

Application under regulation 12 of The Emergency Powers Coronavirus General Provision (Bailiwick of Guernsey), No. 7 Regulations, as amended, 2021, to revoke the Applicant's requirement to self-isolate.

[2021]GRC043

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between:

DOCTOR STEPHEN ADRIAN BRIDGMAN

APPLICANT

- AND -

THE CIVIL CONTINGENCIES AUTHORITY

CCA

-and-

THE MEDICAL OFFICER OF HEALTH

MOH

**Application by the Applicant under Regulation 12 of the
No. 7 Regulation to revoke a requirement to self-isolate**

Case heard: 19, 20 and 21 July 2021

Decision handed down: 22 July 2021

Judgment handed down: 23 July 2021

Before: Catherine Maureen Fooks, Judge of the Royal Court

**The Applicant was unrepresented
Counsel for the CCA and MOH: Advocate P M Grainge**

Legislation, cases and texts considered:

The Civil Contingencies (Bailiwick of Guernsey) Law, 2012, as amended ("the CCL")
The Emergency Powers Coronavirus General Provision (Bailiwick of Guernsey), No. 7 Regulations, as amended, 2021 ("No. 7 Regulations")

The Emergency Powers Coronavirus General Provision (Bailiwick of Guernsey), No. 8 Regulations 2021 ("No. 8 Regulations")

The Human Rights (Bailiwick of Guernsey) Law, 2000 ("HRL")

Extract from chapter 11 of *de Smith's Judicial Review 8th Edition*

The Nolan Committee's 1st Report on Standards in Public Life (summary)

SV and A v Denmark [2018] ECHR 35553/12, 36678/12

Guzzardi v Italy [1980] ECHR 7367/76

Enhorn v Sweden [2005] E.C.H.R. 56529/00

Dolan & Others v Sec of State for HSC & Another [2020] EWCA Civ 1605
R v Manning [2020] EWCA Crim 592
Matheson v States Housing Authority CA 1997-99 GLR10
Bassington Ltd v HM Procureur CA 1997-99 GLR180

Preliminary Note: This is an ex tempore judgment

Background

1. There was a directions hearing on this matter on Thursday 15 July 2021, which timetabled the matter in the hope that the substantive hearing could start on Monday 19 July, 2021. On Friday 16 July, Advocate Grainge applied for an extension of time on the grounds that those instructing her from the CCA and the Medical Officer of Health, to whom I refer in this judgment by the initials (“MOH”), were unavailable due to an outbreak of coronavirus in Alderney, with which they had to deal as a matter of some urgency.
2. The hearing still commenced on Monday 19 July, although only legal argument was possible. The Applicant opened his case on Tuesday 20 July. Evidence was given by him and his witness Dr Muir. Advocate Grainge then opened and evidence was given by Mr de Garis and the MOH. Closing speeches were completed by the end of Wednesday 21 July and I reserved judgment. On Thursday 22 July I handed down my decision that I was dismissing Part 1 of the Application, with reasons to follow in this ex tempore judgment.
3. Whilst I have been able to read carefully all the materials filed and consider very carefully all the evidence and submissions and reach a decision, it has not been able to issue a full and perfected judgment. The fact that I do not refer specifically to a particular point or piece of evidence does not indicate that I have not taken it into account.

Introduction

4. The Applicant in this matter is Dr Stephen Adrian Bridgman, who is a medical practitioner, registered with the UK General Medical Council and the Medical Council of New Zealand, as a specialist in Public Health Medicine and who was Director of Public Health, Chief Medical Officer and Medical Officer of Health in Guernsey, from 2009 to 2017. He is Honorary Senior Lecturer in Public Health at University of Aberdeen, Scotland. He has been contracted since 2017, to work in New Zealand as a Medical Officer of Health. The Applicant has maintained his home in Guernsey.
5. By application dated 14 July 2021 (“the Application”), the Applicant, being a person required to self-isolate upon arrival in the Bailiwick (“the Requirement”) under Regulation 5 of the No. 7 Regulations, applied to the Court, pursuant to Regulation 12(1) of the No. 7 Regulations, for an Order in three parts:
 - (1) revoking the Requirement in the circumstances of the Applicant’s case;
 - (2) for the costs of this Application; and
 - (3) for damages.
6. I am dealing with part 1 of the Application.
7. The Respondents to the Application are the Civil Contingencies Authority (“CCA”) and the Medical Officer of Health (“MOH”). Advocate Grainge made an oral application on 19 July for the removal of the CCA as a Respondent. I declined to deal with that matter without a written Application and no Application was received. The representative in Court for the CCA

was Mark De Garis, Strategic Lead for People Policy and one of the senior advisers to the CCA. The Medical Officer of Health, Dr Nicola Brink MBE, was present in person. Her qualifications are: Masters in Medicine, Fellow of the Royal College of Pathologists (Virology), Fellow of the Faculty of Public Health. Her Annual Medical Appraisal is carried out through that Faculty and her re-validation with the General Medical Council is similarly carried out through that Faculty of Public Health. She holds the posts of Director of Public Health and Medical Officer of Health and also has a Clinical Role for the management of persons with HIV and Hepatitis.

The Legislative Framework

8. The CCA was established under Section 1 of the Civil Contingencies Law and empowered under Section 12 to make emergency regulations, subject to certain conditions and to prefacing any regulations with a statement, the content of which is prescribed by Section 12 of the CCL. The No. 7 Regulations were made on the 17 June 2021. Those Regulations contained the prescribed statement, which includes reference to proportionality and Convention Rights and the nature of the emergency, namely, that there are one or more persons within the Bailiwick, or who may enter the Bailiwick, who may be infected with Severe Acute Respiratory Syndrome Coronavirus 2.
9. Section 16 of the CCL limits the duration of regulations to 30 days. No. 8 Regulations were made on the 15 July 2021 and came into force on 16 July 2021. Although, by the time the Application was heard, the No. 8 Regulations were in force, Section 25 of the No. 8 Regulations preserves the effect of anything done under the No. 7 Regulations. For the purposes of this judgment I will use the numbering of the No. 7 Regulations, as this was the numbering adopted by the parties and the Court at the hearing. The layout of the No. 8 Regulations is different, but the provisions equivalent to the relevant No. 7 Regulations are not different in any material way to the consideration of this Application.

Regulation 5

10. Regulation 5 is the requirement to self-isolate on arrival in the Bailiwick and contains the following provisions relevant to this Application:

5(1) Subject to –

- (a) provision made in or under Schedule 1 (concerning Critical Workers) or Schedule 2 (concerning Country Categories, which Schedule has effect),
- (b) paragraphs (2) to (7), and
- (c) Regulation 5A (requirement to self-isolate on arrival in the Bailiwick: children accompanying Blue Arrivals),

a person who has arrived in the Bailiwick by air or sea, other than a Blue Arrival, must self-isolate for 21 days; and for the avoidance of doubt, subject to any direction to the contrary from the MOH in any particular case, a Blue Arrival is not required to self-isolate, and is not subject to any other restrictions or requirements.

- (2) If a person falling within paragraph (1) who underwent a test for COVID-19 directly on arrival in the Bailiwick undergoes a test for COVID-19, 13 days after his or her date of arrival (or at such other time as the MOH may direct under this paragraph) (in this Regulation, a “**Day 13 test**”), and the result of that Day 13 test is negative, that person will not be required to self-isolate for the remainder of the 21 day period.

