My name is Luke Atkinson, I am an individual concerned that our human rights have been taken away by the government, unjustifiably and not in proportion to the seriousness of Covid-19.

The ‘lockdown’ imposed by the government to contain the coronavirus and Covid 19, the disease it causes has been enforced mainly through the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (‘the Regulations’), imposed under powers delegated by the Public Health (Control of Disease) Act 1984 (‘the 1984 Act’).

Recently Lord Anderson QC, Robert Craig, Tom Hickman QC and others and Benet Brandreth QC and Lord Sandhurst QC have argued that the Regulations were or may have been ultra vires as secondary legislation beyond the delegated powers under Pt 2A of the 1984 Act. In turn, Prof Jeff King has argued that the delegated powers were exercised lawfully. It is the view of the author that the arguments against the vires of the legislation on that ground are more convincing.

This article argues that the Regulations are also a disproportionate interference with the rights protected by the European Convention on Human Rights (‘the Convention’); and that, were they challenged by judicial review, should be disappplied if necessary to avoid a breach of s 6 of the Human Rights Act 1998.

**The impact of the Regulations**

The impact upon rights and freedoms is grave. In particular:

1. They may constitute a deprivation of liberty engaging Article 5 (see R (Jalloh) v Home Secretary [2020] UKSC 4).
2. Each cardinal freedom protected by Article 8, including the maintenance of relationships with parents, children, and siblings, is engaged.
3. The restrictions on gatherings prevent the right of worshipers to attend or gather in any places of worship (protected by Article 9) other than for funerals.
4. The interference with the political rights of association and assembly (Article 11) – a ‘precious freedom’ (Verrall v Great Yarmouth Borough Council [1981] QB 202) and one of the ‘paramount values of a democratic society’ Stankov v Bulgaria [2007] ECHR 582) that has ‘almost become a constitutional principle’ (R (on the application of Gillan) v Metropolitan Police Comr [2006] UKHL 12) – are particularly serious given the limited Parliamentary scrutiny of the Regulations and place an unreasonable impediment upon the mobilisation of opposition to such impositions upon rights and freedoms.
5. The isolation required by the Regulations engages Article 14, being indirectly discriminatory on those with mental illness (in view of the isolation it imposes) on women (given that they are disproportionately affected by the domestic violence that has more than doubled during the ‘lockdown’) and on
poorer and disabled children (whose education has suffered much more than others).

6. The closure of businesses will decrease their goodwill and will engage Article 1, Protocol 1 to the Convention (Breyer Group plc v Department for Energy and Climate Change [2015] EWCA Civ 408).

7. Notwithstanding online provision, many children will be denied the ‘basic minimum of education’, thus at least engaging Article 2 of Protocol 1 (see Ali v Head Teacher and Governors of Lord Grey School [2006] UKHL 14).

In respect of Article 2 of the Convention, the Strasbourg jurisprudence only recognises a positive duty to intervene where there is a ‘real or immediate risk to life’ over which the authorities ‘retained a certain degree of control’ (Finogenov and Others v. Russia [2011] ECHR 2234, para 209). This is very different to the circumstances of a pandemic in which some scientific evidence suggests heavy restrictions on the movement and association of the whole population is necessary to contain its spread.

**Proportionality: the test to be applied**

Preliminary to considering proportionality, the fact that the United Kingdom (or even France, Italy and Spain, despite more stringent ‘lockdowns’) did not register any derogations from the Convention (under Article 15) might suggest that the public health crisis is not one that threatened the ‘life of the nation’. It is questionable whether a virus which, while undoubtedly dangerous and life threatening, appears to have a mortality rate of between 0.12 and 1%, could be considered to threaten the life of the nation. Likewise, the failure to use the Civil Contingencies Act 2004 both: (a) puts in question the lawfulness of the use the delegated powers of the Public Health (Control of Disease) Act 1984, given that it is a bespoke basis for regulations in a public emergency imposing strict limitations and Parliamentary scrutiny; and (b) is relevant to determining the proportionality of the Regulations, in view of the above.

A determination of the proportionality of Regulations, imposing a code affecting a number of different freedoms for public health reasons, is best judged through applying the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted for that purpose by the UN Economic and Social Council in 1984, and the UN Human Rights Committee.

Strasbourg jurisprudence supports the application of such specialised international instruments enunciating recognised norms of international law (Demir v Turkey [2015] ECHR 316 at [85]–[86], ECtHR). They are principles of international law developed and adopted for that purpose during public health crisis, in circumstances where restrictions are likely to impact upon a nexus of different rights and freedoms; and they incorporate well established proportionality principles. This is not to say that case law on the proportionality of restrictions of individual rights will not also be relevant to the determination of the challenge.

These Principles require that restrictions should, at a minimum, be:

- carried out in accordance with the law;
- directed towards a legitimate objective;
- strictly necessary in a democratic society to achieve the objective;
the least intrusive and restrictive available to reach the objective;
based on scientific evidence and neither arbitrary nor discriminatory in application; and
of limited duration, respectful of human dignity, and subject to review.

