IN THE HIGH COURT OF JUSTICE **CO/2105/2021**

QUEEN'S BENCH DIVISION

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

SKELETON ARGUMENT

FOR THE CLAIMANT

Time estimate for pre-reading: 4.5 hours.

Agreed time estimate for hearing: 1 day.

A list of essential documents and an agreed chronology have been filed.

**The Claimant requests permission to rely on the Third Statement of Mr Hawkins which replies to the Defendants' evidence. The Claimant is seeking the Defendants' agreement to the admission of the statement.*

**Since the substance of this skeleton argument is 26 pages, permission is sought pursuant to* PD54A§14.3

References to the Core hearing bundles are in the form "[CB/y/z]" where "y" is the tab number and "z" is the page number

References to the Exhibits bundles are in the form "[EBx/y/z]" where "x" is the bundle number, "y" is the tab number and "z" is the page number.

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(*by paragraph number*)

A. INTRODUCTION

1. This is the rolled-up hearing of the Claimant's judicial review of: (i) the legality of the first review of the "traffic light system" ("**TLS**") regulating international travel, announced by the First Defendant on 3 June 2021; and (ii) the approach taken by the First and/or Second Defendant to the on-going review of the TLS country classifications.

2. The TLS is established by The Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021, SI 2021/568 ("**ITOL Regulations**"). The process for assessing which countries are designated as "high risk" (red), "medium risk" (amber) and "low risk" (green) is said by Government to be a clear and transparent "risk-based" system. The focus of this challenge is predominantly on the green and amber lists – which are by far the most commercially significant for the industry.

3. The Claimant's core complaint is about the fundamental lack of transparency in the TLS which means that the basis for categorising territories between the green or amber lists is unknown and appears arbitrary. In summary, the Defendants have: (i) failed to explain the basis on which territories are categorised as green and amber (i.e. indicative criteria and thresholds); (ii) not provided the reasons for those classifications in respect of individual countries (other than on an exceptionally partial and incomplete basis), and (iii) failed to publish the country risk assessments produced by the Joint Biosecurity Centre ("JBC") or the data on which they are based (the "**TLS information**").

4. The vital importance of openness, clarity and transparency is cogently explained in the first and third witness statements of Mr Hawkins. In short, the Claimant and other industry participants: (i) cannot understand how decisions with massive impacts on their businesses are taken and cannot make sensible business planning decisions; (ii) cannot ascertain whether such decisions are rational and lawful; and (iii) cannot, if they choose to do so, make informed representations to the Defendants about particular territories or the operation of the system as a whole. There is also a wider point, that industry and consumer confidence in the process requires it to be based on clear, rational and consistent risk assessments and not arbitrary and inconsistent, as the territory allocations appear to be.

5. This fundamental lack of transparency is contrary to a clear assurance given by the First Defendant on 7 May 2020. In announcing the TLS, he stated that it will operate by "*classifying destinations by risk*" assessed by the JBC and that the data used by the JBC, "*will be published on gov.uk*" **[EB1/12/162]**. He went on to state:

"*This year it's about not just 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 all of that is going to be published this year, both the methodology and the data, so people can see themselves how and why the particular countries and territories that are being included at the moment are in there*" (emphasis supplied). **[EB1/10/154]**

6. The TLS system is therefore said to be a rational, transparent, risk-based system which allows people to "*see*" "*how and why*" particular individual territories are classified as either green or amber.

7. The Defendants resist the provision of the TLS information primarily on the basis that there is, they submit, no legal requirement for them to provide it. The Defendants are however wrong about this for three reasons,

   (1) First, the measures imposed by the ITOL Regulations represent a serious interference with the Claimant's rights protected by Article 1 of the First Protocol ("**A1 P1**"), given effect by section 6 and Schedule 1 to the Human Rights Act 1998 ("**HRA**"). Measures interfering with A1 P1 rights are required to be clear, accessible and foreseeable to protect against arbitrariness. Those conditions are not met. On the contrary, the country allocation decisions are based on unknown reasons, the risk assessments are unpublished and appear inconsistent. It is a classic instance of decision-making lacking protections against arbitrariness.

   (2) Second, the First Defendant gave a clear assurance to the industry and the public that the TLS information would be published. That created a procedural legitimate expectation as to the procedure that the Defendants would follow in conducting reviews of country categorisations. Although the Defendants contend that they have complied with the representation, that is clearly not the case. Nor is there anything approaching an overriding public interest reason for allowing the Defendants to depart from that promise.

   (3) Third, the Defendants are required to provide the TLS information to satisfy general common law principles of fairness and transparency. In particular: (i) the principle that reasons will be given for decisions to allow persons affected by them to understand them and challenge them; and (ii) the principle of transparency that requires that policies and criteria that are applied to decisions affecting the interests of persons and entities to be made public.

8. For these reasons, the Court is asked to grant the Claimant permission for judicial review and allow the claim. A draft order has been attached to this skeleton which the Court is invited to make.

9. The Claimant's case is supported by letters from TUI Group dated 11 June 2021 **[EB1/38/311]**, easyJet dated 16 June 2021 **[EB1/41/319]**, International Airlines Group dated 20 June 2021 **[CB/26/235]** and two witness statements of Juliusz Komorek on behalf of Ryanair **[CB/14/155]** and **[CB/31/261]**. Mr Clive Jacobs of Travel Weekly also supports the claim at §85-87 **[CB/32/265]**. The Claimant does not object to Mr Jacob being named as an interested party and his statement being admitted.

B. FACTUAL CONTEXT

(1) The GTT

10. On 22 February 2021 the Government published a four-step "*roadmap*" for lifting Covid-19 restrictions which included a commitment to reconvening a taskforce to make proposals for restarting non-essential international travel (COVID-19 Response – Spring 2021) **[EB1/4]**.

11. At the request of the Prime Minister, the First Defendant reconvened the Global Travel Taskforce ("**GTT**") to provide *"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"* (Terms of Reference). The GTT had previously issued a report in November 2020.

12. On 9 April 2021, the GTT issued its second report. Paragraph 3 of the GTT's report referred to the Government's "*roadmap*" **[EB1/6]**.

> *"Given our successful vaccination programme, the roadmap included a commitment to relaunching the GTT to consider a safe return of international travel. We have worked with industry and international partners to develop a risk-based framework that can facilitate the return of international travel while managing Variants of Concern*. (emphasis added)

13. The GTT's report proposed that measures limiting outbound travel be removed and that the Government should "*implement a 'traffic light' country system, to which different restrictions are applied depending on risk*" (§7 (emphasis supplied)).