11. There are routes to variation for adults of the 21 day self-isolation period:

- (1) The reduced self-isolation options contained in Schedule 2, based on the categorisation of countries from which a person has travelled. For the purposes of this judgment, Section 4 concerning Category 2 travellers and, to an extent, Section 5 direct transit are relevant. It is to be noted that eligibility to take part in the reduced self-isolation options provided for arrivals from Category 2 and 3 countries require a person not to have spent any of the 14 days immediately prior to that person's arrival in the Bailiwick in a place which is a Category 4 country (Section 2).
- (2) The second route is voluntary testing on day 13, (as just read out in Section 5), which can reduce the period to 14 days if that test is negative.
- (3) The third route is falling within Section 4A as a Blue Arrival (see below) or;
- (4) The fourth route, a decision of the MOH, under Regulation 6(2), varying the requirement to self-isolation.

12. Regulation 23(2) defines a Category 2, 3 or 4 country as specified on the relevant States of Guernsey website for the purposes of the Regulations. Categorisation is made in accordance with the Regulations and is based on the prevalence of infection over a 14 day period and is similar to the categorisation system in some other countries.

13. The categories of country relevant to the Applicant's Application are New Zealand and Singapore which are Category 2 countries and Category 4 into which Heathrow and Gatwick fall.

14. Section 4 of Schedule 2 sets out the reduced self-isolation options for arrivals from Category 2. These are tests on arrival and day 7, and if negative, there is no self-isolation but passive follow-up. The default position for a Category 4 traveller, is that a Section 5 Requirement to self-isolate for 21 days applies, but that traveller can opt to take a day 13 test and if that is negative, can leave self-isolation.

Blue Arrivals

15. Regulation 4A defines a "Blue Arrival":

- "4A. (1) In these Regulations, a "**Blue Arrival**" means a person (other than a child) who has arrived in the Bailiwick after spending all (*my emphasis*) of the period of 14 days immediately before his or her arrival in a Blue List Country, and who has a full vaccination history.
- (2) Subject to paragraph (3), a "**Blue List Country**" means any of the Bailiwick, the United Kingdom, the Republic of Ireland, Jersey and the Isle of Man."

16. It is of note that just after the No. 8 Regulations came in, which repeated Section 4A(2) (in Regulation 19), Jersey was removed from the classification. The countries listed in this Regulation are also referred to as the Common Travel Area ("CTA").

17. In order to qualify as a Blue Arrival, there are two separate requirements:

- 1 The spending of all of the period of 14 days immediately before arrival in a Blue List Country; and

2 having a full vaccination history as defined under Section 4(4) as follows:

“4A.(4) For the purposes of these Regulations, a person (P) has a “**full vaccination history**” if –

- (a) P has received a full course of a UK certified vaccine administered in a Blue List Country (*my emphasis*), and
- (b) [.....] (*irrelevant to this Application*)

And in any case, where a question is raised as to whether a person has a full vaccination history, for the purposes of these Regulations, the determination of the MOH shall be final.

18. In sub-Section (5) there is a definition of a “**UK certified vaccine**”:

“4A.(5) For the purposes of paragraph (4), a “**UK certified vaccine**” means a vaccine against coronavirus the use of which is authorised by the European Medicines Agency, or the Medicines and Healthcare products Regulatory Agency of the United Kingdom (or the Secretary of State), either by way of a marketing authorisation or otherwise.”

19. It is very important to note at this point that the Applicant could never have qualified as a ‘Blue Arrival’, regardless of the status of his vaccination, as he had not been in a Blue List Country for all of the 14 days prior to his arrival in the Bailiwick.

20. The Covid-19 gov.gg website is a source of information in relation to certain matters, including exemptions from the Regulations and requirements. Notwithstanding that the whole of England is categorised as Category 4, arrival in England at certain entry points does not negate the Category 2 status of travellers from those countries, subject to strict conditions. In the case of Heathrow Airport, which was the Applicant’s point of entry into England, it is clearly stated that leaving the airport invalidates any exemption.

21. Regulation 5 imposes the requirement to self-isolate. Regulation 6(2) gives the MOH the power to vary such a requirement in the circumstances of an individual case:

“6(2) The requirement to self-isolate under Regulation 5(1), 5(2) and 5(2)A may be varied by the MOH in relation to a particular case, orally or in writing, [.....]”

22. The Application is made in relation to a refusal by the MOH to exercise her discretion under Regulation 6(2). The Application is made under Regulation 12 which provides:

“12.(1) A requirement, restriction or condition imposed under this Part, or Schedule 1 or Schedule 2, may be varied or revoked by the Royal Court on the Application of an affected person.”

It is common ground that the Applicant is an affected person. I will return to the scope of Regulation 12 later in this judgment.

The Applicant’s Vaccination against COVID-19

23. The Applicant was vaccinated in New Zealand with the Pfizer COMIRNATY vaccine on the 10 March 2021 and the 2 April 2021. The MOH in evidence, confirmed that this vaccine is a UK certified vaccine, as defined under Regulation 4A of the No. 7 Regulations.

24. As the vaccine was administered in New Zealand, the Applicant does not fall within the definition of a person with a “full vaccination history” under Regulation 4A.(4) of the No. 7 Regulations.

The Applicant’s travel and Application

25. The Applicant gave evidence as to his travel plans. He explained that he wished to return to Guernsey to reunite with family and he mentioned sick relatives in England and Jersey. He held a number of open tickets, one set being for travel from New Zealand via Dubai and one booked, he thought, in June, via Singapore, departing New Zealand on 9 July, because Singapore was a green country for the purposes of the relevant categorisation in England at the time. He made the decision to travel in early July. He started his internal travel in New Zealand on 9 July NZ time (8 July in Guernsey).
26. His daughter arrived in Guernsey on 7 July (which is 8 July in New Zealand) and discovered that there was an issue with quarantine in Guernsey. This was less than 36 hours before the Applicant was due to travel from New Zealand and he made the decision that it was too late to change his plans. He did accept that he could have changed his plans, had he so wished.
27. It was not entirely clear from the Applicant’s evidence exactly how much research he had carried out himself in relation to the travel restrictions applicable in the Bailiwick at the relevant time. He did accept that he could have made specific enquiries.
28. The Applicant was clearly aware that there was a potential issue with the recognition of his vaccination, as on 2 July, he emailed the variation team (which the MOH explained in evidence, is a small team including herself and others, acting under her authority, which deals on her behalf with variation applications), posing a general question as to whether he could obtain a certificate of immunisation in Guernsey from a course of vaccination administered abroad. It is to be noted that this is some 6 days before he started his internal travel. The Applicant did not receive a response to that email until 11 July, but his email did not specify that his enquiry was linked to specific and imminent travel.
29. By email dated 7 July, ie before the Applicant started his journey (the email is to be found at page 75 of the exhibits to the MOH’s affidavit and I will use page references from those exhibits elsewhere), the Applicant applied for what he described as a “compassionate exemption”. He made reference to visiting relatives who are unwell. He outlined his travel plans including reference to his transit from Heathrow to Gatwick and the measures that would be taken, such as social distancing. He asserted that he was fully COVID immunised from a Commonwealth country and that he would pose a much lower risk to the public in Guernsey than a Guernsey resident who has visited the UK. He attached to that email the website information for medical and compassionate travel which had been updated on 7 April 2021. It stated that those arriving from a Category 3 or 4 country could apply for variation but “this will be very limited”. It sets out a list of reasons for variation, which is not exhaustive. The Applicant did not, at that stage, complete the form, although the link was in the extract.
30. Following receipt of an email inviting him to complete the form, the Applicant, by email dated 9 July, while in transit between New Zealand and Singapore, submitted the form (the email is at page 73 and the form (“the Form Application”) at page 77. He cited ‘compassionate reasons’ as the type of variation requested and the reason for the Application. He proposed to reduce any risk of transmission prior to arrival, by virtue of his:

1. having been immunised;

2. having a letter from his New Zealand registered medical practitioner proving his immunisation statement;
 3. his understanding that immunisation is so effective that fully immunised Guernsey residents no longer need to quarantine when returning from a UK visit and;
 4. that he had been staying for months in New Zealand where there is no community COVID transmission.
31. He proposed methods to reduce the risk of community transmission of COVID-19 after arrival in the Bailiwick by way of testing, passive follow-up and all other standard practices as recommended by Guernsey Public Health. He made the point that he might need to be staying in Guernsey less than 14 days given illness in his family in England and Jersey.
32. In the box marked “any other relevant information” he made reference to the fact that his and his family’s understanding from the new rules was that he would not need to quarantine in Guernsey as he had travelled via a safe route. He did not attach any supporting documentation with reference to the unwell relatives.
33. The variation team responded within 7 hours by email dated 9 July 2021. That email said: “... Our clinicians advised that you will be categorised as a Category 4 arrival due to having been vaccinated outside of the common travel area (“CTA”). Therefore, you will be required to complete the 14-day self-isolation, on arrival into the Bailiwick, which can be shortened, following receipt of negative results to your ‘day 1’ and ‘day 13’ COVID-19 testing”.
34. Despite the refusal contained in the email, the Applicant chose to travel to Guernsey. He could have changed his plans but did not. He arrived on 10 July 2021 and went into self-isolation.
35. In cross-examination, the Applicant accepted that he took a calculated risk in travelling to Guernsey. In his view, there was no need for him to isolate but he knew that he might not get the exemption.
36. Following receipt of the refusal, his arrival and commencement of self-isolation in Guernsey, the Applicant contacted MOH directly by email on 12 July 2021 (page 71). He said that the Border Agency had advised of her “personal” powers to vary and suggested that he email her. He said that he sought a revocation of the requirement to self-isolate. He re-stated his argument that his vaccination status should be accepted and asserted that he had travelled from a very low risk area (Category 2). He challenged the fact that travel through Heathrow and Gatwick resulted in self-isolation as a Category 4 arrival, when Southampton is also Category 4 but does not so result.
37. By email just under an hour later (at page 70) the MOH replied. She explained the limitations on verifying certificates to those from the CTA and the lack of an internationally-accepted standard for verification and a lack of an appropriate level of security that would be acceptable, for example, similar to the Guernsey vaccination certificate which has similar features to a passport, to prevent copying and alteration. She explained that Guernsey is in a deliberately phased ‘unlock’ and did not have the capacity to deal with every exception and that the CCA had agreed to work through the CTA first. She invited the Applicant to apply for a variation with the relevant supporting documentation. She referred to the immunisation programme and that all adults will not be vaccinated until mid-August. She indicated that a variation would be possible if the Applicant had to leave for New Zealand before the 14 days had elapsed.
38. The Applicant was not satisfied with this response and emailed MOH again on 13 July (at page 89) setting out a number of points. In summary, he was asserting that she had a public health clinician role and should conduct a public health assessment of him to include consideration of

his vaccination status and risk profile. He challenged the public health purpose of his self-isolation. He asserted that she was depriving him of his liberty, in breach of Article 5 and he alleged discrimination against him.

39. MOH responded just over 20 minutes later stating that she had nothing to add. The Applicant emailed her again a few hours later and that is the end of the correspondence.
40. It is worth noting as part of the chronology that the Applicant was encouraged to make further Applications to vary and a so-called “walk variation” (which allows the person to go out for a walk at certain times subject to restrictions) was granted on 16 July on medical grounds.

What constitutes the Applicant’s Application to MOH?

41. It is the Applicant's case that he seeks a review of the refusal of the MOH to grant him a revocation. He applied on the Form Application for a variation and then he describes his email to MOH after the refusal of the Form Application, as an application under Regulation 6(2). His email of 12 July does not refer specifically to that Regulation. Regulation 6(2), when read in conjunction with Regulation 3, confers on MOH a power of revocation.
42. I am minded to treat the email of 12 July as an application and the MOH’s email, just under an hour later (at page 70), as her response.
43. Whilst I have considered the content of the subsequent emails between the Applicant and the MOH directly, I do not consider that they can form any part of the Application process, nor do they form a separate and new application. The Applicant’s email of 13 July (pages 89-92) is marked as ‘not to be shared’ and I note that he did not attach it to his affidavit in support of his application, so I consider that, in contacting the MOH directly again on 13 July, the Applicant is simply inviting her to reconsider her decision, which she declines to do. There is no mechanism for reconsideration of decisions and I distinguish here Section 12 of Schedule 1, where there is such a mechanism in regard to critical workers. In my view the MOH was under no obligation to reconsider her decision and cannot be criticised for not continuing the private correspondence.
44. In terms of reasons for his applications, Advocate Grainge in her submissions indicated that the Applicant had also raised the stress of isolation within his Application. I can find no reference to stress within the two applications above, but in any event, no supporting documentation was provided and the application for variation was made on the basis of compassionate reasons rather than medical ones and the Regulation 6(2) Application is made on a different basis to which I will return below.

The scope of the Applicant’s Application to MOH

45. One of the points made by the Applicant in his affidavit and in the initial directions hearings, was that he was hoping for a decision about his vaccination status, as it would be relevant to his plans to travel in and out of Guernsey to England and Jersey while he was back in the Bailiwick. As things stand, he would be categorised as a Category 4 arrival from England each time as he does not qualify as a Blue Arrival as he is not a person with full vaccination history. The position with reference to Jersey has changed since his arrival. I explained to the Applicant early on that I can only deal with the Application before me which relates to the imposition of the Requirement on him now.

The Applicant’s travel categorisation

46. The Applicant travelled from New Zealand, a Category 2 country via Singapore, another Category 2 country, to Heathrow which is Category 4 and thence to Gatwick which is also Category 4, and thence to Guernsey.
47. Had the Applicant been able to travel to Guernsey directly from the same London airport into which he had arrived from Singapore, he would have been able to take advantage of the dispensation which provides that he would have remained a Category 2 traveller, notwithstanding his having passed through a Category 4 airport. The flight he took from Singapore arrived at Heathrow and he had to transit to Gatwick therefrom to fly to Guernsey and this period of time rendered him a Category 4 arrival. He travelled by public transport. His vaccination status is irrelevant to this categorisation. A person immunised in Guernsey would also be a Category 4 arrival having made the same journey.

