



3 HARE COURT

Self-quarantine measures for international travellers – the prospects of a legal challenge

On Wednesday 3rd June 2020, two statutory instruments were laid before the UK Parliament that provide the legislative framework for HM Government’s much trumpeted plan for international travellers arriving in England to self-quarantine for 14 days.

[Christopher Loxton](#) examines the legislation, and the prospects of potential legal challenges, and concludes that the Government is likely to face substantial difficulties in providing adequate legal justification for the self-quarantine measures contained in the legislation.

-
1. After much fanfare, and not an inconsiderable degree of criticism, on Wednesday 3rd June 2020 HM Government laid¹ before the UK Parliament two statutory instruments applicable in England²:
 - The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 [“the International Travel Regs”]³; and
 - The Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) Regulations 2020 [“the Health Information Regs”]⁴.
 2. The Explanatory Note to the International Travel Regs describes their purpose as follows:

‘These Regulations impose requirements on people arriving in England from outside the common travel area (that is, the open borders area comprising the United Kingdom, the Republic of Ireland, the Isle of Man, and the Channel Islands), in order to prevent the spread of infection or contamination from coronavirus or coronavirus disease.’
 3. The Home Secretary, Priti Patel, gave the following rationale for the legislation to the House of Commons on 3rd June⁵:

¹ Despite widespread media coverage of the Home Secretary, Priti Patel, announcing the policy on 22nd May and introducing the legislation in the House of Commons on 3rd June, the International Travel Regs were laid before Parliament by Matt Hancock, the Secretary of State for Health and Social Care, and the Health Information Regs by Grant Shapps, the Secretary of State for Transport.

² The Welsh Government issued its own regulations on 5th June 2020:

<http://www.legislation.gov.uk/wsi/2020/574/introduction/made>

³ http://www.legislation.gov.uk/ukxi/2020/568/pdfs/ukxi_20200568_en.pdf

⁴ <http://www.legislation.gov.uk/ukxi/2020/567/contents/made>

⁵ <https://hansard.parliament.uk/commons/2020-06-03/debates/0E489EED-CCDC-4466-A967-48947B5BDA03/Covid-19UKBorderHealthMeasures>

'Some have suggested that public health measures at the border should have been introduced when the virus was at its peak. However, at that time, the scientific advice was clear that such measures would have made little difference when domestic transmission was widespread. Now, however, the transmission rate in the United Kingdom continues to decline, and international travel is likely to resume from its record low. Therefore, the scientific advice is that imported cases of the virus pose a more significant threat to our national effort and our recovery. Travellers from overseas could become a higher proportion of the overall number of infections in the UK, and therefore increase the spread of the disease. The Government are therefore taking a proportionate and time-limited approach to protect the health of the British public.'

4. The purpose of the Health Information Regs is described in its own Explanatory Note as being the imposition of *'information requirements on persons ("operators") operating commercial transport services for passengers travelling to England by sea, air or rail from outside the open borders area comprising the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland (the "common travel area")'*.

The International Travel Regs

5. The International Travel Regs contain two principle requirements:
 - (1) For travellers into England to provide information including contact details and details of their intended onward travel; and
 - (2) For travellers to self-isolate for a period of 14 days following their arrival in England.
6. Certain categories of person are exempt from both of these requirements as discussed below.

The provision of information (Regulation 3)

7. As stated, the first requirement found in the International Travel Regs is for persons arriving in England from outside "the common travel area"⁶ to provide information⁷ on a "Passenger Locator Form" (PLF) on arrival. The information required on the PLF includes one's name, home address, date of birth, sex, phone number, email address, travel document number and substantial details concerning the person's journey⁸. Adults have responsibility for completing a PLF for each accompanying child.
8. A person must also complete a PLF if they arrive in England from within the common travel area but have come from outside the common travel area within 14 days of their arrival in England.
9. The footnote to the definition of a PLF in regulation 2 makes clear that the forms will not be available in hard-copy but that passengers will be asked to complete digital/electronic versions by UK immigration officers if they have not already completed the form prior to their arrival.

⁶ Defined as anywhere else in the UK (including Northern Ireland, Isle of Man and the Channel Islands) and the Republic of Ireland.

⁷ Set out in Schedule 1.

⁸ Set out in paragraph 2 of Schedule 2.

10. Nothing in regulation 3 requires a person to provide any information if it is not within their possession or control⁹.
11. If a person has completed a PLF prior to their arrival in England, for example via an airline or travel agent, they must provide evidence of this when requested to do so by an immigration officer (from the UK Border Force).
12. A person is not required to complete a PLF if they fit into one or more of 12 categories of persons set out in paragraph 1 of Schedule 2 which broadly cover persons who work for foreign governments or international organisations¹⁰; are Crown servants¹¹ or government contractors carrying out '*essential government work related to the United Kingdom border*'; or are Crown servants, government contractors, or military personnel from designated foreign countries¹², carrying out '*essential defence activities*' within the 14 days from arrival in England.
13. A person is also exempt if they have arrived in England from Wales or Scotland – note not anywhere else in the common travel area – '*temporarily*' for a reason set out in regulation 4(9) (see paragraph 21 below).
14. Under regulation 9, a person may use the information contained on a PLF and/or disclose it to another person for use where it is '*necessary*':
 - (a) for the purpose of carrying out a function under the Regulations,
 - (b) for the purpose of—
 - (i) preventing danger to public health as a result of the spread of infection or contamination with coronavirus or coronavirus disease,
 - (ii) monitoring the spread of infection or contamination with coronavirus or coronavirus disease, or
 - (iii) giving effect to any international agreement or arrangement relating to the spread of infection or contamination with coronavirus or coronavirus disease, or
 - (c) for a purpose connected with, or otherwise incidental to, a purpose described in sub-paragraph (a) or (b).
15. The data protection implications of such a provision is discussed below at paragraph 73.

