

## The Scottish Government's continued restrictions on outdoor recreation from a human rights perspective

### Description

This post takes a further look ([see here](#)) at the Scottish Government's continued unfair restrictions on people's right to travel for outdoor recreation and why they have been able to get away with this.

### The change in the Stay at Home "rule"

Both the UK and Scottish Governments have muddied the differences between "law" and "advice" by describing both as "rules". The Stay at Home "rule" provides a classic example.

The legal restrictions introduced in England on 5th January were initially draconian, only allowing people out of their homes for physical exercise, not recreation, similar to the first lockdown a year ago. The law was then quietly changed on 20th January when outdoor recreation was added to the list of reasonable excuses for leaving the home. In England, the stay at home law didn't impose any fixed limit on how far you could travel for exercise or outdoor recreation, only that this had to be reasonable. The advice was to stay as local as possible and not to travel to beauty spots. The media publicity when Boris Johnson was photographed cycling in the East End of London and the £200 fines dished out to two women travelling five miles for a walk ([see here](#)), however, led to confusion about how far it was legally possible to travel for exercise or outdoor recreation.

As the pandemic lessened, people who were confident about their rights started to travel further e.g. a fair number of people from the north west of England have been regularly going to the Lakes for the day for some weeks now while others cowered at home. Where the law in England continued to be more draconian than in Scotland was the ban on taking exercise or outdoor recreation with anyone from another household, which lasted until 8th March, and the level of fines which was much higher than in Scotland.

The end of the Stay at Home "Rule" in England on 29th March was marked by significant changes in both the law and guidance. On that date the Health Protection (Coronavirus Restrictions) (All Tiers) (England) Regulations were repealed entirely and replaced by the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 ([see here](#)). The new regulations contain no provisions about staying at home or restricting travel within the UK (as opposed to foreign travel). Instead, they limit where people can go through restrictions on gatherings (indoors and outdoors), requirements for holiday accommodation to remain closed and by listing all the various types of business that must remain closed. Alongside this, the guidance in England has also changed and now explicitly allows people to travel unlimited distances for outdoor recreation or exercise for the day. The advice not to stay away overnight will be modified on 12th April when self-catering accommodation should be allowed to re-open.

The Scottish Government has taken a very different legal approach to England. On 5th January it too introduced a new legal restriction requiring people to stay at home.

**[F97 Requirement to stay at home in Level 4 areas**

17.—(1) A person who is living in a Level 4 area must not leave **[F98** or remain outside of] the place where that person is living.

(2) For the purposes of sub-paragraph (1), the place where a person is living includes the premises where they live together with any garden, yard, passage, stair, garage, outhouse or other appurtenance of such premises.

(3) Sub-paragraph (1) does not apply to any person who is homeless.

The Restriction introduced on 5th January, less an accompanying list of reasonable excuses for breaching it.

But this was in addition to the existing restriction that was in place for travel ([see here](#)). Since the list of reasonable excuses accompanying both restrictions were almost identical (both allowed you to go out for exercise and outdoor recreation within five miles of your local authority boundary), the Stay at Home restriction made very little difference to what you actually could and couldn't do. It was this restriction that Nicola Sturgeon referred to when she said the Stay at Home Rule was being repealed on 2nd April ([see here](#)). She was right to refer to it as a rule, but since it was effectively a duplicate rule — an example of regulatory overload — its repeal will make very little difference for most people. Hence why so little changed on Friday 2nd April.

These Regulations amend the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 to revoke the requirement to stay at home in a Level 4 area from Friday, 2 April 2021. These Regulations also provide that a person who lives in a Level 4 area must not leave or remain away from that area. These Regulations amend the restriction on public gatherings outdoors in a Level 4 area to provide an exception for a gathering outdoors which is for the purpose of organised exercise for persons under 18 years of age (previously this exception only applied to persons under 12 years of age). These Regulations expand the list of retailers allowed to open in Level 4 areas, providing that hairdressing and barber services may be provided where those services are provided exclusively by appointment and extend the circumstances in which retail services may be provided by way of a click and collect service. These Regulations widen the definition of “relevant sporting body” and “senior representative” and make a number of consequential amendments in order to provide that an additional group of elite athletes are able to train and compete. Finally, these Regulations adjust the face coverings requirements to make clear that face coverings are required in polling stations or premises where votes are opened and counted, unless you have a reasonable excuse and remove the requirement for visitor information to be collected if a hospitality venue is being used as a polling station, in line with the true policy intention.

