

Can I go to the park please Dad? Everyday lessons in legal certainty in the English Coronavirus Regulations

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This post analyses the changes made on 13 May 2020 to the coronavirus social distancing [regulations](#) for England. The criterion for analysis is the basic Rule of Law requirement of legal certainty. Certainty allows us to plan our actions, lets the police know what it is they should be enforcing, and most importantly stops us from inadvertently breaking the law. The very limited case-study is the question posed in many households today - can I go to the park please Dad?

The legislative background is set out at the end.

Legal certainty 1 - the Regulations

A key requirement of the Rule of Law is legal certainty. For [Bingham](#) law must be clear and predictable. "Legal certainty" is a requirement in the [Venice Commission Rule of Law Checklist](#) . According to [Simson Caird](#) in his study of the constitutional standards of the House of Lords, "the rule of law requires laws to be reasonably certain. More specifically, [Brandreth and Sandhurst](#) questioned the level of legal predictability in the 26 March iteration of the regulations.

With that in mind, can the Regulations be used to answer some quotidian questions?

1. Can I go to the park with my kids?

- 26 March - Yes, assuming that some "exercise" occurs
- 21 April - As before
- 12 May - Yes, assuming that this is "open-air recreation" or "exercise"

2. Can I play football with my kids in the park?

- 26 March - Yes, assuming the same "household"
- 21 April - As before
- 12 May - As before

3. Can my kids play football with their friends in the park?

- 26 March - No, different household
- 21 April - As before
- 12 May - Not sure. It depends.

- Yes - one child from Household A, and one child from Household B.
- No - one child from Household A, and more than one child from Household B.
- No - Dad can't join the game, because then it would be more than one member of another household. Or perhaps just the sole child is breaking the law (exercising with 2 people from another household), not your family (exercising with 1 person from another household).
- Not sure - one child from household A, one from household B, one from household C. It depends if you construe reg 6(2)(b)(iii) as repetitive and recurring (so that you can have multiple iterations of 1 member of another household) or as a one-off (it only applies once, so a maximum of one other household). Using teleological interpretation, the intention is to reduce the spread of the virus, so the one-off interpretation is probably best.

This is before taking into account regulation 7, which still limits public gatherings to a maximum of 2 persons, unless they are all in the same household. If 3 or more kids play football in the park, and one of them is from a different household, then they are all breaking the law. Assuming that playing football together is a public gathering.

This also doesn't take into account the amendment to Schedule 2. The new paragraph 44 states that outdoor sports courts can now open. So the basketball court is now open, and I can use it, provided that either everyone playing basketball is in my family, or only 1 person from Household A is playing against 1 person from Household B. But if there are more than 3 people, and any one of them is from a different household, they are all breaking the law. Opening up outdoor sports courts only seems to make sense in terms of singles tennis, as any team sports require both teams to all be from the same household.

It is a little confusing.

Legal certainty 2 - Law v Guidance

Law is hard and fast rules, obligations which we must obey, duties which are enforceable in a court, and backed up by sanctions. Guidance is also important, but it is not the same as law. Guidance is something to "have regard to", something which we "ought" to follow. It is the parts of the [Highway Code](#) saying that we "should" do certain things, rather than "must" do other things. The distinction is clear: the NHS [advises](#) me to stop smoking, but the law says it is [unlawful](#) to smoke in an enclosed public space.

There is confusion between the social distancing rules and the social distancing guidance. Take the most obvious example - the 2 metre rule. Everyone knows that we have to stay at least 2 metres away from others if at all possible. Justin Madders MP made the following observation in [debating](#) the English Regulations

Will the Minister provide clarity on the status of the 2-metre social distancing rule? It is probably the most effective tool in helping to stop the spread of the virus, yet it does not appear in the regulations. Does it appear elsewhere? Is it actually enforceable?

The answer is no. It is not a rule. It is very sensible guidance, and ought to be followed by everyone. But it is not law. This disregard for the distinction between law and guidance has been present from the start of the pandemic, see for example the concluding section of my [Report](#) for the Bingham Centre for the Rule of Law on the original Coronavirus Bill.

