being of my flock. On the Christian Sabbath service before the second lockdown, I broke the news to the congregation that by threat of law we would be forced to close down the chapel. This resulted in several vulnerable people breaking down into tears. Our congregation is made up of people from different backgrounds, with a number of people suffering from drug addiction, alcoholism, anxiety, depression and also members of the LGBT community who are struggling with their identity. All of these people have mentioned that the church is a safe place where they can come for healing, fellowship and to worship God with likeminded people. One of the aspects of church life is that people from a variety of contexts come together to support each other, and to provide care; unfortunately, that support system has now been removed by the Government.

As a congregation we have ensured that our chapel is COVID secure; we have conducted risk assessments, implemented a one-way system, provided hand sanitiser and face coverings, and also maintained social distancing. These measures came at a great financial cost for our small congregation, especially since financially we were struggling due to a previous lockdown which prevented meetings.

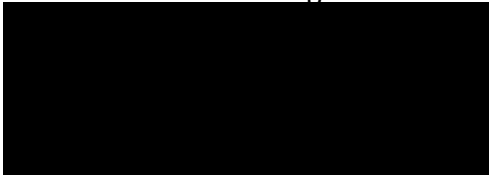
As biblical Christians, we take seriously the commands of God to gather on the Lord's Day in order to worship the Creator. We believe that all of humanity was made by God, and as such are accountable to Him. Since He is the One who gives life, we should seek to honour and worship Him, with the failure to do so being sin. By the Government forcing places to worship to close, they are forcing us to compromise our deeply held religious beliefs and are denying us the right to practice our religion in public.

Our fear is that if we defied the Government's new lockdown law, which we believe to be unjust and outside of its God-given authority, that we would be met with investigation from the charity commission, we would also face insurance issues, and potentially criminal prosecution from the Police. As Baptists, we have a long history of our forebears facing

opposition and persecution from the Government over the liberty to worship; we remember back into our history to a time when the Government in this land previously sought to regulate Christian worship. This previous regulation resulted in many Baptists being forced to meet secretly, and if caught the congregation faced harsh punishment from the State. While, we pray that our current Government does not seek to use this new lockdown powers in an evil manner, we are concerned that a precedence may be set. The current regulations have given over control of churches to the Government to the point where the administration of the sacraments (Communion and Baptism) are controlled by edicts from Westminster. It is alarming to us that a new form of Erastianism has appeared in our land which has made the Government the theological head of the Church, and has by this new lockdown law, sought to remove Christ from being that Head.

As Christians, we want to live at peace with all people; we desire that all people have the freedom to worship, so we pray for the day when religious liberty will be restored. We believe that our freedom to worship is given by God, as such, we are firmly convinced that the Government does not have the God-given authority to take those freedoms away. If the State persists in this course of action, then we will be forced to make a decision as to whether we obey God or the Government. Currently, the law is already placing a heavy burden upon our consciences; we long to be good citizens, but we have first allegiance to the Lord Jesus. History has shown that biblical Christians make good citizens, so we believe it would be best for the nation for places of worship to be open, in order that we may rightly worship God and work for the good of our communities.

Yours in Contending for the Faith,



BMin GradDipTh

Pastor
Newquay Baptist Church

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12 November 2020

Dear Sirs,

I am Pastor of Christ Church, Herbert Street, Loughborough. After completing my PhD in Psychology I lectured at Loughborough University before planting the church in the northeast side of the town in 2005. In 2019 we reconstituted as a reformed Baptist congregational church. In late 2018 the church took over an Independent Methodist building in the centre of our neighbourhood from an older congregation who had faithfully ministered the gospel and provided a place of worship for the community for over a hundred years. We moved into the building in early 2020 to continue the ministry of the previous congregation.

The Lord God has been worshipped in the community on the site of the building for as long as the redbrick terraces have stood and the community was established. Over the years the local community has developed to become a socially, ethnically and economically diverse neighbourhood. The church has had its doors open for the proclamation of the gospel, regular Sunday worship, baptisms, communion, youth work, mums and toddlers' groups and community outreach for generations. Christ Church feel privilege to have had the baton passed to us to carry on worship and mission in this diverse community from this well-established site of ministry. It is our plan to renovate the building and seek to rekindle many of the kinds of ministry that have gone on at the building for generations.

We are a Baptist church who teach the bible and align doctrinally with the historic reformed confessions of the 17th century. Our church is around 40 members, made up largely of young families and a few older folks. We see around 60 or more attend worship on Sundays each week. Gathered worship on a Sunday, according to the commands of scripture, in the presence of the Lord, through the preaching of the bible and communion with him through the ordinance of the Lord's supper, is central to our understanding of the calling, function, and institution of the church and its officers.

Aside from our weekly Sunday service of worship, which is the centre of our week, we meet three times a year for gathered members meetings. Jesus tells us that where two or three are gathered together in his name he is there in the midst (Matthew 18:20). Just as the presence of Christ in the gathered congregation is central to worship, so too is the gathering of God's people in the presence of Christ central to the institutional governance of the church. As a congregational church these times are vital for both the theological leadership of the church and the constitutional life of the church. We also have small group prayer meetings in homes, and bible teaching every other week on a

Thursdays. In the summer months we run a holiday bible club from the building and also summer-long weekly bible teaching and games for families on two parks in the area. We have a program of pub quizzes throughout the year with an evangelistic talk, which we run in partnership with a local pub, and our “story café” which runs in a large kitchen and gives non-Christians the chance to hear the bible read out on a Sunday evening and ask questions about the Christian faith.

Since the lifting of restrictions on meeting after the first lockdown, Christ Church has worked hard to create a Covid-secure environment for Sunday worship. All other meetings have been closed or moved online. People are checked in and out with track and trace data collection. Anyone with symptoms is turned away at the door. There are hand sanitiser stations, and ushers in PPE gear show household bubbles and individuals to their socially distanced chairs. Mask are compulsory. Services have been shortened to an hour, and on exit, people are ushered from the building in stages and encouraged to go straight home without gathering outside. We have had no outbreaks of Covid in the congregation.

The closure of churches under the new lockdown laws indicates a deep misunderstanding on the part of the Government of the nature of the church and humanity, and also effectively denies the practice of the Christian religion in England by the closing of the institutional functions of the church. The measures therefore infringe upon various rights to freedom of religion and worship as well as bring untold damage to the spiritual and mental wellbeing of Christians and communities.

The theology of the presence of the Lord in the midst of the gathered congregation, on the Lord’s day, by his word and the ordinances, makes all these practices central to the Christian faith and the function of the church. This view is shared by all the main traditions. The church gathers physically in the presence of Christ (Matthew 18:20) for worship (e.g. Psalm 149, Ephesians 5:19-21), the preaching of the word of God, prayer, baptism (Matthew 28:17-20), the Lord’s supper (1 Corinthians 10-14), and the exercise of the duties of church members in member’s meetings (Matthew 18:20). All these functions take place in and by physical gathering of the congregation. If physical gatherings are stopped then the institution of the church is closed down. While the spiritual body of the church remains, the institution of the church ceases. The *public* institutional life of the church is as important as the *private* life of faith and belief. The two go together. In order to walk in obedience to Christ’s commands, the Christian needs the institution of the church. The institutional functions of the church - worship, preaching, communion, baptism and corporate prayer and singing - are spiritual means of grace. They are the ways in which Christ himself sustains his people. The book of Hebrews commands us to not stop meeting together for the edification of brothers and sisters. Denial of public worship is denial of the Christian’s communion with God through the institutional functions of the church and the means of grace. It is a denial of the freedom to practice the Christian faith itself.

The Government has categorised churches with other “non-essential” activities in society. In order to arrive at this conclusion, the government must be operating out of a purely materialist view of the world and humanity and a deep misunderstanding of the nature and function of the church. Humans are more than virus carriers, more than

economic agents, and even more than cognitive beings with mental health needs. Humans are bodies and souls and are made to worship and commune with the triune God through his Son and Spirit. The institutional functions of the church are as essential to life as shopping for essentials, medical care, and the premier league. The damage to society, human flourishing, and personal faith of being told that the practice of our religion is non-essential and that it has now been criminalised cannot be overstated.

Romans 13 calls Christians to submit to the state as an agent of God. Christians have more reasons, therefore, than many to uphold the laws and institutions of society. However, the state is not God and is not lord of the conscience. When the state commands things which are contrary to God's law or forbids things the Lord commands Christians are thrown into a deep state of cognitive dissonance and troubled conscience; we want to uphold the law but we cannot disobey the God of creation and salvation who stands above the government. Pastors, leaders and congregations are thrown into turmoil and denied the ability to formally meet, to fellowship, and worship in order to work our way through the complexities. We are criminalised under the lockdown laws for doing the very things we need to do in order to be obedient citizens under God.

Examples of the damage to fellowship, spiritual growth of believers, outreach to the community, the lonely, the elderly, struggling young families and the basic practice of everyday faith and the Christian conscience are legion. Let me illustrate with just one example of the web of damage. A young boy who loves the Lord Jesus is desperate to be baptised and welcomed into membership in the church. As Baptists we believe communion is for believers only. The young lad is desperate to take communion, to enjoy what he sees other believers enjoying as members of Christ and of one another. For him to be baptised requires a gathered members meeting conducted according to God's word, baptism classes, and a baptism service of the gathered flock. All these things are now criminalised under the lockdown regulations. A young boy is being denied his right under God to take up his life in the church in obedience to Christ's commands. For him to do so would result in the dispersion of the congregation by police, fines, and prosecution of church officers, a likely charity commission investigation and the loss of church insurance policies.

The denial of the right to gather for public worship not only affects the congregation. The church is also there so that the community have a place to come and hear the gospel and worship the Lord. The bible teaches that, as well as being both body and soul, humans have our eternal destiny to face. People face uncertainty, loss of loved ones, the reality of their own mortality as well as deep spiritual and mental difficulties and trauma. All traditions of Christian worship, from reformed churches to Pentecostal and charismatic, understand that God is present in worship. Denial of public worship is a denial of the opportunity for people to come to know God and have their deepest questions answered about their eternal destiny.

The restrictions on church worship have been imposed without the support of data showing that churches are causing the spread of infection. I am bringing this action, along with scores of other leaders, because the government's disproportional response to Covid through the closure of churches is causing untold pastoral damage and the

criminalisation of law abiding citizens. It presents a dangerous precedent for the future of religious freedom in the UK.

Yours sincerely



Dr Jonathan Woodrow

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN

(On the Application of REV. ADE OMOOBA MBE and Others)

Claimants

-and-

(1) THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

(2) THE WELSH MINISTERS

Defendants

FIRST WITNESS STATEMENT OF WADE MCLENNAN

I, Rev Wade McLennan, New Hope Community Church of 4 Drawlings Close, Cardiff, CF3 5RB will say as follows:

1. My wife and I run New Hope Community Church. This operates in Llanrumney, which is one of the poorest areas of Cardiff, with a significant amount of social deprivation. We minister to the elderly and those with all manner of social problems and addictions.
2. When the Welsh Government announced their decision to close churches again under The Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020, we were absolutely devastated. We therefore considered what to do, very carefully, however in good conscience, we believed that it was right to continue to meet for worship.
3. Our decision to remain open we believe was justifiable. As Christians we simply cannot turn people away, be they the stranger, our neighbour, our fellow believers etc. Jesus said as much as you have done it to the least of these, you have done it unto me. So for us to turn people away, would be a denial of our faith.

4. It appeared that worship services were unlawful, this seemed to be at odds with paragraph 14 which allows:
 - (1) A person responsible for premises of a kind listed in paragraphs 30 to 32 of Schedule 1 must ensure that the premises are closed to members of the public, except for the uses permitted by paragraphs (2), (3) and (4).
5. Amongst the exceptions noted are:
 - (2) A place of worship may be open—
 - (d) to provide essential voluntary services;
 - (6) In this regulation, “public services” includes the provision of food banks or other support for homeless or vulnerable people, childcare, blood donation sessions or support in an emergency.
6. It was our intention and belief that we were acting both within our charitable objects and the provisions of the legislation by offering support to vulnerable people within our community. This was particularly so as we had three suicides in our community in the preceding week.
7. When the Police arrived at our premises on Sunday 25th October 2020 at approximately 19.20pm, we had 27 adults and 9 children (under the age of ten), all adults were properly socially distanced and was wearing an appropriate face covering. Everyone had temperatures taken upon entry and track and trace were in operation.
8. Since the start of the pandemic, we have followed the law and ensured that we have taken all appropriate measures.
9. We were in the middle of our worship service when someone began pounding on the doors, both front and back, shining torches through windows and letterbox. This caused distress for those vulnerable people and children within the building.
10. Eventually, my wife and I left through the fire exit door and closed the door behind us. We were approached by four or five police officers, who began questioning us, suggesting that a disco was going on, we assured them that there was no disco and the lights these were referring to were flashing Christmas lights, that are on all year round.
11. They asked to come in to search the building, we did not want them to however they said they had the right to come in anyway, even using forced entry.
12. After a bit more discussion, we opened the door and the police came in and searched the building, then one officer explained that we were in breach of the law and that

everyone had to leave. Some of the parishioners objected to leaving. We were eventually allowed five minutes to close our service. After prayer, there were some people crying and were very distraught. Everyone collected their belongings and left the building. The police then waited until everyone had left from the grounds of the premises, before they too left. This event had been recorded and posted on social media by various members of the congregation

13. On Tuesday 27th October, we received an email from the Charity Commission requesting the following information:
 - a. They wanted the trustees' comments, particularly regarding concerns that we knowingly breached current Coronavirus restrictions.
 - b. Whether the trustees discussed the decision to remain open for worship and whether all trustees were in agreement with this.
 - c. Whether the police were to take further action.
 - d. Whether the Church was now been closed for worship.
14. On Tuesday 27th October, we had a telephone conversation with a Trustee of the organisation that holds the title deeds, as they had concerns about the recent publicity arising out of the Police's attendance, and they advised that there were implications for them as a charity as they owned the title deed. There were also implications for us. They said they had already spoken to their legal representatives and would be writing to us.
15. On Thursday 29th October, we received an email from our Insurance Broker (Access Insurance) stating that they had seen a news article regarding the church holding a service on Sunday, which contravened Government regulations. They reminded us of the condition of our Church Insurance policy that we were to "*comply with all statutory and other obligations and regulations imposed by any authority*" and failure to do so could result in a claim being refused.
16. They requested that we confirm in writing that the church will now be abiding by the regulations imposed and they wanted a reply as soon as possible.
17. On the 28th October, we received a telephone call from a Member of Parliament. The MP seemed very concerned about the media attention and in exchange for keeping things out of the media, and to avoid any difficult situations for the forthcoming Sunday; the MP stated that we needed to write an email setting out our mid-week meetings that take place every Thursday and Friday at the church with 22 vulnerable adults attending.
18. The MP insinuated that by keeping things out of the media, he would be willing to speak to the Police to allow us to have our mid-week meetings and also would verify this with South Wales Police.

19. The MP then emailed us on the 29th October with all the information he had received from the Council which clearly stated *'We have to be clear that if the NHCC is allowed to open and provide these services, they can be no acts of worship; the Regulations are clear, that is not permitted.'*
20. On the 1st November at approximately 13.45pm, two riot police vans and seven police officers (some with tasers) attended the church. The plan was to broadcast an online service, however this was not a public service. That said if people turned up, we did not believe in good conscience that we could turn them away. If the police did, then that would be a matter for them. Four police officers came into the building and three police officers escorted our daughter from a cabin (called Kids Zone) and started to question her, this left her very distressed and shaken. One of the police officers suggested to her *'you are the one that made the video'* and another officer constantly had their hand on their taser whilst speaking to her.
21. We had six people within the building, they all had specific roles in the live broadcast of the service. The sergeant was satisfied that no one was in the building that should not be, and explained that they were just responding to a complaint from a member of public. One of the officers told us that they would be on duty throughout the evening and that we would be expecting another visit.
22. We then received a text message from the MP, asking if everything went well on Sunday, I responded and told him about the above incident. The MP was not happy and said he would speak to South Wales Police.
23. We had a telephone call from an inspector from South Wales Police at approximately 4.00p.m. stating that he spoke to the MP and apologising if his officers acted unprofessionally and not acted as they should. This was in part because some of the officers who came out were not on his team.
24. Again, during the evening, there were six people in the church doing the online broadcast and whilst we were live broadcasting, two police officers came into the building, even though the front door was closed. They stated that they had received another complaint from a member of the public and they were under a duty to investigate. The police stated that the music was too loud and that we needed to take the TVs down from our window as we were inciting people to gather outside.
25. We explained that the TVs had been used throughout the summer in the same manner and part of this was our advertising and broadcast procedure.
26. Whilst they were speaking to us, they were stood next to a speaker and so it was hard to communicate, so they told us to turn it down. We unplugged the speaker, they wanted us to tell everyone outside to leave and said that it was our fault that they had gathered.

27. Our focus was what was happening inside, not what was happening outside. My wife and I both refused to forbid people from gathering outside and were not prepared to tell them to leave. The police dispersed the people, we do not know exactly how many were outside. We were told that some got into their cars however again the police told them to leave the area as they were not allowed to sit in their cars.
28. We received another phone call from the Police Inspector on the 4th November stating that he was aware of some difficulties over the weekend which he was keen to avoid for the forthcoming weekend. He asked us what our plans were for the forthcoming Sunday. We told him that we would be doing our annual remembrance services but outside. Due to the number of people that would be attending, we would be holding two remembrance services. The police did not come to either of these services. We told by the Inspector that if anyone gathered outside in the evening during our 6.30pm live online broadcast service, these people would be fined. However, the police did not come to the church on Sunday.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.



.....
Wade McLennan
12 November 2020

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN

(On the Application of REV. ADE OMOOBA MBE and Others)

Claimants

-and-

(1) THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

(2) THE WELSH MINISTERS

Defendants

STATEMENT OF FACTS AND GROUNDS FOR JUDICIAL REVIEW

References to the JR Permission Bundle are in the form: [Page].

Introduction

1. This is a claim for judicial review brought by a large group of faith leaders of Christian churches and congregations to challenge the lawfulness of the second set of COVID-19 lockdown measures introduced in England and Wales in the autumn of 2020, to the extent that they close, and criminalise the use of, places of worship for religious services (with very limited exceptions).
2. Specifically, the Claimants challenge the following:
 - (a) regulation 18(7) of the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 (SI 2020/1200) (“**the English Regulations**”); and

- (b) regulation 14 of the Health Protection (Coronavirus Restrictions) (No. 3) (Wales) Regulations 2020 (SI 2020/1149 (W.261)) (“**the Welsh Regulations**”).

The First Defendant (“**the Secretary of State**”) made the English Regulations, while the Second Defendants (“**the Welsh Ministers**”) made the Welsh Regulations. Both sets of Regulations were made using powers under the Public Health (Control of Disease) Act 1984 (“**the 1984 Act**”). The Claimants seek declarations that the regulations identified above are unlawful and/or any further or other relief which the Court thinks right.

3. In outline, the position of the Claimants is that the English and Welsh Governments have now introduced two successive sets of lockdown measures which have completely prohibited and criminalised public communal worship, a core aspect of religious life for the Claimants and their congregations. With these measures, the Governments have inflicted a terrible human cost, without rigorous consideration of less onerous restrictions, and as part of a package which leaves places of worship open for secular activities.

Summary of Grounds

4. In summary, the grounds of challenge are as follows:
- (1) Breach of Article 9, ECHR (General): The imposition of a legal order closing places of worship to practically all forms of religious service and prescribing criminal sanctions constitutes a disproportionate interference with the Article 9 rights of the Claimants, their congregations and other people of faith, in particular the right to manifest their religion or beliefs in communal worship, teaching, practice and observance.
 - (2) Breach of Article 9 and Article 8, ECHR (Baptism Services): Further or alternatively, the regime of restrictions constitutes a disproportionate interference with Article 9 rights, and with such rights read in conjunction with Article 8 rights, in prohibiting the use of places of worship for baptism services.

- (3) Breach of the public law duty of enquiry: Before imposing the restrictions in question, the Defendants failed to discharge their public law duty of enquiry, in particular by failing to ascertain: (a) the extent to which leaving open places of worship would risk contributing to the spread of COVID-19; and (b) the extent to which any such risk could be ameliorated by requiring COVID secure measures to be adopted.
- (4) Ultra vires / legality principle: The making of the specific regulations challenged was outside the legislative power conferred by the 1984 Act since only express statutory language could be used as a basis for interfering with the free exercise of religion and the autonomy of religious institutions, which is an important principle long recognised by English law and the constitution.

Background Facts

The Claimants

5. The Claimants are a group of faith and church leaders whose congregations and places of worship have been directly affected by the lockdown measures introduced in England and Wales. They include both English and Welsh ministers. The Claimants serve their communities both by providing places of Christian worship and also by undertaking other forms of socially beneficial service, including childcare; youth groups; food bank services; meals for the elderly; family counselling; community outreach; and pastoral care to vulnerable individuals. A summary of the positions and roles of a number of the Claimants is appended: see [35]. A number of the Claimants have provided letters in support of this claim: see [451].
6. For the Claimants and their congregations, regular communal worship is a core aspect of their religious faith and practice, it is not optional. The expert report of Dr Martin Parsons (a theologian) [189] explains in detail, with reference to biblical sources, the critical importance to many Christians of group worship and receipt of sacraments in public gatherings of their religious communities.

COVID-19

7. The disease COVID-19, a newly recognised infectious disease caused by the SARS-CoV-2 virus, was first identified in Wuhan, China, in December 2019. By February 2020, the disease had spread to Europe. The first documented transmission of the disease in the UK took place on 28 February 2020. It is a virulent disease which can result in a range of symptoms, from mild to very severe. In the most serious cases, it can lead to hospitalisation and death. Most countries have responded to the disease by introducing from time to time various measures which restrict movement and gathering of citizens for certain purposes.

The First Lockdown Measures and the Recovery Strategy

8. With effect from 26 March 2020, comprehensive lockdown measures were introduced across the United Kingdom, co-ordinated between the four nations. In England, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) were made under powers conferred by the 1984 Act. Regulation 5(5) provided that a person responsible for a place of worship was required to ensure that it was closed during an open-ended “emergency period”, except for uses permitted by regulation 5(6), which were: (a) for funerals; (b) for broadcasting services; and (c) for provision of “essential voluntary services or urgent public support services”. Regulation 7 prohibited any person from participating in a gathering of more than two people in a public place except for specified exceptions. Regulation 9(1) provided that any person contravening those requirements committed a criminal offence.
9. In May 2020, the UK Government published its COVID-19 recovery strategy document entitled “Our Plan to Rebuild” [112]. That document laid out a three-step process for lifting restrictions, with Step 1 being to permit return to work and some return to school; Step 2 being to permit further social contact and non-essential retail; and Step 3 being to re-open other businesses, leisure facilities, personal care and places of worship.

The Claimants’ Challenge to the First Lockdown Measures and Recovery Strategy

10. On 28 May 2020, a letter before claim was sent on behalf of a group consisting of many of the present Claimants to the Government Legal Department (“GLD”) [49], putting forward an intended challenge to the lawfulness of the then-current English regulations insofar as they affected places of worship and/or to the lawfulness of the recovery

strategy as it affected such places. The GLD responded by letter dated 11 June 2020 [60], disputing the proposed challenge. A reply was sent on 15 June 2020 [65], responding to the points made by the GLD and pressing for an ADR meeting. In answer, by letter dated 19 June 2020 [69], the GLD invited two of the proposed claimants (Pastor Ade Omooba MBE and Pastor Matthew Ashimolowo) to one of a series of round-table meetings to discuss the re-opening of places of worship. Pastor Thabo Marais and Dr David Muir had already been part of the Government's round table discussions since March.

11. Given the serious and ongoing effects of the restrictive measures, the group of Claimants filed a judicial review claim on 23 June 2020 [71], with a request for urgent consideration. The GLD responded by letter dated 24 June 2020 [321], disputing the request for expedition of the claim. It pointed to the fact that, on 23 June 2020, the Prime Minister had announced an intention to ease existing restrictions from 4 July 2020 in order to re-open places of worship for prayer and services. By order dated 26 June 2020 [325], Swift J refused the request for expedition and ordered the Secretary of State to prepare a response to the claim in the usual timescale.
12. With effect from 4 July 2020, the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (SI 2020/684) were made, which lifted all restrictions on gatherings in places of worship. At about the same time, the Government published guidance which indicated that communal worship could take place, while advising that numbers attending be limited on the basis of capacity and to permit social distancing. Against that background, the GLD wrote to the solicitors for the Claimants on 7 July 2020, inviting them to withdraw their judicial review claim on the basis that it was now academic [327]. In the event, the claim was withdrawn because the restrictions were no longer in force and there was at that time no immediate prospect of them being re-introduced.

Other Judicial Review Claims

13. To the knowledge of the Claimants, two significant judicial review claims were considered by the Courts which addressed the compatibility of the first regulations with religious rights:

- (a) In *Hussain v Secretary of State for Health & Social Care* [2020] EWHC 1392 (Admin) [239], Swift J considered an application for interim relief to prohibit enforcement of the relevant regulations so as to permit Friday prayers at Barkerend Road Mosque. He refused relief, primarily on the basis that there was not a strong prima facie case that the regulations were incompatible with Article 9. However, he granted permission for judicial review on the basis that the point was reasonably arguable (see [33]).
- (b) In *Dolan v Secretary of State for Health & Social Care* [2020] EWHC 1786 (Admin) [520], Lewis J dealt with a range of applications for permission to seek judicial review of the regulations, including one claim based on an Article 9 point. He indicated (at [85]-[87]) that he had been minded to grant permission for judicial review, but that the claim may have become academic because following the hearing he had learned of the intention of the Government to lift the relevant restrictions on places of worship in early July.

The Period from July to October 2020

14. In the period from July to October 2020, places of worship in England and Wales were open for acts of communal worship without legal restrictions. Despite a lack of legal restrictions, as explained in various of the letters from a number of the Claimants in these proceedings [451 - 504], they took responsible measures to promote social distancing and COVID-safe practices within their premises.

The Second Lockdown Measures

15. The Welsh Regulations were made on 21 October and came into force on 23 October 2020. They imposed restrictions on business activities, gatherings and movements of individuals (including school closures). Regulation 14(1) [516] provided for closure of places of worship, community centres and crematoria as follows:

“A person who is responsible for premises of a kind listed in paragraphs 30 to 32 of Schedule 1 [places of worship, community centres and crematoria] must ensure that the premises are closed to members of the public, except for the uses permitted by paragraphs (2), (3) and (4).”

The exceptions provided by paragraph (2) allowed for places of worship to be open for funerals; weddings; broadcasting acts of worship; provision of “essential voluntary

services”; and provision of “public services upon the request of the Welsh Ministers or a local authority.”

16. The Welsh Regulations came to an end on 8 November 2020. However, in the period while they were in force, they affected the places of worship for which a number of the Claimants in these proceedings are responsible.

17. The English Regulations were made on 3 November and came into force on 5 November 2020. They have similarly introduced wide-ranging restrictions on business activities and the movement of individuals, although subject to a range of exceptions (including keeping schools open). Regulation 18(7) [518] provides:

“A person who is responsible for a place of worship must ensure that the place of worship is closed, except for uses permitted in paragraph (8) and regulation 11(18).”

The exceptions provided for in regulation 18(8) include: funerals (limited to 30 attending); commemorative events celebrating the life of a person who has died; broadcasts of acts of worship; provision of “essential voluntary services or urgent public support services”; childcare; and individual prayer. They do not extend to permitting any communal acts of worship (including baptismal services) or weddings. Significantly, the Government has published guidance on the use of places of worship for the permitted purposes, including on the subjects of risk assessment, ensuring social distancing and test and trace.¹

18. At the time the English Regulations were made, the Government’s Chief Scientific Adviser (Sir Patrick Vallance) and its Chief Medical Officer (Prof Chris Whitty) gave evidence at a session of the House of Commons Science and Technology Select Committee on 3 November 2020. Sir Patrick Vallance said (a) that the Government and its advisory body (SAGE) had no clear evidence on the effect on COVID-19 transmission of closing places of worship and (b) that there was no good data to answer the question whether previous closure of places of worship had had a material or negligible effect. Prof Whitty said that his understanding of the effects of people

¹ See: <https://www.gov.uk/government/publications/covid-19-guidance-for-the-safe-use-of-places-of-worship-during-the-pandemic-from-4-july/covid-19-guidance-for-the-safe-use-of-places-of-worship-during-the-pandemic-from-4-july>.

gathering for worship was largely “anecdotal”. See transcript of evidence, Q1531-Q1534.²

Response to the Second Lockdown Measures

The second lockdown measures have provoked significant public criticism from religious leaders. The Catholic Church Bishops’ Conference³ described the ban as a “source of deep anguish” and demanded that the Government give reasons for its decision to preclude acts of worship in the new lockdown measures. They added that they had “not yet seen any evidence whatsoever that would make the banning of communal worship, with all its human costs, a productive part of combatting the virus.”

Effects of the Closure of Places of Worship to Communal Worship

19. As explained in the various letters provided by the Claimants in support of this claim [451 - 504], the closure of places of worship to community acts of worship is a terrible blow to them and their congregations. Regular attendance at church is a central part of the religious life of these believers. It is also a source of great solace, comfort and social support for many people, especially at a time of widespread job losses, deprivation and related social ills.

The International Dimension

20. The effects of COVID-19 lockdown measures in prohibiting religious services have been the subject of successful legal challenges in a range of jurisdictions. In particular:
- (a) In France, an interim relief judge of the Conseil d’État (the supreme administrative court) considered the proportionality of a comparable “lockdown” of places of worship in *W and others* (see [283] for a certified translation of the judgment). The Court found that the blanket ban on religious services in France, a constitutionally secular State, was a “serious and manifestly unlawful infringement” of a fundamental freedom (i.e. of Article 9 religious rights and of equivalent rights recognised in French and international

² See: <https://committees.parliament.uk/oralevidence/1122/default/>.

³ See published statements at: <https://www.cbcew.org.uk/statement-from-the-president-and-the-vice-president-of-the-conference-on-the-prime-ministers-statement/>; and <https://www.cbcew.org.uk/statement-on-the-four-week-national-lockdown-and-a-call-to-prayer/>.

law). The Court pointed out that there was no basis for saying that safety rules could not be drawn up to govern religious services or that they would not be observed in practice.

- (b) In Germany, the Federal Constitutional Court in the case of *F* (1BvQ 44/20), 29 April 2020, considered a challenge by a Muslim religious association and granted interim relief to permit Friday prayers at a mosque (see [305] for a certified translation of the judgment). The Court (unanimously) reasoned that a complete ban on communal acts of worship with no means to apply for exemptions was an impermissible interference with constitutional rights.
- (c) In the USA, the Circuit Court of Oregon granted a temporary injunction suspending orders of the Governor precluding religious services: see *Elkhorn Baptist Church et al v Katherine Brown, Governor of the State of Oregon* (Case # 20CV17482) (see [312] for the judgment). The Court concluded that the orders were not required for public safety in circumstances where the plaintiffs could observe social distancing, as in grocery stores and other businesses deemed essential by the Governor.
- (d) A similar claim was brought in Texas in the case of *Steven Horze et al* (Case 20-0249) (see report at [319]). In response, the Governor issued an executive order which included churches in the list of “essential services” which were permitted to remain open. Because it had achieved its objective, the claim was withdrawn.

21. A common feature of all these judgments is that the Courts recognised that complete bans on religious services are interferences with religious rights of a very high order. Another common feature is that the Courts concluded that such absolute prohibitions were disproportionate. To justify such bans, it was necessary to establish that less intrusive measures (such as guidance or legal requirements for social distancing and other COVID safe measures, or provisions allowing for exceptions) would be ineffective.

22. It should also be noted that a similarly rigorous assessment of the proportionality of lockdown measures in South Africa led the High Court to hold that in numerous respects the measures involved disproportionate interferences with fundamental rights: see *De Beer v Minister of Co-operative Governance and Traditional Affairs (Case No. 21542/2020)* (see [249] for the judgment). Although religious services were exempted from the lockdown in South Africa and were not considered by the Court, there were analogous restrictions on cultural practices connected to funerals (including night vigils) which the Court judged to be excessive and unjustifiable.

Protocol correspondence

23. The Claimants sent a judicial review protocol letter to the Welsh Ministers on 23 October 2020 [333] and received a response on 26 October 2020 which disputed the claim [343]. The Claimants replied on 29 October 2020 [351].
24. The Claimants sent a separate protocol letter to the GLD (on behalf of the Secretary of State) on 2 November 2020 [368] and received a response on 5 November 2020 which disputed the claim [382].

Ground (1): Breach of Article 9, ECHR (General)

25. The challenged regulations amount to interferences with Article 9 rights which are disproportionate and so infringe Convention Rights. They are therefore unlawful under section 6(1) of the Human Rights Act 1998. It should be noted that the UK Government (unlike some member states) has not derogated from Convention rights under Article 15 on the basis of national emergency. The protections afforded by the Convention and the 1998 Act apply in the usual way.
26. Article 9 (freedom of thought, conscience and religion) 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.”

The ECtHR has repeatedly recognised that Article 9 rights constitute “one of the foundations of a ‘democratic society’ within the meaning of the Convention”. In their religious dimension, they are “one of the most vital elements that go to make up the identity of believers and their conception of life”. They are also a “precious asset” for all in society, since “the pluralism indissociable from a democratic society, which has been dearly won over the centuries” depends upon them: see *Kokkinakis v Greece* (1993) 17 EHRR 397 at [31]; *Eweida v UK* (2013) 57 EHRR 8 at [79]; *Lee v Ashers Baking Co Ltd and others* [2020] AC 413 at [49].

27. The importance of Article 9 religious-based rights in the UK is given particular recognition by section 13(1) of the Human Rights Act 1998, which provides:

“If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.”

28. The following features of Article 9 rights are of significance to this claim:

- (a) It is not for the State to assess the legitimacy of religious beliefs (e.g. as to the importance of public and collective worship), and not for the Court to enter into any controversy over what principles are to be considered central to a religion. Provided that a personal or collective conviction attains a certain level of cogency, seriousness, cohesion and importance, it is protected: see *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 at [22]-[23]; *Eweida* at [81]; *İzzettin Doğan and others v Turkey* (2017) 64 EHRR 5 (Grand Chamber) at [68].
- (b) The guarantee to manifest religion or belief in public or in private either alone or in community with others should not be seen as giving public authorities a choice to decide how believers may or should manifest their belief: see *X v United Kingdom* (App. No. 8160/78) (Commission Decision).

- (c) An act of worship or devotion which forms part of the practice of a religion or beliefs in a generally recognised form is a “manifestation” of belief, which is protected by Article 9: see *SAS v France* (2015) 60 EHRR 11 at [55]. It is not necessary that the act of devotion should be mandated. See also *Williamson* (cited above) at [23], [30] and [32].
 - (d) Article 9 specifically protects the right to manifest religion in community with others, in public and within the circle of other believers. It therefore protects the rights of believers to meet peacefully in order to worship in the manner prescribed by their religion: see for instance *Cyprus v Turkey* (2002) 35 EHRR 30 (Grand Chamber) at [243]-[246]. Measures impinging on places of worship may constitute interferences with this protected right: see for instance *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v Turkey* (App. No. 32093/10) (2 December 2014) at [41].
 - (e) Article 9 also protects the autonomy and independence of religious institutions. The right “encompasses the expectation that the [religious] community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords”: see for example *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 (Grand Chamber) at [62]; *Sindicatul “Pastorul Cel Bun” v Romania* (2014) 58 EHRR 10 (Grand Chamber) at [136].
 - (f) It is open for an ecclesiastical or religious body to exercise the rights guaranteed by Article 9 on behalf of its adherents: see *Cha’are Shalom Ve Tsedek v France* (App. No. 27417/95) (Grand Chamber) at [72].
29. In this case, the challenged regulations undoubtedly constitute an interference with Article 9 rights. First, they involve an absolute prohibition on manifestation of religion by acts of communal worship, which is a core tenet of belief and practice for many Christians. Secondly, they preclude many from undertaking what they regard as acts of regular obligatory worship and participation in religious sacraments. Thirdly, they interfere with the independence of religious institutions by requiring them to close

places of worship for some purposes but not others, effectively prescribing for what purposes churches may legitimately be used.

