



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 98

P1043/20

OPINION OF LORD ERICHT

In the cause

(FIRST) KLR & RCR INTERNATIONAL LTD, trading as ONE 20 WINE CAFE;
(SECOND) CALEDONIA INNS LIMITED; (THIRD) LA P'TITE FOLIE LTD;
(FOURTH) WHIGHAMS WINE CELLARS LIMITED; (FIFTH) MONTPELIERS
(EDINBURGH) LIMITED; (SIXTH) ALBELANDY LIMITED; and
(SEVENTH) GORDON STEELE QC

Petitioners

against

THE SCOTTISH MINISTERS

Respondents

Petitioners: Dean of Faculty, Welsh; Balfour and Manson
Respondents: Mure QC; Irvine Scottish Government Legal Directorate

11 December 2020

Introduction

[1] The First to Sixth Petitioners operate various hospitality businesses (such as cafes, restaurants and hotels) in Edinburgh. The Seventh Petitioner operates short term lets in the Edinburgh area. In this Petition, they seek Suspension et *separatim* reduction of the decision (the “Decision”) of the Scottish Ministers on 8 December 2020 to continue the Level 3 restrictions for the City of Edinburgh local authority area.

[2] Under the Level 3 restrictions, the First to Sixth Petitioners are prohibited from selling alcohol for consumption on any part of their premises and must close their businesses between the hours of 6.00pm and 6.00am. Also, there are restrictions on travel into Edinburgh which affect hospitality and accommodation businesses.

[3] The Level 3 restrictions are more restrictive than the Level 2 restrictions. Under the Level 2 restrictions, the Petitioners would be permitted to remain open until 8.00pm and to serve alcohol for consumption indoors to customers who are eating a meal prepared by the petitioners. Travel is permitted between level 2 areas.

[4] The petition called before me today on the Petitioners' motion for *interim* suspension. This is the extempore opinion which I gave after hearing counsel.

[5] The legal test to be applied today has two parts. Firstly, have the Petitioners averred a *prima facie* case? Secondly, does the balance of convenience favour the granting of *interim* suspension?

The law

[6] The law on levels of restriction is set out in the *Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020/344* (the "Regulations"). The Regulations set out the restrictions applicable to 5 levels of restriction, with Level 0 being the least restricted and Level 4 being the most restricted. The Regulations also ascribe each local authority in Scotland to a particular level. A local authority can be moved to a different level by amendment of the Regulations. The decision challenged in this petition was given effect to by the *Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 7)*

Regulations 2020/427 (the “Amendment (No 7 Regulations”). The Amendment (No 7 Regulations) come into force at 6.00pm today.

[7] The Amendment (No 7) Regulations were enacted under the affirmative procedure. Yesterday, on 10 December, the Scottish Parliament Covid 19 Committee, having taken evidence on the Amendment (No 7) Regulations from Michael Russell, Cabinet Secretary for the Constitution, Europe and External Affairs, and Professor Jason Leitch, National Clinical Director, Scottish Government, recommended that they be approved. These Regulations were made and laid before the Parliament yesterday afternoon. They are subject to the affirmative procedure which means that Parliament will have an opportunity to vote on them. However they take effect in the meantime pending the vote.

[8] The Petitioners do not seek to challenge the law. They do not seek to challenge the Amendment (No 7) Regulations. Instead they seek to challenge a prior decision of the Scottish Ministers.

The decision challenged this Petition

[9] The reasons for the Decision are to be found in the First Minister’s statement to Parliament on 8 December and a document entitled *Coronavirus (COVID-19): allocation of levels to local authorities – 8 December 2020 Outcome of the 5th review of the allocation of levels to local authorities, alongside evidence and analysis informing these decisions* (the “Fifth Review Document”).

[10] In her statement to the Parliament the First Minister said:

“We have also looked very carefully at whether Edinburgh should move to level 2 at this stage. Edinburgh is currently recording 68 cases per 100,000 people, which is below the Scotland-wide average, and its test positivity levels are also relatively low. However, cases in Edinburgh have risen slightly in recent days, and there seem also to have been increases in East Lothian and Midlothian.

The imminence of the Christmas period has also had an impact on our thinking. A move to level 2 in Edinburgh would mean opening up significantly more services in our second biggest city in the two weeks before Christmas. That move would carry significant risk of increased transmission, and for that reason we want to have as much assurance as possible that the situation is as stable as possible before we make that move. For that reason—this has been a difficult decision—we have decided not to move Edinburgh to level 2 this week, but we will consider that again next week for both Edinburgh and Midlothian. “

[11] The Fifth Review Document states (emphasis added):

“Purpose

This document sets out:

- the outcome of the 5th review of the allocation of levels to local authorities
- a summary of the reasons for changes in allocation

An evidence paper setting out the data and analysis supporting these decisions has also been published.

Decision-making process

On 29 October 2020, as part of Scotland’s Strategic Framework, we published the initial allocation of levels to local authorities. These allocations came into effect on 2 November 2020.

