



5 CHANCERY LANE
LONDON
WC2A 1LG
T: 0345 257 6377

Contact: Hotel Quarantine JR Team
Email: HotelQuarantine@pgmbm.com
Our Ref: HotelQuarantineJR.TG.TB

The Rt Hon Matthew Hancock MP
C/O
The Treasury Solicitor
Government Legal Department
102 Petty France
Westminster
London
SW1H 9G

Sent by email only to: newproceedings@governmentlegal.gov.uk

Private and confidential

5 March 2021

Dear Sirs

Re: Judicial Review of The Health Protection (Coronavirus, International Travel) (England) (Amendment) (No.7) Regulations 2021 – Letter before Claim

This is a letter before claim sent in accordance with the judicial review pre-action protocol.

1. The Claimants

We represent the following clients who intend to commence judicial review proceedings unless a satisfactory response is received to this pre-action protocol letter:

- (1) [REDACTED], a retired British Citizen who lives in [REDACTED] with her adult son. On 18 October 2020 [REDACTED] travelled to South Africa to attend her elder son's wedding. [REDACTED] was due to return to England on 14 February 2021. However, her flight was delayed and so she arrived on 15 February 2021. She had not booked or purchased her "managed self-isolation package". She has been advised that she will be contacted about payment. [REDACTED] completed her quarantine in a government-designated hotel on 26 February 2021.
- (2) [REDACTED], proceeding by her mother and litigation friend [REDACTED]. [REDACTED]'s identity is confidential and an anonymity order will be sought upon issuing of the claim pursuant to CPR 39.2(4). [REDACTED] is a British and Portuguese citizen aged 16. In January 2021 [REDACTED] and her brother travelled to Portugal to stay with their father, a medical professional in a hospital in Lisbon, under shared custody arrangements. [REDACTED] is

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hoping to return home to England to complete her GCSE year in the classroom from 8 March 2021 or as soon as possible thereafter. As an unaccompanied minor, her mother would be required to join her in quarantine in a government-designated hotel.

2. Details of the Claimants' legal advisers

Excello Law Limited trading as PGMBM. Our address and reference number are below. The partner dealing with this matter is Tom Goodhead.

3. Details of the matter being challenged

The Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 7) Regulations 2021/150 and the policy of the Secretary of State for Health and Social Care on the imposition of charges for "managed self-isolation packages" under those regulations.

4. Interested Parties

None.

5. The issues

i. Background

1. On 8 June 2020, The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (SI 2020/568) (the "**Regulations**") came into force to help curb the spread of COVID-19 in England. The Regulations imposed requirements on travellers arriving in England from outside the UK, the Republic of Ireland, the Channel Islands and the Isle of Man (the "**Common Travel Area**"). Travellers falling within the Regulations were required to provide specified information to the Government upon entry, with some required to undergo a 14-day period of self-isolation (later reduced to 10 days) at their homes.
2. As initially made, the requirements applied in respect of all travel to England from anywhere outside the Common Travel Area, but from 10 July 2020 travellers from a list of "exempt countries and territories" were no longer subject to the requirement to self-isolate. Later amendments introduced further refinements, including "additional measures" imposed on travellers from certain areas and rules banning all flights and vessels from some high-risk regions.
3. From 15 December 2020, amendments brought in by The Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 26) Regulations 2020 (SI 2020/1337) introduced a "Test to Release" scheme. The "Test to Release" scheme allowed some self-isolation periods to be reduced from 10 days (previously 14 days) to five days, provided the traveller took a government-validated private COVID-19 test on or after the fifth day from last being in a non-exempt country and received a negative result. Anyone who received a positive or an unclear result had to continue to self-isolate. From 24 December 2020, the "Test to Release" scheme stopped applying to countries which were subject to "additional measures".