30. The challenged regulations may therefore only be justified in Article 9 terms if they are prescribed by law and necessary to serve one of the legitimate aims set out in Article 9(2). Subject to the arguments advanced under Ground (4), it is accepted that the measures in dispute are prescribed by law.
31. For a limitation on such fundamental rights to be “necessary”, it must satisfy a test of proportionality established in Convention and domestic case law. The four questions to be addressed are: (a) whether there is a legitimate objective sufficiently important to justify limiting a fundamental right; (b) whether the measures designed are rationally connected to the objective; (c) whether they are no more than reasonably necessary to accomplish the objective; and (d) whether they strike a fair balance between the rights of the individual and the interests of the community; See *R (Adath Yisroel Burial Society) v Inner North London Coroner* [2019] QB 251 at [99]; *R (Ul-Haq) v Walsall MBC* [2019] PTSR 1192 at [43]. These are tests for the Court to apply, and not for the decision-maker (subject only to supervisory review). At the third stage, the burden is on the authorities to prove that there is “no other means of achieving the same end that would interfere less seriously with the fundamental right concerned”: *Biblical Centre of the Chuvash Republic v Russia* (App. No. 33202/08) at [58].
32. The measures adopted in this case are disproportionate. It is not in doubt that limitation of the spread of COVID-19 is a legitimate objective and that it could be sufficiently important to justify limiting fundamental rights. The Claimants cannot say at present whether or not the measures in question (a blanket ban on communal acts of worship, rather than requirements or guidance to follow COVID safe practices) are rationally connected to the objective, since there has been no publication of any cogent evidence to show that a ban on religious gatherings will materially affect the spread of infections. In any event, the measures are disproportionate for the following reasons:
 - (a) They involve a complete prohibition on communal acts of worship, rather than any lesser restriction. Lesser measures might have included: (i) limiting the numbers of people attending communal services either per service or per square

metre of floor space in a place of worship; (ii) requiring social distancing to be observed in such services, with distances of two metres maintained between household groups; (iii) precluding people gathering in groups within or near the place of worship; (iv) preventing touching of devotional objects; (v) preventing singing or playing of musical instruments; and (vi) limiting numbers of services. Most of these measures feature as aspects of Government guidance on the use of places of worship for the (largely non-religious) purposes for which they are permitted to be used under the challenged regulations. The Claimants have obtained expert evidence from a microbiologist, Ian Blenkarn (see reports at [212], [228] and [433]), which makes clear that simple measures could be adopted which would make religious services substantially COVID safe. The letters provided by various of the Claimants in support of this claim make clear that they would make scrupulous efforts to comply with such measures.

- (b) The measures do not allow for any exception or exemption. For example, they do not permit places of worship, which can establish that they are observing COVID safe measures, to re-open for services of worship. They do not provide local authorities with the power to impose restrictions or conversely to grant exemptions.
- (c) The measures impose legal requirements (not guidance) which are backed by criminal sanctions (rather than, for instance, a civil penalty). As is well-established, the severity of applicable sanctions is a relevant consideration in the proportionality exercise: see *Biblical Centre of the Chuvash Republic* (cited above) at [60]. In particular, measures call for strict scrutiny if they involve criminal sanctions: see *Manoussakis v Greece* (App. No. 18748/91) at [44]. To the knowledge of the Claimants, there has been no public suggestion by Government ministers that those responsible for places of worship did not observe legal requirements or guidance in earlier phases of the pandemic.
- (d) The measures seek to ensure that places of worship may still be used for non-religious activities (e.g. childcare and welfare services) to which the Governments attach importance while preventing them from being used for the religious activities which are their *raison d'être*. They thereby privilege use of

religious premises for secular purposes. They permit what may in many cases be more regular and more crowded gatherings of people than would be permitted if religious services were allowed with restrictions. This illustrates that the ban is not reasonably required and that it does not strike a fair balance between the interests of the community and the rights of believers.

(e) The measures permit individual prayer, while criminalising acts of communal worship. This feature does not render the regulations defensible, since for many believers, individual prayer is not a substitute for worship as a community. However, it does give rise to bizarre consequences, such as that a large number of individuals may gather in a place of worship quite lawfully, but the gathering becomes unlawful as soon as a vicar or minister stands at the front and begins a communal prayer. Again, this shows that an absolute ban is not reasonably required and that it does not strike a fair balance between the interests of the community and the rights of religious people.

33. The argument may well be made by the Defendants, that they should be accorded a considerable margin of appreciation in imposing regulations for the good of public health. However, while the ECtHR affords Governments a certain margin of appreciation for restrictions on access to places of worship, restrictions on the freedom to manifest religion, punishable through the criminal law, call for very strict scrutiny: see *Manoussakis* (cited above). The recognition of a margin of appreciation by the Strasbourg institutions is not a prescription for complete deference at the national court level. Here, it does not legitimise a government imposing a blanket ban on religious services based on an unevidenced assumption or assertion that such a ban would be materially more effective as a public health measure than less intrusive options.

34. Moreover, when deciding how widely a margin of appreciation should be drawn, the Court may have regard to any consensus and common values emerging from the practices of member states: see *Bayatyan v Armenia* (Case No. 23459/03) (Grand Chamber) at [122]. In this regard, it is noteworthy that the great majority of European states have not prohibited religious services: see the ECLJ Report “Restrictions on Religious Freedom in Europe in the Name of the Fight against Covid-19” (4 November

2020).⁴ Only Great Britain and three other countries have imposed such a rule, whereas 28 have authorised religious services (including several which have otherwise imposed lockdown measures).

Ground (2): Breach of Article 9 and Article 8, ECHR (Baptism Services)

35. In addition to their general challenge to the regulations based upon Article 9, the Claimants specifically maintain that those regulations are unlawful in that they prohibit baptism services. Such services have a particular significance to many Christians. The interest in having an appropriate service of baptism take place at an appropriate time is protected by Article 9 and by that Article read in conjunction with Article 8 (right to respect for private and family life).
36. As explained in the report of Dr Parsons at [22]-[33], services of baptism represent a particular manifestation of belief in which an infant or convert is welcomed into the church community. For many, it is a central sacrament and aspect of faith. The timing of baptism of infants is important for many Roman Catholics and some Anglicans who believe that it is essential for salvation. Delaying baptism is likely to cause deep distress to such persons, since their belief would hold that, if the child died, it may be denied entry to heaven. The timing of baptism of converts is also important for many Christians especially Evangelicals, who believe that it should take place immediately after conversion.
37. It is well established that a rule or decision which prevents a religious ritual being performed within the time required or expected by the faith constitutes an interference with Article 9 rights. That point is made most clearly in the *Adath Yisroel* case (cited above), which concerned a coroner's decision the effect of which was to delay release of bodies for burial to families of the Jewish orthodox faith and Muslim faith. Accordingly, the challenged regulations represent an interference with Article 9 rights insofar as they prohibit services of baptism.
38. The interest of religious families in having baptismal services performed within the prescribed or expected period also engages Article 8 rights. The scope of the right to

⁴ See: <https://eclj.org/religious-freedom/coe/limitations-portees-a-la-liberte-de-culte-en-europe-au-nom-de-la-lutte-contre-la-covid-19>.

private and family life protected by Article 8 does not lend itself to exhaustive definition, but encompasses the right to personal development and to decisions concerning reproduction and bringing-up of children; see for instance *Paradiso and Campanelli v Italy* (2017) 65 EHRR 2 (Grand Chamber) at [159]. There may be an overlap in this regard between the protection afforded by Article 9 and that afforded by Article 8: see for instance *Folgero and others v Norway* (2008) 46 EHRR 47 (Grand Chamber) at [98].

39. The ban on baptismal services represents an interference with Article 9 and/or Article 8 rights which cannot be justified on grounds of proportionality. The following points are made in addition to the general matters set out under Ground (1):
- (a) Baptismal services are not sufficiently numerous or frequent that an exemption allowing them to proceed (subject to proper COVID safe practices) would be likely materially to increase the spread of disease infections in the community.
 - (b) Such services could easily be permitted subject to limitation of numbers of persons attending, as happens with exempted funerals and commemorative services. It is difficult to discern why no comparable exemption for baptismal services has been granted.
 - (c) The matter of baptismal services raises in particularly acute form the distress caused to the individual believer by the banning of a particular form of religious service as part of a poorly reasoned set of restrictive measures. As set out above, delaying baptism for weeks or months will often cause even greater distress than banning believers from attending other forms of service.

Ground (3): Breach of Public Law Duty of Enquiry

40. A public authority which chooses to exercise legislative power to impose restrictions in the interests of public health owes a public law duty of enquiry to establish an evidence base for the particular restrictions (at least insofar as a well-resourced government machine can do in the time available). In this instance, so far as the Claimants are aware, the Defendants did not carry out any rigorous assessment to determine that the measures absolutely preventing use of places of worship for religious

services (while leaving them open for other purposes) were likely to have a public health benefit sufficient to justify them. They thereby breached their duty of enquiry.

41. The duty of enquiry is one upon a decision-maker to “take reasonable steps to acquaint himself with the relevant information” to make his/her decision; see *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] 1 WLR 5765 at [58] (citing *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 at 1065). It is a counterpart to the obligation of public authorities to act rationally, and just as subordinate legislation may be reviewed on rationality grounds (see *Javed v SSHD* [2002] QB 129) so it may be reviewed for failure to comply with the duty of enquiry.
42. In this case, there was apparently a failure by the Defendants to consider whether and to what extent the intended absolute ban on religious services would assist in the objective of reducing infection rates. In particular, the Claimants are not aware of any enquiries or modelling in England demonstrating: (a) the extent to which permitting some religious services would risk contributing to the spread of COVID-19; and/or (b) the extent to which any such risk could be mitigated by requiring COVID secure measures to be adopted. No evidence has been provided by the GLD in protocol correspondence to support its contention that the measures taken are proportionate to their suggested objective. The Claimants are apparently not alone in being unaware of any such evidence, given the statement of the Catholic Church Bishops’ Conference cited in paragraph 19 above.
43. The Select Committee evidence referenced in paragraph 18 above strongly indicates that no serious attempt has been made to assess or model either whether the previous closure of places of worship in England had a more than negligible effect on the transmission of the virus or whether closure of places of worship in the second lockdown period would have any material benefit. The Government appears to have been working from a mixture of anecdotal evidence and guesswork.
44. In protocol correspondence, the Welsh Ministers have referred to the conclusion of their Technical Advisory Cell (dated 19 October 2020) that a “firebreak” lockdown should include restrictions on places of worship in the interest of reducing the spread of

infections. However, there is no information on what modelling was carried out to reach this conclusion, and on its face, it appears very speculative. It acknowledged that “precise estimation [was] very difficult” and that risks would vary substantially with location. It does not appear to have considered the extent to which a lockdown would be more effective than requirements for safety precautions in places of worship.

45. Given the challenges brought in response to the first lockdown measures, it should have been very apparent to the Defendants that the measures which they proceeded to take in October and November respectively, would constitute interferences with Article 9 rights. The introduction of these measures was preceded by periods of discussions within the UK Government and public debate,⁵ during which the effects of different options (including lesser restrictions) could have been properly assessed or modelled. In view of the serious effect of the measures affecting places of worship, proper compliance with the duty of enquiry should have involved significant further work in this regard.

Ground (4): Ultra Vires / Legality Principle

46. The challenged regulations are outside the legislative power provided by the statutory provisions under which they were made. In accordance with the legality principle, the very general language of the enabling legislation cannot properly be used for the purpose of prohibiting communal acts of worship and/or dictating the use of places of worship, since that would contravene a basic constitutional principle recognising the autonomy and independence of religious institutions in England and Wales.
47. As noted above, both the English Regulations and the Welsh Regulations were made pursuant to the 1984 Act, and the disputed provisions were made pursuant to section 45C(1), which states:

“The appropriate Minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).”

⁵ In particular, on 13 October 2020 the leader of the opposition, the Rt Hon Sir Keir Starmer, called for a short “circuit-breaker” lockdown in England of two to three weeks, following the release of documents showing that government scientific advisers had made a similar proposal three weeks previously: see <https://www.bbc.co.uk/news/uk-54528807>.

Section 45C(3) further provides that regulations under subsection (1) may include provision “imposing or enabling the imposition of restrictions or requirements on in relation to persons, things or premises in the event of, or in response to, a threat to public health.” The statutory language is exceptionally broad in scope and entirely generic in expression. There is nothing in the enabling Act specifically permitting interference with places of worship or religious services.

48. The principle of legality means that “[f]undamental rights cannot be overridden by general or ambiguous words”, since there is “too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process”. Accordingly, “[i]n the absence of express language or necessary implication to the contrary, the courts... presume that even the most general words were intended to be subject to the basic rights of the individual.”: see *R v SSHD, Ex parte Simms* [2000] 2 AC 115 at 131E-G. This principle has been confirmed repeatedly at the highest level, for instance: *R v SSHD, Ex parte Pierson* [1998] AC 539 at 575A-D; *AXA General Insurance Ltd v HM Advocate and others* [2012] 1 AC 868 at [151]-[152]; *R (Evans) v Attorney-General* [2015] AC 1787 at [57]. Furthermore, and relatedly, even where a statutory provision authorises an intrusion upon a constitutional principle or fundamental right (such as access to a court or free exercise of religion), it is “interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question.”: see *R (UNISON) v Lord Chancellor* [2020] AC 869 at [80].
49. The respect of autonomy and independence of religious institutions has a long history in the constitutional law and history of England, Wales and the United Kingdom. For example:
- (a) 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.”
 - (b) Even the assertion by Henry VIII of supremacy over the Church was embodied in specific primary legislation. The Elizabethan settlement which followed

adopted a division between state and church spheres of responsibility. Article 37 of the Articles of Religion states that “we give not to our Princes the ministering either of God’s Word, or of the Sacraments...”

- (c) Section 36 of the Offences against the Person Act 1861 (as still in force) makes it an offence to obstruct, by threats or force, any clergyman or minister from celebrating divine service in a place of worship or to arrest such a clergyman or minister upon civil process.
- (d) The Church of England (Powers) Act 1919 established the right of the Church of England authorities to legislate by measure on any matter concerning that Church.
- (e) The Church of Wales was disestablished by the Welsh Church Act 1914. Section 13(1) of that Act provided that nothing in any Act, law or custom should prevent the bishops, clergy and laity of that Church from framing “constitutions and regulations for the general management and good government of the Church in Wales and the property and affairs thereof.”
- (f) As noted above, when Parliament came to pass the Human Rights Act 1998, it used section 13(1) to give especial importance to “the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience or religion.”; see *Aston Cantlow PCC v Wallbank and another* [2004] 1 AC 546 at [15].

50. In the long history of this country, there is no precedent for the temporal authorities prohibiting religious services on grounds of public health. There has been no comparable action in response to previous disease epidemics, up to and including the “Spanish flu” (H1N1) pandemic of 1918. The only precedent of which the Claimants are aware for a general “lockdown” of places of worship in this country is the suspension of church services and sacraments (except baptism) ordered by Pope Innocent III between 1208 and 1214, and that was a measure taken by ecclesiastical authorities (by Papal Interdict).

51. The Claimants do not suggest that Parliament cannot legislate on matters relating to or impinging upon the Church of England or any other religion. However, the respect for freedom to worship is written into the constitutional DNA of this country, just as is the right of access to a court (considered in the *UNISON* and *Evans* cases, cited above). It engages the principle of legality.
52. The Claimants' primary submission is that section 45C of the 1984 Act does not permit regulations to be made which: (a) preclude places of worship from being used for religious services; or (b) entirely preclude all forms of communal worship. Such measures involve a direct and serious interference with the independence of religious organisations and freedoms of religious people. They cannot be authorised by wording as broad and generic as is found in section 45C. If the Governments had intended to permit such measures to be taken, the proper course would have been to include specific provision in primary legislation (e.g. the Coronavirus Bill 2020) authorising restrictions on religious practice and/or places of worship, which would then no doubt have triggered a comprehensive debate about the proper limits of any such powers.
53. Alternatively, if that submission is not accepted, then section 45C of the 1984 Act should be read as only permitting regulations to be made interfering with the autonomy of religious institutions and freedom of worship to the extent reasonably necessary to serve the public health objectives. As set out above in relation to Article 9 proportionality, the measures which have been introduced are more intrusive than reasonably necessary.
54. In the further alternative, the Claimants submit that on any view section 45C of the 1984 Act does not permit the kind of micro-management of religious practice and use of places of worship which is provided for by the challenged regulations. Such a general provision cannot allow the temporal authorities to dictate the proper manner of prayer (individual as opposed to collective), rather than for instance determining whether a building should be open at all or whether COVID safe precautions should be taken.

Response to Potential Arguments that the Claim is Academic

55. The Welsh Ministers have argued in protocol correspondence that this claim is academic and should not be considered by the Court, because it is being brought after the Welsh Regulations ceased to have effect. It may be that the Secretary of State will make a similar argument, since (despite the request for expedition) this claim may well be considered after the present lockdown restrictions have been lifted.
56. The Claimants reserve the right to respond to any such arguments in a Reply to the Defendants' Summary Grounds, but would make the following points at this stage:
- (a) It has long been recognised that a public law challenge can and will be considered if it is in the public interest to do so, notwithstanding that it may not have any immediate effect on the parties: see for instance *R v Board of Visitors of Dartmoor Prison, Ex Parte Smith* [1987] QB 106 at 115 and *R v SSHD, Ex Parte Abdi* [1996] 1 WLR 298, and see generally *Fordham, Judicial Review Handbook (6th ed.)* at [4.6]. A question of legal and practical importance on which the Court can give useful guidance will often justify proper consideration of a claim: see for instance *R (Ullah) v SSHD* [2004] 2 AC 323 at [5]. If a problem may recur in the current or a very similar form, that may justify the consideration of a claim. In the context of religious rights, see *R (Rotsztein) v HM Senior Coroner for Inner North London* [2015] EWHC 2764 (Admin) at [15].
 - (b) There is a strong public interest in the Court considering and resolving this claim, having regard to its legal subject-matter. It raises important issues as to the proportionality of orders closing places of worship and as to the scope of the legislative powers granted by the 1984 Act.
 - (c) There is also a strong interest in the Court considering this claim for more practical reasons. It is entirely possible that either or both of the Governments will consider introducing equivalent or similar lockdown measures affecting places of worship in the future, and there is a strong public interest that they should do so in a lawful manner. A resolution of this claim would help ensure that objective.

- (d) Given that the history of the present pandemic is one of intermittent introduction and relaxation of restrictions, if claims are ignored on the basis of changing circumstances the result will be that the authorities will never be held to account or even given guidance by the Courts on the lawful exercise of extremely wide-ranging powers. Both the Welsh Ministers and the Secretary of State have acknowledged that a further lockdown is possible or likely in early 2021.
- (e) Declarations that the challenged measures are unlawful could in any event produce real and direct benefits for individuals. They could afford defences to individuals who may face prosecution for having breached the regulations: see *Boddington v British Transport Police* [1999] 2 AC 143. They could spare religious ministers who have not complied (or allegedly not complied) from a range of difficulties with insurers, landlords and the Charity Commission.

Reasons in Support of the Request for Expedited Consideration of the Claim

57. At the time of filing this claim, the English Regulations represent a continuing and serious interference with the religious freedoms of the Claimants and their congregations. It is strongly in their interest for the legal position to be clarified without further delay. Furthermore, it is in the public interest that the issues raised by this claim should be resolved before any consideration is given to extending the present lockdown measures or re-introducing them. The Claimants adopted a reasonable approach in withdrawing their first claim when it appeared that the closure of places of worship to religious services was at an end. They are now reasonably entitled to ask for early consideration of their arguments.

Conclusions

58. For all the reasons set out above, the Claimants ask that the Court grant permission for judicial review of the challenged regulations and that it grant declarations to the effect that they are unlawful, and/or such further or other relief as it thinks right.

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15 January 2021

Dear Scottish Ministers,

The closure of places of worship in Scotland

We act for the ministers and church leaders whose names are set out at the foot of this letter. We have been instructed following the Scottish Ministers' decision to take measures to ensure that all places of worship would close from Friday 8 January 2021.

Many of those who we represent are also signatories to the letter of 11 January 2021 addressed to the First Minister of Scotland. A copy of that letter accompanies this letter, and it can be taken as read that the concerns expressed therein are adopted and repeated. We have also seen the Cabinet Secretary for Communities and Local Government's reply of 13 January 2021.

What follows is a respectful request that Scottish Ministers reconsider the decision in respect of the closure of all places of worship and reverse the measures that have been taken by revoking the Regulations that gave effect to the decision.

If this request is rejected, then our clients intend to challenge the lawfulness of the Regulations by petitioning for judicial review. We anticipate that Scottish Ministers will require to take advice on the content of this letter but with churches being closed for worship, this is an urgent matter and so we ask that a response be received by no later than 5.00 pm on Thursday 21 January 2021.

Background

At the outset our clients wish to emphasise that they fully understand the seriousness of the COVID-19 pandemic and they appreciate that the Scottish Government is required to make difficult decisions as it seeks to take steps to decreased the spread of the virus. Our clients do not doubt that the measures taken by the Scottish Government and the regulations made by Scottish Ministers are motivated by a desire to act for the common good. Despite that, our clients consider that the Scottish Ministers have failed to appreciate that the closure of places

of worship is a disproportionate step, and one which has serious implications for freedom of religion. Scotland is the only nation in the United Kingdom that has closed places of worship at this present time and that action is also out of step with the restrictions that have been put in place in other countries (for example Germany and the United States).

Scottish constitutional issues

Separation of church and state is a fundamental feature of the constitution of Scotland. The church does not interfere in the affairs of state and the state has no place in governing the affairs of the church. The doctrine of the "two kingdoms" was well-established by 1592 when the General Assembly Act was passed. The Act gave the church authority over all matters ecclesiastical, with the monarchy merely having the right to attend or send their commissioner to attend the meeting at the General Assembly. The 1592 Act also gave the elders of each church a specific legal responsibility to ensure that regular worship; particularly the preaching and the ministry of the sacraments, continued. The present prohibition on the conduct of sacraments of baptism and the Lord's Supper and on meeting together violates the Act of 1592.

The freedom of the church was confirmed in the 1921 Church of Scotland Act:

"This Church has the inherent right, free from interference by civil authority, but under the safeguards for deliberate action and legislation provided by the Church itself, to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements, and to define the relation thereto of its office-bearers and members, but always in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the said Confession, of which agreement the Church shall be sole judge, and with due regard to liberty of opinion in points which do not enter into the substance of the Faith."

There has been no attempt to close churches since the Stuart kings made it a capital offence to meet for worship and listen to preaching other than that in the established church.

It should also be noted that the majority of churches in Scotland hold to theology which believes that interference in matters sacred by the secular authority, is a direct threat to their independence. This is true not only of Presbyterians but also Baptists, Brethren and newer independent churches.

It is contrary to the principle of legality that basic constitutional duties and powers involving independence of religious organisations and freedoms of religious people are purportedly removed by powers conferred under general language of enabling legislation and regulations that have not even been laid before a legislative body. At the minimum measures of such consequence should have been subject to democratic debate.

Even if regulations interfering with the autonomy of religious institutions and freedom of worship were to be considered lawful (which our clients dispute) this can only be to the extent reasonably necessary to serve the public health objectives. The measures which have been introduced here are more intrusive than reasonably necessary.

The Scottish provisions and the European Convention on Human Rights

In terms of the Human Rights Act 1988 s.6, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. To this end, it is contended that the regulations that came into force on 8 January 2021 are in violation of Article 9, read with Article 11, of the European Convention on Human Rights ('the Convention') in so far as they require the closure of places of worship. The Human Rights Act gives particular emphasis in s.13 to rights under Article 9.

Article 15 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. The United Kingdom has chosen not to avail itself of that right. Any decision of the Scottish Ministers accordingly falls to be examined on the basis of the Convention.

Section 49 and schedule 19 of the Coronavirus Act 2020 empowers Scottish Minister to make health protection regulations for 'the purpose of preventing, protecting against, controlling or providing a public health response to incidence or spread of infection or contamination in Scotland.'

The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 ('Local Levels Regulations') came into effect on 2 November 2020. These regulations revoked several earlier regulations and implemented the level-based approach across Scotland. Those regulations did not close places of worship.

On 8 January 2021, the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) (No 11) Regulations 2021 (SSI 2021/3) came into force. Those regulations amended the Local Levels Regulations.

Regulation 4 inserted paragraph 1A into schedule 5 of the Local Level Regulations. That paragraph states:

"Requirement to close places of worship in a level 4 area to members of the public

1A.—(1) A person who is responsible for a place of worship must close that place of worship, except for a use permitted in paragraph (2).

(2) 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 a 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 persons, 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 sessions, vaccination centres or support in an emergency), provided that, in each case, the premises are used in accordance with the requirements of paragraph 8.

(3) Sub-paragraph (1) does not prevent the use of premises, while those remain closed to members of the public, to take preparatory steps in pursuance of a requirement in paragraph 8.”

The introduction of this provision has had the effect of closing places of worship in level 4 areas for all uses, except for those explicitly listed. This means that now it is unlawful for people in level 4 areas to gather in person to worship and practice their religion. Level 4 extends to the whole of mainland Scotland.

Prior to this provision coming into law, churches in Scotland had been working carefully and consistently to ensure that social distancing measures were being followed and that other sensible and workable restrictions, such as limitations on the number of people who could be in attendance at a place of worship, were in place and being strictly followed. Where anti-infection precautions could not be put in place churches imposed their own voluntary ‘lockdown’.

Disproportionate interference with Article 9 rights

It must be undisputed that the new restrictions are a significant interference with freedom of religion and religious assembly.

We respectfully draw to the Ministers’ attention the comments of the European Court of Human Rights in the case of *Metropolitan Church of Bessarabia v. Moldova* (2002) 35 E.H.R.R. 13 at §114:

“The Court recalls its standing case law that freedom of thought, of conscience and of religion, as safeguarded by Article 9, is one of the foundations of a “democratic society” within the meaning of the Convention. In its religious dimension, it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”

The Court noted in the same case (at §118) :

“Furthermore, since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards freedom of association against any unjustified interference by the State. This being so, the right of believers to freedom of religion, which includes the right to manifest one’s religion collectively, presupposes that believers may associate freely, without arbitrary interference by the State. The autonomy of religious communities is in fact indispensable to pluralism in a democratic society and is therefore at the very heart of the protection afforded by Article 9.”

It is these freedoms that are removed by SSI 2021/3.

Even if the interference with our clients’ fundamental rights and freedoms is “prescribed by law” and intended to serve a legitimate aim, they do respectfully question whether there are relevant and sufficient reasons for complete closure. It is a matter for the Scottish Ministers to justify

such a serious interference with Article 9 rights. Our clients maintain that the regulations are a disproportionate response to the current situation.

Only convincing and compelling reasons can justify restrictions on a fundamental Convention freedom, *Wingrove v. United Kingdom*, 1996 E.C.H.R. 1937, 1956. The broader the impact of the restriction on the Convention rights, the more compelling must be the justification. 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).

There are severe limits on acceptable restrictions on religious freedom under Article 9. The Court has made it clear that such restrictions, call for "very strict scrutiny" (*Manoussakis and Others v. Greece*, 23 EHRR 387 § 44, 47 54-53). Further, it is not open to the state to determine whether religious beliefs or the means used to express them are legitimate.

The nature and the severity of any sanction is also taken into account when the court assesses the proportionality of interference (*Biblical Centre of the Chuvash Republic v Russia* (Application no. 33203/08) 12 June 2014. Here Scottish Ministers have imposed criminal sanctions on persons seeking to exercise their right to worship together.

At the beginning of the pandemic, and while emergency steps were being taken in March 2020, there was perhaps a recognition that a wide margin of appreciation needed to be given to Scottish Ministers as society and government tried urgently to come to terms with what was being faced. This was in the context of a global response to an unprecedented situation. Now, some 10 months later a different global consensus has emerged in relation to freedom to worship.

Proportionality requires to be assessed having regard to international consensus and common values (see *Batatyán v Armenia* (2012) 54 E.H.R.R. 15 at §[122]). No other part of the United Kingdom is currently requiring places of worship to close, much less criminalising, public worship.

There is an emerging international jurisprudence in France, Germany, the United States and South Africa holding that bans and restrictions on religious services are unlawful. To cite but a few:

- In *MW et al* the highest Administrative Court in France, the Council of State, found that the blanket ban on religious services in France was a "serious and manifestly illegal infringement" of religious rights under Article 9 and other French and international provisions.
- The Federal Constitutional Court of Germany considered the matter in *F* (1BBQ 44/20), 29 April 2020. The Court granted interim relief permitting Friday prayers in a mosque, on the grounds that a blanket ban with no mechanism to apply for exemptions was a disproportionate interference with constitutional rights.

- In November 2020 the Supreme Court of the United States considered the matter in *Roman Catholic Diocese of Brooklyn v Cuomo* and relief was granted against the New York governor's restrictions on religious services.
- In *De Beer v The Minister of Cooperative Governance and Traditional Affairs* a South African court sustained a challenge against lockdown generally, where this could not be shown to be rationally connected to legitimate aims.

In order to justify the regulations completely closing places of worship, the Scottish Ministers would be required to show that the previous regulations which required measures to be taken to minimise risk, were insufficient to protect public health. To be clear, our clients are perfectly prepared to continue to adhere to the restrictions in Schedule 5, para 8 of the Local Levels Regulations.

On 8 January 2021, when being questioned by the Scottish Parliament's Covid-19 Committee, the Deputy First Minister John Swinney could not point to any established connection between worship responsibly organised in accordance with the provisions of the Local Levels Regulations prior to their amendment and the spread of the virus.

Indeed there is no evidence that there is any causal connection between churches remaining open and the spread of the virus. This in part must be the reason that during the third English national lockdown whilst schools closed (unlike the second lockdown) churches did not.

In Scotland, with suitable restrictions in place, public transport continues to operate; essential shops remain open; people are still attending their places of work; exercise may be taken – including golf; professional sport is permitted, and the court system remains open. Yet, places of worship are closed. The closure is arbitrary, inconsistent and disproportionate when looked at in light of the Convention. The closure of places of worship and the criminalisation of collective manifestation of religion which takes place under carefully and responsibly controlled conditions goes too far.

None of the activities we list, save the courts, directly involve fundamental rights and freedoms. The courts have remained open in recognition of rights relating to access to justice in terms of Article 6, and Article 8 (family courts) yet the 1998 Act, in s.13, gives Article 9 rights priority even over Article 6. The decision of the Court in *Metropolitan Church of Bessarabia v. Moldova* gives some insight into why Article 9 rights are given such fundamental importance.

Our clients therefore ask that Scottish Ministers rethink this restriction. They maintain that churches have responded effectively to the public health threat and that there is no lawful justification for interference in such dramatic fashion. Any interference needs to be proportionate and necessary in a democratic society. The ban imposed since 8 January 2021 does not meet those requirements.

Summary

In Romans 12:18 the Bible says "If it is possible, so far as it depends on you, live at peace with everyone". Our clients have no wish to bring this matter before the courts but the freedom to

worship is, and has always been, of central importance to the Christian faith. They ask with humility, please will Scottish Ministers reconsider.

Our clients make this respectful request that Scottish Ministers reconsider the steps taken to impose closure on places of worship in Scotland. They believe the decision to be entirely disproportionate and incompatible with rights enshrined in the Convention. They ask that in relation to SSI 2021/3, that Regulation 4(b), which inserted paragraph 1A into schedule 5 of the Local Level Regulations be revoked; that Regulation 4(e)(i) be revoked and that Regulation 4(f)(i) be revoked. With regard to the additional provisions made to the Loch Level Regulations by SSI 2021/1 they ask that there be added to paragraph 18 of schedule 5 an additional provision, namely "to attend a place of worship".

We look forward to your early response to this request but have instructions to present a petition to the Court of Session, if a positive outcome cannot be achieved. We will commence steps to that effect from 5.00 pm on Thursday 21 January 2021.

Yours faithfully,

[Redacted signature]

Schedule

Andrew Baldock , Minister, Kilwinning Evangelical Church, [Redacted]
[Redacted]

Gerald White, Pastor, Hope Church Bingham, [Redacted]

Rev Nathan Owens, [Redacted]

David Dickson, Associate Pastor, [Redacted]
[Redacted]

John-William Noble, Pastor, Grace Baptist Church Aberdeen, [Redacted]
[Redacted]

Garry Brotherston, Minister, Bishopbriggs Free Church of Scotland, [Redacted]
[Redacted]

Angus R. Cameron, Pastor, Cumnock Baptist Church, [Redacted]

Rev William Macleod BSc, ThM, Knightswood Free Church of Scotland (Continuing), [Redacted]
[Redacted]

Geoffrey de Bruin, Senior Pastor, CRC Edinburgh, [Redacted]
[Redacted]

Rev Dr Rupert Hunt-Taylor MRCVS, Edinburgh North Church, [REDACTED]
[REDACTED]

Rev Greg MacDonald, Minister of the Cross congregation [REDACTED]
[REDACTED]

William Philip, Senior Minister, The Tron Church [REDACTED]

Paul Harkess, Assistant Minister, Maxwell Church, [REDACTED]
[REDACTED]

James MacKenzie, Elder, Edinburgh North Church [REDACTED]

Arthur O'Malley, Pastor, East Gate Church, [REDACTED]

Rev Graeme Craig, Ayr Free Church of Scotland (Continuing), [REDACTED]
[REDACTED]

Andrew R Allan, Minister, Partick Free Church of Scotland (Continuing), [REDACTED]
[REDACTED]

John MacKenzie, Session Clerk: Assynt & Eddrachillis congregation of the Free Church of
Scotland (Continuing) and Clerk of the Northern Presbytery [REDACTED]
[REDACTED]

Daniel Titus, Pastor, Bethany Evangelical Church Dumfries, [REDACTED]
[REDACTED]

Rev James S. Haram, Shettleston Free Church of Scotland, [REDACTED]
[REDACTED]

Maurice Roberts, Minister (Retired), [REDACTED]

Colin Wilson, Editor, Christians Together [REDACTED]

Tom Malone, Pastor, Foundation Church [REDACTED]

Rev Kenneth Macdonald, Stornoway Free Church [REDACTED]
[REDACTED]

Tom Budgen, Minister, Kilmuir and Stenscholl Free Church of Scotland (Continuing), [REDACTED]
[REDACTED]

Rev Alexander James MacInnes, Lochalsh & Strath Free Church of Scotland (Continuing),
[REDACTED]

Alisdair S Smith, Elder, Knox Church Perth

[REDACTED]

Edith Forrest, Elder, St Columba Church (Church of Scotland)

[REDACTED]

Yerik Kellet-Smith, Elder, Ruchill Parish Church

[REDACTED]

Rev Alasdair Macleod, Knock & Point Free Church (Continuing)

[REDACTED]

[REDACTED]

-

T: [REDACTED]

E: [REDACTED]

Brent Haywood
Partner and Solicitor Advocate
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.

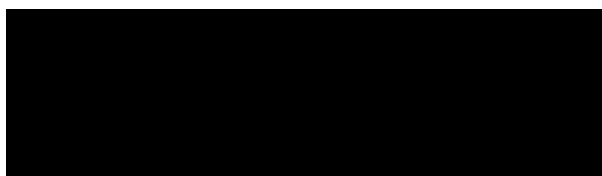
Conclusion.

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.

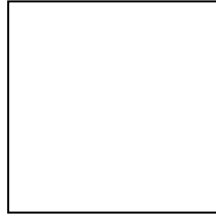
Our lead policy official has offered to meet with representatives of your clients to discuss the contents of this letter further in case there has been any misunderstanding which can be resolved. Our clients look forward to working with yours and, as the Cabinet Secretary says in her letter, to work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



UNTO THE RIGHT HONOURABLE
LORDS OF COUNCIL AND SESSION

P E T I T I O N

of

REVEREND DR WILLIAM J U PHILIP
having an official address at The Tron Church, 25 Bath Street, Glasgow, G2 1HW
and OTHERS

PETITIONERS

for

Judicial Review of the closure of places of worship in Scotland

HUMBLY SHEWETH:

1. That the petitioners are the Reverend Dr William J U Philip MB ChB(Hons), MRCP, BD the Senior Minister of The Tron Church, Glasgow City Centre, 25 Bath Street, Glasgow, G2 1HW and the other persons listed in the Schedule of Petitioners. They are ministers and church leaders of various Christian churches. They have a mutual interest in challenging secondary legislation forcing the closure of churches in Scotland and criminalising public worship. The legislation in question is the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3, hereinafter

“the Closure Regulations”). The Closure Regulations were made by the respondents, the Scottish Ministers, at 12.25 pm on 6 January 2021 and laid before the Scottish Parliament the same day. They came into force on 8 January 2021. They were approved by resolution of the Scottish Parliament on 20 January 2021 with 96 votes for and 5 votes against approval and 18 abstentions. The additional party’s averments anent his identity, position, qualifications and the effect of the Closure Regulations on him and the churches for which he has responsibility are believed to be true.

2. That, as explained below, this petition concerns (*inter alia*) a devolution issue within the meaning of the Scotland Act 1998, schedule 6, paragraph 1. RCS 25A.2 therefore requires service on the Lord Advocate and the Advocate-General .
3. That the date on which the grounds giving rise to the petition first arose was 6 January 2021.
4. That the petitioners (and others) caused their solicitors Messrs Lindsays to write to the respondents on 15 January 2021 asking for reconsideration and revocation of the Closure Regulations in so far as they forced the closure of churches in Scotland and criminalised public worship. The respondents have not reconsidered, nor revoked the material parts of the Closure Regulations. Instead they presented them to the Scottish Parliament for approval. The respondents

solicitor replied to Messrs Lindsays on 22 January 2021. The respondents do not offer any reconsideration or revocation. The additional party's averments anent his solicitor's correspondence with the respondents are believed to be true.

5. That the petitioners seek:
 - 1) Declarator that the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 are unlawful in so far as they purport to require the closure of churches in Scotland and to criminalise public worship.
 - 2) Reduction of the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021, regulation 4(b), (e)(i) and (f)(i).
 - 3) Declarator that a person living in a Level 4 area may lawfully leave the place that person is living in order to attend a place of worship.
 - 4) Such further orders (including an order for expenses) as are reasonable in all the circumstances.

6. That the petitioner challenges the making of the Closure Regulations in so far as they purport to require the closure of churches in Scotland and to criminalise public worship on the following grounds.

