IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
**[2021] EWHC 2156 (Admin)**

No. CO/1562/2021
CO/1569/2021
CO/1568/2021

Royal Courts of Justice

Wednesday, 14 July 2021

Before:

THE HONOURABLE MR JUSTICE LINDEN

B E T W E E N :

THE QUEEN
on the application of
(1) KHAN OMER KHALID
(2) YASIR WAHAB & Ors
(3) FAISAL SAEED — Claimants

- and -

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE — Defendant

- and -

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) SECRETARY OF STATE FOR TRANSPORT

Interested Parties

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MR P. TURNER, MR M Z. JAMALI, MR J. GAJJAR and MR A. BADAR (instructed by Ashton Ross Law) appeared on behalf of the Claimants.

DR M. BIRDLING (instructed by the Government Legal Department) appeared on behalf of the Defendant.

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**J U D G M E N T**

MR JUSTICE LINDEN:

Introduction

1 These are renewed applications for permission in three claims, permission having been refused on the papers in each of them by Sir Ross Cranston on 25 May 2021. The claims raise similar issues and were ordered to be heard together by Swift J on 7 May 2021.

2 Mr Paul Turner appeared with Mr Jay Gajjar and Mr Ahmad Badar for the claimants. With the permission of the court, Mr Turner appeared by CVP. Dr Malcolm Birdling appeared for the defendant.

The issues

3 In very broad outline, the claimants are British nationals or have rights of residence in the United Kingdom. Each travelled to Pakistan in March 2021 to visit his father, who was in poor health. Each was there when it was announced, on 2 April 2021, that Pakistan was to be placed on the so-called "Red List" with effect from 9 April 2021. Each, if he returned to the United Kingdom from Pakistan after that date, was therefore required, subject to qualifying for exemption, to quarantine for ten days in a designated hotel on his return and to pay charges for doing so as part of what was known as the "managed quarantine system", or MQS.

4 In the event, Mr Saeed returned in May 2021. Mr Wahab and Mr Omer Khalid returned in June 2021. Mr Saeed and Mr Wahab underwent quarantining under the MQS but it was unnecessary for Mr Khalid to do so because he had not been in Pakistan in the ten days prior to his arrival in the United Kingdom.

5 The Claim Forms take various points but the claimants' position has helpfully been consolidated in a joint skeleton argument prepared on their behalf by Mr Gajjar and Mr Badar, which is dated 5 July 2021. Their grounds of challenge are as follows:

(a) The defendant's decision to place Pakistan on the Red List was irrational (Ground 1).

(b) The requirement to quarantine in a designated hotel amounts to unlawful deprivation of liberty contrary to Article 5 of the European Convention on Human Rights (Ground 2).

(c) The charges levied for the period of quarantine are excessive (Ground 3).

6 Mr Wahab pleaded that the requirement to quarantine disproportionately infringed his rights under Article 8 of the ECHR, but that point has not been pursued.

7 In the event that the claims are successful, the claimants seek declaratory relief. The claimants also seek disclosure in support of their claims and there are then issues as to the quantum of costs ordered by Sir Ross Cranston to be paid by the claimants in the event that their applications for permission fail.

The legislative framework

8 The existence of the requisite powers is not contested by the claimants and I can, therefore, be brief. When the claims were issued on 29 April 2021, the relevant statutory framework was Schedule B1A to the Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (as amended), which set out rules applicable to people arriving from countries listed in Schedule B1 to the 2020 Regulations (the so-called 'Red List'). In very brief summary, subject to certain exemptions, such arrivals were and are required to arrive at a designated port. They must possess or obtain a self-isolation package, meaning a booking at accommodation designated by the defendant for the relevant purposes, a booking on designated transport to that accommodation and an approved testing package. They must then travel directly to the accommodation and self-isolate there for ten days. Whilst there, they are provided with accommodation, food, essential testing and other services. Paragraph 9 of Schedule B1A provided that charges could be levied by or on behalf of the defendant in respect of these services.

9 By regulation 2 of Health Protection (Coronavirus, International Travel) (England) (Amendment) (No.12) Regulations 2021, Pakistan was added to Schedule B1 with effect from 9 April 2021, together with Bangladesh, Kenya and the Philippines.

10 With effect from 17 May 2021, the relevant statutory framework was Schedule 11 to the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulation 2021, to which I will refer as the ITOL Regulations. The ITOL Regulations consolidate the 2020 regulations and various other related provisions in all material respects for present purposes.