4. In early January 2021, a COVID-19 variant called P.1 (the so called “Brazilian Variant”) emerged that was first identified in travellers from Brazil, who were tested during routine screening at an airport in Japan.
5. On 18 January 2021, the Government suspended all travel corridors and required anyone arriving in England from anywhere outside the Common Travel Area to self-isolate for 10 days. Moreover, travellers to England were required to provide proof of a negative COVID-19 test taken three days prior to their departure. The UK Government also published a “red list” of countries and banned all travel into England from countries on the list. This ban did not apply to British or Irish citizens, or third country nationals with residency rights in the UK who were required to self-isolate at home for 10 days from the day of arrival.
6. On 9 February 2021, the Secretary of State for Health and Social Care announced the new hotel quarantine system that would come into force six days later, on Monday 15 February 2021.
7. The Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 7) Regulations 2021 (S.I. 2021/150) (the “**Hotel Quarantine Regulations**”) were made and laid before Parliament on 12 February 2021 and came into force on 15 February 2021. They amended the Regulations. The provisions material to this dispute appear to have been made under section 45B of the Public Health (Control of Disease) Act 1984 (the “**1984 Act**”).
8. Following the amendments made to the Regulations by the Hotel Quarantine Regulations, persons who have been in a red list country in the previous 10 days are required to quarantine in a government-designated hotel room for 10 full days from the day of their arrival. Such persons must have booked a “managed self-isolation package” that includes transport, quarantine hotel and testing package. A “managed self-isolation package” costs £1,750. Any person receiving a positive result from their day two COVID-19 test must pay an additional £304 for a further two nights of quarantine, and those receiving a positive result from their day eight test must pay an additional £1,216 for a further eight nights of quarantine. However, a policy entitled “*Managed quarantine: what to expect*” published by the Government on 14 February 2021 further provides that such travellers will not be allowed to leave quarantine until they no longer show any COVID-19 symptoms,¹ meaning that there could be no maximum limit on the total number of days that one will be required to quarantine.
9. Travellers will be allowed to quarantine with the people they travelled with. Each “additional adult” or child over 12 sharing a room will need to pay a fee of £650.
10. Once travellers are in their hotel rooms, they must remain in their rooms until their quarantine ends, except for certain “permitted reasons”. “Visible security” is in place to ensure compliance with the new measures. In relation to certain permitted reasons, travellers must be given prior permission from a person authorised by the Secretary of State and also comply with any

¹ “If you receive a positive result from either of your tests, you will not be able to leave managed quarantine until 10 days have passed from the date of the test and you no longer [sic] coronavirus (COVID-19) symptoms”: Paragraph 11 (*Leaving quarantine*), Department of Health & Social Care, “Managed quarantine: what to expect” (14 February 2021). Available at: <https://www.gov.uk/government/publications/managed-quarantine-what-to-expect/managed-quarantine-what-to-expect>.

reasonable requirements imposed by that person. Permitted reasons where permission may be granted to travellers to leave their rooms include: (a) to exercise; (b) to visit a person who the traveller reasonably believes is dying; and (c) to attend a funeral of a member of their household or a close family member. Government guidance says that exercise outside will only be permitted “in very special circumstances”.² For other listed permitted reasons, such as seeking urgent medical assistance and to avoid injury, illness or to escape risk of harm, it appears that permission is not required. The Government guidance adds a restriction which goes further than the Regulations – namely that a traveller will not be able to leave at all if they have tested positive for coronavirus during the quarantine period.³ Children are subject to the same quarantine rules and unaccompanied children who are travelling from a red list country can be joined by their parents or guardians. At the end of the quarantine period, travellers are returned to the airport they were collected from when they arrived in England.

11. There are a small number of groups of people that are exempt from having to quarantine under the Regulations. These include, but are not limited to, hauliers who have travelled from Portugal, defence personnel, visiting forces and government contractors, border security officials and representatives of a foreign country or territory or British Overseas Territories.
12. Fixed Penalty Notices of up to £10,000 can be imposed on anybody breaching the rules and the Government has warned that a person can be imprisoned for up to 10 years for anybody concealing the fact that they have been to a red list country in the relevant time period.

ii. The legal regime

13. Section 45B of the 1984 Act provides:

“45B Health protection regulations: international travel etc.

(1) The appropriate Minister may by regulations make provision—

- (a) for preventing danger to public health from vessels, aircraft, trains or other conveyances arriving at any place,*
- (b) for preventing the spread of infection or contamination by means of any vessel, aircraft, train or other conveyance leaving any place, and*
- (c) for giving effect to any international agreement or arrangement relating to the spread of infection or contamination.”*

14. Subsection (2) provides, that regulations may in particular provide:

“for the medical examination, detention, isolation or quarantine of persons, ...”

