

The law and COVID-19: the Prime Minister's muddle about the Government's own rules (as of 27th March 2020) and a call for clarity

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The takeaway point from this note is that the Prime Minister's message to the nation on 23rd March 2020, which was meant to describe the effect of regulations actually made on 26th March 2020, does not accurately describe the restrictions imposed by those regulations. He has created the impression that people may only leave their homes for work which is "essential". That is not what the regulations require. The regulations entitle anyone to leave home for work, if the work itself means they cannot do it from home. This is so, regardless of value-judgments about the relative importance of the work in the fight against COVID-19 or the like.

This is not something that would be clear to anyone who is not a lawyer. Unless or until they are changed, the current regulations do not do what the Prime Minister said they would do.

Possibly the Prime Minister's description of the restrictions would be a better way of containing the disease. But it is crucial for businesses to have clarity and certainty. They cannot be expected to deal with the fall-out of muddle created by politicians, on top of the effects already created by COVID-19 and the restrictions imposed by law. The knock-on effects for the actual conduct of business are likely to inflict further and unnecessary harm to an economy which is already facing unprecedented turmoil.

In the circumstances, the Government ought urgently to clarify the position either by (i) amending the regulations to match the Prime Minister's description of them or (ii) by publicising widely a correct description of what restrictions apply to work-related activities.

1. Section 45C of the Public Health (Control of Disease) Act 1984 as amended empowers a minister to make regulations 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. The power is general; but among the matters specifically identified as falling within the power, is making 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": section 45C(3).
2. Acting under (principally) that power, at 2pm on 21st March 2020 the Secretary of State for Health made the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 SI No 327 ("the First Regulations"). Broadly stated, these regulations

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required outlets selling food and drink to stop serving food and drink for consumption “on-premises”; and they required leisure businesses to stop trading. The regulations were expressed to lapse after six months but would otherwise end before then if and when the Secretary of State issued a direction.

3. Acting under (principally) the same power, at 1pm on 26th March 2020 the Secretary of State for Health made the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI No 350 (“the Second Regulations”). These repealed and revoked the First Regulations, but incorporated and expanded their effect. There is no longer a “relevant period” but, instead, an “emergency period” which will last for six months (see Regulation 12) or until the Secretary of State so declares, with an obligation to review at least once every 21 days and an obligation on his part so to declare as soon (in effect) as possible. Broadly stated: regulation 4 perpetuates the rule against serving food and drink for consumption “on premises” with limited exceptions. Regulation 5 requires business to shut down if they consist of “offering goods for sale or for hire in a shop, or providing library services”, subject to limited exceptions for food shops and others deemed essential, including not only pharmacies but also building supplies, car repair and MOT services and taxi services. It also requires hotel and other providers of accommodation to shut down, subject to limited exceptions. It also shuts down or restricts the operation of places of worship and crematoria and burial grounds. Regulation 6(1) provides that “During the emergency period, no person may leave the place where they are living without reasonable excuse.” “Reasonable excuse” is not defined, but regulation 6(2) contains a list of matters which “reasonable exclude includes”. These include (regulation 6(2)(f)) “to travel for the purposes of work ... where it is not reasonably possible for that person to work ... from the place where they are living”; and (regulation 6(2)(h)) “to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings”. Regulation 7 provides that “During the emergency period, no person may participate in a gathering in a public place of more than two people except ... (b) where the gathering is essential for work purposes” or “(d) where reasonably necessary - ... (iv) to participate in legal proceedings or fulfil a legal obligation.”

