Application for Judicial review involving the Civil Contingencies (Bailiwick of Guernsey) Law 2012 and The Emergency Powers (Coronavirus) (General Provision) Bailiwick of Guernsey) (No 9) Regulations 2021; with grounds of challenge being that there is not nor has there been a "emergency" sufficient to justify the imposition of particular Regulations and that there has been an improper exercise of powers.

[2021]GRC051

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Hearing: 10th September 2021

Between: **LOUISE LE POIDEVIN** **Applicant**

- v –

THE CIVIL CONTINGENCIES AUTHORITY **Respondent**

Before: **HER HONOUR HAZEL ELEANOR MARSHALL QC**
LIEUTENANT BAILIFF

Sitting alone

The Applicant appeared in person by Microsoft Teams
Advocate for the Respondent: Advocate P M Grainge

Legislation and authorities referred to:

The Human Rights (Bailiwick of Guernsey) Law 2000.
The Civil Contingencies (Bailiwick of Guernsey) Law 2012 ss 12, 13
The Emergency Powers (Coronavirus) (General Provision) Bailiwick of Guernsey) (No 9) Regulations 2021, paras 5 and 20

Practice Direction No.3 of 2004 (Judicial Review)

Litchfield v Director of Environmental Health and Pollution Control (Guernsey Judgment 37/2014
Bridgman v the Medical Officer of Health and the Civil Contingencies Authority, [2021] GRC043

JUDGMENT
(delivered *ex tempore* and later perfected)

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1. This is an application by Mrs Louise Le Poidevin, brought against The Civil Contingencies Authority, whereby she seeks, in her own words at the time, "*judicial review of the Civil Contingencies (Bailiwick of Guernsey) Law 2012,"* as well as a "*Declaration of Incompatibility in relation to the Emergency Powers (Coronavirus) (Bailiwick of Guernsey) Regulations as I believe they breach the Human Rights (Bailiwick of Guernsey Law) 2000, as amended".*

2. That is the application that comes before the Court. It is a specific reference, plainly, to the Civil Contingencies (Bailiwick of Guernsey) Law 2012. ("the **Contingencies Law**") but in terms of the Regulations (*The Emergency Powers (Coronavirus) (General Provision) Bailiwick of Guernsey) (No 9) Regulations 2021* - **"the Regulations"**) it emerges that it is a challenge to what is now Clause 5 of those Regulations headed *'Requirement to self-isolate on arrival in the Bailiwick'.* I read from what I am told is the ninth iteration of these Emergency Regulations. I will indicate the procedure by which they are made, insofar as it is relevant, later.

3. Paragraph 5 is headed "*Requirement to self-isolate on arrival in the Bailiwick.".* It reads

> "*(1) Subject to*
>
> *(a)* [not relevant]
>
> *(b) Paragraphs (2) - (8) and*
>
> *(c)* [not relevant]
>
> *a person who has arrived in the Bailiwick from outside, 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 Medical Officer of Health in any particular case, and to any direction from the Authority in relation to one or more categories of case or in relation to all cases, a Blue Arrival is not required to self-isolate and is not subject to any other restrictions or requirements'.*

4. A "Blue Arrival" is defined in paragraph 20 as a person who has received 2 doses of a recognised Coronavirus vaccination, the second of these being more than 14 days before their arrival in the Bailiwick.

5. Paragraphs (2) and (3) are also material. They state:-

> "*(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 such other time as the Medical Officer of Health may direct under this paragraph, (in this Regulation called '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.*
>
> *"(3) If a person falling within paragraph 1 undergoes a Day 13 test and the result of that Day 13 test is positive, he or she will be required to self-isolate in accordance with instructions from the Medical Officer of Health and to comply with all other restrictions and requirements imposed on him, or her, by the Medical Officer of Health"*

6. The remaining paragraphs, sub-paragraphs (4)-(8) are in relation, principally, to children and are not material.

Background

7. That is the Regulation of which Mrs Le Poidevin fell foul when she arrived in the Island. Mrs Le Poidevin was born in Guernsey. She lives in the United Kingdom, but she has family here and, in particular, her son. She arrived in the Bailiwick on 29th August 2021 at the Harbour. Her purpose was to see her son and, in particular, I understand, to attend an Engagement Party meal due to be held on 11th September, which is in fact tomorrow evening. She also, unfortunately, has medical issues which have made it, for her, a matter of extreme family importance to see her

son, whom she has not been able to see during the period of the lockdown, and thus for the last 18 months or so.

8. Mrs Le Poidevin, however, is not vaccinated at all. She is not, she wished to emphasise, an "anti-vaxxer", but she does take the view that the anti-Covid vaccinations are experimental and she does not wish to participate in what she sees as a global experiment in vaccination. She also, she made very clear, resents the form of coercion which, in her view, is what is being applied to people with regard to travel and movement restrictions dependent on their being vaccinated or not being vaccinated. It is, of course, well known that in many places throughout the world, a test of being double vaccinated is used as a qualification which is applied to authorise and enable people to be released from what would otherwise be restrictions on their travel, or imposed requirements to go into quarantine.

9. Mrs Le Poidevin also refused to take a test at the Harbour. She said that this was because she wanted to see a risk assessment as regards the particular tests that were being applied. She also has very strong views with regard to the safety of such tests, and in particular how they are administered and the question of whether they can, themselves, introduce into the system of the person who is being tested, particles which could cause problems and difficulties for them or, indeed, illness. I think it is fair to say that she regards the tests themselves, as potentially being no more safe - and in fact possibly less safe - than the disease against which the test is taken.

10. It follows from Regulation 5 which I have quoted above, therefore, that on her arrival, and having refused to take a test, Mrs Le Poidevin became required to enter into self-isolation for a period, in principle, of 21 days. She told me that she had concluded that it was going to cost her something like £2,600 to isolate in a hotel for such a period at the time, which she thought was quite appallingly expensive and that it was a breach of her general human rights and freedoms, that that should be imposed. In the event, though, I think she said that she had instead camped in a friend's garden.

11. But in any event by the time she came to appear before me, which she did by Microsoft Teams at this hearing on 10th September, things had moved on. She appears at any rate to have a room in which she is able to self-isolate. It may be with a friend, or not, but she has been able to take advantage of that particular accommodation. She has also, I am told, been able to obtain, in the circumstances, what has been described as a "walking variation" (no doubt a form of dispensation under Regulation 5(2)) to the strictness of her self-isolation, which has enabled her at least to be able to leave her accommodation to go outside, to some degree. This has also, I understand, enabled her to see her son from a distance, although she did tell me that she was not really able to see his face. I also understand that the present position, and which has recently happened, is that she has been given a further specific variation, (which I have described as a "compassionate variation", but that is my own description and not a recognised term of art) under which the Civil Contingencies Authority, or more accurately the persons charged with supervising the imposition of these regulations, have concluded that it would be reasonable to allow her to leave self-isolation, at midnight tonight, which I understand is the expiration of 14 days of self-isolation. Interestingly, the tenth iteration of the Regulations, which was made on 6th September, and which I understand will come into force in a day or two, has now removed the need for a full 21 days of self-isolation for persons who enter the Bailiwick who are not double vaccinated and has reduced that to 14 days for anybody, but I am told that it is not under that relaxation that Mrs Le Poidevin has been granted her freedom (as I think she would put it) from midnight tonight, but that this permission has arisen from the fact that her own particular case has been kept under review.