² Paragraph 8 (*Leaving quarantine*), “Managed quarantine: what to expect” (*Ibid*).

³ Paragraph 12 (*Compassionate leave*), “Managed quarantine: what to expect” (*Ibid*).

15. Pursuant to this power, the Secretary of State has made the Regulations which, amongst other things, provide for persons to quarantine in hotels when they arrive from red list countries. The Regulations also require people to undertake three coronavirus tests: one before beginning the journey to England and two after arrival while in quarantine.

16. Section 45F(2) provides that such regulations may,

“(f) permit or prohibit the levy of charges;”

17. Schedule B1A of the Regulations applies to any person who arrives in England from a country listed in Schedule B1 or who has been in such a country in any of the 10 days before they arrive in England (paragraph 1). The person is required to be in possession of a managed self-isolation package (paragraph 5). The person must proceed directly to the accommodation in the package using the means of transport provided (paragraph 6). Paragraph 10 provides:

“Unless P leaves the common travel area where P is permitted to do so under these Regulations, P must self-isolate in the place in the accommodation designated in the managed self-isolation package until whichever is the later of—

(a) the end of the period of 10 days beginning with the day after P’s arrival in England;

(b) the end of the period for which P is required to self-isolate under Schedule 2C.”

18. Paragraph 9 of Schedule B1A of the Regulations allows the Secretary of State or a person authorised by him to impose a charge for a managed self-isolation package. It 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.”

19. The amount of the charge is not specified in the Regulations.

20. The Government rules on travelling to the UK make clear that all persons, unless falling within express exemptions (but not limited to persons seeking temporary or permanent residence in England), are required to be in possession of a managed self-isolation package if they have been in a red list country (the **“Charging Policy”**). The Charging Policy sets charges for such packages as follows (see [Booking and staying in a quarantine hotel when you arrive in England](#)):

How much you'll need to pay

	Rate	Additional day rate (for more than 10 days of quarantine)
Rate for 1 adult in 1 room for 10 days (11 nights)	£1,750	£152
Additional rate for 1 adult (or child over 12)	£650	£41
Additional rate for a child aged 5–12	£325	£12

21. The Charging Policy provides that for those facing “*significant financial hardship as a result of this charge*”, there will be an opportunity to apply for a deferred repayment plan when booking. This is only available if the traveller already receives income-related benefits, and they will be required to pay back their debt to the Government in 12 monthly instalments.
22. The Charging Policy also states that “[t]here will be an additional fee if your quarantine is extended. The additional day rate specified above is applicable for those who have already stayed in quarantine for 10 days”.

iii. Grounds of challenge

Ground 1: Imposition of charges for quarantine and testing is ultra vires

23. The general power to “permit or prohibit” the levy of charges for things done under sections 45B and 45C of the 1984 Act, which is contained in section 45F(2)(f), is general and unspecific. It provides no guidance on the matters that can be charged for or the level of charges.
24. That section must, in particular, be read subject to the International Health Regulations 2005 (“**IHR 2005**”), an international instrument which is binding on all World Health Organization (“**WHO**”) Member States including the United Kingdom.
25. Part VII of the IHR 2005 provides for charges. Article 40 prevents the imposition of charges for quarantine:

“Article 40 Charges for health measures regarding travellers

1. *Except for travellers seeking temporary or permanent residence, and subject to paragraph 2 of this Article, no charge shall be made by a State Party pursuant to these Regulations for the following measures for the protection of public health:*

[...]

- (c) appropriate isolation or quarantine requirements of travellers;*

[...]

2. *States Parties may charge for health measures other than those referred to in paragraph 1 of this Article, including those primarily for the benefit of the traveller.*
3. *Where charges are made for applying such health measures to travellers under these Regulations, there shall be in each State Party only one tariff for such charges and every charge shall:*

[...]

(b) not exceed the actual cost of the service rendered..."

26. Further,

- (1) "quarantine" is defined as:

"quarantine" means the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination;

- (2) "suspect" is defined as:

"suspect" means those persons, baggage, cargo, containers, conveyances, goods or postal parcels considered by a State Party as having been exposed, or possibly exposed, to a public health risk and that could be a possible source of spread of disease;"

27. These definitions clearly apply to the "managed self-isolation" imposed by the Regulations, since the Regulations restrict the activities of persons considered by the UK Government to have been exposed or possibly exposed to a public health risk, namely, presence in a territory with a high prevalence of a potentially vaccine-resistant strain of coronavirus.