Self-isolation (Regulation 4)

16. As mentioned above, the second requirement found in the International Travel Regs is for persons who have either arrived in England from outside the common travel area, or have arrived in England from within the common travel area but have come from outside the common travel area

⁹ Regulation 3(9).

¹⁰ Including the members of '*the family forming part of the household of a person*' who falls within one of the 12 categories: sub-paragraph 1(i) of Schedule 2.

¹¹ As defined under section 12(2) of the Official Secrets Act but broadly categorised as a Government Minister of the UK Government or the Devolved Administrations, civil servants, police officers, and members of the UK security and intelligence agencies.

¹² Including all Commonwealth countries and all members of NATO.

within 14 days of their arrival in England, to self-isolate for 14 days from their date of arrival unless they depart England sooner.

17. The requirement does not apply to asylum seekers provided accommodation under the Immigration and Asylum Act 1999 or a person subject to bail conditions and provided with accommodation under the Immigration Act 2016.
18. The location of one's self-isolation must be their home, the home of a friend or family member, a hotel, hostel, bed and breakfast accommodation, or '*other suitable place*', provided the address is one specified on the person's PLF. Where it is not possible for a person to self-isolate in such a location s/he will be provided by accommodation '*facilitated by the Secretary of State*' for the purposes of their self-isolation.
19. Upon arrival in England a person must '*travel directly to the place at which they are to self-isolate*'¹³ unless '*it is necessary [for the person] to stay overnight at an arrival on their arrival in England before travelling directly to another address at which they will be self-isolating*'¹⁴.
20. A person self-isolating ("P") does not have to self-isolate from:
 - (a) from any person with whom they were travelling when they arrived in England and who is also self-isolating in the place where P is self-isolating;
 - (b) where P is self-isolating in their home, from any member of their household; or
 - (c) where P is self-isolating in the home of a friend or family member, from any member of the household of that friend or family member.
21. A person may not leave the place where they are self-isolating except for the following nine reasons:
 - (a) to travel in order to leave England, provided that they do so directly;
 - (b) to seek medical assistance, where this is required urgently or on the advice of a registered medical practitioner, including to access any of the services referred to in paragraph 37 or 38 of Schedule 2 to the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020¹⁵;
 - (c) to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings;
 - (d) to avoid injury or illness or to escape a risk of harm;
 - (e) on compassionate grounds, including to attend a funeral of—

¹³ Regulation 4(7).

¹⁴ Regulation 4(5)(b).

¹⁵ The services are dental services, opticians, audiology services, chiropody, chiropractors, osteopaths and other medical or health services, including services relating to mental health, and veterinary surgeons and pet shops.

- (i) a member of P's household,
 - (ii) a close family member, or
 - (iii) if no-one within paragraph (i) or (ii) are attending, a friend;
- (f) to move to a different place for self-isolation specified in the Passenger Locator Form or a form equivalent to a Passenger Locator Form pursuant to an enactment in Scotland, Wales or Northern Ireland; or
- (g) in exceptional circumstances such as—
- (i) to obtain basic necessities such as food and medical supplies for those in the same household (including any pets or animals in the household) where it is not possible to obtain these provisions in any other manner,
 - (ii) to access critical public services, including—
 - (aa) social services,
 - (bb) services provided to victims (such as victims of crime),
 - (iii) to move to a different place for self-isolation where it becomes impracticable to remain at the address at which they are self-isolating.

22. Pursuant to regulation 4(13), a person is exempt from the requirement to self-isolate if they meet a condition and/or fall into a category set out in Schedule 2 which includes a person who fits into one of 12 categories summarised in paragraph 12 above (who do not have to fill in a PLF). In addition, Part 2 of Schedule 2 sets out 66 further categories of persons not required to self-isolate including:

- (a) *'A road haulage or a road passenger transport worker'*¹⁶;
- (b) *'A worker with specialist technical skills, where those specialist technical skills are required for essential or emergency works or services (including commissioning, maintenance, and repairs and safety checks) to ensure the continued production, supply, movement, manufacture, storage or preservation of goods, where they have travelled to the United Kingdom in the course of their work or otherwise to commence or resume their work'*¹⁷;
- (c) A person who has travelled to the UK who is required to undertake work as a health or care professional in the United Kingdom within 14 days of their arrival, and is eligible to practise a UK regulated medical / health care profession¹⁸;
- (d) A person employed or self-employed in the UK who resides in another country to which they usually return at least once a week, or who resides in the UK and pursues an activity as an

¹⁶ Paragraph 6(1).