Background

11 It is not necessary to rehearse the background of the pandemic, the decision-making in relation to the introduction of restrictions on travel to and from this country and the development of the red, amber and green lists in any detail.

12 Suffice it to say that on 4 February 2021 ministers agreed that, subject to certain limited exemptions, arrivals in England who had travelled through Red List countries in the preceding ten days should be required to enter the MQS. This system came into force on 15 February 2021. The aim of the MQS was to reduce the risk posed by people arriving into the United Kingdom and, in particular, the risk associated with what are known as "variants of concern" or VoCs, as well as what are referred to as "variants under investigation", which were considered to be high risk of entering the UK and then spreading. I will call both categories of variant "VoCs" for ease of reference. A particular concern was, and remains, the risk of a VoC undermining the vaccination programme and, as a result, having serious economic, health and social consequences and/or putting at risk the Government's plans for the gradual lifting of Covid-related restrictions.

13 Decisions about whether to put a given country on the Red List are informed by a range of factors but there is a particular focus on the expert views of the Joint Biosecurity Centre, Public Health England and the UK Health Security Agency, using a dynamic risk assessment methodology endorsed by a technical board comprising the four UK Chief Medical Officers and other technical experts. The risk assessments which are carried out have a particular focus on the public health risk from VoCs posed by incoming travellers to the United Kingdom. Regular monitoring and evaluation is undertaken by Public Health England to identify those variants which may be of concern. Where a new VoC is identified, the Joint Biosecurity Centre reviews over 250 countries and territories for evidence of its presence. Direct evidence of the VoC within a country or territory, through VoC surveillance, is taken into account but many countries have limited or no VoC

surveillance in place. Indirect indicators are, therefore, also taken into account, including levels of exportation of VoCs to the United Kingdom (which is detected through mandatory testing and sequencing) or to third countries, the strength of travel links with countries known to have the VoC or any rapid deterioration of epidemiological indicators that may suggest the presence of a VoC.

14 Any country or territory which is identified through these threshold indicators is then subject to a more comprehensive analysis. This analysis is then presented, in conjunction with evidence about travel links to the United Kingdom for additional context, so that there can be differentiation between countries according to the prevalence of the VoC and the numbers travelling to the United Kingdom. For example, there may be countries where the prevalence of a VoC is high but travel to the United Kingdom is low, and there may be countries where VoC prevalence is lower but there are higher numbers of travellers to the United Kingdom.

15 Countries or territories are also routinely reviewed for any reduction in risk so as to inform decisions about whether they can be removed from the Red List. Indicators that this can be considered as a possibility include Covid-19 cases decreasing to a very low level, clinical downgrading of a given VoC to a variant not of concern, evidence that community transmission of a VoC is under control or has ceased, and consideration of whether borders with countries assessed to have a known VoC are closed.

16 In his Summary Grounds of Defence, the defendant states that:

> *"27. Pakistan was put on the Red-List ..for the following reasons:*
> *a. Pakistan was undergoing a third wave of COVID-19 with its epidemiological picture worsening.*
> *b. Overall traveller positivity was high (4.6% between 3-17 March 2021 and 4.6% since 15 February 2021). Since 15 February 2021, six cases of the South Africa-associated VoC (VOC-20DEC-02) and one case of the Bristol-associated VoC (VOC-21FEB-02) had been detected from 690 sequenced samples through mandatory testing (1%).*
> *c. Traveller volumes to the UK from Pakistan were very high (11,680 arrivals in the week ending 18 March 2021) and while exemptions were at low levels (3%) many of these travellers would enter UK communities directly.*
> *d. Pakistan has limited genomic sequencing capability. Although it published full-length sequences in 2020, it has not done so since December 2020, making it difficult to assess with any real confidence the presence or absence of VoCs in Pakistan.*
> *e. The JBC considered that Pakistan posed the third-highest risk of countries not yet on the Red-List, behind Kenya and Bangladesh. Philippines was the fourth-highest rated country with India fifth."*

17 In the light of comparisons with India which are made in the claimants' pleaded case, albeit their comparisons are not limited to India, the defendant also states in his Summary Grounds that:

> *"28. India was, at the time of the decision to place Pakistan on the Red-List, considered to pose less of a risk than Pakistan and the other countries identified. Overall, traveller positivity was 1.6% between 3-17 March 2021 and 1.6% since 15 February 2021. 1 out of 139 sequences were found to contain the South Africa VoC (0.7%). However, India was kept under careful review given that:*

*a. It has very limited genomic sequencing capability. The latest sequence was available on 1 March 2021 but was collected on 31 January 2021. The location data are ambiguous and usually includes only the state. Samples are also geographically sparse.*

*b. The epidemiological situation had worsened since early February 2021.*

*c. Traveller volumes to the UK were high (9.615 arrivals in the week commencing 22 March 2021).*

*29. India was subsequently added to the Red-List on 23 April 2021 by the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 13) Regulation 2021 following: additional imported VoCs; the emergence of 3 new VuIs from India (one now confirmed as a VoC); and, an increase in positivity amongst travellers*."

