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Your ref: **HotelQuarantineJR.TG.TB**
Our ref: [redacted]

26 March 2021

Dear Sirs

[redacted] & [redacted] v Secretary of State for Health and Social Care

This response is provided in accordance with the requirements of the judicial review pre-action protocol. We apologise for the delay in replying to your Pre-Action Letter, dated 5 March 2021.

Proposed Claimants

(1) [redacted]; and,

(2) [redacted], proceeding by her mother and litigation friend [redacted].

In your letter, you set out various factual matters pertaining to these individuals. We have no knowledge of these and are unable to comment on the matters set out. For the purposes of this letter, we assume that your factual account is accurate but this should not be taken as admitting matters of which our clients have no knowledge. Our client's rights in this respect are reserved.

We note at the outset that the Second Claimant is said to be in Portugal. As you are aware, Portugal was removed from the list of countries in Schedule B1 to the Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (the "**International Travel Regulations**") – otherwise known as the "red-list" – on Friday 19 March 2021, pursuant to regulation 4(2) of the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No.10) Regulations 2021. The effect is that the Second Claimant can now return to the UK without being subject to the requirement of isolating in a Managed Quarantine Facility. In those circumstances, her claim is academic. Having been informed of this fact, in your letter of 19 March 2021 you did not seek to set out why her challenge should, nonetheless, be entertained by the Court according to the principles in *R v SSHD ex p Salem* [1999] 1 AC 450 (HL). In more recent cases, the courts have asked whether "*exceptional circumstances*" exist for such a claim to be heard: eg *R (Heathrow Hub Ltd) v SST* [2020] EWCA Civ 213, §208. No such exceptional circumstances exist in this case. The fact that there is another claimant challenging the same measure in this claim eliminates any broader public interest said to inhere in the Second Claimant's challenge.

For these reasons, the matters said to arise on the Second Claimant's facts will not be considered further.

Proposed Defendant

Secretary of State for Health and Social Care

Reference Details

Our reference: [redacted]

Please cite the above reference number on all future pre-action correspondence.

Details of the decision being challenged

The Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 7) Regulations 2021 – which amended the International Travel Regulations. This introduced the requirements to book "managed self-isolation packages" for those entering the UK from red-list countries unless an exemption applied (the "**Managed Quarantine System**" or "**MQS**") and to self-isolate in designated hotels (the "**MQS Facilities**"). As part of the MQS, individuals would have to pay for the "**MQS Fees**".

Legal and Factual context

1. The Pre-Action Letter sets out the factual background leading up to the introduction of the MQS in some detail. We do not intend to repeat those matters here.

(a) Background

2. At all times the Government has monitored the international risk to public health and has taken proportionate measures to protect the community.

3. By way of example, in response to identification of a mutated version of the coronavirus linked to mink farms in Denmark, on 6 November 2020 Denmark was removed from England's Travel Corridor list and, on 7 November 2020, all sector-specific exemptions from the requirement to self-isolate were removed for people arriving in England who had been in or transited through Denmark in the 14 days preceding their arrival. On 8 November 2020, a prohibition was introduced on the arrival of vessels and aircraft which had travelled directly from Denmark to England except: those which did not carry passengers; those operated by or in support of the Government; or where landing or docking in England was reasonably necessary for health and safety reasons. After keeping the situation under review for a number of weeks, the measures were lifted on 27 November 2020.

4. In late December 2020, the Government were aware of the emerging threat of a new SARS CoV-2 variant of concern (VOC202012/02, lineage B.1.351) originating in South Africa. As a result, on 24 December 2020 additional measures including a ban on direct flights and a ban on entry for foreign nationals (without residency rights) from South Africa to restrict the possible transmission of the variant of concern were introduced. These measures were formally extended on 9 January 2021 to include: Angola, Botswana, Democratic Republic of Congo and Lesotho. These measures were further extended on 29 January 2021 (except for the flight ban due to the lack of direct flights) to Burundi and Rwanda and all measures, including the direct flight ban, were extended to the United Arab Emirates.

5. Another variant of concern (VUI202101/01, lineage P.2) was detected in Brazil, followed by a second similar but more concerning variant of concern in Japan among travellers from Brazil (VOC202101/02, lineage P.1) which has several more mutations. Additional measures to help prevent the spread of the variant of concern identified in Brazil were introduced on 15 January 2021. Measures included a direct flight ban for Argentina, Brazil, Chile, Cape Verde, and Portugal (including Madeira and the Azores), as well as a ban on entry for foreign nationals (without residency rights) travelling from Argentina, Brazil, Bolivia, Chile, Columbia, Ecuador, French Guiana, Guyana, Paraguay, Peru, Suriname, Uruguay, Venezuela, Cape Verde, Panama and Portugal (including Madeira and Azores). Such was the concern

that the sector-specific exemptions from quarantine were suspended for travellers having recently visited these countries.[1]

6. The above actions demonstrate: (i) the continuous monitoring of the situation by the Government; and, (ii) the speed with which such decisions needed to be and were taken to manage the threat of COVID-19 and protect public health.