14. Paragraph 17 of the GTT report made clear that the GTT proposed, "*… a clear and consistent evidence-based approach to facilitate the safe, sustainable and robust return of international travel."* (emphasis supplied). It also referred to a *"simulation model"* which could be used to compare

the relative effectiveness of restrictions on international travel for different countries/territories.

15. Paragraph 19 repeated that the "*overarching principle*" was "*for a clear and evidence-based approach*" that would assess the specific and changing risks of individual countries and territories.

16. The proposed traffic light system would designate countries as being of low, moderate or high-risk. The GTT report stated (at §23) that the allocation of countries according to *this* "*risk-based approach*" will "*be kept under review and respond to emerging evidence, with a particular focus on Variants of Concern.*"

17. The GTT report stated that the JBC, which is part of the UK Health Security Agency, an executive agency of the Department of Health, "*will publish data and analysis to support the process of allocating countries.*" Decisions, it stated, will be "*driven by the data and evidence at the time*" (§24). It also recognised the importance of consumer confidence to any return to international travel and that this would depend upon clarity and consumer trust in the system (§43), and said that this would be supported by a "*Green Watchlist*" to "*support travellers as they book travel*" (§45).

18. On 22 April 2021, the House of Commons Transport Committee concluded in its report, *Safe return of international travel?*, that "*to allow businesses to prepare for*" the "*planned safe restart of international travel*" the Government "*must...explain the criteria and mechanism by which countries will move between risk categories by 1 May 2021 at the latest*" (§18(b)) **[EB/7/146]**.

19. The GTT report was accepted and adopted by the Government as its policy on reopening international travel, which was announced on 7 May 2021 **[EB1/12]**. However, the GTT report did not itself set out criteria or thresholds for the territory-by-territory risk assessment that it proposed. Nonetheless at the Downing Street press conference on that day, the First Defendant provided the assurances set out in paragraph 5 above.

(2) ***The "summary risk assessment methodology"***

20. On 7 May 2021 (last updated on 11 May 2021), the Government published guidance which it described as a "*dynamic risk assessment methodology to inform ministerial decisions on red, amber and green list countries and territories*" **[EB1/13/168]**. It was developed by the JBC and comprised the following four stages or elements:

(1) Regular monitoring and evaluation of new variants to identify those which may be of concern.

(2) The selection of countries and territories for "*triage*" or "*deep dives*" examining factors such as weekly incidence of Covid-19, testing rates and travel links.

(3) Further risk assessment of countries that "*pass the triage*".

(4) Outcomes that inform ministerial decisions.

21. The "*methodology*" sets out a non-exhaustive factors that would be considered at the triage/deep dive stage **[EB1/13/168]**:

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

22. The methodology was described by the First Defendant as a *"summary of the JBC methodology"* when he announced the TLS **[EB1/15/187]**. It is, indeed, a high-level summary that is uninformative and provides no explanation of how decisions are arrived at.

23. It does not contain any information about what thresholds apply when the JBC analyses the incidence of Covid-19 in countries and territories outside the UK or what criteria are applied in terms of testing in such countries, even on an indicative basis. It is entirely unsurprising and uninformative for the JBC to state that it will look at things like test positivity numbers or weekly incidence rates.

24. There is also no information about how countries are selected for *"triage"*/*"deep dive"* or how countries *"pass"* that stage. In short, the *"methodology"* provides negligible additional

information to that provided in the GTT report and does not set out a clear explanation of how decisions are made, or criteria against which decisions can be made.

25. As explained below, no significant information that explains how this process was applied in practice at the first review was disclosed with, or is apparent from, the reasons supporting the decision on 3 June 2021.

(3) The ITOL Regulations

26. The ITOL Regulations were made under section 45B of the Public Health (Control of Disease) Act 1984 on 14 May 2021 and came into force on 17 May 2021. They are subject to annulment by either House of Parliament within forty days of being laid (by 23 June).

27. The rationale for the ITOL Regulations was set out in the Explanatory Memorandum, which explained that the purpose was to impose restrictions where overseas territories have a higher incidence and prevalence of coronavirus than the UK (§7.5).

28. The Explanatory Memorandum went on to state that the ITOL Regulations implemented the traffic light system recommended by the GTT (§7.8). It explicitly accepted that it established a "*risk based*" approach "*based on factors such as the level of community transmission of variants of concern or variants under investigation, levels of testing, genomic sequencing and reporting*". This, it stated, would "*allow the UK government flexibility to adapt to the evolving health situation around the world whilst keeping borders open*".

29. The Explanatory Memorandum stated that the allocation of countries would be kept under review and adapted "*based on emerging evidence*" (§7.12).

30. Part 2 of the ITOL Regulations imposes requirements on passengers to provide information upon arrival in a Passenger Locator Form ("**PLF**") (reg. 3) and to undertake Covid-19 testing when they return to England from outside the common travel area (regs. 4, 5, 6). The common travel area constitutes England, Scotland, Northern Ireland, Wales and the Republic of Ireland.

31. The ITOL Regulations then distinguish between three categories of country or territory outside the common travel area corresponding to green, amber and red. They impose additional requirements on category 2 (amber) and 3 (red) list countries and territories, which have a significant impact on consumer demand.

32. Persons arriving from amber list countries must self-isolate at an address specified in their PLF for a period of either 10 days (reg. 9) or 5 if they purchase an additional test. Persons arriving from red list countries must be in possession of a "*managed self isolation package*", which requires them to isolate in a hotel for 10 days.

33. Part 4 imposes requirements on carriers to ensure that passengers have provided requisite information and have required test results (regs. 13-17).

34. Regulation 24 of the ITOL Regulations establishes the requirement for a review of the need for the measures at regular intervals:

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

35. The Government has stated that it will conduct three-weekly reviews pursuant to this provision. The outcome of the first review was announced on 3 June 2021.

(4) The First Review: 3 June 2021

36. On 3 June 2021 the Defendant released a statement setting out the outcome of the first review. The statement says that Portugal was moved to the amber list because there had been, (i) *"an almost doubling"* of case positivity rates in Portugal, and (ii) sixty-eight cases of the Delta variant of concern *"have been identified in Portugal"*, including with a potentially detrimental mutation **[CB/5/39]**.

37. No information was provided as to why no country had been moved to the green list. A limited amount of data was provided in relation to Portugal **[CB/5]** but no explanation or assessment of the data explaining the conclusions drawn or thresholds applied. The scientific advice of the JBC and any advice from the UK medical officers was not provided or even mentioned. As explained by Mr Hawkins, the position was further obscured by confusing statements made by Ministers to the media (TH1 §73, 74, 78, 80-81 **[CB/6]**).

