Neutral Citation Number: [2021] EWHC 2031 (Admin)

Case No: CO/2105/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2021

Before

LORD JUSTICE LEWIS AND MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

MANCHESTER AIRPORTS HOLDINGS LIMITED — **Claimant**

-and-

(1) SECRETARY OF STATE FOR TRANSPORT
(2) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendants

-and-

(1) RYANAIR DAC
(2) INTERNATIONAL AIRLINES GROUP
(3) VIRGIN ATLANTIC AIRWAYS LIMITED
(4) TUI UK LIMITED
(5) EASYJET AIRLINE COMPANY LIMITED

Interested Parties

-and-

CLIVE JACOBS

Intervener

- -

TOM HICKMAN QC & TOM LEARY (instructed by **Hogan Lovells Solicitors**) for the **Claimant**

DAVID BLUNDELL QC & JULIA SMYTH & YAASER VANDERMAN (instructed by **Government Legal Department**) for the **Defendants**

NICOLAS DAMNJANOVIC (instructed by **Stephenson Harwood LLP**) for the **First Interested Party**

The remaining Interested Parties did not attend. The Intervener had permission to intervene only to the extent of filing written evidence.

Hearing date: 9 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:00 am 20 July 2021.

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LORD JUSTICE LEWIS and MR JUSTICE SWIFT:

A. Introduction

1. This challenge arises from amendments made by the Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 2) Regulations 2021 to the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 ("the Amendment Regulations" and the "International Travel Regulations", respectively). The International Travel Regulations are the latest instalment of restrictions affecting travel outside England, and persons arriving in England from abroad, imposed to reduce the risk of transmission of Covid-19. Various restrictions on international travel, taking various forms, have applied since June 2020.

2. The International Travel Regulations were made on 14 May 2021 and came into effect on 17 May 2021. They established a so-called traffic light system of restrictions on persons entering England from countries outside the common travel area (as defined by section 1(4) of the Immigration Act 1971, i.e., the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland). The system places countries outside the common travel area in one of three categories: each category is contained in a Schedule to the Regulations. Different restrictions apply to each category. The categories are referred to colloquially as the green, amber and red lists. In this judgment we will refer to these lists collectively as "the traffic light lists". The Claimant's challenge (which comes before us as a rolled-up hearing) was prompted by decisions announced by the First Defendant ("the Secretary of State") on 3 June 2021 which were then put into effect by the Amendment Regulations. The Amendment Regulations were made on 6 June 2021, laid before Parliament on 7 June 2021 and came into force on 8 June 2021. Among other matters, they amended the Schedules to the International Travel Regulations, with the consequence that Portugal ceased to be on the (Category 1/Schedule 1) green list (falling by default into the (Category 2/Schedule 2) amber list), and each of Afghanistan, Bahrain, Costa Rica, Egypt, Sri Lanka, Sudan and Trinidad and Tobago was added to the (Category 3/Schedule 3) red list (each had previously been on the amber list). The primary thrust of the Claimant's challenge is that these decisions were taken without proper reasons being given and without proper notice of the criteria applied when deciding that countries should move from one list to another. The Claimant also raises an issue as to the meaning and effect of regulation 24 of the International Travel Regulations, a provision that requires the Secretary of State periodically to review the requirements imposed by the Regulations.

(1) The International Travel Regulations

3. The International Travel Regulations were made pursuant to powers in the Public Health (Control of Disease) Act 1984 ("the 1984 Act"). By section 45B(1) of the 1984 Act the Secretary of State has power to make regulations *"… for preventing danger to public health from vessels, aircraft, trains or other conveyances arriving at any place …"*. The power to make regulations

under the 1984 Act is exercisable by statutory instrument: see section 45P(1). Sections 45Q and 45R of the 1984 Act prescribe the parliamentary procedures required to make regulations under the 1984 Act. Each of the International Travel Regulations and the Amendment Regulations was made under the negative resolution procedure.

4. The International Travel Regulations were preceded by a report produced in April 2021 by the Global Travel Taskforce: *"The Safe Return of International Travel"*. The Taskforce is a cross-governmental body, convened in February 2021 by the Secretary of State at the request of the Prime Minister with terms of reference to report *"… with recommendations aimed at facilitating a return to international travel as soon as possible, while still managing the risk from imported cases and variants of concern"*. The Government's stated intention was that following delivery of this report it would decide when international travel should resume.

5. International travel has been severely disrupted by the Covid-19 pandemic and during the past 15 months has been affected by various restrictions contained in regulations made under the 1984 Act. Restrictions requiring persons entering England to self-isolate were first put in place in June 2020, and, in one form or another, have remained in force since. In addition, measures in place have included bans on direct flights between some countries and England and bans on entry affecting the nationals of specific countries, and restrictions on persons in England preventing them (absent good reason) from leaving to travel to destinations outside the United Kingdom.

6. The Taskforce's report included the following:

> "19. The overarching principle is for a clear and evidence-based approach to facilitate the safe, sustainable and robust return of international travel while managing the risks from imported cases and Variants of Concern. The health risk posed by arrivals from different countries varies considerably and is likely to change over time as infection rates fluctuate, Variants of Concern are identified, and vaccine programmes are rolled out, so the principles of a risk–based approach has received consistent support throughout the GTT's engagement across government, and with the transport industry, academics, and trade unions.
>
> …
>
> 22. To respond to the new context, we will launch a new approach for England from 17 May at the earliest, for all countries, to which different restrictions are applied depending on risk. This risk will likely be based on factors such as the level of community transmission of Variants of Concern, levels of testing, genomic sequencing and reporting. This will allow the UK government the flexibility to adapt to the evolving

> health situation around the world while keeping borders open.
>
> - Red countries: High-risk countries (currently known as "red list")
> - Amber countries: Moderate-risk countries.
> - Green countries: Low-risk countries.
>
> 23. The allocation of countries will be kept under review and respond to emerging evidence, with a particular focus on Variants of Concern. The Joint Biosecurity Centre will publish data and analysis to support the process of allocating countries. Allocations will inevitably change …"

7. The International Travel Regulations concern travel to England by persons coming from outside the common travel area. The Regulations put in place a series of requirements for travellers to provide information; in certain circumstances to be tested to determine whether they are infected with coronavirus; and to undertake periods of quarantine referred to in the Regulations as a requirement to self-isolate (see regulation 9). The self-isolation requirement applies to persons who arrive from, or who recently prior to arriving in England have spent time in, countries falling within either Category 2 (at Schedule 2 to the Regulations – the amber list) or Category 3 (at Schedule 3 to the Regulations – the red list). Schedule 1 to the Regulations lists the Category 1 countries which are referred to as green list countries. Category 1 and Category 3 countries are identified by name in each of the respective Schedules. Category 2 countries comprise all other countries, i.e., any country not named in either Category 1 or Category 3.

8. Under the International Travel Regulations as originally made, persons arriving from or arriving having recently been in amber list countries are required to self-isolate for 10 days. The period of self-isolation reduces to 5 days if the person concerned tests negative for coronavirus after a set period of time: see Schedule 8 paragraph 4, and Schedule 10 paragraph 5. Regulation 9 makes detailed provision about the place of self-isolation. However, in most instances, persons arriving from amber list countries will self-isolate at their home address. Schedule 11 to the International Travel Regulations makes further provision for those entering England from or after recently being in red list countries. Such persons may only enter England by certain airports, and they must have arranged a "managed self-isolation package" comprising accommodation at a place designated by the Secretary of State, transport to that place, and a testing package (i.e., arrangements to be tested for coronavirus infection).