What actually matters in terms of the ability of people to exercise their freedom are, for physical exercise and outdoor recreation, the travel restrictions and, for everything else, the closures of named

businesses, where you can go indoors (e.g. other people's houses, shops ) etc etc. In Scotland some of that will change slightly on 5th April when some businesses (hairdressers, some retail, click and collect) can re-open. The travel restrictions, however, are not due to change until 26th April so people's right to go out for outdoor recreation won't really change till then.

There is, however, one significant exception. The removal of the Stay at Home requirement from the regulations would appear to mean that is no longer unlawful for a person to stay outdoors overnight, as long as they keep to the travel rules. In other words people should now, quite legally, be able to go camping or campervanning anywhere their local authority area and also, potentially, to go backpacking further afield as long as they start and finish at the same place within five miles of their local authority boundary.

Working that out, however, from the much amended and extremely convoluted Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 ([see here](#)) is quite a challenge. In my view the law in England is far simpler to understand and includes a clear legal framework for each step out of lockdown.

## Where has the science gone?

It is very difficult to see any scientific rationale or justification for the following:

- From 5th April, in Scotland you will be able to go to a hairdresser or barber, which involves close personal contact, but you cannot go more than five miles beyond your local authority boundary for a walk until 26th April. In England, it's the other way round: you can now travel anywhere you like for outdoor recreation but hairdressers won't be opening until 12th April
- On 26th April, on the same day residents of Scotland will be allowed to travel for outdoor recreation, the following is planned: all remaining shops and mobile close contact services can resume; gyms and swimming pools can reopen for individual exercise; driving lessons and tests will restart; the limit for attending weddings and funerals will increase to 50; indoor hospitality can open without alcohol and outdoor hospitality can stay open until 10pm. Does Outdoor Recreation really pose similar risks of spreading Covid-19 to all these things?
- In Scotland self-catering accommodation, which involves contact with no-one if done in household groups, will be re-opening the same day as hotels, 26th April. In England self-catering is opening on 12th April, earlier than hotels, B and Bs etc. Which is more rational? In England the repeal of the Stay at Home regulations also make it quite legal for people to go and stay in second homes or their caravan so long as this is not let out as holiday accommodation, whereas in Scotland this too will be illegal until 26th April.

The discriminatory impact of the current travel regulations are severe:

- People who live in one of Scotland's main cities, Aberdeen, Dundee, Edinburgh or Glasgow, have few options for outdoor recreation and even fewer, if they are concerned about their vulnerability to Covid-19. But people living in Inverness, Perth or Stirling can access hundreds of square miles of countryside

- For people who live in one of Scotland's smaller local authorities geographically (Clacks, Midlothian, East Renfrewshire, West and East Dunbartonshire) the constraints on their rights are even worse. Leafy, East Dunbartonshire may be, but there are 108,000 people living within 67 square miles, a population density of 1600 per square mile. That compares to Argyll and Bute, whose population of 80,000 people is spread over 2,668 square miles, a population density of 32 per square mile. People living in Argyll and Bute have many options to climb, hill walk, sail, canoe, camp, sit on a beach etc but people living in East Dunbartonshire have none of those choices.

## **The case for a legal challenge**

The Scottish Government's track record during Covid-19 shows it has little respect for human rights, whether this is the right of people to see their relatives in a care home (an activity with some risk) or the right of people to go out for a walk in the countryside (an activity that is almost entirely risk free). Despite considerable evidence about the very low risks of catching Covid-19 outdoors and evidence about the terrible impact these restrictions are having on people's physical and mental health has failed to change the Scottish Government's position or that of its official advisers.