Public worship as an integral part of Christianity

7. The petitioners hold that public corporate worship, involving the physical gathering together of Christians for prayer, proclamation of the gospel, the celebration of holy communion by Christians meeting together in one place and the administration of the sacrament of baptism in the presence of the physically assembled Christian community, are fundamental and indispensable aspects of their religion. Assembly, or congregation, of the Christian community is of the very essence in which the being of the Christian Church is expressed.

8. By the same token the petitioners hold that virtual events whereby worshippers simultaneously “log on” to internet platforms do not constitute public worship. They do not permit the church to assemble. They do not permit the church to share in the physical elements of communion. They do not permit baptism to take place in the sense understood by the church since its commencement. In the absence of the gathered people of God, there is effectively no “church”. The additional party’s averments anent the Canon law of the Roman Catholic Church are believed

to be true under explanation that petitioners are from a presbyterian and reformed tradition which does not adopt the additional party's position on "sacred space" and the "Eucharist". Believed to be true that the respondents' enforced closure of churches for which the additional party has pastoral responsibility is incompatible with a number of the obligations placed on him as a parish priest in the context of his own tradition. Not known and not admitted whether fundamental matters affecting the additional party were taken into account by the Scottish Ministers.

9. Further, the absence of physical worship in any form excludes members of the church from participation in the practice of their religion. It prevents the church exercising a full ministry to its members. Reference is made to the letters from church leaders lodged herewith.

10. The petitioners' beliefs on these points are genuinely held. They are not capricious. They are derived from Scripture and consistent with the historic teaching of the church. Reference is made to the expert report of Dr Martin Parsons lodged herewith. The Closure Regulations result in a situation of direct conflict with the petitioners' beliefs. The petitioners are unable to worship in accordance with the requirements of their faith. With reference to the respondents' averments in answer, believed to be true that other Christian leaders and organisations in Scotland hold, and have expressed, faiths and beliefs that differ from the petitioners. That does not entitle the Scottish Government, or the Court, to

disregard the petitioners' rights and freedoms. Reference is made to statement 27. Believed to be true that the Scottish Government hold meetings with some church leaders and leaders of other organisations who have indicated support for the Closure Regulations. *Quoad ultra* and save in so far as they coincide herewith, the respondents' averments in answer are denied. With reference to the additional party's averments in answer admitted that the lawfulness of a measure is not judged by reference to whether there is a section of society that does not find the measure objectionable. Admitted that online streaming is not a valid substitute for physical gathering together as a congregation in the additional party's tradition. The additional party's averments anent what he seeks, the size of his churches, the disproportionate nature of their closure and the effect of closure on the finances of his parish and Archdiocese are believed to be true. Not known and not admitted whether the adverse impacts of closure on the additional party's church members, and of the people generally, were taken into account by the Scottish Ministers.

The historic freedom of the church from state interference

11. Churches in Scotland have long-established and traditional authority over their own affairs, free from state interference. This was established by 1592 when the General Assembly Act was passed. The 1592 Act expressly gave the church authority over all matters ecclesiastical. It also imposed on the elders of each church the legal responsibility to ensure that regular worship took place, including

preaching and the ministry of sacraments. Elders are thus required by law to ensure that holy communion is celebrated and that baptisms of infants and converts is carried out. With reference to the respondents' averments in answer the public worship of the church and the ministry of the sacraments are ecclesiastical and spiritual matters. *Quoad ultra* and save in so far as they coincide herewith, the respondents' averments in answer are denied. The additional party's averments anent the history and principle of religious toleration are not known and not admitted.

12. The 1706 Act for Securing Protestant Religion forms part of the Union with England Act 1707 and its English counterpart, forming the basis of the Union between Scotland and England. This Act included provision that:

“... her majesty, with advice and consent foresaid, expressly provides and declares that the foresaid true Protestant religion contained in the above-mentioned Confession of Faith, with the form and purity of worship presently in use within this church, and its presbyterian church government and discipline, that is to say the government of the church by kirk sessions, presbyteries, provincial synods and general assemblies, all established by the foresaid acts of parliament pursuant to the Claim of Right, shall remain and continue unalterable, and that the said presbyterian government shall be the only government of the church within the kingdom of Scotland.

The Union settlement retained the historic independence of the church from the state. That independence extended to the form and purity of the worship of the church. The Westminster Parliament was given no authority over the church in Scotland and cannot therefore confer authority over the church on any other

body. Save in so far as they coincide herewith, the respondents' averments in answer are denied. With reference to the additional party's averments in answer the the terms of the Union with England Act 1707 and the Union with Scotland Act and the terms of the accession oath sworn by Elizabeth II are admitted. *Quoad ultra* the additional party's averments are not known and not admitted.

13. The Church of Scotland Act 1921 confirmed that the church has inherent right, free from interference by civil authority, but under the safeguards for deliberate action and legislation provided by the church itself, to frame and adopt its own standards, the church being the sole judge of its fundamental doctrines. Article IV of the Declaratory Articles recognised in the 1921 Act affords to the church

“... the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church...”

Church worship and the ministry of the sacraments are not matters of a civil nature in terms of the 1921 Act. Reference is made to *Ballantyne v Presbytery of Wigtown* 1936 SC 625. The Closure Regulations are accordingly not of a civil nature in so far as they purport to require the closure of churches and thereby prevent worship and ministry of the sacraments. With reference to the respondents' averments in answer the 1921 Act and Declaratory Articles and the case of *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73 are referred to for their

terms, as are the Closure Regulations. *Quoad ultra* and save in so far as they coincide herewith, the respondents' and the additional party's averments in answer are denied

14. A material number churches in Scotland, whether Presbyterians, Baptists, Brethren or newer independent churches (including those which the petitioners lead) hold to a theology which believes that interference in matters sacred by the secular authority is a direct threat to their independence. Reference is made to the expert report of Dr Martin Parsons lodged herewith. The additional party's averments as to the dualism model for the relationship between church and state, as explained by Andrew Melville is accordingly admitted. Admitted that the Scottish Reformation differed radically from the English and that the king wielded no authority *ex officio* in the Scottish church. The terms of the Westminster Confession of Faith are admitted as are the terms of the discussion in *Free Church of Scotland v Overtoun* (1904) 7 F (HL) 1. Admitted that the civil power had (and has) a duty to provide for the advancement of the church's interests and welfare in the tempoal sphere but no right or power to interfere with the internal workings of the church itself. Admitted that the settlement of 1689 resulted in the Crown's recognition of Presbyterianism as the proper form of Church government in Scotland.

15. The Closure Regulations *prima facie* contravene the historic freedom of churches in Scotland. The petitioners maintain that these regulations are *ultra vires*. They prevent elders of churches from carrying out their legal responsibilities. They are an unprecedented interference with the practice of the Christian religion in Scotland since the persecution of the Presbyterian church instituted by the Stuart kings.

Coronavirus legislation

16. Section 49 and Schedule 19 to the Coronavirus Act 2020 (passed by the Westminster Parliament) empowered the Scottish Ministers to make regulations which made provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland. Such regulations may, in terms of that legislation impose or enable the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.
17. The respondents purportedly exercised the powers conferred by Schedule 19 to the Coronavirus Act 2020 by passing the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 ('Local Levels Regulations') which came into effect on 2 November 2020. Regulation 3(5)

and schedule 5, Part 1, paragraph 8 place requirements on persons responsible for places of worship in Level 4 areas as follows:

“8.—(1) A person who is responsible for a place of worship, carrying on a business or providing a service in a Level 4 area must take—

- (a) measures to ensure, so far as reasonably practicable, that—
 - (i) the required distance is maintained between any persons on its premises (except between persons mentioned in sub-paragraph (2),
 - (ii) persons are admitted to its premises in sufficiently small numbers to make it possible to maintain the required distance, and
 - (iii) the required distance is maintained between any persons waiting to enter its premises(except between persons mentioned in sub-paragraph (2), and
- (b) all other measures which are reasonably practicable to minimise the risk of the incidence and spread of coronavirus on the premises, for example measures which limit close face to face interaction and maintain hygiene such as—
 - (i) changing the layout of premises including the location of furniture and work stations,
 - (ii) controlling the use of entrances, passageways, stairs and lifts,
 - (iii) controlling the use of shared facilities such as toilets and kitchens,
 - (iv) otherwise controlling the use of, or access to, any other part of the premises,
 - (v) installing barriers or screens,
 - (vi) providing, or requiring the use of, personal protective equipment, and
 - (vii) providing information to those entering or working at the premises about how to minimise the risk of exposure to coronavirus.

The required distance applicable to places of worship is 2 metres. Failure to comply with paragraph 8(1)(a) is a criminal offence under regulation 5(1)(e) unless a reasonable excuse is shown pursuant to regulation 5(4).

18. The Local Level Regulations further provide that persons responsible for places of worship must in addition have regard to guidance issued by the respondents under paragraph 9. Compliance with these requirements may be enforced under

regulation 4. A contravention of a direction or failure to comply with an instruction or prohibition, under regulation 4 is a criminal offence under regulation 5(3). It is a defence under regulation 5(4) if a person can show a reasonable excuse. Since 5 January 2021 every area in mainland Scotland has been designated a Level 4 area under lockdown conditions. The guidance is referred to for its terms. *Quoad ultra* and save in so far as they coincide herewith, the respondents' averments in answer are denied.

19. On 6 January 2021 the respondents made the Closure Regulations. Those regulations apply in Level 4 areas. They purport to require a person who is responsible for a place of worship to close that place of worship, except for certain restricted uses. Regulation 4(b) inserted paragraph 1A into the Local Level Regulations, as follows:

“Requirement to close places of worship in a level 4 area to members of the public

1A.—(1) A person who is responsible for a place of worship must close that place of worship, except for a use permitted in paragraph (2).

(2) 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 a 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 persons, 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 sessions, vaccination centres or support in an emergency), provided that, in each case, the premises are used in accordance with the requirements of paragraph 8.

(3) Sub-paragraph (1) does not prevent the use of premises, while those remain closed to members of the public, to take preparatory steps in pursuance of a requirement in paragraph 8.”

Paragraph 4(e)(i) and (f)(i) remove exemptions on attending places of worship as part of indoor or outdoor gatherings from paragraphs 11 and 12 of the Local Level Regulations.

20. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 10) Regulations 2021 (SSI 2021/1) inserted in Schedule 5 to the Local Level Regulations new paragraphs 17 and 18. Paragraph 17 imposes a requirement that a person living in a Level 4 area must not leave the place where that person is living. Paragraph 18 provides examples of reasonable excuse for leaving that place the purposes of regulation 5(4). The list does not include attendance at a place of worship for the purpose of worshipping there. If public worship is lawful, then it should be lawful to leave home to attend a place of worship. With reference to the respondents’ averments in answer the Local Levels Regulations (as amended by SSI 2021/1) are referred to for their terms, beyond which no admission is made. The additional party’s averments anent the Canon law of the Catholic Church are believed to be true.

Legislation relating to fundamental rights and freedoms

21. The Human Rights Act 1998 provides:

- In section 6 that it is unlawful for a public authority to act in a way that is incompatible with a right protected by the European Convention on Human Rights (“the Convention”). The respondents are a public authority. They are bound by section 6.
- In section 13, that the fundamental right to freedom of thought, conscience and religion is singled out for particular protection. That section provides:

“(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.”
- Section 14 allowing the United Kingdom to designate any derogation from the Convention for the purposes of article 15 of the Convention. The United Kingdom has not designated any derogation. It accordingly holds itself as bound by the Convention. The respondents remain bound to act compatibly with Convention Rights, notwithstanding the current threat to public health arising from coronavirus.

Save in so far as they coincide herewith, the respondents’ averments in answer are denied. The additional party’s averments as to Convention rights, the powers of Scottish Ministers and the interpretation and application of article 9(2) of ECHR are admitted. The case of *Padfield v Minister of Agriculture* [1968] AC 997 is referred

to for its terms beyond which no admission is made. It is admitted that the blanket ban on the exercise of a constitutionally-protected right, backed by criminal sanction, exceeds what is reasonable and proportionate, that the Closure Regulations are not as “prescribed by law” and that they are accordingly Convention incompatible, *ultra vires* and null and void. The case of *Christian Institute v Lord Advocate* [2016] UKSC 51 is referred to for its terms. *Quoad ultra* and save in so far as they coincide herewith the additional party’s averments are not known and not admitted.

22. The Scotland Act 1998 provides:

- In section 54(2) that:

“(2) It is outside devolved competence—

- (a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or
- (b) to confirm or approve any subordinate legislation containing such provision.

Section 29(2) states that a provision is outside the legislative competence of the Scottish Parliament if it is incompatible with any of the Convention rights.

- In section 57(2) that:

“(2) A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights...”

The “Scottish Government” is a collective term used to refer to the respondents (see section 44(2)).

- In Schedule 6, paragraph 1 that a question whether any provision of an Act of the Scottish Parliament or purported or proposed exercise of a function by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights, or whether a function is exercisable within devolved competence, is a “devolution issue.”

European Convention on Human Rights

23. Article 9 of ECHR 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.

Article 11 states:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the

exercise of these rights by members of the armed forces, of the police or of the administration of the State.

24. Freedom of thought, conscience and religion is safeguarded by article 9 of ECHR as one of the foundations of a democratic society. This was explained by the European Court of Human Rights in the case of *Metropolitan Church of Bessarabia v. Moldova* (20002) 35 E.H.R.R. 13 at §114:

“The Court recalls its standing case law that freedom of thought, of conscience and of religion, as safeguarded by Article 9, is one of the foundations of a “democratic society” within the meaning of the Convention. In its religious dimension, it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”

With reference to the respondents’ averments in answer the decision of the European Court of Human Rights in *Metropolitan Church of Bessarabia v Moldova* is referred to for its terms, beyond which no admission is made.

25. The Court noted in the same case (at §118) :

“Furthermore, since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards freedom of association against any unjustified interference by the State. This being so, the right of believers to freedom of religion, which includes the right to manifest one’s religion collectively, presupposes that believers may associate freely, without arbitrary interference by the State. The autonomy of religious communities is in fact indispensable to pluralism in a democratic society and is therefore at the very heart of the protection afforded by Article 9.”

26. In recalling that religious freedom has been “dearly won” the Court is alluding to the persecution of holders of religious beliefs, including Christians over many centuries. In the last century the German Evangelical Church found it necessary in the Barmen Declaration to reject state control of the church and many of those involved in producing that declaration paid with their lives for defending the independence of the church. Within the last two years the Rt Rev Philip Mounstephen in his Independent Review for the Foreign Secretary of FCO Support for Persecuted Christians recorded contemporary persecution of Christians and pointed out that Freedom of Religion and Belief may be viewed as the most fundamental human right because so many others depend on it. He states “If freedom of religion or belief is removed so many other rights are put in jeopardy too.” The respondents in this case have removed the petitioners’ freedom of religion. If they are to practice their religion the petitioners would (*prima facie*) break the criminal law and be liable to penalties in the criminal courts. Save in so far as they coincide herewith, the respondents’ averments in answer are denied. With reference to the additional party’s averments believed to be true that the Closure Regulations also interfere with the additional party’s freedom of religion.
27. Freedom of belief is absolute. It is not for the court to embark on an inquiry into an asserted belief or its orthodoxy. Nor is it for the court to hold an inquiry into the extent to which the petitioners’ beliefs conform to, or differ from the beliefs of other persons who profess the Christian faith. The right to freedom of religion as

understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed (*R (Williamson) v Secretary of State*) [2005] 2 AC 246 *per* Lord Nicholls of Birkenhead at §§16 and 22). With reference to the respondents' averments in answer, the petitioners do not have alternative forms of worship available to them that are consistent with their beliefs. In these circumstances the beliefs of other persons are not relevant to the interference with the petitioners' article 9 rights. The petitioners are currently prevented by criminal sanction from manifesting their beliefs. Article 9 is referred to for its terms, beyond which no admission is made. The additional party's averments anent article 9 of ECHR and anent the onus of demonstrating that the measure in this case is justified are admitted. *Quoad ultra* not known and not admitted.

28. The petitioners recognise that the right to manifest religious belief is qualified. It may be subject to interference prescribed by law and necessary in a democratic society in the interests of (*inter alia*) public safety. In this case it is clear that article 9 is engaged and that the Closure Regulations interfere with the manifestation of religious belief, including that of the petitioners. The respondents claim that the interference is justified by the coronavirus pandemic, that the interference is in accordance with law and pursues a legitimate aim of public safety. With reference to the respondents' averments in answer the petitioners' beliefs as to the nature of public worship is explained at statements 7 to 10 above. The Closure Regulations

prevent collective public worship in the sense in which the petitioners believe is a requirement for the Christian Church. The petitioners recognise that persons who are ill, infirm, or shielding may be unable to attend public worship. This does not invalidate the petitioners' beliefs. *Quoad ultra* and save in so far as they coincide herewith, the respondents' averments in answer are denied. The additional party's averments anent the effect on him of the Closure Regulations are believed to be true. Admitted that the respondents have not opted for the least restrictive option to protect public health. Admitted that the Closure Regulations are disproportionate and on that basis contrary to the additional party's Convention rights. The limitations on the respondents' power are admitted. Admitted that the Closure Regulations are unlawful.

29. The petitioners respectfully challenge whether the interference is in accordance with the law, given the historic freedom of the church from state interference set out above. Save in so far as they coincide herewith, the respondents' averments in answer are denied.
30. Further and in any event, it is for the respondents to justify the Closure Regulations as "necessary in a democratic society" by showing relevant and sufficient reasons for the interference with the petitioners' right to manifest their religious beliefs. With reference to the respondents' averments in answer, the petitioners have not challenged that the aim of the Regulations is legitimate. They challenge the

characterisation of public worship as “non-essential indoor social contact” given that it involves a fundamental right and freedom and can be carried out with safeguards at least equal to other activities that have not been rendered criminal. The petitioners challenge the inclusion of in-person public worship in activities selected by the respondents for criminalisation. The petitioners believe that such worship is fundamental and indispensable to the Christian Church, as explained in statements 7 to 10. Watching a form of service online is not a substitute for public corporate worship. It is not possible to administer sacraments online. The new variant of the virus is common to all parts of the United Kingdom. Only Scotland has elected to close places of worship. The petitioners do not challenge such data as is available. They challenge the respondents’ response in the form of the Closure Regulations. These have been in place since 8 January 2021. The respondents’ expression of intention to repeal them is referred to for its terms. The Closure Regulations remain in place. The petitioners’ maintain that they are unlawful. *Quoad ultra* and save in so far as they coincide herewith, the respondents’ averments in answer are denied. With reference to the additional party’s averments admitted that the respondents are obliged to review the Local Levels Regulations at least every 21 days. Admitted that the fundamental right to manifest religion may only be interfered with in the circumstances set out in article 9(2) of ECHR. Believed to be true that worship by way of live streamed video is not public worship for the purposes of the additional party’s religion. Admitted

that the closure of places of worship for public worship is disproportionate and unlawful.

Proportionality

31. The petitioners are prepared to conduct public worship under the conditions set out in the Local Levels Regulations, schedule 5 paragraph 8. They are respectful of the need to take appropriate steps to prevent the spread of coronavirus.

32. The respondents are unable to show that public worship conducted under the restrictions set out in the Local Levels Regulations, schedule 5 paragraph 8 materially increases the threat to public health from coronavirus. The respondents have continued to operate courts under a restricted regime. Freedom to manifest religion and belief under article 9 enjoys greater protection than access to justice under article 6 of the Convention. The respondents have allowed continued operation of supermarkets. Churches can be operated with better regard for public safety than supermarkets. Reference is made to the expert report of Dr Ian Blenkharn lodged herewith. With reference to the respondents' averments in answer the petitioners challenge the characterisation of their fundamental rights and freedoms in terms of article 9 of ECHR as non-essential in a democratic society. Save in so far as they coincide herewith, the respondents' averments in answer are denied.

33. There are severe limits on acceptable restrictions on religious freedom under article 9. The European Court of Human Rights has made it clear that such restrictions, call for “very strict scrutiny” (*Manoussakis and Others v. Greece*, 23 EHRR 387 § 44, 47 and 53). With reference to the respondents’ averments in answer the decision of the European Court of Human Rights in *Manoussakis and Others v. Greece* is referred to for its terms, beyond which no admission is made.
34. The nature and the severity of any sanction is taken into account when the court assesses the proportionality of interference (*Biblical Centre of the Chuvash Republic v Russia* (Application no. 33203/08) 12 June 2014). The respondents have in this case imposed criminal sanctions on persons seeking to exercise their right to worship together. With reference to the respondents’ averments in answer the decision of the European Court of Human Rights in *Biblical Centre of the Chuvash Republic v Russia* is referred to for its terms, as are the other cases cited by the respondents, beyond which no admission is made.
35. Proportionality requires to be assessed having regard to international consensus and common values (see *Batatyán v Armenia* (2012) 54 E.H.R.R. 15 at §[122]). No other part of the United Kingdom has required places of worship to close at this time. No other part of the United Kingdom has criminalised public corporate worship. Christians in other parts of the United Kingdom are currently free to gather together for worship and administration of the sacraments, subject to

compliance with guidance of a similar nature to the requirements of the Low Level Regulations. With reference to the respondents' averments in answer, admitted that places of worship were required to close in the early months of the pandemic under explanation that this was challenged in England and in Wales. Judicial reviews in those jurisdictions did not in the event require to be heard. Believed to be true that certain denominations and individual churches do not take advantage of their freedom and have chosen to cease communal in person worship. Admitted that the Scottish Government is not obliged to replicate any approach to public health adopted in other parts of the United Kingdom. The position in other parts of the United Kingdom is relevant to the proportionality of the response of the Scottish Government. Save in so far as they coincide herewith, the respondents' averments in answer are denied. With reference to the additional party's averments admitted that as at 1 December 2020 there was no substantive decision in *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin). Admitted that differences in treatment between different parts of the United Kingdom may give rise to discrimination under article 14 of ECHR and requires to be justified. The decisions in *R (A) v Health Secretary* [2017] UKSC 41 and *Catholic Archdiocese of Brooklyn v Andrew Cuomo* 592 US (2020) are referred to for their terms. The lack of justification for the "four harms approach" is admitted. The Additional Party's averments anent the position in England, Wales and Northern Ireland are admitted. The relevance of his call in relation to the basis or bases for a divergence in Scotland from these less restrictive approaches is

admitted. Believed to be true that participation in an online event is not relevant sacramental participation for the purposes of the Catholic Church. Save in so far as they coincide herewith, the additional party's averments in answer are not known and not admitted.

36. There is an emerging international jurisprudence in France, Germany, the United States and South Africa holding that bans and restrictions on religious services are unlawful, in particular:

- In *MW et al* (case nos 440366, 440380, 440410, 440531, 440550, 440562, 440563 and 440590, Administrative Court, France, 18 May 2020) the highest Administrative Court in France, the Council of State, found that the general and absolute ban on religious services in France was a “serious and manifestly illegal infringement” of religious rights under article 9 and other French and international provisions (§34).
- The Federal Constitutional Court of Germany considered the matter in *F* (1BvQ 44/20), 29 April 2020. The Court granted interim relief permitting Friday prayers in a mosque, on the grounds that a complete prohibition with no mechanism to apply for exceptions in individual cases subject to conditions and restrictions specific to the situation was a disproportionate interference with constitutional rights.
- In November 2020 the Supreme Court of the United States considered the matter in *Roman Catholic Diocese of Brooklyn v Cuomo* (592 US (2020), 25

November) and immediate interim relief was granted against the New York governor's restrictions on religious services. The applicants were complying with all public health guidance and complained that regulations treated houses of worship more harshly than comparable secular facilities. The Supreme Court held that their constitutional claims were likely to prevail and that denying relief would lead to irreparable injury to constitutional freedoms. Similar judgments were reached by Court of Appeal of the State of California, Second Appellate District, Division Two in *County of Los Angeles, et al. v. The Superior Court of Los Angeles County; Grace Community Church of the Valley, et al., Real Parties in Interest* (Case No. B307056) on 25 August 2020 and the United States District Court for the District of Columbia in *Capitol Hill Baptist Church v Muriel Bowser, in Her Official Capacity as Mayor of the District of Columbia* (Case No. 20-cv-02710 (TNM)) on 9 October 2020. The Supreme Court also granted injunctive relief against the Californian prohibition on indoor worship services in *South Bay United Pentecostal Church v Newsom* (592 US (2021), 5 February 2021

- In *De Beer v The Minister of Cooperative Governance and Traditional Affairs* (High Court of South Africa, Case No 21542/2020, 2 June 2020) the South African court sustained a challenge against lockdown generally, where this could not be shown to be rationally connected to legitimate aims. The court criticised an approach that disregarded constitutional rights (see §§7.17-21).

These decisions represent a material and growing international jurisprudence on the interference with the fundamental right and freedom to exercise religion in acts

of public worship. Save in so far as they coincide herewith, the respondents' averments in answer are denied. With reference to the additional party's averments in answer admitted that the respondents bear the burden of showing no lesser restrictive measures are available to them. Admitted that the fundamental constitutional role of the court is to protect the fundamental rights of individuals from unlawful interference by the state. Admitted that the Closure Regulations are disproportionate and unlawful.

37. In the circumstances there are cogent reasons to challenge whether the respondents can show that their closure of churches, in the face of the fundamental right to freedom of religion and belief, even if lawful, was proportionate, rather than an unlawful undermining of a crucial part of democratic society. Save in so far as they coincide herewith, and for the reasons set out above, the respondents' averments in answer are denied. With reference to the additional party's averments in answer it is admitted that executive discretion cannot override the fundamental rights of individuals and that the fundamental right to congregate and express one's faith must be given a higher priority than other matters. Save in so far as they coincide herewith, the additional party's averments in answer are not known and not admitted.

Remedy

38. The petitioners therefore seek declarator that the Closure Regulations are unlawful, in so far as they purport to require the closure of churches in Scotland and to criminalise public worship. They seek reduction of those parts of the Closure Regulations that have this effect. They also seek declarator that a person may lawfully leave home in order to attend a place of worship. The latter declarator is required in order to ensure that if churches are open, worshippers may attend. Declarator is necessary to confirm that attendance at a place of worship constitutes a reasonable excuse for a person to leave a place of residence, without committing an offence. Save in so far as they coincide herewith, the respondents' and additional party's averments in answer are denied.

39. That in the absence of an alternative remedy, the petitioner is under the necessity of seeking judicial review. The petition is brought in terms of Chapter 58 of the Rules of the Court of Session.

PERMISSION TO PROCEED

40. That the Petitioners satisfy s.27B(2) (permission to proceed) of the Court of Session Act 1988. The petitioners as ministers and church leaders of churches required to close by the Closure Regulations have an interest in the subject matter of the application. There is a *prima facie* interference with their article 9 right to freedom

of religion and belief. They maintain on the grounds set out above that the interference with this right is not necessary in a democratic society. It is for the respondents to demonstrate relevant and sufficient reasons and the proportionality of the Closure Regulations. The respondents as public authorities cannot act incompatibly with the petitioners Convention rights. They have no power to pass secondary legislation that conflicts with such rights. The averments of fact and law hereinbefore demonstrate that the petitioners have a real prospect of success.

TRANSFERS TO UPPER TRIBUNAL

41. That the Petition is not subject to a mandatory or discretionary transfer to the Upper Tribunal.

PLEAS-IN-LAW FOR THE PETITIONER

1. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 being unlawful in so far as they purport to require the closure of churches in Scotland and to criminalise public worship, declarator to that effect should be granted in accordance with Statement 5(1).

2. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 being unlawful in so far as they purport to require the closure of churches in Scotland and to criminalise public worship, should be reduced in accordance with Statement 5(2).

3. It being in the circumstances lawful for a person living in a Level 4 area to leave the place they are living in order to attend a place of worship, declarator should be granted to that effect in accordance with Statement 5(3).

According to justice etc.

S. W. / signed.

SCHEDULE OF PETITIONERS

1. Rev. Dr William Philip, having an official address at The Tron Church, 25 Bath Street, Glasgow, G2 1HW.
2. Rev. Andrew Baldock, having an official address at Kilwinning Evangelical Church, 5 Garden Square Lane, Kilwinning, KA13 6AD.
3. Gerald White, residing at 55 Magdalene Gardens, Edinburgh, EH15 3DN.
4. Rev. Nathan Owens, having an official address at Maxwell Church, 4 Crosshouse Road, Kilmaurs, KA3 2SA.
5. David Dickson, having an official address at Lochee Baptist Church, 12 Bright Street, Dundee DD2 3DE.
6. John-William Noble, residing at Hilton Avenue, Aberdeen, AB24 4RT.
7. Rev. Garry Brotherston, having an official address a Bishopbriggs Free Church, 13 Auchinairn Road, Bishopbriggs G64 1XU
8. Angus R. Cameron, having an official address at Cumnock Baptist Church, 18a Barrhill Road, Cumnock KA18 1PG.
9. Rev. William Macleod, having an official address at Knightswood Free Church of Scotland (Continuing), 361 Fulton Street Glasgow, G13 2SP

10. Geoffrey de Bruin, having an official address at London Road Church, London Road, Edinburgh, EH75PH.
11. Rev. Dr Rupert Hunt-Taylor MRCVS, residing at, 62 Craigeith View, Edinburgh EH4 3JY.
12. Rev. Greg MacDonald, residing at The Manse, North Dell Ness, Isle of Lewis Scotland, HS2 0SW.
13. Paul Harkess residing at 43 Ardgour Road, Kilmarnock, East Ayrshire, KA3 2AJ.
14. Arthur O'Malley, having an official address East Gate Church, 5 Glenpatrick Road, Elderslie, PA5 9AP.
15. Rev. Graeme Craig, having an official address at Aye Free Church of Scotland (Continuing), 7 Lyndsay Street, Ayr, KA8 9QE.
16. Rev. Andrew R Allan, having an official address at Partick Free Church of Scotland (Continuing), 2-4 Thornwood Terrace, Glasgow, G11 7QZ.
17. John MacKenzie, residing at 307, Culkein, Drumbeg, by Lairg, Sutherland, IV27 4NL.
18. Rev. James S. Haram, residing at 191 Sandyhills Road, Glasgow G32 9NB.
19. Rev. Maurice Roberts, residing at 5 Muirfield Park, Inverness, IV2 4HA.
20. Colin Wilson, residing at 19 Bellfield Road, North Kessock, Inverness IV1 3XU.

21. Rev. Tom Budgen, having an official address at Kilmuir and Stenscholl Free Church of Scotland (Continuing), Staffin Road, Staffin, Portree, Isle of Skye, IV51 9JS.
22. Rev. Alexander James MacInnes, having an official address at Lochalsh & Strath Free Church of Scotland (Continuing), Ardelve, Dornie. Kyle, IV40 8DZ
23. Alisdair S Smith, residing at Flat 2, Pitfour Castle, Glencarse, Perthshire, PH2 7NJ.
24. Edith Forrest, residing at 1 Mount Zion, Church Road, Quarrier's Village, Renfrewshire, PA11 3TD.
25. Rev. Alasdair Macleod, residing at 25c Swordale, Point, Isle of Lewis HS2 0BP.
26. David Gibson, having an official address at Trinity Church, Aberdeen, 10 Beechgrove Avenue, Aberdeen, AB15 5EJ
27. Rev. Murdo Macleod, having an official address at Snizort Free Church (Continuing), Skeabost Bridge, Isle of Skye, IV51 9NP

SCHEDULE FOR SERVICE

Part 1 – Respondents

The Scottish Ministers, St Andrew's House, Regent Road, Edinburgh, EH1 3DG

Part 2 – Interested Parties

1. The Lord Advocate, Crown Office and Procurator Fiscal Service, 25 Chambers Street, Edinburgh EH1 1 LA
2. The Advocate General for Scotland, Victoria Quay, Edinburgh EH6 6QQ

SCHEDULE OF DOCUMENTS

1. Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3).
2. Covid-19 Committee Report 8 January 2021
3. Official Report, Meeting of the Parliament, 20 January 2021, cols 97 – 100 and 114 – 116.
4. Report from Martin Parsons dated 26 January 2021.
5. Report from Ian Blenkharn dated 22 January 2021.
6. Letter from The Signatories to the First Minister of Scotland dated 11 January 2021.
7. Letter from Cabinet Secretary for Communities and Local Government dated 13 January 2021
8. Letter from Lindsays to The Scottish Ministers dated 15 January 2021.
9. Letter from Rev Dr William J U Philip (The Tron Church) dated 14 January 2021.
10. Letter from Alexander James MacInnes (Lochalsh & Strath Free Church (Continuing)) dated 14 January 2021.
11. Letter from Rev. Nathan Owens (Maxwell Church)
12. Letter from Rev. Paul Harkess (Maxwell Church)
13. Letter from Pastor Daniel Mihet (Bethany Evangelical Church Dumfries) dated 12 January 2021.
14. Letter from William Macleod (Knightswood Free Church (Continuing), Glasgow) dated 12 January 2021
15. Letter from Andrew R Allan (Partick Free Church (Continuing)) dated 14 January 2021.
16. Letter from Geoffrey de Bruin (Christian Revival Church Edinburgh) dated 13 January 2021.

17. Letter from John-William Noble (Grace Baptist Church Aberdeen) dated 16 January 2021.
18. The Barmen Declaration
19. Independent Review for the Foreign Secretary of FCO Support for Persecuted Christians, Rt Rev Philip Mounstephen, Introduction (pp 6 – 8).
20. *MW et al* , case nos 440366, 440380, 440410, 440531, 440550, 440562, 440563 and 440590, Administrative Court, France, 18 May 2020
21. *F* (1 BvQ 44/20), Federal Constitutional Court of Germany 29 April 2020
22. *Roman Catholic Diocese of Brooklyn v Cuomo* Supreme Court of the United States, 592 US _ (2020), 25 November 2020
23. *De Beer v The Minister of Cooperative Governance and Traditional Affairs*, High Court of South Africa, Case No 21542/2020, 2 June 2020.
24. Letter from Richard Henry, Session Clerk, Tron Church, to church members, dated 21 January 2021
25. Letter from Aileen A Nimmo, Scottish Government Legal Directorate to Brent Haywood, Lindsays WS dated 22 January 2021.



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 32

P74/21

OPINION OF LORD BRAID

In the cause

REVEREND DR WILLIAM J U PHILIP AND OTHERS

Petitioners

for

Judicial Review of the closure of places of worship in Scotland

Petitioners: Scott QC; Lindsay

Respondents and First Interested Party: Mure QC, Irvine; Scottish Government Legal Directorate

Additional Party: O'Neill QC, Welsh; Balfour & Manson LLP

24 March 2021

Introduction

[1] The petitioners, Reverend Dr William Philip and 26 others, are ministers and church leaders of Christian churches of various protestant denominations, including the Free Church of Scotland (Continuing), the United Free Church of Scotland, the Baptist Church and others. They challenge, by judicial review, the lawfulness of the enforced closure, in January 2021, of places of worship in Scotland. That closure was a response by the respondents, Scottish Ministers, to the risks posed by Covid-19, and specifically the new variant B.1.1.7 which emerged towards the end of 2020. The case raises two issues: (1) the extent, if any, to which the respondents have the constitutional power, at common law, to

restrict the right to worship in Scotland; and (2) whether the closure is an unjustified infringement of the human rights of the petitioners and others to manifest their religious beliefs, and to assemble with others in order to do so, in terms of articles 9(2) and 11 of the European Convention on Human Rights (ECHR). I will refer to these issues as the constitutional issue, and the ECHR issue.

[2] The legislation under challenge, which effected the closure of places of worship, is the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3). For simplicity, I will simply refer to them as “the Regulations”. The Regulations were made by the respondents on 6 January 2021 and laid before the Scottish Parliament on the same day. They came into force on 8 January 2021 and were approved by resolution of the Scottish Parliament on 20 January 2021. The petitioners seek three orders: declarator that the Regulations are unlawful in so far as they purport to require the closure of churches in Scotland and to criminalise public worship; reduction of regulations 4(b), (e)(i) and (f)(i) of the Regulations (which removed certain exemptions which previously existed in relation to worship); and declarator that a person living in a Level 4 area may lawfully leave the place that person is living in order to attend a place of worship.

[3] It is of course now well known that the respondents have stated an intention to permit public worship with effect from 26 March 2021, and so, at least if that statement of intention is made good, the outcome of this case will have little immediate practical effect in the short term. Nonetheless, the issues raised are of importance, since there have been previous church closures; and for aught yet seen, there may be future lockdowns. The petitioners made clear at the outset of the substantive hearing that they therefore insist in the

orders sought, as they are entitled to do, not least as for the time being, the Regulations remain in force.

[4] There is an additional party, Canon Thomas White, a Roman Catholic priest. On 26 February 2021 I allowed him to participate in the process, as a person directly affected by the issues raised in the petition. Since the case was already at an advanced stage by that time, I did not allow him *carte blanche* to raise all arguments he might have raised had he been involved from the outset. Instead, he was limited to addressing the issues already before the court. He nonetheless elected to enter the process on that basis, rather than to raise his own petition. The additional party supports the petitioners, and the orders they seek. He provides an additional perspective in relation to Roman Catholicism, both in relation to the constitutional issue, and the ECHR one.