¹⁷ Paragraph 26.

¹⁸ Paragraph 30.

employed or self-employed person in another country to which they usually go at least once a week¹⁹;

- (e) A person who has an offer of employment for seasonal work to carry out specified activities in edible horticulture on a specified farm.

Enforcement (Regulations 5 to 7)

- 23. Regulation 5 provides a police constable (and as yet undesignated other authorised persons) the power to direct or remove a person back to a place where that person is self-isolating if the constable has reasonable grounds to believe the person has left or is outside the place where s/he is self-isolating in contravention of regulation 4.
- 24. Regulation 6 sets out the following five criminal offences:
 - (1) A person who, without reasonable excuse, contravenes a requirement in regulation 3;
 - (2) A person who contravenes a requirement in regulation 4;
 - (3) A person who, without reasonable excuse, contravenes a requirement in or imposed under regulation 5;
 - (4) A person who, without reasonable excuse, wilfully obstructs any person carrying out a function under these Regulations commits an offence.
 - (5) A person who intentionally or recklessly provides false or misleading passenger information [on a PLF for example] commits an offence.
- 25. All of the offences listed above are punishable on summary conviction by a fine.
- 26. Additionally, regulation 7 authorises a police constable, an immigration officer (in relation to a person providing false or misleading passenger information), and as yet undesignated other authorised persons, the power to issue fixed penalty notices if that authorised person has reasonable grounds to believe an offence has been committed under the International Travel Regs and the alleged offender is aged 18 or over.
- 27. Regulation 11 requires the Secretary of State for Health and Social Care to review the Regulations every 21 days and regulation 12 provides that the Regulations expire 12 months after they came into force on 8th June 2020.

The Health Information Regs

- 28. Regulation 3 requires air, sea and rail operators to ensure that passengers who arrive in England from outside the common travel area on such services, other than during an exemption period

¹⁹ Paragraph 37.

(determined in accordance with regulation 5), have been provided with certain public health information in the required manner (see regulation 4), on three separate occasions:

- (a) where prior to departure a booking was made for the passenger to travel on the relevant service, before the booking was made;
- (b) where prior to departure the passenger was checked in to travel on the relevant service, at the time of check-in; and
- (c) while the passenger was on board the vessel, aircraft or train.

29. Breach of Regulation 3 is a criminal offence punishable on summary conviction by a fine.
30. Regulation 4 states that for the purposes of the information requirement in regulation 3, the Secretary of State for Transport may from time to time specify, by placing a statement on the gov.uk website:
- (a) the information about coronavirus, coronavirus disease and related duties and public health guidance (including, in particular, duties and guidance applying to passengers arriving in England) to be provided under regulation 3(1); and
 - (b) the manner in which that information is to be provided for the purposes of that regulation.
31. The Secretary of State published a statement under regulation 4 on 5th June 2020²⁰. Operators are strongly advised to read the statement in full as it sets out what they must publish to passengers at the booking stage, at check-in, and whilst on board the vessel, aircraft or train. The statement also provides the following guidance on how the information should be disseminated to individual passengers at the booking and check-in stages:
- 'Where the booking or check-in process is managed by someone other than the operator, it is sufficient for the operator to show that they have taken reasonable steps to ensure that the information is provided by that person.'*
- In practice, the reasonable steps may include writing to third parties (including via email) and asking that they provide the information to travellers at the stages that those third parties manage.'*
- Where someone books or checks in on behalf of the passenger, it is sufficient for the information to be given to that person along with a request to pass it on to the passenger if they are old enough and have sufficient mental capacity to understand it.'*
32. Regulation 5(1) stipulates that if the Secretary of State is of the view that it is no longer necessary or expedient to maintain the information requirement [of reg.3], the Secretary of State must place a statement on the gov.uk website indicating that the information requirement will cease to have effect in relation to passengers arriving after the time and date specified in the statement.
33. Regulation 5(2) stipulates that if, at any time when by virtue of regulation 5(1) the information requirement does not have effect, the Secretary of State is of the view that it is again necessary or

²⁰ <https://www.gov.uk/government/publications/coronavirus-covid-19-requirements-to-provide-public-health-information-to-passengers-travelling-to-england/coronavirus-covid-19-required-information-and-exemption-periods-under-the-public-health-information-for-passengers-travelling-to-england-regulati>

expedient to impose the information requirement, the Secretary of State must place a statement on the gov.uk website indicating that the information requirement will have effect in relation to passengers arriving from the time and date specified in the statement.

34. Rather remarkably, given that the Secretary of State only published a statement on gov.uk on Friday 5th June 2020, the statement on the website says '*there is no exemption period currently in place*' meaning that operators will have had to ensure the required information was provided to passengers who arrived in England from Monday 8th June 2020 onwards.
35. Regulation 6 requires operators to keep records and to provide authorised persons²¹ with copies of those records and other information about how they are complying with the requirement to provide information to passengers. Breach of these requirements is also a criminal offence punishable on summary conviction by a fine.
36. Regulation 7 allows authorised persons to deal with offences under regulation 3 by a fixed penalty notice and regulation 8 allows authorised persons to bring prosecutions for offences under the Regulations.
37. Regulation 9 requires the Secretary of State for Transport to review the Health Information Regulations every 21 days and regulation 10 provides that the Regulations expire 12 months after they came into force on 8th June 2020.