9. Regulation 24 of the International Travel Regulations which is the subject of Ground 1 of the Claimant's challenge provides:

> "**24. Review of need for requirements**.
> The Secretary of State must review the need for the requirements imposed by these Regulations by 14 June 2021 and at least once every 28 days thereafter."

(2) Allocation to the traffic light lists: the Risk Assessment Methodology document, and the traffic light review

10. One matter that is important when it comes to analysis of the Claimant's claim is how countries came to be placed in each of the traffic light lists when the International Travel Regulations were made. This is explained in the *"Risk assessment methodology to inform international travel traffic light system"* ("the Risk Assessment Methodology") published by the Secretary of State on 11 May 2021, three days before the International Travel Regulations were made.

11. The opening paragraphs of the Risk Assessment Methodology state as follows:

> "The Joint Biosecurity Centre (JBC), part of the UK Health Security Agency, in partnership with devolved administrations, has developed a dynamic risk assessment methodology to inform ministerial decisions on red, amber and green list countries and territories, and the associated border measures. This methodology has been endorsed by the JBC technical board (4 UK Chief Medical Officers and their relevant specialists, such as Chief Scientific Advisers).
>
> JBC reviews over 250 countries and territories. As a precautionary approach, countries and territories are assumed to be amber unless there is specific evidence to suggest they are:
>
> - green – presenting (with confidence) a low public health risk to the UK from all COVID-19 strains
> - red – presenting a high public health risk to the UK from known variants of concern (VOC), known high-risk variants under investigation (VUI) or as a result of very high in-country or territory prevalence of COVID-19."

12. Thus, the default position is that every country will be on the amber list. As the document explains, this decision was taken as a precautionary measure in circumstances in which all countries are affected by the Covid-19 pandemic with the consequence that the people arriving from all countries present a risk of transmission and should be required to self-isolate. Any decision to move a country from the amber list will depend on the existence of specific evidence, either that persons arriving from those countries present only a *"low risk to public health from all COVID strains"* in which case the country would be removed to the green list; or if there is specific evidence that persons arriving from certain countries present a high public health risk, the country will be removed to the red list.

13. On 3 June 2021 the Secretary of State published a press release explaining what was described as the result of the *"first traffic light review"*. The material part of the press release said this:

> "The first update to the government's traffic light list for international travel has taken place today (Thursday 3

> June 2021), with Portugal moved to the amber list to safeguard public health against variants of concern and protect our vaccine roll out.
>
> Seven countries – including Sri Lanka and Egypt – have also been added to the red list. All changes to the list will come into effect at 4am on Tuesday 8 June.
>
> The decision to move Portugal (including Madeira and the Azores) to the amber list follows increased concern in the spread of variants of coronavirus, including a mutation of the Delta variant, and the risk that is posed of bringing these back to the UK if people are not required to quarantine.
>
> The situation in Portugal has required swift action to protect the gains made with the vaccine roll out – there has been an almost doubling in the COVID-19 test positivity rate in Portugal since the first review for traffic light allocations, far exceeding the ONS estimated national positivity rate in the UK. More significantly, according to data published on GISAID … 68 cases of the Delta variant of concern have been identified in Portugal, including cases of the Delta variant with an additional, potentially detrimental, mutation."

This decision was put into effect by the Amendment Regulations which were made on 6 June 2021 pursuant to the power at section 45B of the 1984 Act, and came into force on 8 June 2021.

14. On 8 July 2021, the day before the hearing of this application, the Secretary of State announced that further revision is to be made to the International Travel Regulations including that with effect from 19 July 2021, persons arriving in England from or after spending time in amber list countries will not be required to self-isolate if they have been fully vaccinated against Covid-19 with an NHS-administered vaccine in the United Kingdom. Mr Hickman QC who appears for the Claimant, Manchester Airports Holdings Limited, submitted that even though this may mean more people will now be able to travel abroad and return without having to self-isolate, the change announced does not render the claim academic as there will be a proportion of people who are not yet fully vaccinated and to whom the International Travel Regulations continue to apply. We accept that submission.

(3) The Claimant, the Interested Parties, the Intervener, and the Claimant's case in summary.

15. Manchester Airports Holdings Limited owns and operates three airports in England: Manchester, London Stansted, and the East Midlands airport. These are substantial undertakings; in a statement made for these proceedings, Tim Hawkins, the Claimant's Chief of Staff explains that prior to the pandemic some 60 million passengers used its airports each year. The First, Second, Third and Fifth Interested Parties all operate well-known

airlines; the Fourth Interested Party is a German-based multi-national company whose business is travel and tourism. We have received evidence and heard submissions from the Claimant and the First Interested Party. Clive Jacobs, a long-time operator of various travel businesses, applied to intervene by way of a written statement and exhibits. None of the parties objected to Mr Jacobs' application; we allowed it and have considered his evidence.

16. The Claimant's claim falls into two parts. The first part (Ground 1) concerns the meaning and effect of regulation 24 of the International Travel Regulations. The specific issue is whether the obligation to *"... review the need for the requirements..."* imposed by the International Travel Regulations includes an obligation to review whether countries should stay in their existing traffic light list or move to a different list. The second part of the claim (all the remaining Grounds) comprises the Claimant's case that the Secretary of State is under a legal obligation to publish reasons for the decisions announced on the 3 June 2021 and given effect to by the Amendment Regulations; that the reasons should include the methodology relied on to reach decisions that Portugal should be removed from the green list, that the other countries including Sri Lanka and Egypt should go to the red list, and that all countries on the amber list pursuant to the International Travel Regulations should remain on that list; and that all the data relied on when those decisions were made should be published. The Claimant contends this obligation exists by reason of any/all of the common law duty to give reasons; an obligation of "transparency"; a legitimate expectation arising from comments made by the Secretary of State at a press conference on 7 May 2021; and by reason of the Claimant's Convention rights, that is, its rights under article 1 of Protocol 1 to the European Convention on Human Rights.

B. Decision

(1) Ground 1: the meaning and effect of Regulation 24.

17. The Claimant's contention is that the review required by regulation 24 encompasses reconsideration of whether countries should stay where they are on the traffic light lists or move from one list to another. The Claimant submits that the contents of the Schedules are inextricably linked to the scope of application of restrictions imposed by the International Travel Regulations, including the requirement to self-isolate. By reference specifically to regulation 9, the Claimant contends there is no logical reason to read regulation 24 as if it applied to the requirement to self-isolate expressly referred to in regulation 9, but not to each of the categories specified in Schedules 1 – 3 respectively, which identify the scope of that self-isolation requirement.

18. The Secretary of State's case to the contrary was put as follows in his Skeleton Argument:

> "15. … The obligation under reg. 24 is to review "*the need for the requirements imposed by these Regulations"*. What is at issue on such a review is, therefore, whether the requirements imposed under the Regulations on travellers and travel operators are still necessary and proportionate; in other words,

> the need for the system itself. This includes, for example: the necessity and proportionality of requiring those returning from Red list countries to be subject to the Managed Quarantine Service; the requirement from those returning from Amber list countries to self-isolate at a specified address for 10 days; and, the requirement for those persons arriving in England from outside the common travel area to possess a valid notification negative COVID-19 test result."