[5] The essence of the petitioners' case is that an integral part of Christianity is the physical gathering together of Christians for prayer, proclamation of the gospel, the celebration of communion and the administration of the sacrament of baptism. The essential physical element of these aspects of their faith is absent from virtual, internet events. The petitioners maintain, first, that the Regulations are *ultra vires* (that is, that the respondents lacked the power to make them) insofar as they contravene the historic freedom of churches in Scotland to practise religion and threaten the independence of the church; and, second, that the Regulations are in any event unlawful because they amount to a disproportionate infringement of the petitioners' human rights, under articles 9 and 11 of ECHR, to freedom to manifest their religious beliefs and to freedom of peaceful assembly.

[6] The respondents do not dispute that the petitioners' religious beliefs (and those of the additional party) are genuinely held; nor that the Regulations interfere with the manifestation of those beliefs; nor that articles 9 and 11 are engaged. However, they argue

that the Regulations do not interfere with the independence of the church, and were competently made. They also argue that, at the time the Regulations were made, they were a necessary and proportionate measure in response to the new variant and accordingly that they impose acceptable restrictions on the ECHR rights of the petitioner and of the additional party.

[7] I will begin by examining the Regulations themselves, the regulations which they amended - the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 ('Local Levels Regulations') - and the enabling legislation, to give an early understanding of what exactly the Regulations restrict, and what it is that the petitioners object to (paras [8] to [21]). I will then consider the background against which both sets of regulations were made (paras [22] to [58]), the impact on the petitioners and additional party (paras [59] to [63]), before turning to deal with the constitutional, and then the ECHR, issues (paras [64] to [82] and [83] to [127]).

The Regulations

[8] Both the Regulations and the Local Levels Regulations were made by the respondents in pursuance of the power conferred on them by section 49 of the Coronavirus Act 2020 (passed by the Westminster Parliament). That section, under reference to schedule 19 of that Act, empowered the respondents to make regulations for the purpose of (schedule 19(1)):

“preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland (whether from risks originating there or elsewhere)”.

[9] Paragraph 1(2) provides that the regulation-making power in sub-paragraph (1) may be exercised:

- “(a) in relation to infection or contamination generally or in relation to particular forms of infection or contamination, and
- (b) so as to make provision of a general nature, to make contingent provision or to make specific provision in response to a particular set of circumstances.”

Such regulations may, in terms of paragraph 1(3)(c), include provision:

“imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health”.

[10] Regulations under the 2020 Act may not include provision imposing a restriction or requirement unless the respondents consider, when making the Regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it (schedule 19, paragraph 2(1)). Paragraph 5(2) permits the creation of offences, and 5(4) makes provision for the maximum penalties which may be imposed, being, on summary conviction, imprisonment for a period not exceeding 12 months or a fine not exceeding the statutory maximum (£10,000) or both, and on conviction on indictment, imprisonment for a period not exceeding two years or a fine or both.

[11] As regards regulations made by the respondents, paragraph 6(1) of schedule 19 provides that they are subject to the affirmative procedure, but by virtue of paragraph 6(2), paragraph 6(1) does not apply if the respondents consider that the Regulations need to be made urgently. Sub-paragraph (3) provides that in such circumstances the Regulations:

- “(a) must be laid before the Scottish Parliament; and
- (b) cease to have effect on the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.”

[12] As introduced (and as currently in force), the Local Levels Regulations set out five protection levels (Level 0 to Level 4) which are designed to apply increasing levels of protection from the virus in local authority areas according to prevalence, the risk to communities and the need to protect the NHS. Level 4 was and is the most restrictive level.

These regulations came into effect on 2 November 2020. Regulation 3(5) and schedule 5, Part 2, paragraph 8 placed requirements on persons responsible for places of worship in Level 4 areas as follows:

“8.—(1) A person who is responsible for a place of worship, carrying on a business or providing a service in a Level 4 area must take—

- (a) measures to ensure, so far as reasonably practicable, that—
 - (i) the required distance is maintained between any persons on its premises (except between persons mentioned in sub-paragraph (2),
 - (ii) persons are admitted to its premises in sufficiently small numbers to make it possible to maintain the required distance, and
 - (iii) the required distance is maintained between any persons waiting to enter its premises ... and
- (b) all other measures which are reasonably practicable to minimise the risk of the incidence and spread of coronavirus on the premises, for example measures which limit close face to face interaction and maintain hygiene such as—
 - (i) changing the layout of premises including the location of furniture and workstations,
 - (ii) controlling the use of entrances, passageways, stairs and lifts,
 - (iii) controlling the use of shared facilities such as toilets and kitchens,
 - (iv) otherwise controlling the use of, or access to, any other part of the premises,
 - (v) installing barriers or screens,
 - (vi) providing, or requiring the use of, personal protective equipment, and
 - (vii) providing information to those entering or working at the premises about how to minimise the risk of exposure to coronavirus.”

The required distance applicable to places of worship is 2 metres. In short, regulation 8 imposes a duty on any person responsible for a place of worship to take steps to reduce the risk of coronavirus spreading, including social distancing, limiting the numbers who attend, the wearing of face masks, and so on. The Local Levels Regulations further provide that persons responsible for places of worship must in addition have regard to guidance issued by the respondents under paragraph 9. The guidance, dated 7 January 2021 (number 7/5 of process) which is updated from time to time, is comprehensive and includes detailed information about the need for persons responsible for a place of worship to familiarise

themselves with Test and Protect, which is designed to prevent spread of Covid-19 in the community; to keep a temporary register of those attending to support contact tracing; and to carry out a risk assessment. It is not disputed by the respondents that when places of worship were allowed to reopen after the first lockdown in 2020, compliance with the guidance which applied to places of worship was good.

[13] As introduced, the Local Levels Regulations also required various specified premises within a Level 4 area to close (regulation 1). The specified premises did not include places of worship, which were permitted to continue to open, subject of course to regulation 8 and to the guidance. Those regulations also imposed a prohibition on public gatherings indoors in a Level 4 area, unless (among other exceptions) the gathering was for the purpose of attending a place of worship (schedule 5, paragraph 11(1)(b)(iii)). The Regulations likewise prohibited outdoor gatherings in a Level 4 area, unless (among other exceptions) the gathering was for the purpose of attending a place of worship (schedule 5, paragraph 12(1)(d)(iii)).

[14] The Local Levels Regulations also provide that they must be reviewed at least every 21 days (regulation 8(1)). As soon as the respondents consider that any restriction or requirement set out in these regulations is no longer necessary to “prevent, protect against, control or provide a public health response to the incidence or spread of infection”, they must revoke that restriction or requirement (regulation 8(2)).

[15] The Local Levels Regulations are also time-limited: currently, they are due to expire on 30 September 2021 (regulation 9(1)). The expiry date has already proved to be something of a moveable feast, in that the original date for expiry of the Regulations was 31 March 2021, this date having been amended by subsequent regulation.

[16] On 6 January 2021 the respondents made the Regulations. They apply to Level 4 areas. They require a person who is responsible for a place of worship to close that place of

worship, except for certain restricted uses. Regulation 4(b) inserted paragraph 1A into schedule 5 of the Local Levels Regulations, as follows:

“1A – Requirement to close places of worship in a level 4 area to members of the public

- (1) A person who is responsible for a place of worship must close that place of worship, except for a use permitted in paragraph (2).
- (2) 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 a 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 persons, 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 sessions, vaccination centres or support in an emergency), provided that, in each case, the premises are used in accordance with the requirements of paragraph 8.
- (3) Sub-paragraph (1) does not prevent the use of premises, while those remain closed to members of the public, to take preparatory steps in pursuance of a requirement in paragraph 8.”

[17] Regulations 4(e)(i) and (f)(i) also remove the exemptions on attending places of worship as part of indoor or outdoor gatherings from paragraphs 11 and 12 in schedule 5 of the Local Levels Regulations. Thus, those regulations not only require the closure of all places of worship except for specified purposes (which include marriages and funerals, but do not include, for example, communion or baptisms); they also prohibit any form of communal worship indoors or outdoors. Additionally, the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 10) Regulations 2021 (SSI 2021/1) which were made on 4 January 2021, and laid before and approved by the Scottish Parliament on 5 January 2021, inserted in schedule 5 to the Local Levels Regulations new paragraphs 17 and 18. Paragraph 17 imposes a requirement that a

person living in a Level 4 area must not leave the place where that person is living.

Paragraph 18 provides examples of reasonable excuse for leaving that place for the purposes of regulation 5(4). The list does not include attendance at a place of worship, (although as the respondents point out, it is simply a list of examples, albeit a lengthy one, rather than an exhaustive list of what is deemed to be a reasonable excuse).

[18] Regulation 5 of the Local Levels Regulations provides that it is an offence for a person to contravene any of the restrictions or requirements in schedule 5 (with certain exceptions, including paragraphs 8(1)(b) and 9). A contravention of a direction or failure to comply with an instruction or prohibition, under regulation 4 is also made a criminal offence by regulation 5(3). It is a defence under regulation 5(4) to show a reasonable excuse. Any person committing an offence is liable, on summary conviction, to a fine not exceeding the statutory maximum, currently £10,000: regulation 5(5). Alternatively, a fixed penalty notice may be issued under regulation 7, the first such notice imposing a penalty of £60 with subsequent penalties doubling, to a maximum of £960.

[19] There are exceptions from the requirement to close premises. Thus, while the Local Levels Regulations require, by regulation 1, the closure of all "listed businesses", including for example, cinemas, sports stadia and conference centres, that requirement does not prevent the premises being used for any purpose requested by (again, for example), a health board or the Scottish Courts and Tribunals Service (regulation 1(3)(d)), thus allowing premises which would otherwise be closed to be used for certain purposes, such as the administering of vaccines, or the conduct of remote jury trials. Additionally, while retail premises must close, by virtue of regulation 2, that requirement does not apply to retail premises deemed essential, including food retailers, pharmacies, funeral directors, bicycle shops and off-licenses (regulation 2(3)).

[20] In short, the Local Levels Regulations, as amended by the Regulations, effectively close places of worship throughout Scotland. Since 5 January 2021 every area in mainland Scotland has been designated a Level 4 area (other areas having been added subsequently). Any person opening a place of worship, or congregating indoors or outdoors to worship would be committing an offence and would be liable to be dealt with as set out above in para [18].

Are places of worship truly closed? Do the Regulations criminalise worship?

[21] This is a convenient point at which to dispose of two issues which have arisen during the course of the case. The first is whether it is correct to speak of the closure of places of worship. Some of the respondents have claimed in public, and to Parliament, that places of worship have not closed because they can remain open for certain purposes as explained above. In their answers to the petition, the respondents were at pains to avoid using the petitioners' description of the Regulations as the Closure Regulations. It is of course true that the buildings themselves may open for certain purposes if it is safe to do so. But the issue is not whether the buildings which are used as places of worship may physically open their doors but whether they can be used for the purpose for which (as the name suggests) they were intended - for worship. There can be no doubt that places of worship may not open *for worship* and in that sense it is jejune at best, misleading at worst, to state that places of worship remain open. They do not. It is no more correct to state that churches remain open because certain activities may be carried out there, than it would be state that cinemas remain open because they are used as jury centres. The second issue is whether it is correct to categorise the Regulations as criminalising worship. Again, counsel for the respondents was keen to play down the implications of regulation 5(5), submitting that there was a

graded scheme whereby a person breaching the Regulations would first be required to go home in terms of regulation 4, following which a fixed penalty notice (or successive notices) would likely be issued under regulation 7, with prosecution only being resorted to as a last resort. I accept that if an individual slipped into a church which happened to be open as a food bank (say) for a short period of private prayer (which would be an offence, in terms of the Regulations) such a person would likely receive no more than a fixed penalty notice. On the other hand, were any of the petitioners to open their churches every Sunday, in open defiance of the Regulations, then it is difficult to envisage that being dealt with by any means other than prosecution. It is worth pointing out that the fine which may be imposed on conviction is the statutory maximum of £10,000, twice as much as the highest fine on the standard scale. Perhaps, rather than using the pejorative term “criminalising worship”, it is sufficient for present purposes simply to note that any person who breaches the Regulations, either by opening a place of worship, or by assembling with others for the purposes of worship, would be committing a criminal offence and to leave the matter there. I accept that the aim of the Regulations is not to criminalise worship *per se* but the fact can hardly be denied that they may have that effect.

Factual background

General

[22] To place the objections to the Regulations in context, it is necessary to rehearse the background in some detail. I will set out: the current state of knowledge about Covid-19; the history of the respondents’ response to the pandemic including the basis for their decision-making to date; the legislative history in relation to places of worship in Scotland (and elsewhere); the emergence of the new variant, and the governmental response to it, in

late December 2020 and early January 2021; and more recent pronouncements by the First Minister about possible relaxation of the restrictions on places of worship. The following narrative is obtained from the respondents' productions, including, in relation to the risks posed by Covid-19, *Framework for Decision Making* (December 2020) (number 7/7 of process) at pages 15-18, 25-26 and the paper prepared by SAGE titled '*SARS-COV-2 Transmission Routes and Environments*' (22 October 2020) (number 7/12 of process) (see in particular page 2); and from the affidavits of Professor Jason Leitch, National Clinical Director of the Scottish Government; Amanda Gordon, Deputy Director of Local Interventions; and Robert Marshall, Deputy Director of the Connected Communities Division of the Scottish Government, all of which I accept as accurate insofar as they impart purely factual information.

Covid-19

[23] Covid-19 is a potentially fatal respiratory disease caused by the highly transmissible severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) pathogen. Transmission of SARS-CoV-2 primarily occurs as a result of airborne droplets from an infected person being passed to others during close personal contact within 2 metres, and aerosols (respiratory particles) exhaled by an infected person being inhaled by others within close proximity or, in indoor settings, the same room for a prolonged period of time. The risks of transmission increase with, amongst other factors, the amount of time spent in the company of an infected person, poor ventilation and the number of interactions. Repeated group activities in indoor settings with poor ventilation, and with people closely packed in a small space are particularly high-risk. The corollary of that is that well-ventilated indoor spaces with people spaced out in a large space give rise to the lowest risk of indoor transmission (for a full list of

high and low risk factors, see SAGE paper, *SARS-COV-2 Transmission Routes and Environments*, 22 October 2020 table 1 (number 7/12 of process). Mortality and morbidity as a result of Covid-19 increase with age and so demographics are also relevant in considering the risks which arise from any given setting. Since the outbreak of Covid-19 in 2020, over 7,500 people have died in Scotland from Covid-19 within 28 days of having first tested positive for SARS-CoV-2 (number 7/30 of process) and, according to the same measure, over 124,000 people have died in the United Kingdom taken as a whole. To put the Scottish figure into the context of the new variant, approximately half of all deaths to date have occurred since the end of November 2020. The new variant is now the dominant strain in Scotland. The SAGE paper just referred to also states that understanding where transmission takes place and the modes of transmission is a “very challenging” task - note: not impossible - and is more difficult in settings such as public spaces where contact tracing is very limited. Again, there is a corollary, which is that where contact tracing is possible, identifying the place and mode of transmission will be, at worst, less challenging.

The basis of and Governmental structure for decision-making

[24] Scottish Government decision-making in relation to the pandemic is based on clinical evidence, expert advice, and a balanced assessment of the risks: see *Scotland’s Strategic Framework (23 October 2020)* (number 7/6 of process). This Framework was updated in February 2021 (number 7/19 of process). The updated version repeats what was in the earlier one, that the government’s strategic intent is to suppress the virus to the lowest possible level and keep it there whilst striving to return to a more normal life for as many people as possible: page 4. Information, data and advice are obtained from a variety of external and internal resources and considered in various different ways. Data on the

prevalence of the virus, test positivity and NHS capacity are reviewed formally at least once a week by the National Incident Management Team (chaired by Public Health Scotland), the 'Four Harms' group within Scottish Government which provides recommendations to Ministers, and Cabinet itself. The Four Harms are: harm to health caused by the virus; wider harm to health and well-being and to social care services; broader social harms; and harm to the economy. Regular meetings of the Scottish Government Resilience Committee coordinated by the Scottish Government Resilience Room (SGoRR) also take place between Ministers and senior officials to discuss particular elements of the pandemic response. SGoRR works closely with and obtains information and assessments from the UK Government's Civil Contingencies Committee (commonly known as 'COBRA'). Informal internal reviews of data by civil servants take place most days on a national and local level.

[25] There is also a Faith and Belief team, within the Connected Communities Division of the Equalities, Inclusion and Human Rights Directorate of the Scottish Government. This team regularly engages and consults with representatives of most faiths, religions and denominations in Scotland to enable dialogue and detailed discussions on ongoing Covid-19 related and emerging issues. Meetings are held weekly where discussions take place, on matters such as restrictions affecting places of worship including regulations and applicable guidance, giving an opportunity for representation of views, concerns, suggestions or more general interests of the faith communities to the decision makers within the Scottish Government. The Faith and Belief team provides its views to the Outbreak Management team which has been set up to collate evidence and data from scientists, policy leads, and experts to inform and make recommendations to the Four Harms group and through them the Scottish Cabinet.

The governmental and legislative public health response, with particular regard to places of worship

[26] Covid-19 was declared to be a pandemic by the World Health Organisation on 11 March 2020. On 13 March 2020, the first death attributable to Covid-19 was confirmed in Scotland. On 17 March 2020, the First Minister in a statement to the Scottish Parliament announced stringent public health measures directed to reducing transmission of the virus, including minimising social contact as much as possible and working from home. On 19 March 2020, the Cabinet Secretary for Communities and the Chief Medical Officer (CMO) wrote to faith leaders urging them to suspend communal worship and prayer in places of worship. The CMO and the Cabinet Secretary for Justice wrote on 19 March 2020 to Muslim communities, encouraging the closure of mosques. Most if not all places of worship closed on or around 20 March 2020 on a voluntary basis.

[27] On 26 March 2020, legal restrictions on movement and gatherings came into force: The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (SSI 2020 No 103). As a result of regulation 4(6) of those regulations, places of worship were required by law to close except for certain permitted uses (funerals; broadcasting an act of worship; or providing essential voluntary services or urgent public support services: regulation 4(7)) subject to minimum distancing requirements. Similar provisions (including criminal sanctions) were in force as regards places of worship for similar periods in England, Wales, and Northern Ireland. Regulation 5(1) of SSI 2020 No 103 put the 'stay at home' requirement into law. On 23 April 2020, the Scottish Government published its *Framework for Decision Making* setting out its approach to making decisions about transitioning out of the lockdown restrictions then in force. The Scottish Government published *Further Information and Supporting Evidence* on 5 and 7 May 2020 respectively.

[28] On 22 June 2020, an amendment to regulation 4(6) of SSI 2020 No 103 inserted a provision permitting use of, and so attendance at, a place of worship for private prayer and contemplation, notwithstanding the requirement to otherwise stay at home. Similar provisions were made at similar times in England and Wales. Slightly earlier provision was made in Northern Ireland.

[29] On 10 July 2020 in Scotland, the ‘stay at home’ requirement imposed by regulation 5(1) of SSI 2020 No 103 was revoked. On 15 July 2020, regulation 4(6) was also revoked. From that date, the right to communal worship at places of worship in Scotland was reinstated, subject to various ‘reasonable measures’ requirements being imposed with regards to distancing measures and the number of persons being admitted at any one time.

[30] On 14 September 2020, SSI 2020 No 103 was revoked in its entirety, and replaced by the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SSI 2020 No 279). Places of worship were not closed by those regulations, although mitigation requirements were imposed. On 9 October 2020, SSI 2020 No 279 was replaced by the Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (SSI 2020 No 318). Again places of worship were not closed, including in the “protected area” (covering the Central Belt of Scotland) which was subject to stricter measures, although, again, mitigation requirements were imposed.

The Strategic Framework and the ‘Local Levels’ approach

[31] On 23 October 2020, the Scottish Government published *Scotland’s Strategic Framework*, above. It records the Scottish Government’s recognition of the important role of congregational worship in supporting spiritual wellbeing and its hope at the time of

publication that “places of worship can safely remain open with restricted numbers”, subject to evidence-based review: page 47. It states, at page 3: “There is no acceptable number of people we are willing to let become infected”, although this phrase has been dropped from the February 2021 version.

[32] On 2 November 2020, SSI 2020 No 318 was revoked and replaced by the Local Levels Regulations. In *Scotland’s Strategic Framework*, Level 4 is described as entailing “measures [which] would be designed to be in place for a short period, to provide a short, sharp response to quickly suppress the virus”. None of the levels of protection provided for the closure of places of worship. In contrast, in England and Wales during what is commonly referred to as the ‘second lockdown’, places of worship were closed for communal worship from 5 November 2020 to 2 December 2020. As with the first lockdown, similar criminal sanctions for breaches of the relevant public health regulations applied there.

The new variant

[33] In December 2020, evidence began to emerge of a new variant of SARS-CoV-2 with increased transmissibility. Information was received by the Scottish Government from SAGE (number 7/10 of process, discussed below) which identified that the new variant (B.1.1.7) was estimated to have an increased rate of transmission of between 40-70%. At a meeting attended by, among others, the First Minister and Professor Leitch on 16 December 2020, advice was received from Professor Sir Jeremy Farrar, a British Medical researcher, who is currently part of SAGE, that, whilst much was unknown about the new variant, what was known showed that there was clear justification for strong measures - closing down as many premises as possible as soon as possible - being taken at the earliest point. The minutes of this meeting have not been produced.

[34] The increased transmission risk from the new variant led to an assessment by the Scottish Government of all activities that involved different households meeting, including attendance at places of worship. The outcome of that assessment is recorded in a Scottish Government paper entitled "*Harm 1 The Direct Impact of Covid - focus on transmission risk and impact of R*" dated 21 December 2020 (number 7/11 of process). Particular risks in relation to duration of contact; regularity of attendance; and aerosol and droplet transmission were identified.

[35] On 23 December 2020, a paper was received from the SAGE Environmental and Modelling group (SAGE-EMG) and the Independent Scientific Pandemic Insights Group on Behaviours (SPI-B) titled *Mitigations to Reduce Transmission of the new variant SARS-CoV-2 virus* (23 December 2020) (number 7/10 of process). That paper identified that previous mitigations continued to be appropriate but were unlikely to be sufficient in relation to the new variant, especially in winter; and that the appropriate strategy required to include "reducing indoor contacts to the lowest level possible": page 1. Despite the lack of evidence for the precise mechanisms involved, the paper suggested that "for a given exposure there is a greater likelihood of infection, and hence there is a need to take further actions to reduce exposure to the virus in order to mitigate risks": page 2, §3. The possibility of a higher viral load, which could increase the amount of virus generated by respiratory activity, was also identified: §4. There was undeniably a worsening of the problem posed by COVID, the scale of which can be seen from the numbers of COVID-related deaths in Scotland since 2 November 2020. On that date there had been 2,849 such deaths registered in Scotland since the start of the pandemic 8 months before; by 4 January 2021 the figure had reached 4,622. As recorded above, the present figure stands at over 7,500.

[36] Also on 23 December 2020, the Faith and Belief Team sent an internal email (number 7/33 of process) in response to a request to advise on the implications of the First Minister deciding to opt for full closure of places of worship. After noting that the projected move of most of Scotland into Level 4 on Boxing Day would in any event entail a significant reduction in gatherings at places of worship, the recommendation was that the extension of Level 4 and associated reduction of the cap on places of worship across Scotland from 50 to 20 (a cap which existed only in guidance) would on a Four Harms assessment represent the most proportionate response to concerns around the exponential growth in COVID infections. The reasons given were: an absence of any evidence of COVID transmission at a place of worship in Scotland capped at 50, let alone 20; the restriction of the right to religious freedom was recognised to be a significant step; and what is described as “stakeholder pushback” on existing caps from certain faith groups.

[37] Also on 23 December 2020, a weekly report from Public Health Scotland was published (number 7/13 of process) reflecting data as at 21 December 2020. The weekly reports from Public Health Scotland include information from contact tracing ‘Test and Protect’ interviews which seek to identify the places which an individual who has tested positive has visited in the 7 days prior to symptom onset (or date of test if asymptomatic). The information is primarily used for tracing purposes and cannot positively identify where transmission took place. It can, however, be used to identify potential sources of exposure. The data from the 23 December 2020 report identified that, in the week ending 20 December 2020, 45 individuals who had tested positive had visited a place of worship and prayer: page 20. The equivalent information published on 7 January 2021, reflecting data as at 4 January 2020 and so the period after Christmas, showed that figure had increased to 110: number 7/14 of process, page 20.

[38] To put the figure of 45 into context, it is instructive to look at the entire table in which that figure appears, and at the two following tables. They are as follows (the corresponding figures for 7 January 2021 are shown in parentheses):

Table 13 - Events and Setting - Events and Activities (week ending 20 December)

Shopping	1,794	(4,561)
Eating out	674	(1,171)
Personal Care	511	(2,387)
Visiting a health or social care setting	502	(669)
Exercising	271	(501)
Visiting friends or relatives	235	(1,960)
Entertainment and day trips	136	(269)
Sport events	64	(68)
Private events and celebrations	63	(250)
Worship and prayer	45	(110)
Other	44	(19)

Table 14 - Events and Setting - Household or Accommodation (week ending 20 December)

Event Category	Event Cases	
Your own home, or family home	838	(2,227)
Other accommodation	127	(319)
Shared accommodation	67	(79)
Supported living	49	(88)
Holiday accommodation	28	(21)

Table 15 - Events and Setting - Travel and Commuting (week ending 20 December)

Event Category	Event Cases	
Public transport - bus	188	(295)
Car share	140	(603)
Taxi	112	(255)
Train - domestic	63	(94)
Other	133	(148)

[39] In passing, I comment that there does not appear to have been discussion of the comparative aspect of these figures; for example, that of all the single activities undertaken in the week to 20 December 2020, the one which had the lowest incidence of Covid-19 was worship and prayer (“other” presumably comprising a panoply of activities). That cannot quite be said for the figures for 7 January 2021, where fewer people with COVID had

attended a sports event or caught a train than had gone to a place of worship, but in that week the figure for worship and prayer remained low in comparison with other activities.

[40] On 29 December 2020 a Scottish Government internal memo (number 7/34 of process) was submitted to the Cabinet Secretary by the Connected Communities team, its stated purpose being to outline the options for tightening of restrictions on places of worship at protection Level 4. The memo recorded (at paragraph 16) that the Scottish Government had been notified of only one small outbreak with a church in Lanarkshire, involving two individuals. A caveat was given, that there may have been more outbreaks of which the Government had not been notified, but the caveat was itself qualified by a recognition that even if there had been more outbreaks, they remained low, officials believing that there was a strong adherence to the guidance already in place since July 2020. Four options were set out. Option A was for no change to the current Level 4 position, which would result in restricted numbers of up to 20 people being able to attend a place of worship in Level 4 areas. This option, it was said, would reduce the (already low) risk of transmission still further, and was the recommended option. Option B was to restrict the number of people permitted to attend. This option was not recommended, on the grounds that it would lead to confusion, would potentially discriminate against places of worship that usually catered for larger congregations and that 20 was assessed to be the minimum number that stakeholders were likely to accept for meaningful attendance. Option C was to restrict attendance at places of worship to individual prayer. This option was not recommended, on the grounds that it could lead to accusations of bias. Option D was to fully restrict the operation of places of worship. It was recommended only in the instance that there was agreement that to do otherwise would:

- “(i) compromise the integrity of the ‘stay at home’ message, and/or
- (ii) create insurmountable inconsistencies as level 4 guidance is further tightened for similar-sized gatherings and arrangements with similar transmission risks; and/or
- (iii) run counter to the protection of public health.”

[41] The memo goes on to state:

“If the decision is made to restrict level 4 further or to move to a ‘stay at home’ message, in the first instance officials recommend **option A** is implemented. A significant reduction in numbers of those who can attend places of worship is already taking place on 26 December as most of the country enter into level 4 restrictions. If a further tightening of the level 4 restrictions specifically for places of worship is deemed necessary, officials would recommend **option D** be pursued. Option B - whilst of course reducing numbers and thus the chances for the virus to transmit - is assessed as unlikely to make much of a difference in public health terms. However, *Options B + C would pose a risk to stakeholder relations and would be more difficult to justify from a faith policy perspective than option D* [emphasis added].

We have consulted clinical advisers and their preference is option A in almost all occasions but option D in extremis.”

[42] Although the date it bears is misleading (since it wrongly bears the date 21 December 2020, a throw-back to an earlier incarnation) another Four Harms assessment (number 7/60 of process) accompanied the memo of 29 December 2020. This assessed the options of private worship only, and complete closure, against each of the Four Harms. Among other things, it commented that while places of worship gave rise to moderate to high risk, “places of worship have introduced strong mitigations...hence the benefits from closure may be lower”; further, that from a new Four Harms perspective, the impact from option B - reducing the numbers - would be marginal.

[43] On 31 December 2020, the Head of COVID Analysis sent an internal email (number 7/35 of process) commenting from a Four Harms perspective on the possible restrictions on places of worship. Reducing the numbers, it was said, would make “no real difference” so the options considered were private prayer only, or complete closure (options C and D in the memo of 29 December 2020). Closure would have a moderate to

high impact on harm 1, whereas private prayer would have a more modest impact (“quite low”). This email proceeded on the basis that 800,000 people regularly engaged in congregational worship. This asserted figure falls to be contrasted with what was stated in the Four Harms assessment number 7/60 of process, which stated that “up to” 800,000 people regularly attend places of worship (later in the same document it is said that “a decreasing proportion of the population attend places of worship”).

[44] Since the assertion that 800,000 regularly engage in worship can plainly not be justified by the statement that “up to” that number do so, it is worth taking a moment to look at where that figure, whether as an estimated actual number or simply as a maximum, comes from. The issue is dealt with by Robert Marshall, at paragraph 9 of his affidavit, in which he, too, queries the 800,000 figure. He refers to a report published in 2016 (number 7/48 of process) which estimated that there were around 390,000 regular churchgoers in Scotland of the Christian faith (which represented the vast majority of those who attended places of worship). Even if one were to assume that every single person of those who professed other faiths regularly attended their respective places of worship, the total number attending places of worship regularly would still, based on the figures quoted by Mr Marshall at paragraph 8, come in at fewer than 500,000. He tells us that he sought clarification from the author of the 31 December email as to where the figure of 800,000 had come from. The answer given was that according to 2011 census data, over 2.9 million people in Scotland had affiliated themselves with a religious group, but that is a far cry from saying that between a third and a quarter of those people attend their place of worship regularly. Mr Marshall goes on:

“whilst the exact number of practising individuals was unknown, using Census, ONS and Scottish Church Census figures that census estimated that at that time there

were around 380,000 -800,000 individuals who regularly attended places of worship across Scotland”.

[45] I find that explanation unhelpful: what is “that” census which is referred to, after the reference to two Censuses? Be that as it may, any estimate which is as broad as 380,000 to 800,000 in no way justifies the statement in the email, without qualification, that 800,000 people regularly engage in worship. This is potentially significant, since in the context of a Four Harms assessment which was considering the impact of church closures, it clearly makes a material difference to the impact if one assumes that the number of people unable to attend is 800,000 as opposed to less than half that number. The difference is greater still if one factors in that social distancing and the density requirements may reduce still further the numbers who can attend places of worship for so long as the pandemic is with us.

[46] Going back to the email of 31 December 2020, it is interesting in other regards. It also states:

“From a harm 2 and 3 perspective we know that the mental health deterrent (*sic*) of restricting congregational worship or closing places of worship are potentially very significant for faith communities. Increased isolation and loneliness and a loss of community could impact on mental and potentially physical health.”

On this passage, I observe that (in contrast to the Four Harms assessment number 7/60 of process) there appears to be no recognition of the *spiritual* harm caused by an inability to worship, which goes beyond increased isolation, loneliness and loss of community. The email then concludes:

“Alternately (*sic*) it may be a relief to some more vulnerable members of the congregation if they know they cannot attend and a difficult decision on whether to risk attending is take (*sic*) out of their hands by closure.”

Senior counsel for the additional party was particularly scathing about this statement which he described as “breathtakingly patronising”. Whether that is so or not, insofar as the email appears to proceed on the basis that a positive benefit would be conferred by closure, which

could not be conferred by other means (such as advice from the church itself not to attend), it is surely going too far.

[47] The next significant piece of advice was contained in a submission by the Director of Outbreak Management to the First Minister dated 31 December 2020 (number 7/62 of process). Under the heading “Further measures” this confusingly states:

“Further measures are in development and could be implemented shortly, in the light of four harms analysis, through changes to law and guidance. These have all been discussed with relevant policy leads across the SG, and most but not all, have been agreed. They include:

- Prohibition of/ further restrictions on weddings;
- Prohibition of/ further restrictions on funeral wakes;
- Closure of places of worship
- Some further business closures, such as ski centres.”

The confusing aspect is that it is not clear whether the four measures listed are among those which have been agreed, or are the things which have not been agreed. In any event, nothing which has been produced by the respondents shows that closure of places of worship had been agreed by the “policy leads” by that stage. The confusion is perhaps clarified in Annexe A to the submission which lists three options for restricting places of worship (option A which previously was recommended, is not presented as an option).

What was previously option B - restricting numbers - was not recommended because (a) it might cause confusion if it were different from the number permitted to attend weddings and (b) it might be “seen to” further discriminate against places of worship that usually cater for larger congregations. Option C - private worship was not recommended, because it was seen to be unfair to faiths for whom individual prayer was not established practice. The option that places of worship be unable to admit worshippers, even for individual prayer or contemplation, was recommended, the advice stating:

“This reflects the position for places of worship during the first phase of the pandemic and would ensure that there could be no accusation of discrimination against certain faith groups”.

I deal with the discrimination point elsewhere but meantime observe that there is no mention or apparent recognition of the facts, first, that during the first phase of the pandemic, social distancing was in its infancy, face coverings were on the distant horizon and the requirements which now exist in the Local Levels Regulations, and associated guidance simply did not exist; and, second, that as recognised in other advice and assessments, compliance with that guidance by all faith groups had been very good.

[48] Finally in relation to the submission of 31 December 2020, as senior counsel for the additional party pointed out, there is an interesting contrast between the approaches to places of worship and workplaces respectively at paragraph 39 in Annexe A, where it states that the transmission risk in the latter is to be left to the wide range of guidance on safe working and to existing regulations which place a range of duties on operators of premises to take steps to minimise the risk of transmission.

[49] The next development was that a report was prepared for the Scottish Cabinet by the Deputy First Minister, with a series of recommended measures, which included in relation to places of worship, the following:

“Closing places of worship. Since stay-at-home rules do not allow leaving the home to attend a place of worship for a service or for private prayer, these would be closed for all purposes other than broadcasting a service or conducting a funeral or wedding.”

Whatever one makes of the proposal to close places of worship, it could hardly be said at that stage already to be justified by the stay at home rules. The statement begs the question of whether those rules should allow for individuals to attend places of worship, as they

allow for other exceptions. Alternatively, if the Deputy First Minister's intention was to state the then-existing law, then his statement was inaccurate.

[50] On 4 January 2021, the Scottish Government published a paper titled *State of the Epidemic in Scotland* (number 7/9 of process). That paper identified that in the week to 4 January 2020, a step change had occurred in the incidence and prevalence of the virus in Scotland (including a doubling of daily case numbers, and a 65% increase in the cumulative 7-day incidence rate) which was anticipated to lead to increased hospital admissions and mortality, even with nationwide Level 4 restrictions: page 1. The paper stated that the rapidly increasing dominance and case rate of the new variant in Scotland was expected to increase further in line with the situation in south-east England and London, where over December the case rate per 100,000 of population had, respectively, increased by nearly four and over five times the case rate at the start of that month. Those increased rates of infection were in spite of significant public health measures to try to curb the spread having been introduced: page 2. At that stage, London and the south-east of England were already in the highest 'tier' of restrictions applicable at that time. Modelling evidence (summarised in the '*State of the Epidemic in Scotland*' paper) was prepared by Professor Roger Halliday, the Scottish Government's Chief Statistician and Data Officer. It suggested that, even under the new nationwide Level 4 restrictions, the effect of the new variant would lead to a substantial increase in cases in Scotland and an increase, beyond capacity, in hospital and ICU bed demand: (number 7/9 of process) - in short, to the NHS being overwhelmed.

[51] The proposals were subsequently approved by Cabinet on 4 January 2021 and on that day the First Minister gave a statement to the Scottish Parliament (number 7/24 of process) in which she announced the re-introduction of lockdown restrictions in Scotland

and the closure of places of worship, including for communal prayer. The First Minister's statement recorded her awareness of the importance of communal worship and the position of the Scottish Government that the restriction was necessary to reduce the risk of transmission. As we have seen the so called stay at home requirement was reintroduced on the following day.

[52] Although the measures contained in the Regulations as regards places of worship are not currently replicated elsewhere in the United Kingdom, a number of places of worship in other parts of the United Kingdom have closed for communal worship on a voluntary basis; and places of worship have been closed in the Republic of Ireland.

[53] At the Covid-19 Committee meeting on 8 January 2021, the Deputy First Minister in answer to a question about the closure of places of worship, stated:

“That is a difficult issue, because nobody in the Government wants to restrict people's ability to take part in communal religious worship. That is the last thing on earth that I want to do. However, the point that has run through all my answers today is that we must acknowledge that human interaction - in whatever context, whether it be an early learning centre, a school, a factory, a shop, a bank, a hospital or a church or other place of worship - gives the virus an opportunity to spread.

Therefore, if we cannot, as a society, confidently assume that our national health service can withstand growth in infection that results from the level of human interaction, we must take action to minimise the amount of human interaction. That is crucial if we are to reduce prevalence of the virus.