12. Mrs Le Poidevin accepts, as is obviously the case, that there has been correspondence between her and the authorities, who have been keeping their eye on her. I understand that there is a "Covid welfare" team whose function is indeed to contact and oversee the welfare of those who are self-isolating. I do not think, though, that she is particularly appreciative of the way in which

she has been dealt with. It is apparent, from the papers before me, that she was told that it was possible for her to get medical assistance or consultation, even though she was in self-isolation, if or as she needed it. She was also told of the possibility of applying for a variation, as she has apparently done, and she has been contacted with regard to ascertaining her circumstances and seeing what her situation was. This is contact which I do not think Mrs Le Poidevin thinks a great deal of, but that is a matter of detail which I do not really have to consider, as it is not material to the actual issues before me. The position is that anybody who is self-isolating in this way is, as it were, kept in touch with by the authorities, to ensure that they know what they are doing, to review their position and to ensure that they are given the opportunity of making an application for a special release, or for other specific provisions to deal with their welfare.

The Regulations and their enabling provisions

13. As far as the relevant Emergency Regulations themselves are concerned, I have indicated that there has been a ninth and tenth iteration if these. The Regulations are emergency powers which, I was informed, take effect for 30 days in principle but then have to be renewed. This process appears to have begun in about March 2020, at the time when there was the initial fear of the Coronavirus pandemic, which grew up over the early part of the year, from January, and caused the initial lockdown in March 2020. Since then, I am told, there is a blueprint by which the Regulations themselves are necessarily considered at regular intervals because of their requirement to be renewed, and insofar as that they are relaxed, they have been relaxed over the period in a series of staged relaxations, as it has been felt appropriate to make these gradual changes and reduce the restrictions regarded as necessary.

14. The power under which these Regulations are made comes, as I have indicated, from the Civil Contingencies (Bailiwick of Guernsey) Law 2012 and in particular ss. 12 and 13. S. 12 is the section which confers authority on the Civil Contingencies Authority ("the **CCA**" or "the **Authority"**) to make emergency regulations, and it says at paragraph 12(1):-

    "(1) *The Authority may make emergency regulations if the conditions in Section 13 are satisfied'.*

15. There then follow provisions relating to the way that the Authority is entitled to make the regulations, which also set out what it needs to be satisfied about in order to do so, and what it must declare itself to be satisfied about. It must specify the nature of the relevant emergency in respect of which the regulations are made, (subs. 12(2)(a)). It must also, under s 12(2)(b) declare, that it is satisfied that the conditions in section 13, (to which I will refer in a moment) are satisfied and that the Regulations contain only provisions which are appropriate for and proportionate to the purpose of preventing, controlling or mitigating the emergency or any aspect or effect of the emergency in respect of which the regulations are made (subs. 2 (b) (ii)), that the effect of the regulations is in due proportion to the emergency or that aspect or effect of the emergency (subs. (2)(b) (iii)) and that the regulations are compatible with the Convention rights, within the meaning of Section 1 of the *Human Rights (Bailiwick of Guernsey) Law 2000* (subs. (2)(b)(iv)).

16. The conditions that are to be complied with are set out in s.13. S.13(1) records that

    "*this Section specifies the conditions mentioned in Section 12."*

17. The first condition – I read from subss. (2)-(5) – is that

    "*an emergency has occurred, is occurring or is about to occur*."

    The second condition is that

"*it is necessary to make provision for the purpose of preventing, controlling or mitigating the emergency or aspects or effects of the emergency.*"

The third condition is that

"*the need for provision referred to in subs. (3) is urgent."*

and the fourth condition is that
"*Her Majesty's Procureur has advised the Authority about the proportionality of making the proposed regulations*."

18. The reference to "*proportionality*" in subs 13(5) is therefore a reference back to the requirements that the Authority must be satisfied about such proportionality as set out in section 12(2)(b).

19. Advocate Grainge, appearing today for the CCA, relies, therefore, on the fact that it is apparent that the question of proportionality and suchlike, which found some of Mrs Le Poidevin's complaints, is a matter to which the attention of the Authority will have had to be turned, specifically, on the face of it, in order for them to consider it justified to make the particular regulations which they have made. In other words, this is not simply a point about non-compliance with the Human Rights Law, or disproportionality, or something like that, arising independently and fortuitously upon an external consideration of something which has been done; it is a situation in which the very exercise of the power to make the Regulations will have turned the attention of the Authority, and HM Procureur, to consideration of proportionality, and it will have been given consideration (though I have no doubt that Mrs Le Poidevin would say; not adequate consideration) by the Authority itself. That point is, therefore, an important background point.

The subject matter of this Application

20. Having set out the Regulations and the general background above, I return to this particular Application. It seeks a judicial review, and as originally formulated by Mrs Le Poidevin, it purported to request judicial review of the Contingencies Law, itself, although it also sought "declarations of incompatibility" with human rights laws in relation to the particular Regulations. However, the terms of the Application were elaborated on in a letter from Mrs Le Poidevin dated 6th September 2021, which therefore has been treated as effectively being her application.

21. As I explained to Mrs Le Poidevin, the CCA having looked at the terms of the letter of 6th September 2021, came to the conclusion that it should apply, and it does apply today, to have Mrs Le Poidevin's application dismissed, stayed or refused on the grounds that it discloses no reasonable basis on which it should be allowed to be taken further.

22. The Application is made under Practice Direction No.3 of 2004. This Practice Direction was made by the then Bailiff, and as its name ("Judicial Review") suggests, it gives guidance to practitioners as to the approach which the court will adopt in relation to the special case of claims for judicial review, and thus guidance to practitioners and litigants as to the procedure which they should follow and what they should expect when making such an application.

23. The Practice Direction requires that the claim be instituted in the normal way by tabling a Cause in the Friday Court, but that the cause must seek permission to proceed with the claim for judicial review contained therein, and it must name the defendant and all other parties considered to have a sufficient interest in the subject matter of the claim (para. 2). The Practice Direction lays down (para. 4) that the claim must include details of the decision which it is sought to review, a detailed statement of the grounds for bringing the claim for judicial review and details of the remedy being sought, including any interim remedy sought, and a statement of the facts relied on together with details of any prior communications in respect of the claim.

24. At that juncture, the court will give such directions as are seen fit with regard to the conduct of the proceedings. This means that, at that stage, and has happened in previous cases, the court will consider the question whether permission should be granted for the claim for judicial review to be allowed to go forward. For the CCA, Advocate Grainge referred to *Litchfield v Director of Environmental Health and Pollution Control* (Guernsey Judgment 37/2014) which expanded on what is taken into consideration with regard to permission to go forward.
25. In Guernsey, unlike England, there is no specified time limit during which an application for judicial review must be brought, although the proceedings do need to be instituted promptly, but the proceedings themselves must disclose some arguable ground for judicial review which has a realistic prospect of success. It is up to the Respondent, if of the view that the application is unduly out of time, or does not disclose an arguable case, then to make such a case to the court, and ask the court to refuse permission for the claim to go forward. That is what the Civil Contingencies Authority has done in this case.

Preliminary point - delay

26. I will therefore deal with one point at the outset. The original application brought by Mrs Le Poidevin, who is not a lawyer, sought a judicial review of the actual law itself, i.e. of the "Contingencies Law". As I pointed out to her (and as Advocate Grainge submitted), an application in those terms is simply not one which can be brought at all, because the Contingencies Law itself, is primary legislation. It is the Law which lays down the possibility of emergency regulations being made and confers the power to do so on the Civil Contingencies Authority, but it is therefore not amenable to judicial review because it is not an administrative act; it is actually a legislative act and it is primary legislation. It follows that there would have to be some other target for her application if it is to be competent.