The rationality challenge

18 In their skeleton argument the claimants formulate this ground as follows:

> *"Based on evidence available in the public domain, it is arguable that Pakistan did not fit the criteria to be added to the list and was, therefore, perverse/irrational."*

They go on to argue that:

> *"Publicly available data do not support the contention that Pakistan was lawfully and rationally added to the red list of countries."*

19 The claimants then point to Worldometer data as to the levels of Covid-19 infections per 100,000 people, as at 2 April 2021, for the four countries added to the red list on 9 April 2021 and for India as well as Brazil, the United States of America and five European countries, including the United Kingdom. These figures show that Pakistan had 3,070 cases per 100,000 compared with around 34,000 for Germany, around 70,000 for Spain and France, around 76,000 for Belgium and around 94,000 for the United States of America.

20 The claimants do not highlight the figure for India but this was nearly three times as high as the figure for Pakistan. They do, however, compare the daily increase in Covid-19 cases for Pakistan on 2 April 2021, which they say was 5,234, with the increase for India that day, which they say was 89,091.

21 The claimants point out that the data relied on by the defendant only go up to 18 March 2021 and they argue that, therefore, they do not provide a full picture. They assert in their skeleton argument that factually it cannot be the case that the numbers of travellers into the country from Pakistan was greater than it was (for India at the material time, given (they say) that there are only two cities from which travellers can fly here from Pakistan and flights are limited, whereas there are flights from around eight cities in India. But they do not provide evidence about this or give their own figures for the number of travellers from each country at the material time or at all.

22 The claimants say that the defendant's explanation, as set out in its Summary Grounds of Defence, is also arguably incorrect in stating that Pakistan has not published full length genomic sequences since December 2020, and they produce evidence from a website, known as GISAID, which (they say) shows that it has done so on various occasions in the first three months of 2021. If this claim in the Summary Grounds of Defence is false then, the claimants say, it renders the entire decision irrational or, as they put it, "contaminated".

But they do not provide evidence of what any genomic sequences published in Pakistan in the first three months of 2021 actually showed about the prevalence or otherwise of any of the relevant variants in the present case.

23 The claimants say that there is a genuine concern about whether the defendant's decision was based on the science as opposed to internal or political considerations, although they do not assert that there were any improper purposes, still less identify the external/political considerations which they say may have influenced the decision to place Pakistan on the Red List. No submission in relation to improper purpose was developed by Mr Turner at this hearing either.

24 In considering these arguments, it is important to remember the well-established principle that in contexts such as the present, which involve the evaluation of complex scientific evidence, fine policy judgments and the protection of public health, it is not for the court to second-guess decisions which are taken, particularly in the context of a pandemic. A very broad margin of discretion is to be afforded to the Secretary of State and the scope for intervention by the court is very limited: see, for example, *R v Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 CLMR 123 [43]-[47]; *R (Dolan) v Secretary of State for Health and Social Care* [2020] WLR 2326 [97], and *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin) [21]-[22].

25 Here the defendant explained why the four countries, including Pakistan, were being added to the Red List on 9 April 2021 in an explanatory memorandum which was published alongside the Regulations. This says, amongst other things:

> *"The countries subject to additional measures have all been judged to pose a risk to the United Kingdom from importation of a variant of concern. Requiring self-isolation in designated accommodation will help prevent community transmission and result in important public health benefits."*

26 The defendant has explained the decision further, and in greater detail, in his pleadings and it is not realistically arguable that this explanation fails to establish a rational basis for the decision to place Pakistan on the Red List. As the Lord Chief Justice put it, at para.97 of his judgment in the *Dolan* case:

> *"In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters."*

27 The claimants' arguments, based on comparative rates of Covid-19 infection as at 2 April 2021, are nothing to the point given that the defendant was focused on a specific issue, namely the risk of people bringing VoCs into the United Kingdom from Pakistan and other countries and, therefore, on the data which are more directly relevant to that question. In any event, the fact that Pakistan performed better on some measures would not prevent the defendant from reaching a rational decision to add it to the Red List based on an assessment of the relevant data as a whole.