(b) Consideration of impacts

7. The decision to implement the MQS and MQS Fees was informed by an Equality Analysis and Family Test Analysis. These documents considered in detail the potential impacts of the MQS and MQS Fees on those with protected characteristics and the family unit, including children.

(c) Legal regime

8. The MQS was inserted into the International Travel Regulations by the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 7) Regulations 2021. This was done using the power contained in s.45B of the Public Health (Control of Disease) Act 1984 (the "**1984 Act**"), which 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.*
>
> *(2) Regulations under subsection (1) may in particular include provision–*
>
> *(a) for the detention of conveyances,*
>
> *(b) for the medical examination, detention, isolation or quarantine of persons,*
> *…*
> *(e) for prohibiting or regulating the arrival or departure of conveyances and the entry or exit of persons or things,*
> *…*
> *(g) requiring persons to provide information or answer questions (including information or questions relating to their health)."*

9. The MQS takes effect through Schedule B1A to the International Travel Regulations. Paragraph 1 of Schedule B1A states that:[2]

> *"Subject to paragraph 2, this Schedule applies to a person ("P") who arrives in England from a country or territory listed in Schedule B1 or has at any time in the period beginning with the 10th day before the date of their arrival in England departed from or transited through a country or territory listed in Schedule B1."*

10. Schedule B1 lists the countries that are on the "red-list".

11. The effect of paragraphs 3-8 of Schedule B1A is that individuals must have booked an MQS package before arriving in England and must travel directly to the MQS Facility on arrival. Paragraph 9 provides that a charge may be imposed for those booking MQS packages. Such a charge has been imposed, as set out

[1] Hauliers who had departed from or transited through Portugal in the previous last 10 days were still exempted in order to protect the critical flows of goods to the UK.
[2] By regulation 4(1)(d) of the International Travel Regulations, the duty to self-isolate applies to those who are caught by Schedule B1A.

in the Government's "*Booking and staying in a quarantine hotel when you arrived in England*" guidance. The MQS Fees set out therein cover the cost of the service being provided and that would otherwise be borne by the government.

12. Paragraph 10 of Schedule B1A sets out the duty to self-isolate in the MQS Facility. Exemptions and mitigations from this duty are contained in paragraphs 11-13 and 17-18 of Schedule B1A.

(d) Exemptions and mitigations

13. Whilst recognising the imperative of reducing the risk of transmission of variants of concern in the UK, the Secretary of State also appreciates the potential impact of the MQS and MQS Fees on particular groups of persons. For that reason, various groups have either been exempted from the MQS or are subject to mitigations. For example, the requirement to stay in a MQS Facility does not apply to, amongst others:

    i. Unaccompanied children arriving in England for the purposes of attending boarding school, who can quarantine at boarding school premises instead;[3]

    ii. Unaccompanied children arriving in England, who can quarantine at home where it is not reasonable for a parent or carer to join them in the MQS Facility;[4]

    iii. Individuals whose medical needs cannot be adequately supported in MQF;[5]

    iv. Individuals who need to visit a dying household or family member or friend and who can be accommodated by the medical facility or hospice to self-isolate.[6]

14. These exemptions are in addition to: the occupations listed in paragraph 2 of Schedule B1A, such as defence personnel and diplomats, who are considered essential to the running of the economy and the country; other exemptions contained in paragraph 18 of Schedule B1A to the International Travel Regulations; the mitigations contained in paragraphs 11,12 and 17 of Schedule B1A to the International Travel Regulations; the permitted reasons to leave self-isolation contained in paragraph 13 of Schedule B1A to the International Travel Regulations.

15. Moreover, as set out in the Government's "*Booking and staying in a quarantine hotel when you arrived in England*" guidance, those who are liable for the MQS Fees but who are on income related benefits are able to apply for a deferred payment plan, allowing them to spread repayment of the MQS Fees over 12 months.

(e) Ongoing review of the MQS

16. The scope of the MQS is under constant review and is formally reviewed at least once every 28 days: Regulation 11 of the International Travel Regulations. In line with scientific understanding, this has led to the removal from and addition of countries to the red-list depending on the level of risk associated with them. By way of example, regulation 4 of the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No.10) Regulations 2021 removed Portugal and Mauritius from the red-list whilst adding Ethiopia, Oman, Qatar and Somalia.

Response to the Proposed Claim

(a) Ground 1 – Imposition of charges for quarantine and testing is ultra vires

[3] This exemption was introduced by the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 9) Regulations 2021.
[4] This exemption was introduced by the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 9) Regulations 2021.
[5] This exemption was introduced by the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 10) Regulations 2021.
[6] This exemption was introduced by the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 10) Regulations 2021.

17. The Claimants argue that the power to charge contained in s.45F(2)(f) of the 1984 Act, when read with Article 40 of the International Health Regulations 2005, does not give the Secretary of State the power to impose the MQS Fees. The Secretary of State rejects this argument.

18. **First**, s.45F(2)(f) of the 1984 Act is in deliberately broad terms. Parliament intended to entrust the Secretary of State with this broad power to levy charges as he saw fit to respond to a global pandemic.