Ten days ago Lord Braid ruled in the Court of Session that the Scottish government's restrictions on places of worship disproportionately interfered with the freedom of religion as secured in the European Convention on Human Rights and was therefore unlawful. The restrictions were struck down with immediate effect. If restricting people's ability to enter a place of worship, while maintaining a 2 metre physical distance, is a disproportionate response to preventing the spread of Covid-19, stopping people from travelling for outdoor recreation is surely even more so. So why has there not been a legal challenge, using for example the rights in the European Convention to freedom of movement?

The explanation, I believe lies in the fact that the 27 religious organisations that brought the legal challenge are almost completely independent of government and therefore risked little by taking the Scottish Government to Court. By contrast, the organisations that represent outdoor recreational interests, are all now dependent on Scottish Government funding and this severely constrains their ability to speak up for what is right. Ramblers Scotland, for example, may have stopped promoting the Scottish Government restrictions but they can't actually criticise them publicly ([see here](#)).

Unfortunately our politicians, who might have created some political space that would have enabled recreational organisations to speak out, have remained silent. Perhaps the election hustings being organised by Scotways on 16th April ([see here](#)), while focused on the need for recreational infrastructure, might provide an opportunity to ask some awkward questions?

## **The mis-use of the law by our public authorities**

In the absence of any protest or political debate about the continuing restrictions on outdoor recreation, our Public Authorities have been allowed to abuse the law.

On Friday Cairngorm Mountain quietly re-opened the road up to Coire Cas which they had closed unlawfully i.e. without any road traffic regulation order last December. At the time of writing they still haven't updated their website or Facebook Page to say so.

Meantime, the Loch Lomond and Trossachs National Park Authority on 1st April announced ([see here](#)) they are not re-opening their camping permit areas until 26th April. That is an abuse of the camping byelaws. While camping was not possible while the Stay at Home restrictions were in force, now they have been rescinded people living in the three local authority areas which are covered by camping management zones should be able to camp in those areas. However, if they attempt to do so, they risk being criminalised under the camping byelaws even though they can camp quite legally in areas just outside these zones. This is wrong and is another example of the camping byelaws being used for purposes other than those for which they were originally intended.

## What needs to happen?

It's probably too late to crowd-fund a legal challenge against the travel restrictions as they apply to outdoor recreation it took the churches months but now is the right time to start campaigning to prevent similar limits being imposed in future. Three days ago Nicola Sturgeon announced that if she is elected again she will set up an inquiry into the Scottish Government's handling of the Covid crisis before the end of the year. We need to ensure that any Public Inquiry includes detailed consideration of the Scottish Government's restrictions on outdoor recreation during the crisis, including:

- how the evidence for the risks of spreading Covid-19 through outdoor recreation informed Scottish Government policy;
- how the evidence of the risks of spreading Covid-19 through using the road network informed Scottish Government policy (e.g to what extent were concerns that people might spread Covid-19 by breaking down or needing to re-fuel justified?);
- the impact that the restrictions on outdoor recreation had on people's physical and mental health and the extent to which the adverse impacts of lockdown could have been mitigated through promoting outdoor recreation for all;
- the differential impacts across Scotland of using local authority boundaries as a basis for imposing the restrictions and what consideration the Scottish Government gave to the fairness of this and potential alternatives;
- whether, taking all these factors in account, the restrictions that have affected outdoor recreation have been proportionate in terms of human rights law and therefore lawful;
- how the enforcement measures in the various iterations of the Restrictions Regulations, as they applied to outdoor recreation, were applied by the police and whether this was done equitably;
- the way in which public authorities used other laws to prevent people exercising their access rights to undertake outdoor recreation ([see here](#)) and the Scottish Government's response to this;
- and lastly, the Scottish Government's response to people who took the law into their own hands (e.g. the closure of the public road to Cairn Gorm, the blocking off of laybys).

Quite a list! If you have other suggestions, do add in the comments below.

## Category

1. Access rights

## **Tags**

1. access rights
2. camping
3. Covid-19
4. outdoor recreation
5. Scottish Government

## **Date Created**

April 4, 2021

## **Author**

nickkempe

*default watermark*