27. Advocate Grainge also made the point that if Mrs Le Poedvin's application is taken at face value, seeking judicial review of the Contingencies Law itself, then it should, in any event, be struck out on the grounds of unacceptable delay before the application has been served, because that Law, was enacted in 2012. However, as I have accepted (and said to Mrs Le Poidevin) Mrs Le Poidevin is not a lawyer, and she may well therefore have worded her application infelicitously. I said that I would, therefore, hear from her exactly what was the nature of the complaint she wanted to make, and if there were something within that complaint which did have substance, such that it could found a properly formulated claim for judicial review, and of which I would take the view that it ought to be allowed to go forward, then I would give permission to her to amend the form of her application so as to take account of any such particular claim or argument that she wished to advance and which did appear to have the necessary substance.

28. Consequently for a significant part of the hearing this morning I went through with Mrs Le Poidevin, the basis of the complaints that she was making so as to ascertain exactly what it was she was complaining about, and thus identify the action or decision that she was objecting to, in order to see if her complaint did advance a potentially arguable and viable claim for judicial review in some respect. As Advocate Grainge submitted, for a viable claim for judicial review to be made, it is necessary, first, to identify the decision that is actually complained of and then to identify the grounds for challenging its validity by way of judicial review. The first question is, therefore: what is the decision or decisions actually complained of?

29. I suggested to Mrs Le Poidevin that there were really three different levels at which she might therefore be making a complaint. The first would be that the *Emergency Powers (Coronavirus) (Bailiwick of Guernsey) Regulations 2020* themselves, in general, were for some reason, simply improperly made and were *ultra vires*. The second more detailed level might be that a particular regulation among them - as to which, as I have indicated, it is Regulation 5 that appears to be the one that Mrs Le Poidevin is objecting to - was improper or *ultra vires.* The third, at an even greater level of detail, might be that her claim was an objection to a particular decision that had

been made, under the Regulations specifically in relation to her - in other words an individual decision - which she wished to challenge and make the subject of judicial review. I think she accepted this framework, which I think is the correct framework, and which is an analytical aid to identifying what is the subject matter of her claim for judicial review.

30. It does not really matter how the objection is viewed or expressed, as long as it can be seen that there is some decision, at one of those three levels, which is what Mrs Le Poidevin is aiming her objection at.

31. We are therefore first concerned with identifying from Mrs Le Poidevin what exactly she complains of, and what are the grounds on which she makes that complaint.

Grounds of challenge - (1) no sufficient "emergency"

32. The first matter which has been identified out of her complaint, and I am satisfied that this is right, is that Mrs Le Poidevin makes one objection on the basis that there is not, and there has not been any "emergency" sufficient to justify the imposition of the particular Regulations.

33. As will be seen, this is a very generalised objection. It really goes to the basis for the CCA making regulations at all. It could be said that as those Regulations began being made in 2020, there has obviously been a huge amount of delay before that point has been taken by the service of judicial review proceedings. However, Advocate Grainge said, very fairly, that she would not take any delay point and would not submit that judicial review on such a basis such could not be pursued because of delay.

34. Since the Regulations are re-made in successive iterations, it could be said that this generalised objection could be made in respect of what was included in ninth iteration of these Regulations, those being the regulations in force when Mrs Le Poidevin fell foul of them on the 29th August. They had only come into force on 13th August 2021, having been made a few days earlier. It therefore might be said, in any event, that there had been no undue delay in bringing these proceedings in order to challenge these particular regulations, but, in any event, with the delay point not being taken, the argument of substance as to "no emergency" can be considered on its merits.

35. The essence of this argument, whether it is applied to the general power to make regulations or the making of these particular Regulations, is that Mrs Le Poidevin says that there is simply no emergency justifying the making of such regulations. So that is her first point.

Grounds of challenge (2) - improper exercise of powers

36. Mrs Le Poidevin has raised various other points of challenge in the course of her evidence, and she was asked to produce a bundle of the materials that she would want to put before the court. It is right to say that this is not a question of putting forward before the court all the evidence that would necessarily be put forward at a final hearing, if the matter is allowed to proceed, but it is necessary at this stage, where the question of permission to proceed is being considered, that if there are materials which Mrs Le Poidevin wishes to say show the justification for her being allowed to proceed with her application for judicial review, then she ought to be permitted to, (and she should) put them before the court, because otherwise the court could say that there was nothing to justify allowing the case to go forward. What Mrs Le Poidevin has produced has been a bundle of materials, most of which, I think, have been rendered into hard copy, although there are some videos which Mrs Le Poidevin said that she would wish to rely on at any ultimate hearing (which I think were videos in relation to the taking of Covid tests and so forth) which it had not been possible to be reduced to hard copy for this hearing. Nevertheless, I have before me a very great deal of the material which Mrs Le Poidevin wants to rely on in support of her contentions.

37. I can indicate some of the headings that Mrs Le Poidevin has helpfully used in respect of her various pieces of evidence. She has produced documents that come from, in particular, the United Kingdom - largely, I think, in e-mails - stating what has been going on there. She has produced videos of Boris Johnson and Christopher Witty, making addresses to the public. She has produced figures regarding Covid survival rates, and Covid deaths in comparison, which point up the well-known fact that a death within 28 days of a positive Covid test is treated as a "Covid death" whatever its cause, and how it has been pointed out that this potentially exaggerates the number of deaths from Covid. She refers to various articles from the press and internet, in relation to fear-mongering and propaganda and allegedly misleading information that has been put out. Examples are an article which records medical criticisms of the PCR test and its accuracy which had been put forward by a group of peer review scientists who are looking, they say, at flaws in the basis of PCR testing for Coronavirus. There is also an article on how the tests which are employed might be dangerous. There are articles on various other matters in relation to the effects of chronic fear on a person, on how emergency restrictions are causing a direct threat to human welfare as well as the wider arguments about the damage to democracy and infringements of human rights under lockdown. There are also articles about the vaccines' safety; Mrs Le Poidevin has assembled evidence of, she says, adverse reactions to the vaccine, and so forth.

38. Mrs Le Poidevin has very strong views about the vaccine, which she has explained, and they are her reasons for not being vaccinated. She regards these as the matters which she ought to be able to air and to bring forward, and she relies on these as the grounds for her application, challenging the imposition of the self-isolation regulations on her.

39. I have made it clear in the course of this hearing that, as a court of law, I am not concerned with political arguments where they are truly political matters. I am concerned only with legality, and the question whether Mrs Le Poidevin has reasonable grounds in law for seeking judicial review of any of the matters that I have referred to above, namely, and specifically, the restrictions imposed by para 5 of the current iteration of the Emergency Regulations, or their effect as far as the particular decisions to which she has been subject are concerned, so as to decide whether any such challenge as she raises should be allowed to proceed by way of judicial review.

Test for proceeding with judicial review application

40. As far to the test for whether a judicial review application should be allowed to proceed, Advocate Grainge submitted that legal test which should be applied is fourfold, although in the end she relies on only one such aspect. The four requirements are:

    (1) that the applicant has sufficient interest in the subject matter,
    (2) that there has been no undue delay,
    (3) whether the defect of process complained of actually made any difference to the relevant decision; and
    (4) arguable grounds, i.e. grounds which have a real, as contrasted with fanciful, prospect of success.