(5) The Second Review: 24 June 2021

38. The First Defendant reviewed the country lists on 24 June 2021. Malta, the Balearic islands, Madeira, and a range of Caribbean islands were added to the green list and/or the green watchlist from 30 June 2021. The First Defendant explained in the announcement that the watchlist signals that these countries are at risk of moving from green to amber (although

Portugal had previously been moved from green to amber with no notice and without being placed on the green watchlist on 3 June 2021) .

39. In announcing these changes, the First Defendant provided very limited reasons, simply stating that these countries had been moved to the green list because they "*met the necessary criteria to be reclassified*" **[EB2/55/403]**. Since, however, the basis for the initial categorisation has never been explained this statement is entirely uninformative.

40. A summary of the key data used by the JBC to inform the latest round of recategorisations was published but did not cover all of the relevant criteria, and included no data relating to countries that have remained on the amber list **[EB2/56]**.

(6) The importance of transparency to the Claimant

41. The impacts on the Claimant of the restrictions on international travel that have been imposed by the Government prior to and under the traffic light system have been dramatic. Passenger throughput has been a fraction of normal levels. As a consequence, many of the Claimant's facilities at Manchester, Stansted and East Midlands airports have either been mothballed or significantly under-utilised; most notably, demand levels have been too low to warrant the opening of the recently completed extension of T2 at Manchester Airport and T3 is not in use due to lack of traffic (TH1 §19 **[CB/6/52]**).

42. Despite drastic cuts to jobs, pay reductions, the sale of non-core property, freeze on all discretionary spend, capex programmes put on hold and the injection of significant equity, the Claimant has been highly cash negative, with revenues amounting to only a small fraction of its operating costs of approximately £26,000,000 per month (TH1 §20 **[CB/6/52]**). The evidence of Mr Hawkins is that Government decisions restricting air travel, including the TLS, have also prevented it from performing obligations under financing arrangements, requiring it to seek covenant waivers from its bondholders. The measures have also resulted in airlines, retailers, and other commercial suppliers being unable to perform their contracts with the Claimant, which in many instances are predicated on passenger numbers, thus dramatically impacting on the value of the Claimant's commercial agreements (TH1 §17, §18(c) **[CB/6/51**]).

43. Decisions taken by the Defendants as to whether to place a country on the green or amber list therefore have a direct and dramatic impact on the Claimant's business. Even the movement of apparently small territories can make a major difference: as Mr Hawkins

explains, 10% of the Claimant's revenues is derived from the Spanish Islands and placing these on the green list would boost revenues and have a direct impact on jobs (TH1 §96 **[CB/6/76]**).

44. There are a number of reasons why it is important that such decisions are made in a manner that is transparent.

45. First, it is necessary for (i) business planning and (ii) to provide realistic performance predictions to lenders as part of the Claimant's obligations to its bondholders (TH1 §18(c) **[CB/6/52]**). Mr Hawkins provides a detailed explanation of how the Claimant engaged in detailed analysis of the limited available information about green/amber categorisations; and he exhibits internal slides produced in May, following the introduction of the TLS, which shows how the Claimant interrogated the available data and made projections based upon them (TH1 §62-§69 **[CB/6/64-67]**. Mr Hawkins says it is "*business critical*" for the TLS information to be published (TH1 §97 **[CB/6/76-77]**; TH3 §14(a) **[CB/30/251]**).

46. Secondly, it is also necessary for the Claimant and others to have confidence in the process and to be in a position to challenge; (i) the TLS if it is operating in an unlawful way; or (ii) unlawful decisions made under the TLS. Mr Hawkins explains that the Claimant cannot "*scrutinise and if necessary challenge*" the categorisation decisions if it does not know the reasons for them or how they are taken (TH1 §88 **[CB/6/74]**; TH3 §14(b) **[CB/30/251]**).

47. Thirdly, the Claimant may wish to make representations to the Defendants about particular country categorisations or more generally about the operation of the TLS. Whilst the Defendants contend that they have no duty to <u>invite</u> representations, the Defendants do not contend that representations could not properly be made and if made they would be required to consider them (pursuant to their duty to have regard to all relevant considerations).

48. Indeed, not only do they not take such a position but at §56 of the SGD the Defendants positively rely on the ability of the Claimant to make representations about the amber/green categorisations to the Defendants. They state, "*[t]he Claimant is able, if it wishes, to make representations to the Secretary of State*" (§56). The Defendants go on to say that the "*evidence demonstrates*" that this is the case, because "*the Claimant has been in regular communication with the Government about a range of measures relating to international travel including specific measures.*"

49. The Claimant entirely agrees. Indeed:

(1) Dr Leontaridi refers to a wide range of discussions and contacts with the industry, including "*regular meetings*" with Mr Hawkins and other airport operators for the purpose of discussing Covid recovery and implementation of the GTT recommendations (RL §23 **[CB/12/139]**). That purpose clearly embraces the operation of the TLS.

(2) Dr Leontaridi also accepts that airline industry participants commissioned research papers on travel restrictions which were discussed with officials in March and April (RL §24 **[CB/12/139]**), and that a number of meetings have taken place to discuss "*modelling [produced by the industry] to inform the opening up of international travel*" (RL §24 **[CB/12/139]**).

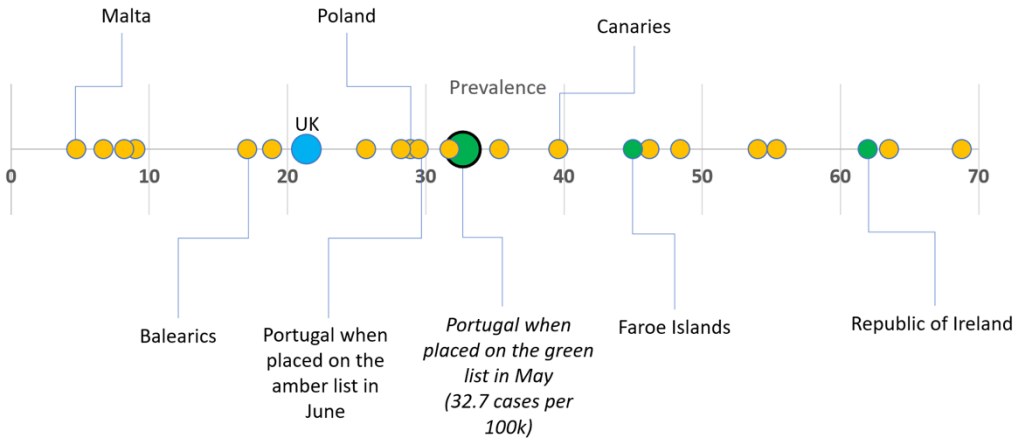
(3) Dr Leontaridi also accepts that the JBC has briefed the Claimant and others on risk assessment methodology (RL §26 and §33 **[CB/12/139-140]**).