Mr Blundell QC, for the Secretary of State, further submitted that provisions like regulation 24 are present in many if not all the Regulations made since March 2020 which have put in place temporary measures aimed at restricting the spread of Covid-19. He submits this sort of provision should only be understood as applying to requirements imposed by those regulations (including the International Travel Regulations) and not to matters going to the application in practice of a requirement. Thus, in the context of the International Travel Regulations establishing a list such as those in each of the Schedules 1 to 3 to the Regulations is a requirement, but the contents of the lists do not themselves comprise any form of requirement that is relevant for the purposes of regulation 24.

19. We accept the Claimant's submission on Ground 1. As a matter of interpretation, the requirements in regulation 9 are that persons travelling from, or who have recently been in, certain countries (identified by cross-referring to Schedule 2 rather than by including the names in regulation 9 itself) must self-isolate on coming to England. It is the need for those requirements that is to be reviewed. That necessarily involves consideration of whether persons returning from particular countries, or who have recently been in certain countries do need to self-isolate.

20. That interpretation is reinforced by consideration of the purpose underlying the International Travel Regulations. They were made with a view to regulating travellers arriving in England by imposing restrictions on them. The application and extent of those restrictions depends directly on whether they have arrived from or recently been in either an amber list country or a red list country. The purpose of a review is to consider whether the restrictions in place – in terms of the content of the restrictions and the countries from which people are travelling – are now needed or should be amended. The obvious purpose of regulation 24 is impaired if a distinction is drawn between the self-isolation restriction *per se* and matters going to its scope of application so that only the former, but not the latter, needs to be reviewed.

21. Regardless of how the Secretary of State's submission may apply to any other set of regulations, the logic of his submissions breaks down when set against the way in which the International Travel Regulations are formulated. The lists in Schedules 1 to 3 exist only to give substance to provisions such as the self-isolation requirement in regulation 9. The requirement arising from regulation 9 does not make sense in terms of providing public health protection, unless it is read as requiring self-isolation on arrival from specified countries.

22. Nevertheless, the Secretary of State does make a further practical point which we do accept. To date, when exercising the regulation 24 review power, the Secretary of State has in fact reviewed the contents of the green list and the red list and in consequence therefore, of the amber list too. That being so, the Secretary of State has carried out the review required by regulation 24 in a lawful manner. He has not acted unlawfully; he has conducted a review which meets the requirements of the regulation. This part of the Claimant's challenge raises no matter of practical significance, at least no matter which has to date been one of practical significance. We will return to the consequence of this in the final section of this judgment.

(2) The duty to give reasons and the obligation of "transparency".

23. The Claimant's remaining grounds of challenge overlap. The Claimant's overall submission is that by reason of one, all, or any combination of the remaining grounds of challenge the Secretary of State is subject to a legal obligation which requires him to publish reasons why the Amendment Regulations moved Portugal from the green to the amber list and other countries from the amber to the red list; reasons why countries on the amber list were not changed by the Amendment Regulations; the criteria that were applied, and the data relied on, when taking all these decisions. Although the Claimant advances the remaining grounds collectively, it is important for sake of clarity to consider each in turn. We do not consider the cumulative effect of these arguments is greater than the sum of the parts.

24. The first part of the Claimant's submission rests on the common law principle described by Elias LJ in *R(Oakley) v South Cambridgeshire District Council* [2017] 1 WLR 3765. At paragraph 30 of his judgment, having noted Lord Mustill's conclusion in *R v Secretary of State for the Home Department ex parte Doody* ([1994] 1AC 531) that there was no general obligation at common law that public authorities give reasons for administrative decisions, Elias LJ said

> "… it may be more accurate to say that the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so."

25. We do not accept that this assists the Claimant in this case. First, the true target of the Claimant's challenge is not an administrative decision but regulations 6 and 7 of the Amendment Regulations (i.e., the regulations that varied the contents of the Schedules to the International Travel Regulations). There is no express statutory obligation, either in the 1984 Act or the International Travel Regulations, to give reasons for amending regulations, or indeed when reviewing the need for the requirements contained in the International Travel Regulations pursuant to regulation 24.

26. Furthermore, it is well-established that where secondary legislation is challenged on grounds of alleged procedural error not arising from any procedure prescribed in the enabling power in primary legislation, the common law will not ordinarily intervene to supplement the provision made in the primary legislation. In *R(BAPIO Action Limited) v Secretary of State*

for the Home Department [2007] EWCA Civ 1139, the Court of Appeal considered a claim that changes to the Immigration Rules (which had been made in exercise of powers in the Immigration Act 1971) were unlawful for want of prior consultation. All members of the court concluded that the common law duty of fairness could not provide a sufficient basis for an obligation to consult before changes to the Rules were made: see per Sedley LJ at paragraphs 41 – 47. The other judges, Maurice Kay LJ and Rimer LJ agreed. But they also went further. At paragraph 58 Maurice Kay LJ said as follows:

> "58. I wholly agree with Sedley LJ's reason for concluding that a duty to consult did not arise in this case, namely the non-specific nature of the alleged duty and the lack of clear principle by which to define it. For my part, however, I would not so readily reject one of the alternative submissions made by Ms Laing on behalf of the Home Secretary. Whilst I do agree with Sedley LJ that the Rules are susceptible to judicial review on grounds such as *ultra vires* or irrationality, I doubt that, as a matter of principle, a duty to consult can generally be superimposed on a statutory rule-making procedure which requires the intended rules to be laid before Parliament and subjected to the negative resolution procedure. I tend to the view that, in these circumstances, primary legislation has prescribed a well-worn, albeit often criticised, procedure and I attach some significance to the fact that it has not provided an express duty of prior consultation, as it has on many other occasions. The negative resolution procedure enables interested parties to press their case through Parliament, although I acknowledge that their prospects of success are historically and realistically low. They also retain the possibility of challenge by way of judicial review on the sorts of substantive ground to which I have referred. For these additional reasons I would be minded to reject the appeal to procedural fairness as the basis of a legal duty of consultation. I do not feel driven to this conclusion by authority. Indeed, I share Sedley LJ's view that the *Nottinghamshire* case (above, paras 29 and 30) and *Bates v Lord Hailsham* (above, para 32) are not or are no longer directly in point. However, as a matter of principle, I consider that where Parliament has conferred a rule-making power on a Minister of the Crown, without including an express duty to consult, but subject to a Parliamentary control mechanism such as the negative resolution procedure, it is not generally for the courts to superimpose additional procedural safeguards. In one sense, this view gains support from the reasoning by reference to which Sedley LJ would dismiss the appeal. The lack of specificity and the absence of a clear principle of limitation which exist in the present case would, in my view, be present in most cases in which an unexpressed duty to consult might be postulated."