41. First, Advocate Grainge accepts, for present purposes at any rate, that Mrs Le Poidevin has a sufficient interest in bringing an application for judicial review, at least in respect of arguments in relation to the "lower levels", as I put them, of decisions that have been identified - in other words not the main Law itself but a possible decision or implementation of that Law either as secondary legislation, or in respect of specific decisions taken under it. She is not arguing that Mrs Le Poidevin does not have sufficient status to make an application.

42. Second as already mentioned, there is the requirement of sufficient promptness and as also already mentioned, Advocate Grange has accepted not to argue any point about delay.

43. A third qualification, which can often come into play, is whether if the claim succeeded and the fault in relation to the decision, or decision-making process were upheld, there would then in fact be any different outcome, (i.e. a different decision). This usually arises in situations where the argument is that there has been some procedural unfairness or there has been some matter taken into account that should not have been taken into account, or not taken into account when it should have been taken into account, but the court forms the view that, even if such a fault had occurred (so that the judicial review application might be well-founded in principle) it is nonetheless clear that the decision would have been the same, in any event, if it had not occurred. In such instances, unless there is exceptional public interest, permission to proceed would be refused. Advocate Grainge accepts, however, (and in my view she is right) that that principle does not really come into play in this case, because what is being complained about here is not so much the conduct of the decision-makers with regard to the matters in question, so much as the unacceptable substance of the decisions themselves.

44. Therefore, and finally, Advocate Grainge says, that the essential point is that the court must refuse leave to proceed unless it is satisfied that there is an arguable ground for judicial review having a realistic prospect of success. She submits, and in my judgment correctly, that what this test means in any given case will depend on all the circumstances, and the nature and gravity of the issues to be argued. She also accepts, rightly, that to be "arguable" means more than just to be potentially arguable on a speculative basis, i.e. to be capable of being formulated or expressed. The argument must have a "real" prospect of success. By that I mean not necessarily more likely to succeed than to fail, but that the prospect of success must not be merely fanciful. Advocate Grainge's submission, therefore, is that when Mrs Le Poidevin's application is examined, it can be seen to stand no reasonable or sufficiently reasonable prospect of success on the above test, and it should therefore not be permitted to go further, and take up the time of the court and of the numerous people who would have to deal with the matters which are advanced in order to refute them at a full hearing.

The complaints

45. So far, therefore, I have indicated the legal test. I have also identified one of Mrs Le Poidevin's arguments, namely that there is and has been no proper "emergency" within the meaning of the Contingencies Law generally, to justify the imposition of at least, the 9th iteration of Regulations - in other words that the decision of the CCA that there was such an "emergency" was wrong in law. This is a complaint of *ultra vires* The other matters that Mrs Le Poidevin has complained about, and which have been identified are, next, that PCR tests and lateral flow tests are not fit for purpose and are dangerous to health, for reasons I have already given, that the vaccine has caused more deaths and life changing illnesses than the virus has, that there is no reliable scientific evidence to suggest that asymptomatic people can transmit the virus and I think also that that there is no reliable scientific evidence that unvaccinated people are any more likely to transmit the virus than vaccinated people, since it can be carried asymptomatically. These are arguments that the basis of the regulations is "wrong" which has to mean, wrong in a manner which can be recognised on judicial review. She also complains also that these amount to breaches of Articles 14, 8, 3 and 17 of the Human Rights Convention, which have occurred and which and impinge upon her.

46. Advocate Grainge submits, that Mrs Le Poidevin's arguments based on the above matters stand no reasonable prospect of founding a successful application for judicial review.

The law

47. There are four or five bases on which an applicant for judicial review could (and would have to) found his or her case that a particular identified decision should fall to be quashed or otherwise interfered with by the court on a judicial review application.

48. The first ground is illegality. That is, in effect, saying that there was no power in law to make the particular decision in question.

49. The second is irrationality. This involves arguing that the impugned decision was a decision which no reasonable authority in the position of the actual Authority, could have made, or, in other words, that the decision was perverse, or at least perverse on the basis of the evidence which was or should have been before the Authority. I will leave that for the moment.

50. The third, is that of some procedural unfairness, but it has not been suggested that that applies in the circumstances of this case.

51. There is a fourth ground, which is that the decision-maker took into account something which he/she/it ought not to have done, or left out of account some matter which was material and ought to have been taken into account, but it can be seen that whilst this may be a possible route to attack a decision if the decision making process can be examined, it is often the case that the attack requires, as here, to be mounted on the basis of criticism of the substance of the decision itself, and then this ground can only be a matter of inference.

52. The fifth identifiable ground, which definitely is founded upon by Mrs Le Poidevin, is disproportionateness. This is, in a way, a sub-category of the second ground (irrationality) or arises as a consequence of the fourth ground (taking into account the wrong cohort of considerations) as it involves arguing that the decision in question was not a reasonable decision which could have been made, because its effect was simply disproportionate to the matter with which it was purporting to deal.

53. Mrs Le Poidevin agreed, in argument, that she was plainly relying on this last type of complaint. She also relies, she says, on the complaint of irrationality. It seems to me, however, that what that really comes down to is that the strength of Mrs Le Poidevin's opinion as to the unreasonableness of the decision that has been taken with the effect of imposing self-isolation in her circumstances is such that she regards it as irrational that the Authority should have made such a decision. So, in practice, that really comes back to the other points to which I have referred and the grounds of illegality, or perverseness of the decision, with disproportionateness being, in context possibly perhaps just a less extreme test. In regard to the "no emergency" point, the illegality argument arises in a slightly different way, because, if she is right that there was or is no "emergency" within the meaning of the Contingencies Law, it would be unlawful to make emergency regulations in relation to a supposed emergency.

54. It is therefore in respect of the above tests, by which Mrs Le Poidevin will have to convince the court that her application is arguable, that I turn to consider the CCA's argument that her application should not be allowed to proceed but should be stayed at this first stage.

Discussion - No "emergency"?

55. First, I consider the question of "emergency". Mrs Le Poidevin's contention that there is, in fact, no "emergency" rests on the fact that, she says, when you actually examine the statistics in Guernsey, in particular, and you look at the situation properly, there is not a major or serious danger to public health arising from the Coronavirus situation. She points to the fact that she says that at present there have been only 16 (or maybe now risen to 17) deaths in Guernsey, and there are only 168 Covid cases. I think she also suggested that these people were not symptomatic, but I am not sure quite where that comes from because the statistics appear to indicate that there are 168 people who have tested positive for Covid, but not whether or not they

were symptomatic. But at any rate, she says that there are only 168 cases, which is clearly, she submits, not a serious situation and in those circumstances the situation cannot, she submits, be reasonably viewed as amounting to an "emergency".

56. In my judgment, however, this is not a viable argument at all. This is because the point is that the power of the CCA to deal with an emergency and to make regulations, rests also on the fact that there is, possibly, a *potential* emergency - in other words a situation where, if you do not make the regulations in question, a severe detriment to the health of islanders which then would be an emergency, may well actually ensue. In my judgment this is well within the contemplation of s 13 of the Contingencies Law and, importantly, it requires a judgment as to future possibilities, which is a judgment placed in the hands of the CCA.

57. As a linked point, Mrs Le Poidevin rather pours scorn on the suggestion that there have even been so many "Covid deaths," because she says that it is clear that the statistics have been exaggerated, as mentioned above. However, it seems to me, that when one looks at the situation it is incontrovertible - and I think Mrs Le Poidevin herself even accepted this - that there are people who have had severe respiratory infections, traceable to the virus that has been labeled Sars Cov-2, and which can fairly be described as a pandemic. She says that on the basis of the scientific documents that she has produced, she would even go so far as to contest whether there is such a definite virus. On the other hand, though, there is also a large and generally accepted amount of scientific information put forward which suggests that there is a link between what has been described as, or found to be, the Sars Cov-2 virus and severe respiratory illness that has, indeed, proceeded to cause a significant number of deaths in many jurisdictions.