4. Thus, although the Second Regulations are more sweeping than the First Regulations, they do not introduce restrictions preventing the conduct of business generally, whether or not the business itself is in some sense “essential” for the fight against COVID-19 or other unspecified purposes or based on any kind of value-judgment. Business premises are not likely to qualify as a “public place”, because a “public place” is simply somewhere to which the public has access, such as a park or a highway, or perhaps in return for a fee such as certain kinds of playground or other venues, and does not fairly describe ordinary business premises, from which the public are excluded and only employees may enter. But even if ordinary business premises were to count as a “public space” for these purposes, nevertheless a “gathering” of more than two people would be “essential for work

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purposes” if required by the job in hand: again, regardless of whether or not the job in hand is itself essential for the fight against COVID-19 or other unspecified purposes or based on any kind of value-judgment. Further, this is so, whether or not the attendance could also be justified on the basis that it was required to “fulfil a legal obligation”, which is unlikely: this language appears directed at non-contractual obligations, imposed by the general law.

5. All of this appears to me to be clear, upon a true interpretation of the Second Regulations.

6. However, perhaps springing from the language of “essential for work purposes” (though “essential” also appears elsewhere in the Second Regulations), in non-legal discourse there has emerged a distinction between work which is “essential” and work which is “non-essential”. In fact, the Second Regulations do not ask whether the work being undertaken is itself “essential”, or contain any method for distinguishing between work which is “essential” and work which is not “essential”. All they do, so far as relevant, is ask whether work can be done from home, regardless of whether or not the work itself is “essential” as a matter of value-judgment about its relative importance; and, in the case of gatherings in public places, whether the gathering which has taken place is “essential” for work purposes, regardless of whether or not the “work” itself is “essential” as a matter of value-judgment about its relative importance.

7. Thus, the Second Regulations do not contain any blanket restriction on leaving home to do work which is not “essential” work. The relevant distinction is between work which cannot be done at home, and work which can be done at home. The concepts are entirely distinct.

8. Nevertheless, the concepts have become muddled up. In particular, they have become muddled up in, and mainly through, the utterances of ministers of the Crown. The Prime Minister is primarily responsible. In a statement broadcast to the country on 23rd March 2020, Mr Johnson said:

“That is why people will only be allowed to leave their home for the following very limited purposes: ... travelling to and from work, but only where this is absolutely necessary and cannot be done from home.”

The last part of that quotation would of course strike a lawyer as ambiguous. But, on the other hand, especially to a lay person hearing those words uttered in a time of national crisis, the clear emphasis was not on the idea that (a) people could continue to leave their homes for work purposes, where the nature of their work was such that they could not do it from home; but instead on the idea that (b) only work which was “absolutely necessary” could justify anyone leaving their homes.

9. In other words, a lay person — and indeed a lawyer who had not read the legislation — would expect the Second Regulations to be directed at (b), whereas in fact they are

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directed exclusively at (a).

10. It is of course possible that the Prime Minister's utterance better reflects what ought to be done in response to the current pandemic, than the Second Regulations. If, because of political messaging, society generally observes more stringent restrictions than the law requires, then the effects may be benign. Equally, it is possible that the Second Regulations might be tightened further, to reproduce or indeed go beyond the description actually uttered by the Prime Minister on 23rd March 2020.

11. Nevertheless, as a description of the restrictions actually imposed by the Second Regulations, it is clear that the Prime Minister's message was misleading. It is also clear that it has in fact misled at least some sectors of business. For example, a quick google search reveals the Lift and Elevator Industry Association stating on its website as follows:

“Many in our industry are involved in roles on site to carry out essential work on sites critical to the COVID-19 response and to keep equipment and users safe, and in support of site work with parts and equipment. They therefore need to leave their homes to carry out this work and so fall into the category of ‘but only where this is absolutely necessary and cannot be done from home.’”

There follows a list including attendance at such places as hospitals and the like. This is a clear example of the muddle I have mentioned.

12. The result is a situation which creates immense legal risk for businesses with contractual commitments which may depend on whether their activities are lawful, or unlawful. This is not an area where doubt and ambiguity can be tolerated. The Government owes a duty to the public and the economy to legislate clearly and speak clearly about what business can do, and what it cannot do. The alternative is litigation and potentially catastrophic financial losses, with many losers and no winners.

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