Sadly - and much to my personal regret - that cannot exclude places of worship. We must acknowledge that, because they are places where people come together, there is potential for the virus to spread. If we do not take action to minimise that interaction, we will not interrupt flow and circulation of the virus.”

[54] In response to a further question as to the basis for the curtailment of the fundamental human right of freedom of worship and religion, the Deputy First Minister replied:

“I contend that a fundamental right has not been curtailed...Every Sunday morning, we sit in our house and participate in a Catholic mass that is led by one of a number

of leaders of the Catholic church. We are able to exercise that right safely within our own home. *Therefore, our rights are in no way constrained by the restrictions* [emphasis added].”

[55] At the same meeting, Professor Leitch stated:

“From last week’s test and protect data, we know that 120 people went to places of worship during their infectious period. That creates a risk that I am unwilling to take in relation to my advice to decision makers. The decision makers then choose what to do with that advice - that is their job. However, I am afraid, particularly because of the broad demographic of people who attend places of worship - people of all ages, with all types of diseases - that we cannot protect those individuals robustly enough, so at this point in the pandemic, closing places of worship is the right thing to do.”

[56] When then asked for data in relation to each area of Scotland, and what evidence there was that the virus has spread as a result of worship service being held, Professor Leitch replied:

“I should add that the data that Mr Lindhurst seeks is impossible to get - it is unavailable. I cannot tell you where everybody got the virus. Every sector asks for exactly that data. All that I can tell you is where people were during their infectious period. I cannot tell you that they passed it on to Frank or Mary, or that they got it from Frank or Mary, because of the incubation period of the particular infectious agent. Just as the hospitality industry seeks that data, so do those who advocate - like me - for places of worship. That data is unavailable.”

[57] And finally, the Deputy First Minister again:

“It is ultimately for ministers to make decisions on the steps that we believe are appropriate in trying to interrupt circulation of the virus. Fundamentally, a range of options are available to us in terms of steps that we can take, and ministers are ultimately accountable for the steps that they take. That is what we do with the advice that is provided to us by advisers such as Professor Leitch; we reflect on that advice and we take decisions accordingly.”

Events since 8 January 2021

[58] On 18 January 2021, the Cabinet Secretary for Communities and Local Government wrote to Scotland’s faith and belief communities about the restrictions contained in the No 11 Regulations. The Cabinet Secretary stated that she understood and appreciated

“the significant role communal worship plays in supporting people’s mental and spiritual well-being, and its importance as a lifeline for many in preventing social isolation and loneliness”.

She committed to ensuring that places of worship would be amongst the first sectors to be seriously considered for any easing of restrictions. On 16 February 2021, the First Minister in a statement to the Scottish Parliament stated that priority would be given to getting places of worship open again. *Scotland’s Strategic Framework Update* of 23 February 2021 set out a proposed timescale for the re-opening of places of worship on a restricted numbers basis and subject to conditions being met, around 6 weeks after the partial reopening of schools. On 23 February 2021, the First Minister stated the intention of the Scottish Government to allow the reopening of communal worship in time for Passover and the Easter Weekend (number 7/21 of process). A review in relation to the measures contained in the Local Levels Regulations, as amended by the Regulations was carried out during the week beginning 1 March 2021. All such measures are currently said to be under review. Most recently, on 9 March 2021, the First Minister announced the respondents’ intention to allow places of worship to open, if the data permits, from 26 March 2021.

Impact (what is worship?)

[59] In order fully to understand the impact of the closure of places of worship, and the extent to which worship is or is not impeded by the Regulations, it is necessary first to understand what worship entails; or, at least, for the purposes of this petition, what it entails for the petitioners and for the additional party. The closure of places of worship has the obvious impact that no-one can attend there in order to worship; and as we have seen, it is not currently possible lawfully to assemble anywhere else, indoors or outdoors, to worship. The respondents’ position on this is somewhat ambivalent. On the one hand, they

accept that there has been an interference with the petitioners' right to manifest their religion. On the other hand they repeatedly assert that worship is possible on-line, a position which is maintained in their answers to the petition at answer 30; and they aver in answer 28 that "churches continue to engage in collective worship, prayer and pastoral care albeit by different means". See, too, the Deputy First Minister's comment to the Covid-19 Committee, referred to at para [54] above, that "our rights are in no way constrained by the restrictions". Additionally, in a submission which appeared to rile Mr O'Neill for the additional party, counsel for the respondents submitted that private prayer in a church was not required because individuals could pray alone, anywhere.

[60] In support of their respective positions, I have been presented with a welter of material on behalf of the petitioners, and the additional party. The material founded upon by the petitioners includes a report by Martin Parsons (number 6/4 of process), who I accept has the necessary experience and expertise to be an expert witness. I also have letters from several of the petitioners (numbers 6/9 to 6/17), commenting, among other things, on the essential features of the concept of worship in their faith. (I have been careful to discount any expressions of opinion on the proportionality of the Regulations, and on whether or not Covid-19 poses a risk to the health of those who catch it.) I accept from these that central to the Christian faith practised by the petitioners is the importance of physically congregating to undertake corporate worship; communion; baptism; and congregational ministering through spiritual gifts. In so far as Roman Catholicism is concerned, I have affidavits from the additional party himself, one archbishop and two bishops. Eucharistic Celebration, at a public Sunday Mass, is of particular importance. The attendance at mass is seen as an essential, not optional, element of the Catholic faith. The sacrament of confession can be administered only in the presence of a priest and baptism, which is the means by which

children enter the Catholic Church, also requires physical presence. Canon law sets down the conditions for public corporate worship, which involves, among other things the physical gathering together of Christians for prayer, proclamation of the Christian Gospel and the celebration of Holy Communion by Christians meeting together in one place. In addition, church buildings have a particular significance within Catholicism (which is why praying at home is not equivalent to praying in a church). A consecrated church building is considered to be a sacred space. The sacramental grace cannot be received from a video-recorded or video-streamed service. Again, I have been careful to disregard those parts of the affidavits which go beyond the purely factual and into the realms of expressing opinion on the closures. I have also disregarded the financial impact of the Regulations upon the additional party and others since in that regard churches are in no different a position from any other organisation whose finances have been adversely impacted by Covid-19.

[61] I accept the evidence of the petitioners and of the additional party that worship in their faiths cannot properly take place on-line, by means of internet platforms. The respondents have produced various Decrees and other documents issued to Bishops (numbers 7/43 to 7/46 of process) giving advice as to alternative means of celebration of the liturgy, but these can best be described as “work-arounds” during the pandemic (and are time-limited). The same can be said of other on-line broadcasts and services. These are best viewed as an alternative to worship, rather than worship itself. While certain church practices - the reading of prayer, preaching and teaching - may be observed, or even, in the case of live streaming, participated in to a certain extent, on a computer screen or a television whilst alone, in the solitude of one’s own home, that does not amount to collective worship. The essential features of worship identified above - including communion and

baptism - cannot take place by those means. While it is true, as the respondents also submit, that care and assistance may continue to be provided to vulnerable individuals in the circumstances set out in regulations 13 and 18 of the Local Levels Regulations, such services do not amount to worship, any more than do other services which a church or other place of worship may provide to its local community, such as a lunch club. Equally, while funding has been made available by the respondents to encourage the participation in on-line services by elderly and vulnerable people, among others, to assist digital connectivity, that does not and cannot provide a substitute for worship.

[62] It is significant that the respondents do not dispute that the petitioners' beliefs (and those of the additional party) are genuinely and sincerely held. It therefore matters not, at least in the context of this discussion, that some people, among the same or other faith groups, hold different views, or that they have supported the measures as being appropriate and necessary on public health grounds. Insofar as their support is based on their views on proportionality, those views are equally as irrelevant as those of the petitioners. It is not for them, or the respondents, to dictate to the petitioners or to the additional party, that, henceforth, or even for the duration of the pandemic, worship is to be conducted on-line. That might be an alternative to worship but it is not worship. At very best for the respondents, in modern parlance, it is worship-lite.

[63] For all these reasons, I am clear that the effect of the closure of places of worship is that the petitioners, and the additional party are effectively prevented from practising or manifesting their religion, however many broadcasts or internet platforms may exist.

The constitutional issue

Introduction

[64] The petitioners' argument in relation to the constitutional issue is that insofar as the Regulations prevent worship, they are beyond the competence of Parliament, and therefore beyond the competence of the Scottish Parliament and of the respondents. They are, say the petitioners, an interference with the practice of the Christian religion in Scotland, unprecedented since the persecution of the Presbyterian church instituted by the Stuart kings.

[65] The fundamental constitutional principle relied upon by the petitioners is that, in Scotland, there is a division of authority between the church, which exercises spiritual authority; and the state, which exercises civil authority. The real issue between the parties is not so much whether that is a constitutional principle, as whether in this case the respondents have crossed the line between civil and spiritual authority. Nonetheless, to place the importance of the principle in context, it is necessary to say something of the history.

The historical background

[66] The historical background is set out in the report by Martin Parsons. It is unnecessary to repeat the terms of his report at length. He tells us that at the Reformation, Protestant Christians in Scotland adopted the "doctrine of the twa kingdoms", whereby God had ordained both civil government and the church, each having a distinct role. As both were ordained by, and subject to, God, civil government must not interfere in the church, but must be obeyed insofar as the Word of God allowed. The General Assembly Act 1592 embedded this as a public theology within Scots law. Among other things, that Act made

clear that the kirk had exclusive authority to deal with all matters of church life and worship. It also imposed on the elders of each church the legal responsibility to ensure that regular worship took place, including preaching and the ministry of sacraments. Elders were thus required by law to ensure that Holy Communion was celebrated and that baptism of infants and converts was carried out. There followed an attempt by the later Stuart monarchs to disregard the 1592 Act, as part of a move towards royal absolutism, leading to a century of religious conflict. The covenanter struggle which took place at that time was an example of the church's resistance to attempts at government interference in church life, and was widely revered as an example of Christians standing up under severe persecution. That came to an end with the accession of William and Mary to the throne following the Claim of Right Act 1689, heralding a new era of religious toleration in Scotland. The inviolability of the protections of church freedoms including the jurisdiction of the church over worship were affirmed in the Acts of Union of both the Scottish and Westminster Parliaments. The independence of the church and freedom from interference by civil authorities has for many years been central to the self-identity of the majority of protestant churches within Scotland and is understood by many to be a theological imperative.

Submissions for the petitioners

[67] Under reference to Mr Parsons' report, and the "doctrine of the twa kingdoms", senior counsel for the petitioners submitted that insofar as the Regulations criminalised the four central aspects of worship in which the petitioners believed - assembly to worship, the sacraments of communion and baptism, and congregational ministry - they were unconstitutional. It was a fundamental feature of the constitution in Scotland that the State had no authority over the worship of the church. Worship fell within the sole province of

the church. Counsel referred to the General Assembly Act 1592, the Confession of Faith Ratification Act 1690, the Act for Securing of the Protestant Religion 1706, the Union with Scotland Act 1706, and the Union with England Act 1707. In particular, the 1707 Act guaranteed to Scotland in all time coming the independence of its church (and for that matter, its legal system). The consequence was that the Westminster Parliament simply had no power to interfere in the church, nor could it confer power to do so on any other body. It followed that the Coronavirus Act 2020, insofar as it permitted the closure of premises, could not apply to Scottish churches. The Regulations threatened the independence of the church. The petitioners stood upon the shoulders of the Covenanters. The Church of Scotland Act 1921, did not legislate for the church; rather it was merely declaratory of and recognised Articles prepared by the church and removed any doubt that “matters spiritual” fell within the exclusive jurisdiction of the church. Article IV articulated the church’s right and power, subject to no civil authority, to legislate and adjudicate finally, on all matters of doctrine, worship, government and discipline. In *Ballantyne v Presbytery of Wigtown* 1936 SC 625, the election of a minister was held to be a spiritual matter in which the court had no jurisdiction. LJC Aitchison analysed the Act, concluding, at page 654, that it did not confer rights upon the church but was a recognition by Parliament of the Articles framed by the General Assembly in the exercise of what it claimed to be its own supreme powers. Although in *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28 a claim by a minister for sex discrimination was held not to be a spiritual matter, that was because the parties had entered into a contract of employment binding under civil law, thereby deliberately leaving the field of matters spiritual. That could not be said of the petitioners in the present case.

[68] Closure of places of worship, thereby preventing the church from carrying out corporate worship, communion, baptism and congregational ministry trespassed into the sole province of the church. Those were all spiritual, not civil, matters. It was wrong to categorise the closure as being a civil matter, as if it were simply a law affecting a particular building or a matter extraneous to the church. The Regulations were therefore beyond the power of Parliament, and by extension, the Scottish Parliament and the respondents. It mattered not what crisis was faced by the government: it simply had no power to interfere in spiritual matters. In criminalising worship, the respondents had crossed a line which they were not permitted to cross. It may be that it was open to the state to impose other civil measures which might impact upon the right to congregate to worship (such as a 24 hour curfew) but that was not what they had done. The church could be trusted to act responsibly in relation to all matters pertaining to the pandemic (as it had done).

Submissions for the additional party

[69] Senior counsel for the additional party presented the constitutional argument from a different perspective. In his comprehensive written Note of Arguments and a wide-ranging written submission, he referred to certain Canons of Roman Canon law, and to the essential aspects of the additional party's beliefs, set out above in para [60]. From a specifically Catholic perspective to allow for weddings and funerals but to ban the use of churches for baptism was a peculiarly disproportionate restriction because baptism was the necessary "gateway" sacrament to participation and reception of the other sacraments recognised in Catholic teaching. The Regulations, by forcing the additional party to close the churches for which he was responsible, had placed him in an impossible situation. He could not comply

with his canonical obligations without being subject to the rigour of the state's criminal laws for breaching the Regulations.

[70] Senior counsel also embarked upon what he himself acknowledged to be a historical *excursus* on the principle of religious toleration and the preservation of religious pluralism in Scotland, both before and after the 1707 Union. He not only referred to the Acts of Union, but traced the historical reasons therefor, drawing a distinction between Scotland and England insofar as the relationship of Church and state was concerned. He also traced the history of the principle of religious toleration in England and Scotland respectively. The substance of his submission was that the principle of religious toleration, the right to public worship and the protection and preservation of religious pluralism were constitutional principles with far deeper roots than the subsequent constitutional principles of equality of treatment regardless of sex or race. These principles were so embedded that they imbued among other things the extent of the powers acceded to the Scottish Parliament and to the respondents. Thus the powers conferred on the Scottish Parliament and on the respondents had always to be read and applied against the background of the requirement to respect those fundamental principles. That all said, the additional party accepted, at least for the purposes of the present petition, that the respondents were entitled to impose some restrictions on the right to practise religion in general, and Catholicism in particular; and by formulating the argument as being one of a requirement for *respect for* the principles of religious toleration and pluralism, did not go so far as to argue that the state could not interfere at all with the ability of the additional party to practise his religion, irrespective of circumstances. Indeed, he accepted in terms that the public health objectives of the measure were sufficiently important in principle to justify lawful and proportionate limitation of his

fundamental rights, both under the Convention and at common law. However, his position was that the intervention by the respondents was neither.

Submissions for the respondents

[71] Senior counsel for the respondents submitted that the Regulations did not relate to spiritual matters and so did not constitute an unlawful interference with the independence of the church in Scotland. The 1592 Act conferred power and jurisdiction on the units of Church government in ecclesiastical and spiritual matters alone. The 1592 Act insofar as it remained in force had to be read in accordance with the 1921 Act, which recognised the Declaratory Articles of the Church of Scotland and established the independence of the Church of Scotland in spiritual matters alone. Spiritual matters for the purposes of the 1921 Act were matters of doctrine, worship (in the sense of the system and principles thereof), government, discipline, membership and office, constitution and membership of Church courts, the mode of election of office-bearers and the “boundaries of the spheres of labour” of its ministers and other office-bearers. Section 3 of the 1921 Act provided that nothing in that Act “shall affect or prejudice the jurisdiction of the civil courts in relation to any matter of a civil nature”. The state may, and does, regulate a host of civil matters that can affect places of worship, including, for example, health and safety law, compulsory purchase and planning; and occupiers liability. These were civil, not spiritual, matters. The 2020 Act made no exception for premises used as a place of worship. The Regulations were made by the respondents acting within devolved competence under primary legislation of general application. Their objective was to protect life and public health by reducing as far as possible the incidence and transmission of the virus. Properly interpreted, they could not be said to be directed at spiritual matters. They were not directed at, and did not interfere

with the independence of, the church. The petitioners' position could not be said to be comparable with that of the Covenantors.

[72] As regards the additional party's submissions, Canon law did not provide a basis upon which the court could hold that the Regulations are unlawful. Its relevance was restricted to illustrate the impact on the additional party of the Regulations. That said, it was evident from other provisions of Canon law that there were recognised exceptions within Canon law, which did not require physical presence within church. Further the Catholic Church had specifically addressed the implications of the pandemic for its liturgical celebrations in a number of documents issued by the Congregation for Divine Worship and the Discipline of the Sacraments and in an article on the Vatican website (numbers 7/44 to 7/46 of process).

Decision on the constitutional issue

[73] There is much common ground between the petitioners and the respondents on this issue. Both accept that the effect of the series of statutes founded on by the petitioners, culminating in the Church of Scotland Act 1921, is that the church has exclusive jurisdiction in matters spiritual, and the state has exclusive jurisdiction in matters civil. To put that more precisely and in the words of Article IV of the Declaratory Articles appended to the 1921 Act, the church alone has: "the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government and discipline in the church...". That right is correspondingly acknowledged by the state in the following words of the Article, that the civil authority does not have: "any right of interference with the proceedings or judgments of the church within the sphere of its spiritual government and jurisdiction."

[74] Article IV clearly sets out the dividing line between Church and State. The question for determination in this case is, as counsel recognised, a more difficult one: on which side of the line does this case fall? Each party submits that the case falls squarely on their side of the line. There is an initial attraction in the petitioners' argument that the closure of all places of worship for worship, and indeed the criminalisation of worship should it take place in defiance of the Regulations, is a spiritual matter, for what greater interference with worship could there be than to ban it altogether? On the other hand, there is an equal initial attraction in the respondents' argument that legislation in the sphere of public health, particularly in a time of national crisis, is a matter for the state, the health of all the states' citizens being exclusively a civil matter. The problem in this case arises because, in the exercise of its undoubted civil power to enact public health legislation, the state has suspended the ability of the petitioners to worship through the cumulative effect of a range of measures imposed upon society, and other religions, as a whole; one such measure being the requirement to close places of worship, and another being the requirement not to leave home without reasonable excuse.

[75] The petitioners' argument that no intervention at all is permissible in their worship, regardless of circumstances, is significantly weakened by two, perhaps three, matters which senior counsel for the petitioners was constrained to accept. The first was that it is a necessary consequence of her argument that the only body which has legitimate authority to order the closure of church buildings for public health reasons is the church itself. Since public health, by its very nature, affects the entire public, not simply members of the church, I do not accept that proposition which, apart from any other consideration, fails to recognise that Church members may acquire an infection at church which they then transmit to the broader community. Further, the proposition not only gains no support from, but runs

contrary to, Article IV which confines the church's right to legislate to matters of "doctrine, worship, government and discipline" and public health falls within none of those categories.

The second matter which weakens the petitioners' argument is the concession that the respondents did have the constitutional power to order a 24/7 curfew on public health grounds, in other words to order the entire population to remain indoors all day, every day, which would also have the practical effect of prohibiting worship albeit by a different route. If the state may constitutionally prevent worship by one draconian measure - a curfew - then why may it not do so equally constitutionally by different - and less draconian - measures? In each case, the primary aim of the legislation is to protect public health and preserve life; in each case, a consequence is that worship is prevented. The third possible weakening of the petitioners' argument is that they would accept a restriction preventing them from singing in church. Such a restriction would clearly be made on public health grounds - because singing is thought to increase the risk of transmission - but nonetheless would be a restriction on the manner in which the petitioners were permitted to worship. Of course, a restriction of being unable to sing is a much lesser restriction than one of not being able to be present in church at all, but this example does help to underscore the point that a restriction on worship, large or small, may be acceptable if imposed by the state in pursuit of a legitimate aim falling squarely within the field of civil law.

[76] However, identifying weaknesses in the petitioners' argument does not assist in identifying what test should be applied in deciding whether the respondents have acted in accordance with the constitution or not. No reported case is in point. *Ballantyne* (above) concerned the election of a minister, clearly a spiritual matter falling within the sole province of the church. *Percy* was held to involve a civil matter - namely a sex discrimination claim - because the parties had entered into a civil contract and had, in the

words of Lord Nicholls of Birkenhead at paragraph 41, “deliberately left the sphere of matters spiritual”. Senior counsel for the petitioner sought to derive support from that by pointing out that the petitioners had not deliberately left the sphere of matters spiritual, but I do not consider that *Percy* can be read as supporting the proposition that a matter can be civil only where the parties have deliberately left the spiritual sphere. Senior counsel for the respondents sought to derive some support from *Gallagher v Church of Jesus Christ of Latter-Day Saints* [2008] 1 WLR 1852, and Lord Hope of Craighead at paragraph 31, where he said that the legislation in that case (rating legislation) was not directed at Mormons because of what they believed in. However, that comment was made in the context of considering whether Mormons had been discriminated against because of their religion, which is not precisely the issue in the present case.

[77] Nor is a complete answer to the petitioners’ case provided by the respondents’ argument that the state may, and does regulate a host of civil matters that can affect places of worship - both the buildings, and the churches which use them. That is to ignore that the fundamental objection to the Regulations read as a whole is not simply that they apply to places of worship, but that the effect of them is that by ordering their closure, they prevent those places from being used for worship. If the state legislated for no good reason to order the closure of every church in the land, that would clearly be unconstitutional.

[78] It is arguable that the state has not merely the power to act to preserve public health and life, but that it has a constitutional duty to do so. In this case, that duty has come into conflict with its duty not to interfere in matters which are the sole province of the church. The petitioners argue that there are no circumstances in which the state’s powers could trump their right of worship, no matter the scale of the public health emergency faced by the state, but that is not an attractive outcome, and is not one supported by the additional party

albeit he approaches it from a different religious perspective. The question rather is how, where state and church come into conflict in this way, the line is to be drawn.

[79] Since the petitioners' position is that no interference at all is permissible, senior counsel for the petitioners was unable to help in answering this question. Senior counsel for the additional party, as noted above, accepted that public health objectives were sufficiently important in principle to justify lawful and proportionate interference, but did not cite any authority in support of this assertion. However some assistance is gained from Lord Reed in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at paragraph 68 where he discussed proportionality as an aspect of justice which can be traced back via Aquinas to the *Nicomachean Ethics* and beyond. Under reference to Blackstone's *Commentaries on the Laws of England*, 9th ed (1783) volume I page 125, Lord Reed said that the concept of civil liberty comprises "natural liberty so far as restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". This idea then developed into the concept we know as proportionality, which came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. Accordingly, any interference in worship by the state will be lawful if (and only if) it is a proportionate and necessary response to a civil matter in which the state is entitled to legislate.

Conclusion

[80] I reject the petitioners' proposition that any interference with their right to worship, no matter how proportionate, is beyond the powers of the respondents.

[81] However since the Regulations do interfere with the constitutional right of the petitioners to worship, notwithstanding that they have as their primary purpose the protection of health and preservation of life, they will be beyond the constitutional

competence of the respondents (at least insofar as the petitioners and the additional party are concerned) if that interference is not proportionate.

[82] That said, I propose to consider the question of proportionality in the context of the Convention argument as to the lawfulness of the Regulations, and I will therefore revert to the question of constitutional competence below. It was not submitted that proportionality should be approached any differently in either context - and Lord Reed's observations would suggest that there is now no difference, if there ever was. It follows that the constitutional argument adds nothing to the petitioners' case: if the Regulations are a disproportionate interference, the petitioners will succeed; if not, they will fail.

The Convention Issue

The Human Rights Act 1998

[83] The Human Rights Act 1998 provides in section 6 that it is unlawful for a public authority to act in a way that is incompatible with a right protected by the European Convention on Human Rights ("the Convention"). The respondents are a public authority. They are bound by section 6.

[84] One immediate source of controversy between the parties is what is meant by section 13 of the 1998 Act which singles out the right to freedom of thought, conscience and religion for a special mention. That section provides:

“(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.”

[85] The petitioners argue that this means that the article 9 right to freedom of thought conscience and religion is singled out for particular protection and must therefore be

accorded a status which other Convention rights do not have. The respondents, under reference to *R (Amicus and others) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) argue that the provision does not give greater weight to the rights protected by article 9 than they would otherwise enjoy under the Convention itself. Senior counsel for the petitioners pointed out that in *R (Amicus)* the point was conceded by counsel and not decided by the court. She submitted that the respondents were inviting the court to disregard section 13. Either section 13 had no effect, or it was intended to, and did, draw attention to the strength and importance of the article 9 right. Senior counsel for the respondents, in reply, submitted that the only other provision in the Act which uses the phrase “have particular regard to” was section 12(4) and both that, and section 13(1) were introduced following lobbying by particular pressure groups. He submitted that the wording was unusual but that the section did not read as one intended to elevate article 9 to a position of particular prominence.

[86] On this matter, I agree with senior counsel for the respondents. The requirement to have particular regard to a factor does not entail that the factor in question is to be accorded any more weight than any other factors. In a case where the very issue is whether the right has been unjustifiably interfered with, it is axiomatic that the court would in any event be paying particular regard to the importance of the right. What section 13 does do, is to underscore, if any underscoring be needed, that the rights under article 9 are important, but the section cannot be read as meaning that they are any more important than any other Convention right.

[87] In passing I mention section 14 of the 1998 Act which allows the United Kingdom to designate any derogation from the Convention. The United Kingdom has not designated any derogation and accordingly holds itself as bound by the Convention. The respondents

therefore remain bound to act compatibly with Convention rights, notwithstanding the current threat to public health arising from coronavirus.

The Scotland Act 1998

[88] Section 54(2) of the Scotland Act 1998 provides:

- “(2) It is outside devolved competence—
- (a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or
 - (b) to confirm or approve any subordinate legislation containing such provision.”

Section 29(2) states that a provision is outside the legislative competence of the Scottish Parliament if it is incompatible with any of the Convention rights.

[89] Section 57(2) provides:

- “(2) A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights...”

European Convention on Human Rights

[90] Article 9 of ECHR 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.”

Article 11 states:

- “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

Submissions

Introduction

[91] Much of the applicable law was agreed by the parties. The main difference between them as to the law was in relation to the degree of margin of appreciation to be afforded to the respondents. Accordingly, I find it unnecessary to repeat the parties’ submissions at length. All parties lodged written notes of argument which they adopted and upon which they expanded at the substantive hearing. I have taken all of the submissions into account. In this section, I merely record the substance of each party’s position, expanding upon the respective submissions where it is necessary to do so in the analysis which follows.

Submissions for the petitioners

[92] Senior counsel for the petitioners submitted that the restrictions imposed by the Regulations were a disproportionate interference with the petitioners’ right to manifest their religion. As such, they fell outwith the legislative competence of the Scottish Parliament, and of the respondents, by virtue of sections 29(2), 54(2) and 57(2) of the Scotland Act 1998, above, and were unlawful. The petitioners recognise that some restriction is necessary and in particular are prepared to abide by the lesser restrictions imposed by paragraphs 8 and 9 of schedule 5 in the Local Levels Regulations. The respondents enjoyed a narrow margin of appreciation where restriction of the right to manifest religion was concerned, and in such a

case any restriction should be the subject of strict scrutiny by the court: *Manoussakis v Greece* (1997) 23 EHRR 387. The greater the sanction, the greater the degree of justification required: *Case of Biblical Centre of the Chuvash Republic v Russia* (Application no 33203/08) 12 June 2014. In considering the margin of appreciation, the court may have regard to a consensus between states, and common values; the court could also consider whether there were effective alternatives: *Bayatyan v Armenia* (2012) 54 EHRR 15. The respondents had failed to recognise that manifestation of religious belief was a fundamental right and freedom, and had erred by treating it as if it were a non-essential activity, when it was not. In considering proportionality, the court should take into account that other activities or businesses, such as professional sport and banks, had been allowed to continue to operate. The courts also continued to operate, including the use of jury centres in cinemas. Churches could be operated with better regard for public safety than, say, supermarkets, which had been allowed to stay open (senior counsel was prepared to accept that they could be regarded as essential, but in her submission, no more essential than places of worship). Reference was made to an expert report of Dr Ian Blenkharn (number 6/5 of process) on the adequacy of mitigation measures. He is a healthcare, occupational and environmental microbiologist with over 45 years' experience in the NHS and University Medical Schools, and in the private sector. He has advised many organisations on risk-reduction measures since the outbreak of Covid-19. A comparison could also be drawn with England and Wales, where churches had not been required to close in response to the new variant. Additionally, there was a growing international consensus whereby restrictions on places of worship had been struck down by the courts in a number of jurisdictions across the world. In this regard, senior counsel referred to a welter of cases: *F* (1BvQ 44/20), Federal Constitutional Court of Germany 29 April 2020; *Roman Catholic Diocese of Brooklyn v Cuomo*,

Supreme Court of the United States, 592 US ____ (2020), 25 November 2020; *De Beer v The Minister of Cooperative Governance and Traditional Affairs*, High Court of South Africa, Case no 21542/2020, 2 June 2020; *Capitol Hill Baptist Church v Muriel Bowser, in Her Official Capacity as Mayor of the District of Columbia* (Case No 20-cv-02710 (TNM)) on 9 October 2020; and *South Bay United Pentecostal Church v Newsom* (592 US ____ (2021), 5 February, 2021, Supreme Court of the United States).

Submissions for the additional party

[93] The additional party, too, is prepared to accept the conditions set out in the Local Levels Regulations. The bulk of his senior counsel's submission at the substantive hearing was directed towards proportionality, and to the level of scrutiny to which the respondents' decision to close places of worship should be exposed. Only a limited margin of appreciation should be allowed to the state when it interfered in religious matters. A *Wednesbury* style approach was not appropriate. Senior counsel for the additional party placed particular emphasis on the criminalisation of worship, which he described as an extraordinary abuse of the state's power. The state should not prefer Mammon to God, as it had done. A consultative approach, involving dialogue with the churches, ought to have been adopted. Senior counsel then himself exposed the respondents' decision-making to a high level of scrutiny, submitting that there was no material before them from which it could be concluded that the measure adopted was proportionate. They had failed to establish that transmission of coronavirus happened to a significantly higher degree in places of worship than anywhere else. Professor Leitch had expressly stated that such data was unavailable. Less intrusive measures were available including all those in the Local Levels Regulations and the guidance. The respondents could not prove that, with the

adoption of less restrictive measures, in-person worship could not operate within an acceptable and tolerable risk threshold. It was wrong to say that scientific judgments were in issue. The additional party did not dispute the science. He did dispute that the science required the closure of all churches.

Submissions for the respondents

[94] The nub of the respondents' position is that the decision to close churches was ultimately a political one in which they enjoyed a large margin of appreciation. While it was true that the petitioners' article 9 rights and those of the additional party were restricted, so too were many other Convention rights, including rights under articles 2 (life), 5 (liberty and security), 6 (fair trial), 8 (respect for family/private life), and others. All of the affected rights had to be considered by government when responding to the pandemic, all were important and all had been interfered with to some degree or other. It was impossible to rank them. The respondents had to carry out a constant balancing exercise which may change from time to time. Ultimately they had reached a political decision, in which the court should not interfere. It was irrelevant what had been done in other countries, or what the courts had decided there. This court was unaware of the factual background which informed decisions elsewhere. There was no emerging international consensus that bans and restrictions on religious services were unlawful. There had been insufficient time for such a consensus to emerge. The circumstances in *Bayatan v Armenia* (above) were very different from those surrounding the pandemic. In that case the consensus had emerged over a period of about 70 years amongst almost all of the Member States of the Council of Europe, which was far removed from the circumstances here. However, it was relevant that the government had had dialogue with faith groups across the board and that many church leaders and

organisations agreed with the closure, and did not support the petitioners' action. The risks posed by Covid-19 are cumulative and multifactorial. Dr Blenkarn did not take into account the cumulative nature of risk or the increase in risk posed by increased opportunities for interaction. The Regulations reflected the decision taken by the respondents in light of the new variant to limit permitted activities to those which they considered essential, such as food shopping and obtaining medical assistance. They were made on the basis of scientific advice. Permitting the operation of foodbanks in churches, and permitting their use as vaccination centres, was consistent with that decision. They were a justified and proportionate response. Article 9, whether read alone or in conjunction with article 11, did not bestow a right at large for individuals to gather to manifest their religious beliefs wherever, whenever, and in whatever manner they wished. The question was ultimately not whether the decision had been reached in the right way, but whether there had actually been a violation of the rights in question. The proportionality test was predicated on substance and outcome, not process: *R (Nasseri) v Secretary of State for the Home Department* [2010] 1 AC 1. The respondents had committed to revoke the Regulations at the earliest possible opportunity and most recently, had stated that they would do so in time for communal worship during the forthcoming religious festivals, in particular Easter and Passover.

Decision on ECHR

Introduction

[95] It is common ground that articles 9 and 11 are engaged. For completeness, I accept the submission of senior counsel for the petitioners that the scope of the article 9 right is undeniable; that freedom of thought, of conscience and religion as safeguarded by article 9,

is one of the foundations of a democratic society; and that since religious communities traditionally exist in the form of organised structures, article 9 must be interpreted in light of article 11: *Metropolitan Church of Bessarabia v Moldova* [2002] 35 EHRR 13. The article 9(1) right of freedom of belief is absolute: *Williamson v Secretary of State* [2005] 2 AC 246. None of this is challenged by the respondents. They do not challenge the genuineness of the petitioners' beliefs, nor could they lawfully do so. As they accept, it is irrelevant that others do not share those beliefs (and so, at least in this context, any belief held by other faiths, or for that matter, by the respondents, that worship may be conducted on-line, is irrelevant).

[96] It is also common ground that there has been interference with the article 9(2) right to manifest religion. As senior counsel for the petitioners submitted, the blanket ban on opening churches for public worship constitutes interference. The petitioners have no alternative means of manifesting their religion: *cf R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 per Lord Bingham of Cornhill at 23 and 24. In contrast to the claimant in that case (a schoolgirl who had been denied access to her school unless she wore the school uniform, and who could have chosen to attend another school) the petitioners do not have the option of manifesting their religion in another way. Although the respondents at times appear to have suggested that on-line worship is an alternative means whereby the respondents may manifest their religion, as in the Deputy First Minister's comments to the Covid-19 Committee, they do not dispute, in this petition, that there has been interference with the article 9(2) right. They found upon the fact that the interference is temporary. Nonetheless, the Regulations do give rise to interference, and, under reference to the discussion at paras [62] and [63] above on the relevance of on-line worship, the respondents are correct to accept that they do. The degree of interference

comes back into play when considering whether the interference has had a proportionate effect.

[97] As parties agree, the issue for determination is whether the restrictions imposed by the Regulations fall within article 9(2) namely whether they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society in the interests (in this case) of public health.

Prescribed by law

[98] To be prescribed by law, the Regulations must both have a basis in domestic law, and be accessible to the persons concerned and be foreseeable as to their effects: *Christian Institute v Lord Advocate* [2016] UKSC 51, para [79]. As the Supreme Court stated in that paragraph, these qualitative requirements of accessibility and foreseeability have two elements: that the Regulations must be formulated with sufficient precision to enable any individual to regulate his or her conduct; and that they must be sufficiently precise to give legal protection against arbitrariness. On any view, the Regulations pass this test. They have been made under and in accordance with the Coronavirus Act 2020. As noted in paras [8] to [11] above, that Act permits the respondents to make regulations of a general nature, which may include provision requiring premises to close, as the Regulations do, and which may create offences (as the Local Levels Regulations which were amended by the Regulations do). The Regulations were laid before, and approved by a resolution of, the Scottish Parliament in accordance with schedule 19, paragraph 6 of the 2020 Act. Given the dangers posed by the new variant, the respondents were entitled to take the view that the Regulations needed to be made urgently. The Regulations are in precise terms and are not

arbitrary in their application. The Regulations therefore pass the legality leg of the ECHR test.

Legitimate aim

[99] Insofar as they pursue the protection of public health and preservation of life, it is accepted by the petitioners and by the additional party, albeit with a degree of reluctance, that the Regulations pursue a legitimate aim which is within the scope of article 9(2). The reluctance stems from the caveat that it would not be a legitimate aim to pursue the elimination of all death, or even all premature death, which would, as the petitioners and the additional party point out, be impossible, and it could not be a legitimate aim to pursue the impossible. That is true, but I think it is unfair to attach too much weight to the statement in the first *Strategic Framework* document to the effect that there was “no acceptable number of people” the respondents were willing to let become affected, which can perhaps be seen as employing a degree of political rhetoric. As I have observed, that phrase does not appear in the latest version. The Regulations in any event do not in fact pursue the elimination of all premature death, since they admit of exceptions. Perhaps a better way of encapsulating their aim is that they seek to reduce risk by suppressing the virus to the lowest possible level and it is certainly not for this court to question that strategy. It is beyond question that the Regulations have a legitimate aim.