50. In the light of such engagement, it is clear that the Claimant could make representations to the Defendants even if it is not invited to do so – a point conceded by the Defendants at §56 of the SGD. There is a self-evident need for the industry to understand how the TLS works and it is plain that any representations made by the Claimant about country categorisation would, quite properly, be taken into account.

51. Mr Hawkins explains each of these points cogently and powerfully. If corroboration is needed, it is provided by his email dated 18 May 2021 **[EB1/19/200]**, in which he wrote to Dr Leontaridi requesting greater transparency for reasons elaborated in more detail in his statement. Neither Dr Leontaridi nor any other official responded to that email.

(7) The reasons cannot be inferred from the decisions

52. As explained by Mr Hawkins, the Claimant went to very considerable efforts to deduce the rationale for the original categorisation of countries as green or amber (TH1 §61-71 **[CB/6/64]**). The 3 June 2021 decision did not, however, correspond to the only pattern that could be identified from the original categorisation and published data: the prevalence of coronavirus per head of population. Mr Hawkins highlights this in his witness statement with the following diagram, which shows Covid-19 prevalence per country (seven-day average per 100,000 population) as at 24 May 2021 (the relevant date for the purposes of the 3 June 2021 categorisation decision):



53. Without further information about the underlying rationale for the decisions, there appears to be no discernible internal consistency or logic to the decision based on the available data alone: for example, the Balearics were placed on the green list on 24 June 2021 despite having a higher prevalence of Covid-19 than in 3 June 2021, when they were kept on the amber list. The further confusion created by that decision is depicted in the diagram set out at §30 of Mr Hawkins' third statement **[CB/30/256]**.

54. Whilst the Variants of Concern are said by the Defendants to be a key factor in its decisions, there is no means of knowing how data on Variants of Concern is assessed or how the JBC conducts its risk assessment by reference to variants of concern. This is despite the fact that the First Defendant referred expressly to the fact that data explaining how Variants of Concern would be treated in the risk assessments would be published ("*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 … all of that is going to be published this year…*"). To the extent that the Defendants' decisions are based on other factors, these have not been disclosed and therefore the Claimant is unable to discern a basis for the decisions based on currently published information alone.

(8) The information that the Defendants are refusing to publish

55. The Government has published no information or reasons that explain why countries remain on the amber list. The only information that has been supplied relates to red list countries, to Portugal and to the handful of territories that were moved to the green list on 24 June 2021. No reasons have been given in relation to any country that has remained on

the amber list; while limited data is periodically published in respect of amber countries as part of the Weekly NHS Test and Trace statistical releases, the availability of this data alone cannot assist the Claimant's own understanding of the Defendants' decision-making (TH3 §29 **[CB/30]**).

56. The Defendants have supplied no further information in this claim. Indeed, the Defendants have not even provided a clear and comprehensive statement explaining the data and information that exists and that could be published. For instance, the Claimant and the Court have not been told what information was considered by Ministers, what recommendations were made to them or what reasons are recorded for their decisions. No ministerial submission has been disclosed. This is not the candid approach expected of Defendants in judicial review proceedings.[1]

57. Piecing the jigsaw together from the published sources and the Defendants' evidence, the following information appears to exist (and has informed the Order the Claimant is seeking, albeit subject to a lack of transparency about the information that in fact exists):

    (1) **Data on amber/green list countries**. The Government and JBC have "*detailed data*" on amber list countries whether they have been moved or not (JM §61 **[CB/11/132]**).

    (2) **Triage thresholds**. Mr Mogford's evidence confirms that there <u>are</u> "*indicative criteria*" that are applied in the triage process that relate to the list of factors that are considered when the JBC decides whether to subject a country to a "*deep dive*" (§36). These "*triggers*" (§29) determine whether "*indicators have changed in a material way*" (§35). Mr Mogford later refers to "*thresholds*" applied at the triaging stage (§41).

    (3) **JBC risk assessments**. Countries that pass the triage stage are subject to deep dive assessment. The methodology states that this is a "*comprehensive risk assessment*" / "*JBC risk assessment*" in relation to each country **[CB/13/169]**. Mr Mogford states that this assessment considers the "*thresholds*" applied at triage stage together with other data (JM §41) **[CB/11/126]**. The JBC designates emerging variants and produces an "*overall RAG [red, amber, green] rating*" (RL §26 **[CB/12/139]**) The JBC produces "*overall recommendations*" to the Defendants based on "*both quantitative and qualitative*

[1] A defendant must: "*Assist the court will full and accurate explanations of all the facts relevant to the issues the court must decide*", including "*a true and comprehensive account of the way the relevant decisions in the case were arrived at*": *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at §50

indicators" (JM §41 and §44 **[CB/11/126-127]**). This is we are informed the "*best way of understanding the public health risk posed by travel to and from a specific country"* (JM §44 **[CB/11/127]**).

(4) **Additional considerations**: The methodology states that Ministers will take into account JBC risk assessments and reach decisions based on these assessments and "*wider public health factors*". There has been no candour-compatible explanation of what factors other than JBC statements the Defendants consider, which may include advice from Government medical or scientific officers.

(5) **Ministerial submissions/reasons**: The methodology states that decisions are taken by Ministers. Mr Mogford states that the Government "*reviews the amber list countries to see if they should be taken off the Amber list and put on the Green list."* He continues that "*[i]ndeed, that is the whole point of the system"* (JM §56 [**CB/11/131**]). It is reasonable to infer that Ministers will take such important decisions with the aid of a Ministerial submission and relevant data and that such important decisions will be minuted or recorded. Insofar as Ministers have not recorded reasons, then the failure to do is itself unlawful for the reasons given below.

(9) The Defendants' objections to provision of information

58. As noted at the outset, the Defendants' principal argument for not providing TLS information is that, they submit, they are not required by law to provide it. The Defendants also set out some practical objections to the provision of the information which are considered in this section. None of these practical objections withstands scrutiny.

59. Mr Mogford objects to the provision of detailed country data at §61 **[CB/11/132]** on the basis that: (i) it would be "*unduly burdensome and divert resources"*; and (ii) would risk "*conveying a partial impression"* and would not include, "*wider public health considerations*". As to the first point:

(1) Mr Mogford states that this objection relates to both inviting representations from the industry on the amber list and providing JBC data and reasons. But he only explains the former (§62 **[CB/11/132]**): he does not explain how providing the data, JBC assessments or reasons after the event would be unduly burdensome given that it appears it involves publishing information that already exists.