28 Although some comparisons to India are made in the claimants' pleaded case, at the material time Pakistan was not performing as well as India on the measures which the defendant considered most relevant to the decision in hand. In any event, it is difficult to see how this comparison assists the claimants. If it was rational to include Pakistan on the Red List, the fact that some other country also ought to have been included does not assist the claimants. The claimants do not put their case in this way but, insofar as it is suggested that Pakistan could not rationally be included if India was not also to be included at the same point in time, the defendant's pleaded case clearly sets out a rational basis for the differential treatment of the two countries as at 9 April 2021. Insofar as the claimants put forward a contention to the contrary, in my view, that contention is bound to fail.

29 In any event, India was added on 23 April 2021 and Pakistan has remained on the Red List. The claimants have not suggested, still less sought to prove, that the position in relation to VoCs in relation to Pakistan has improved, still less that it has improved to a point where it would be irrational for it to remain on the list. This aspect of the claimants' case therefore has a distinctly academic flavour. The point that no case has been made that the position in relation to Pakistan has improved since a decision to add it to the Red List, is also an answer to the claimants' criticism of the defendant for relying on data for the period to 18 March 2021.

30 As for suggestions that the defendant has got some of its facts wrong, this has not been established in relation to the volume of arrivals from Pakistan as compared with India. In relation to the question of the publication of full-length genomic sequences by Pakistan, I accept that the documents produced by the claimants put a question mark against what is said on this point in the Summary Grounds of Defence, but it goes no further than that. The relevant print-outs from the internet appear to show that data was collected in January 2021 and that it was submitted at the end of March 2021, but the documents do not take the matter further than that. They do not, on their face, establish that the reports were published. But, in any event, and as will be seen in due course, nothing turns on that because this material does not contradict the material relied on by the defendant to the point of even beginning to establish that the matters relied on by the defendant were incapable of being the basis for a rational decision. As I have also pointed out, it is not suggested, still less has it been shown, that published reports in early 2021 showed that the level of risk in relation to Pakistan was lower than that which it was thought to be by those making the decisions which are impugned in the present proceedings.

31 The claimants do not put forward a case in relation to reports of genomic sequencing based on mistake of fact as a distinct ground of challenge for the purposes of a judicial review, but nevertheless Dr Birdling has very fairly drawn to my attention the possibility of arguing the point in this way and the principles, as set out in *E v Secretary of State for the Home Department* [2004] QB 1044 [66]-[67]. In fairness to the claimants, I have considered that potential argument but the mistake alleged goes no further than to believe that no reports were published by Pakistan after December 2020, whereas it is said that they were. No arguable case has been established that this mistake played a material part in the defendant's reasoning, such that unfairness was caused to the claimants. If the claimants had produced evidence that published reports in January to March 2021 established a powerful case that Pakistan should not be added to the Red List, then the position might have been otherwise. I therefore accept Dr Birdling's submission that there is nothing which is capable of even arguably demonstrating a "straightforward and undisputed misunderstanding of a central material fact" (see *R (Michael) v Governor of HMP Whitemoor* [2020] 1 WLR 2524 [48]).

Ground 2

32 Article 5 of the European Convention on Human Rights provides:

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
> *...*
> *(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."*

33 The claimants rely in *Storck v Germany* [2006] EHRR and submit that the requirement to quarantine for ten days in a hotel involves confinement by the state for a period of time which is more than negligible without their consent and under threat of criminal sanction for a breach. As Mr Turner submitted, the effect of the quarantine was that the liberty of the claimants was *"to some extent curtailed"*. He advocated that there was a ready alternative available, namely to require arrivals to quarantine at home.

34 The contention that Article 5 has been breached is, in my judgment, unarguable for two fundamental reasons. First, it is not realistically arguable that a person who quarantines as part of the MQS is deprived of their liberty as opposed to their liberty being curtailed or restricted. Second, in any event, even if there was a deprivation of liberty, the case falls within Article 5(e).