58. It therefore seems to me that it is really unarguable, but that the Civil Contingencies Authority, if perceiving the prospect that an emergency of that nature (ie in public health terms) might arise in the near future, was entitled, under the terms of the Contingencies Law, to make regulations with regard to averting or coping with such prospective emergency - provided always that they were sufficiently proportionate to the prospect of this developing - and which would be a valid exercise of their powers.

59. Mrs Le Poidevin's case in this regard really depends on whether her own view of what is or is not an emergency or potential emergency would, or could, be accepted as correct in opposition to the apparent acceptance by the CCA itself that there was and is such an emergency or potential emergency, that acceptance having been made on the basis of the matters that they are obliged to consider under the Law, and the advice that they have been given and must be taken to have received, since they have declared this to be the case. This is because they are obliged to satisfy themselves of the existence of such an emergency and also, they will have had to receive advice as to the proportionateness of the measures proposed and the justifiability of taking emergency action, by HM Procureur. In that context it seems to me that for Mrs Le Poidevin to argue that the CCA was wrong to hold that there has been no "emergency" and there is not the prospect of an "emergency", in reliance simply on statistics, is fanciful. The obvious situation is that Guernsey imposed regulations that have prevented what might well have been a serious emergency if the virus had been allowed to run riot and infect the island from developing. The statistics show the success of the regulations, rather than showing that there is not nor has been any sufficient "emergency" to justify them, and they cannot, in my judgment, be used in their bare form to justify a contention that there was/is no true "emergency". The significance of the statistics need to be interpreted sensibly, in context.

60. I am therefore quite satisfied that there is no prospect of Mrs Le Poidevin's being able to substantiate a claim for judicial review on the basis of any argument of that nature.

61. I am fortified in relation to this question by noting the case of *Bridgman v the Medical Officer of Health and the Civil Contingencies Authority*, [2021] GRC043 a very recent decision, of Judge Fooks in this court, in which it was accepted by Dr Bridgman, who was vehemently opposed to

the regulations for self-isolation that were being applied to him, that there was an emergency faced by the Bailiwick. Advocate Grainge refers to paragraph [119] of that judgment which reads:-

> "*Advocate Grainge urged me to factor in the emergency faced by the Bailiwick and the balancing exercise between the rights of the individual and the population. There is support for this proposition in the English Court of Appeal case of 'Durman v Manning' where the English Court of Appeal, in different circumstances, took account of the emergency presented by Covid 19. In my judgment it must be right that the balance of the exercise is affected by the emergency which has generated the need for the decision. 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"*

62. That decision was on the basis that it was simply accepted that there was an emergency, either actual or of potential generation, sufficient to justify the implementation of relevant emergency powers; Dr Bridgman's complaint was about the actual content of a decision to refuse him a variation of the regulations as they had been applied in his case and, as is well known, his application failed. It does seem to me, however, that that this case is some general authority that it is broadly accepted that 'the' situation (to use a neutral phrase) in Guernsey, as it appears to persons charged with making these decisions, can reasonably be viewed as being an emergency.

63. As I have explained to Mrs Le Poidevin, while her opinion may be that the decision that there was or is an "emergency" was incorrect, that is not the test for present purposes. The hurdle she would have to overcome would be whether she could show, in all the circumstances as they were known or reasonably appeared to the CCA and the Medical Officer of Health, that they could not reasonably have considered that there *was* an emergency, actual or potential, which would justify them making regulations. As I have said, I find that that that is a completely fanciful argument to make and I would not be prepared to allow Mrs Le Poidevin's application to go forward on that basis.

Discussion - the general requirement for unvaccinated persons to self-isolate

64. The next point, therefore, becomes whether, on the basis that the CCA had/has the right and the power to make relevant and proper emergency regulations, Mrs Le Poidevin could successfully contend that the actual regulations that were made and which affected her, were made on a wrong basis, in the sense that the decision to make the particular regulation is a decision which was flawed and therefore amenable to judicial review. In this context she has produced, as I have indicated, a whole host of materials which she says are evidence of that fact. In effect she seems to me to be saying that there has been an unreasonable overreaction here, in the regulations that have been made, her proposition being roughly as follows.

65. Mrs Le Poidevin is not doubly vaccinated. She is not doubly vaccinated through a choice that she has made in her own interests and which she regards as being a perfectly proper and reasonable choice, and no-one is suggesting that that is not her reasonable choice. But she says that the requirement therefore that she should self-isolate for 21 days or even for 14 days is disproportionate, if not irrational and illogical, because, she says, there is no evidence that she is a potential carrier of the disease sufficient to justify this. What she actually submits is that doubly vaccinated persons may still carry the disease whilst being asymptomatic and appearing perfectly healthy, just as they would be if they are not bearing or carrying the disease at all, and in those circumstances she says there is no evidence that being doubly vaccinated affects the question whether a person might transmit the disease.

66. I draw this distinction carefully, because I asked her exactly what it was that she was saying had not been properly taken into account (or whatever else was the flaw) which made it unreasonable for the quarantine regulation to be imposed on her. Mrs Le Poidevin's argument came down to saying, as I understood it, that the reason for requiring self-isolation must be (as a matter of logic) the prevention or minimisation of the risk that you might transmit the disease in the community, so the reason for not requiring persons who are doubly vaccinated to self-isolate must be that it is thought that they do not pose the risk of such transmission. However, it is accepted that people with Covid can be asymptomatic. Mrs Le Poidevin accepts (and I asked her this specifically) that even on the basis of the evidence that she has produced, people can carry the disease, despite the fact that they are asymptomatic. What she says, though, is that there is no scientific evidence - absolutely no scientific evidence - that an asymptomatic, apparently healthy person can transmit the disease, and she then goes so far as to say that that is the case, whether or not they are vaccinated. In other words, she asserts that the fact that you are doubly vaccinated does not affect the risk that you pose as a transmitter of the disease; it is whether or not you have symptoms, i.e. whether you feel unwell, which makes you a likely transmitter.

67. She submits that quarantining should be left to the discretion of the individual. If they feel unwell, they should of course then quarantine themselves but that should be a personal decision which she would expect any reasonable person to take, if they did feel unwell. Her objection is to the coercion to quarantine that was imposed by the blanket restriction, which meant that someone who was feeling perfectly healthy and had no reason to believe they had the disease or was in any way infectious, should have to self-isolate against the possibility that they *might* be infectious, just because they had not been doubly vaccinated.

68. In my judgment, this becomes a proportionality argument. Effectively, it is an argument that, on the scientific evidence, it is irrational and disproportionate to hold that somebody who has not been vaccinated but who is not feeling ill with Covid-type symptoms, is actually potentially capable of transmitting the disease to the detriment of all the other members of society with whom they might come into contact, such that they should have to take the safety measure of remaining in quarantine for a period until one can be sure that they are not actually likely to go down with the disease. It is not proportionate and reasonable to require them to do so, when one does not require the same quarantining from persons who are not apparently unwell, but who are doubly vaccinated.