The evidence

48. There was some argument over expert evidence. Advocate Grainge contended that (leaving Dr Muir aside for the moment), the MOH was the only expert witness and that I must accept her evidence as there was no evidence to counter it. I do not accept this as a general proposition. It is my role to assess the evidence given by any witness including an expert, applying the principles relevant to that type of witness.
49. In any event, this is academic as the Applicant contended that the MOH could not give expert evidence as she is a party, in the same way as I had made that very point to the Applicant at a preliminary hearing. I agree with him and I cannot treat either of them as experts, but I have considered very carefully what they both had to say in evidence. They are both Medical Officers of Health rather than members of the public. They have a clear difference of opinion as to the assessment of risk in the case of the Applicant's journey and this is a key issue for me.
50. I must also consider how to treat Dr Muir's evidence. He provided an email then joined us on audio for his examination in chief, where his evidence exceeded the ambit of his email. He left before being cross-examined and the Applicant accepted that we would carry on with the case and that Advocate Grainge would challenge the weight of the evidence as being untested which she duly did. I accept Dr Muir's evidence as expert evidence as respects the assessment of vaccination certificates from abroad for critical NHS workers as that appeared to be his field. The MOH accepted this evidence and confirmed that the same process could apply in Guernsey. The point was well made by her, however, that this is not the same exercise as assessment for border control for travellers. The Applicant said that Dr Muir was an aviation specialist but I could not recall that evidence being led. Dr Muir gave some evidence about lower risk on aircraft because of the filters with which MOH agreed, and I accept that evidence. He also gave some evidence about comparable risk between the Applicant as a traveller and a person spending time only in England and returning to the Bailiwick. But I note that he said that he would rely on the Government in assessing any comparable risk between someone travelling from Singapore and a person in London, and my assessment was that he was not holding himself out as an expert on comparable risk. There was no evidence of expertise to make such an assessment. I attribute little weight to that part of his evidence.
51. The Applicant put in evidence (which was uncontested) that Jersey would recognise his vaccination. Each jurisdiction has its own approach. Jersey has taken a very different approach from Guernsey, as it is entitled to do. The fact that Jersey accepts the Applicant's vaccination paperwork within its regime does not make it wrong or unreasonable for Guernsey to refuse. In contrast to Jersey, England will only accept its own certificates and New Zealand still appears to have a very restrictive border regime where vaccination status, even of those vaccinated in New Zealand, is irrelevant to travellers. Arrivals, including the Applicant when

he returns there, face 2-weeks mandatory self-isolation in a managed unit on arrival, regardless of vaccination status.

The Applicant's evidence

52. Understandably, the Applicant's evidence was intertwined with his submissions. By way of evidence, which he gave by affidavit and oral evidence, he set out his professional background, family circumstances, vaccination history, travel plans and the history of the relevant Applications. I have incorporated into the relevant paragraphs above such of that evidence as pertains to those paragraphs.
53. In cross-examination, the Applicant accepted that he took a calculated risk of self-isolation when he came to the Bailiwick. He accepted that he could have changed his plans. He also accepted that travelling, especially to a Category 4 hub, increased the risk of infection, but he argued vehemently that this was no greater risk than others travelling through Gatwick to Guernsey. The Applicant in his closing, stated that the risks at Gatwick and Heathrow, being sites with international travellers, had been mitigated by social distancing and the segregation of the highest risk travellers. He made the point that many Guernsey residents use Gatwick and Heathrow and would be mingling with other travellers, including international travellers. He said that the coach journey he took from Heathrow to Gatwick, was in a direct coach with social distancing and mask wearing. He asserted that his vaccination is the same as a Guernsey vaccinated person and that the non-recognition of that vaccination was discriminatory. He asserted that that vaccination was relevant to his risk level. He explained his assessment that he posed no greater risk than the tens of millions of CTA travellers who could come to Guernsey without self-isolating. He categorised this assessment as fact, not opinion. He referred to the evidence of Dr Muir and that from the Jersey Authority.
54. The Applicant accepted that he had not given sufficient information in support of the Application for variation based on compassionate reasons. He accepted that he had been granted a 'walk variation'. He accepted further that each jurisdiction has its own rules.

The evidence of Mr de Garis

55. Mr de Garis gave evidence on behalf of the CCA by way of his affidavit which forms the major part of his examination in chief, supplemented by oral evidence. He explained the CCA's response to the pandemic, stressing that is a legal requirement that the CCA acts appropriately and proportionately, with the advice of Her Majesty's Procureur, prior to the making of any regulations. The CCA also takes the advice of the MOH and others, with a view to making evidence-based decisions, concerning measures necessary to prevent harm to human welfare. The key challenge has been limited resources in terms of a finite number of people with the correct skills and infrastructure such as only one hospital, alongside keeping broader critical services operational. Maintaining the confidence of the community is important. Release from lockdown has consistently been a staged process. He set out the 3-step progression in releasing border restrictions, with Step 1 being the current position, focusing on the CTA, moving to include Categories 1 – 4 at Step 2 and at Step 3 to international alignment with the UK traffic light and vaccination certification system. Progress of the blueprint has been disturbed by the delta variant.
56. Another key component of the release of travel restrictions is the vaccination programme in Guernsey, anticipating that, possibly from 15 August, all Bailiwick residents of 18 years and over will be vaccinated and two weeks will have passed from the last vaccination. Mr de Garis raised the deteriorating situation in the UK and the rapid rise of cases in Jersey. Different jurisdictions have made different decisions depending on their circumstances and their own judgements as to the balance of risks. It is his understanding that New Zealand would not accept any of the vaccination certificates from Guernsey and that New Zealand has no general

policy relating to inbound fully vaccinated arrivals. He explained that in relation to vaccination certificates acceptable to the UK, this is confined to those who have been vaccinated as part of the UK vaccination programme. Only on 16 of July, the UK government announced that arrivals from France in the previous 10 days, must quarantine for 10 days on arrival regardless of their vaccination status. By way of update, he explained that late in the evening on 15 July, 3 cases were detected in Alderney. It was his view that the policies adopted by the CCA, which have been tailored to the circumstances of the Bailiwick, have, to date, served it well.

57. In his oral evidence Mr de Garis made some additional points that the CCA has to make decisions serving large numbers of people, as it can only deal with individuals by way of exception. In answer to questions put by the Applicant, he explained that every single decision at the CCA is paused, so that advice can be taken from the Law Officers on the proportionality and necessity of each such decision in the context of human rights. It is important to balance the needs of the wider community with an individual's needs in this emergency situation. He made the point that the CCA can only discharge its functions in an emergency. These are very serious, exceptional times and exceptional and decisive action is required to protect the community.
58. He highlighted the difficulties in verifying vaccinations from elsewhere and the issue of attempted forgery of vaccination cards. He described the international certification as "eagerly awaited". The CCA would be overwhelmed, he said, were it to have to consider each individual application.

Evidence of Dr N Brink ("MOH")

59. The MOH gave evidence by affidavit and oral evidence. In her affidavit she deals with the chronology of the applications made by the Applicant, as set out above. At paragraph 13 she refers to encouragement given to the Applicant to make applications for variation. She sets out the policy of the States of Guernsey, as agreed by the CCA and endorsed by the States of Guernsey, that the only people able to travel into the Bailiwick without isolation or testing requirements, are those arriving from the CTA ie 'Blue Arrivals' as defined in Regulation 4A.
60. When exercising her discretion under Regulations 6(2) MOH considers that she must take into account policy. She went on to explain the process for variation via the online application form and the types of circumstances where she might consider some sort of variation to be reasonable and proportionate. Such variations focus on needs, such as medical treatment, end of life visits, funerals and shared care arrangements for children and young people. She said that she also received requests for variations from those who, for physical or mental health reasons, find self-isolation requirements difficult and these variations are regularly allowed, if supported by a medical health professional. She accepted that she must consider the individual circumstances but said that she must be fair and treat each Applicant in the same way, not favouring one over the next. The variations team has processed approximately 100 variation applications in previous days - on average she said they get 60 to 70 per week.
61. The MOH said it is an important public health principle that everyone should be treated the same.
62. She said there is no way of confirming the validity of the New Zealand vaccination certificates. It was clear that in her view, the fact the vaccination did not fulfil the criteria of the Blue Arrival was a consideration. She made the point that many jurisdictions are not accepting vaccination certificates from other countries.
63. She did consider the Applicant's claim that he should be treated as being the equivalent of a person with a full vaccination history and be considered as a person of low risk having travelled from a Category 2 country. In her view, were she to accept the New Zealand vaccination