Reception and potential legal challenges

38. It would not be an understatement to say the policies contained within the International Travel Regs have been pilloried by the media, the Government's own MP backbenchers, and aviation and travel businesses alike.
39. British Airways' owner, IAG, is considering possible legal action²², whilst Ryanair and Easyjet have purportedly co-signed with BA a pre-action letter to the Government calling, inter alia, the legislation '*wholly unjustified and disproportionate*'²³.
40. It has also been reported that with more than 500 travel and hospitality businesses, spearheaded by a new group called "Quash Quarantine", are expected to join the airlines' legal challenge to the legislation²⁴.

²¹ For maritime operators it is the Secretary of State for Transport; for air operators it is the CAA; for rail operators it is the Office of Rail and Road.

²² <https://www.theguardian.com/politics/2020/jun/05/british-airways-considers-legal-action-over-uk-quarantine>

²³ <https://uk.reuters.com/article/uk-health-coronavirus-britain-airlines/ba-ryanair-easyjet-protest-over-wholly-unjustified-uk-quarantine-plan-idUKKBN23E0HD>

²⁴ <https://www.telegraph.co.uk/news/2020/06/07/quarantine-policy-decided-court-500-travel-hospitality-firms/>

A judicial review challenge

41. Three of the traditional grounds for judicial review – illegality, irrationality, and procedural impropriety²⁵ – are all discussed below, together with potential challenges under human rights laws and data protection laws.

Illegality

42. An obvious form of illegality is where a UK public body acts beyond the powers prescribed to it. In other words, the public body acts *ultra vires* by taking measures that are inconsistent or in contravention of the parameters imposed on it by EU legislation²⁶, primary legislation, and/or subordinate legislation.
43. It is certainly arguable that the restrictions set out in the International Travel Regs impose restrictions on the movement of workers and their families between England and other EU member states. Freedom of movement of workers and their families is guaranteed by article 45 (for employer persons), and article 49 and 56²⁷ (for self-employed persons), of the Treaty on the Functioning of the European Union (“TFEU”), supplemented by Directive 2004/38²⁸ (“the Free Movement Directive”) and Regulation 492/2011²⁹.
44. Article 45(3), TFEU provides that limitations on the freedom of movement of workers can be justified on grounds of ‘*public health*’³⁰, and article 29 of the Free Movement Directive specifically provides a public health justification for ‘*diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation*’ which the Covid-19 coronavirus has been so defined. However, any restrictions must not infringe the EU principles of non-discrimination and proportionality³¹.
45. Whilst the International Travel Regs are unlikely to unlawfully infringe the principle of non-discrimination – given the restrictions apply equally to UK residents and foreigners alike – the instrument is likely to face a serious challenge on the grounds of proportionality.
46. Although there can be little doubt that the International Travel Regs pursue a legitimate aim – ‘*to prevent the spread of infection or contamination from coronavirus or coronavirus disease*’³² – the measures must be appropriate and necessary to attain the intended aim, in the sense that no alternative measures which would inflict no or less damage could be introduced to achieve the aim instead³³. One does not have to ponder for too long before thinking of alternative measures that could have been introduced that would likely have achieved the aim in a more proportionate manner, for example the self-isolation requirements only applying to persons entering England from countries with high rates of Covid-19 infections, and/or travel permission being granted only

²⁵ These categories are not exhaustive nor mutually exclusive.

²⁶ For the duration of the Brexit transition period the UK is subject to the vast majority of EU law: see section 1A(1) to (4) European Union (Withdrawal) Act 2018.

²⁷ Freedom of establishment and freedom to provide services respectively.

²⁸ Full title: *Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State*.

²⁹ Full title: Regulation 492/2011 on freedom of movement for workers within the Union.

³⁰ A similar provision can be found in article 52 with regards to freedom of establishment though no such provision is found in TFEU with regards to services.

³¹ As laid down in article 5 of the Treaty on European Union (TFU) and in Protocol No.2 of TFEU.

³² As set out in the Explanatory Note: see paragraph 2 of this article.

³³ Case 265/87, at paragraph 21; C-504/04, at paragraph 35.

to travellers entering England if they have are not symptomatic and have not been subject to a self-quarantine requirement in their own country (with health declarations being filed prior to travel).