69. Mrs Le Poidevin argues that vaccination may stop you going down with the disease and feeling the effects of it, but there is no evidence that it stops you carrying it, and therefore transmitting it. Therefore, she says that it is discriminatory to compel her to self-isolate because she has chosen, for her own reasons, to be one of the non-vaccinated persons rather than doubly vaccinated persons. That difference of treatment represents, she says, an unfair, unreasonable, and (I think she would say in the context of the Regulations) even an irrational, improper and disproportionate application of the power to impose quarantine restrictions of the general nature that has been imposed by the Authority. In support of her arguments there is no scientific evidence to support the view that isolating somebody who is apparently healthy and asymptomatic actually prevents transmission of the disease, she refers, again, to various of the papers, articles and commentaries which she has collected from the internet research, and which she says support this point of view.

70. In my judgment this argument is not sufficient to get Mrs Le Poidevin's application for judicial review over the hurdle of demonstrating a sufficiently real prospect of success. I remind myself that this would involve showing that the decision, as taken by the Civil Contingencies Authority, to put into effect the ninth iteration of these Emergency Regulations including Regulation 5 as it affects Mrs Le Poidevin's position as a voluntarily non-vaccinated person, was in all the material circumstances, irrational, unreasonable or disproportionate to its objective.

71. Mrs Le Poidevin clearly holds a very strong view about the science in the matter and believes that the science in the matter supports her view that there is no evidence that self-isolation of an individual in a situation such as hers would actually help to prevent the transmission of the Covid disease. She does accept, however, (I think, but in any event, it appears to be incontrovertible) that there is evidence the other way (as it were), and also evidence that many other authoritative bodies take a different view. It also has to be accepted, in my judgment, that in a situation where public health questions arise with regard to the transmissibility of a new and unknown virus, the questions which arise as to what protective steps need to be taken are decisions for those in authority, and where the situation is not already clearly known, taking an appropriately cautious, ("better safe than sorry") view as to the quarantine requirements which ought to be imposed is not an unreasonable approach for such authority to take.

72. Any challenge to their decision then becomes a question of examining the basis on which any particular decision was made, and the judgments and the balance that have actually been applied, but always in the situation where the actual decision itself has been confided to the particular authority, here the Civil Contingencies Authority, on the advice, no doubt, of the Medical Officer of Health, and the information which is available to them at the time, as to what are appropriate precautionary measures to take. This means that, to succeed in her challenge, Mrs Le Poidevin would have to satisfy the court that, at the time these regulations were made and against the history of the matter as then known (and we know this has been ongoing since at least March 2020), the decision of the authority to require persons in her position to self-isolate for up to 21 days, but not to require the same of persons who had been doubly vaccinated at least two weeks previously, was either so inexplicable and extreme as to be irrational, or left entirely out of account some piece of evidence which would necessarily have changed that decision.

73. The history, of course, is that there were no possibilities of vaccination at all until a vaccine had actually been produced and tested, but as I have said Mrs Le Poidevin regards this process as having been so hurried that she considers it to be be experimental and that there may be as yet unknown side effects. She argues, therefore, that if that could be the case, then requiring people to be vaccinated in order to be able to enjoy their general human right to free movement and association with family, and so forth, is something that ought to be taken into account as a reasonable reason for not being vaccinated. However, in my judgment that does not take the matter far, because the fact that one may have a reasonable reason for not being vaccinated does not necessarily make it unreasonable for the Authority to decide that quarantine is required for those who are not vaccinated, but that this can be relaxed or waived for those who have had themselves vaccinated. Where the line is to be drawn between the vaccination status of different persons, having regard to the potential for possible transmission of infection, is a decision which is one that has to be taken by the relevant authority itself, at the time, and according its view of the balance of risk and seriousness of potential consequences, based on the state of the science presented to it at the time.

74. In my judgment if her case were to proceed, Mrs Le Poidevin would face the problem that the evidence that she wishes to advance would be a large amount of scientific evidence of only one side of the argument (if I can put it that way) because she herself accepts that there are scientific papers that go the other way. She has naturally produced for me the materials that favour her position, which is opposed to the regulation to which she objects. However, to succeed, she would have to show, not just that there was <u>some</u> evidence in support of her position (and this position would have to be, not merely that it was not necessarily unreasonable for her to choose not to be vaccinated or tested, but rather that there was no scientific basis for suggesting that an unvaccinated or untested person could be more of a risk as to spreading the disease, although not symptomatic, than a vaccinated person), but also that such evidence was so overwhelmingly in her favour, that the decision made by the CCA (namely to impose a self-isolation requirement on her, but not on persons who had been vaccinated, and not so strictly on a person who, though not vaccinated, was willing to take a test and tested negative) was not a decision or a distinction to which the CCA could reasonably have come, on the whole general state of scientific evidence,

thinking and advice at the time. In my judgment the proposition only has to be stated that way for it to be seen that such an argument stands no real prospect of success.

75. The relevant decision was made on the basis of the CCA's conclusion that the safety and protection of the general populace on human welfare grounds militated in favour of imposing quarantine on persons unless they were doubly vaccinated. I remind myself that the position previously has been that nobody was vaccinated and hence we had lockdowns and the requirement that everybody stay at home and self-isolate totally, and that it is the relaxation of those severe restrictions because of vaccination which has later occurred, and which I am now considering. The ninth and the tenth iteration of the Regulations represent the continual process of review of the Coronavirus Emergency Regulations that is carried out by the CCA to see whether, and if so, how far, it appears to be safe, and appropriately careful but also appropriately liberal, to relax the stringent regulations that were initially imposed because of the risk of transmission of the disease. I do not think that there is, or even could be, any contest to the evidence that the transmission of this disease person to person can have really serious consequences potentially, in particular, for elderly persons, and I am not sure that Mrs Le Poidevin does actually controvert this. What I think she says, rather, is that given that one does not know for certain about the transmissibility point, and given the weight of scientific evidence that she can produce which she says supports her view that there really is no evidence of there being transmissibility if one has no symptoms, the CCA therefore ought to have taken a different view as regards guarding against such risk in cases such as hers.

76. However, viewed like that it is quite plain, in my judgment, that what Mrs Le Poidevin is really arguing is that the decision that was taken by the CCA ought to have been a different decision. That is not the question which arises. The question that arises is whether the decision which was taken is a decision that the CCA could reasonably have taken in all the circumstances.

77. In those circumstances it would not, in my judgment, avail Mrs Le Poidevin that she can produce commentaries from the internet which have criticised and contested the way in which the United Kingdom Government approached the science and the question of imposing lockdown. She has referred, for example, to their taking into account the reactions and behaviour of persons and therefore promoting fear-mongering, taking advice from people as to how to present matters so as to manipulate the behaviour of the public in the ways which were wanted, and that this has been uppermost in the making of some of the statements that have been made with regard to the seriousness and transmissibility of the Coronavirus infection. She submits that that agenda, i.e. trying to manipulate public behaviour, ought to been taken into account in any weight (obviously reducing it) which ought to have been accorded to statements made by the UK government.

78. However, that, again, is not, in my judgment, really in point. The real point is that the statements being made by the UK Government were part, of the information that would have been available at the time, and to be taken into account, and would reasonably have appeared worthy of considerable weight. I also remind myself that we have a responsible Medical Officer of Health whose job it is to be looking at the general information, and the general circumstances and potential effects of the virus on Guernsey, and to be advising the CCA as to what are therefore the appropriate measures to be taken to protect the Guernsey public. (I observe, also that the latter may not take such a liberal view as Mrs Le Poidevin does of the willingness to risk being exposed potentially to transmission of the disease.) It is the job of the CCA then to balance those general views in the light of scientific and medical advice, to make the least intrusive quarantine or suchlike regulations as they feel able to do.