(2) This is an administrative task and one that is fundamental to transparency of the system. Indeed, the Government routinely makes available SAGE data and advice relating to Ministerial decisions about social distancing measures (see paragraph 62 below), recognising the importance of transparency to the pandemic response in that context.

60. The second of Mr Mogford's points is equally unpersuasive. It is the present position that is partial and unequal, given that information is only provided about countries that are re-categorised. Moreover, the Defendants are required to explain any "*wider public health considerations*" that affect their decisions. At present, there is no clarity as to what such considerations might be. Such general and unexplained references to wider factors are too easily used as means of dressing-up essentially arbitrary and inconsistent decision-making in respectable sounding rhetoric.

61. Two general objections are raised to the provision of information in §41 of Dr Leontaridi's statement **[CB/12/142]**. First, that it would impact international relations for the UK to share epidemiological data that has been provided to the UK on condition of confidence by another country. Secondly, that some material is commercially sensitive. These are weak points: (i) such concerns have not prevented the Defendants from providing information and reasons where countries have been recategorized; (ii) the reference to commercial confidence is extremely vague and unexplained; (iii) if any epidemiological data has been shared on conditions of confidence by another State (an inherently unlikely scenario), and such confidentiality will not be waived, the data can be redacted. The Claimants' draft order makes provision for this.

62. Therefore, insofar as these practical objections explain why the First Defendant has not complied with his promise and why information has not been supplied, they are palpably bad reasons. Indeed, the Defendants' refusal to provide information relating to the TLS stands in marked contrast to the approach that the Government has adopted in relation to advice relating to social distancing measures. The Government publishes minutes and advice given by SAGE and supporting data on its website (TH3 §16 **[CB/30/252]**). The website notes that the evidence and assessments were produced in a fast-moving

environment "*and should be viewed in this context*" but were "*the best assessment of the evidence at the time of writing*".[2]

C. GROUNDS FOR JUDICIAL REVIEW

(1) The legal basis for the traffic light review and the duty to review whether the additional requirements imposed on amber countries are necessary

63. There is an initial issue between the parties as to the legal basis for the traffic light review.

64. Regulation 24 of the ITOL Regulations imposes a requirement on the Secretary of State to carry out a "*review*" of the "*need*" for the "*requirements*" imposed by those regulations at least at 28-day intervals.

65. The Defendants contend that this does not require them to review whether the requirements relating to specific territories continue to be necessary (i.e. testing/self-isolation/hotel quarantine), which would require the Defendants to have regard to e.g. the levels and trajectory of coronavirus in that territory by comparison with the UK. The Defendants say that the review under regulation 24 is only about "*the need for the system itself*" (SG §16).

66. This is not correct. The regulations impose requirements on travellers from specific territories that are extremely onerous. Regulations 24 is designed to ensure that each of the requirements imposed by the regulations remains justified. If the Defendants were correct not only would regulation 24 not require consideration of whether, e.g., it remains necessary for passengers returning from India to be subject to hotel quarantine, but as long as the Defendants considered there to be at least one country that required travel restrictions, even if only testing, they would not need to carry out any further review under regulation 24.

67. That is not the purpose of regulation 24, which is to ensure that measures having significant impacts on individual rights are kept under review to ensure their continued necessity and

[2] The website continues: "*The national and global response to the spread of coronavirus continues to develop quickly and our knowledge of the virus is growing. These statements and accompanying evidence demonstrate how our understanding of coronavirus has evolved as new data has emerged. The evidence was often compiled very rapidly during a fast-moving response and should be viewed in this context. The papers presented here are the best assessment of the evidence at the time of writing, and their conclusions were formed on this basis. As new evidence or data emerges, SAGE updates its advice accordingly. Therefore, some of the information in these papers may have been superseded at a later date. This page will be updated on a regular basis with the latest available evidence provided to SAGE*". <https://www.gov.uk/government/collections/scientific-evidence-supporting-the-government-response-to-coronavirus-covid-19>>

proportionality. The TLS review is therefore a requirement of regulation 24 and properly understood is conducted under that provision.

(2) Breach of the HRA 1998

68. Country allocation decisions under the TLS represent a significant interference with the Claimant's use of its "*possessions*" for the purposes of A1P1 protected by section 6 and Sch. 1, HRA 1998: (i) they prevent and restrict its ability to use and commercially exploit its property, such as airports and associated infrastructure for which they are licensed to operate; and (ii) prevent and interfere with the performance of its contractual rights and obligations. Mr Hawkins' evidence in support of this is summarised at paragraphs 41-43 above; he describes how, because of such restrictions, the Claimant's business is currently operating at a substantial loss with only a fraction of its ordinary revenues.

69. Since the measures are not permanent, they are in the nature of a "*control of use*" of possessions within the second paragraph of A1 P1, rather than a "*deprivation*" under paragraph 1, but A1 P1 is nonetheless engaged. Thus, it is a control of use of possessions where measures taken by a public authority have the practical effect that a business is prevented from making an effective use of its property.[3] Examples of this are as follows,

    (1) In *Bimer SA v Moldova*, App. No. 1508/03 §51 it was held that an amendment to the Customs Code that prohibited selling duty free outside international airports "constitutes a measure of control of use of property" although it did not prevent such shops "conducting … an ordinary retail business" (§51).

    (2) In *Pinnacle v UK* App. No. 33298/96 the Specified Bovine Material Order 1996, which prohibited the sale of meat from cattle heads for human consumption, was held by the Commission to represent a "control of use" of the businesses and commercial property of the applicants who specialised in deboning cattle heads.

    (3) In *Andrews v UK*, app. No. 37657/97 the Court observed that legislative measures introducing controls on use of particular items in the "interests of public health" will inevitably have an "adverse financial impact on many categories of business" and treated the measure as an interference with A1 P1.

[3] See *Breyer Group v Department of Energy and Climate Change* [2015] 1 WLR 4559 §62 (Dyson MR) explaining the judgment in *Agotixim v Greece* (1995) 21 EHRR 250.

(4) In *Malik v United Kingdom* App. No. 23780/08 §90 it was held that measures that, "*significantly affected the conditions of [the applicants'] professional activities and reduced the scope of those activities…*" represented a control of use. E.g. "*Where, as a consequence of the restrictions, the applicant's income and the value of his clientele and, more generally, his business, fell, the Court has held that there was interference with the right to peaceful enjoyment of possessions*"

(5) A1 P1 is also engaged where a measure has the effect of removing or restricting contractual rights or business licences, as is the case here: see e.g. *O'Sullivan McCarthy Mussel Development Ltd v Ireland* App. No. 44460/16 §89 and 104 and *Malik v United Kingdom* App. No. 23780/08 §91.