47. For transport operators such as airlines, EU law is unlikely to provide much assistance in a legal challenge as the restrictions and obligations imposed by the International Travel Regs and the Health Information Regs are unlikely to infringe the principles of free market access, freedom of establishment, and equal conditions of competition set out in TFEU and the Multilateral Agreement on the establishment of a European Common Aviation Area given the restrictions and obligations apply equally to domestic and foreign operators. For travel, tourism and hospitality businesses based in the UK, EU law may provide more scope to challenge the International Travel Regs as they will undoubtedly deter tourists from coming into the UK whilst the legislation remains in force.
48. In relation to primary legislation, both the International Travel Regs and the Health Information Regs state that they are made by the respective Secretaries of State in exercise of their powers conferred by sections 45B, 45F(2) and 45P(2) of Part 2A the Public Health (Control of Disease) Act 1984 (“the 1984 Act”).
49. There has been significant legal debate as to whether Part 2A of the 1984 Act provides an adequate legal basis for the self-quarantine provisions found in Health Protection (Coronavirus) Regulations 2020. The majority of commentators³⁴ have compellingly concluded that the 1984 Act does *not* provide sufficient legal basis for the imposition of the self-quarantine provisions in the Health Protection (Coronavirus) Regulations 2020 because, in short, section 45C of the 1984 Act provides no clear and explicit power to order the general population to self-quarantine given the section provides particular examples of restrictions and requirements which do not mention self-isolation/quarantine.
50. The reasons for holding section 45C of the 1984 Act insufficient to permit the quarantine restrictions set out in the Health Protection (Coronavirus) Regulations 2020 apply with some force to section 45B of the 1984 Act under which the 14-day quarantine restrictions in the International Travel Regs have been made.
51. The Explanatory Notes to the Health and Social Care Act 2008 (“the 2008 Act”) state the following³⁵:

‘Internationally the case for taking an “all hazards” approach to dealing with such health threats was taken up by the World Health Organization (‘WHO’) and reflected in the International Health Regulations 2005 (‘IHR’). The IHR are the means by which WHO aims to prevent and control the international spread of disease, by action that is commensurate with and restricted to public health risks, and which avoids unnecessary interference with international traffic and trade... The IHR came into effect in June 2007. This Act amends the Public Health Act 1984 to enable IHR to be implemented, including WHO recommendations issued under them.’ [emphasis added]
52. In the International Health Regulations 2005 (“IHR”) themselves³⁶, ‘*isolation, quarantine or placing [a] traveller under public health observation*’ is only permitted where ‘*there is evidence of an imminent public health risk*’ and the measure is ‘*necessary to control such a risk*’. Not only must

³⁴ Lord David Anderson KBE QC, by Robert Craig, by Lord Sandhurst QC and Anthony Speaight QC and Tom Hickman QC, Emma Dixon and Rachel Jones. Professor Jeff King has defended the legal basis of the 2020 Regulations.

³⁵ At paragraph 30.

³⁶ <https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1>

quarantine measures be evidenced based, the risk to public health imminent, and the measures necessary to control the risks, there must be no ‘unnecessary interference with international traffic and trade’. This is the prism through which section 45B of the 1984 Act and regulation 4 of the International Travel Regs must be interpreted. As the Government has not disclosed the specific evidence upon which the self-isolation restrictions are said to be based, one cannot properly assess the extent to which they contravene the IHR and go beyond the scope of section 45B of the 1984 Act.

Irrationality

53. Irrationality, or “*Wednesbury*”³⁷ unreasonableness, arises where a public body has acted illogically, arbitrarily, inconsistently and/or absurdly. The act or decision must be flawed in the sense of being based on inconsistent logic or reasoning, there being a lack of a rational connection between due considerations and the desired outcome.
54. Under the heading ‘*Why are measures needed?*’ the following rationale is given in the International Travel Regs’ Explanatory Memorandum³⁸ for the legislative provisions:

‘7.1 COVID-19 is a highly-transmittable virus, the infection fatality rate of which is probably around 1% though this can be significantly higher in certain sub-populations such as those aged 70 and over. As the UK moves to a situation where local incidence and prevalence is much lower relative to international incidence and prevalence, imported cases could become a higher proportion of the overall number of infections, and so preventing imported cases and preventing onward transmission from these cases will likely reduce incidence and prevalence. As social distancing measures are relaxed in the UK, the contact tracing programme will be relied upon to contribute to keeping the reproduction rate (‘R’) of COVID-19 below 1 by rapidly tracing the contacts of people with symptoms or a positive test of COVID-19 and providing them with appropriate advice and care. If early cases in a transmission chain are not rapidly identified and their contacts traced, a single imported or domestic case of COVID-19 could result in significant onward transmission within the UK. If and when passenger numbers increase, the relative impact of imported cases and onward transmission of coronavirus from these cases on the domestic incidence of coronavirus will rise. The number of passengers arriving in the UK has fallen by 95%, year on year due to the virus itself and international travel restrictions which have been applied in the majority of jurisdictions across the world, but can be expected to rebound as social distancing measures are relaxed.

7.2 The measures draw on passenger information and self-isolation requirements introduced around the world to prevent the cross-border transmission of coronavirus.