Necessary in a democratic society

[100] This leads to the core issue in this case which is whether the Regulations are proportionate. Parties accepted that proportionality falls to be assessed by adopting the four-stage approach set out in *Bank Mellat*; see also *Christian Institute*, above. Lord Reed at

Bank Mellat, paragraphs 71 and 72 (pages 789-790), explained that this structured, analytical approach falls to be contrasted with that of the Strasbourg court, where the principle of proportionality is “indissolubly linked to the concept of margin of appreciation”. I take from this that while margin of appreciation is still a relevant factor at several of the stages, as we will see, it is not the complete answer to a challenge that a decision or legislation is not proportionate. The four stages, as formulated by Lord Reed at paragraph 74, are:

(i) whether the objective being pursued is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure’s effect on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. (Lord Reed recognised that his formulation of the fourth criterion was more extensive than that of Lord Sumption at paragraph 20 (page 771) but as he pointed out, there is no material difference, and the wider formulation makes it easier to apply that criterion in an analytical manner; although Lord Reed dissented in relation to the application of the test, there was no disagreement as to what the test was.)

Importance

[101] As regards importance, nothing more need be said in this case, since it is not in dispute that the aim being pursued - reduction in risk for the protection of health and preservation of life - is sufficiently important to justify limitation of the protected right.

Rationality

[102] As Lord Reed made clear at *Bank Mellat* para [92] rationality is a causal test. The decision maker has a margin of appreciation, but that is achieved by holding that a measure is rationally connected to its objective if implementation can reasonably be expected to contribute to achievement of that objective. In applying this test, the court must not substitute itself for the decision maker. Rather, the test is an objective one, based on common sense and logic. The court is concerned with the substance of the measure, rather than the process by which it was reached: *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100. However the reasons given for a decision may at least in some circumstances show that the measure is irrational, as the decision of the majority in *Bank Mellat* illustrates.

[103] Applying that to the facts of this case, insofar as the closure of places of worship combined with the stay at home requirement will inevitably reduce human interaction, which is a known means of transmission, it cannot be said, on an objective approach, that there is no rational connection at all between the Regulations and the aim. Much criticism was made by senior counsel for the petitioners, and for the additional party, of the manner in which the decision was reached. Senior counsel for the additional party spent some time in attempting to show that the decision was not justified by the reasoning of the respondents collectively or individually and that there was a complete absence of any data showing that persons had become infected in places of worship. There are various answers to this. First, as the SAGE document referred to in para [23] above makes clear, it is extremely challenging to determine where and how Covid-19 has been transmitted. Second, the criticism to some extent misses the point, which is that the overall risk is reduced by reducing human interaction. Simply because one cannot tell *which* people in the population will not catch or transmit Covid-19 as a result of the various different restrictive measures put in place, does

not mean that one cannot say with confidence that the restrictive measures as a whole will have the consequence that *fewer* people will catch or transmit it. It is not irrational to conclude that the more people stay at home, the less the virus will be passed on.

Accordingly, the Regulations satisfy the rationality stage of the assessment. That said, there is a whiff of irrationality about the decision not even to allow places of worship to open for private prayer, when one looks at the reasoning behind that option not being recommended. I discuss this further when considering the third stage of the assessment, below.

Less intrusive means

[104] The question at this stage of the test is whether a less intrusive measure than closing places of worship (on pain of criminal sanctions) could have been used without unacceptably compromising the achievement of the objective of maintaining public health and preserving life by reducing the risk of infection from coronavirus.

[105] The approach at this stage has recently been summarised by the Court of Appeal in *R (FACT) v Environment Secretary* [2020] 1 WLR 3876, as follows:

- (i) The decision maker has a margin of appreciation or discretion which is highly fact and context specific. The evaluation will take account of all relevant circumstances, including conditions prevailing at the time the decision was taken, and the reasons given why less restrictive measures were rejected.
- (ii) A measure will be disproportionate if it is clear that the desired level of protection could be attained equally well by measures which were less restrictive.
- (iii) The burden of proof lies with the decision maker.
- (iv) The decision maker is not required to consider every possible alternative.

- (v) The mere assertion that some other measure is equivalent and less intrusive is not sufficient; and equally the fact that some other measure can be envisaged is not enough.
- (vi) It is relevant that the measure is “general, simple, easily understood and readily managed and supervised”.

[106] The respondents accept that they have the burden of proof of showing that the desired level of protection could not have been achieved by less restrictive means. They also attach some weight to the importance of having a simple, easily understood “bright line” message (“stay at home”), although it is a moot point as to whether the legislation itself is simple and easily understood. As I have already observed, it is in relation to the margin of appreciation, the flip side of which is what level of scrutiny must be applied to the Regulations, that the parties differ. The respondents argue for a high margin of appreciation. They say that the following factors point to that result: a scientific judgment is involved (see *R (Surayanda) v Welsh Ministers* [2007] EWCA Civ 893, Thomas LT at paragraph 67); the decision was one more suitably taken by an executive subject to the scrutiny of Parliament than by the court (*Bank Mellat*, Lord Sumption at paragraph 21); the Regulations have been subject to the scrutiny of, and approved by, the Scottish Parliament (*Bank Mellat*, per Lord Sumption at paragraph 44; *R (Dolan) v Secretary of State for Health and Social Care, Secretary of State for Education* [2020] EWCA Civ 1605, per the Court of Appeal at paragraph 86 (this case is of particular interest since it involved a challenge to English regulations made in response to the pandemic)). No significance should be attached to the fact that churches (this time) had remained open in England and Wales: what measures to introduce depended on a range of factors, including the ability of the NHS to cope, and it should not be assumed that the prevailing conditions in England and Wales were the same

as those in Scotland. Nor could a proper comparison be made with the decision that other premises or activities remained open. A whole range of considerations had to be taken into account and a balanced judgment made.

[107] The petitioners for their part argue that where article 9 rights are involved, as a matter of principle the decision maker is subject to a high level of scrutiny and there is a small margin of appreciation: *Manoussakis v Greece* (1997) 23 EHRR 387 at 407, where the Court said:

“In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society. Further, considerable weight has to be attached to that need when it comes to determining, pursuant to paragraph 2 of article 9, whether the restriction was proportionate to the legitimate aim pursued. The restrictions imposed on the freedom to manifest religion...call for very strict scrutiny by the Court”

[108] The petitioners also rely upon certain passages in *Metropolitan Church of Bessarabia and Others v Moldova* (2002) 35 EHRR 13 in the context of a discussion by the European Court of Human Rights of general principle; and of course section 13 of the Human Rights Act 1998, discussed above. They rely too upon the decision in England and Wales not to close places of worship, justifying the conclusion, say the petitioners, that less restrictive measures could also have been imposed in Scotland. Similarly, they point to the fact that other premises in Scotland remain open. The respondents had wrongly and unjustifiably equated religion with non-essential services, when it was anything but non-essential. As regards the science, the decision to make the Regulations could not properly be categorised as a scientific judgment. The science was not in dispute. The additional party made the additional point that Professor Leitch was not a microbiologist. The respondents had not properly considered the efficacy of the type of mitigation measures described by Dr Blenkharn in his report.

[109] I consider that this question is more finely nuanced than either party would have it. As the authorities make clear, the breadth of the margin of appreciation in each case ultimately must turn on the facts: *Bank Mellat*, Lord Sumption at paragraph 26; *R (FACT)*, above. The magnitude of what is at stake is a factor to be taken into account: *Metropolitan Church of Bessarabia* at paragraph 119, where the issue at stake was said to be “the need to maintain true religious pluralism, which is inherent in the notion of a democratic society”.

[110] As the respondents submit, while the present case does involve religious pluralism to the extent that the petitioners’ (and additional party’s) beliefs differ from those of other faiths, the facts in this case are far removed from those in the cases founded on by the petitioners. In *Manoussakis* the laws under consideration were ones which restricted the construction and use of temples by any denomination other than the Greek Orthodox Church. In *Metropolitan Church of Bessarabia*, Moldova had refused to recognise the church in question at all. In a third case, *Case of Biblical Centre of the Chuvash Republic v Russia* (Application no 33203/08, 12 June 2014), the issue was dissolution of a religious organisation. Those cases are of a different magnitude to the present case where the restriction is, on any view of a more limited nature and for a temporary period only.

[111] As regards whether the decision involved a scientific judgment best left to an executive armed with expertise and experience not available to the court, I do not consider that the decision can be categorised in that way. As the petitioners point out, the science is not in dispute. It is accepted that Covid-19 is an extremely serious and highly transmissible disease which can result in serious illness and death. The scientific material on which the respondents based their decision is either available to the court or ought to have been made available. It should also be pointed out that also not in dispute is that mitigating measures such as social distancing, face masks, hand washing and good ventilation are known to

reduce the risk of transmission. This emerges not only from Dr Blenkarn's report but from Scottish Government advice, such as the much publicised FACTS.

[112] With that in mind, I now turn to consider the respondents' reasoning for not adopting less restrictive measures. I consider that they have a number of difficulties in discharging the burden on them. The first is that, armed with the knowledge, in late December 2020, of the risks posed by the new variant, the recommendation given to the respondents in the memo of 29 December 2020 (para [40] above) was to maintain the status quo. Other options short of full closure were also considered. One option (option B) was to reduce the number of persons who could attend a place of worship but that was not recommended, on the basis that it would make little difference to the level of risk in public health terms - a clear acknowledgment, read in context, that the risk was already small. The second difficulty is that no real account seems to have been taken of the other factors (short of stopping people meeting) which also serve to reduce risk: low density of occupants, good ventilation, face coverings etc - see SAGE paper, para [23] above. Third, no real consideration was given to whether steps short of a compulsory closure of all places of worship might achieve the same end and in particular no consideration was given to whether guidance might suffice. The fourth difficulty is that Professor Leitch, at paragraph 36 of his affidavit, lists a number of fears about the consequences of allowing people to attend places of worship: for example, that they may use public transport; they may car share; they may congregate outside. At paragraph 79 he develops this theme by saying that there is more risk of catching or passing on the virus by going to a supermarket, a bank and a place of worship than if one only goes to the supermarket. However, the matters mentioned in paragraph 36 could easily have been covered by guidance (as car-sharing is) and it is not at all obvious why it should necessarily be assumed that the

public (particularly, that section of it which attends places of worship, as opposed to those celebrating a sporting success, say) will not pay heed to, or will disregard, government guidance. As regards the point about attending three places rather than one, it does not really add anything to the argument, if one assumes that the visit to the supermarket and bank are essential ones which will be made in any event. When one comes to consider the other option which was considered and not recommended, option C, allowing places of worship to remain open for private prayer only, the respondents run into still more difficulties. It cannot be disputed that this option would give rise to a much reduced risk of people meeting than if attending for communal worship. To turn Professor Leitch's opinion at paragraph 79 on its head, if someone is at the supermarket or bank anyway, how is the risk of transmission materially increased if that person were to pop into church for a short period of private prayer, alone? Senior counsel for the respondents submitted that such a person might meet others in the church, but that was not the reason given for disallowing even private worship. The sole justification in the advice given to ministers was that such a measure might be seen as discriminatory, since some faiths do not practise private prayer: see para [41] above. As senior counsel for the additional party submitted, without rejoinder from the respondents, that cannot be a valid justification, and indeed runs counter to the principle of religious pluralism. Further, a desire not to risk stakeholder relations (para [41]) and the taking of a difficult decision out of the hands of the vulnerable (para [46]) cannot, in my view, justify the extreme restriction which was imposed, when other options were available, and when the favoured option on public health grounds was expressly said to be preservation of the status quo.

[113] A further problem for the respondents is that the factual information upon which their decision was based was wrong, inasmuch as they were misinformed about the number

of people who regularly attended church: see paras [43] to [45]. That is relevant because it clearly had a material effect upon the likely impact of any measures imposed.

[114] Perhaps a more fundamental problem for the respondents is that as soon as they allow some exceptions to the “stay at home” rule and the corresponding requirements to close premises and restrict activities, it then falls on them to justify why other exceptions are not allowed. It is not necessarily a case of choosing to allow one thing instead of something else: if one activity is deemed to present acceptable risks, then it is legitimate to ask why another comparable activity is not. To put this a slightly different way, it would be easier to justify the closure of places of worship if the risk from the new variant was so great that no activities at all were to be permitted, including meeting under any circumstances, save (say) going to the supermarket once a week. As soon as that approach is departed from, the respondents must be taken to have acknowledged that, whatever the increased risks from the new variant, *some* indoor assembly can safely be achieved if mitigation procedures are followed. While I accept that it is difficult to draw a meaningful comparison between places of worship and some premises which are exempt from the requirement to close, such as bicycle shops, a more meaningful comparison can perhaps be drawn with the continued use of cinemas as jury centres. Like places of worship, they involve people from different households coming together repeatedly to congregate indoors in a confined area. Indeed on one view, jury centres might be thought to carry more risk because the duration of contact is longer. Many, indeed most, of the points made by Professor Leitch in his affidavit apply equally to jurors: they may use public transport, they may car share; they may congregate outside. The answer given by senior counsel for the respondents when pressed about this apparent distinction was to say that choices had to be made, that it was important that the criminal justice system continue to operate, and that the respondents were entitled to leave

the decision as to whether to use cinemas and if so which ones to the SCTS, which enjoys the resources of the state. I accept all of this, but the point, it seems to me, is that there is at the very least an implicit acceptance by the respondents that meeting indoors *can* be safe if suitable mitigation measures are adopted. The article 6 right to a fair trial within a reasonable period is important, but so, too, is the article 9 right, and nowhere have the respondents explained why in the one case, closure was considered to be necessary and in the other, not.

[115] For all these reasons, and without in any way questioning the science which underlay the respondents' decision-making, I conclude that the respondents have failed to show that no less intrusive means than the Regulations were available to address their aim of reducing risk to a significant extent. Standing the advice they had at the time, they have not demonstrated why there was an unacceptable degree of risk by continuing to allow places of worship which employed effective mitigation measures and had good ventilation to admit a limited number of people for communal worship. They have not demonstrated why they could not proceed on the basis that those responsible for places of worship would continue to act responsibly in the manner in which services were conducted, and not open if it was not safe to do so; in other words, why the opening of churches could not have been left to guidance. Even if I am wrong in reaching that conclusion, the respondents have in any event not demonstrated why it was necessary to ban private prayer, the reasons which were given for that recommendation being insufficient to withstand even the lowest degree of scrutiny.

[116] For these reasons, I have therefore concluded that the Regulations, having failed the third stage of the *Bank Mellat* test, are not a proportionate interference with the article 9 rights of the petitioners and additional party.

[117] For the avoidance of doubt, in reaching this view, I have left out of account the fact that not all countries have adopted the same measures, and that in other jurisdictions, similar and different measures have been ruled by the courts to be disproportionate. I accept that this court cannot know what factors were taken into account in such decisions. I accept the respondents' submission that there is no international consensus as to how the pandemic should be legislated for.

Proportionate effect

[118] It remains necessary to consider the fourth stage of the test, for completeness and in case I am wrong in the conclusion just reached. This stage involves a balancing of the respective interests: a weighing up of the severity of the measure's effects on the one hand, against the benefits secured by the measure on the other. A range of factors can be considered at this stage, including, in the present case, the extent to which the measure contributes to the achievement of the aim, in other words, the extent to which the risk is reduced by the Regulations; the importance of the right in issue; the severity of the measure's effects; and whether the decision maker has expertise or information not available to the court. Of course, as Lord Sumption recognised in *Bank Mellat*, there is a degree of overlap between the various stages of the test and some factors will necessarily arise here which I have already taken into account at the earlier stages.

[119] As regards the extent to which the Regulations reduced risk I have already commented on the fact that the risk was low to begin with. Notwithstanding the greater transmissibility, mitigating factors are known to reduce the risk of transmission, even indoors. Given the relatively low number of instances of persons with Covid-19 known to have attended a place of worship (in comparison with other activities) it is not clear to me

that the blanket closure of all places of worship can be said to have contributed to a material reduction in risk.

[120] Considering next the importance of the affected right, it is not clear that the respondents have fully appreciated the importance of article 9 rights. They have admittedly paid lip service to article 9 by referring to it, but there is no evidence that they have accorded it the importance which such a fundamental right deserves. The reference in the Equality Impact Assessment relative to the Regulations (number 7/8 of process) to allowing only essential activities to continue would appear to suggest otherwise (particularly when one has regard to the activities which are considered to be essential). When addressing the Covid-19 Committee, the Deputy First Minister appears to have thought that there was no interference at all (para [54]). However, there is no doubt from the authorities, here and elsewhere, that the right to manifest one's religion is an important right to which much weight must be attached.

[121] As for severity of effect, it is all too easy to argue, as the respondents in effect do, that "it doesn't really matter" that places of worship are closed because it's only for a short period, and those who wish to do so can go on-line. The first of those points is valid to an extent, although it should be pointed out that 3 weeks became 6 became 9, and that by the time the Regulations (we are told) will be revoked or amended with effect from 26 March 2021 they will have been in force for 11 weeks. I have already commented on virtual "worship". It can be seen only as an alternative to, not a substitute for, worship. While some people may derive some benefit from being able to observe on-line services, it is undeniable that certain aspects of certain faiths simply cannot take place, at all, under the current legislative regime: in particular, communion; baptism; and confession, to name but

three. It is impossible to measure the effect of those restrictions on those who hold religious beliefs. It goes beyond mere loss of companionship and an inability to attend a lunch club.

[122] The fact that the Regulations are backed by criminal sanctions is also a relevant consideration. Were the petitioners to insist on manifesting their beliefs, in accordance with their religion, they would be liable to be met with a fine of up to £10,000, a not insignificant penalty.

[123] The above factors all point towards the conclusion that the Regulations have a disproportionate effect. There are however other factors which point the other way, not least, the severity of Covid-19 and the threats posed by the new variant, which I do not underplay in the slightest. This factor deserves considerable weight. The need to avoid the NHS being overwhelmed is another factor, although, if I am correct in saying that the risk is reduced to an insignificant extent by the Regulations, this factor attracts less weight. The fact that much public opinion, including that of other faiths and church leaders, supports the closures is also a relevant consideration, which I thought initially might carry some weight. However, I have concluded that it does not, for a number of reasons. First, the beliefs of some church leaders clearly differ from those of the petitioners and the additional party as to whether on-line worship is worship; but the beliefs of the petitioners and the additional party are valid nonetheless (even if they are minority beliefs). Second, clearly some church leaders agree with the decision to close churches and consider the Regulations themselves (as opposed to their effects) to be proportionate (see, for example, letter from the Covid-19 Committee of the Free Church of Scotland dated 21 January 2021 (number 7/15 of process); but having already discounted as irrelevant the views of those who consider the Regulations to be disproportionate, I must also discount views in the opposite direction. As I have said,

proportionality is the question the court must decide. Third, it is hardly relevant that some do not object to their rights being interfered with, if others in the same position do.

[124] I also recognise the importance of the need for the so-called “bright line” message, which attracts a little, although not great, weight, given the extent to which such a message is already diluted by the other exceptions.

[125] As regards the cases from other jurisdictions, for the reasons already given I do not attach weight to them beyond the fact that they emphasise the importance of the right to manifest religion whether in reliance on article 9 or under constitutions different from ours. The American cases perhaps give rise to the best soundbites - “Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical”: Gorsuch J, in *Roman Catholic Diocese of Brooklyn v Cuomo*, above - but they do not provide a sound basis for reaching a decision on proportionality in this jurisdiction.

[126] Ultimately the matter is finely balanced, particularly as I recognise that the decision is ultimately a political one and that the respondents do enjoy some margin of appreciation at this stage of the test as at others. Nonetheless, the apparent under-playing of the importance of the article 9 right in comparison with other activities, coupled with the blanket ban on *all* forms of worship, including private prayer, communion, confession and baptism, lead me to the conclusion that even if *some* enforced restriction on the right to worship was justified by the situation in December 2020/January 2021, the Regulations in the form they were passed did have a disproportionate effect and thus that they also fail the fourth stage of the assessment.

Conclusion

[127] For all these reasons, I have concluded that the Regulations do constitute a disproportionate interference with the article 9 right of the petitioners and others. As such, they are beyond the legislative competence of the respondents for the reasons set out above.

[128] Reverting to the constitutional issue, for the same reasons I therefore find that the Regulations are also a disproportionate interference with the petitioners' and additional party's constitutional rights.

Caveat

[129] It is as important to understand what I have not decided as what I have. I have not decided that all churches must immediately open or that it is safe for them to do so, or even that no restrictions at all are justified. All I have decided is that the Regulations which are challenged in this petition went further than they were lawfully able to do, in the circumstances which existed when they were made.

Remedy

[130] The question remains, what remedy are the petitioners entitled to at this stage? They seek declarator that the Regulations are unlawful in so far as they purport to require the closure of churches in Scotland and to criminalise public worship, and they are clearly entitled at least to the first part of that; the second part may be unnecessary if the first part is granted. They also seek reduction of the offending parts of the Regulations and a further declarator that a person living in a Level 4 area may lawfully leave the place that person is living in order to attend a place of worship.

[131] Senior counsel for the respondents invited me, in the event that I found in favour of the petitioners, to fix a further hearing so that they could address the court on the terms and timing of any remedy to be granted. This would give them the opportunity to make submissions on the desirability of the court making an order under section 102 of the Scotland Act 1998, including the potential for suspending the effect of the Court's decision for a period to allow any defect in the Regulations to be corrected. Senior counsel further submitted that the court should not reduce any parts of the Regulations without affording the respondents the opportunity of making appropriate replacement provisions in respect of places of worship according to the circumstances then applying. The respondents further argued that even if the Regulations were found to be unlawful, it would not be appropriate for the Court to grant the declarator as to reasonable excuse, that being a decision for the respondents having regard to the evidence and advice available at the relevant time.

[132] Senior counsel for the petitioners and for the additional party urged me not to follow the course suggested by the respondents. They submitted that if the petitioners were correct in their arguments then they should be able to resume worship immediately. There had already been irreparable harm; and in a reference to *Gorsuch J*, above, the holiday should not become a sabbatical. As regards the reasonable excuse declarator, it was necessary, so as to ensure that the other remedies were effective.

[133] The position is complicated by the respondents' present intention (at least at the time of writing) to remove the restrictions imposed by the Regulations with effect from 26 March 2021, meaning that any remedy I grant is in any event likely to have little practical impact.

[134] While I consider that the circumstances are not necessarily such as to justify an order under section 102 - the Regulations have been in place for a relatively short period; third party rights are unlikely to be affected - I can see the force in allowing the respondents a

short opportunity to consider how the Local Levels Regulations might be amended in light of my decision. However, if the restrictions are indeed removed, in any event, within the next few days, then the issue may be academic. I also wish to be addressed further on the “reasonable excuse” declarator, since I am not currently persuaded that to grant it would not be usurping the function of the legislature. However, that too may be academic if the respondents do indeed allow communal worship from 26 March 2021.

[135] For all these reasons, I will put the case out to call By Order on Thursday 25 March 2021, so that parties may address me further on what orders I should make, in light of this Opinion, and the foregoing comments.

V

SECRETARY OF STATE FOR THE DEPARTMENT OF HEALTH AND SOCIAL CARE

(Respondent)

Expert witness statement

1. I, Dr Martin David Parsons have been instructed by Andrew Storch Solicitors representing the claimant, to prepare an expert independent witness statement.
2. My principal qualifications to act as an expert witness in this case include the following: A first class honours degree in Theology and a PhD in Biblical and Islamic Theology and Christian Mission (Brunel University, 2005). I am the author of two major academic books one on Christian and Islamic Theology and one on Christian Public Theology, as well as a number of published articles in these fields. I have been elected as a member of the following learned societies: Tyndale Fellowship for Biblical Research and I am a Fellow of the Higher Education Academy (FHEA). I have been faculty member of the Oxford Centre for Religion and Public Life where I was involved in supervising postgraduate research in association with the University of Stellenbosch, South Africa. I have also previously been Head of Research and Director of Studies at the international headquarters of a Christian organisation specialising in freedom of religion or belief. I have previously been an expert witness for a number of cases in the UK court system. I have attached my CV as appendix 1.
3. I have been provided with the following material:
 - a) Letter of instruction.
 - b) Copy of 11 June 2020 response from Government Legal Department to pre action letter and the claimant's response dated 15 June 2020.
 - c) Expert statement (including addendum) by Ian Blenkharn healthcare, occupational and environmental microbiologist.
 - d) A copy of the judgement in Hussain v SSHSC 2020 [EWHC] 1392 (Admin).

4. My instructions were to advise on
 - A) The biblical importance of the church meeting together in corporate worship
 - B) Public Theology and the importance of corporate worship and weddings for the range of Christians in the UK.

A) The biblical importance of the church meeting together in corporate worship

The church as a local geographical entity

4. In the New Testament (NT) the word ἐκκλησία (ekklēsia) normally translated as 'church' in English versions has two meanings.¹ a) it's primary meaning, which in the local congregation in a particular geographical location. In the majority of NT books where it occurs (Acts, Romans, 1 and 2 Corinthians, 1 and 2 Thessalonians, 1 Timothy, Philemon, James, Revelation) this is its sole meaning; b) There are a more limited number of specific NT passages, particularly in Ephesians, Colossians and Hebrews where it refers to the church in general, often in relation to Heaven.
5. In other words, the normal meaning of 'church' in the New Testament is a geographically local congregation of Christians.
6. Christians in the earliest days generally met in large private homes. However, the New Testament clearly distinguished churches from individual Christian families. For example, Paul's First Pastoral Epistle to Timothy states one of the criteria for the church leadership was that someone had to lead their own family well, as

"If anyone does not know how to manage his own family, how can he take care of God's church?"²

As such the fact that Christians in the NT generally met in private homes is not of relevance, as the churches consisted of multiple households.

The physical gathering of the church

7. The New Testament emphasises the importance of the church physically gathering together on a regular basis. At no point does the Bible ever suggest that Christianity is an activity to be carried out by an individual in isolation from others.

¹ With the probable exceptions of Matt.16:16; 18:17 which are prior to Jesus' death and resurrection and therefore may refer to the synagogue, for which the term was commonly used.

² 1 Timothy 3:1-7.

8. This is evident in the teaching of Jesus recorded in the Gospels. Jesus had told his disciples that *“I will build my church, and the gates of Hades³ will not overcome it”*³ and where even *“two or three gather in my name, there am I with them.”*⁴

9. In the New Testament the early church placed great emphasis on physically meeting together. The Gospels and Acts of the Apostles describe the church both immediately after Jesus’ crucifixion and later physically meeting together despite fear of persecution.⁵ The Acts of the Apostles describes some at least, as physically meeting together on a daily basis,⁶ which Hebrews also implies.⁷ 1 Corinthians, the NT book which provides the most detailed window on the practice of the early church, repeatedly describes the church as *“coming together”*;⁸ while Hebrews, which is written in the context of persecution gives a specific exhortation to Christians, that notwithstanding the persecution they are facing to continue physically meeting together:
 10. *“And let us consider how we may spur one another on toward love and good deeds, not giving up meeting together, as some are in the habit of doing, but encouraging one another—and all the more as you see the Day approaching.”*⁹

 11. It is also noteworthy that the NT does NOT give any equivalent specific instruction as to which day of the week the church was to meet on. For example, the communion service at Troas described in Acts 20 appears to have taken place on a Saturday evening.¹⁰ While in Romans 14:5 Paul states that

*“One man considers one day more sacred than another, another man considers every day alike. Each one should be fully convinced in his own mind.”*¹¹

 12. The exhortation not to neglect meeting together therefore stands in marked contrast to this and emphasises the importance attached to physically meeting together even in times of persecution.

³ Matthew 16:18.

⁴ Matthew 18:20.

⁵ John 20:19; Acts 4:23-31; 5:42; 12:12-17.

⁶ Acts 1:14; 2:1; 2:44-46; 5:12.

⁷ Hebrews 3:13.

⁸ 1 | Corinthians 3:17; 11:18, 20, 33-34; 14:23, 26

⁹ Hebrews 10:24-25.

¹⁰ Acts 20;7ff.

¹¹ Romans 14:5.

Can a church function solely over the internet?

13. It is important to be clear what the Biblical understanding of the church is, which is at variance with some aspects of the popular usage of the term in English. The Church is not the building, nor is it simply the group of Christians in that location. As Archbishop Donald Robinson expressed it:

*“Church is not a synonym for the ‘people of God’; it is rather an **activity** of the ‘people of God’.”(emphasis original)¹²*

14. This is potentially of some importance to this case, as it means that ‘church’ is not something that one can be simply listen to, for example, on the television or over the internet.

15. The New Testament uses a number of metaphors to describe the church, including the bride of Christ and the body of Christ. The image of the body is important because it is developed in both 1 Corinthians and Ephesians to emphasise that church cannot be one person ministering and others passively listening.

16. In 1 Corinthians 12 the Apostle Paul emphasises this, writing:

“Just as a body, though one, has many parts, but all its many parts form one body, so it is with Christ...Even so the body is not made up of one part but of many. Now if the foot should say, “Because I am not a hand, I do not belong to the body,” it would not for that reason stop being part of the body. And if the ear should say, “Because I am not an eye, I do not belong to the body,” it would not for that reason stop being part of the body. If the whole body were an eye, where would the sense of hearing be? If the whole body were an ear, where would the sense of smell be? But in fact God has placed the parts in the body, every one of them, just as he wanted them to be. If they were all one part, where would the body be? As it is, there are many parts, but one body. The eye cannot say to the hand, “I don’t need you!” And the head cannot say to the feet, “I don’t need you!” On the contrary, those parts of the body that seem to be weaker are indispensable,”¹³

17. Before going on to spell out the different ways individual members contributed.

¹² D.W.B Robinson ‘Church’ :205-207 in J.D. Douglas, N. Hillyer, F.F. Bruce, A.R. Millard, J.I. Packer and D.J. Wiseman (eds) *New Bible Dictionary* (Leicester:IVP,1962,1982). Donald Robinson was a lecturer at Moore Theological College, Sydney, Australia and later Archbishop of Sydney.

¹³ 1 Corinthians 12:12-22.

“Now you are the body of Christ, and each one of you is a part of it. And God has placed in the church first of all apostles, second prophets, third teachers, then miracles, then gifts of healing, of helping, of guidance, and of different kinds of tongues. Are all apostles? Are all prophets? Are all teachers? Do all work miracles? Do all have gifts of healing? Do all speak in tongues? Do all interpret? Now eagerly desire the greater gifts.”¹⁴

18. What is clear from this list, is that the biblical pattern for the church is that of an organic whole where a wide range of members are actively involved in ministering to the rest of the congregation.¹⁵
19. The New Testament describes the practice of the church as including the following:
- i) Gathering together to listen to the public reading of scripture, preaching and teaching.¹⁶
 - ii) Corporate prayer.¹⁷
 - iii) Gathering together for Christian fellowship.¹⁸
 - iv) Worship – which includes both a) *“singing to one another” with Psalms, Hymns and spiritual songs,*¹⁹ and b) songs of worship addressed specifically to God.²⁰ Paul’s letter to the Colossians specifically exhorts them to *“Let the message of Christ dwell among you richly as you teach and admonish one another with all wisdom through psalms, hymns, and songs from the Spirit, singing to God with gratitude in your hearts.”*²¹
 - v) The Lord’s Supper i.e. communion/eucharist.²²
 - vi) Baptism.²³
 - vii) Ministering to the church by means of spiritual gifts.²⁴ Paul summarises this in his first letter to the Corinthians, writing: *“What then shall we say, brothers and sisters? When you come together, each of you has a hymn, or a word of instruction, a revelation, a tongue or an*

¹⁴ 1 Corinthians 12:27-31.

¹⁵ Gordon D Fee *The First Epistle to the Corinthians* New International Commentary on the New Testament (Grand Rapids: Eerdmans, 1987): 616-25 on 1 Cor. 12:27-31 argues that the text implies that the first three (apostles, prophets and teachers) “are not to be thought of as ‘offices’ held by certain persons in the local church, but rather as ministries that find expression in various persons.” The author is Emeritus Professor of New Testament Studies at Regent College, Vancouver.

¹⁶ 1 Timothy 4:13; 5:17.

¹⁷ Acts 2:42.

¹⁸ Acts 2:42.

¹⁹ Ephesians 5:19.

²⁰ Acts 16:25.

²¹ Colossians 3:16.

²² Acts 2:42; 1 Corinthians 11:17-34.

²³ Acts 2:38,41; 8:12, 36-38.

²⁴ Romans 12:3-8; 1 Corinthians 12:7-31; 14:1-28.

interpretation. Everything must be done so that the church may be built up.”²⁵

- viii) Evangelism i.e. preaching to outsiders.²⁶
- ix) It is also implied, though not specifically stated that weddings may have been conducted.²⁷
- x) Similarly, there is evidence of something approximating to funerals having been conducted by the church.²⁸

20. Of these ten practices,

- a) Those permitted to continue by the current Coronavirus regulations are solely funerals, but even then with very significant restrictions on attendance.
- b) Those church activities which can take place over the internet are Christian teaching or preaching. Two or three others church activities could potentially do so, though only to a limited extent: corporate prayer, fellowship, evangelism. NB although individual worship in the sense of singing hymns etc to God is possible in private homes, *corporate* worship as described above – whether hymns addressed to God or to each other is not.
- c) Those which cannot reasonably be undertaken via the internet: corporate worship, communion, baptism, congregational ministering through spiritual gifts, weddings.

21. Thus the majority of church practices either cannot or cannot be fully practised without physically meeting together.

22. The Lord’s supper and weddings merit particular attention here.

23. The essence of the Lord’s supper is physically coming together, hence its common designation as ‘communion’. In 1 Corinthians 11 Paul emphasises the importance of this being conducted appropriately, stating that some of the way this had been done in the Church at Corinth had become so individualistic that it was doing “more harm than good.”²⁹ He then adds that:

“So then, when you come together, it is not the Lord’s Supper you eat, for when you are eating, some of you go ahead with your own private suppers.”³⁰

²⁵ 1 Corinthians 14:26.

²⁶ Acts 2:14ff.

²⁷ 1 Corinthians 7:8-9; 1 Timothy 5:11-14.

²⁸ Acts 5:6,9-10; 8:2.

²⁹ 1 Corinthians 11:17.

³⁰ 1 Corinthians 11:20-21.

24. Explanations offered by biblical scholars as to why the Corinthian practice is judged by Paul to be “*not the Lord’s supper*” fall into three basic options: i) intense individualism; ii) some go ahead without waiting for others; iii) it is done in private.³¹ Whilst, Paul is concerned with malpractice here, the passage does make clear the importance of physically being together as “*one body*” in the Lord’s supper.

25. Paul goes on to describe the Lord’s supper citing Jesus’ words concerning the bread and wine:

*“This is my body, which is for you; do this in remembrance of me.”*²⁵ *In the same way, after supper he took the cup, saying, “This cup is the new covenant in my blood; do this, whenever you drink it, in remembrance of me.”*

26. The actual meaning of these words has been the subject of intense debate since the Reformation, between Catholic, Lutheran and other Protestant understandings of how the presence of Christ in the communion service is to be understood.³² However, whilst Catholics and Protestants disagree as to the exact definition of a sacrament, they are agreed that the Lord’s supper is a ‘sacrament’ and therefore particularly important. In fact, for Protestants baptism and the Lord’s supper are the only sacraments.³³

27. It is therefore particularly significant that the current Coronavirus regulations do not enable either baptism or the Lord’s supper to take place.

28. The current prohibition on churches conducting either baptisms or the Lord’s supper has a particular significance as both of these form part of Christian Public Theology which has been embedded in English law in the form of the 39 Articles of the Church of England (see section B below).

29. The conducting of Christian weddings is also of particular importance. Both the OT and the NT stress the importance of maintaining sexual purity before marriage.³⁴ For example, the Epistle to the Hebrews states:

³¹ Gordon D Fee *The First Epistle to the Corinthians* New International Commentary on the New Testament (Grand Rapids: Eerdmans, 1987): 540-43 on 11:21.

³² R.T. Beckwith ‘Eucharist’ in Sinclair B Ferguson, David F Wright and J.I. Packer (eds) *New Dictionary of Theology* (Leicester: IVP, 1988): 236-38. The author was warden of Latimer House, Oxford.

³³ C.O. Buchanan ‘Sacrament’ in David F Wright and J.I. Packer (eds) *New Dictionary of Theology* (Leicester: IVP, 1988): 606-08. The author was principal of St John’s Theological College, Nottingham.

³⁴ 1 Corinthians 5:9-11; 6:12-20.

“Marriage should be honoured by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexually immoral.”³⁵

The latter term which is rendered as ‘fornication’ in some English translations covers all forms of sexual activity outside of marriage.³⁶

30. This does not in any sense mean that the Bible has anything other than a positive view of sexuality or fails to recognise sexual desire. It is that it emphasises that the proper place for the expression of sexual desire is marriage.

“Now to the unmarried^[a] and the widows I say: It is good for them to stay unmarried, as I do. But if they cannot control themselves, they should marry, for it is better to marry than to burn with passion.”³⁷

31. The current prohibition on churches conducting weddings therefore indirectly discriminates against committed Christians by allowing unmarried couples to move in together, while prohibiting Christian weddings from taking place.