Rimer LJ concurred at paragraph 64 to 65

> "64. Maurice Kay LJ, whilst agreeing with Sedley LJ that no duty to consult arose in this case, favours a more sharp-edged view. That is that in a case such as the present in which, in section 3, Parliament has prescribed a particular procedure for the rule making process, being one that is subject to the control mechanism of the negative resolution procedure, but which does not include any express duty to consult, there will generally be no scope for the superimposition of additional procedural safeguards on the prescribed statutory procedure by way of an appeal to the courts on the grounds that fairness requires a duty to consult.
>
> 65. I respectfully prefer and agree with the views expressed by Maurice Kay LJ. The practical difficulties that have led Sedley LJ, on his own approach, to reject any duty of consultation in the present case provide in my judgment a compelling inference that the real explanation as to why appellants are not entitled to succeed on the consultation issue is that it is simply no part of the scheme of section 3 that there should be any consultation; and if that is the legislature's scheme, it is not for the courts to re-write it. I regard that view as supported by the fact that, as was cogently illustrated to us, the legislature is well able when it chooses to do so to identify whether any and, if so, what consultation process should precede any legislative changes, yet in the case of section 3 it chose to remain silent on the topic."

In other words, a court ought not to rewrite or supplement a legislative scheme for the adoption of secondary legislation.

27. This principle was applied by the Court of Appeal in *R(Delve) v Secretary of State for Work and Pensions* [2021] ICR 236, dismissing a claim that primary legislation that raised the state pension age for certain cohorts of women was unlawful because the Secretary of State for Work and Pensions had failed to take adequate steps to notify the women affected by the change. This obligation, the claimant in that case contended, arose by reason of the common law obligation of fairness. The court rejected that contention. It accepted the reasoning of Maurice Kay LJ and Rimer LJ: see the judgment at paragraphs 103 to 105.

28. Although the issue before us concerns an obligation to give reasons and not an obligation of prior consultation, the principle identified by Maurice Kay LJ holds good in this case. It will rarely be appropriate to supplement a prescribed parliamentary procedure for making secondary legislation by imposing additional requirements. In this case, amendments are made by the Secretary of State, laid before Parliament, and are subject to the negative resolution procedure. Absent some specific reason, no further legally enforceable obligation should be superimposed requiring the provision of reasons for or further information and data relied upon in the making of secondary legislation.

29. At the hearing we were provided with the judgment of the Supreme Court in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700, although no party made submissions by reference to this judgment. In that case the majority of the Supreme Court did read-in a requirement to give prior notice to and invite representations from a bank which was targeted for economic sanctions, notwithstanding the sanctions were imposed through secondary legislation and the relevant primary legislation provided for no such process. We consider this authority has little to say that is relevant to the issue before us. The court in *Bank Mellat* readily accepted that the situation before it was far distant from that before the Court of Appeal in *BAPIO*. At paragraph of 44 of his judgment Lord Sumption said this:

> "44. Where the courts have declined to review the procedural fairness of statutory orders on the ground that they have been subject to Parliamentary scrutiny, they have not generally done so on the ground that Parliamentary scrutiny excludes the duty of fairness in general or the duty of prior consultation in particular. These decisions have generally been justified by reference to three closely related concepts which for my part I would not wish to challenge or undermine in any way. First, when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy. Second, there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are targeted at particular persons. The courts originally developed the implied duty to consult those affected by the exercise of statutory powers and receive their representations as a tool for limiting the arbitrary exercise of statutory powers for oppressive objects, normally involving the invasion of the property or personal rights of identifiable persons. *Cooper v Board of Works for the Wandsworth District* … was a case of this kind, and when Willes J (at 190) described the duty to give the subject an opportunity to be heard as a rule of "universal application", he was clearly thinking of this kind of case. Otherwise, the proposition would be far too wide. While the principle is not necessarily confined to such cases, they remain the core of it. By comparison, the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, generally based on a promise or established practice. Third, a court may conclude in the case of some statutory powers that Parliamentary review was enough to satisfy the requirement of fairness, or that in the circumstances Parliament must have intended that it should be. It is particularly likely to take this view where the measure impugned is a general legislative measure. The

> reason is that when we speak of a duty of fairness, we are speaking not of the substantive fairness of the measure itself but of the fairness of the procedure by which it was adopted. Parliamentary scrutiny of general legislative measures made by ministers under statutory powers will often be enough to satisfy any requirement of procedural fairness. The same does not necessarily apply to targeted measures against individuals."

30. Then, at paragraph 46 of his judgment, Lord Sumption drew a distinction between measures contained in secondary legislation that were "legislative" (such as the immigration rules considered in *BAPIO*) and those which were not such as the targeted restriction imposed on Bank Mellat. The measures at paragraph 6 and 7 of the Amendment Regulations are genuinely legislative in nature. Superimposition of an obligation to give reasons is not appropriate.

31. But even if this conclusion is wrong, what the Secretary of State said when making his announcement on 3 June 2021 was sufficient to discharge any obligation to give reasons that could arise at common law. The submissions made to us focused on two matters. One was that the reasons given for the decision that Portugal should cease to be on the green list and move to the amber list (the default position described in the Risk Assessment Methodology document), were not adequate. We have set out the material part of the statement at paragraph 13 above. In addition, the press statement included two tables containing data that had informed this decision. Taken together, these matters are sufficient explanation of the reasons why Portugal had ceased to be a green list country.

32. The Claimant's other submission was that the reasons were inadequate because they failed to explain why countries on the amber list remained on that list and had not been moved to the green list. We reject this submission for two linked reasons. The first is that the reasons given on 3 June 2021 must be read together with the Risk Assessment Methodology document. This made it clear that, in the context of the global pandemic, the Secretary of State took a precautionary approach when deciding whether a requirement to self-isolate should be imposed. That obligation would apply to persons arriving in England from any and every country unless there was specific evidence to satisfy him that circumstances in a particular country (so far as they pertained to the pandemic) presented only a low risk to public health in the United Kingdom. Thus, if a country remains on the amber list, the reason is the precautionary approach plus the lack of sufficient evidence to the contrary. In context, that is sufficient reason. The Secretary of State only needs to go further in cases where, relying on specific evidence, he decides that a country should move to or away from the amber list, default position.

33. The linked reason is that any further obligation would impose unrealistic burdens on the Secretary of State in the context of a review which, pursuant to regulation 24, must be undertaken at least every 28 days and which determines the approach to be taken to persons arriving from any of

approximately 250 countries. In his judgment in *Oakley* (at paragraph 76) Sales LJ recognised that where Parliament had failed to specify a duty to give reasons the court should be slow to step in to impose general obligations because a court is not well-placed to assess the level of administrative burden that an obligation might impose and the effect such a burden might have on the ability to take timely decisions. This is an important consideration in the present context. The logical conclusion of Mr Hickman's submission is that the obligation to give reasons will apply not only to decisions such as those contained in the Amendment Regulations but also to decisions that a particular country should stay in its place in any of the traffic light lists. The Risk Assessment Methodology document refers to two types of decisions: decisions on whether the position on any specific country should be subject to detailed assessment; and if detailed assessment is undertaken, the decisions consequent on that assessment. The logic of the Claimant's case is that reasons must be provided for all these decisions on the occasion of each review. We are satisfied that any such obligation in the circumstances of this case would impose an unreasonable burden; it would risk slowing the decision-making process; it would hamper rather than enhance effective public administration.