35 As regards the first point, in *Secretary of State for the Home Department v JJ* [2008] AC 385 at [16], Lord Bingham said that:

> *"Deprivation of liberty might take a variety of forms other than classic detention in prison or strict arrest.....the court's task was to consider the concrete situation of the particular individual and taking account of a whole range of criteria, including the type, duration, effects and manner of implementation of the measures in question to assess their impact on him in the context of the life he might otherwise have been living."*

36 That task has not been assisted in the present case by the fact that no evidence has been put before the court by any of the claimants as to their particular circumstances or, at least, their particular circumstances bearing on the effect of quarantining under MQS. Indeed, at the time that proceedings were issued none of the claimants had, in fact, been required to quarantine under that system. I will, however, consider the position as a matter of principle since that is the way in which it has been advanced on the claimants' behalf.

37 In *AP v Secretary of State for the Home Department* [2011] 2 AC 1 [2], Lord Brown added, in the context of control orders issued pursuant to the Prevention of Terrorism Act 2005:

> *"... the judge has to decide as a matter of judgement whether the restrictions overall deprive the controlee of, rather than merely restrict, his liberty."*

38 In *R (Dolan) v Secretary of State for Health and Social Care*, Lewis J (as he then was) considered whether the requirement to quarantine at home under the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 amounted to a deprivation of liberty, and held that it was not realistically arguable that it did (see [2020] EWHC 1786 (Admin] [64]-[75]). Permission to appeal this decision was refused by the Court of Appeal, which said that it was a mischaracterisation to say that the 2020 Regulations placed a person under house arrest or a curfew:

*"The obligation to stay at home was subject to numerous express exceptions which were non-exhaustive and the overriding exception of having a reasonable excuse"* (see [2021] WLR 2326 [91]-[94]).

39 Similarly, here it is important to note that a person chooses whether to travel to the United Kingdom knowing the position if they travel here from a Red List country. Secondly, the MQS only applies to them if they were in a Red List country in the ten days prior to arrival in the United Kingdom. As I have noted, in the case of Mr Khalid, he was not required to submit himself to MQS because he chose to travel from Pakistan to a non-Red List country and to spend ten days there before returning to the United Kingdom.

40 In addition to this, the quarantine period is of short duration. During the ten day period the individuals are not required to self-isolate from any person with whom they were travelling when they arrived in England and who is also self-isolating in the same place as them (para.10 of Schedule 11). So they are able to mix with members of their particular cohort. Nor are they required to self-isolate from any persons staying at the same place whose assistance they require because they are a child or because they have a disability (para.11).

41 Paragraph 12 of Schedule 11 then sets out a series of exceptions from the requirements imposed by paras.10 and 11, in terms of self-isolation within the hotel. More important in the present context, para.13 permits a person to leave or be outside of the hotel in certain circumstances, albeit in a number of those circumstances they need to obtain the permission of a person designated by the defendant, and they are obliged to comply with any conditions of leaving the hotel which are imposed by the designated person. The specified circumstances include to travel to a port or leave the common travel area, to fulfil legal obligations, to take exercise, to visit people who are dying, to attend funerals of members of the household or close family members and other exceptional circumstances. Examples of such circumstances are given in the statutory instrument and they include to seek medical assistance, to access critical public services, to avoid injury or illness and to access veterinary services if they are required urgently.

42 The claimants seek to distinguish *Dolan* on the basis that here the self-isolation is required to be in a place other than home and they are required to pay. These are factual distinctions but they do not make a material difference to the question whether the person in question is deprived of their liberty under MQS, which is the issue on which the claimants have to succeed if they are to get off first base. The claimants say that the exceptions under Schedule 11 are different to, and narrower than, the exceptions which were under consideration by the Court of Appeal in *Dolan*, under what was an earlier iteration of Regulation 6 of the 2020 Regulations. I accept that they are, and that the exemptions in para.13 are limited (see also *R (Sarikaya) v Secretary of State for Health and Social Care* [2021] EWHC 1958, which Dr Birdling, again very fairly, put before the court). But the fact of the exemptions, combined with the other features of the quarantine which I have mentioned, in my view, still mean that the person who is quarantining is not even arguably deprived of their liberty for the purposes of Article 5 during the period in question.

43 In any event, as I have noted, deprivation of liberty for the purposes referred to in Article 5(e) will be compatible with Article 5 provided that it is in conformity with national law and meets the requirements of necessity and proportionality (see *Enhorn v Sweden* [2005] 41 EHRR 633 [36]). I note that the claimants do not address Article 5(e) in their skeleton argument, despite the fact that it is pleaded in the defendant's Summary Grounds of Defence. I nevertheless raised the question with Mr Turner as to what his submission was on this issue. He did not deny that the purpose of the self-isolation requirements in

Schedule 11 of the ITOL Regulations and the purpose of putting Pakistan on the Red List was to prevent the spread of an infectious disease, namely Covid-19. Secondly, the claimants have not disputed, and nor did Mr Turner dispute, that the relevant measures have been taken in accordance with domestic law, nor could the claimants dispute this point.