28. It follows that charging for managed self-isolation is contrary to the IHR 2005.

29. The International Health Regulations ("IHR") were made under Article 21 of the WHO Constitution 1948 which grants the World Health Assembly the power *inter alia* to adopt regulations concerning "*sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease*". Article 22 provides that regulations adopted pursuant to Article 21 come into force for all members after due notice has been given of their adoption by the Health Assembly unless a member rejects the regulations or makes a reservation within the period stated in the notice.

30. The United Kingdom is a founding member of the WHO (it signed up to the WHO Constitution on 22 July 1946).⁴

⁴ https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IX-1&chapter=9&lang=en.

31. The IHR were first adopted in 1969 and were substantially amended on 23 May 2005 by the 58th World Health Assembly. The 1984 Act was intended to implement the UK's obligations under the 1969 IHR: See *Francis, R (On the Application Of) v The Secretary of State for Health and Social Care* [2020] EWHC 3287 (Admin) at [12]. Pursuant to Article 22 of the WHO Constitution and Articles 59 and 64 of the IHR, the IHR 2005 entered into force on 15 June 2007 subject to any reservations entered by States. The UK along with 190 other states did not enter any reservation to the IHR 2005.

32. The purpose and scope of the IHR 2005, as recorded in Article 2, is:

“to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”

33. Part 2A of the 1984 Act (sections 45A to 45T) were introduced by section 129 of the Health and Social Care Act 2008 for the express purpose of implementing the IHR 2005. This is made clear in paragraph 30 of the explanatory notes to that Act:

“The IHR are the means by which WHO aims to prevent and control the international spread of disease, by action that is commensurate with and restricted to public health risks, and which avoids unnecessary interference with international traffic and trade. The previous International Health Regulations (1969) were concerned with action at international borders in relation to three specific infectious diseases (cholera, plague and yellow fever), but increasingly were recognised as unable to deal with new threats, such as SARS. The new IHR are concerned with infectious diseases generally, and also with contamination. They also pay more attention than their predecessors to the arrangements needed in-country to deliver an effective response to health risks. The IHR came into effect in June 2007. This Act amends the Public Health Act 1984 to enable IHR to be implemented, including WHO recommendations issued under them.”

34. It is an established, “rule of statutory interpretation” that:

*“where a statute is passed in order to give effect to the obligations of the United Kingdom under an international convention, the statute should be given a meaning that conforms to that of the convention”: see *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116, 141 and *Bennion on Statutory Interpretation*, 5th ed (2008), section 221.6.” *R (Adams) v Secretary of State for Justice* [2011] UKSC 18 [2012] 1 AC 48 at [14] per Lord Phillips.*

35. There are two further relevant principles of construction that are closely associated with that referred to above:

(1) There is a strong presumption that Parliament does not intend or authorise conduct that would place the UK in breach of its international obligations: *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976 per Lord Hoffmann at [27].

(2) In a case which “concern[s] the construction of a statutory right, duty or power which would otherwise be of uncertain scope” it can be “seen or presumed that Parliament

intended the statute to comply with the United Kingdom’s international obligations”: R (Yam) v Central Criminal Court [2015] UKSC 76 [2016] AC 771 at [35].

36. These principles applied to the general power to charge contained in section 45F(2)(f) make clear that the charging power is not entirely open-ended but must be read subject to the UK’s international obligations under the IHR 2005. It would require clear words or necessary implication for Parliament to authorise or require action that would place the UK in breach of its international obligations and there can be no question that the charging power expressly or by necessary implication authorises or requires the imposition of charges for quarantine.

37. It therefore follows that either:

- (1) Paragraph 9 of Schedule B1A of the Regulations is ultra vires insofar as it purports to authorise the Secretary of State to impose charges for quarantine, and should be severed from the Regulations; or
- (2) The discretion conferred by that provision cannot be exercised in a manner that is contrary to Article 40 of the IHR 2005 and the charging regime imposed by the Secretary of State under the Charging Policy is therefore ultra vires.

38. In responding to these points, please also clarify the basis on which the charges are calculated and the degree to which they exceed costs to providers.