7.3 Measures to require all passengers arriving a) arriving in England from outside of the Common Travel Area, or b) arriving in England from elsewhere in the Common Travel Area where they have been outside of the Common Travel Area in the past 14 days to provide their contact details and onward travel information will aid the domestic contact tracing programme. The details will be used to protect the public’s health and reduce transmission of COVID-19 in the UK. Once someone is confirmed as infected with COVID-19 who has travelled to England recently, the data will be rapidly interrogated to identify the people around them as they travelled i.e. their contacts. The information will then be used to inform those identified of their contact status, what it means, the actions that will follow, and what to do if they develop symptoms. Contacts will also be provided with information about prevention of the disease i.e. social distancing, hand hygiene, etc. If symptomatic, the contact will be reminded of the isolation requirements and informed of the testing process. The data will continue to be used to allow for follow-up by public health officials to monitor for symptoms. The details will also be used to enforce the 14-day self-isolation requirement for passengers.

³⁷ After the famous case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

³⁸ http://www.legislation.gov.uk/ukxi/2020/568/pdfs/ukxiem_20200568_en.pdf

7.4 Measures to require all passengers to self-isolate for 14 days will reduce the social contact of any passengers who import cases of COVID-19, and therefore reduce onward transmission contributing to the domestic incidence of coronavirus.

7.5 Certain people travelling to maintain essential supply chains, critical national infrastructure or to contribute to crisis response will be exempt from the self-isolation requirements. Certain people will also be exempt from the requirement to provide the contact tracing details...'

55. Paragraph 7.1 of the Explanatory Note makes clear that an overarching assumption that gives rise to the legislation being brought in is that the infection rate (the “R” number) in the UK is decreasing relative to other countries. There can be little doubt that this is true when one compares the UK³⁹ with the global picture – given the R number is unfortunately increasing overall internationally⁴⁰ – and in comparison to countries such as Brazil⁴¹, however, it cannot be said in comparison to many countries in Europe, Africa, Asia and Australasia. Accordingly, the chance of international travellers into England transmitting the coronavirus is lower than the resident population in England.
56. In any event, the rationale set out in paragraph 7.1 for the contact tracing programme in paragraph 7.3, namely the provision of information on passenger locator forms (PLFs), is undoubtedly sound and appears to be a proportionate measure to ensure that international arrivals can be traced and contacted if they are suspected of being infectious or come into contact with someone who is. However, it is with some difficulty that one tries to comprehend how paragraph 7.1 provides the reasoned justification for the self-isolation policy summarised in paragraph 7.4 given that the policy applies to all arrivals into the common travel area regardless of whether they arrive from countries with lower R rates than that of the UK.
57. At the daily 10 Downing Street press conference on 3rd June 2020, Sir Patrick Vallance, the Government’s Chief Scientific Adviser said *‘the [self-isolation] measures like this are most effective when the number of cases is very low, and they’re most effective when they’re applied to countries from higher rates’*⁴². In other words, quarantines work best when infection rates inside a country have dropped and when applied to countries with high rates of infection. According to the latest findings published by the Medical Research Council Biostatistics Unit at the University of Cambridge⁴³, the R number is in fact increasing in England, particularly in the North West.
58. Professor Dingwall, a Nottingham Trent University academic who is a member of the sub-group Scientific Pandemic Influenza Group on Modelling (SPI-M) which reports to the Scientific Advisory Group for Emergencies (SAGE), told BBC Radio 4’s Today programme on 4th June 2020:

‘We are not seeing new clusters that are taking off from people who have been travelling abroad. I think we would really need to get the level in this country significantly further down before quarantine started to become a useful measure. Even then, we would have to see something that is targeted on countries with a significantly higher level of community transmission than ourselves - and there aren’t too many of those around, I’m afraid.’

³⁹ As at 4pm CEST on 8th June 2020 the UK had 286,198 confirmed cases of Covid-19 and 40,542 deaths: <https://covid19.who.int/region/euro/country/gb>

⁴⁰ <https://covid19.who.int>

⁴¹ <https://covid19.who.int/region/amro/country/br>

⁴² <https://www.theguardian.com/world/2020/jun/03/priti-patel-urged-to-publish-scientific-advice-behind-uk-quarantine-move>

⁴³ <https://www.cam.ac.uk/research/news/covid-19-r-number-increasing-across-england-and-highest-in-north-west>

59. The World Health Organisation's (WHO) own guidance, *Considerations for quarantine of individuals in the context of containment for coronavirus disease (COVID-19)*⁴⁴, gives the following advice under the heading 'When to use quarantine':

'Introducing quarantine measures early in an outbreak may delay the introduction of the disease to a country or area or may delay the peak of an epidemic in an area where local transmission is ongoing, or both. However, if not implemented properly, quarantine may also create additional sources of contamination and dissemination of the disease.'

60. Even if it can be said dubiously that the timing of self-isolation is not irrational, it is questionable whether the policy's specific requirements achieve the aims regulation 4 of the International Travel Regs sets out to achieve. The requirement for travellers arriving into to England to self-isolate for 14 days is clearly drawing an equivalence with persons who already reside in England who have symptoms of coronavirus and who may be infectious as both are required to self-isolate for 14 days⁴⁵. However, set out in paragraph 20 above, under regulation 4 a person self-isolating ("P") does not have to self-isolate from:

- (a) from any person with whom they were travelling when they arrived in England and who is also self-isolating in the place where P is self-isolating;
- (b) where P is self-isolating in their home, from any member of their household; or
- (c) where P is self-isolating in the home of a friend or family member, from any member of the household of that friend or family member.