44 Thirdly, in relation to the question of whether the measures satisfy the requirements of necessity and proportionality, Mr Turner submitted that there were alternatives, that the defendant could have introduced a regime which was the same as, or similar to, the stay-at-home regime which was under consideration in the *Dolan* case. He said that: *"It worked before"*, and that there was no reason for it not to work again. He described the MQS as *"a step too far"*. I asked Mr Turner whether he could see the answer to his argument and he said that he could, no doubt because the answer is obvious. What Mr Turner was advocating was a system which would necessarily be less effective than the stay-at-home regime because it would permit individuals travelling from what are regarded as high-risk countries in relation to VoCs to travel home on public transport, not necessarily doing so directly, to join members of their family and to live with them in the same household. Clearly that would be a significantly less protective measure than the measures that have been put in place under MQS.

Ground 3

45 The claimants do not dispute that the defendant has a power to enact health protection regulations which permit the levying of charges but, for completeness, this power is to be found in s.45F(2)(f) of the Public Health (Control of Disease) Act 1994. The specific power in the present context is contained in para.9 of Schedule 11 to the ITOL Regulations, which states:

> *"The Secretary of State or a person designated by the Secretary of State may impose a charge in relation to the accommodation, transport and testing package mentioned in the definition of a "managed self-isolation package" and the Secretary of State may recover any sum owed by P pursuant to such a charge as a debt."*

46 The charging structure under the MQS is £1750 for the first adult, £650 for each additional adult and for each child over the age of eleven and £325 for each child aged between five and eleven. Those who are unable to pay upfront may opt to do so in instalments over a twelve month period.

47 The claimants' skeleton argument formulated the ground of challenge as being that the charges are *"excessive, irrational and/or unreasonable and/or substantively unfair and/or ultra vires"*, but ultimately they advance one main argument under this heading, namely that on a true construction of the relevant legislative provisions the defendant's power is to recover his costs but not to make a profit. Here, it is asserted, the defendant appears to be making a profit.

48 Assuming, purely for the sake of argument, that the claimants' construction of the statutory provision is correct, the flaw in this ground is that it has no factual foundation. The claimants' argument is based on some *ad hoc* research as to the cost of a room in an airport hotel which has been carried out by the claimants' legal representatives on Booking.com. They produced a list of some hotels near Heathrow and Gatwick which, they say, shows that the average price per night for these hotels was £48 as at 12 April 2021. They say that, therefore, the average price for an eleven night stay in these hotels will be £528. They do not produce evidence in relation to the hotels which are actually used for the MQS but they say that these are likely to be near airports, so the cost of travel would be small. They say that

two PCR tests could be bought for a price as low as £158. On this basis, they say that the defendant must be making a profit and that this is not permitted by the relevant statutory provisions.

49 However, in his Summary Grounds of Defence, the defendant says that the costs incurred by the Government in relation to the MQS are not limited to the costs of a room. The Government invited hotels to bid competitively for a room rate, including food, if they wished to become a provider. This rate, as well as the quality, proximity to the airport and size of the hotel, guided the decision on which hotels to contract with. The selected hotels are all of good quality and would be considered mid-range. They provide three meals a day, delivered to the room, a daily fruit bowl and tea and coffee throughout the day. They also provide a laundry service for personal clothes and clean sheets. Towels are provided as required and delivered to the room. These services obviously go beyond what would be provided by a "room only" type booking.

50 The defendant also says that the original projected cost for each adult was £1748 and, on this basis, the fee of £1750 was set. As things have turned out, the normalised costs between February and March 2021 have been £2,457 per adult, comprising £110 per day for accommodation costs, £71 per day for security costs, £46 for transport costs, £95 for testing costs, £56 for liaison costs, £193 for administrative costs and £15 for other costs. The cost of the shortfall has been borne by the Government.

51 To this the claimants respond that they seek disclosure of the basis for the defendant's calculations. They say that the Government's approach to contracting for goods and services in the context of the pandemic has been the subject of judicial criticism in other cases, such as *R (Good Law Project) v Minister for the Cabinet Office* [2021] EWHC 1659 (Admin), and they say that if public money is in fact subsidising the cost of the MQS facilities then there is all the more reason for the court to scrutinise the bidding and contracting process.