certificate, on the basis of equity and fairness, she would have to accept the certification from all Category 2 countries. She said, on more than one occasion, “every variation we make has the potential to increase the risk for Bailiwick residents”. She made the point that double-vaccinated people can become infected and transmit the virus. About half the current active cases in the Bailiwick are due to double-vaccinated people. She explained that there are concerns about various Variants of Concern, originating from other parts of the world, and the concern from the Bailiwick in relation to the Applicant’s travel, would be the importation of a Variant of Concern, which she explained is one that has increased transmissibility, increased virulence, or against which the vaccinations used in the Bailiwick have reduced efficacy. A Variant under Investigation has concerning characteristics but has not yet developed into a variant of concern. The UK and Guernsey dominant Variant of Concern is the delta variant and all modelling in the Bailiwick is based on that variant. When people travel through international hubs they mix with other people, including in Singapore, from areas where there are Variants of Concern or under Investigation. In airports, there is mixing, with varying ventilation, some may be overcrowded, some not, some people may be wearing masks, some not. In her view, the mitigation of risk is not going to be 100%.

64. She raised concern about the coach journey between Heathrow to Gatwick in terms of fellow travellers from different parts of the world, the Applicant having to queue up, what the cleaning regime was and gave her opinion that that transit journey will certainly have increased risk.
65. In her view it would be wrong just to accept certification from other countries, as this would raise risk at a time when the situation in all our neighbouring jurisdictions is deteriorating. The Beta variant has decreased efficacy for the AstraZeneca vaccine. It would undoubtedly increase the Bailiwick risk profile if an unknown variant came in.
66. It is necessary for the public health purpose, MOH said, to balance the risk of transmission to Guernsey of a particular Variant of Concern by an individual, against the rights of the population of the Bailiwick of Guernsey, who have worked so hard together to achieve hard fought gains. She rejected the Applicant’s suggestion that he could rate his risk of infection as being that which he has in New Zealand.
67. The MOH went on to explain that the very large outbreak in Alderney has come from a single source so we should be very cognisant of the risks that we take, as she put it. This is a critical point in the incremental relaxation of travel restrictions.
68. The MOH also referenced the importance of the completion of the adult vaccination programme in the Bailiwick. The fact that the vaccination programme is not complete changes the risk profile to the community. This is directly relevant with regard to transition through international transport hubs and she reiterated her concern about the transit journey, by coach, from Heathrow to Gatwick. It is simply unknown exactly with whom the Applicant would have been mixing at all of those hubs, she said.
69. She rejected the notion that the Applicant had been detained in any way because, in her view, he came voluntarily. She said that she could not quantify his personal risk and she certainly could not say that the transit process was risk free even for a double vaccinated person. She posed the question – “what risk is there to the community to give you what you want”? She made the point that the Applicant will be detained for two weeks in New Zealand on his arrival there.
70. She indicated that her discretion under Regulation 6(2) was not an absolute discretion, as she has to take account of the Law and the Regulations.
71. It is her view that she has a responsibility to be fair and equitable to everyone and not just those who make an Application.

72. The MOH explained the public health team is a small team with limited capacity and for example, over the weekend of 17 and 18 of July had been working on the national emergency, namely the outbreak of COVID-19 in Alderney. It is this small public health team which deals with the specific process established by the CCA to enable bespoke variations to travel policies. She explained that they simply do not have the resources or indeed skill to verify vaccination certification from different parts of the world. One issue would be language and it would be wrong to discriminate against someone who presented a certificate in a foreign language. It is important to have an appropriate governance framework for any decision-making process in relation to foreign vaccination certification. It is for this reason that she wants to link our local vaccination certification for people vaccinated outside of the CTA with any international certification that is developed. She would not want the Bailiwick to be an outlier and risk the loss of gains made.
73. She made the point that the Applicant's evidence that Jersey is prepared to accept his vaccination is not comparable, as the approach of the government of Jersey has been significantly less restrictive than that in Guernsey. The death rate in Guernsey has been below one half of that of Jersey and the infection rate is less than one-twentieth.
74. She was concerned not to risk undermining the Bailiwick exit strategy that has served us so well to date and which has enabled the Bailiwick to enjoy long periods of no internal restrictions, except for the two periods of lockdown.
75. The MOH rejected any notion of discrimination as even Guernsey vaccinated residents, who are unable to be classed as "Blue Arrivals" would have to self-isolate in the circumstances of a similar journey to that made by the Applicant. She challenged the Applicant's assertion that there is no public health purpose in requiring him to self-isolate in circumstances where that self-isolation is to protect the health and wellbeing of all Islanders in circumstances where no travel is risk free.
76. The MOH reiterated the invitation to the Applicant to provide sufficient information to support a visit to the UK at the end of his period of self-isolation in order to visit sick relatives and in relation to his statement that self-isolation is stressful.
77. She accepted that the Applicant's vaccination appears to be a UK certified vaccination, but it does not qualify under Regulation 4A. She made it clear that the policy had been to start with the CTA because of large numbers of the community with relatives in that area who wish to travel. The next step would be to try to establish protocols with other countries based on community need. Community needs in general have been largely informing policy. It is important to maintain public confidence. At the moment the population is split as to the relaxation of travel restrictions. There must be open and transparent decision making.
78. The MOH went on to speak at some length about the Enhorn case being a case with which she is familiar.

The Applicant's case

79. It is to be noted that the Applicant's case has evolved since the Application was filed on the 14 of July. This is not a criticism, but it is relevant to the approach that I must take to the Application. The Form Application is an application for variation based on compassionate grounds, made on route to Singapore before arrival in Guernsey. Post arrival, the Applicant has sought a revocation of the Requirement, not based on compassionate grounds, but based on low risk and vaccination status. The Application before me is to revoke the Requirement based on low risk and vaccination status, together with loss of liberty and discrimination.

80. It is the Applicant's case that his Application must be dealt with on an individual basis. He asserts that it has already been determined in Guernsey, that people at considerably higher risk do not need to self-isolate and thus the Requirement that he self-isolate, is not necessary, justified or proportionate for the prevention of the spread of infectious diseases and is unlawful.
81. It is the Applicant's case that his vaccination in New Zealand is identical and readily verifiable; there is no difference in risk between countries outside the CTA and countries within the CTA and the failure to accept his vaccination as equivalent is discriminatory.
82. In his view, his risk profile should be taken as lower than 10s of millions who can come here from the CTA with the same vaccination and do not need to self-isolate. The risk of fully vaccinated travellers, with brief transits through the UK would be much lower than just about any other Guernsey resident traveller. Specifically, the coach journey, which concerns the MOH, was no different in risk from a fully vaccinated resident of the UK travelling to Guernsey, or a Guernsey resident travelling home making the same journey.
83. He considers it relevant to the assessment of risk, that his vaccination certificate would be accepted by Dr Muir, to enable him to work with the most vulnerable patients in the NHS . Dr Brink confirmed that the same would be likely in the Guernsey Health Service if Guernsey were in need of medical practitioners.
84. Administrative reasons are not, he said, adequate to justify detention where there is no public health benefit. He did accept that what he described as administrative reasons are in fact contained in the regulations made by the CCA. He asserted that quarantine is arbitrary, even if it accords with policy, as it fails to meet the requirements for justification needed under the Human Rights Law and to meet the proportionality principle.
85. He asserted that the regulations were confusing and that the fact that he had returned to the Bailiwick, knowing that he would have to self-isolate, were no exemption granted, is not relevant to the consideration of the lawfulness of his detention. In terms of equality, he said, there should be equality between people of equal risk. He rejected the argument that an exemption to him would mean an exemption for all Category 2 travellers and questioned, in any event, whether there would be a great number. He asserted that an exemption only needed to be considered on request.
86. The failure by the MOH to revoke the Requirement, having been presented with evidence of equivalent vaccination and acceptance by Jersey and Dr Muir, together with his public health assessment, has the effect of requiring him to self-isolate, even though there is no public health purpose which is unjust and is in breach of Article 5. He is of such low risk that his detention is not necessary to prevent the spread of infectious disease.
87. The MOH should make a public health risk assessment of each applicant individually and give a full response, particularly to his Application because he was raising fundamental issues. He asserted that she is a clinician, responsible for his public health and therefore should have assessed him. In his view, she had sought to bolster her decision retrospectively by producing a plethora of factual and legal argument not raised when she rejected his request for reconsideration. Lack of resources cannot justify detention. Finite resources do need to be prioritised.
88. The MOH is under an obligation to exercise her power under Regulation 6(2), through the prism of Convention rights, but in his view, she gave no consideration to them at the time of her decision-making.
89. The Applicant also filed a skeleton argument, to which I refer below in the Section about loss of liberty. Other points he has made are included in the specific Sections below.