61. There is also no requirement for any persons who P is residing with to self-isolate or otherwise remain at the address P is residing at if they have also not arrived into England from another country. This is in contrast to the requirement⁴⁶ for members of a household to stay at home and not leave the house for 14 days if a person from that household develops any symptoms of coronavirus⁴⁷.

62. As stated in paragraph 22 above, there are a combined total of 78 categories of occupations/roles that if a person falls within s/he is not required to self-isolate. Whilst it is perhaps justified for certain people to be exempt from the quarantine scheme if they '*maintain essential supply chains [or] critical national infrastructure*' or '*contribute to crisis response*'⁴⁸, but if the ultimate aim is to reduce and eventually eliminate Covid-19 one has to consider whether the exempt categories are drawn too widely.

63. It has been suggested⁴⁹ that at least 1.5 million people fall within the exemptions set out in Schedule 2 of the International Travel Regs given that road haulers, bus and coach drivers qualify,

⁴⁴ [https://www.who.int/publications/i/item/considerations-for-quarantine-of-individuals-in-the-context-of-containment-for-coronavirus-disease-\(covid-19\)](https://www.who.int/publications/i/item/considerations-for-quarantine-of-individuals-in-the-context-of-containment-for-coronavirus-disease-(covid-19)); Interim guidance dated 19th March 2020

⁴⁵ Although at present there is no legal requirement to do so save that if they leave their household they may not have a reasonable excuse defence under regulation 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (as amended).

⁴⁶ Ibid.

⁴⁷ <https://www.gov.uk/guidance/nhs-test-and-trace-how-it-works#people-who-have-had-close-contact-with-someone-who-has-coronavirus>

⁴⁸ Paragraph 7.5 of the International Travel Regs' Explanatory Memorandum: see paragraph 54 above.

⁴⁹ <https://www.independent.co.uk/travel/news-and-advice/coronavirus-travel-quarantine-uk-exempt-jobs-professions-a9541331.html>

as do health and care professionals, police constables, and frequent business travellers⁵⁰. The exemption for seasonal agricultural workers alone is likely to mean approximately 90,000 persons⁵¹ able to travel into England from outside the UK⁵².

64. In addition, any persons who have come from Ireland, Scotland, Wales or Northern Ireland, provided they have not come from outside the common travel area within 14 days of their arrival in England, will also not have to self-isolate⁵³; what some have called “the Dublin dodge”. The combined population of these countries is over 15 million people⁵⁴.
65. Lastly, there is the issue of enforcement of the International Travel Regs. Lucy Moreton, from the Immigration Services Union (ISU), which represents around 4,000 UK Border Force members, branded the policy of providing PLFs ‘*farical*’ and said passengers could fill ‘*complete rubbish*’ into the address form and there is no way for Border Force officers to verify whether it is correct⁵⁵. Whether police forces in England also have the inclination and resources to enforce the information or self-isolation requirements contained in the legislation remains to be seen.

Procedural unfairness

66. This ground arises where a public body has failed to adhere to minimum standards of procedural propriety that arise either from relevant statutory procedures or principles of natural justice that govern the decision-making process.
67. As stated in the respective Explanatory Memorandums to the International Travel Regs⁵⁶ and the Health Information Regs⁵⁷, neither piece of legislation were subject to consultations, despite the fact that both were laid before Parliament on Wednesday 3rd June and entered into force three working days later on Monday 8th June with a variety of criminal offences contained within both.
68. Under the Health Information Regs, not only do transport operators risk committing criminal offences for failure to provide the required public health information under regulation 3 that is found on the gov.uk website⁵⁸; they also risk committing criminal offences if they fail to keep records and to provide authorised persons⁵⁹ copies of those records ‘*and other information about how they are complying with the requirement to provide information to passengers*’⁶⁰. No specific definition is contained in the Health Information Regs as to the content and form of such records and “other

⁵⁰ See paragraph 22 above.

⁵¹ <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/temporaryemployeesemp07>

⁵² <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/labourintheagricultureindustry/2018-02-06>

⁵³ See paragraph 16 above.

⁵⁴ Eurostat; ONS UK.

⁵⁵ <https://www.theguardian.com/politics/2020/jun/04/british-airways-shuns-priti-patel-meeting-over-quarantine-plans>

⁵⁶ http://www.legislation.gov.uk/ukxi/2020/568/pdfs/ukxiem_20200568_en.pdf

⁵⁷ http://www.legislation.gov.uk/ukxi/2020/567/pdfs/ukxiem_20200567_en.pdf

⁵⁸ See paragraphs 28 and 29 above.

⁵⁹ For maritime operators it is the Secretary of State for Transport; for air operators it is the CAA; for rail operators it is the Office of Rail and Road.

⁶⁰ See paragraphs 35 and 36 above.

information”, or guidance available at the time of writing save for the following patently insufficient text on the gov.uk website⁶¹:

‘Operators must keep records of the steps taken to provide the required information in the required manner to passengers. These records may be requested by the Civil Aviation Authority, the Office for Rail and Road or the Maritime and Coastguard Agency.’