The allocation document makes clear that decisions have to be based firmly on the best available evidence, assessed through a process that is open, transparent and collaborative and frequently reviewed so that restrictions are not kept in place longer than is strictly necessary to achieve the aim of suppressing the virus.

The allocations are reviewed weekly and this document sets out the outcome of the fifth review.

In line with the process set out in the allocations document, the National Incident Management Team (NIMT), chaired by Public Health Scotland and including representatives from local government as observers, met to discuss the latest analysis of data, which had been agreed with local partners including Directors of Public Health. The NIMT then provided advice to a group made up of the Scottish Government’s chief advisers and lead officials representing the ‘four harms’ and observers from local government. This group helped form recommendations for Ministers on allocation of levels, which were discussed with the relevant local authorities, and then agreed by the Scottish Cabinet on 8 December 2020.

The critical indicators which inform the allocation of levels are:

- a) The number of cases per 100,000 people over the past seven days.
- b) The percentage of tests that are positive over the past seven days.
- c) Forecasts of the number of cases per 100,000 consisting of the weekly number of cases in two weeks' time.
- d) Current and projected future use of local hospital beds, compared with capacity.
- e) Current and projected future use of intensive care beds, compared with capacity.

The status of these indicators, including relevant trends for each local authority, is set out in the separate evidence paper. The data itself does not determine the relevant level of any local authority, and it is considered alongside local intelligence and other local, regional and national factors. As Scotland's Strategic Framework (p.23) says: 'These decisions require judgement to be applied to all the facts and considerations relevant at the time they are made, and in relation to the area directly affected and for Scotland as a whole.'

Summary of review

In announcing the initial allocation of levels to local authorities to Parliament on 29 October, the First Minister made it clear that the Scottish Government was taking a deliberately cautious approach. This was not only to reflect the fact that we were introducing a new framework for the first time, but also the fragility of the situation we were facing.

Since the levels approach was introduced we have seen a decrease in the number of positive cases being reported each day. This suggests that the protective measures currently in place are having a positive effect. Prevalence of the virus is still too high, but we hope to see further improvements over the coming weeks as the data reflects the impact of the level 4 measures.

A cautious and limited relaxation of rules over the festive period was announced on 24 November 2020. Over the period 23-27 December, up to 8 people from a maximum of 3 households can form a 'bubble'. This measure is being introduced to address issues of loneliness and isolation over the festive period, but the safest way to spend Christmas is to stay within your own household, in your own home and your own local area.

There is a significant risk that if family and friends gather for the festive period this could lead to a rise in the R number and increased cases of COVID-19 as a result. It is therefore important to manage this risk carefully to ensure that the hard work and sacrifices of people and businesses across Scotland are not undermined.

In order to safely allow limited gathering over Christmas, to mitigate issues of isolation and loneliness during this time a deliberately cautious approach has been taken to this review. Lowering prevalence of the virus prior to the festive period is key to avoiding the need for more restrictive protective measures in the new year and ensuring that the NHS does not become overwhelmed by a COVID-19 in January, which is traditionally the most challenging time for it.

The risks around increased social activity over the festive period are particularly acute in large urban areas. The frequent transport links and high concentrations of hospitality and retail venues mean that these areas can attract large numbers of people over the festive period creating increased opportunities for transmission. This additional risk was also a factor for consideration in this week's review. The outcome of this week's review is that a number of changes will be made, moving areas down to lower levels. This reflects the overall progress seen in the data, with new cases, hospitalisations, ICU admissions and deaths now all trending down from late-October peaks. The next scheduled review will be on 15 December.

.....

Summary of reasons for change in allocation of level

The following table sets out summary information only. Further data is contained in the supporting analytical paper. Broader information, including at the local level by the National Incident Management Team, has also been considered in reaching these allocation decisions.

Local authority: allocation of level to each area and summary of indicators

Local authority*	Cases/100k	Test Positivity	Cases/100k forecast	Hospital forecast	ICU forecast	Present level	New Level
East Ayrshire	M	M	L	L	L	4	3
North Ayrshire	M	H	L	L	L	3	3
South Ayrshire	M	L	L	L	L	4	3

Scottish Borders	L	L	VL	L	L	2	1
Dumfries and Galloway	L	L	VL	L	L	2	1
Fife	M	H	L	L	L	3	3
Clackmannanshire	H	L	M	L	L	3	3
Falkirk	L	M	VL	L	L	3	2
Stirling	M	M	M	L	L	4	3
Moray	VL	VL	VL	L	L	1	1
Aberdeen City	L	M	L	L	L	2	2
Aberdeenshire	M	M	M	L	L	2	2
East Renfrewshire	M	H	L	L	L	4	3
Inverclyde	L	L	L	L	L	3	2
Renfrewshire	H	H	M	L	L	4	3
West Dunbartonshire	M	M	VL	L	L	4	3
East Dunbartonshire	M	H	VL	L	L	4	3
Glasgow City	H	H	L	L	L	4	3
Highland	VL	VL	VL	L	L	1	1
Argyll and Bute	H	M	VL	L	L	2	2
South Lanarkshire	M	H	L	L	L	4	3
North Lanarkshire	M	H	L	L	L	4	3
East Lothian	L	M	VL	L	L	2	2
Midlothian	M	H	VL	L	L	3	3