Ground 2: The unaffordable level of fees and absence of any adequate exceptions or reference to a person’s means under the Charging Policy

39. The imposition of charges represents a very substantial additional cost for those persons needing to travel. For example, we give some indication of the ordinary costs of flights to red list countries and the additional costs of buying a managed self-isolation package:

	Red list country	Departure – Arrival	Average flight cost (one-way) ⁵	Total cost (average flight cost + cost of managed self-isolation package for one adult for 10 days)	Increased cost in %
1.	Brazil	Brasilia – London	£221	£1,971	792%
2.	Portugal	Lisbon – London	£70	£1,820	2,500%
3.	South Africa	Johannesburg – London	£220	£1,970	795%
4.	Zimbabwe	Harare - London	£335	£2,085	522%

⁵We calculated the average flight costs by taking the average of all “best flights” that showed up on Google Flights. For example, we did a [search](#) on 26 February 2021 which showed that there were three “best flights” for 21 March 2021 from Brasilia to London, with respective prices of £189, £204, and £270 (taxes and fees included). The average flight cost for Brazil is therefore £221. To ensure that the only control variable is the place of departure, all searches were conducted on the same day (26 February 2021), and the dates of flight in these searches were all set as 21 March 2021.

40. For many people, the costs are unaffordable and prohibitive. As the table above shows, requiring travellers to pay £1,750 to quarantine in a government-designated hotel will in some cases increase the cost of returning home by a staggering 2,500%. For those travelling with children or those who are required to quarantine for longer than the 10 days, the increase will be even higher. The effect is therefore to prevent persons travelling to see family and, in many cases, will impede and even prevent family units from being together.
41. In some cases, the charges impede people, including children, from exercising their right of abode or residency in the United Kingdom, frustrating their statutory rights under the Immigration Act 1971. Section 2 of that Act provides, for example, that a British citizen has a “right of abode” in the UK.
42. Moreover, in relation to children specifically, charges that frustrate their ability to return to their home or school are not in their best interests. There is a duty under section 55 of the Borders, Citizenship and Immigration Act 2009 that the best interests of children are a primary consideration in this context. Baroness Hale also stated in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 [2011] 2 AC 166 at [25] that the Strasbourg Court will expect national authorities to apply Article 3(1) of the United Nations Convention on the Rights of the Child and treat the best interests of a child as “a primary consideration” under Article 8 of the European Convention on Human Rights.
43. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2021] EWCA Civ 193 (the “*PRCBC case*”) Lord Justice David Richards held that fees imposed on registration for British citizenship had failed to have regard to the best interests of children and were set at unaffordable levels for many. They were therefore unlawful. The Judge approved the reasoning given by the first instance Judge (at [76]):

“there is no evidence in the voluminous papers before me that [the Secretary of State] has identified where the best interests of children seeking registration lie, has begun to characterise those interests properly, has identified that the level of fee creates practical difficulties for many (with some attempt being made to evaluate the numbers); and has then said that wider public interest considerations, including the fact that the adverse impact is to some extent ameliorated by the grant of leave to remain, tilts the balance.”

44. Furthermore, whilst the Court of Appeal in the *PRCBC case* held that the imposition of fees was not itself unlawful as frustrating the right of children to register as British citizens, this was because the primary legislation relating to registration for British citizenship made explicit provision for the imposition of fees. However, in the present case, Parliament has made no explicit requirement for the imposition of charges in relation to the exercise of statutory rights under the Immigration Act 1971 (or even in relation to quarantine specifically). The logic and reasoning of the Court of Appeal therefore strongly supports our clients’ contention that the imposition of charges at an unaffordable level is unlawful where it impedes the exercise of statutory rights. As Lord Justice David Richards stated in paragraph 61:

“The question in each case where it is said that delegated legislation has illegitimately curtailed rights conferred by primary legislation is whether, on a

*proper construction of the primary legislation and, if different, the primary legislation under which the subordinate legislation has been made, the delegated legislation was authorised in the terms that it was made. In a case, such as *JCWJ*, where the power is contained in separate and unconnected primary legislation, it is highly likely, perhaps inevitable, that the power contained in the unconnected legislation will not authorise the making of subordinate legislation that curtails a right conferred by other primary legislation.”*