34. All these matters are addressed in the evidence of Edward Wynne-Evans, the Acting Director for the Health Analysis Directorate at the Joint Biosecurity Centre and the UK Health Security Agency, and the evidence of Jonathan Mogford, the Director for Design and Policy for the Managed Quarantine Service at the Department of Health and Social Care: see Mr Wynne-Evans' first statement at paragraphs 7 – 12; and Mr Mogford's first statement at paragraph 61. We accept that evidence. Further, both Mr Wynne-Evans and Mr Mogford explain the sensitivity attaching to data supplied to HM Government for the purposes of assessment of risks presented by circumstances prevailing in other countries, and to assessments by UK scientists based on that data: see Mr Wynne-Evans' first statement at paragraph 13; and Mr Mogford's first statement at paragraph 59. We accept their evidence that the existence of a legal obligation to provide greater detail than, for example, that given by the Secretary of State on 3 June, may risk jeopardising the supply of information to HM Government from overseas governments and organisations.

35. Allied to the Claimant's submission on the duty to give reasons was a further submission that a common law principle of transparency existed which in this case required the Secretary of State to publish the criteria against which decisions allocating countries to, or retaining them within, specific traffic light lists were taken.

36. Even if that submission were made good as a matter of law, it would not succeed on the facts of this case. The Risk Assessment Methodology document published by the Secretary of State on 11 May 2021 explained the methodology that would be applied when decisions were taken on whether any country should appear on either the green or red traffic light lists. The material part of that document is as follows:

> "The methodology consists of 4 parts:
>
> • variant assessment

- triage
- risk assessment
- outcomes that inform ministerial decisions

Variant assessment

Regular monitoring and evaluation of new variants is undertaken by PHE to identify those which may be of concern (VOCs and VUIs) to the UK.

This assessment considers several factors including:

- transmissibility
- severity of disease
- escape from natural immunity
- escape from vaccine-induced immunity
- effect on therapeutics
- zoonotic emergence (jumped from animal to human)
- current epidemiology

…

Triage

Selects a list of countries and territories for further risk assessment ("deep dives"). This stage considers a range of indicators, including:

- testing rates per 100,000 population
- weekly incidence rates per 100,000 population
- test positivity
- evidence of VOC/VUI cases in country and territory

  exported cases VOC/VUI to the UK and elsewhere
- genomic sequencing capability
- strong travel links with countries and territories known to have community transmission of a VOC/VUI

Further risk assessment

All countries and territories that pass triage for green or red indicators undergo a more comprehensive risk assessment using additional quantitative and qualitative information (for

> example, from publicly available platforms such as GISAID and the World Health Organization, host government websites, UK mandatory testing data and travel data), taking into account data availability, limitations and biases.
>
> **Outcome**
>
> Available and relevant sources of information for each country or territory are used to provide an overall assessment on:
>
> • genomic surveillance capability
>
> • COVID-19 transmission risk
>
> •VOC/VUI transmission risk
>
> Travel connections with the UK and details of the in-country and territory vaccination profile are included as contextual information.
>
> Decisions on red, amber or green list assignment and associated borders measures are taken by ministers. Ministers will take the JBC risk assessments into account alongside wider public health factors to inform watchlists and make their decisions.
>
> …
>
> This methodology will evolve to reflect the changing pattern of the COVID-19 epidemic and as the JBC incorporates new scientific insights, new data sources, and new analyses that become available. The methodology is subject to quarterly review (as a minimum) by the JBC technical board."

Mr Hickman criticises this explanation as being insufficiently detailed: for example, relevant thresholds for testing rates and weekly incidence rates are left unstated. The premise of Mr Hickman's submission comes to the proposition that the requirement at common law is that information should be published that is sufficient to permit the Claimant (or anyone else) to see precisely how every conclusion has been reached.

37. This premise is false for two reasons. First, based on the evidence in this case, we are satisfied that it is not realistic to expect that further detail could be published. The Risk Assessment Methodology document does not describe a mechanistic or even purely quantitative process. As explained by Mr Mogford (his first statement at paragraphs 41 – 46), the process is better described as "integrated": data from overseas sources must be critically assessed (different countries will collect data differently and with varying degrees of reliability), and the weight given to information may depend on the circumstances in the country concerned. The significance of the data on conditions in any one country, must then be assessed relative to the

epidemiological situation in the United Kingdom. Put shortly, there is no definitive route map.

38. The second reason is that Mr Hickman's premise assumes a level of legal scrutiny that at common law does not and never has existed. In the context of a pandemic, deciding what measures should be applied for the protection of public health is self-evidently a matter of assessment for which the executive has primary responsibility. The role of judicial review is limited to determining the lawfulness of the approach of the executive to the decision-making process. It is not for a court to make, or assess the correctness of, such assessments of what measures should be adopted to address the public health problems posed by coronavirus. Any legal obligation to give reasons or provide other information relevant to decisions taken must be framed with this legal reality well in mind. In this case what is provided in the Risk Assessment Methodology document more than meets any legal obligation to publish criteria by which the traffic light lists would be compiled. Whether or not to publish more data, be it to enhance public confidence in restrictions imposed in response to the pandemic or otherwise, is a matter of political judgement not legal obligation.

39. Quite apart from this, however, we do not consider Mr Hickman's submission on the existence or impact of a common law duty of transparency to be well-founded. In support of this submission the Claimant relies on the judgment of the Supreme Court in *R(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, and the judgment of Green J in *R(Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 (Admin). The circumstances before the Supreme Court in *Lumba* are well-known. They concerned whether powers to detain pursuant to widely framed provisions in the Immigration Acts needed to be guided by policy, and a situation in which conflicting policies existed, one published the other unpublished. At paragraph 20 of his judgment Lord Dyson said this:

> "… Mr Beloff QC rightly accepts as correct three propositions in relation to a policy. First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations."

At paragraph 34 Lord Dyson continued:

> "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements."

And at paragraph 37 – 38 he stated the following conclusions

> "37. There was a real need to publish the detention policies in the present context …The failure to publish these policies meant that individuals who may have been wrongly assessed as having committed a crime that rendered them ineligible for release would remain detained, when in fact, had the policy been published, representations could have been made that they had a case for release.
>
> 38. The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."

40. It is therefore clear that Lord Dyson's references to transparency were made with very specific circumstances in mind: discretionary decisions directed to or targeted at identifiable persons in circumstances in which a right to make representations arose. The decision challenged in this case, contained in the Amendment Regulations is of an entirely different nature. This is readily apparent from the relevant enabling power at section 45B of the 1984 Act. The context for the decision in issue before us bears no comparison to the situation before the Supreme Court in *Lumba*.

41. The judgment of Green J in *Justice for Health Ltd* must also be understood in its context. That case was the challenge by junior doctors to the way in which the Secretary of State for Health had approached a decision to apply revised terms and conditions of employment to them. One submission made was that:

> "… the manner in which the relevant policy and decision was taken was so opaque and confused that it violated the principles of "*transparency*" and "*good administration*".

The material parts of Green J's judgment are paragraphs 141 and 148.