City of Edinburgh	L	M	VL	L	L	3	3
West Lothian	M	H	L	L	L	4	3
Orkney Islands	VL	VL	VL	L	L	1	1
Shetland Islands	VL	VL	VL	L	L	1	1
Angus	L	M	VL	L	L	3	2
Dundee City	M	H	VL	L	L	3	3
Perth and Kinross	M	M	L	L	L	3	3
Na h-Eileanan Siar	VL	VL	VL	L	L	1	1

*Ordered by health board

VL = very low, L = low, OC = of concern M = moderate, H = high, VH = very high
Summary of reasons for change in allocation of level

The following table sets out summary information only. Further data is contained in the supporting analytical paper. Broader information, including at the local level by the National Incident Management Team, has also been considered in reaching these allocation decisions.

Local authority	level	Summary of reasons for decision
Aberdeen City	2	<ul style="list-style-type: none"> case numbers are not consistently falling recent outbreaks in the area managed locally urgent work to be undertaken with local authority to understand underlying causes better this will continue to be monitored closely allocation unchanged
Aberdeenshire	2	<ul style="list-style-type: none"> no consistent progress over last week recent outbreaks in the area being managed locally urgent work to be undertaken with local authority to understand underlying causes better this will continue to be monitored closely allocation unchanged
Angus	2	<ul style="list-style-type: none"> persistent decline over past 10 days in case numbers, with downward forecast test positivity maintained at moderate

		<ul style="list-style-type: none"> consistent with move to level 2 with close monitoring
Argyll and Bute	2	<ul style="list-style-type: none"> sharp rise in case numbers over the past week related to individual outbreaks some increase to test positivity over the past week allocation unchanged although the situation will be monitored closely
City of Edinburgh	3	<ul style="list-style-type: none"> case level low but fluctuating test positivity maintained at moderate without improvement allocation unchanged
Clackmannanshire	3	<ul style="list-style-type: none"> no consistent progress over the last week allocation unchanged
Dumfries and Galloway	1	<ul style="list-style-type: none"> consistently low case numbers and positivity rates over the last week move to level 1 fully indicated
Dundee City	3	<ul style="list-style-type: none"> increase in case levels over the last week, still at moderate no movement in positivity rates over last week allocation unchanged
East Ayrshire	3	<ul style="list-style-type: none"> case level still moderate with slight decrease test positivity is down over the week to moderate levels consistent with move to Level 3
East Dunbartonshire	3	<ul style="list-style-type: none"> case level still moderate with slight decrease, forecast now very low test positivity fallen slightly over past week consistent with move to Level 3
East Lothian	2	<ul style="list-style-type: none"> some increase in case numbers but these remain low compared to national average test positivity rates slightly down over the week and remain at moderate allocation unchanged
East Renfrewshire	3	<ul style="list-style-type: none"> some improvement in case numbers over the week and forecast now low

		<ul style="list-style-type: none"> • test positivity unchanged • consistent with move to Level 3
Falkirk	2	<ul style="list-style-type: none"> • case levels still low, test positivity moderate • has maintained consistency despite rates in neighbouring areas • consistent with move to level 2
Fife	3	<ul style="list-style-type: none"> • case levels still moderate • test positivity up slightly • allocation unchanged
Glasgow City	3	<ul style="list-style-type: none"> • consistent improvements in case numbers and test positivity over the last week • consistent with move to Level 3
Highland	1	<ul style="list-style-type: none"> • cases and test positivity continue to decline • allocation unchanged
Inverclyde	2	<ul style="list-style-type: none"> • reductions to both case numbers and test positivity to levels consistent with a lower level • to move to level 2
Midlothian	3	<ul style="list-style-type: none"> • some increase to both case numbers and test positivity over the last week but low case rates overall • allocation unchanged
Moray	1	<ul style="list-style-type: none"> • cases remain low • allocation unchanged
Na h-Eilean Siar	1	<ul style="list-style-type: none"> • some increase to case numbers over the past week but from low levels • test positivity stable • allocation unchanged
North Ayrshire	3	<ul style="list-style-type: none"> • no consistent progress over the last week • allocation unchanged
North Lanarkshire	3	<ul style="list-style-type: none"> • improvements in case numbers over the last week • some reduction to test positivity • Consistent with move to level 3