45. In the present case, the power to impose charges for measures taken under the 1984 Act is clearly distinct from the right of persons to exercise their statutory rights under the Immigration Act 1971. It is not a condition for the exercise of such rights. Where therefore the imposition of charges is unaffordable and prevents or impedes those rights being exercised it follows from the reasoning of the court in the *PRCBC* case that the charges are unlawful.
46. Therefore, the fact that the Charging Policy has no regard to these impacts and includes no reduction in charges or exceptions means that impacts on persons who cannot afford to pay the costs, or who are required to travel to ensure family unity or to exercise statutory rights, are disproportionate under Article 8 of the European Convention on Human Rights and/or frustrates statutory rights and/or is contrary to the requirement to ensure that the best interests of children are a primary consideration.
47. The ability of persons receiving income related benefits to defer the fees (the “**Deferred Payment Plan**”) does not meet these points. The scope of that provision is exceptionally limited and indeed irrational. Such benefits are already set at a minimum level. The Joseph Rowntree Foundation report *UK Poverty 2020/21* found families in receipt of income-related benefits are financially vulnerable.⁶ An unexpected repayment obligation of £1,750 or more over 12 months is clearly unaffordable.
48. The imposition of unaffordable charges under the Charging Policy is highly detrimental to children travelling to visit family and who are unable to return to the UK and resume their classroom learning, due to begin on 8 March 2021.
49. [REDACTED] is 16 years old and travelled to Portugal with her brother, aged 14, to visit their father. [REDACTED] and her brother are hoping to return home to England to resume their classroom learning. [REDACTED] and her brother are both in full-time secondary education and so receive no income. Due to the fact that [REDACTED] and her brother are both minors, were they to return to the UK, their mother (who is currently at home in the UK) would have to quarantine with them in a government-designated hotel. Based on figures for the average cost of a one-way flight from Portugal to the UK,⁷ [REDACTED] and her family would have to pay a minimum of £3,190 for both children to be able to return to the UK, this being a 2,179% increase in costs.⁸ Given

⁶Joseph Rowntree Foundation, *UK Poverty 2020/21* (13 January 2021) at 43. Available at <https://www.jrf.org.uk/report/uk-poverty-2020-21>.

⁷ See the table at paragraph 39 above.

⁸ This value was calculated by adding together the cost of a one-way flight from Portugal to the UK for two people ([REDACTED] and her brother) with the cost of quarantining in a government-designated hotel for [REDACTED], her brother and her mother and calculating the percentage increase between the cost of the flights compared with the cost of the flights and the hotel quarantine package.

that neither █████, nor her brother are in receipt of any income and that █████'s mother is a single parent in the UK, the imposition of prohibitively high charges under the Charging Policy frustrates their ability to return home to the UK to be with their mother and to resume their classroom learning.

50. The imposition of charges under the Charging Policy also has particular impacts on persons who are retired and have no income from work, but rather rely on the state or personal pension provision.
51. █████ is retired and receives no income from work, instead, she relies on a pension of £695 a month. This pension provision is used to cover her expenses including mortgage payments of £403.38 a month as well as her health and heating insurance. Notably, █████'s flight to South Africa was paid for by two of her sons, as she could not herself afford the airfare. Taking into consideration the amount of █████'s pension payments, as well as her expenses, it is abundantly clear that █████ is not able to pay the hefty charges under the Charging Policy. Although, the Government has put in place the Deferred Payment Plan, firstly, it is not clear whether █████ qualifies for deferred payment as she does not receive income-related benefits and secondly, even if █████ were eligible, she would still be unable to cover the costs under the Charging Policy which would amount to approximately £146 a month. █████'s situation demonstrates not only the impact of imposing such high fees on retired persons, but the lack of consideration that was given to retired persons when imposing these fees.
52. The reality is that the Charging Policy has been introduced without any proper consideration for its impacts and without any adequate provision being made for the very substantial additional costs imposed. Its effect is to (a) impose unaffordable costs on persons needing to return to the UK, exercising their statutory right of abode or right of residence, and (b) prevent many people from travelling for family reasons in the future. For the various reasons given above, this is unlawful.