79. In my judgment it is fanciful to suggest that there is a possibly successful argument that their decision, in requiring non-vaccinated people coming into the Bailiwick who would otherwise be free to move around at large, to self-isolate for an appropriate period so as to obviate the possibility that they may be carriers of the disease and able to transmit it, was a decision which such an authority could not reasonably make, in all the circumstances pertaining at the time. In

my judgment this remained so at the time of the decision to enact the 9th iteration of these regulations. The contrary argument, in my judgment, could only involve being wise with hindsight, or relying on evidence which, whilst favourable to Mrs Le Poidevin's strongly held view, was not in itself balanced evidence but would be counter-balanced by other evidence, which she herself dismisses, but which would bring matters back to the proposition that the actual decision was one for the Authority to make balancing all the information, for itself.

80. I emphasise that the question is not even whether the Authority could reasonably have made a different decision, but whether the decision which it actually did make was one which it could reasonably have made at all, in all the circumstances and taking into account and balancing all the information which it reasonably had or should have had. In my judgment it would be an impossibly high hurdle to argue that it was not.

81. Mrs Le Poidevin further argued that support for her view came from the fact that the CCA were taking the advice given by the World Health Organisation. She criticises this, because she says that the World Health Organisation has the interests of big business in the pharmaceutical industry injected into it (as to which she has produced, once again, evidence of articles and commentaries from the internet), and that consequently such advice ought not to have been relied upon. Once again, though, that is a proposition which at best is a matter that the CCA might take into account as a matter of balance; it does not go further and mean that the CCA was obliged to give such advice no credence at all. The World Health Organisation is an apparently world-respected authority on public health matters, and the fact that there may be people who are suspicious or sceptical about it, and who post complaints about it, does not, in my judgment, give rise to any sufficient reason to argue that it is clear that the CCA in Guernsey ought to have ignored the advice which it was giving, when it did.

82. In fact, it seems to me to be clear (and I think I am quite entitled to take judicial notice of this) that most of the jurisdictions of the developed world share the same approach, ie that vaccinated persons are less likely to catch the disease and can be treated as posing less risk of transmitting the disease, than non-vaccinated persons.

83. I should mention also that Mrs Le Poidevin referred, at one stage, to suggestions of there being some kind of conspiracy by those involved in the regulations in Guernsey to act in the interests of others. That, however, is nothing more than an assertion, and there is no evidence that there has been any improper motive or improper behaviour by the CCA. I can accept Mrs Le Poidevin's point that, until she actually gets the opportunity of compelling the CCA to produce the evidence about risk assessments and the information that was available to it, she may not be able to prove her case, but in my judgment, the generally available facts of this case are such that if Mrs Le Poidevin really did have a potentially sustainable case in that direction, i.e. that the decision, the effect of which was to require someone in her particular circumstances to go into quarantine for a period, had been taken in a manner which was improper, or contrary to the proper approach to be expected of a statutory authority wielding such powers in circumstances such as these, then there would be something of fact or evidence which she could pray in aid in support of such an argument at this point, rather than merely making an unsupported assertion that there is some kind of conspiracy afoot.

84. Mrs Le Poidevin submits that such decisions as those behind these Regulations are very serious, for having the effect of trashing the economy and blighting people's lives, and she submits that this is a reason why the court should allow her complaint to go forward, so that everything about the making of such decision can be examined and scrutinised. That is not, though, in my judgment, any sufficiently good reason in law, for allowing her to proceed. That assertion simply emphasises that what Mrs LePoidevin is really concerned about is a political matter and not a legal matter.

85. The potential consequences which she raises are matters of policy, because they go into the balance which the Authority itself is required to take into account as a political and administrative judgment, between precautionary support for public health concerns about the spread of Coronavirus and other concerns for the economic, or the emotional, or other effects on people which could result from such a precautionary approach. That is a matter of judgement and balance, and I repeat, the question then becomes, not whether the decision was a proper, good, or correct decision, but whether it is or was a decision that was within the range of decisions which it was reasonable to make, in terms of the balance that it was felt appropriate to apply at the relevant time. That is why the particular decision can only be impugned as a matter of judicial review on the basis that it was a decision to which no reasonable authority could have come. Such an outcome seems to me to be quite impossible to argue in the light of, not only the broad spectrum of evidence, but also of all the similar decisions that have been made by many, many other jurisdictions around the world to vary similar effect, even if not exactly the same in detail. Mrs Le Poidevin's objection is therefore, in reality, an objection which is largely political. As such, it is not justiciable and the contention that Mrs Le Poidevin could establish the only legal basis on which the relevant decision can be contested as a matter of judicial review (namely that the decision, viewed objectively, was irrational or perverse, or demonstrably failed to take account of matters which would have inevitably resulted in a different decision if they had been taken into account) is fanciful.

86. With regard to Mrs Le Poidevin's complaint that the requirement for self-isolation actually imposed on her as an unvaccinated person was disproportionate to the alleged emergency, I reject the proposition that there is any real prospect of her being able successfully to challenge the validity of the relevant Regulations, or the particular decisions made in relation to her case, on this basis, for reasons which I have already given above, and refer to further in Paragraph 93 below.

Human Rights considerations

87. I add the following points because Mrs Le Poidevin has referred specifically to claimed breaches of human rights, by reference to the European Convention on Human Rights which is incorporated into Guernsey Law by the *Human Rights (Bailiwick of Guernsey) Law 2000.* They go, therefore, to whether Mrs LePoidevin stands any real prospect of obtaining a "Declaration of Incompatibility" with regard to either the Contingencies Law or the Regulations.

88. She refers first to Article 3. This is a prohibition on torture and inhuman or degrading treatment or punishment. She suggests that, the treatment to which she has been subjected, namely requiring her to self-isolate, breached this prohibition. She likened it to a situation in which there was no fresh air. She was required to confine herself to a room. She said that this was a welfare point that nobody should be subjected to because you would not even subject animals to that kind of confinement.

89. In my judgment this is an argument that cannot begin to succeed. Quarantine is the recognised approach, where there is a danger that is regarded as sufficiently serious to make it the safe course to require a person confine themselves to their own company unless and until such time as one can be satisfied that they are not carrying and capable of transmitting a potentially nasty disease. It cannot in my judgment be argued that this amounts to inhuman or degrading treatment within the meaning of Article 3 except by exaggeration and misuse of language. It is perfectly apparent, from the context of Article 3, that that is relating to the kind of atrocities that occur in less developed or civilised countries, which allow extreme, disproportionate or inappropriate punishments or treatment of individuals. To suggest that a quarantine requirement, in appropriate circumstances, is either inhuman or degrading is absurd and is the kind of rhetoric which gets used when an argument is being advanced on an exaggerated or sensationalist basis The same goes for Mrs Le Poidevin's describing the fact that she is in the same island as her son

but she was prevented from going to see him as "torture". This is simply not a use of language which is within the meaning and intention of Article 3 of the Human Rights Convention.

90. She likewise complains at a breach of Article 8. It is not disputed that the restriction imposed through quarantine on her being able to see or visit her family was an interference with her "family life". However, and first, the right in question is a right to '*respect for private and family life*', which is not quite the same as a right to non-interference with one's family life - and in any event, the right in question is qualified. The right is that

> *"there should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder of crime, for the protection of health or morals or for the protection of the rights and freedoms of others."*

91. It can be seen firstly that this wording preserves the requirement that any such interference must be legal, but it implicitly thereby acknowledges that such interference is legally possible. Second, there can be justification for such interference if its imposition is reasonable in a democratic society. That reinforces the fact that in interference which is lawfully authorised by an organ of such a society may well be permissible. Lastly, it indicates what countervailing considerations may trump the right, and justify such an interference, and it will be noted that the material such interest here is the protection of health, and possibly the protection to the rights and freedoms of others (by which I would mean the rights and freedoms of other to go about their business free from the fear that they might be coming into contact with persons who have come in from outside the Bailiwick and who might be carrying this rather obnoxious virus). The proper assessment of this is a balancing matter and thus, once again, in my judgment, shows that the right to "respect for family life" is not absolute and untrammelled.