Orkney Islands	1	<ul style="list-style-type: none"> • numbers continue to be low and will be monitored to see if recent changes to indoor socialising rules have any impact • allocation unchanged
Perth and Kinross	3	<ul style="list-style-type: none"> • slight reduction in case numbers, overall stable test positivity • allocation unchanged
Renfrewshire	3	<ul style="list-style-type: none"> • more consistent reduction in case levels from high incidence • case forecast remains moderate • consistent with move to level 3
Scottish Borders	1	<ul style="list-style-type: none"> • decreases in case numbers and test positivity over the last week • consistent with move to Level 1
Shetland Islands	1	<ul style="list-style-type: none"> • numbers continue to be low and will be monitored to see if recent changes to indoor socialising rules have any impact • allocation unchanged
South Ayrshire	3	<ul style="list-style-type: none"> • notable decreases to case numbers • test positivity now low • consistent with move to Level 3
South Lanarkshire	3	<ul style="list-style-type: none"> • case levels decreased to moderate • test positivity stable • consistent with move to Level 3
Stirling	3	<ul style="list-style-type: none"> • large decrease in case numbers over last week • test positivity down to moderate • consistent with move to Level 3
West Dunbartonshire	3	<ul style="list-style-type: none"> • continued decline in case numbers over last week • test positivity stable at moderate • consistent with move to level 3
West Lothian	3	<ul style="list-style-type: none"> • some improvement in case numbers at moderate levels • consistent with move to level 3"

Evidence

[12] The Evidence Paper which was referred to in the Fifth Review Document stated:

“COVID-19: Strategic Framework – Levels Allocations Review

Summary Indicators and Trends

Background

The purpose of this paper is to provide a summary of data for the five headline local authority area indicators in the context of the level review on 8th December. The review is based on the five agreed indicators – Cases/100k, test positivity, Cases per 100k forecast, Hospital forecast and ICU Forecast. The forecast indicators are updated weekly, with latest update on Thursday 3rd December. The Cases/100k, test positivity measures are updated daily and include information published on Monday 7th December.

Tables 1-5 show the data used to derive each guide indicator for each Local Authority

- Table 1 shows trends in weekly cases per 100,000,
- Table 2 shows trends in test positivity.
- Table 3 shows the latest 2 week case forecasts
- Table 4 shows the projections of hospital bed demand for Covid
- Table 5 shows the projections of ICU demand for Covid

Annex A of this paper presents a report per Local Authorities summarising trends in the five indicators guiding levels.

The purpose of the hospital and ICU projections is to give early indications of concern, clearly with higher levels of concern. As such, the outputs from the indicators shown in the Local Authority tables are shown as ‘very high’ where the projections show a breach of capacity within 2 weeks for ICU or 3 weeks for Covid hospital beds, ‘high’ where the projections show a breach of capacity within 3 weeks for ICU or 4 weeks for Covid hospital beds, ‘of concern’ where the projections show a breach of capacity within 4 or 5 weeks for ICU or 5 or 6 weeks for Covid hospital beds, and ‘low’ if the projections don’t breach capacity within this time period.”

[13] The Evidence Paper set out the data for each indicator for each Council.

Covid Decision Making

Covid-19 A Framework for Decision Making

[14] In April 2020 the Scottish Ministers published a Document entitled *Covid-19 A Framework for Decision Making* (the “April Framework”).

[15] The April Framework was issued in the context of the lockdown which was then in force and has to some extent been superseded by subsequent events. Time and space prevent the contents of this document being set out in full in this opinion but I draw attention to the following passages in it:

“Although the decisions on if, when, and how to ease restrictions must be made by government, they cannot be made in isolation. We are listening to the best scientific advice and will apply our best judgements to that. We must also listen to the people of Scotland. Transparency and engagement is fundamental. This document sets out the situation as we understand it, and the principles on which we will base our decisions to ease the current restrictions or, should it become necessary to prevent harm to re-impose or further tighten restrictions.

- The pandemic is a health crisis, a social crisis and an economic crisis that is causing harm on an unprecedented scale.
- Difficult decisions are required to balance these various, inter-related harms so as to minimise overall harm.
- The harms caused do not impact everyone equally.
- We will protect those most at risk and protect human rights.

COVID-19 causes harm in at least four ways. First, the virus causes direct and tragic harm to people’s health. We have seen this in these first phases of the pandemic in Scotland in the daily growth in number of new cases; number of new hospitalisations; number of people requiring treatment in Intensive Care Units; and, sadly, the number of deaths related to the virus.

Second, the virus has a wider impact on our health and social care services in Scotland; how our people are using those services; and how this impacts on non-COVID health harms. We have mobilised our health and social care services to an unprecedented degree to respond to COVID-19. That has meant the postponement of other types of care and treatment.

Despite the NHS remaining open for those who need it, we have seen significant reductions in people seeking help. This will impact on those most at risk. The health impacts brought about by greater inequalities may themselves be significant over years to come. We must adapt to ensure that our health and social care services can resume this wider care as soon as possible, and this forms part of our planning for the period ahead.

Third, the restrictions which Scotland, together with the other UK nations, has necessarily put in place to slow the spread of the virus can in turn cause harm to our broader way of living and society, including, for example, the negative effects of increased isolation, particularly for those living alone, and the impact on children's well-being from closing schools.