52 This approach is hopeless. The defendant has set out the position in relation to the costs of MQS and has confirmed that it has done so in accordance with its duty of candour. It is not for the court, in the context of a claim for judicial review, to decide whether the defendant could have made arrangements which are cheaper. It may be that in other cases, in the context of different contractual arrangements, entered into under different legislation, the court has found flaws in the particular contracting process undertaken; but this is irrelevant to the question of whether the defendant has set the MQS fees at an unlawful level. The present claimants do not challenge the process by which the providers of MQS hotels and associated services were procured or even so much as raise a concern about the contracting process itself. They simply contend that the charges are too high.

53 As for the argument that costs are excessive, unreasonable, irrational and unfair, once it is accepted the Government is, in fact, subsidising the cost of the MQS this argument falls away.

54 Ten minutes before the hearing commenced, I was sent an Amended Statement of Facts and Grounds in a different case, involving different claimants. That is case CO/1743/2021. There were then handed up to me a Consent Order in the same case and a letter from the Government Legal Department in that case, dated 1 July 2021. Mr Turner informed me that although these documents were not referred to in the pleadings or included in the bundle, or referred to in the claimants' skeleton argument they were, in fact, relevant to Ground 3. On further investigation of this question, it emerged that claim number CO/1743/2021 is a challenge brought by three other claimants to the hardship aspects of the charging structure

in relation to MQS. It also emerged that a review of that aspect of the structure is being conducted by the defendant by agreement and that, accordingly, the claim CO/1743/2021 has been stayed for a short period.

55 I accept Dr Birdling's submission that those proceedings do not cast light on issues in the present case. As I have already indicated, the claimants have given no evidence about their own experience of quarantine under MQS, still less any evidence of financial hardship caused by that charging structure. The claim that is before me is limited to an in principle claim that the Government was, in fact, seeking to make a profit from the charges that were being levied by MQS. I have, therefore, not found the materials put before me at this late stage to be of any assistance.

Conclusion on permission

56 It follows that I therefore refuse permission on all grounds.

Disclosure

57 In their Statements of Facts and Grounds, the claimants seek the following disclosure:

> *"53.1 Disclosure of the scientific evidence/data relied upon by the Defendant to add Pakistan to the red list of countries.*
>
> *53.2 Disclosure of the scientific evidence/data relied upon by the Defendant to add Pakistan and other countries to the red list – such disclosure will permit the Court to compare the respective decisions to add individual countries to the list. In particular, the Claimant would invite the Court to order the disclosure of (in each case, disclosure will require comparative data from other relevant countries which may, depending on the Defendant's process, include countries not on the red list):*
>
> *53.2.1 The numbers of people travelling into the United Kingdom as used by the Defendant to add Pakistan and other countries to the red list.*
> *53.2.2 The data held and used by the Defendant to reach the conclusion that Pakistan's genomic sequencing was inadequate (in comparison to other countries).*
> *53.2.3 The comparative number of COVID tests taken in Pakistan and other countries.*
> *53.2.4 The number of infected persons entering the United Kingdom.*
> *53.2.5 The number of infected persons entering with a variant of concern.*
>
> *53.3 The financial basis upon which the Health Secretary arrived at a figure of £1,750 for managed quarantine with a breakdown of how that figure is allocated to various components of the quarantine strategy."*

58 Mr Turner said that this application was still pursued, and that if I was not minded to grant permission on the evidence currently before the court I should nevertheless order disclosure of the information and documents sought. He and the claimants would then consider whether they did, in fact, have an arguable case and would apply to amend, if they considered that they did. If they did not consider that they had a case, he assured me that they would not pursue the matter.

59 In my view the appropriate course, in the circumstances of the present case, is for the court to reach a view about whether there is an arguable claim for judicial review and, if there is,

to make appropriate orders, if necessary, in relation to the question of disclosure. But this application has served to strengthen my view that the claimants' claims are misconceived, in part because they are based on a misunderstanding of the principles applicable to judicial review.

60 Two relevant principles for present purposes are, first, that at the permission stage the claimant must establish a recognised ground for judicial review which is realistically arguable. It is not the function of the Administrative Court simply to second-guess the decisions of public bodies or to give declaratory relief on the basis that it disagrees with judgments which have been made by such bodies. Nor is it the function of the court to make speculative orders for disclosure on the basis that this may result in material which supports a public law challenge.