70. The Defendants concede that A1 P1 is engaged for the purposes of the grant of permission (SGD §53) but maintain that it is not engaged on the merits. The Defendants rely on the case of *Breyer*, which held that the announcement of a future probable change to renewable energy subsidies represented an interference with possessions under A1 P1 where it had an immediate effect on the value of solar installation construction businesses. The Court distinguished the immediate impact on a business (which engaged A1 P1) with merely an expected loss of future income (which did not). The case is of no assistance to the Defendants. The Claimant in this case has numerous physical assets which the Defendants' decisions restrict them from using and the decisions also have a direct and immediate impact on their contracts and business revenues. It is not the Claimant's case that the Defendants' decisions mean only that their business will be less profitable in the future.

71. A1 P1 requires that interferences with possessions are "*subject to conditions provided for by law*".[4] This requires that,

(1) Domestic law is sufficiently accessible, precise and foreseeable in its application to enable persons and businesses to regulate their conduct to an extent to which is reasonable in the circumstances (*Lekić v Slovenia*, App. No. 36480/07, 11 December 2018 at §95).

[4] This phrase is construed in the same manner as the phrase "in accordance with law" in Article 8 in respect of interference with the rights protected by this provision or "prescribed by law" relating to interferences with the rights protected under Articles 9, 10 and 11 of the Convention.

(2) Discretionary powers must be subject to sufficient safeguards to avoid them operating "*arbitrarily and selectively*" or in ways that are "*scarcely foreseeable*" (*Hentrich v France* (1994) 18 EHRR 440 at §42).

(3) An affected person must have reasonable opportunity of presenting their case to the authorities and mounting an effective challenge to the legality of such measures. In ascertaining whether this requirement has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures (*Lekić* at §95).

(4) There must be a requirement for reasons to be provided: in *Air Canada v United Kingdom* (1995) 20 EHRR 150, the Court held that whilst reasons had not been given for seizure of an aircraft, "*it would have been open to Air Canada to have instituted judicial review proceedings to challenge the failure of the Commissioners to provide reasons for the seizure of the aircraft…*" (§44). A1 P1 was therefore not breached because there was a legal obligation, enforceable through judicial review, that reasons be supplied.

72. In response to these authorities, at §54-§55 of the SGD, the Defendants contend that it is impractical to define with precision when countries will be categorised as green/amber. This however is not to the point: the Claimant is not requesting greater precision it is challenging the accessibility of the criteria, thresholds and reasons, which must be published to facilitate foreseeability and enable any illegality to be subject to effective challenge. Indeed, the Claimant cannot presently object to the precision of the criteria since it does not know what they are.

73. At §56 of the SGD the Defendants contend that the Claimant is able to make representations to the Defendants and "*can challenge the decision as to which country is placed on the list directly, by way of judicial review*". This however is disingenuous: absent the TLS information the Claimant has no basis for such a challenge. Insofar as it is said that the Claimant can bring a challenge in order to obtain reasons, then that is no answer to this claim which seeks to do precisely that.

(3) Procedural Legitimate Expectation

74. In the present case, the First Defendant made a promise as to the procedure that was to be followed in the review of the TLS. The promise is cited at paragraph 5 above and can be found at **[CB/10/154], [CB/12/162]**. Mr Hawkins explains that he thought that this statement

was a response to requests that he had made to Dr Leontaridi in an email dated 4 May 2021 seeking greater transparency, to which he had not received a response (TH1 §40 **[CB/6/57]**).

75. The representation is clear and unambiguous and devoid of any qualification. The First Defendant states that the assessments of countries will be transparent, and that people will see why countries are on each list: explanation, methodology and data will be published.

76. In *R v Devon County* Council, *ex p. Baker* [1995] 1 All ER 73, at 89 Simon Brown LJ referred to this category of legitimate expectation case as, "*those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice.*"

77. The Supreme Court in *Re Finucane* [2019] UKSC 7; [2019] HRLR 7 established that a statement made by a Minister as to the procedure to be adopted in reaching a decision can establish a legitimate expectation that the procedure will be followed even where it is "*made not just to [the claimant] but to the world at large*" (§63). The Supreme Court also made clear that reliance on such an undertaking is not required to found such a legitimate expectation (ibid[5]).

78. Public officials are not bound to comply with legitimate expectations in all circumstances. However, they can only resile from such expectations if there is an "*overriding reason to resile from it … in which case the court will itself judge the adequacy of the reason advanced for the change of policy*" (*Re Finucane* §56 (citing Lord Woolf MR in *Ex p. Coughlan*)). This requires a "*bona fide decision …taken on genuine policy grounds not to adhere to the original policy …*" (*Re Finucane* §76).

79. With the possible exception of any data the publication of which would be harmful to international relations, nothing approaching such an overriding public interest reason has been provided by the Defendants. Moreover, there is no evidence within the witness statements filed in this claim of any decision by the First Defendant to change policy or to resile from his representation. On the contrary, the Defendants maintain that the

[5] *R (RD & Ors) v Worcester CC* [2019] EWHC 449 (Admin): "*Knowledge of (or detrimental reliance upon) an express representation is not an essential requirement where the representation relied upon is made to the public at large or a class of persons…*" (Nicklin J).

representation has been complied with: SGD §41.4. There is however a profound disconnect between what the First Defendant promised and what his officials have in fact done.

80. The only possible justification that has been advanced on which it might be justified for the Defendants to not fully comply with the representation is harm to international relations if certain material is published. This is a vague unsubstantiated assertion, with no particulars given. But it clearly would not apply to the vast majority of the TLS information sought by the Claimant. The Claimant has accommodated the point in the draft Order.

81. The Defendants in their SGD provide no other possible answer to this ground of challenge:

    (1) The Defendants' first point is that the First Defendant did not undertake to publish "*all the scientific data*" considered by the JBC (SGD §41.1). This is hard to understand. The First Defendant referred to the JBC data and the methodology, data and approach to variants of concern and said, in terms, "*all of that is going to be published*" (emphasis supplied).

    (2) It is next said that the statement was "*off the cuff*" and the First Defendant used the words "*I think*" (SGD §41.2). But the Secretary of State did not say " *I think the data will be published*" but "*I think reassuringly….*" and "*I think that will be helpful…*" i.e. he thought it reassuring and helpful that the data would be published: he was not expressing doubt about whether it would be published. There was no uncertainty or qualification to his assurance that the data and methodology would be published "*so people can see themselves how and why the particular countries and territories are being included at the moment are in there*".