Fourth, along with the wider negative impacts of the global pandemic, the lockdown has had an enormous impact on our economy, with a potential fall of 33% in GDP during the period of lockdown. This is unprecedented and is causing deep uncertainty and hardship for many businesses, individuals and households. The damaging effect on poverty and inequality may be profound." (p 6 – 7)

"Section 4 – Framework for Decisions

- We want to ease restrictions but must be prepared for them to be reimposed as well as lifted.
- Any lifting of restrictions will rely on high levels of support and compliance from the whole population with any continued physical distancing.
- We will be open and transparent about the evidence we have.
- We will consider how our decisions impact on all parts of society.

It is important that there are clear criteria to guide decisions on whether to maintain, tighten or relax the lockdown. There is a process in place to guide us. **We will follow the evidence and apply judgement to it.** We will consider the advice from experts across science, public health, the economy, and beyond. Our Chief Medical Officer's Advisory Group, in alignment and discussion with the advisory structures in other parts of the UK including SAGE, is advising us on the public-health impacts of the crisis and how to mitigate them. We are also able to draw on the range of economic and social policy expertise from the across government and beyond to inform our decision making.

While we will continue to operate within a four nation UK framework and align our decisions as far as possible, we will take distinctive decisions for Scotland if the evidence tells us that is necessary.

The evidence we now publish daily on cases, hospitalisations, ICU admissions and deaths will tell us if community transmission is controlled. The following chart shows the trend in recent weeks of daily numbers of COVID-19 patients in hospital. There are signs it has plateaued. The capacity of our health and care system to care for our people when any restrictions are lifted will be a factor. Evidence on the impact on the economy and society, in particular more at-risk communities, will also be critical to any decision making.”(p 12)

Covid-19 Scotland's Strategic Framework

[16] In October 2020 the Scottish Ministers published a Document entitled *Covid-19 Scotland's Strategic Framework*. (the “October Framework”).

[17] Again this is a lengthy document and I draw attention to the following passages.

“This new Strategic Framework sets out how we will work to suppress the virus and presents an honest reflection of the decisions we will need to make, and the balance we will have to reach, and it does so rooted in tackling the four harms we know the virus causes.

The first harm is the direct attack on life and health.

When the virus begins to spread, we need to put in place protective measures to suppress it. To make this simpler, we are moving to a system of levels of protection which will be regularly reviewed. Ministers, with expert advice, will apply these levels, nationally and/or locally, in a proportionate way, guided by evidence on the state of the epidemic, and only for as long as necessary....

The second harm the virus does is to our wider health and care services, and indirectly to our health and wellbeing. ...

The third harm is to wider society.....

And of course, the fourth harm is one that will have hit many individuals, communities and businesses the hardest – the damage inflicted on the economy, employment, and our prosperity. We have seen recovery starting, and we have acted to support and protect it, while keeping workplaces safe – however, we recognise that many businesses are now suffering from re-imposed protective measures. We will do all we can, at our own hand, with our partners and through the four nations approach, to protect jobs and invest in our future. But we must acknowledge that the levers at our disposal, as a devolved government, do not match the scale and consequences of the pandemic and the toll it will take. It is an unprecedented global health crisis with unprecedented global economic consequences. During lockdown, we provided an unprecedented package of

support to businesses, followed through by ensuring the necessary local support was in place. As we look ahead to a new levels approach, we will ensure, as far as we can and with the resources available to us, support for businesses required to close, or otherwise affected, by protective measures.” (p 4-5)

[18] Further information about the four harms is provided on page 17-18 and the document then says:

“All these harms are related and will require tough choices in determining priorities, some of which cannot always follow a simple comparison of risks. However, in making decisions about the future measures, we have weighed up not just the transmission risk inherent in different settings and activities, but also the impacts on broader health and well-being, society and the economy. To bring transparency to our decisions, and to support people to understand the very difficult issues that we face, we publish data on these harms online”

[19] At pages 22-23 the document states:

“Once the initial levels have been set for each local authority area across Scotland, levels will be reviewed weekly in the light of the evolving situation to decide whether levels should be maintained, increased, or reduced. However, while levels will be reviewed weekly, areas are likely to move between levels less frequently than that. Once set, levels are likely to be in place for two to four weeks at least, to give time for the effect of changes to be observed in data about the virus, and to ensure that the incidence and prevalence of the virus are responding to measures put in place to suppress it.

Decisions on levels, both initially and on review, carry significant consequences, for the communities they affect and for Scotland as a whole, in relation to the ‘four harms’ caused by the virus: its direct impacts on health, and the effect of measures to suppress it on wider health and care, society, and economic activity. In taking and reviewing these decisions, we will exercise care and judgement, applying the approach and principles set out in the Scottish Government’s COVID-19 Framework for Decision-Making. In particular, protective measures will only be applied where and for so long as they are justified, necessary and proportionate.