Conclusions

32. In the New Testament the church is primarily understood as a local congregation which physically meets together.
33. This meeting together was of such importance that the early church continued to meet together – and the NT actually exhorts them to meet together even during times of persecution.
34. The current prohibitions on churches set out in the Coronavirus regulations which prevent people attending churches, while allowing them to attend other public buildings such as shops, has effectively prevented churches operating in the biblical sense as churches. Of the ten features of Church life in the New Testament described above, only one is permitted by the government (funerals) and only one other (listening to preaching/teaching) can properly and fully be practised via the internet.
35. There is a particular issue with the prohibition on weddings, which creates a form of indirect discrimination against Christians who adhere to biblical teaching on marriage.

³⁵ Hebrews 13:4.

³⁶ F.F. Bruce *The Epistle to the Hebrews* New International Commentary on the New Testament (Grand Rapids, Eerdmans, 1990): 372-73 on 13:4. The author was Rylands Professor of Biblical Criticism and Exegesis at Manchester University and internationally regarded as one of the preeminent biblical scholars.

³⁷ 1 Corinthians 7:8-9.

B) Public Theology and the importance of corporate worship and weddings for the range of Christians in the UK

The intertwining of Christian Public Theology and law

36. S.13 of Government Legal Department's 11 June response to the claimant's pre action letter states that because

"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.

...that Parliament can legislate for Church of England matters, most recently having done so in section 84 of the Coronavirus Act 2020...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"

37. In fact, the relationship between government, parliament and the church, particularly, though by no means exclusively the Church of England Church, is extremely relevant to this issue. In particular, because this is one of the rare areas where aspects of Christian Public Theology have been embedded within the law. The purpose of the following is to address that issue from the perspective of Christian Public Theology, rather than law.

38. Whilst the relationship between the church and state has evolved over the centuries, that evolution has been underpinned by a Christian Public Theology, which has at times been stated in law, that the government is appointed by God and therefore accountable to God. This led to a series of royal charters setting out the freedom of the church from the sphere of the state.

39. The 1215 Magna Carta³⁸ reflects this in its preamble which begins

"John, by the grace of God, king of England... Know that, having regard to God and for the salvation of our soul..."

before setting out in the first article a confirmation of the pre-existing rights of the church:

"In the first place have granted to God and by this present charter confirmed for us and our heirs for ever that the English church shall be free (quod Anglicana ecclesie libera sit), and shall have its rights undiminished and its liberties unimpaired (et habeat jura sua integra, et libertates suas illesas)."

³⁸ For parallel texts of the 1215, 1216 and 1225 versions of Magna Carta cf David Starkey *Magna Carta: the True Story Behind the Charter* (London: Hodder and Stoughton, 2015): 159-255.

40. However, it was the 1559 church-state settlement which formally defined separate spheres for church and state.³⁹ Broadly speaking, the state may not interfere in either the interpretation of scripture or the sacraments i.e. in effect worship and teaching, while the church must be subject to the law in other matters.

41. The English (1559) settlement is also set out in the 39 Articles of the Church of England. Article 37 states

“...Where we attribute to the Queen’s majesty the chief government, by which titles we understand the minds of some slanderous folk to be offended; we give not to our princes the ministering either of God’s Word, or of the Sacraments, the which thing the injunctions also lately set forth by Elizabeth our Queen do most plainly testify: but that only prerogative which we see to have been given always to all godly princes in Holy Scriptures by God himself; that, that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evildoers...”

42. Similar, separate spheres are set out in the 1592 General Assembly Act (old Scottish parliament) – sometimes referred to as the Great Charter of the Church of Scotland. which states that each kirk (i.e. church)

“haif power and iurisdiction in thair awin congregatioun in matteris ecclesisticall.”⁴⁰

43. These separate spheres are reiterated with more detail in the 1921 Church of Scotland Act:

“This Church has the inherent right, free from interference by civil authority, but under the safeguards for deliberate action and legislation provided by the Church itself, to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements, and to define the relation thereto of its office-bearers and members, but always in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the said Confession, of which agreement the Church shall be sole judge, and with due regard to liberty of opinion in points which do not enter into the substance of the Faith.”⁴¹

44. It should be noted that one of the differences in terms of Public Theology between the English and Scottish settlements is that the former is mildly Erastian i.e. it is based on a theology permits the state to interfere and dictate in minor matters of church life such as which clothes clergy should wear – these

³⁹ Act of Supremacy 1558 c.1 (1 Elizabeth 1) and Act of Uniformity 1559 (Public Act, 1 Elizabeth I, c. 2).

⁴⁰ General Assembly Act 1592 (Old Scottish Parliament) c.8.

⁴¹ Church of Scotland Act 1921 c.29 (Regnal.11 and 12 Geo. 5) Schedule 5.

are termed *adiaphora* (literally ‘things indifferent’). However, whether Christians can meet to worship is clearly not *adiaphora*, as the whole area of the sacraments and Christian teaching is specifically excluded from the sphere of the church.

45. The prohibition on churches conducting baptisms and meeting together for communion are particularly significant as these are specifically listed in the 39 Articles as sacraments⁴² and the sacraments are specifically stated to be outside the sphere of the state to interfere with.⁴³
46. Whilst the above refers specifically to the Church of England, it is of wider relevance as the public theology of the Church of England has come to interpret its role here as defending not merely freedom of religion for the Church of England, but for members of all faiths.
47. This was expressed by HM Queen Elizabeth 11 in a speech to an ecumenical gathering of faith leaders at Lambeth Palace during her golden jubilee year (2012):

*“Here at Lambeth Palace we should remind ourselves of the significant position of the Church of England in our nation’s life. The concept of our established Church is occasionally misunderstood and, I believe, commonly under-appreciated. Its role is not to defend Anglicanism to the exclusion of other religions. Instead, the Church has a duty to protect the free practice of all faiths in this country.”*⁴⁴

The coronation and accession oaths

48. S.13 of the 11 June 2020 letter from the Government Legal Department appears to be unaware of the way that significant aspects of the Public Theology set out above have been intertwined with English and Scottish law. The role of Lord Chancellor has historically been seen as guarding the balance between the three arms of the executive, parliament and the judiciary because they sat within all three spheres. In a similar manner, the monarch, as both head of the civil government and supreme governor of the Church of England is effectively guardian of the constitutional balance between the latter. This is spelt out in two of the three oaths sworn by each new monarch on their accession and coronation.
49. The Coronation Oath,⁴⁵ which HM Queen Elizabeth 11 swore in 1953 specifically asked the new monarch to maintain the church-state settlement, including all the rights and privileges of the church:

“Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel? Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law? Will you maintain and preserve

⁴² Article 25 *Of the Sacraments*.

⁴³ Article 37 *Of the Civil Magistrates*.

⁴⁴ *Speech by the Queen at Lambeth Palace 2012* <<https://www.royal.uk/queens-speech-lambeth-palace-15-february-2012>> [accessed 19 June 2020].

⁴⁵ Prescribed by the Coronation Oath Act 1688.

inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England? And will you preserve unto the Bishops and Clergy of England, and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them? HM All this I promise to do.”⁴⁶

50. In the Oath under the Acts of Union 1706/07 (the ‘Scottish Oath’) the new monarch similarly promised to protect the government, worship, discipline, rights and privileges of the Church of Scotland:

“I, Elizabeth the Second by the Grace of God of Great Britain, Ireland and the British dominions beyond the seas, Queen, Defender of the Faith, do faithfully promise and swear that I shall inviolably maintain and preserve the Settlement of the True Protestant Religion as established by the laws of Scotland in prosecution of the Claim of Right and particularly an Act entitled an Act for the Securing the Protestant Religion and Presbyterian Church Government and by the Acts passed in both Kingdoms for the Union of the two Kingdoms, together with the Government, Worship, Discipline, Rights and Privileges of the Church of Scotland.”

Lack of precedent for closure of churches

51. I am not aware of any previous government in Britain which has sought to close churches. Although it has sometimes been claimed that this happened in 1208, in fact then the Pope, rather than the king closed churches by placing the whole of England under an interdict. This resulted from a dispute between King John and the English church over who should be the next Archbishop of Canterbury. In the course of this King John had the Pope’s choice, Stephen Langton, banished from England. John finally relented, Langton became Archbishop of Canterbury and played a major role in drafting Magna Carta, including specifically the first article on freedom of religion.⁴⁷ Therefore while this forms an important part of the context in which the first article of Magna Carta needs to be understood, it did not involve the government closing churches. The actions of the UK government in doing so in the coronavirus regulations are therefore entirely unprecedented.
52. The nearest to any sort of precedent for such actions are: a) In England the Elizabethan laws which forbade the opening of separatist churches i.e. churches, other than those of the established church and led to the execution of a number of separatists and imprisonment of thousands more, particularly Quakers and Baptists such as John Bunyan as well as the flight overseas of others, including those later termed ‘The Pilgrim Fathers’.⁴⁸ b) in Scotland when James VII (James 11 in England) attempted to impose episcopacy and made it an act of treason punishable by death to meet for worship or to listen to

⁴⁶ Robert Hazell and Bob Morris *Swearing in the New King: The Accession Declarations and Coronation Oath* The Constitution Unit, University College London (May 2018). The authors are Professor of Government and the Constitution and former Public Affairs Secretary to the Archbishop of Canterbury respectively.

⁴⁷ David Starkey *Magna Carta: The True Story Behind the Charter* (London:Hodder,2015):56.

⁴⁸ John Coffey *Persecution and Toleration in Protestant England, 1558-1689* (Harlow:Pearson,2000):169-79 gives figures of more than 15,000 Quakers sentenced to imprisonment, 450 of which died in prison and a further 200 sentenced to banishment. The author is Professor of early Modern History at Leicester University.

preaching other than in the established church. This led to the 'Covenanter Struggle' in which more people were killed for their faith than at any other period in British history, with the final decade of that period still being known as "the killing time" in Scotland today.

53. Both of those episodes were ended by the accessions to the English and Scottish thrones of William and Mary in 1689. In England this was immediately followed by what is commonly referred to as the Toleration Act (1689).⁴⁹ This allowed Protestant dissenters both to meet for worship and to open public places of worship for the first time. This led to literally hundreds of dissenting chapels in the following couple of years. This right was extended to Catholics in 1778 and then those holding non trinitarian beliefs in 1813, thereby establishing full freedom of worship in the UK.
54. There is a certain irony in that the government has legally prevented churches from meeting in the year in which we celebrate the 400 year anniversary of the sailing of the Pilgrim Fathers in the Mayflower, who fled first to the Netherlands then North America to escape the restrictions on Freedom of worship described above.⁵⁰

Conclusions

55. There is therefore a public theology, aspects of which have been embedded in both English and Scottish law. This sets out distinct spheres for church and government, with the government being specifically excluded from interference in matters of worship beyond minor details (adiaphora) in England and excluded from interference in all aspects of worship in Scotland.
56. The decision of the government and parliament to legislate to close churches and prevent them carrying on worship, including the sacraments of baptism, and communion as well as weddings is therefore unprecedented.
57. For this reason and because it touches on the coronation and accession oaths it is also a major constitutional issue. The latter is particularly significant, as this is an area where Christian Public Theology is embedded in English and Scottish law.
58. It is therefore of great significance, not only that this has been done, but that it has been done without the level of public consultation or parliamentary scrutiny which is normally associated with far less contentious legislation.

⁴⁹ William and Mary, 1688: An Act for Exempting their Majestyes Protestant Subjects dissenting from the Church of England from the Penalties of certaine Lawes. [Chapter XVIII. Rot. Parl. pt. 5. nu. 15.] British History Online <<https://www.british-history.ac.uk/statutes-realm/vol6/pp74-76>> [accessed 19 June 2020].

⁵⁰ <<https://www.mayflower400uk.org/>> [accessed 19 June 2020].

Appendix 1

Dr Martin Parsons CV

My principal qualifications to act as an expert witness in this case include the following: A first class honours degree in Theology and a PhD in Biblical and Islamic Theology and Christian Mission (Brunel University, 2005). I am the author of two major academic books one on Christian and Islamic Theology and one on Christian Public Theology, as well as a number of published articles in these fields. I have been elected as a member of the following learned societies: Tyndale Fellowship for Biblical Research and I am a Fellow of the Higher Education Academy (FHEA). I have been faculty member of the Oxford Centre for Religion and Public Life where I was involved in supervising postgraduate research in association with the University of Stellenbosch, South Africa. I have also previously been Head of Research and Director of Studies at the international headquarters of a Christian organisation specialising in freedom of religion or belief. I have previously been an expert witness for a number of cases in the UK court system.

Education

- B.Sc. Geography (upper second class honours), University of Hull (1982-85).
- Post-Graduate Certificate in Education, University of Hull (1986-87).
- B.A. Theology (first class honours) and Diploma in Pastoral Studies, London Bible College (now London School of Theology) in association with University of Brunel (1991-94).
- Ph.D. Biblical and Islamic Theology and Christian Mission, London School of Theology in association with University of Brunel (part time 1998-2004).
- Summer Institute of Linguistics (SIL) in association with University of Reading, General Linguistics 1 and 2 (1994) and Applied Linguistics with Literacy (1996).

Membership of learned societies

- Tyndale Fellowship for Biblical Research (elected to membership 1999).
- Royal Geographical Society with Institute of British Geographers (elected Fellow – FRGS 2009).
- Higher Education Academy (elected Fellow – FHEA 2015).

Professional experience

Independent consultant – Christian Belief, Freedom of Religion or Belief, Islam and Christian-Muslim Relations.
Faculty member of Oxford Centre for Religion and Public Life (OCRPL), delivering PhD programme in association with University of Stellenbosch, South Africa (October 2017- 2019).

Head of Research and Director of Studies Barnabas Fund International Headquarters (international aid agency supporting persecuted Christians (October 2015- May 2019).

Research Ethics Project Leader Anglia Ruskin University, wrote and taught new online course in Research Ethics for undergraduates and taught postgraduates.(January - June 2015).

Publications

Books

Unveiling God: Contextualising Christology for Islamic Culture (Pasadena,CA:William Carey Library,2006) 356pp (Biblical Theology, Islamic Theology and Christian Mission).

Good for Society: Christian Values and Conservative Politics (Bloomington,In, Westbow,2020) 680pp (Biblical Theology, History and Public Theology).

Academic articles

'Review of Warren Dockter "Churchill and the Islamic World" (New York:IB Taurus,2015)' *Bulletin of the Centre for the Study of Islam and Other Faiths* (Australia) (2015/16):115-17.

'The Future of Afghanistan' *Bulletin of the Centre for the Study of Islam and Other Faiths* (Australia) (2012):43-52.

'William St Clair Tisdall (1859-1928) and the Use of Historical Criticism' *Centre for Islamic Studies Newsletter* 10 (2001) 9-10.

'Karl Pfander (1803-1866) and the Direct Approach' *Centre for Islamic Studies Newsletter* 9 (2000/2001).

'Alexander Duff (1806-1878) and the Educational Approach' *Centre for Islamic Studies Newsletter* 8 (2000) 6-7.

'Claudius Buchanan (1766-1815) and the Great Experiment' *Centre for Islamic Studies Newsletter* 7 (1999) 8-9.

'Christian Influence on Ibn Arabi' *Centre for Islamic Studies Newsletter* 7 (1999) 6-7.

Booklets and reports written for Barnabas Fund:

- *How Britain led the World in Developing Freedom of Religion: 300 Years since the First of the Test Acts was repealed in Britain* 33pp (launched in House of Commons January 2019).
- *Turn the Tide: Reclaiming Religious Freedom in the UK* 52pp (Jan 2018)
Turn the Tide: Reclaiming Religious Freedom in Australia 54pp (Jan 2018)
- *Turn the Tide: Reclaiming Religious Freedom in New Zealand* 50pp - jointly written with Peter McKenzie QC (Jan 2018)
- *Barnabas Fund Summary report on freedom of speech in universities* (April 2018).
- *Regulation and inspection by the backdoor: The latest attempt to bring in state regulation and OFSTED inspection of all out of school education settings including Christian Sunday schools* (April 2018).
- *Barnabas Fund analysis of UK Government's Integrated Communities Strategy Green Paper* (March 2018).
- *The deliberate persecution of Christians in Eritrea by the Eritrean government* (March 2017).
- *Replacing one form of intolerance with another: Barnabas Fund's analysis of how the Casey review into opportunity and integration in Britain significantly undermines the UK's heritage of religious liberty* (November 2016).
- *Response to proposal by the UK Government to require registration and inspection of all Islamic supplementary schools and Christian Sunday schools with power to close those deemed to be promoting 'Extremism'* – sent to Education Secretary within 24 hours of this proposal being announced (November 2015).
- *Response to the UK Government's new counter-extremism strategy* (October 2015).

Government and select committee submissions (UK and Australia)

- *Islamist control of refugee camps in the Islamic world: implications for the vulnerability of Christian refugees fleeing the Syrian conflict* Barnabas Fund subsequently submitted as evidence to DfID Select Committee inquiry on Syrian refugees at request of Committee member Fiona Bruce MP (Nov.2015) accessible at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-development-committee/syrian-refugee-crisis/written/22780.pdf>.
- Barnabas Fund submission to UK House of Commons Home Affairs Select Committee inquiry on hate crime and its violent consequences (Dec 2016) accessible at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/hate-crime-and-its-violent-consequences/written/43940.pdf>.

- Barnabas Fund Australia submission to Australian Parliament Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee Inquiry on Protecting Freedom of Religion or Belief 12,700 words (February 2017).
- *Australia: the land of the Free? Barnabas Fund Australia's submission to the Commonwealth government religious freedom review* 18,000 words (September 2017) accessible at: <<https://www.pmc.gov.au/sites/default/files/religious-freedom-submissions/11473.pdf>>.
- *Barnabas Fund submission to Joint Committee on Human Rights Inquiry into factors which may impede individuals from using the UK's human rights framework effectively* (May 2018) accessible at: <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/enforcing-human-rights/written/81885.pdf>>.
- Briefing note *Attempts at forced re-conversion to Islam in the UK* (for meeting with Lord Bourne, Minister for Faith, June 2018).
- Drafted operational guidance for national Police Chiefs Council on violence against Christian converts from Islam (August 2018).

Expert declaration

I Dr Martin Parsons DECLARE THAT:

1. I understand that my duty in providing written reports and giving evidence is to help the Court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.
4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
5. I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.
6. I have shown the sources of all information I have used.
7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including my instructing lawyers.
10. I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.
11. I understand that;
 - 11.1 my report will form the evidence to be given under oath or affirmation;
 - 11.2 questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;
 - 11.3 the court may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the proceedings, where possible reaching an agreed opinion on those issues and identifying what action, if any, may be taken to resolve any of the outstanding issues between the parties;
 - 11.4 the court may direct that following a discussion between the experts that a statement should be prepared showing those issues which are agreed, and those issues which are not agreed, together with a summary of the reasons for disagreeing;
 - 11.5 I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert;
 - 11.6 I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.
12. I have read Part 35 of the Civil Procedure Rules, the accompanying practice direction and the Guidance for the instruction of experts in civil claims and I have complied with their requirements.
13. I am aware of the practice direction on pre-action conduct. I have acted in accordance with the Code of Practice for Experts.

STATEMENT OF TRUTH I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Signature..... Date.....

Christian Concern
**Potential litigation concerning the reversal of church closure as
part of COVID-19 precautions**

Report prepared under
the instruction of:

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Andrew Storch Solicitors
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Reference:

MP:MP3515

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5 May 2020



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1 Documents received

1 Following a brief telephone enquiry, a Letter of Instruction sent by email and dated 1 May
2020.

2 Instruction

2 To provide an independent expert report that considers:

3 Whether the following alternatives to the complete closure of churches remains appropriate in
light of the evolving COVID-19 crisis:

- Reopening of churches for prayer. Observing social distancing, providing handwashing facilities at the door, admitting limited numbers of persons.
- Reopening of churches for Sunday services, again observing social distancing etc.
- Reopening of churches for urgent counselling and spiritual comfort, again observing social distancing etc.
- Reopening of churches for weddings, again observing social distancing etc.

3 Conflicts of interest

4 I have no conflicts of interest in any aspect of this case.

4 Current COVID-19 precautions (community)

5 Many individuals have chosen to wear a face mask and/or gloves when at work, travelling, or
more generally while outside for exercise, recreation, shopping etc.

6 This is acceptable though perhaps limited in value. Most face masks have little filtering
capacity for particles as small as a virus particle. Thus, wearing a cheap face mask, a
homemade face mask, an impromptu face covering such as a scarf, or even a high quality
commercial face mask of proven filtration efficiency if worn incorrectly, will each offer little
protection to the wearer.

7 A full face visor almost certainly performs as well as a cheap face mask, and may be
considered a more practical alternative when delivering a church service.

8 There are some advantages. Even a simple face mask will capture many respiratory droplets
emitted by the wearer that may serve to protect others. Thus, 'my face mask protects you, and
your face mask protects me'. It is widely assumed also that face masks/face coverings remind
the wearer to keep their fingers away from their mouth, nose and eyes that are common
routes for transmission of the COVID-19 coronavirus.



9 There is no value in wearing eye protection.

5 The role of the church

10 The church is central to the social and mental health of many people. In these particularly difficult times, the church performs a valuable role that is complimentary to the welfare and physical health of many.

11 Having reviewed the current knowledge base concerning COVID-19 infection, routes for transfer from person-to-person and evidence for the susceptibility of different individuals I am satisfied that with modification, as detailed below, church services can be continued and expanded with safety.

12 A particular concern is the provision of support to members of the community who do not have access to appropriate computer equipment to join an online service etc, and whose only alternative would be to physically attend the church. This might include attending a service or simply visiting the church for a period of private reflection.

13 In the following sections, I provide details of several approaches to the fulfilment of the role of the church that could run concurrently. Though presently it is important and wholly appropriate to adhere to government guidance, in my opinion there are workable, safe, and wholly effective alternatives to be used in support of those vulnerable individuals who cannot access an online service.

6 Online church services

14 Online church services are the preferred option. With the large number of online conferencing platforms, many of which are free to use, this will be a safe, reliable, and wholly effective means of delivery. There are no associated infection control risks. I recommend that these be continued for the foreseeable future.

7 Recommended precautionary measures to be observed

7.1 Church services

15 Traditional church services should be restricted to those who are unable to attend via online delivery, or contact a representative of the church by telephone.

16 Churches might remain open and accessible for a limited number of people who cannot join an online service. On these occasions, church buildings can be open but must be staffed to ensure that all who may attend comply with the appropriate precautionary measures detailed



below. In this way, I expect the church can fulfil its role in society and provide comfort and support to those who need it without creating any new or greater risk of infection transmission.

7.2 *Individual face-to-face services in the individual's home*

17 Where infirmity makes it impossible for individuals to attend the church, and where
engagement with an online service is not possible an individual home-based face-to-face
service or support visit should be possible without risk.

18 In Sections 8 and 9 of this report, I outline a range of precautionary and preventative
measures that will, in most circumstances, enable the church to fulfil its role in society and
support to the community.

7.3 *Care homes etc*

19 I understand that church services are regularly held in care homes, with additional visits by
pastors and other religious representatives as requested.

20 That is commendable. However, presently the incidence of COVID-19 coronavirus infection in
care home residents is reported to be particularly high though the numbers announced are
somewhat vague. Special precautions are therefore necessary.

8 **Recommended precautionary measures**

8.1 *Social distancing*

21 As per current government recommendations, maintaining social distancing with a minimum
two metre¹ separation is appropriate at all times.

22 Across the entire church estate including buildings and their grounds, and while undertaking
any remote activities for parishioners and others, this two metre social distancing must
rigorously be observed. This “rule” must apply at least until corresponding government
recommendations are relaxed.

23 At the time of writing, it seems likely that the government may soon implement changes to the
COVID-19 precautions and in particular reduce the required social distancing from two metres

¹ Note that two metres is a notional separation distance. It must not be overlooked that two metre separation relates to separation in all directions, in front and behind, to the left and to the right etc. Greater separation distances are obviously better, but sometimes may be impractical if not impossible to achieve.



to 1 metre. If and when this is to happen, then the minimum separation distance can be reduced accordingly. However, note that the required separation distance is a minimum.

24 If government advice regarding the minimum required separation distance is indeed reduced to one metre, then this can be adopted. Note however that the greater the separation distance the greater the degree of protection. It may therefore be appropriate to maintain two metre separation, or even more, in order to reduce transmission of infection.

25 An added benefit is that an imminent change in government policy may have to be reversed if infection rates climb again. That could cause some disruption and confusion in the delivery of church services and marking of seating locations/minimum separation distances in church buildings. I would therefore recommend maintaining the current separation distance of 2 metres for at least 2 – 3 weeks after any government relaxation of restrictions.

8.2 **Health awareness and social isolation**

26 Health awareness is an essential part of prevention. Thus, no pastor, church employee, assistant, helper or visitor, and no parishioner, should attend any church gathering if they believe that they are currently suffering from, or have recently suffered from, symptoms suggestive of COVID-19 infection:

- A raised temperature
- A new and persistent dry cough
- Any other symptoms that have been identified by a healthcare practitioner and who had advised the individual to isolate themselves because of the possibility of COVID-19 infection.

27 Those who develop a dry and persistent cough or a raised temperature while at church should withdraw immediately.

28 Those who have recently been in close contact with any individual who was suffering COVID-19 infection, who was suspected to be suffering from COVID-19 infection, or who had one or more individuals within their household suffering from COVID-19 infection should not go to church.

29 A degree of polite observation would be advisable to identify those few who may choose, at least initially, to 'carry on regardless'.



8.3 **Shielding**

30 No individual who has been advised by a healthcare practitioner to shield themselves from
infection because of some serious underlying risk factor(s) should attend the church.

31 No individual who has within their household an individual who is shielding should attend the
church.

32 For these individuals, online services maybe the appropriate option. As I note elsewhere for
online service delivery to care home residents, the temporary and short term loan of an iPad
or similar device may be feasible.

33 Delivery of the device and its subsequent collection must ensure no direct contact between
the person undertaking the delivery and the recipient. A minimum two metre separation must
be maintained at all times and it will be therefore appropriate to knock or ring a doorbell, leave
the device on the doorstep, and then stand back by at least two metres until the door is
opened and the device collected by the individual, a family member, or by a carer.

34 A named individual must be nominated to deliver, collect and disinfect these devices between
each use.

9 **Specific hygiene precautions**

35 Remember that COVID-19 infection can be transmitted before symptoms develop.

9.1 **Care homes**

36 Care home visits should be restricted as much as possible as presently the risks are particular
great. Random visits should not take place.

37 Every pastoral visit should be arranged by telephone and approved in advance by a senior
care home manager, at which time inquiries can be made about the general health of all
residents of that home. The possibility for online-only visits can also be discussed. Indeed, the
church might investigate the use of a number of iPad or similar devices to facilitate some
limited number of online services. As these would be loaned to individual care homes and/or
care home residents, a named individual must be nominated to deliver, collect and disinfect
these devices between each use. For this, I recommend vigorous rubbing with one or more
Clinell Universal Medicated wipes². These are active against a wide range of bacterial, fungal
and viral pathogens including COVID-19 coronavirus and have become the de facto NHS
standard.

² <https://gamahealthcare.com/products/universal-range>



38 It is appropriate that the decision of the care home manager or senior healthcare professional
regarding if and when to visit, and during a visit which care home residents to see, will be
observed at all times.

39 If personal visits are permitted, these should be undertaken by an individual not taking church
services. Clearly, this may be restrictive but is I believe an entirely appropriate additional
precaution.

40 The visitor should have with them disposable gloves and a face mask. Depending on
circumstances these may not be necessary, but it would be appropriate that they are available
if required. An ample supply of alcohol hand gel is essential. It should be used at least at the
time of entry to the property and again at the end of the visit, and when moving from room to
room to visit individual residents who cannot congregate centrally.

41 Good quality face masks are likely to remain in short supply at least for the foreseeable future.
To ensure that these are prioritised for used by healthcare professionals, visits might be
postponed if their use is mandated and yet supplies are short. Care homes should have their
own priority supplies and may support a pastoral visit by offering to supply a mask in order to
meet their current infection prevention standards.

42 Report to the senior care home manager on arrival and comply with all hygiene, infection
prevention and safety measures.

43 No refreshments should be taken, or given, during the visit.

44 If food or wine are normally used as part of a religious service then, if at all possible, this
should be withheld. If that is not possible, this should be managed in such a way that
continues to permit the minimum two metre separation. Shared drinking vessels or contact
with various church plate etc should not happen unless, at the very least, this is thoroughly
washed and sanitised before and between every contact. Use single-use disposables.

9.2 **Home visits**

45 Individual home visits should be restricted as much as possible. Random visits should not take
place.

46 An individual pastoral visit might best be arranged by telephone at which time inquiries can be
made about the general health of all members of that household. Inquiry should also invite the
resident(s) to consider an online-only visit If that would be a feasible alternative.

47 If an individual home visit is to take place, the church should carefully appraise the need for
and value of that visit. Few such visits are likely to be appropriate.



48 If at all possible, the visit should be carried out by an individual not needing to take church services or to visit any care home. Clearly, this may be restrictive but is I believe an entirely appropriate additional precaution.

49 The visitor should have with them disposable gloves and a face mask. Depending on circumstances these may not be necessary, but it would be appropriate that they are available if required. An ample supply of alcohol hand gel is essential. It should be used at least at the time of entry to the property and again at the end of the visit.

50 In this context, alcohol hand gel is preferable to the use of hand washing facilities at the home being visited. Though vigorous washing of hands with soap and running water is effective there can be no certainty as to the hygiene of any hand towel that is offered which should therefore be avoided.

51 No refreshment should be taken during the visit.

52 If food or wine are normally used as part of a religious service then, if at all possible, this should be withheld. If that is not possible, this should be managed in such a way that continues to permit the minimum two metre separation. Shared drinking vessels or contact with various church plate etc should not happen unless, at the very least, this is thoroughly washed and sanitised before and between every contact. Use single-use disposables.

9.3 **Church services**

53 It is my considered opinion that churches can now and should remain open for regular church services and that this can be achieved without risk. However, certain precautions must be observed.

- A clear and unambiguous notice should be displayed prominently at the church door, to explain all that is required of visitors. This might also explain, the options for online services and any booking system that might be applied in the event that multiple services are provided to reduce the total number of persons present at any one time, thus facilitating social distancing.
- Social distancing must be observed and maintained at all times, remembering that this requires a minimum two metre separation in front and behind, to the left and to the right.
- The need to maintain social distancing applies to all of those who are present.
- It may be appropriate to nominate one or more Individuals to act as concierge, directing visitors to a particular seat in order that they comply with the separation rules.
- Members living together in a single household can sit together.



- Friends, neighbours, and relatives etc who do not live together in a single household must not sit together and must observe the two metre separation rule.
- To avoid all ambiguity, it may be advisable to mark individual seating areas to ensure separation in a way similar to that applied by many supermarkets to ensure customer separation.
- The number of people attending each service may be limited due to space constraints. A satellite location that can be equipped with a suitable video link may assist. However, this location must also be actively managed to ensure, as above, that social distancing is maintained at all times.
- Depending upon resource it may be preferable to hold several successive services, each separated in time to allow for breaks etc, and to avoid those leaving a service to come close to those waiting for the next service. A booking system may be advisable to avoid disappointment.
- Hand washing for each person entering the church might be considered appropriate but is, I suspect, hugely impractical. In the alternative, I would recommend provision of an ample supply of alcohol hand gel containing a minimum 60% alcohol. Pump action dispensers should be placed close to the entry door and used by every person on entry and again on exit. A simple pictorial instruction poster on the use of alcohol hand gel should be displayed nearby³.
- A member of the church team should be positioned at the door to ensure compliance with hand hygiene requirements and to prevent overcrowding.
- Food and drink should not be offered. If refreshments are to be provided for pastors and church officials between successive services, this should be provided using disposable cups and disposable plates; hands should be sanitised with alcohol hand rub before eating and after clearing away used cups and plates.
- If food or wine are normally used as part of a religious service then, if at all possible, this should be withheld. If that is not possible, this should be managed in such a way that continues to permit the minimum two metre separation. Shared drinking vessels or contact with various church plate etc should not happen unless, at the very least, this is thoroughly washed and sanitised before and between every contact. Use single-use disposables.
- Door handles and push plates, and other touch surfaces including for example hymnbooks should be sanitised after each use. This would best be achieved at the end of every

³ <https://www.hey.nhs.uk/wp/wp-content/uploads/2017/01/Hand-washing-2.png>



service using Clinell Universal Medicated wipes. These pre-wetted wipes are most unlikely to cause damage to books etc.

9.4 *Miscellaneous visits not being part of an organised church service*

54 There may be considerable value to some individuals to have access to the church on an individual basis outside regular service hours, for urgent counselling and spiritual comfort. If this is to be considered, the church must be open and unlocked, or a doorbell provided to gain access. At all times when a visitor is in attendance a member of the church also should be in attendance to supervise, making sure that if a second or third visitor should arrive the required social distancing rule is observed.

55 On entering the church, alcohol hand gel should be used and on leaving the church, used again.

9.5 *General precautions*

56 During services it will be helpful to ensure good ventilation of the church and any room used for overflow services. taking care not to jeopardise security of the church, some windows and doors should be opened when the premises are in use and remain open until the areas have been cleaned and vacated.

57 After every period of use or service, the church should be cleaned at least to remove any spilled debris. As noted above, door handles and door push plates should be wiped down with a Clinell wipe.

10 **Conclusions**

58 I restrict my comments to matters of microbiology, infection, infection prevention, and hygiene.

59 With rigid adherence to the guidelines noted above, I see no reason for continuing the suspension of church services at the present time. Indeed, we might hope that the sum of all precautionary measures continues to be successful and that the risk of infection will fall.

60 However, it must be recognised that the church has a valuable role in society, particularly to those in need of support spiritual, psychological and more general support, companionship etc. As such, the support that can be given to more vulnerable members of society supports their welfare and well-being, and supports also the work of local authorities and the National Health Service.

61 I fully support the continuation of online church services and online support for individuals. Visits to see individuals in their own home, and visits to care homes, present particular



difficulties. These should be undertaken only by specific individuals who dedicate their time to these tasks in particular, and do not participate in regular church services.

62 Presently, visits to care homes may be severely restricted if not wholly inappropriate in order to protect the residents. In every case the decision of the care home managers and senior healthcare professionals must be accepted without question. In the alternative, the church may find the resources to make available one or more iPads or similar devices on temporary loan such that a one-to-one service for the housebound or care home resident can be achieved.

63 The circumstances of the proposals outlined here will not, in my opinion, increase the risk of transmission of COVID-19 infection. However, the success of the proposal is dependent upon the rigour with which these guidelines are adopted and maintained. To ensure that that is maximised, I would strongly recommend that each church nominates a lead person for training of others, and ensures compliance. A national or regional training guide based upon the recommendations presented here, on paper or to be delivered online, will ensure success and further minimise risk while delivering support to those in need.

64 I strongly commend relaxation of restrictions on church services. In line with the suggested policies outlined here a strong emphasis can be placed upon online church services, but with provision for the support of those unable to engage in this way.

65 If relaxation of restrictions in accord with the suggestions given here is to be permitted, then the church must remain aware of and monitor government announcements regarding changes to both current and future restrictions. If the rate of COVID-19 infection worsens at some time in the future, on a local, regional or national basis then relaxation of current restrictions may be reversed. If that happens, then of course the church must immediately comply with those restrictions pending subsequent government review.

66 My Letter of Instruction raises the following specific questions:

- Reopening of churches for prayer. Observing social distancing, providing handwashing facilities at the door, admitting limited numbers of persons.
- Reopening of churches for Sunday services, again observing social distancing etc.
- Reopening of churches for urgent counselling and spiritual comfort, again observing social distancing etc.
- Reopening of churches for weddings, again observing social distancing etc.

67 In light of the current and the still incomplete knowledge of COVID-19 coronavirus infection, and the general principles of infection prevention and control, I can identify no barriers to



reopening of churches as outlined above. The model rules I propose here should make this as risk free as possible. Indeed, this might be safer than many current commercial activities in the manufacturing and supply industries, including many small and mid-range supermarkets that are permitted to operate.

11 Declaration

I, James Ian Blenkharn, declare that:

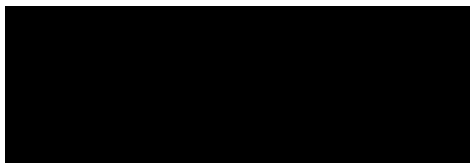
- 1 I understand that my duty in providing written reports and giving evidence is to help the Court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
- 2 I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
- 3 I know of no conflict of interest of any kind, other than any which I have disclosed in my report.
- 4 I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
- 5 I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.
- 6 I have shown the sources of all information I have used.
- 7 I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
- 8 I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
- 9 I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including my instructing lawyers.
- 10 I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.
- 11 I understand that:
 - 11.1 my report will form the evidence to be given under oath or affirmation;
 - 11.2 questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;



- 11.3 the court may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the proceedings, where possible reaching an agreed opinion on those issues and identifying what action, if any, may be taken to resolve any of the outstanding issues between the parties;
 - 11.4 the court may direct that following a discussion between the experts that a statement should be prepared showing those issues which are agreed, and those issues which are not agreed, together with a summary of the reasons for disagreeing;
 - 11.5 I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert;
 - 11.6 I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.
- 12 I have read Part 35 of the Civil Procedure Rules, the accompanying practice direction and the Guidance for the instruction of experts in civil claims and I have complied with their requirements.
- 13 I am aware of the practice direction on pre-action conduct. I have acted in accordance with the Code of Practice for Experts.

12 Statement of Truth

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.