> "141. I turn now to the law. The principle of transparency has evolved out of Strasbourg jurisprudence but it is now well established as a common law principle. It is said to amount to a component of the "rule of law" and the principle of "legal certainty". In *Nadarajah v Secretary of State for the Home Department* … at [68] Lord Justice Laws stated that it

> was a *"requirement of good administration"* (to which the courts would give effect) that *"public bodies ought to deal straightforwardly and consistently with the public"*. The principle serves a number of important purposes. A law or policy should be sufficiently clear to enable those affected by it to regulate their conduct i.e., to avoid being misled. Such a law or policy should also be sufficiently clear so as to obviate the risk that a public authority can act in an arbitrary way which interferes with fundamental rights of an individual. Clear notice of a policy or decision is also required so that the individual knows the criteria that are being applied and is able to both make meaningful representations to the decision maker before the decision is taken and subsequently to challenge an adverse decision (for instance by showing that the reasons include irrelevant matters). Where the principle applies it might require the publication of the policy that a decision maker is exercising; it might require that the policy be spelled out in greater detail so that the limits of a discretion may be demarcated; it might require the decision-maker to be more specific as to when he/she will or will not act.
>
> …
>
> 148. In my judgment the principle of transparency applies. First, the present decision was not a "one-off" as was submitted. On the contrary the decision has short, medium and long terms effects and sets out what the Minister expects of himself, of employers, of regulators and of the junior doctors over a protracted period of time. Second, the decision was, in part, addressed to the junior doctors since it was the sole vehicle through which the Minister communicated that he would not negotiate further with them and would introduce the contract without their collective agreement. Third, the decision affected important private law contractual (employment) rights of the doctors. Fourth, the decision set out the Minister's future negotiating stance vis-à-vis the junior doctors in relation to such issues as non-contractual matters, teething problems with the contract itself and the 2018 joint contractual review with the BMA. The principle of transparency is a component of the broad principle of "*good administration*", the *"rule of law*" and "*legal certainty*". In my judgment it would take a powerful legal and policy argument for these to be disengaged from a decision such as that in dispute; and I can discern none."

42. The legal basis for these paragraphs requires careful examination. The comments of Laws LJ in *Nadarajah* ([2005] EWCA Civ 136) concerned only the high-level concept, or principle, underlying court decisions in legitimate expectation claims. The comments were not intended to recognise the existence of a free-standing legal obligation (still less one that enabled the courts to determine when and what type and quantity of

information used in the decision-making process must be disclosed to the public at large). Laws LJ effectively made this point in his later judgment in *R(Bhatt Murphy) v Independent Accessor* [2008] EWCA Civ 755 when referring to the notion that the legitimate expectation doctrine applied to circumstances that were "unfair" or "an abuse of power":

> "28. Legitimate expectation of either kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power … The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a backstop review of the primary decision-maker's stance or perception … Unfairness and abuse of power march together … But these are ills expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case. The excoriation of these vices no doubt shows that the law's heart is in the right place, but it provides little guidance for the resolution of specific instances."

Returning to his own judgment in *Nadarajah* (and specifically the passage relied on by Green J) Laws LJ said this (at paragraph 51):

> "51. To all this there are no doubt refinements and qualifications, and there may be other cases. And major questions can arise as to the circumstances in which the public interest will, in the court's view, allow the change of policy despite its unfair effects. This was the subject of some observations of mine in *Ex p Nadarajah* … I would only draw from *Nadarajah* the idea that the underlying principle of good administration which requires public bodies to deal straightforwardly and consistently with the public, and by that token commends the doctrine of legitimate expectation, should be treated as a legal standard … Any departure from it must therefore be justified by reference among other things to the requirement of proportionality (see *Ex p Nadarajah*, paragraph 68)."

43. Neither this passage from Laws LJ's judgment in *Bhatt Murphy* nor paragraph 68 of his judgment in *Nadarajah* seeks to establish duties of "good administration" or "transparency" as free-standing legal norms. They are concerned with the underlying reasons as to why a public body may be obliged to comply with a clear and unambiguous representation giving rise to a legitimate expectation and the circumstances in which a public authority might resile from such a legitimate expectation.

44. This is a strong indication that neither a notion of "good administration" (nor one of "transparency" as an aspect of good administration) identifies any immutable legal standard either peculiarly within the expertise of a court, or capable of predictable application by a court. A court might readily identify and regulate conduct at the outer margins of what might amount to good administration or transparent action, but it is not well-placed within those margins to prescribe hard and fast legal standards. In these respects, notions of good administration and transparency are not counterparts to, for example, the principle of fairness; and even when applying the principle of fairness, courts have been careful to recognise that while the court will determine the requirements of fairness for itself, it must make allowance for the fact that one size cannot fit all circumstances. Any free-standing notion of "good administration" or "transparency" is several degrees further removed: neither is likely to describe a manageable legal standard. Rather, these are labels that state conclusions. When those conclusions are justified that is because they are descriptive of what is required by long-established legal principle (be it the principle of fairness, *Wednesbury* principles, or otherwise). They do not identify any discrete, enforceable legal obligation.

45. The Claimant's submission in the present case makes the point. Transparency, it is submitted, gives rise to a legal obligation to disclose all material relevant to all decisions on whether countries should move from one traffic list to another or stay where they are. That submission proves too much. If such an obligation exists in this case, there is no reason why it should not apply to every administrative decision taken by any public authority. The true position is that the application of generally framed common law principles (such as the principle of fairness) has always been measured in specifics, taking account of the interests at stake affected by the relevant decision and the context in which the decision exists. In the present context resort to language of transparency adds nothing. The operative principle concerns the extent to which the Secretary of State is required as a matter of law to explain the 3 June 2021 decision which was put into effect by the Amendment Regulations. For these reasons this part of the Claimant's argument also fails.

(3) Legitimate expectation

46. The Claimant's next submission is that the Secretary of State is required by reason of a legitimate expectation to publish all information relating to decisions contained in the Amendment Regulations, and all information explaining why countries on the amber list did not move from that list.

47. The Claimant's submission is that the relevant legitimate expectation arose from an answer given by the Secretary of State to a question during a press conference at Downing Street on 7 May 2021. The purpose of the press conference on 7 May 2021 was to announce the traffic light system recommended by the Global Travel Taskforce, which was due to be implemented by the International Travel Regulations. The Secretary of State was present, together with Dr Jenny Harries, Chief Executive of the UK Health Security Agency, and Paul Lincoln, Director General of the Border Force. At the beginning of the press conference the Secretary of State gave a prepared statement. This included the following:

> "… I'm glad to be standing here today … announcing the first, albeit tentative, steps towards unlocking international travel.
>
> …
>
> Nobody wants to go back into lockdown. Not Ever!
>
> That is why today's announcement, removing the internal "stay in the UK" restriction from the 17 May (2021) is necessarily cautious.
>
> …
>
> That is why are Global Travel Taskforce has come up with a traffic light system classifying destinations by risk … This is based on data by the Joint Biosecurity Centre which will be published on gov.uk.
>
> …
>
> So, I am announcing today that from May 17, you will be able to travel to 12 green list countries and territories including Portugal, Gibraltar and Israel.
>
> I regret that favourite summer destinations like France, Spain and Greece are not yet included.
>
> But, every three weeks from reopening we will review countries to see if we can expand the green list. So this is just a first step …"

After the prepared statement the Secretary of State took questions. The representation relied on by the Claimant was made by the Secretary of State in response to a question from Mr Kelso of Sky News. The material part of the question was:

> "Is it realistic to think that this year we will see the return of mass travel to Spain, to France and other really popular destinations as opposed to this tiny list of many islands?"