These decisions require judgement to be applied to all the facts and considerations relevant at the time they are made, and in relation to the area directly affected and for Scotland as a whole. We are committed to ensuring that decisions will always be informed by data and analysis. To guide us, we will be monitoring key indicators on the state of the epidemic on a daily and weekly basis and taking changes in these into account when considering whether escalation is needed or whether an area can move down a level. These indicators may change over time as the virus develops and new data becomes available and we will keep it under review and open to scientific and clinical views. We will also set out more

detail of the ranges we will consider as we take initial decisions on the application of the levels framework. However, the indicators are likely to include:

- The number of cases per 100,000 people over the past seven days, including for particular age groups of the population
- Forecasts of the number of cases per 100,000 over the fortnight ahead
- The percentage of tests that are positive over the past seven days
- Current and projected future use of local hospital beds, compared with capacity
- Current and projected future use of intensive care beds, compared with capacity

These indicators will be considered as part of a rounded assessment of the facts and circumstances relevant to each decision. We will publish, with each decision, a statement of the reasons for it. We already provide a range of daily updates on national data and trends on our web page Coronavirus (COVID-19) Daily Data web page, and our modelling work Coronavirus (COVID-19): modelling the epidemic; and we publish a dashboard which brings together both data and evidence on the broader impacts of COVID-19.” (emphasis added)

[20] In Part 7 of the Document the Scottish Ministers set out a package for economic support which was predicated on the potential for differing protection levels being applied across areas.

Letter from the Deputy First Minister to City of Edinburgh Council

[21] On 9 October the Deputy First Minister wrote to the Leader of City of Edinburgh Council explaining the Respondent’s reasoning. The letter reflected the reasons given in the First Minister’s Statement to Parliament.

Parliamentary answers

[22] At First Ministers’ Question Time yesterday, 10 December 2020, the following exchange took place:

“Covid-19 Restriction Levels (Edinburgh)

2. Richard Leonard (Central Scotland) (Lab): We all understand that Scotland’s strategic framework says that decisions on lockdowns are based on judgments as well as facts. Do the national incident management team and Public Health Scotland not have access to the same data and intelligence that the First Minister and her Cabinet have? We know that public health officials briefed the leadership and chief executive of the City of Edinburgh Council that the city should be moved to level 2. That is not just hearsay – that is what is stated in an emergency motion that is being moved by the Scottish National Party leader of the council this afternoon. Why did the First Minister and her Cabinet vote to overturn that advice?

The First Minister (Nicola Sturgeon): When we take the advice of the national incident management team, we look at all the indicators and we apply judgment to that. The chief medical officer is part of the Cabinet discussions. I will preface my comments on Edinburgh by saying this: why on earth would I want to keep Edinburgh or any other part of the country in a higher level of protection when I did not think that there was a need to do that?

I will share with the chamber the latest data on Edinburgh. These are the figures that were available yesterday; we will get updated figures later today. Over the past seven days, the number of cases per 100,000 in Edinburgh has gone up by 14 per cent and test positivity has gone up by 0.5 per cent. Test positivity is still moderate in Edinburgh, but it has increased in five of the past seven days. The latest data show that case levels have increased in four of the past seven days. The health board breakdown of the case numbers that I reported to the Parliament a moment ago shows that Lothian accounts for the second biggest number of cases that we have reported today. These are serious decisions that have to be taken carefully. If case numbers are rising slightly or not declining significantly enough in an area, there is a risk in easing restrictions, because the danger is that the situation will very quickly run out of control. The Cabinet reached the judgment that taking Edinburgh down a level at this stage would pose a significant risk to the overall situation, which is why we did not do that. We will review the position again on Tuesday.

We need only look across the world, across Europe and even across the United Kingdom right now to see what happens when restrictions are eased. As restrictions have been eased, there has been a slight increase in the number of cases in England, a dramatic increase in Wales and a bit of an increase in Northern Ireland. That is what we potentially face as we ease restrictions, so it is important that, before we do so, we ensure that the situation is as stable as possible.

Given the data on Edinburgh that I have just shared with the chamber, I do not think that easing the restrictions this week would have been a safe or sensible decision. I understand why people in Edinburgh wanted that to happen but, in a couple of weeks, I think that they might have had a very different view.”

Factual matters averred by the Petitioners

[23] The Petitioners aver:

“The respondent arrived at this decision without consulting City of Edinburgh Council, and in defiance of advice from its own public health advisors (who had stated, publicly, that Edinburgh ought to be placed in Level 2).”

Failure to consult with City of Edinburgh Council

[24] The Petitioners have provided no evidence to support their assertion. On the other hand, the Fifth Review Document states that the recommendations allocation of level were discussed with the relevant local authorities prior to the Decision. Also, a resolution passed unanimously by City of Edinburgh Council on 10 December 2020 states *inter alia*:

“ Council notes that the Leader and Chief Executive have met with public health officials and the Deputy First Minister weekly and have consistently made Edinburgh’s case for the least restrictive level, within the context of public health’s recommendations –putting the protection of residents as the first priority.....

The Council seriously regrets that despite robust representations from Edinburgh Council to the Cabinet and public health advice supporting a case to reduce Edinburgh’s level of restrictions to level 2, this has not happened”

[25] Senior Counsel for the Respondents stated that the Deputy First Minister had spoken with City of Edinburgh Council representatives on 10, 17 and 28 November and 1, 6 and 8 December.