92. I note also that, in this particular instance with regard to aspects affecting family life, there were specific provisions made for Mrs Le Poidevin, to try to take account of that. She was given a variation which gave her the means of at least seeing her son from a distance (though she was somewhat unappreciative of this, contending that it made her inability to see him up close to even more poignant). It is quite common in challenges based on human rights for an objection to be made, and even to succeed, on the grounds that a restriction or consequence imposed or laid down was disproportionate because it was a blanket restriction, affecting a broad class of persons and therefore without having regard for extenuating individual circumstance, or particular cases where a broad, universal provision acted (unnecessarily) harshly for a particular individual. In this instance, though, I have noted, and I was impressed, by the fact that, as has been explained there is a procedural blueprint which means that the restrictions themselves are limited in duration and therefore monitored regularly with a view to trying to relax them as soon as and when possible, so as to restore all such general human rights as soon as can reasonably and properly be done, and also that, in this particular instance, the States was in contact with Mrs Le Poidevin, and steps were taken to try to alleviate the distress and anxiety caused to her, on an individual basis, as far as possible, in accordance with the regulations imposed for the general health and welfare of the community. I do not see any basis for arguing that the blanket imposition of these restrictions, catching Mrs Le Poidevin's position as they did, meant that their application was disproportionate to, or an undue infringement of, her right to respect for her family life in her particular circumstance.

93. It has also been pointed out, and in my judgment with justification, that Mrs Le Poidevin did come to the Island in full knowledge of the fact that there was a requirement of self-isolation which she could anticipate would be imposed, in view of her unvaccinated status. She therefore cannot complain that something has been imposed upon her that she was not aware of (or was reasonably not aware of) when she actually came.

94. It seems to me that there are these points that make it proportionate. First is the fact that the CCA is obliged to take into account not just the effects of its regulations on persons in Mrs Le Poidevin's position, but also its view of the effect or potential effects on public health and the rights and freedoms of others. Second, efforts were made, as indicated, to ensure that any possibly disproportionate or untoward effect in her particular case was mitigated, as far as possible, - and she has been given the two variations that I have mentioned. Indeed, she has specifically been given a dispensation in order to enable her to attend the family event, tomorrow, which was of importance to her. This all strikes me as clear evidence that the way in which the Regulations are operated is with a view to effecting only the minimum imposition possible to achieve the objects of the regulations and is not rigidly "blanket". And third there is the fact that Mrs Le Poidevin could have avoided coming to the Bailiwick if the prospect of self-isolation here was so obnoxious as to be unacceptable. All this makes it, in my judgment, realistically impossible for her to succeed in arguing that the Regulations as applied in her case were amenable to judicial review or are amenable to any declaration of incompatibility with her human rights.

95. I should make the point, as well, that even if this court did make a Declaration of Incompatibility (i.e. with the Human Rights Law) this does not invalidate the offending legislation, primary or secondary, itself. It simply requires notice to be given to the legislature that some legislative enactment is considered by the court to be incompatible, so that the legislature can consider whether it would be reasonable, and if so how, to amend that legislation to make it compliant. It does not, in itself, effect any change in the law.

96. There is also the point that, as Mrs Le Poidevin is going to be allowed out of isolation, in fact tonight, the length of time during which she is now actually affected is obviously minimal. In a sense, therefore, there is very little point in any further hearings taking place, except that I believe that Mrs Le Poidevin has said that she may well wish to come back to the Island later, (having left in order, I understand, to go back to the UK possibly for medical reasons) and that the same point may arise again later. However, I am not suggesting that her claim should be dismissed on the grounds that there is no point in it going ahead. I am holding that permission to proceed should be refused at this stage because Mrs Le Poidevin's application, even with the indulgence of her being allowed to explain and elaborate on her contentions, discloses no sufficiently arguable grounds for judicial review of any regulation or decision that comes within the purview of the challenge that she proposes to make..

97. I have not specifically referred yet to Articles 14 and 17 of the Human Rights Convention. As to Article 14, Mrs Le Poidevin contends that she is discriminated against, with the discrimination being because she has chosen not to participate in a vaccination programme because of her opinion about the utility and safety of the relevant vaccines.

98. In my judgment, this is not relevant discrimination, it is simply a method of restating her primary complaint in different words. The "prohibition on discrimination" in Article 14 is not, in practice, a separate and free-standing right. It is a reinforcing provision. It sets out that all the human rights previously laid down to be guaranteed and observed by a public authority are to be enjoyed by everyone equally, and without any discrimination on the grounds of sex, race, etc or any other of the mentioned characteristics which have been found to be the subject of unacceptable discrimination. That is why I say that it is simply reinforcing. I note that vaccine status is not one of the stated characteristics in any event, and I do not consider it arguable that Mrs Le Poidevin is being "discriminated" against on the grounds of her opinion about the safety of vaccines. The Regulation would be applied to her in the same way whether she was unvaccinated because of her opinions, or simply because of, say, just laziness. The argument then comes back to Mrs Le Poidevin's contentions about the (un)reasonableness of assuming that there is a greater likelihood of her transmitting the virus when she is asymptomatic and feeling well than there is of a person transmitting the virus who is vaccinated, but asymptomatic and feeling well. I have already considered this argument above and held that that is clearly a matter for the judgement of the CCA to make the relevant decision. The existence (or not) of

Mrs Le Poidevin's having a strong opinion on the safety of vaccination does not, in that context, add anything.

99. Finally, there is Article 17 which, is again, in my judgment, no more than a re-enforcing provision, underlining the point that the Human Rights legislation is designed to protect human rights. It says, effectively, that nothing in the Human Rights Convention can be relied upon to justify any authority taking steps to restrict human rights, i.e. the Convention only circumscribes restrictions, and does not provide any grounds for imposing restrictions. As that is not what is in issue here, Article 17 does not, in my judgment, have any relevance.

Decision

100. For the above reasons, I have come to the conclusion that I should accede to the Law Officer's submission that this application for judicial review is not competent to go forward. It is not competent at all in its actual terms but even having investigated closely what might be the substance of it, with regard to what Mrs Le Poidevin really wishes to say, the reasons why she wishes to say it and the approach that she would wish to adopt with regard to adducing evidence of all sorts of matters, I accept the CCA's submission that she does not disclose any arguable grounds for contesting, as a matter of judicial review, either the imposition of Paragraph 5 of the Emergency Powers (Coronavirus) General Provisions (Bailiwick of Guernsey) No.9 Regulations 2021 (or indeed the latest No.10 Regulations which would, I take it, be in very similar form but with the requirement for 21 days isolation reduced to 14), or the specific decision to apply such requirements to her, in her own personal circumstances, upon her recent arrival in the Bailiwick, and the way in which this was done. There is insufficient prospect of her successfully challenging the above to allow the continued pursuit of her application.

101. I will therefore either dismiss the application, or stay it, on the basis that I refuse permission to proceed.

Hazel Marshall QC
Lieutenant Bailiff

Permission to proceed with this Application refused.
Permission to appeal refused, if sought.
No order as to costs.