The Secretary of State's answer was lengthy; he broke off his own answer to invite Dr Harries to contribute, and after that spoke further in response. The Claimant's solicitors have transcribed the Secretary of State's response. The material part is as follows:

> "… So, to answer your last question about whether we'll see mass travel or not, look I think we shall gradually see an opening up
>
> …

> So it's a gentle, gradual thing as I mentioned before, Heathrow and others are welcoming the steps today
>
> … [Dr Harries' contribution] …
>
> This year it's about not just about the prevalence of cases; it's about the variants of concern; it's about the ability of the country to test the quality of their data; how good their genome sequencing is and I think reassuringly, Paul, all of that is going to be published this year, both the methodology and the data, so people can see themselves why the particular countries and territories that are being included at the moment are in there and I think that will be helpful for everyone."

The passage relied on by the Claimant is underlined. The punctuation in this passage has been added by the transcriber.

48. The premises for a claim based on legitimate expectation are not in dispute. The Claimant must identify a relevant representation that is clear, unambiguous, and devoid of any relevant qualification: see *R v Inland Revenue Commissioners ex parte MFK Under Writing Agents Ltd* [1990] 1 WLR 1545 at page 1570B. The circumstances in which the representation was made and the subject matter and nature of the representation itself must be such that it is reasonable for the representation to be relied on as giving rise to a legal obligation: see *R(Wheeler) v Office of the Prime Minister* [2003] EWHC 1409 (Admin) at paragraphs 41 and 43 to 44.

49. We do not consider the Claimant has established that a representation was made which was capable of founding a claim to a legitimate expectation of the nature alleged. Taken on its own terms, what the Secretary of State said at the press conference on 7 May 2021 in response to Mr Kelso's question is not properly to be understood as the promise for which the Claimant contends. The specific context was a question about whether countries such as France and Spain, destinations for mass tourism, might be added to the green list. Dr Harries and then the Secretary of State pointed out the range of information available to the Joint Biosecurity Centre for the purposes of such a decision. The Secretary of State's reference to people seeing for themselves *"… how and why the particular countries and territories that are being included at the moment are in there"* is referring to countries which were to be on the green list. Looked at fairly, what the Secretary of State said was not any form of promise to provide, for example, information on why countries on the amber list remained on that list notwithstanding the periodic reviews of the traffic light lists. In support of his submission to the contrary Mr Hickman relied on emails dated 4 May 2021 and 18 May 2021 sent by Mr Hawkins, the Claimant's Chief of Staff to Dr Rannia Leontaridi, the Director for Aviation at the Department for Transport. But there is nothing in either email capable of touching on the meaning of what the Secretary of State said at the 7 May 2021 press conference in response to the question put to him.

50. The conclusion we have reached as to a reasonable understanding of the Secretary of State's comments is supported by two further matters of context. The first comes from the Secretary of State's prepared statement at the press conference. This refers to data that was to be published by the Joint Biosecurity Centre (see the part we have set out at paragraph 47 above). It is common ground that the information to which this statement refers is immaterial to the claim the Claimant now pursues. Given that the prepared statement dealt specifically with the provision of information, it is less likely that the responses to specific questions immediately following the making of that statement were, or would reasonably be understood as, providing a legally enforceable commitment to publish other information. The other matter is the Secretary of State's Written Ministerial Statement of 12 May 2021 informing Parliament of the decisions referred to at the press conference. In the written statement, the Secretary of State referred to a publication of a summary of the Joint Biosecurity Council Methodology and *"key data that supports minister's decisions"*. Any reasonable consideration of what the Secretary of State meant by the off-the-cuff remarks made in response to the question at the press conference should be informed by reference to the Secretary of State's prepared comments, both before and after the event. Any other approach would not be reasonable. Those comments contained no reference at all to any promise to publish the range of information the Claimant now seeks. Rather, they are more consistent with a narrower understanding of the Secretary of State's words when he replied to Mr Kelso's question.

51. There are also two further matters that satisfy us that it would not be reasonable to conclude that the matters relied on by the Claimant give rise to the legal obligation for which it contends. One is that the Claimant relies only on what the Secretary of State said in response to a question at a press conference. It will require particular circumstances before off-the-cuff comments might be held to give rise to legitimate expectations enforceable at law. Mr Hickman submitted that during the pandemic press conferences such as the one on 7 May 2021 have been the Government's preferred means of communicating with the public. Thus, he submitted, anything said at a press conference should be considered a matter of importance, capable at least in principle of giving rise to legal obligation. We do not agree. Increased use of press conferences as a means of communication does not alter the nature of the exercise: responses are not prepared and are therefore unlikely, reasonably, to be regarded as setting out promises that should be taken as enforceable at law. There is always room for an exceptional case, but there was nothing exceptional about the answers to questions at the press conference on 7 May 2021, or the circumstances in which they were given. The suggestion that this type of interaction might ordinarily give rise to legal obligation would discourage ordinary communication. It is certainly not a conclusion required to give effect to the principles of good public administration that (per Laws LJ at paragraph 68 of his judgment in *Nadarajah*) inform the scope of the legitimate expectation principle.

52. The other matter that reinforces our conclusion that the Claimant's legitimate expectation claim in these proceedings should fail, is the nature of the promise said to have been made. If the Claimant's submission on the effect of what the Secretary of State said on 7 May 2021 is correct, the representation made was made to the public at large and would be

enforceable by any member of the public. As such, the representation alleged was in the form of a statement of general policy. Although this may not be something that will, regardless of all other circumstances, be fatal to a legitimate expectation claim, it is certainly a matter that should give any court pause for thought. Statements on matters of general policy affecting the public at large will often not be matters capable of being enforced as legal obligation through the mechanism of legitimate expectation: see the paragraphs in the judgment of the Court of Appeal in *Wheeler* to which we have already referred. In the present case, and if, contrary to our conclusion above, the meaning of the statement made by the Secretary of State was as the Claimant contends, that would be a matter weighing heavily against the conclusion that the statement could or ought to be taken as giving rise to a legal obligation.

53. For all these reasons the Claimant's legitimate expectation ground fails.

(4) Convention rights: article 1 of Protocol 1

54. The Claimant's submission is that the decisions contained in the Amendment Regulations are a control of use, which interferes with property within the protection provided by article 1 of Protocol 1. The Claimant then contends that because the Secretary of State has not published criteria by which he decides whether countries stay on the traffic light list to which they were assigned when the International Travel Regulations were made, or move from one list to another, that control of use is not "provided for by law" in the sense required by article 1 of Protocol 1.

55. It is important to recognise that the Claimant's challenge is directed only to the measures announced on 3 June 2021, and then put in place by the Amendment Regulations, and the approach to subsequent reviews and amendments. There is no challenge to the International Travel Regulations (save for the discrete point on regulation 24). It is also relevant to have well in mind to establish its claim, the Claimant must show that any interference with its Convention rights was the result of provisions in the Amendment Regulations. While the Secretary of State's announcement on 3 June 2021 was the herald of change, it did not itself effect change.

56. We are prepared to accept, for the sake of argument, that the variations made by the Amendment Regulations to the traffic light lists in the Schedules to the International Travel Regulations amounted to a form of control of use. Nevertheless, the Claimant's article 1 Protocol 1 case fails for the following reasons.