[26] In these circumstances I am not satisfied that the Petitioners averment in respect of consultation with the local authority has been made out on a *prima facie* basis.

Failure to follow public health advice

[27] The Petitioners have not produced the public health advice to which they refer. Instead they found on the letter from four cross-party Edinburgh MSPs which states that they understand that the decision was contrary to the recommendations of public health officials. They also seek to found on Mr Leonard's question and also questions asked in the Covid 19 Committee, but the answers to these are inconclusive. After the conclusion of oral submissions, they have provided me with various statements from political figures about discussions with officials. Senior counsel for the Respondent stated that the Chief Medical Officer does attend cabinet meetings and was there at cabinet on Tuesday morning and was fully in support of the decision taken by the cabinet that day.

[28] In these circumstances I am not in a position today to come to a conclusive view as a matter of fact on whether the Respondents acted in defiance of their advice. If this Petition proceeds to a full substantive hearing then no doubt witnesses can be examined on this point. However for today's purposes it takes me no further forward. The Respondents were not obliged to act in accordance with the advice of their public health advisers, but were entitled to come to their own judgement.

Prima facie case***Submissions for the Petitioners***

[29] The Petitioners aver that the respondent has assigned to City of Edinburgh a level of restrictions for which there is no support in the data. The respondent has given no rational explanation for the determination that City of Edinburgh should remain subject to the Level 3 restrictions. Having regard to the published data, the Decision is so unreasonable that it is one that no reasonable executive could have reached if acting

reasonably. They found on *R (British Waterways Board) v First Secretary of State* [2006] EWHC 1019 (Admin); *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

They further aver that in failing to take proper account of the relevant data and in failing to consult with the local authority, the respondent has failed to take account of all relevant considerations in making the Decision, rendering it liable to reduction: cf: *R (Clue) v Birmingham City Council* [2011] 1 WLR 99.

[30] They note that a) Cases per 100,000 have dropped from a high of 92 on 20th November 2020 to 68 on 4th December 2020 (indicative of Level 1); b) Test positivity has dropped from 5.1% on 20th November 2020 to 4.1% on 4th December 2020 (indicative of Level 2); c) The probability of City of Edinburgh having more than 300 or 500 cases per 100,000 is shown as 0%. The probability of having more than 100 cases per 100,000 is shown as 15%. The probability of having more than 50 cases per 100,000 is shown as 56% (all of which is indicative of Level 1). Demand for hospital beds in Lothian is stated (at its highest) as 167 with a maximum capacity of 487 (indicative of Level 0). Demand for ICU beds is stated as 11 with a maximum capacity of 55 (indicative of Level 0). They aver that other council areas with worse results are in lower levels than Edinburgh.

[31] The Petitioners aver that it was essential that the Scottish Ministers give full and rational reasons for the Decision: *R (Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2137. The reasons given were not a criterion within the Scottish Ministers framework. The Respondents did not have data showing (a) that allowing premises such as the Petitioner's to trade until 8.00pm rather than 6.00pm would materially increase the risk of transmission of COVID-19; (b) that allowing premises such as the Petitioner's to serve alcohol (in a situation where customers

must remain seated) would materially increase the risk of transmission of COVID-19; and (c) that levels of circulation of COVID-19 within Edinburgh were such that maintaining Level 3 was proportionate and rational.

[32] The Petitioners aver that the Decision was driven by (a) the fact that new cases are higher in Edinburgh than anywhere else in Scotland other than Glasgow, and (b) concerns that people from outwith Edinburgh might, if the Level was lowered, travel into Edinburgh. Neither is a proper basis for the decision. Neither was announced as a criterion and as such is illegitimate: *ex parte Khan* [1985] 1 All ER 120. Insofar as (a) is concerned, the fact that more new cases have been reported in Edinburgh than elsewhere (other than Glasgow) is a simple result of population density and thus not relevant at all – hence it (as opposed to rates per 100,000 population) is not a criterion. As for (b), that is not a relevant consideration given that the respondent has made it illegal for anyone in a Level 3 or Level 4 area to leave that area. The respondent cannot make such travel illegal and at the same time proceed on the assumption that people will travel in breach of the law.

[33] The Petitioners also aver that they had had a legitimate expectation that the criteria set out by the respondent would be followed by the respondent when determining the level of restrictions that is appropriate. The respondent failed to follow and apply those criteria when making the Decision. *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.

[34] The Petitioners also aver that the Decision is a disproportionate and therefore unlawful interference with ECHR Article 8 and 11 rights.

Submissions for the Respondents

[35] The Respondents referred to *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; *R (Hussain) v The Secretary of State for Health & Social Care* [2020] EWHC 1392 (Admin) and *Mott v Environment Agency* [2016] 1 WLR 4338. They submitted that the indicators were not criteria but merely indicators which had to be taken into account when the Respondents made their judgement. There was no irrationality. A wide margin of appreciation should be given to the Respondents. There was no legitimate expectation that the decision would be made solely on the basis of the indicators. There was no breach of convention rights.