Legal certainty 3 -Regulations v Ministerial statements


Going back to first principles, the Rule of Law means that we are governed by the law, rather than governed by the wishes (sensible or otherwise) of the person in charge. So the Government may very well offer sensible advice around eating more fruit and veg, or flying less, or helping my kids with their homework, but these are not [rules](#). As Steve Baker MP [said](#), in a debate on these Regulations, "can we please close this gap, so that police officers are not put in the invidious position of trying to enforce what are really no more than Ministers' opinions of what should be done—in other words, things that are not in law".

In the Prime Minister's [address](#) to the nation on 10 May, he said "And from this Wednesday, we want to encourage people to take more and even unlimited amounts of outdoor exercise". The [Coronavirus FAQ](#) page asks, in relation to the 12 May rules - what can I do that I couldn't do before, and answers "exercise outdoors as often as you wish". This follows on from Michael Gove's earlier [pronouncement](#) that we were entitled to exercise outdoors once per day, 1 hour for a walk, 30 minutes for a jog, depending upon your level of [fitness](#).

This is nonsense. [England](#), [Scotland](#) and [Northern Ireland](#) never had a rule limiting exercise to once per day. Wales did have an [express rule](#) for exercising stating "no more than once a day". The only change made in relation to exercise in the latest English Regulations was the addition of "one member of another household". There has been no change to the law in terms of the frequency or duration of outdoor exercise.

What the Government says matters, particularly during an emergency and particularly as it is unlikely that citizens walk around with the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (as amended twice) in their back pocket. For the Government to repeatedly mischaracterise what the actual rules are is a breach of the Rule of Law.

Raphael Hogarth, of the Institute for Government in an excellent [tweet](#) analysis stated



Sitting in the sun etc are not listed as examples, but "reasonable excuse" is an open category, so the fact the PM has told you it's fine should make it a reasonable (ie lawful) excuse.

This is a slippery slope to capriciousness. Do we have a society where a ministerial speech changes the meaning of the law? It would most likely be an abuse of process to be prosecuted for sunbathing if the Prime Minister said that sunbathing is lawful. But it is anathema to our idea of the Rule of Law if what the Prime Minister says becomes, by virtue of him saying it, the law.

Conclusion

Even during a pandemic, the Rule of Law [matters](#). Citizens are entitled to legal certainty. This means that (a) the Regulations must be clear, precise and certain, (b) the distinction between rules and guidance must not be blurred, and (c) Ministers should not mischaracterise what the law actually says.

Legislative background

[Section 45C](#) of the Public Health (Control of Disease) Act 1984 grants the Secretary of State the power to make regulations "for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection". Under an emergency procedure, these regulations come into effect immediately, but cease to have effect after 28 days, unless they are approved by a resolution of each House of Parliament. [Hickman](#) questions why relaxing the restrictions is an emergency, requiring the use of the urgent procedure. In England, social distancing measures have been enacted using this

procedure in 3 separate statutory instruments:

- Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 made on 26 March 2020 and came into force on 26 March 2020
- Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 made on 21 April 2020 and came into force on 22 April 2020
- Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020 made on 12 May 2020 and came into force on 13 May 2020

[Walker](#) has questioned the merits of using the Public Health (Control of Disease) Act 1984 as the appropriate tool for making social distancing regulations. [Sandhurst and Speaight](#) have questioned their vires. I have [questioned](#) the legitimacy of the 21 April 2020 amendments.

The following sets out each successive iteration of regulations 6 and 7 dealing with exercise outside the home. The italics are my addition to show the changes.

Original version, 26 March

6. (1) During the emergency period, no person may leave the place where they are living without reasonable excuse.

(2) For the purposes of paragraph (1), a reasonable excuse includes the need -

(b) to take exercise alone or with other members of their household

7. During the emergency period, no person may participate in a gathering in a public place of more than two people except-

(a) where all the persons in the gathering are members of the same household

Incorporating amendments, made on 21 April

6. (1) During the emergency period, no person may leave or be outside of the place where they are living without reasonable excuse.

(2) [no change]

7. [no change]

Incorporating amendments, made on 12 May

6. (1) During the emergency period, no person may leave or be outside of the place where they are living without reasonable excuse.

(2) For the purposes of paragraph (1), a reasonable excuse includes the need -

(b) to take exercise-

(i) alone,

(ii) with one or more members of their household, or

(iii) with one member of another household.

(ba) to visit an open public space for the purposes of open-air recreation to promote their physical or mental health or emotional wellbeing

(i) alone,

(ii) with one or more members of their household, or

(iii) with one member of another household.

7. [no change]

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