A restriction impacting upon fundamental freedoms is unlikely to be proportionate if a less restrictive method could have been attained ‘equally well by measures that were less restrictive of a fundamental freedom (R (on the application of Lumsdon and others) v Legal Services Board [2015] UKSC 41, para 66; Sejdic v Bosnia and Herzegovina (2009) 28 BHRC 201, ECtHR) and ‘the fact that a legal dispute… arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it…’ (R (Miller) v Prime Minister, [2019] UKSC 41, paras 31 and 33).

Balanced against the impact of the restrictions on rights and freedoms must be the scientific evidence relied upon by the government to justify them; and its evaluation would be unavoidable for any court reviewing the Regulations. A court would judge proportionality based upon the evidence as it would appear to a rational decision maker on the date of review (See R (on the application of UNISON) v Lord Chancellor, [2017] UKSC 51, in which the Supreme Court, before determining the vires of secondary legislation, evaluated factual evidence of the impact of the tribunal fees on access to justice). This scientific evidence is far more uncertain than is generally accepted and there is, in particular, considerable uncertainty about the effectiveness of lockdowns in containing spread, the true mortality and infection rates (see here and here) and the accuracy of modelling in general and previous modelling from Imperial College (key to government policy) in particular. Sweden presents an example of much less restrictive measures, which evidence suggests may be just as effective (see here, here, here and up to date statistics).

There is a statutory duty to terminate the Regulations if the Secretary of State, on each of the reviews he is obliged to undertake every 21 days, decides they are no longer necessary ‘to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus’ (reg. 3(2)/(3)). Yet the First Secretary of State, Dominic Raab, announcing the continuance of the Regulations on 16th April, announced a further five tests to be applied before they could be removed (in whole or in part), namely:

- that the NHS is able to cope;
- a “sustained and consistent” fall in the daily death rate;
- reliable data showing the rate of infection was decreasing to ‘manageable levels’;
- that the supply of tests and Personal Protective Equipment (PPE) could meet future demand; and
- that the government can be confident that any adjustments would not risk a second peak.

It is suggested that these tests: (a) impose an unreasonable fetter on the government’s discretion to remove or reduce the restrictions (a ground for quashing a decision of a public body: British Oxygen Co Ltd v Board of Trade [1971] AC 610); (b) would (if applied) retain the restrictions (if, for example, there was not a ‘sustained and
consistent’ fall in the death rate) even if an objective evaluation showed that less restrictive measures might have the same object; and (c) fail to require the Secretary of State to have any regard to the impact of the Regulations on the rights and freedoms they restrict.

Application of the Siracusa Principles

An application of these tests suggests that the Regulations, considered as a whole, are not a proportionate response to this public health crisis.

**Strictly necessary in a democratic society to achieve the objective; and the least intrusive and restrictive available to reach the objective**

These are considered together as the question of whether the Regulations are the least intrusive and restrictive measure available is relevant to that of whether they are ‘strictly necessary’ in a democratic society. It is submitted that they are neither.

The Regulations were imposed as part of an express policy that not only fails to consider the potential effectiveness of less restrictive measures but which (through the First Secretary’s tests) expressly fails to balance the harms they may redress against the harms they cause. They impose unprecedented and exceptionally grave restrictions on every area of society and on almost all means of human interaction. And they are likely to devastate the livelihoods of millions and to cause great harm to individuals and to society.

**Based on scientific evidence and neither arbitrary nor discriminatory in application**

While the Regulations are based on scientific evidence, that evidence can only be measured insofar as it justifies the effectiveness of these restrictions measured against any that would be less regressive. The First Secretary’s tests would appear to prevent the termination of any of the restrictions unless each of the conditions it set are met. Thus, the government’s policy can be imputed to be that they will remain in such circumstances even in the face of evidence of that less restrictive measures would be just as effective.

The scientific evidence of the efficacy and effectiveness of the Regulations as a proportionate means of reducing the spread of the virus is uncertain. Before such evidence could establish that the Regulations are the ‘least restrictive’ means of addressing the objective, it would need to be compared to evidence of the effectiveness of less regressive measures; and there is no evidence that any such evaluation has been conducted. Indeed, the speed with which the Prime Minister announced a change in policy on considering the evidence of just one scientific team, led by Prof Ferguson, strongly suggests that it was not.

**Of limited duration, respectful of human dignity, and subject to review**

While the measures are subject to review every 21 days, the decision of the Secretary of State is absolute and subject only to judicial review. Unlike regulations passed under the Civil Contingencies Act, Parliament has no right to scrutinise the Regulations until they expire after six months.
Moreover, the Regulations themselves proscribe – for the first time in the history of this country – all political gatherings and public demonstrations without exception. Even if such an exceptional step was found (on other grounds) to be proportionate, the chilling effect it must have on the ability of opposition to the policy to be organised and mobilised and to demonstrate publicly weighs against a determination that restrictions of this magnitude, subject to no democratic scrutiny for up to six months, are justifiable.

With regard to who is disproportionately affected by measures the government have taken with regard to Covid 19, I fall into that category as a sole director of a ltd company I have no income now £0 and no help from the government, I,m facing financial ruin and no longer emply other freelancers but besides finicial risks, ther are people who live with domestic violence/abuse, this has increased, the minister for safekeeping Victoria Atkins said on LBC radio domestic violence deaths have doubled since lockdown there are people with mental health problems committing suicide, we are making a future generation with life long lasting mental health issues and poverty.

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