Ground 3: Convention and Equality Act challenges to the nature of the quarantine restrictions

53. There are several related sources of obligations concerning equality that the imposition of quarantine must comply with.
54. First, there are requirements imposed by the Human Rights Act 1998 (the "HRA 1998"). The enabling provision of the 1984 Act, section 45B, imposes a discretion on the Secretary of State to make delegated legislation which must, pursuant to section 6 of the HRA 1998, be compatible with the Convention rights.
55. Second, section 29(6) of the Equality Act 2010 ("EA 2010") imposes a substantive duty on all persons exercising "public functions" not to directly or indirectly discriminate against persons by reference to a protected characteristic including age, disability and nationality.
56. Third, section 149 of the EA 2010 imposes a procedural duty on a public authority, when making decisions, to have due regard to the need to:

"(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

- (b) *advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) *foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”*

57. In addition, there is a general obligation to prioritise the “best interests” of children as referred to in paragraph 42 above.

58. In general, a restriction impacting upon fundamental freedoms or that affects minority groups disproportionately will not be lawful under the HRA 1998 or the EA 2010 if a less restrictive method could have been used to achieve the legitimate aim, although a challenge will not succeed merely by establishing that alternative methods could have been used to achieve the aim. The domestic Courts must engage in anxious scrutiny of decisions affecting fundamental rights; and, being in a better position to assess local needs and conditions, apply a stricter standard than the Strasbourg Court while allowing the domestic public authority an area of judgement. The question is an objective one based on the merits.

59. Where no equality impact assessment has been made, or one that is inadequate, the Court should not give the Government any or a more than minimal margin of discretion (*R (The Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Department of Environment, Food and Rural Affairs* [2020] EWCA Civ 649 at [100]). The Secretary of State has not published any impact assessment. While the Claimants await disclosure of the same as a matter of urgency, the Claimants do not consider that any impact assessment can have evaluated, adequately or at all, the impact of the Regulations on children given the nature of the Regulations themselves.

60. The Regulations apply uniformly to every person entering England from a red list country. As is explained in the Explanatory Memorandum:⁹

“6.12 Subject to specified exemptions, the traveller must quarantine in the room in the designated accommodation where they are staying. There are exceptions – such as for urgent medical assistance and to exercise or attend the funeral or visit on their deathbed a close family member or household member (but only with the permission of an authorised person). There are also exceptions to allow people to quarantine to care for a child or disabled person or with others with whom they were travelling on arrival in England and for people to enter quarantine to care for them.”

61. The only other consideration given to children in the Regulations relates to the power to detain an unaccompanied child (rule 5(1C)) and a provision permitting a person who did not travel with a child to isolate with that child to care for him or her (paragraph 11(b)(i) of Schedule B1A, applying to the child, and paragraph 17(a), applying to the carer). The latter would allow (for example) the parent of an unaccompanied child to move into a hotel room with the child. Similar provisions (contained in paragraph 17(b) of Schedule B1A) permit a carer to self-isolate with a person needing care, which would include a disabled person.

⁹ https://www.legislation.gov.uk/uksi/2021/150/pdfs/ukxiem_20210150_en.pdf.

62. It is clear that the Regulations impose conditions on children (a minority group with protected characteristics) that put them at a particular disadvantage because of their age relative to adults, being particularly ill-equipped to suffer confinement in a hotel room. It follows that they also breach Article 14 of the Convention.
63. The guidance states that *“if a medical professional concludes there would be a very substantial detriment to your health and well-being from remaining in hotel quarantine you may be allowed to quarantine in an alternative location.”*¹⁰ This does not reflect, and appears to contradict, the Regulations which require a person to self-isolate in the *“accommodation designated in the managed self-isolation package”*, which is booked prior to entry. There is no clear provision in the Regulations for changing accommodation.
64. Confinement in a hotel room is also likely to have a negative impact on their education, which has already been severely disrupted by the pandemic.
65. Our client ██████████ is in Year 11, her GCSE year, at school. The uniform application of the Regulations means that there is no option for ██████ and her brother to be collected from the airport by their mother and return to self-isolate at their family home in south London, with the privacy of her own room for study. Instead, she must transfer to a government-designated hotel where her mother must pay the full single adult fee of £1,750 to join her two children in quarantine.
66. On 25 February 2021, the Chief Regulator of Ofqual announced that GCSE grades awarded in 2021 will be determined by teacher assessments, which may be based on evidence from work already completed, mock exam results, homework or in-class tests.¹¹ ██████ has been informed by her school that from 11 March 2021 she will be required to sit assessments, which will be used to determine her final GCSE grade (in conjunction with other work done by her).
67. If ██████ is prevented from returning to the UK due to the cost of the Government’s hotel quarantine policy, she will miss contact with her teacher and critical assessments. Alternatively, if ██████ travels to the UK and is forced to quarantine in a government-designated hotel, even if she is permitted to undertake the assessments virtually, she would have to do so in a single hotel room shared with her mother and brother, as opposed to the privacy of her own room at home. This could have a significant negative impact on ██████’s GCSE grades and her future.