The Respondents' case

90. The Respondents' case is to be found in the affidavits and evidence of Mr de Garis and the MOH, the skeleton argument filed on their behalf, and the oral submissions of Advocate Grainge. In summary:

- 1) Even someone with a Full Vaccination History on the Applicant's journey would not be within the definition of a Blue Arrival.
- 2) The strategy for self-isolation on arrival the exceptions to this and the incremental steps to easing travel restrictions are implemented by the Regulations that have been endorsed by the States of Guernsey.
- 3) That strategy aligns the easing of restrictions with all adults being fully vaccinated by the middle of August.
- 4) The MOH must take these matters into account when exercising her discretion under Regulation 6(2).
- 5) There is clear guidance on the website setting out the circumstances in which her discretion may be exercised.
- 6) The Applicant did not give adequate reasons for his applications.
- 7) All applications must be treated fairly and equitably and if an exemption is granted to one Category 2 traveller, the same would have to be applied to all such travellers.
- 8) The MOH was right to decline to verify the Applicant's vaccination. There are no internationally recognised standards, although it is hoped that the Bailiwick can avail itself of the regime of England or other countries. It is not prudent for Guernsey to be an outlier. It does not have the ability to set up a system with proper governance; resource is an issue.
- 9) The Applicant came to Guernsey in the full knowledge of the restrictions which are in place and he came voluntarily.
- 10) The risk he posed, as assessed by the MOH, was such that he should not be granted any exemption.
- 11) Once he has completed his self-isolation requirement, he can seek a variation for compassionate reasons if he wishes to leave and return.
- 12) His argument that he is suffering arbitrary discrimination is misconceived, as all residents who do not have a full vaccination history are unable to come within the definition of a Blue Arrival and therefore have to self-isolate.
- 13) There is no discrimination against him in this case as a Bailiwick vaccinated person undertaking the same journey would have to self-isolate.
- 14) The measures in place are similar to those around the world. Specifically, quarantine is a recognised tool for COVID-19 control.
- 15) It is not currently "business as usual" in Guernsey, but a public emergency.
- 16) The MOH is not bolstering her case, because he was told in the first email that he was a Category 4 traveller and this would have been based on his travel-tracker information, which is based on travel history and vaccination history, although that is not relevant to his categorisation.
- 17) Individual assessment of every person arriving is not feasible in an emergency situation. Neither can the variation team respond in detail to every application. There are 350 to 400 arrivals into Guernsey by air every day and that number increases significantly by several 100 if there is also a ferry.

91. As the case with the Applicant's submissions, I pick up some remaining points in the specific Sections below.

The MOH as a decision maker

92. Regulation 6(2) gives the MOH the power to vary a Requirement to self-isolate in a particular case ie based on an individual's circumstances. It is clear that the power is to vary not revoke. It is common ground that the power must be exercised taking into account the particular circumstances of the individual and in a Convention-compliant way. There can be no doubt that the MOH is a Public Authority for the purposes of decision making. In evidence, she demonstrated her detailed knowledge of the relevant principles and characterised the variation process as being part of the consideration of Convention Rights in the sense of imposing the least severe restrictions necessary. I am satisfied that, whilst there was no explicit articulation in the decisions referencing Convention Rights, they are clearly a part of the overall decision making, and indeed they are specifically part of the Regulation-making process.
93. It must be right that the MOH must take account of the CCL, Regulations and policy. In this emergency situation, it is unobjectionable to have a set of policies which apply to the majority of applications to vary, in order that they can be dealt with in a timely fashion. I was provided with an extract from *de Smith* by Advocate Grainge, regarding formal equality/ consistency, in support of the MOH's contention that, to vary the Applicant's Category 4 status on the basis of vaccination status and risk, would require a similar variation to all Category 4 travellers. Consistency is an important factor in decision-making for a Public Authority, as it goes hand in hand with legal certainty and predictability (see *de Smith* 11-062). There is a rider to this, however, in that Regulation 6(2) empowers the MOH to vary a requirement "in a particular case" and she must exercise that power without fettering her discretion by the blanket application of policy. Policy is the starting point not the end point (see the case of Matheson). A similar comment applies to the Nolan Principles also supplied by Advocate Grainge.
94. I asked to be addressed on the interpretation of the reference to 'finality' of the MOH's determination of vaccination status in Regulation 4A. The definition is said to apply "for the purposes of these Regulations" which appears wider in ambit than just in relation to a Blue Arrival. One might consider that it is confined to Blue Arrival wherever that appears in the Regulations but has no wider application. Vaccination status appears nowhere else in the Regulations. Whilst it is not unreasonable to look at the definition of 'vaccination' which is contained in the Regulations, where the Applicant is seeking a variation outside the Blue Arrival exemption, in my judgment, the MOH is not constrained by that definition. If vaccination history, in her determination, taking into account all relevant factors including policy, mitigated the risk the Applicant posed sufficiently to allow a variation to the Requirement, she could and should grant the variation, notwithstanding the definition contained at paragraph 4A.
95. Advocate Grainge's contention that 'final means final' and that that disposes of the Applicant's Application cannot be accepted. His Application is wider than just vaccination status. If she were right on finality, then it would offend against section 6 of the HRL, as not being subject to challenge, see Bassingdon and I would invoke Section 3 to interpret it in such a way as to be capable of challenge.
96. I have not considered myself restricted to the definition in Regulation 4A in my consideration of the Applicant's vaccination status.

Interpretation of Regulation 12

97. Regulation 12 is an extremely wide and open-ended provision. Under it, the Royal Court has an unlimited discretionary power to vary or revoke a requirement, restriction or condition, imposed under Part 1 of the Law, which includes a Regulation 5 requirement to self-isolate. No guidance is given as to how the discretionary power is to be exercised. The nature of the emergency regulations is that the Regulations have been put into place quickly, in response to the emergency and there is therefore none of the pre-legislation material usually available to render assistance to the Court in interpreting the Regulation.