James Ian Blenkharn - Microbiologist
5 May 2020



13 Ian Blenkharn

- 1 I, James Ian Blenkharn CSci CBiol CWM FRSB FRSPH FIBMS MCIWM of Blenkharn Environmental, London, make this report. I am a healthcare, occupational and environmental microbiologist with 45 years' experience in the NHS and University Medical Schools, and in the private sector. I obtained qualification in Medical Microbiology in 1976, with an additional University of London Master's degree in Microbiology (1980). I have extensive research and teaching experience in the UK and elsewhere.
- 2 The greater part of my career was with the NHS, with the Royal Postgraduate Medical School, and with Imperial College London. I left Imperial in 2004 to continue with my long-established private practice. In addition to that extensive private practice, I am a Lecturer at the University of West London where I teach microbiology and infection prevention & control to healthcare professionals at both undergraduate and postgraduate level.
- 3 In the commercial sector I have held, in addition to many ad hoc consultancy engagements, additional appointments as consultant microbiologist, science adviser, technical and safety adviser etc. I have also held consultant appointments to clinical (healthcare) wastes companies and to water testing companies, acting as science adviser, trainer, auditor and assessor etc, and representative at licencing and permitting applications and appeals.
- 4 My research-driven international practice focuses on aspects of general and environmental microbiology, occupational biohazards and bio-safety, healthcare and environmental infection control & hygiene, and audit and training in the healthcare, water, waste, occupational and environment sectors. I have particular expertise in post-surgical and device-related infections, and in bio-safety with emphasis on environmental and worker hygiene.
- 5 I have published extensively with more than 110 papers on these and related subjects in the medical and scientific literature, and by invitation have contributed to several textbooks and monographs, and to Croner.
- 6 I am a Fellow of the Royal Society of Biology, a Fellow of The Royal Society for Public Health, and a Fellow of the Institute of Biomedical Science. I am a member of the Healthcare Infection Society, the Infection Prevention Society, the British Infection Association, the Microbiology Society, the Association of Professionals in Infection Control and Epidemiology (APIC), the European Society of Clinical Microbiology and Infectious Diseases (ESCMID), and the Royal Society of Medicine. I am a Chartered Biologist, Chartered Scientist, and Chartered Resources and Waste Manager.
- 7 I sat on the Fitness to Practice panel of the Health and Care Professions Council, the independent statutory regulator. I also sat an extended term as Vice Chair of the Royal



Society of Biology Professional Registers Panel. Until its dissolution in March 2009, I was specialist adviser in microbiology to The Healthcare Commission and was subsequently appointed specialist adviser to its successor organisation, the Care Quality Commission, the independent regulator of health and adult social care in England. I currently sit as an Independent Specialist member of the clinical safety committee of the Association of Anaesthetists of Great Britain and Ireland.

- 8 I have more than 30 years' experience as an Expert Witness. I received Expert Witness training first at The Royal Postgraduate Medical School and later at Imperial College London. I hold the certificate of completion of the Bond Solon Civil Procedure Rules for Expert Witnesses course, and the Cardiff University Law School/Bond Solon Civil Expert Witness certificate. In 2019, I completed the Bond Solon Expert Witness 2019 update training course.
- 9 I have appeared in Crown, County and High Courts, in the Coronial Court, at Public Inquiry, Planning and Licencing applications and appeals, in Arbitrations and in Tribunals.
- 10 I am registered with the UK Register of Expert Witnesses, APIL, and with similar organisations in the UK. In the US, I am a member of the Gerson Lehrman Group (GLG) and of ORC International (now Expert Engine) consultancy groups, international organisations providing industry- and discipline-focused networks of consultants, physicians, scientists, and engineers to both public and private sector clients.
- 11 I have acted in Planning and related environmental permitting applications, hearings and appeals, in medicines regulatory hearings, in Public Inquiry, and as an Expert Witness in Courts in Gibraltar, The Netherlands, Germany, Ireland, US, Japan, and most recently in notable discrimination cases in Sweden each having their foundation in matters of hygiene and microbiology.
- 12 I continue to engage in Continuous Professional Development programs registered with the Royal Society of Biology, the Institute of Biomedical Sciences, and CIWM.
- 13 I was founding Editor-in-Chief of the International Journal of Hospital Environment & Hygiene Management. Currently, I am a member of the editorial board of The Journal of Hospital Infection and The Open Waste Management Journal. I have additionally served terms on the editorial boards of The Biologist, The Journal of Infection Prevention, The Journal of Electronic Health. and The International Journal of Engineering, Science and Technology. For more than 3 decades, I have been a regular reviewer for many medical and scientific journals.

A full Curriculum vitae with complete publication list is available on request



Christian Concern
**Potential litigation concerning the reversal of church closure as
part of COVID-19 precautions**

Addendum report & Clarifications

Report prepared under
the instruction of:

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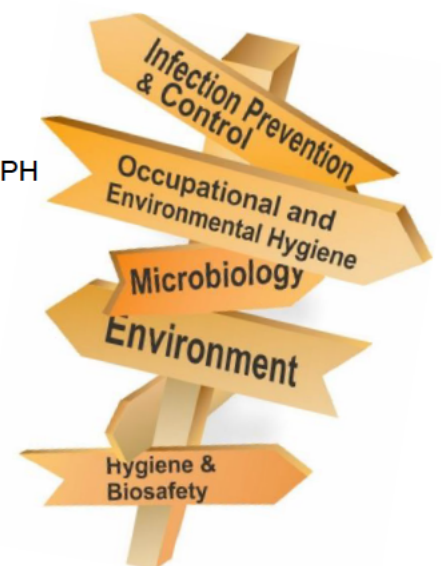
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14 June 2020



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1 Conflicts of interest

1 I have no conflicts of interest in any aspect of this case.

2 Engaging with church services – online or in person?

2 In my substantive report of May 2020, I discuss engaging with the church in three different ways:

- Physical attendance at church services
- Attendance or engagement via an online live stream church service
- Miscellaneous church visits not being part of an organised church service, for quiet reflection or individual worship etc

3 Additionally, I discussed the limited options for individuals to engage with the church by attendance of a pastor or other church member in their own home, and for care home residents subject to overarching infection prevention and control precautions and the prior approval of a senior healthcare professional. For these, I propose no change to the arrangements that I had proposed which are, I believe, entirely clear and wholly in accord with relevant Government guidelines.

3 Physical attendance at church services, or attendance via an online church service

4 I am advised that paragraphs 15, 16, 81 and 85 of my substantive report might be construed to recommend that churches should not routinely be opened. This might be interpreted to recommend replacing in situ church services almost exclusively by online services, with churches open only for those who cannot access services online. This latter group would include only those who are potentially the most vulnerable in the congregation, the non-tech savvy, the elderly, or those adversely affected by financial limitations.

5 For the avoidance of all doubt, it was my intention to propose that church services for a congregation in attendance, supplemented by concomitant live streaming for those unable to attend in person, could take place simultaneously.

6 Recognising the need for hand hygiene interventions on arrival and on departure from the church and in particular the need for rigorous social distancing with a minimum 2 metre separation it will be clear that the capacity of an existing church may be limited. An immediate resolution might be achieved using an overflow location where the service could be live-streamed though this too must comply with the hygiene precautions specified.



7 If such arrangements are not possible and the service is or is likely to be oversubscribed, a
booking system would be advantageous, as I proposed in Section 9.3 of my substantive report
from May 2020. The church will be responsible for taking all necessary steps to ensure
compliance with social distancing requirements.

8 Within the now much reduced physical capacity of the church there will inevitably be
restrictions on the numbers able to attend a chosen church service. If this arises, it is the
responsibility of the church to manage this robustly and refuse or defer entry for any excess
numbers. In that situation, I would be tempted on compassionate grounds to give priority to
those who by age or infirmity would find it difficult to return at some later time, or who do not
have access to the facilities required to receive an online video-streamed service.

4 Miscellaneous church visits not being part of an organised church service

9 On 7 June 2020, the Communities Secretary Robert Jenrick confirmed on behalf of the
Government¹ that:

- i *“places of worship would be permitted to re-open for individual prayer from Monday 15 June, in line with social distancing guidelines”.* It was said that *“this move recognises the spiritual and mental health benefits for people being able to pray in their place of worship, and that for some people this cannot be replicated by praying at home.”*
- ii It is stated that individual prayer will be permitted from 15 June, *“but communally led prayer, worship or devotion such as services, evensong, informal prayer meetings, Mass, Jumma or Kirtan will not be possible at this stage.”*
- iii *“Places of worship still have discretion over when they consider it safe to open and may decide to remain closed or re-open at a slower pace if they wish.”*
- iv *“Under the existing regulations, funerals are allowed in places of worship where it is possible to do so safely. Other gatherings and services such as baptisms, weddings, supplementary schools, meetings and classes are not permitted.”*
- v *“Also places of worship may open for ministers of religion to film or record a service for broadcast, for the hosting of essential voluntary activities such as homeless services, for registered early years and childcare providers and for blood donation sessions. Buildings should also remain closed to tourists.”*
- vi Under the heading ‘further information’, it is stated that *“guidance will be available shortly. Faith leaders should carry out a risk assessment of the place of worship and tailor this guidance as*

¹ <https://www.gov.uk/government/news/places-of-worship-to-re-open-for-individual-prayer>
(last accessed 13 June 2020)



appropriate for the venue and practices being carried out. This will be in addition to any risk assessment already in place.”

- vii *“Individual prayer within a place of worship is defined as a person or household entering the venue to pray on their own and not as part of a group, led prayer or communal act. They should be socially distanced from other individuals or households.”*

10 This jumbled and contradictory Government guidance does not reflect well on its authors or on the Government. It is repeatedly contradictory and, in several ways, irrational in its construct. I will give examples below.

4.1 **Open for individual prayer**

11 In i) it is stated that “places of worship would be permitted to re-open for individual prayer from Monday 15 June, in line with social distancing guidelines”. It does not state that only one person may attend for individual prayer at any one time. Indeed, referencing that attendance should be in line with social distancing guidelines clearly implies an expectation that more than one individual could be present at any one time.

12 Though referring to a family group, the announcement makes no allowance for two unrelated persons attending coincidentally for individual prayer, or three people, or four and so on. If that were to happen then by the Government’s own guidance that would be permitted providing social distancing was maintained at all times. I do not disagree.

13 The guidance becomes perverse and unreasonable, and clearly unscientific, when the same two, three, four, or even more individuals attended an organised church service, even when all appropriate hygiene and infection prevention measures are in place. For no sound reason, that would not be permitted.

14 The lack of qualification in i) contrasts starkly with and contradicts the restriction proposed in ii) above.

4.2 **Discretion to open**

15 In iii) the Government guidance states that “places of worship still have discretion over when they consider it safe to open and may decide to remain closed or re-open at a slower pace if they wish”.

16 Once more, the guidance is contradictory, perverse, and unreasonable. It is clearly unscientific since that “discretion” is condoned by i) yet restricted and perhaps prohibited by ii) above.



4.3 *Funerals, weddings etc*

17 In iv), it is stated that “funerals are allowed in places of worship where it is possible to do so safely.” In this guidance, the entirely reasonable limitation is that this will only be allowed in places of worship where it is possible to do so safely. Those responsible for the operation of the place of worship must take responsibility for managing the number of attendees, ensuring that social distancing at a minimum distance of two metres is maintained at all times, that general environmental hygiene measures are adopted, and with arrangements for hand hygiene on entry and on exit. I fully agree and refer to my substantive report of May 2020 where those measures are discussed in the form of model rules.

18 As discussed in Section 4.1 of this report, it is clear that those who on behalf of the Government compiled this particular guidance have failed in matters of logic. There are no specific constraints on attending a place of worship for a funeral providing the overarching social distancing requirements are maintained. The guidance omits any mention of the permitted numbers of attendees, relying instead on the constraints of social distancing. It is thus in accord with the advice given under i) but contradicts the advice given under ii) above. In iii), the internal contradictions of the Government’s own advice are further conflated in a quite meaningless fashion.

19 Going further, it is stated under iv) that weddings and baptisms etc are not presently permitted. This too is illogical as there is no reason to believe that this could not be managed effectively with appropriate hygiene and social distancing precautions that place a limit on number of attendees as would be expected also for individual worship. Regular church services, or funerals. The risks are the same, and the constraints and limitations are also the same and it just seems particularly perverse and lacking in scientific rigour to permit one while restricting another.

4.4 *Other uses*

20 In v), it is stated that places of worship may open for ministers of religion to film or record a service for broadcast, for the hosting of essential voluntary activities such as homeless services, for registered early years and childcare providers, and for blood donation sessions.

21 Once again, no constraints or limitations are proposed for places of worship when hosting essential voluntary activities, early years and childcare provision, or blood donation sessions. It must rightly be assumed that the same hygiene and infection prevention precautions will apply, to include rigorous social distancing, hand and environmental hygiene, and restriction for those who are or may be exhibiting signs suggestive of COVID-19 infection or who have recently been in contact with someone who has COVID-19 infection.



22 This seems largely appropriate. It is clearly the Government's expectation that those responsible for places of worship could manage this safely, as they should manage their premises open for individual prayer, open for funerals, and more generally to manage effectively and with the discretion to make decisions about when they consider it safe to open.

23 The last part of the wording in v) is particularly difficult to reconcile with the rigid prohibition of in situ church services. As reviewed here, the Government's advice invests in the church the discretion to make decisions about when they consider it safe to open. It is therefore illogical to give the church discretion on so many matters including but not limited to individual prayer, the delivery of online services, blood donation sessions, social care and voluntary activities such as homeless services, for registered early years and childcare providers, and for funerals, but not more conventional church services.

24 Hygiene and related infection prevention precautions will be the same for all activities. The risks would be no greater or no lesser when comparing any one of these activities with any other. As the Government itself notes, the church will be responsible for managing all necessary precautions through a process of risk assessment and that responsibility would be no greater or lesser when comparing any one of these activities with any other.

4.5 **Risk assessment**

25 In vi) under the heading 'Further information', it is stated that "guidance will be available shortly. Faith leaders should carry out a risk assessment of the place of worship and tailor this guidance as appropriate for the venue and practices being carried out. This will be in addition to any risk assessment already in place."

26 I fully agree with this requirement for risk assessment, which in my opinion should include also an expectation for dynamic risk assessment in the event that it appears that social distancing requirements are likely to be compromised by an unexpectedly high number of attendees. However, this scenario might largely be avoided using a booking system, as proposed in Section 9.3 of my substantive May 2020 report.

5 **The role of the church**

27 The church is central to the social and mental wellbeing of many people. In these particularly difficult times, the church performs an ever more valuable role complimentary to the welfare of many.

28 I am satisfied that with the introduction of appropriate hygiene and infection prevention precautions, as detailed in my substantive May 2020 report, church services can continue and be expanded with a generous margin of safety. Those model rules are applicable to all uses of



the church premises, from individual prayer, the delivery of online services, blood donation sessions, social care and voluntary activities such as homeless services, for registered early years and childcare providers, and for funerals. Each of these activities is permitted by the Government and specified in its latest guidance document and the precautions would not change and nor risks increased if applied also to regular in situ services.

29 On the basis of uniformity in approach and rational interpretation of the available scientific evidence, and indeed by analogy to other permitted activities such as the permitted operation of food stores and supermarkets, and imminently of all other non-food stores, it is in my opinion entirely wrong to prohibit regular church services, weddings and baptisms etc. I find no valid reason to limit or to prohibit these latter activities. Indeed, the information provided by this 7 June 2020 Government announcement, leaving aside flaws in scientific and logical reasoning, effectively permit these additional activities.

30 At its most basic, there can be no difference with regard to the safety of individuals or of the community between reopening places of worship for individual prayer in circumstances when more than one family groups and several individuals, perhaps totalling 10 or 15 individuals, coincidentally attend at one time for individual prayer, or when the same number of individuals attend as a group for a single church service. Providing that appropriate precautions are maintained at all times, the risk to individuals and to the community will not be increased and will probably be lowered by the implementation of the model rules I had outlined in Section 7 et seq of my substantive May 2020 report.

6 Conclusions

31 With rigid adherence to the proposed guidelines, I see no reason for continuing the suspension of church services at the present time.

32 It must be recognised that the church has a valuable role in society, particularly to those in need of spiritual, psychological, and more general support, companionship etc. As such, the support available through the fellowship of the church that is available to all, including in particular vulnerable members of society, can support their welfare and wellbeing through engagement in the wide diversity of church activities, and in addition indirectly supports the work of local authorities and the National Health Service.

33 The latest announcement from the Government is internally contradictory. The weight of its own argument strongly favours online or remote church services, funerals, and the opening of churches for individual prayer in addition to a diversity of other social and community activities. The announcement makes clear that these activities must be in line with social distancing guidelines. I agree and hope that the further guidance, when available, will be rigorous as the model hygiene guidelines of my substantive report.



34 At the present time, it continues to be my professional opinion that opening of churches for
conventional church services and for other activities should be permitted. As noted above, by
35 far the majority of those church activities have already been identified as permissible in the
Government's 7 June 2020 guidelines. The model hygiene and infection prevention rules that I
propose will be more than adequate.

35 Regrettably, the Government announcement includes some significant contradictions that I
have discussed above. Eliminating those contradictions to permit regular church services, with
the strict proviso that all church activities are properly risk managed and undertaken in strict
accordance with the hygiene and infection prevention rules outlined earlier is entirely
appropriate.

36 In light of the current knowledge of COVID-19 coronavirus infection, and the general principles
of infection prevention and control, I can identify no scientifically valid barriers to reopening of
churches for services as outlined here. The model rules I propose should make this as risk
free as possible. Indeed, it will in all likelihood be considerably safer than many current
commercial activities in the manufacturing and supply industries, including many shops and
supermarkets that are currently permitted to operate, and all other shops being permitted to
open in the next few days.

37 The latest Government announcement restricting organised in situ church services is bizarre
and irrational. The 7 June 2020 announcement by Communities Secretary Robert Jenrick on
behalf of the Government (Section 4) is perhaps best described as slightly lopsided. It permits
a considerable range of essentially comparable activities to take place on church premises,
but with the singular exception of an organised church service. That one exclusion makes no
sense whatsoever and must be corrected to eliminate that anomaly.

7 Statement of Truth

I confirm that I have made clear which facts and matters referred to in this report are within my
own knowledge and which are not. Those that are within my own knowledge I confirm to be
true. The opinions I have expressed represent my true and complete professional opinions on
the matters to which they refer.



James Ian Blenkarn - Microbiologist

14 June 2020



8 Ian Blenkharn

- 1 I, James Ian Blenkharn CSci CBiol CWM FRSB FRSPH FIBMS MCIWM of Blenkharn Environmental, London, make this report. I am a healthcare, occupational and environmental microbiologist with 45 years' experience in the NHS and University Medical Schools, and in the private sector. I obtained qualification in Medical Microbiology in 1976, with an additional University of London Master's degree in Microbiology (1980). I have extensive research and teaching experience in the UK and elsewhere.
- 2 The greater part of my career was with the NHS, with the Royal Postgraduate Medical School, and with Imperial College London. I left Imperial in 2004 to continue with my long-established private practice. In addition to that extensive private practice, I am a Lecturer at the University of West London where I teach microbiology and infection prevention & control to healthcare professionals at both undergraduate and postgraduate level.
- 3 In the commercial sector I have held, in addition to many ad hoc consultancy engagements, additional appointments as consultant microbiologist, science adviser, technical and safety adviser etc. I have also held consultant appointments to clinical (healthcare) wastes companies and to water testing companies, acting as science adviser, trainer, auditor, and assessor etc, and representative at licencing and permitting applications and appeals.
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- 10 I am registered with the UK Register of Expert Witnesses, APIL, and with similar organisations in the UK. In the US, I am a member of the Gerson Lehrman Group (GLG) and of ORC International (now Expert Engine) consultancy groups, international organisations providing industry- and discipline-focused networks of consultants, physicians, scientists, and engineers to both public and private sector clients.
- 11 I have acted in Planning and related environmental permitting applications, hearings and appeals, in medicines regulatory hearings, in Public Inquiry, and as an Expert Witness in Courts in Gibraltar, The Netherlands, Germany, Ireland, US, Japan, and most recently in notable discrimination cases in Sweden each having their foundation in matters of hygiene and microbiology.
- 12 I continue to engage in Continuous Professional Development programs registered with the Royal Society of Biology, the Institute of Biomedical Sciences, and CIWM.
- 13 I was founding Editor-in-Chief of the International Journal of Hospital Environment & Hygiene Management. Currently, I am a member of the editorial board of The Journal of Hospital Infection and The Open Waste Management Journal. I have additionally served terms on the editorial boards of The Biologist, The Journal of Infection Prevention, The Journal of Electronic Health. and The International Journal of Engineering, Science and Technology. For more than 3 decades, I have been a regular reviewer for many medical and scientific journals.

A full Curriculum vitae with complete publication list is available on request



Christian Concern
Potential litigation concerning the reversal of church closure as
part of COVID-19 precautions

Report prepared under
the instruction of:

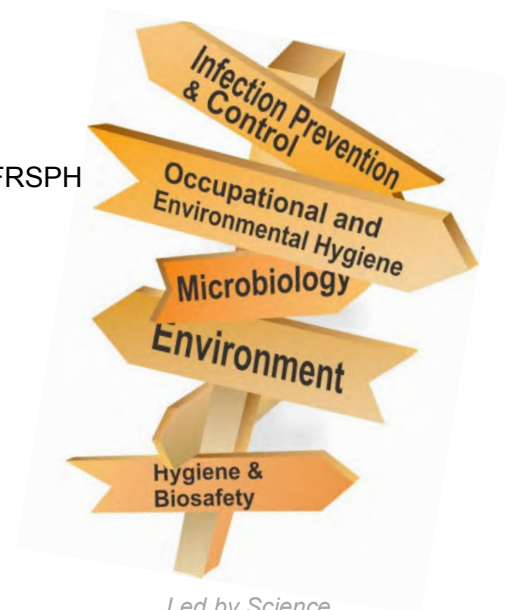
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11 November 2020



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1 Introduction

1 As the impact and spread of Covid-19 infection in the UK and elsewhere continues to
escalate, the evolution of precautionary infection prevention and control measures
recommended by government continues. Increasingly stringent control measures are being
imposed, and to the most part these measures seem well-founded though among some groups
compliance is poor or non-existent.

2 Compliance with control measures is clearly appropriate yet there can be no doubt that a
single all-embracing 'rule' does not fit all situations. In many cases, the rule will be entirely
suitable, easy to apply and, hopefully effective. We must recognise that a general rule may be
inadequate and fail to afford the intended degree of protection, while in others excessive
constraint may have unintended and unwanted consequences far beyond the risk of
transmission of infection.

3 There is a strong and clear case that the church fills a sometimes critical role in times of need
through the support it gives to its members and to others. Additionally, the church provides a
focal point for communities that can extend far beyond the active members of the church.

2 Analogous 'rules'

4 Can church services continue to be held safely? As I note in my report of 5 May 2020 and a
14 June 2020 Addendum report with clarifications, it is my expectation that the activities of the
church can continue safely, though with some specific precautions and constraints.

5 It is wholly intentional that there are broad similarities between the rules proposed for safe
church services and for other church activities and those recommendations, guidelines and
rules set by government for 'essential' and other shopping activities, public houses, cafeterias
and restaurants etc. Much of those government recommendations, guidelines and rules were
adopted for other commercial and community undertakings until the recent heightening of
Covid-19 control precautions. Notwithstanding, the model rules I propose here do not conflict
with those of the government but rather extend far beyond their scope to enhance protection.

6 Though perhaps it was unlikely ever to be the true intention of government to set COVID-19
related rules that were variable in their interpretation it is widely reported in the press and plain
for all to see that considerable variation in interpretation has arisen, remaining unchallenged
by government and its advisers. Despite this variation, there has been no recognised increase
in COVID-19 infection rates, whether local, regional or national.

7 Examples include shops and offices, factories, home delivery services, some sporting and
social events etc. Shops and supermarkets are a particular example worthy of further
comment. Though initially tight constraints were placed upon access to supermarkets in order



to ensure, without draconian measures, adequate social distancing this did not extend to the length of queues snaking through the car park. Over time, it is clear that standards intended to maximise social distancing have relaxed substantially, not supported by government though no doubt to and for the benefit of shops and shoppers alike, but without any evidence of an increase in virus transmission linked to such activities.

3 Model rules for church services and other activities

8 Previously, I have proposed a series of model rules that I believe should be applied by the church to ensure safe operation of their on site activities, of other activities on church premises such as access for private worship etc which is still permitted under the latest iteration of government-led rules, of off-site activities such as one-to-one home visits, visits to care homes and hospitals.

9 All off-site activities would be conducted only with the approval of site managers and undertaken entirely in accord with their rules of prevention. To enhance and expand these activities without compromise to overriding safety rules I had proposed the use of one-to-one or group meetings using one of the many web-based video communication systems such as Microsoft Teams or Zoom. This remote and thus inherently safe approach I also recommended for more regular church services, to reduce if necessary the number of attendees at church when this is constrained by available space, To facilitate access to services by the elderly and infirm who would find it difficult to travel, and if necessary to serve a large congregation that may of necessity be spread over more than one site.

10 I fully commend these model rules and believe that diligently applied the risk of infection transmission will be as low as possible and certainly no greater than is the risk of transmission in the activities of daily life under lockdown.

11 I had made clear the compliance with all of the rules including access to buildings, one-way systems for entry and exit, hand hygiene, rudimentary health questionnaires and temperature checks on arrival would be required. I now make it abundantly clear that to this list of requirements I would add registration of premises and visitor recording under the Government's Track and Trace system.

12 All of these requirements will require careful management to ensure their success. To ensure this, I had recommended that each church should appoint a minimum of two responsible officers to manage entry to church premises, to remind visitors of the required infection prevention rules that must be adopted that would include hand hygiene on arrival an appropriate social distancing once on site.



13 Failure to comply with these rules will be the responsibility of the church authorities who
14 themselves will be subject to prevailing official sanction.

4 Private worship

14 Access to church premises is still permitted for private worship.

15 As far as I am aware, there are no restrictions placed on the number of individuals who may
16 attend at any one time for their own private worship. However, I anticipate that the numbers
17 will be small and the attendance will be irregular.

16 With this in mind I had included in the proposed model rules for churches to ensure that all
17 such visitors requested access, perhaps by ringing a doorbell in order to gain access. In this
18 way, visitors would be discreetly supervised with at least one member of the church team
19 remaining on site to ensure that basic hygiene and related rules were maintained, and
20 inevitably to ensure the safety and security of church premises.

17 I think such rules would be eminently workable and fulfil all of the requirements for access to
18 private worship while maintaining the best possible infection prevention precautions.

5 Weddings, christenings & funerals

18 With careful adoption of the model rules that I had proposed which build upon the
19 recommended social distancing, the use of a mask or other face covering, regular hand and
20 environmental hygiene, I anticipate no valid reason for prohibition of weddings, christenings,
and funeral services, some of which might otherwise be transferred to civic or commercial
properties.

19 Logically, the location for religious or civil ceremonies make no difference to the overall risk of
20 transmission of infection providing core precautionary measures have been implemented and
are maintained. However, it is tempting to speculate that if taking place on church premises
these more rigorous precautions will ensure the highest standards of infection prevention.

6 Inconsistencies

20 It has been widely reported in the media that there exist many inconsistencies in the 'rules'
imposed by government in its tiered Covid-19 control measures. Perhaps first among these
was the government advice regarding what constitutes a substantial meal. Apparently, a pasty
served with chips or a side salad is considered by local government secretary Robert Jenrick a
substantial meal and is permitted to be served while the same pasty but without a salad is
considered a mere snack and cannot be served.



21 Elsewhere, public houses must close though some exploit a loophole in the regulations to sell
beers that are pre-ordered. indeed, some are going as far as providing facilities to pre-order at
the door and to consume drinks at chairs and tables placed immediately outside the premises.
Despite this and other inconsistencies and loopholes, the government have not updated,
corrected or clarified their advice, effectively condoning exploitation of these inconsistencies
and loopholes.

22 University students presently living in halls have now been offered an evacuation-style
operation to get students home safely for Christmas after England's lockdown. The
government has told universities to allocate departure dates during a "student travel window"
between 3 and 9 December, to minimise the risk of them spreading Covid-19.

23 Travel between Wales and England and between Scotland and England has become a
particularly contentious issue with some petty squabbles between the devolved governments,
inconsistent tier structures, and the inevitability that individuals are driving back and forth
across the borders to take full advantage of the differences in the prevailing rules. At the same
time, police forces have been wholly inconsistent in their interpretation and in their
enforcement of these rules.

7 Setting standards, leading by example

24 It is easy to see that on a regional or national scale the setting of rules regarding lockdown is
far from easy and sweeping generalisations resulting in inconsistencies and loopholes which
will be exploited. The extent to which these rules and their implementation, with or without
inherent inconsistencies and exploitation of perceived loopholes, actually contribute to overall
reduction in infection levels is a matter for much debate and it is clear that the government and
its scientific advisers, and others cannot agree on the value of these imposed rules, which
should be retained, which should be revised or strengthened, and indeed which might be
abandoned as worthless or simply unworkable.

25 Having set standards for Covid-19 related infection prevention measures, the government and
others at times struggle with their own compliance. So too do NHS employees. So too do the
operators and employees of supermarkets etc, but little seems to be done to improve
standards of compliance and thereby overall levels of protection.

26 Schools have returned and universities continue to teach though in the majority of cases
teaching, when possible has been delivered online. There is, however, little in the way of
official guidance and both schools and colleges/universities interpret the outline guidelines as
they see fit, often with hugely different interpretations and application, some good and some
not, of even the most basic rules.



27 It is to be hoped that the church will be permitted to open and offer services as usual, but in full compliance to the model rules proposed here which I believe substantially exceed those notional guidelines offered by government. Structured so as to be somewhat more specific and with the additional benefit of a proposed chain of supervision and team approach, I would expect that deviations or neglect by members of the church team and thereby by members of their congregations should be minimal. In turn, it is to be hoped that this will set a standard of performance and compliance that can be used to guide and support others.

28 I do not propose that penalties for non-compliance are waived. However, I do propose that the church should additionally create an overarching management structure to adopt a supervisory role in the implementation of Covid-19 precautions, acting as a central voice and source for guidance about interpretation of these enhanced standard rules. Through this central management group close standardisation will be assured, while problems are identified, expert assistance sought as required, and solutions rapidly cascaded to all members.

8 Conclusions and recommendations

29 The Covid-19 infection prevention guidelines and rules laid down by government are vague, inconsistent, and open to interpretation. Loopholes have been identified and are exploited, not more so than on the periphery of local lockdowns and on the borders between England, Wales and Scotland.

30 The government and its scientific advisers have received much criticism about the development and implementation of these rules and in particular of their inconsistencies. However, there is no evidence of the government's intention to correct those matters.

31 One major consequence of this is that across the UK, church services are now prohibited. Clearly, this is causing some distress that has prompted a detailed review of the issues involved. In that review, I have taken guidance from the government and its scientific advisers, and from my work in medical microbiology and infection prevention and control. Taking all of these factors into account I proposed a set of core 'rules' (Appendix 1) that can be applied to church services and related activities whether taking place on site or at some remote location. Quite intentionally, little if any flexibility in interpretation of those rules is proposed or permitted.

32 It is accepted that the church fulfils a unique role in society. That role takes on many different forms; the church is central to the social and mental health of many people. In these particularly difficult times, the church performs a valuable role that is complimentary to the welfare and physical health of many, and can complement and expand upon those services provided by the Department of Health and Social Care, some private providers in the care home sector, and many other charitable organisations.



- 33 It cannot be overlooked that the church is active in every hospital and care home to provide welfare and comfort to patients and staff alike. Though these activities have been greatly curtailed by the evermore stringent infection prevention and control measures in place in hospitals and care homes, it is to be hoped that the activities of the church can continue and can continue safely at the present time. To that end, I propose and recommend the model rules summarised here and in my substantive report, together with the training and supervision that I have indicated to ensure full compliance. It is my professional opinion that, through implementation of these rules, churches can safely deliver services on site. Moreover, those services can be live-streamed to others in nearby overflow premises, and to others who may be in their own home or care home and unable to travel.
- 34 It is somewhat perverse that the government will permit presently access to church premises for individuals wishing to engage in private worship but have chosen to suspend all organised church services. In my professional opinion I think this is unfortunate and inconsistent, preventing the church from providing support and comfort to its members and indeed to the rest of the community.

Appendix 1

Core 'rules'

- Thorough cleaning of the venue using disinfectant wipes or equivalent on all likely touch surfaces
- Enhanced ventilation with open windows where possible
- Visitors are met at the door; rules and processes explained to visitors
- Booking system with multiple services available if necessary, to avoid overcrowding
- Visitors register with Track and Trace at the point of entry
- Masks or suitable face covering must be worn by all; face masks made available for those who arrive without
- Hand hygiene mandatory for all; hygiene stations at the door
- Marked one-way system of transit throughout the building, from entry to exit
- Active management of seating arrangements to ensure necessary social distancing; flexible arrangements will allow members of the same household to sit together
- No live music
- No singing
- Optional live video casting of services to additional visitors who can be accommodated in an adjacent room or building to maintain to the same safe standard



- Optional live video casting of services streamed to those who wish to or must stay at home
- Supervisory team to ensure compliance with all rules

Appendix 2

Community focus – virus screening, vaccination programmes etc

35 We are all aware of the current and soon to expand programme of virus screening for at risk individuals, and the impending introduction of mass vaccination. The Department of Health and Social Care and others are working hard to plan and deliver these key programmes. However, it is already apparent that there exist significant manpower issues and that GP surgeries could not continue to offer a meaningful range of services to patients if space must be redirected toward the vaccination programme.

36 Presently, screening services are operating out of doors in council car parks, and in some council run sports and community centres. To greatly augment these existing services, it might be appropriate to consider the use of church premises to host these essential programmes. Though I have not explored the feasibility of this proposal in any detail, church premises are located within the heart of every community and could perhaps be made available for use.

37 This seems eminently workable and I happily endorse collaboration between the necessary parties with a view to its implementation. I must make absolutely clear that this proposal has no part whatsoever in the current action. However, if church services are permitted to restart without delay, the proposed rules will ensure a safe and suitable environment for virus screening and vaccination programs

9 Declaration

I, James Ian Blenkharn, declare that:

- 1 I understand that my duty in providing written reports and giving evidence is to help the Court, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
- 2 I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
- 3 I know of no conflict of interest of any kind, other than any which I have disclosed in my report.



- 4 I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
- 5 I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.
- 6 I have shown the sources of all information I have used.
- 7 I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
- 8 I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
- 9 I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including my instructing lawyers.
- 10 I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.
- 11 I understand that:
 - 11.1 my report will form the evidence to be given under oath or affirmation;
 - 11.2 questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;
 - 11.3 the court may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the proceedings, where possible reaching an agreed opinion on those issues and identifying what action, if any, may be taken to resolve any of the outstanding issues between the parties;
 - 11.4 the court may direct that following a discussion between the experts that a statement should be prepared showing those issues which are agreed, and those issues which are not agreed, together with a summary of the reasons for disagreeing;
 - 11.5 I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert;
 - 11.6 I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.
- 12 I have read Part 35 of the Civil Procedure Rules, the accompanying practice direction and the Guidance for the instruction of experts in civil claims and I have complied with their requirements.



- 13 I am aware of the practice direction on pre-action conduct. I have acted in accordance with the Code of Practice for Experts.

10 Statement of Truth

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.



James Ian Blenkharn - Microbiologist
11 November 2020

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- 8 I have more than 30 years' experience as an Expert Witness. I received Expert Witness training first at The Royal Postgraduate Medical School and later at Imperial College London. I hold the certificate of completion of the Bond Solon Civil Procedure Rules for Expert Witnesses course, and the Cardiff University Law School/Bond Solon Civil Expert Witness certificate. In 2019, I completed the Bond Solon Expert Witness 2019 update training course.
- 9 I have appeared in Crown, County and High Courts, in the Coronial Court, at Public Inquiry, Planning and Licencing applications and appeals, in Arbitrations and in Tribunals.
- 10 I am registered with the UK Register of Expert Witnesses, APIL, and with similar organisations in the UK. In the US, I am a member of the Gerson Lehrman Group (GLG) and of ORC International (now Expert Engine) consultancy groups, international organisations providing industry- and discipline-focused networks of consultants, physicians, scientists, and engineers to both public and private sector clients.



- 11 I have acted in Planning and related environmental permitting applications, hearings and appeals, in medicines regulatory hearings, in Public Inquiry, and as an Expert Witness in Courts in Gibraltar, The Netherlands, Germany, Ireland, US, Japan, and most recently in notable discrimination cases in Sweden each having their foundation in matters of hygiene and microbiology.
- 12 I continue to engage in Continuous Professional Development programs registered with the Royal Society of Biology, the Institute of Biomedical Sciences, and CIWM.
- 13 I was founding Editor-in-Chief of the International Journal of Hospital Environment & Hygiene Management. Currently, I am a member of the editorial board of The Journal of Hospital Infection and The Open Waste Management Journal. I have additionally served terms on the editorial boards of The Biologist, The Journal of Infection Prevention, The Journal of Electronic Health. and The International Journal of Engineering, Science and Technology. For more than 3 decades, I have been a regular reviewer for many medical and scientific journals.

A full Curriculum vitae with complete publication list is available on request

