1 December 2020

PRESS SUMMARY

R v Secretary of State for Health and Social Care and Secretary of State for Education ex parte Dolan and Others. [2020] EWCA Civ 1605

On appeal from: Mr Justice Lewis [2020] EWHC 1786 (Admin)

JUDGES: Lord Burnett of Maldon CJ, Lady Justice King, Lord Justice Singh.

The central issues in this appeal are:

1. Whether on 26 March 2020, the Government had the power under the Public Health (Control of Disease) Act 1984 ("the 1984 Act") as amended by the Health and Social Care Act 2008 ("the 2008 amendments") to make regulations in response to the Covid-19 pandemic which regulations introduced 'lockdown' in England? ("the *vires* issue")
2. Upon a proper application of ordinary public law principles are the regulations in any event unlawful?
3. Do the regulations violate a number of the Convention rights which are guaranteed in domestic law under the Human Rights Act 1998 ("HRA")?

The proceedings are brought by (i) Mr Simon Dolan a British citizen living in Monaco who is the owner of businesses based in the United Kingdom. If permitted to under the regulations, he would have wished to come to this country to join in protests against the regulations. (ii) Ms Lauren Monks, an employee of Mr Dolan, who lives in England with her 10 year old son. From March to June 2020 her son did not attend school and neither mother nor son were able to attend mass at church during the relevant time. (iii) The third Appellant is a pupil at a school. He is protected by an anonymity order.

On 6 July 2020, Mr Justice Lewis refused permission to apply for judicial review in respect of each of the issues.

The factual background

On 18 March 2020 the Government requested that schools should stop providing education to children on school premises. On 23 March 2020 the Prime Minister announced that England was being placed in what became known as a "lockdown". The Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350) ("the regulations") gave effect to that announcement and were made by the Health Secretary on 26 March 2020.

The preamble to the regulations stated that they were made in response to the "imminent threat to public health" posed by coronavirus and that the regulations were "proportionate to what they seek to achieve, which is a public health response to that threat".

In broad terms the regulations contained the following restrictions: [16 – 21]:

- Many businesses were required to close (Regs 4 and 5)
- Places of worship had to close save; for limited purposes such as funerals (Reg 5(5))
- A person could not leave the place where they were living without reasonable excuse (Reg 6(1))
- Gatherings in a public place of more than two people was prohibited (Reg 7)

The regulations were to expire at the end of six months and contained a review mechanism.

The regulations had been superseded by the time of the hearing in front of Lewis J and were repealed on 4 July 2020.

The judgment below

The judge rejected the *vires* argument and refused permission to make a claim in judicial review. He considered the ground to be unarguable on the correct construction of the enabling powers conferred by the 1984 Act.

The judge considered both the domestic public law and the human rights arguments as unarguable.

Permission was refused to make a claim for judicial review in relation to each of these issues.

The decision on the Appeal

i) Permission to bring a claim for judicial review is granted in relation to the *vires* argument only with the substantive claim being retained within the Court of Appeal.

ii) The claim for judicial review on the *vires* ground is dismissed. The Secretary of State did have power to make the regulations under challenge.

iii) Permission to appeal against the decision of Lewis J to refuse permission to bring a claim for judicial review in respect of Issue 2 (domestic public law) and Issue 3 (Human Rights) in refused. The grounds are academic and in any event not properly arguable.

Reasons for the decision:

The claim in its totality is academic; the regulations under challenge having been repealed. Academic appeals should not be heard unless there is a good reason in the public interest for doing so (see *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, at 456 to 457.) The Court of Appeal decided that it is in the public interest to decide the *vires* issue rather than leave it to be raised, potentially by way of defence in criminal proceedings in the Magistrates court.

Further the *vires* issue remains a live issue, as new regulations continue to be made under the same enabling power. Permission to bring the claim for judicial review is accordingly granted on the *vires* issue only. The other issues are academic and there is no public interest reason for them to be considered. The Court of Appeal however, having heard full argument, addressed the merits of Issues 2 and 3 notwithstanding that conclusion.

The issue of construction underpinning the *vires* challenge is the narrow question as to whether the Secretary of State has power to impose the restrictions contained in the regulations, not only in relation to an individual or group of persons, but also in relation to the population generally in England. We conclude, on the proper statutory construction of the provisions in the 1984 Act under which the regulations were made, that the Secretary of State had the power to make the regulations under section 45C(1) and (2) of the 1984 Act.[43 – 64]. Further the Explanatory Memorandum which accompanied the 2008 amendments makes it clear that the new regime was introduced to meet a modern epidemic. If the power to make regulations was limited to individuals or groups it would not achieve that purpose.
We have concluded that the 2008 amendments give the relevant minister the ability to make an effective public health response to the widespread pandemic which Covid-19 has caused.

In relation to the domestic public law challenge, the Court does not accept that the Secretary of State had fettered his discretion by imposing 'the five tests' before he would be prepared to ease the initial lockdown, nor that he failed to take account of relevant considerations.
There were powerful expressed conflicting views about how the various balances should be struck. This court could not intervene in this context by way of judicial review on the ground of irrationality in respect of what was quintessentially a matter for the Government, which is accountable to Parliament.

The Human Rights challenge is that the regulations were unlawful because they were incompatible with various Convention rights contrary to section 6(1) Human Rights Act 1998 ("HRA"). We conclude that not only were the challenges academic but unarguable for the reasons found at [52] – [114].
Further, the HRA is primary legislation whereas the regulations are subordinate legislation. It follows if there is a conflict between them, the HRA would have to take priority and any conflict would be resolved by the process of interpretation required by section 3 HRA. [106]

NOTE:
This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document. The full judgment can be found at [2020] EWCA Civ 1605 and the judgment and a copy of this media summary will be made available at www.judiciary.uk