98. The Applicant has been clear that the Requirement that he wishes me to revoke is the self-isolation requirement contained in Regulation 5. He has also been clear that he considers the exercise which I am undertaking to be in the nature of a review of the refusal of the MOH of his Application(s).
99. Advocate Grainge sought to persuade me that Regulation 12 is to be interpreted as giving me only the power to review the decision made by the MOH, taking into account only what was before the MOH at the time of her decision in accordance with usual Public Law principles. Essentially, whether the decision was one that a reasonable decision maker could have made. Advocate Grainge did not accept that I have, or should have, the power to make my own decision in the matter or that the case has proceeded by way of a rehearing.
100. The Applicant also sought to argue that I should be approaching my task in the same way as an appeal and he submitted that, had he come to the Court before seeking any indication from the MOH, he would have been criticised.
101. The difficulty in approaching the exercise of the Court's powers under Regulation 12 as akin to judicial review, is that both parties have adduced considerable evidence before the Court and made submissions which go beyond the scope of reviewing a decision, based on the information available at the time of the decision, the classic Judicial Review process. Regulation 12 gives me the power to vary or revoke. It gives me no power to remit the matter to the MOH for a decision, which I consider points away from the Judicial Review approach and towards a rehearing or considering the matter *de novo*.
102. Advocate Grainge submitted that the Requirement which I am asked to vary or revoke, is not the requirement to self-isolate (under Regulation 5) but the requirement imposed by the refusal of the MOH to vary or revoke that requirement. I cannot accept that interpretation as it is not the MOH who has imposed the requirement to self-isolate. That requirement comes from Regulation 5 and continues, unless and until varied by the MOH.
103. Advocate Grainge also submitted that, as I am not a virologist, I am not qualified to make a decision and that points away from dealing with the application by way of re-hearing. I reject this submission. I am not a virologist, but I am able to make a decision based on the evidence I have heard.
104. Advocate Grainge contended that I must take account of the reasonableness of the MOH's decision and she set out the basis of that decision, namely that it is clearly not *ultra vires*, that the requirement was imposed by the Regulations and that there is no suggestion of bad faith.
105. Advocate Grainge made the point that it is rare for a court to usurp the decision maker and make decision *ab initio*. That may be so, but that is how the Regulation is worded. If it was not the intention of the legislature that I approach the matter *de novo* then consideration should be given to amending the Regulation.

What options does the Court have?

106. Regulation 12 empowers the Court to vary or revoke a requirement. The Applicant seeks a revocation, but I consider that revocation encompasses variation so that it is open to me to vary the Requirement rather than revoking it, should I consider that to be the appropriate course.

Loss of Liberty and Article 5

107. The Applicant asserts that he has been deprived of his liberty in breach of Article 5 of the HRL by the requirement to self-isolate.

108. The Applicant filed a helpful skeleton argument to which Advocate Grainge was able to respond briefly in writing, setting out concisely her points and both parties made submissions. There was a broad measure of agreement as to the relevant principles. The arguments centred on whether there was a deprivation of liberty in this case and, if so, which, if any, exception applied.
109. Advocate Grange made the point that the thrust of the Applicant's skeleton argument was to challenge the lawfulness of the Regulations rather than their Application in the Applicant's case and I agree with her, that this renders much of what is said less relevant to my decision.
110. The Applicant argued that a Requirement to self-isolate was a loss of liberty by way of detention. Advocate Grainge argued that self-isolation is not a loss of liberty, but is rather a restriction of liberty of movement, governed by Article 2 of Protocol 4, which is inapplicable in Guernsey. In the alternative, she argued that there was no breach of Article 5 because the detention falls under paragraph 1(e) of Article 5, namely "the lawful detention of persons for the prevention of the spreading of infectious diseases" or paragraph 1(b), namely "the lawful ... detention of a person... in order to secure the fulfilment of any obligation prescribed by law" with the obligation there being that to self-isolate.
111. The Applicant strenuously rejected the application of para (e) on the basis that the detention of him as a fully vaccinated person, having travelled in a low risk way, was not necessary or justified for the prevention of the spreading of infectious diseases. He argued that his detention was arbitrary, disproportionate and not in accordance with the principles of necessity and justification and he referred to the case of SV and A v Denmark.
112. He also cited Enhorn v Sweden as his primary authority for the principles applicable to the paragraph (e) exemption in respect of infectious diseases. Specifically he argued that there were two questions: (1) whether the spreading of the infectious disease was dangerous to public health or safety and (2) whether detention of an infected person is a last resort, in order to prevent the spreading because less severe measures have been considered and found to be insufficient to safeguard the public interest. When those criteria are no longer fulfilled, he submitted, the basis for the deprivation of liberty ceases to exist.
113. The Applicant set out specific reasons why the need for quarantine to protect public health is much less now than a year ago.
114. In asserting a lack of necessity and proportionality and discrimination, he argued that the Requirement had been imposed because he was not a Blue Arrival. The Requirement, in my judgment, is imposed by paragraph 5 because of his being a Category 4 arrival, not because of his vaccination status. In cross-examination, the Applicant accepted that, by the beginning of July, it was quite clear that he was not a Blue Arrival in terms of the information publicly available.
115. The Applicant then challenged the reasonableness of the decision of the MOH not to grant a variation.
116. His skeleton argument concluded: "the requirement for quarantine imposed on me violates Article 5 in the context of Article 51(e) on every measure of lawfulness and fails to strike the right balance between liberty (which ultimately should prevail) and involves allowing or trusting the individual to take responsibility and the protection of society. The requirement should therefore be revoked in the circumstances of my case in order to reverse the violation."
117. Advocate Grainge sought to distinguish the cases cited by the Applicant as arising from totally different factual situations with long periods of detention, often in a criminal context.

118. She distinguished detention imposed on a person unexpectedly in that person's country of residence, such as that in the Enhorn case, from detention imposed by way of self-isolation for a traveller, who chose to enter a country knowing that such self-isolation would be imposed. I consider that there is some force in that argument. The Applicant has accepted that he took a calculated risk in coming to Guernsey in that he might not be granted an exemption from the requirement to self-isolate.
119. Advocate Grainge urged me to factor in the emergency faced by the Bailiwick, into the balancing exercise between the rights of the individual and the population. There is support for this proposition in the English Court of Appeal cases of Dolan and Manning where the English Court of Appeal (in different circumstances, admittedly), took account of the emergency presented by COVID-19. In my judgment it must be right that the balancing exercise is affected by the emergency which has generated the need for the decision.

Discrimination and Article 14

120. The Applicant argues that he is discriminated against on account of his vaccination status. This goes back to the widespread misunderstanding that his self-isolation was linked to his vaccination status, whereas it was actually linked to his time in a Category 4 country.

Relevance of any confusion over the Rules

121. The Applicant has made frequent reference to confusion over the rules before he travelled. As I have expressed over the course of the hearing, I do consider that some confusion has been caused by the use of the expression 'Blue Arrival', in the context of someone who is not and cannot be a Blue Arrival because that person has been outside the CTA in the relevant 14-day period. The reference to "Fully Vaccinated" in the context of non-CTA travellers, is also likely to cause confusion. If the status of "Fully Vaccinated" is to become a factor outside the Blue Arrival category then, in my view, it will have to be made clear what that means. It must be acknowledged, in fairness, that the Regulations and guidance are being drafted in an ever-evolving situation, that the intention behind the revisions is to allow more people to travel more freely. Confusion about regulations and guidance seems to be a complaint not confined to those drafted in the Bailiwick. The more exceptions there are, the more complex the rules will be. It is always open to people to make specific enquiries.
122. The Applicant accepted that he could have made better enquiries. It seems to me that he relied overly on family and his firm belief that, in his case, there was no good reason for his self-isolation. I cannot ignore that he is a highly intelligent professional working in the very field of the Regulations and other materials, and it is not unreasonable to have expected him to have done his own research or made his own enquiries.
123. Whatever confusion there was, it is clear however, that the Applicant knew that he would be in self-isolation if he could not secure a variation and he knew this in sufficient time to change his plans while still in New Zealand or en route and such confusion is not material, therefore, to his Application before the Court.