69. Regulation 7 allows authorised persons to deal with offences under regulation 3 by a fixed penalty notice and regulation 8 allows authorised persons to bring prosecutions for offences under the Regulations.
70. Regulation 9 requires the Secretary of State for Transport to review the Health Information Regulations every 21 days and regulation 10 provides that the Regulations expire 12 months after they come into force on 8th June 2020.

A human rights challenge

71. A detailed analysis of the extent to which the International Travel Regs (or even the Health Information Regs) contravene the provisions of the Human Rights Act 1998 is beyond the scope of this note. Others have written persuasively^{62,63} that the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (as amended) amount to disproportionate, and therefore unlawful, infringements of a number of articles of the European Convention on Human Rights. Such arguments are perhaps even more compelling in respect of the International Travel Regs when one considers that the self-isolation restrictions found in regulation 4 are not subject to the reasonable excuse defence to leaving one’s house found under regulation 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. Regulation 4 is far stricter and imposes an ‘*exceptional circumstances*’ test for leaving one’s house. It is difficult to see how this can be justified on proportionality (or any other) grounds.

A data protection challenge

72. It is difficult to envisage at this stage a successful challenge under the Data Protection Act 2018 to the requirements set out in regulation 3 of the International Travel Regs concerning travellers providing certain personal and travel information⁶⁴. However, in the coming days and weeks much will depend on which “persons” (as the legislation defines) process the information provided by travellers, how the information is stored, and how and to whom the information is shared with other persons and organisations.

Conclusion

73. As set out above, the self-isolation requirements set out in the International Travel Regs are likely to face a strong judicial review and human rights challenge.

⁶¹ <https://www.gov.uk/government/publications/coronavirus-covid-19-requirements-to-provide-public-health-information-to-passengers-travelling-to-england/coronavirus-covid-19-required-information-and-exemption-periods-under-the-public-health-information-for-p>

⁶² https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn22

⁶³ <https://fieldcourt.co.uk/wp-content/uploads/Francis-Hoar-Coronavirus-article-on-ECHR-compatibility-20.4.2020-2.pdf>

⁶⁴ See paragraphs 7 to 14 above.

74. The Telegraph has reported⁶⁵ that a leaked Home Office document seen by the newspaper admits in regard to the self-isolation policy that it is ‘*very hard to imagine how it would work in practice*’.
75. Both the International Travel Regs or the Health Information Regs contain statutory review mechanisms which call for review every 21 days, the first reviews therefore taking place on 29th June 2020. On the Government’s own case⁶⁶ at review it will ‘*take a number of factors into account within the reviews to satisfy that, in line with scientific advice, the risk of imported cases is suitably low*’. Such factors will include⁶⁷:
- *the rate of infection and transmission internationally and the credibility of the reporting*
 - *the measures that international partners have put in place*
 - *levels of imported cases in other countries where there are more relaxed border measures*
 - *and the degree to which antibody and other testing methodologies prove effective in minimising the health risk*
76. It is as yet unknown what specific scientific evidence the Government relies upon to justify the self-isolation restrictions contained in the International Travel Regs. Whether such purported evidence justifies the continuation of the restrictions also remains to be seen.
77. The Government is unlikely to voluntarily withdraw either piece of legislation sooner than the 29th June given it has political support from HM’s Opposition for the measures and, it would appear, the general public. A YouGov poll⁶⁸ taken on the day the self-quarantine measures were announced on 22nd May revealed out of 3,710 adults surveyed, 80% supported the proposals, with 59% “strongly supporting” and 21% “somewhat supporting” it.
78. What may replace the legislation is also unclear. More than 217 hospitality companies⁶⁹, including hotels, tour operators and restaurants, and the majority of UK-based airlines⁷⁰ have written to the Government proposing the formation of “air bridges” whereby travellers from certain countries would be exempt from the requirements to self-isolate. Given the substantial financial harm this coronavirus epidemic is causing the travel and hospitality industries, it would be a surprising outcome if the International Travel Regs were left to continue unamended after 29th June 2020.

Written by [Christopher Loxton](#) of 3 Hare Court
9th June 2020

⁶⁵ <https://www.telegraph.co.uk/news/2020/06/07/uks-quarantine-scheme-faces-chaos-first-day-home-office-admits/>

⁶⁶ <https://www.gov.uk/government/news/public-health-border-measures-to-come-into-force-next-week>

⁶⁷ Ibid.

⁶⁸ <https://yougov.co.uk/topics/health/survey-results/daily/2020/05/22/d6b97/1>

⁶⁹ <https://www.telegraph.co.uk/news/2020/06/02/travel-updates-quarantine-ludicrous-ill-judged-fudge-says-tourism/>

⁷⁰ <https://www.independent.co.uk/travel/news-and-advice/coronavirus-quarantine-air-bridge-flight-holiday-self-isolation-travel-priti-patel-a9541551.html>

Christopher is an experienced aviation, commercial and public law barrister who practises from 3 Hare Court chambers.

If you would like to contact Christopher for comments or queries on this article or in relation to instructions, please click on his name above or email him on christopherloxton@3harecourt.com.