    (3) It is next stated (SGD §41.5) that the data and methodology has been published. Again, this is difficult to understand given that the only countries in relation to which explanations and data has been supplied are Portugal, Malta and a handful of other territories that have been recategorised. The JBC data, thresholds and assessments have not been supplied.

    (4) The Defendants then state that the Claimant cannot have understood the promise to be unequivocal because of the email sent to Dr Leontaridi on 18 May 2021 **[EB/19/200]**. On the contrary, in the very first line of the email Mr Hawkins states that he is following up a discussion in which he requested information "*in connection with the Transport Secretary's commitment to being transparent about how the Government made*

decisions about green, amber and red lists of countries for international travel from 17 May." It thus shows that the Claimant understood the First Defendant to have given a commitment to provide the information sought. The email goes on to point out that the data that had been published was unilluminating and did not conform to this commitment.

(5) The Defendants next seek to rely (SGD §42) on the case of *Wheeler* for the proposition that a promise made to the public at large is not protected by the doctrine of legitimate expectation. This point however is incorrect: see *Re Finucane* §63, above. *Wheeler* was concerned with "*macro political*" representations such as – in that case – a political promise to hold a referendum. The promise in this case was to publish information and data, which is quite different. Moreover, Richards LJ at §44 noted that whilst a promise made to the public at large might not be enforceable by everybody, "*particular individuals or bodies who are directly affected by the executive action under consideration*" can do so. Richards LJ also quoted Sedley LJ's comments in *Begbie*: "*Sedley LJ said he had no difficulty with the proposition that in cases where government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant has been relying specifically on it.*"

(6) Neither of the other two cases quoted by the Defendants assist them: *Niazi* at §46 concerned substantive legitimate expectations; *Jeffries* at §74 concerns macro political assurances.

(7) Finally, the Defendants state that it would be "*fair*" to resile from the representation (SGD §43). This is difficult to reconcile with their contention that they have complied with it. There is no evidence of any considered change of policy on the part of the First Defendant. As explained above, the basis that the Defendants have given that could possibly constitute an overriding interest would be if a foreign State objected to the disclosure of material that it had provided in confidence and this would cause harm to international relations – but this has not been established and could not apply to most of the TLS information.

82. In the premises, the Court should allow this ground of judicial review.

(4) Common law duty of transparency

83. This absence of transparency is also a breach of the common law duties to give reasons and provide information about the basis on which the decisions to categorise territories as green/amber are taken. Since recent case law on common law principles has emphasised that it is informed by the "*according to law*" standards under the ECHR (*R (Justice for Health Limited) v Secretary of State for Health* [2016] EWHC 2338 (Admin)), those principles have been addressed first, above.

(a) The duty to give reasons

84. What is required by way of the duty to give reasons is a matter for the Court and not public officials, it is not assessed on a *Wednesbury* basis: *R (Help Refugees Ltd) v SSHD* [2018] EWCA Civ 208, [2018] 4 WLR 168 Hickinbottom LJ §122(ii).

85. The principles concerning the giving of reasons were summarised in *R (Oakley) v South Cambridgeshire DC* [2017] 1 WLR 3765 Elias LJ with whom Patten LJ agreed. He stated that:[6] (i) the common law is moving to the position that in general reasons should be given unless there is a proper justification for not doing so (§30); (ii) courts have required reasons where (a) fairness requires it, (b) where it is necessary to explain an apparently aberrant decision, or (c) where it may mean parties may not know if they have grounds of appeal (at §31).

86. As to point (c) above, Elias LJ explained that there is a strong analogy between frustrating rights of appeal and frustrating judicial review and "*there will be many cases where it is in the public interest that affected parties should be able to hold the administration to account for their decisions, and in the absence of a right of appeal, the only way to do so is by an application for judicial review*" (§32). His Lordship explained that therefore it will often be in the public interest that reasons are given to ensure decisions are lawfully made and if not open to challenge (§33).[7]

87. Elias LJ in *Oakley* went on to hold that the planning committee in that case had been under a duty to give reasons because parties who have a "*close and substantial interest in the decision*" have a right to know why it has been taken (§58). He continued:

[6] Sales LJ also agreed but gave his own reasons.

[7] In *Help Refugees*, Hickinbottom LJ stated that generally there must be a proper opportunity to challenge administrative decisions and "as a consequence" unless rendered impracticable, "*sufficient reasons must be given for administrative decisions to allow a realistic prospect of such a challenge. Where the reasons do not enable such a challenge, they will be legally inadequate.*" (§122(iii)).

"58 …This is partly, but by no means only, for the instrumental reason that it might enable them to be satisfied that he decision was lawfully made and to challenge it if they believe that it was not. It is also because citizens have a legitimate interest in knowing how important decisions affecting the quality of their lives have been reached. …

59… In a general sense this may be considered an aspect of the duty of fairness which in this context requires that decisions are transparent. The right of affected third parties to be treated fairly arises because of the strong and continuing interest they have in the character of the environment in which they live. Even if the decision to allow a development does not any property or financial interest, it may damage other non-pecuniary interests which affected parties may value equally highly. In my judgment, these are powerful reasons for imposing a duty of to give reasons, at least if the reasoning process is not otherwise sufficiently transparent."

88. Elias LJ thus considered that decisions, such as planning decisions, that affect the interests of third parties must be "*transparent*" as an aspect of the duty of fairness. He clearly considered that the need for transparency is if anything stronger where pecuniary interests are affected by a decision. He reasoned that the need for reasons was reinforced where the planning committee departed from a recommendation made by a planning officer (§61).

89. These principles require the provision of reasons by the Defendants in the present case.

    (1) The Claimant clearly has a close and substantial interest in the decision and its business is directly impacted by the country allocation decisions.

    (2) The rationale for the allocation of countries cannot be inferred, even with extensive efforts by the Claimant to do so. On the contrary, the decisions appear aberrant: see paragraphs 52-54 above.

    (3) The Claimant has also engaged extensively with the Defendants during the pandemic and in relation to the establishment of the TLS and may wish to make representations on allocation decisions or the operation of the system generally.

    (4) Finally, there is a substantial public interest in interested parties being given reasons so that the decisions are open to scrutiny and challenge. Otherwise, the decisions are effectively immune from judicial review and the supervisory jurisdiction of the Court as to the legality of the merits of the allocation decisions.

90. The Defendants are wrong to say that this ground of challenge is in "*essence*" concerned solely with the ability of the Claimant to make representations on country allocation decisions (SGD §19); that is only a part of the Claimant's contention. But since the Defendants accept that the Claimant could make representations and that these would be taken into account, the Defendants' objection is entirely misplaced (SGD §56).