Decision On part 1 of the Application

My Approach

124. In my judgment, I must approach this application *de novo* rather than by way of Judicial Review; this benefits both parties as I am able to take full account of all the evidence adduced.
125. My decision is a discretionary one and there are no rules as to how that discretion should be exercised. The only appropriate way for me to exercise my discretion is to consider the

legislative framework, the provisions for variation, policy, all the evidence before me and the submissions made.

126. My starting point is the Regulations. The Applicant is subject to a requirement under Regulation 5(1) to self-isolate because he does not come within any of the express exemptions. Specifically, he is a Category 4 arrival because of his transit between two airports and he is not a Blue Arrival as he has been outside the CTA in the 14 days prior to his arrival in the Bailiwick and he is not a Bailiwick vaccinated person.

127. He challenges the Requirement on the basis that:

- 1) he is fully vaccinated in an equivalent way to a Bailiwick vaccinated resident;
- 2) from a risk perspective, he is lower risk than any other person who has spent time in England and who can return without self-isolating because he came from Category 2 countries and he was only in England (a Category 4 country) for a short time and took all reasonable precautions;
- 3) he is being deprived of his liberty to no discernible public health aim; and
- 4) he is being discriminated against when compared with a Bailiwick vaccinated resident.

128. I have an unlimited power to vary or revoke the Requirement, but there are some constraints. In making my decision, I am a Public Authority, so any decision must be Convention compliant. I consider that I must take account of the CCL and Regulations. I must also take into account the types of variation provided for in the online application process, as a matter of policy. But, in common with the MOH, I am not limited to those types of variation and I must not allow policy to fetter my discretion (see the cases of Dolan and Matheson).

129. If I consider that revocation is not appropriate but that the risk posed by the Applicant is sufficiently low to warrant a variation to strict self-isolation, I should make the variation subject to whatever conditions I deem appropriate to mitigate risk.

130. Whilst much has been said about the Applicant's vaccination status, the main issue is that he is a Category 4 arrival because of his journey and his risk profile. A Bailiwick vaccinated person making that journey would also be a Category 4 arrival. It is for the Applicant to make the case that he should be exempt from a clear and lawful Requirement.

Risk

131. The Applicant asserts that his risk profile in terms of his journey is such that he should not have to self-isolate.

132. The MOH gave detailed evidence in support of her assessment that the Applicant's journey cumulatively was not low risk. That assessment was robustly challenged by the Applicant. That evidence is summarised at paragraphs 63, 64, 68 and 69 (MOH) and 53 (Applicant) above.

133. I consider the evidence of the MOH and her reasons for her assessment of the risk posed by the Applicant in his journey to be cogent and compelling and I adopt her reasoning.

Vaccination

134. As to vaccination, the question is whether the fact that the Applicant is double vaccinated with the same vaccine administered outside Guernsey, reduces his risk.

135. The categorisation of the Applicant's journey as Category 4, contains no reference to vaccination status and arguably it is of no bearing, but the Applicant makes his case for exemption based on low risk and vaccination, so both must be considered.

136. The MOH considered the issue of vaccine by reference to Regulation 4A, but did not simply note that the Applicant does not fit within the definition, but has offered a detailed explanation as to why, at this time, she would not conduct an exercise to depart from that definition in the Regulations to verify a vaccination administered elsewhere (see especially paragraphs 63 and 65).
137. She also explained why being double vaccinated did not in her view mitigate the risks from the journey (see paragraph 63).
138. She set her reasoning in the context of the overall plan which is not to open up travel further until all adults in the Bailiwick have been vaccinated in order to preserve the favourable position attained in the Bailiwick.
139. I do not consider it unreasonable to take a careful approach to the verification of vaccines administered abroad at this stage. The fact that there is a plan to secure a way to do so means that the issue is under review. The approach in the Bailiwick is in line with other jurisdictions (such as England) and cannot be criticised in the context of this application and the circumstances in the Bailiwick. It is reasonable to look to a larger jurisdiction to lead the way on vaccination certification and not to risk losing the gains made in this jurisdiction. It is a question of balance. Resources are an appropriate factor but cannot be determinative. I reject the Applicant's contention that this is purely administrative reasoning and not a proper consideration.
140. In my judgment, the MOH's rationale for rejecting the assertion that being double vaccinated reduced the risk the Applicant posed is cogent and I adopt it.

Discrimination

141. For the purposes of discrimination, the Applicant has compared himself with Blue Arrivals. That is an inaccurate comparison as he is not a Blue Arrival on return to Guernsey. I find that no discrimination against him can occur, as a Bailiwick vaccinated person making his journey would have to self-isolate.

Deprivation of Liberty

142. In my judgment these are the relevant points:

- (1) The right to liberty is a Qualified Right i.e. there can be exceptions to it as set out in paragraphs 1(a) to (f) of Article 5, as set out in the HRL.
- (2) The Requirement to self-isolate is imposed by Regulation 5 of the No. 7 Regulations which are made under the CCL.
- (3) The making of regulations is consistent with the exception in paragraph 1(e).
- (4) The Regulations are properly made in accordance with the specific provisions of the CCL and are therefore lawful.
- (5) The Requirement to self-isolate is not made by the MOH.
- (6) In the Applicant's case, he has a 'walk' exemption, so any detention is not continuous.
- (7) The Applicant cannot assert that he has been deprived of his liberty when he came here voluntarily, knowing that he would be required to self-isolate.
- (8) The structure of the categorisation system of countries with its exceptions and ability to seek variation is such that the Requirement to self-isolate cannot be described as arbitrary.
- (9) I am satisfied that, in so far as there is any deprivation of liberty, paragraph 1(e) applies and I do not therefore have to consider whether paragraph (b) also applies.

143. It cannot be ignored that this case has been conducted against a backdrop of an ever-deteriorating situation around us. Last week saw a serious outbreak in Alderney; Jersey has been removed from the Blue list because of rising cases; cases are rising in England and England changed its categorisation of France. This just goes to illustrate the need for careful decision making and the need to react swiftly to what may be rapid changes.
144. We are not living in ordinary times. We are operating with emergency powers and that has a necessary impact on decision making. The need to balance the individual's needs with that of the community in an emergency is all the harder.
145. The Blueprint is a plan to remove travel restrictions on a carefully stepped basis, which has been the approach throughout the pandemic, stress testing each step, to continue to enable Islanders to enjoy freedoms which have been lost to many in other places. That plan is reasonable and, insofar as it does restrict liberty or movement, that is entirely proportionate to the aim of preventing the spread of infectious disease in the context of the small jurisdiction of the Bailiwick.

Conclusion

146. In my judgment the Requirement to self-isolate is lawful and I do not consider that the Applicant is being deprived of his liberty under Article 5, either at all or, alternatively, disproportionately as paragraph 1(e) of Article 5 applies. I consider it relevant to my judgment that the Applicant chose to travel to Guernsey knowing that he would have to self-isolate.
147. In all circumstances, I do not consider it appropriate to revoke or vary the Requirement in the Applicant's case.

Parts 2 and 3 of the Application

148. Part 2 of the Application is an application for costs and Part 3 of the Application is for damages. I had said that those Parts would be deferred until after Part 1 had been determined and I will await further representations.

Catherine Maureen Fooks
Judge of the Royal Court

23 July 2021
(perfected 21st September 2021)