57. The first reason is that the Claimant has failed to provide evidence showing that the measures put in place by the Amendment Regulations have affected property, as that notion has been defined for the purposes of article 1 of Protocol 1. In its judgment in *Breyer Group plc v Department of Energy and Climate Change* [2015] 1 WLR 4559, the Court of Appeal restated the well-established case law that article 1 of Protocol 1 does not extend to protect "rights" to the prospect of income in the future, save to the extent that such prospect might be an aspect of the goodwill attaching to a business (that goodwill being an existing and present asset). At paragraphs 42 to 43 of his judgment, Lord Dyson MR put the matter as follows:

> "42. … The term "possessions" in A1P1 is an autonomous Convention concept … Moreover, as we have seen, the issue of whether (i) goodwill and (ii) future profits amount to possessions has been the subject of a considerable amount of Strasbourg and domestic case-law. …
>
> 43. The well-established distinction between goodwill and future income is fundamental to the Strasbourg jurisprudence. The consistent line taken by the ECtHR is that the goodwill of a business, at any rate if it has a marketable value, may count as a possession within the meaning of A1P1, but the right to a future income stream does not. I agree with Rix LJ that the distinction is not always easy to apply and it seems that the ECtHR has not addressed the difficulties. As Moses LJ put it in *Malik* at para 83, marketable goodwill is a possession "notwithstanding that its present-day value reflects a *capacity* to earn profits in the future" (emphasis added). The important distinction is between the present-day value of future income (which is not treated by the ECtHR as part of goodwill and a possession) and the present-day value of a business which reflects the capacity to earn profits in the future (which may be part of goodwill and a possession). The capacity to earn profits in the future is derived from the reputation that the business enjoys as a result of its past efforts. That is why the applicant succeeded in a case such as *Tre Traktorer* …"

58. In this case the Claimant has filed extensive evidence of the effect of the pandemic on its business: see for example the first statement of Tim Hawkins (16 June 2021) from paragraph 11. We readily accept the effect of the pandemic on the Claimant's business, including the goodwill of that business, has been very severe indeed. However, this harm, catastrophic though it has been, is not the consequence of any measure implemented by the Amendment Regulations; it had all occurred well before those Regulations were made. By contrast, Mr Hawkins' evidence on the impact of the Amendment Regulations focuses on the effect that will be had on its ability to recover from the pandemic and, in particular, its ability to generate income this year if, for example, countries that are prime holiday destinations are placed on the green list, see Mr Hawkins' first witness statement from paragraph 53. All these matters fall squarely into the category regarded as future income for the purposes of article 1 of Protocol 1. It is not property that is protected under the Convention. Mr Hawkins' statements contain no evidence which explains the impact of the measures in the Amendment Regulations on, for example, the Claimant's goodwill or the value of any other possession that falls within the scope of protection under article 1 of Protocol 1. For this reason alone, the Claimant's Convention rights claim must fail.

59. The second reason why the Claimant's Convention rights claim fails is that it rests on an incorrect analysis of the application of the "provided for by law" requirement. Whenever this issue arises, the point for consideration must be whether the measure that is the cause of the interference with the

claimant's Convention rights was sufficiently certain and foreseeable. In this case the Claimant's focus is on the Secretary of State's power to make regulations such as the Amendment Regulations: i.e., the power at section 45B of the 1984 Act. The Claimant's criticism is that the summary of criteria in the 11 May 2021 Risk Assessment Methodology document is an insufficient guide to the way the Secretary of State may, from time to time, exercise his power under section 45B of the 1984 Act to make regulations specifying which countries are on each of the traffic light lists.

60. For the purposes of any claim of breach of Convention rights, this criticism is directed to the wrong target. The simple existence of the section 45B power does not give rise to any interference with the Claimant's Convention rights. The interference only exists when the power has been exercised and Regulations made. The interference with the Claimant's Convention rights arose only when and because the Amendment Regulations were made. That being so, there was no relevant lack of certainty: the effect of the Amendment Regulations (when read together with the International Travel Regulations) was clear so far as concerned the content of the traffic light lists. There is no lack of certainty in any material sense.

61. The third reason is that even if the Claimant's Convention rights claim is assessed on its own terms – i.e. it is assumed both that possessions for the purposes of article 1 of Protocol 1 are subject to control of use by reason of the Amendment Regulations, and that the "provided for by law" requirement does, in the circumstances of this case, require the Secretary of State to give guidance on the circumstances he will exercise his power under section 45B of the 1984 Act to make regulations amending the traffic light lists – the claim still fails.

62. The European Court of Human Rights has always applied the "provided by/in accordance with the law" requirement purposively and pragmatically. The purpose of the requirement is to prevent arbitrary action. The Court has accepted that where a power arises in circumstances that are complex or in which the range of circumstances must be accounted for is necessarily wide or shifting, what the rule against arbitrary action requires must be approached pragmatically: see for example, per Lord Dyson MR at paragraph 29 of his judgment in *R(Bright) v Secretary of State for Justice* [2015] 1 WLR 723, where he stated it was *"… no part of "in accordance with the law" to require public authorities to do what is impossible or impracticable"*.

63. In this case the contents of the Risk Assessment Methodology document are sufficient. They identify the principles applied when formulating the International Travel Regulations to determine which countries should be included in each traffic light list. As we have stated above, given the circumstances of the pandemic and the shifting threat it presents to public health in the United Kingdom, the precautionary approach applied to determine the contents of the amber list – i.e., to apply self-isolation requirements to all countries save where there was positive evidence either that no such requirement was necessary or that stricter red list provision was required – was (and remains) appropriate. That approach is also sufficient for the purposes of any requirement of certainty or foreseeability. The remainder of the document, which describes the four-part methodology the

Secretary of State will apply when taking decisions after 7 May 2021, is also a sufficient indication of the matters the Secretary of State will regard as relevant to the use of his power to make regulations. The criteria may not be precise but given that Covid-19 has proved itself capable of mutation that gives rise to fresh danger to public health, and that scientific knowledge of the virus in any of its forms is itself evolving, the way in which the methodology is set out does not offend any legal principle of certainty or foreseeability.

64. For these three reasons therefore, the Claimant's Convention rights claim fails.

C. Disposal

65. This case came before us as a rolled-up hearing. Having heard full argument on the claim we grant permission to apply for judicial review on all grounds. The Claimant's grounds of challenge based on (a) the duty to give reasons and transparency; (b) legitimate expectation; and (c) Convention rights, fail for the reasons set out above. We have found in favour of the Claimant's submissions on Ground 1 so far as they concern the interpretation of regulation 24 of the International Travel Regulations. However, when exercising the regulation 24 power in June 2021 prior to making the Amendment Regulations, the Secretary of State did in fact review the contents of the traffic light lists. The Secretary of State did, therefore, act lawfully in carrying out his obligation under regulation 24 and did that which the Claimant contended he needed to do. In these circumstances, we do not consider it necessary to grant the Claimant any relief so far as Ground 1 is concerned. So far as concerns the reviews the Secretary of State will undertake in future, our reasoning above (paragraphs 17 – 21) sufficiently explains why the review required by regulation 24 should continue to encompass consideration of the composition of the traffic light lists.