Discussion and decision

[36] The current coronavirus crisis has brought difficult challenges. It has brought particularly difficult challenges to the hospitality industry. I have been provided with information and affidavits about the devastating effect on the businesses of the Petitioners, and the consequences for their survival if they have to operate on level 3 rather than level 2 restrictions over the festive period.

[37] It has also brought particularly difficult challenges to the respondents, who have had to balance various interests in their Covid decision making. These challenges are primarily political, and the court will only intervene if a decision is unlawful.

[38] I endorse the approach which was taken by the English Court of Appeal to challenges to English Covid regulations in the Dolan case at paras 89-90. I also endorse that court's approach to regulations made under affirmative procedure at para 86. The Amendment (No. 7) Regulations have been approved by the Parliament Covid Committee, and although there has not yet been a vote of Parliament, regulations such as this can be voted down by the Parliament if the Parliament so wishes.

[39] The reasons for the Respondent's decision can be found by taking together the statement of the First Minister to the Parliament and the Fifth Review Document and Evidence Paper. In her statement the First Minister acknowledged the low rates in the Evidence Paper, but also took into account a slight increase in levels, and the significant risk of an increase due to the imminence of Christmas.

[40] In my opinion the Respondents were entitled to take into account these factors. The guidance as to how the government will go about its decision making has always emphasised that the indicators are no more than indicators. They are not the sole criteria for making a decision on Covid levels. The Respondents will take them into account when forming their view. The Respondents will also take into account the other three of the four harms identified by them. As the Strategic Framework (p.23) says: 'These decisions require judgement to be applied to all the facts and considerations relevant at the time they are made, and in relation to the area directly affected and for Scotland as a whole.'

[41] In my opinion the Respondents have followed their guidance as to how they would go about their decision, and there was no legitimate expectation that the decision would be made on the basis of the indicators alone: the indicators were to be balanced with other factors.

[42] The flaw in the Petitioners approach is that it elevates the indicators to the primary factor to be taken into account in the Respondent's decisions, with the effect that the only reasons to be taken into consideration would be the statistics in the Evidence Paper, and there would have to be specific reasoned justification to consider any other factors. If that approach were correct, then there would be force in the Petitioners' focus on the statistics in the Evidence Paper and the Summary Reasons in the Fifth Review Document. However the Respondents were also entitled to take into account the slight increase and the risk

associated with Christmas. The Respondents were entitled to balance all these factors and conclude that the slight increase and the Christmas associated risk outweighed the statistics in the indicators. That is a political decision with which the court will not interfere.

[43] In my opinion the reasons given by the First Minister in her ministerial statement were adequate and rational. The court is not entitled to interfere with them. These reasons were not, as the Dean of Faculty seemed to suggest, *ex post facto* justifications in response to political pressure. They were made as part of a First Ministerial Statement to the Parliament. It was appropriate that Decision and the reasons for it were made orally to the Parliament as part of such a statement.

[44] In my opinion the Petitioners do not have a *prima facie* case that in failing to consult with the local authority the Respondents have failed to take into account a relevant consideration. On the information before me, the respondents have consulted with City of Edinburgh Council. The Scottish Ministers were not obliged to come to the same view as the Council but were entitled to come to their own decision.

[45] The Petitioners also maintain that the Respondents did not have data about the effect of hospitality opening hours on transmission of Covid. In my opinion this is not a good ground for challenging the Decision. In deciding whether to move a council from one level to another, the Respondents are not making an individual decision on the details of the restrictions associated with each level. That is a prior decision which was made when the levels and restrictions were originally set, and is dealt with in the *Final Business and Regulatory Impact Assessment Scotland's Strategic Framework Hospitality* and the *Note by the Chief Medical Officer and Chief Nursing Officer and Clinical Director* dated 7 October 2020.

[46] Turning to the Petitioners' argument under the European Convention on Human Rights, in my opinion the Respondents have a wide margin of appreciation in balancing the

various rights engaged by the Covid crisis, particularly as the financial support available to businesses would have to be taken in to account (*Dolan* para 110). The Respondents have not made out a *prima facie* case on this issue.

[47] For all these reasons I find that the Petitioners have failed to establish a *prima facie* case.

Balance of convenience

[48] The Petitioners' aver that whilst the Decision remains in place, the Petitioners' businesses are suffering material detriment and that the detriment is rectified without delay so as to avoid any prolonged (and potentially irreparable) damage to the viability of the business.

[49] In my opinion, the balance of convenience is against the Petitioners. There is no doubt that their businesses are suffering, and one must have every sympathy for that. On the other hand, the suspension of the decision about an entire local authority area will affect not only the Petitioners but also the other residents and businesses in the area. The inconvenience to the Petitioners is limited in time as the levels will be reviewed again next Tuesday.

Order

[50] I refuse the Petitioner's motion for interim suspension.