6. Details of the Action that the Defendant is required to take

The Defendant is required to:

- Agree to remove all charges for hotel quarantine; and
- Agree that the provision made for children is inadequate and set out clearly how the regime will be changed to ensure compliance with the legal obligations referred to above.

¹⁰ Paragraph 12, *(Compassionate leave)* “Managed quarantine: what to expect” (*Ibid*).

¹¹ Ofqual “How qualifications will be awarded in 2021” (25 February 2021). Available at <https://www.gov.uk/government/speeches/how-qualifications-will-be-awarded-in-2021>.

7. Costs Capping Order

The Claimants will apply for a Costs Capping Order (“CCO”) pursuant to CPR 46.16 to 46.19, Practice Direction 46, paragraphs 10.1 to 10.2 and section 88 of the Criminal Justice and Courts Act 2015 (the “2015 Act”). It will be submitted that a CCO is appropriate in this case as the proceedings are of significant public interest in accordance with the definition in section 88(7) of the 2015 Act and because the remedies sought go beyond personal justice.

The imposition of hotel quarantine for all travellers entering England from named countries, including children, the imposition of charges under the Regulations and the policy of the Secretary of State to do so, is likely to affect many thousands of travellers, and those for whom the charges will be such a significant imposition that they will be unable to travel to England to visit close members of their family and friends. The policy is therefore obviously of profound public interest.

For the reasons outlined above, the Claimants will suffer from the effect of the Regulations and are unable to afford the costs of bringing this claim, for which their solicitors are acting on a pro bono basis and which is otherwise being funded by crowdfunding. The Claimants would be unable to meet any costs order if it is imposed upon them.

- (1) The Claimant [REDACTED] is retired, has no income from work and her flight to South Africa was paid for by her two sons as she could not afford it. She would be unable to afford the costs of the deferred payment scheme if eligible for it, which she may not be. [REDACTED] has a home worth approximately £120,000 and the mortgage is £22,064.33. The property is registered in joint names with her son. [REDACTED] receives a monthly pension payment of £695 and makes monthly mortgage payments in the amount of £403.38. Her son does not contribute to the mortgage. [REDACTED] also pays heating insurance of £26 per month and home insurance of £27 per month. [REDACTED] is left with very little (if any) disposable income at the end of each month. [REDACTED] has no other assets of any value.
- (2) The Claimant [REDACTED] is aged 16. [REDACTED] is in full-time secondary education and has no income and no assets of any value. Her mother receives child benefit payments in the amount of £70 a month.

The Claimants have been indemnified against any costs order by their solicitors, who are acting on a pro bono basis with other disbursements (including any adverse costs) to be funded by crowdfunding. To date the crowdfunding campaign has not raised sufficient funds to pay Counsel’s fees, let alone an adverse costs order. The Claimants would withdraw the claim if put at any risk of having to pay a costs order which exceeded the funds raised, and it would be reasonable for them to withdraw the claim in such circumstances.

In these circumstances, we propose that the parties agree a reciprocal costs cap with the Claimants’ costs liability capped at £5,000, and the Defendants’ costs liability capped at £35,000 in respect of these judicial review proceedings. If this cannot be agreed, then the Claimants will make the CCO application to the Court and bring to its attention any refusal to agree this obviously meritorious application in advance.



5 CHANCERY LANE
LONDON
WC2A 1LG
T: 0345 257 6377

8. Details of any relevant documents required to be provided

Please provide all Ministerial Submissions setting out the policy and measures referred to herein. Please provide all impact assessments conducted.

9. Proposed reply date

Please reply to this letter by **15 March 2021**.

Yours faithfully,

PGMBM

PGMBM

Excello Law Limited trading as PGMBM