91. The Defendants next state that there is a distinction between the provision of reasons and the provision of documentation (§22). However, this is not a sound objection in circumstances in which: (i) the Defendants have not provided any clear or comprehensive account of what documentation exists and the extent to which it contains their reasoning; and (ii) the First Defendant accepted in his statement on 7 May 2021 that in order that people would be able to understand why territories were allocated to a particular list, JBC risk assessments, underlying data and other information would be published because they provide the rationale for the decisions being taken: in the present context, that is what the provision of reasons requires. In any event, the Court is entitled to and should declare that the decision is unlawful for the failure to provide reasons.

92. The Defendants also state that the information sought "*largely consists*" of expert scientific advice. It is said that disclosure of such material would not ensure that the Claimant can challenge decisions that are unlawful because the Courts will not arbitrate between competing scientific views (§31). However, provision of such advice might show the decision to be irrational or based on irrelevant considerations (for example) and would enable the Claimant and others to ensure the Defendants were, as they contend, basing their decisions on risk and scientific assessment. In any event, such assessments are central to the decisions taken according to the Defendants themselves.

93. In *R v Secretary of State for Health, ex parte United States Tobacco International Inc* [1992] 1 QB 353 at 371. Taylor LJ explained that where, "*… advice was from a body of independent experts set up to advise the Secretary of State on scientific matters*" he could "*see no ground in logic or reason for declining to show the applicants the text of the advice*". In view of the "*change of policy the Regulations would bring about and its unique impact on the applicants*", fairness demanded that "*such advice should be provided.*"

94. In the context of appraisals of the clinical benefits and the cost-effectiveness of health care interventions, an inherently scientific and multi-factorial exercise, like the TLS country allocations, the Court of Appeal held in *R (Eisai Ltd) v National Institute for Health and Clinical*

Excellence [2008] EWCA Civ 438 that a refusal to provide the a fully executable version of the model used to assess the cost-effectiveness of drugs was a denial of procedural fairness. The Court of Appeal rejected the suggestion that such extensive disclosure would undermine confidentiality or be overly costly, concluding at §65 that this information was "*needed for the purpose of checking the reliability of the model*" (by the affected pharmaceutical companies) and accepted that it should "*be very slow to allow administrative considerations of this kind to stand in the way of its release*".

95. In *R (Savva) v Kensington and Chelsea RLBC* [2011] PTSR 761, the Court of Appeal similarly held that a local authority was required to publish and explain its mathematical tool for calculating personal community care budgets, as part of a common law duty to give reasons. The court recognised that the burden of giving reasons "*would not be insignificant but it is what simple fairness requires . . . If a local authority were entitled to notify a bald figure without any explanation, the recipient would have no means of satisfying himself or herself that it was properly calculated*" (at §20).

(b) The duty to disclose policies and criteria

96. The second aspect of the principle of transparency relied upon by the Claimant requires that where a public body takes a decision based on a policy or set of criteria, the policy/criteria must be made available. On the particular facts of this case, involving an on-going process of decision-making based on risk assessment, there is considerable overlap between this principle and the duty to give reasons.

97. Sedley LJ stated in *B v Secretary of State for Work and Pensions* [2005] 1 WLR 3796 at §43 that a "*lawful policy is necessary if an executive discretion of . . . significance . . . is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases*" and if the Government uses a policy or criteria to guide its decision-making, "*it is the antithesis of good government to keep it in a departmental drawer*" because those affected by it are "*fully as entitled as departmental officials to know the terms of the policy . . . so that they can either claim to be within it or put forward reasons for disapplying it, and so that the conformity of the policy and its application with principles of public law can be appraised* (§43).[8]

98. In *R (Justice for Health Limited) v Secretary of State for Health* [2016] EWHC 2338 (Admin) Green J (as he then was) held that it was now "*well established*" that these principals had evolved

[8] See also *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245; *R (Ames) v Lord Chancellor* [2018] EWHC 2250 (Admin) §§74-76.

by reference to the case law and principles concerning the "*in accordance with law*" requirement under the ECHR (as to which see the discussion of A1 P1 above) to form the "*principle of transparency*". He addressed the authorities at §143 - §147 and provided a summary of the principles of "*transparency*" and "*good administration*" at §6:

> "*6…These are important principles of public law and, in essence, require public bodies to formulate and apply policies in a clear, precise and transparent manner so that those subject to or affected by them know where they stand and can regulate their affairs accordingly. The principles are also important so that those affected by a decision that might be adverse to them can make representations to the decision maker before the decision is taken and/or know the reasons for the decision taken subsequently so that they can decide whether to challenge it in the courts.*" (emphasis supplied)

99. The principle of transparency and the underlying principle of good administration apply to the present context. The decision is one that has a major impact on the Claimant and others, and they have a legitimate interest in understanding the applicable policy, criteria and basis on which decisions allocating countries to each traffic light category are taken. It is, as Sedley LJ, stated, the antithesis of good administration for such matters to be kept in the Departmental drawer.

(c) Breach of the common law principles

100. The duty of transparency at common law as articulated in the authorities concerning reasons and the publication policies/criteria has not been complied with for the reasons already given. In essence, the Claimant does not know or understand the basis for categorising countries as green and amber. The publication of a limited amount of information about countries that are re-categorised falls a long way short of transparency.

D. REMEDIES

101. The court has a discretion as to the appropriate remedy, which can include directing that *"proper and adequate reasons"* be given (*R v Legal Aid Area No. 8 (Northern) Appeal Committee ex parte Angell* (1990) 3 Admin LR 189 at 204G, 207D) and/or granting a declaration that the decision is unlawful or contrary to principles of fairness (*Help Refugees Ltd* §135).

102. A draft order tailored to the circumstances of this claim is attached. In his third statement, Mr Hawkins has referred to 30 countries that make up 85% of total international passengers

(TH3 §15 **[CB/30/251]**). These countries are therefore of particular interest to the Claimant and this has been reflected in the proposed draft order that they ask the Court to make.[9]

E. CONCLUSION

103. The Court is asked to grant permission for judicial review and allow the claim. The Defendants' decisions to categorise countries as amber or green under the TLS, despite being of critical importance to the Claimant and others in the travel industry, lack transparency and as such lack basic protections against arbitrary decision-making. The Court is requested so to rule and to grant the Claimant the remedy it seeks.

TOM HICKMAN QC

TOM LEARY

Blackstone Chambers

6 July 2021

Julia Marlow

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[9] The Order lists certain islands separately from their main countries and therefore runs to 31 countries or territories.