61 Second, assuming that there are arguable grounds for judicial review, disclosure will not be ordered unless it is in accordance with the overriding objective to do so, and the decision as to what is necessary for the fair disposal of the issues between the parties will be made on the basis that both parties are subject to the duty of candour. The rigour of that duty is well-known but Mr Turner wished to remind me of the relevant passages from the judgment of Singh LJ in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 and he took me to them. It is sufficient for present purposes, however, for me to set out the following summary in the Headnote:

> *"The duty of candour to and co-operation with the court, which falls upon a public authority that is a defendant to a claim for judicial review, is a self-policing duty. A particular obligation falls upon both solicitors and barristers acting for public authorities to assist the court in ensuring that these high duties are fulfilled. The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. Witness statements filed on behalf of public authorities in judicial review cases must not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. The duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact".*

62 Here the Acknowledgement of Service attached the Summary Grounds of Defence. The Acknowledgement of Service included a statement of truth which was signed by Mr Richard Weatherhogg of the Government Legal Department, who has conduct of the matter on behalf of the defendant. The Summary Grounds of Defence were also signed by counsel and they included a statement in response to the application for disclosure, that:

> *"The Claimant sets out a series of requests for disclosure at §53 of the Grounds of Review. Usual principles of disclosure, including the disclosure of documents, do not apply in judicial review. This is because of the duty of candour, which requires defendants to disclose all material facts and to assist the Court with full and accurate explanations of all relevant facts: R (Citizen UK) v SSHD [2018] EWCA 1812, §106 (Singh LJ) and Practice Direction 54A, para. 12.1. The Secretary of State considers that this duty has been satisfied by the information contained within these Summary Grounds."*

63 The statement that the defendant believes that he has complied with his duty of candour is also repeated in Dr Birdling's skeleton argument, having considered all of the materials relied on by the claimants and their skeleton argument for the purposes of the permission hearing.

64 The defendant's Acknowledgement of Service and Summary Grounds of Defence state the facts on which the impugned decisions were based, albeit in summary form, and on the assumption that the pleaded basis for the impugned decisions was the true basis, there are no arguable grounds for judicial review, as I have said. Nor have the claimants established any reason to doubt the *veracity* of the defendant's pleaded case as to the reasons for his decision. It therefore cannot be in accordance with the overriding objective, in effect, to make an order which is intended to enable the claimants to check what the defendant has said is the case. It would also be entirely contrary to the rationale of the duty of candour, and the fact that it is a self-policing duty, to do so.

65 When asked on what basis he made what were wide-ranging and sweeping assertions that the defendant had not, in fact, complied with the duty of candour, despite the evidence that he had, Mr Turner relied heavily on what he said was a mistake or inaccuracy as to the availability of reports of genomic sequencing from Pakistan after December 2020. I have dealt with the extent to which a mistake was, in fact, made but, even assuming that the relevant paragraph of the Summary Ground of Defence is entirely mistaken in saying that there were no published reports after December 2020, it does not follow, or even begin to follow, that the defendant has failed to discharge the duty of candour. All that this demonstrates is that, pursuant to the duty of candour, the defendant has disclosed that it proceeded on a basis which was, in part, arguably mistaken. So this point did not establish any basis for the disclosure of the comparative data which the claimants sought. But I am also bound to say that I found it very surprising indeed that Mr Turner felt able, on the basis of this point, to assert that the defendant's pleading as to the costs of MQS should not be trusted, notwithstanding the statement of truth signed by Mr Weatherhogg.

66 Furthermore, even if any form of order were appropriate, I would not have made an order in the wide terms sought. The issue on the claimants' pleaded case is whether there was a rational basis for the decision to place Pakistan on the Red List. If there was, the fact that others ought to have been added will not assist the claimants. If there was not, the claimants would succeed regardless of whether others ought to have been added. The order for comparative data sought by the claimants is, therefore, disproportionate and misconceived in that it contemplates that the court will carry out its own assessment of which countries or territories should or should not have been placed on the Red List. Even if the claimants do not ask the court to go that far, they most certainly ask it to apply a level of scrutiny which goes far beyond that which is permissible in this context.

67 It follows, therefore, that the application for disclosure is also refused.

68 Dr Birdling asked for permission for this judgment to be referred to in future proceedings notwithstanding that this was an application for permission rather than a final hearing. The reason for his application was that there are other cases in which similar issues arise. I grant permission to do so.

———————

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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***CACD.ACO@opus2.digital***

This transcript has been approved by the Judge.