19. **Secondly**, it is for the Secretary of State to decide how to exercise that power constrained only by domestic law, including public law. International law does not constrain the exercise of such a discretion – as the courts have consistently made clear since *R v SSHD ex parte Brind* [1991] 1 AC 696 (HL).

20. **Thirdly**, this is not a case like *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 (SC) where at issue was the proper meaning of an ambiguous term – "*judicial authority"* – which was the same term used in a Council Framework Decision. In such a case, cited by the Supreme Court in *R (Yam) v Central Criminal Court* [2016] AC 771 (SC), §35 (Lord Mance) which you refer to, there is a presumption of domestic law compatibility with international law. Indeed, to interpret s.45F(2)(f) of the 1984 Act so as to import the wording and complex structure of Article 40 of the International Health Regulations 2005 is neither possible nor permissible: *R v Asfaw* [2008] 1 AC 1061 (HL), §§28-29 (Lord Bingham) and §69 (Lord Hope); *R v Lyons* [2003] 1 AC 976 (HL), §§27-28 (Lord Hoffmann).

21. **Fourthly**, the Explanatory Memorandum to the Health and Social Care Act 2008 does not assist. There is no suggestion in the Explanatory Memorandum – in particular, the phrase "*This Act amends the Public Health Act 1984 to enable IHR to be implemented*" in paragraph 30 – that Part 3 of the Health and Social Care Act 2008 was intended to mirror precisely the International Health Regulations or transpose each and every obligation contained within it. In any event, what matters is the actual words of the legislation. They on no view import such obligations; but instead confer on the Secretary of State a wide discretion.

22. **Fifthly**, even if relevant, it is not accepted that the MQS Fees breach the International Health Regulations 2005. In particular, Article 40 does not cover the sort of blanket measure in question here which travellers have advance notice of. Moreover, you do not refer to Article 43 of those Regulations, which permits derogations from other provisions within the International Health Regulations 2005 subject to the satisfaction of certain conditions. It is notable that several signatories to the International Health Regulations are charging for quarantine systems that are very similar to the MQS. These include Australia, Hong Kong, New Zealand, Canada and Singapore.

(b) Ground 2 – Unaffordable level of fees and absence of any adequate exceptions or reference to a person's means under the Charging Policy

23. The Claimants argue that imposition of charges at the current level is unlawful as it breaches Article 8 ECHR, it impedes the exercise of statutory rights under the Immigration Act 1971 and is contrary to the requirement to ensure that the best interests of children are a primary consideration. At §§49-51, the Pre-Action Letter sets out the circumstances of the First and Second Claimants. In light of what is said above, we do not propose to consider the facts of the Second Claimant further.

24. **First,** to the extent that there is any interference with Article 8 ECHR, the MQS is justified. In the context of regulations imposed in response to COVID-19 and the complex social, economic and political considerations in play, the courts have granted the Government a wide margin of judgment on the grounds of democratic accountability and institutional competence: *R (Dolan) v SSHSC* [2020] EWCA Civ 1605, §97; *R (Hussain) v SSHSC* [2020] EWHC 1392 (Admin), §21. Moreover, in circumstances where the Secretary of State gave extensive and conscious consideration to the impacts of the MQS on various groups of people (see below) – including those whom the Claimants are part of – the courts will exercise considerable restraint: *In re Brewster* [2017] 1 WLR 519 (SC), §64.

25. **Secondly**, the MQS Fees are plainly proportionate:

    i. The Government's approach to international travel, as well as all other measures relating to COVID-19, has always been led by its scientific advice. As set out above, following the emergence of variants of concern the Government has acted swiftly and decisively to reduce the risk of their transmission to the UK through arriving and returning travellers. The MQS is an essential part of this response. The Government decided that it was those individuals who

nonetheless decide to travel internationally[7] – and, therefore, those putting at risk the country's response to the pandemic and the efficacy of the vaccination programme – who should bear the cost of the MQS rather than the general public.

ii. The risks of international travel during the pandemic have been known for a long time. At the time of the First Claimant's departure to South Africa, there was significant discussion of second lockdowns in Scotland, Wales and England. Moreover, in the weeks and months leading up to 9 February 2021, such travellers could on no view proceed on the basis that the UK would not impose conditions on those entering the country, including arrangements such as the MQS. Indeed, various other countries have imposed schemes similar to the MQS. Those leaving the country must be taken to have accepted some element of risk in this regard.

iii. As with the other examples cited above, on receiving the scientific advice the Government had to act quickly to ensure the utility and effectiveness of the measures being taken.

iv. Those on low incomes are less likely to be undertaking international travel and, therefore, less likely to be subject to the MQS. The Pre-Action Letter says that the First Claimant was only able to travel abroad because her sons paid for her travel. This is relevant because it means she is in a distinctive position that is unlikely to apply to many others – i.e. a low-income individual whose family living abroad (and in the UK) have been able to fund her visit.

v. The MQS is only a temporary measure and reviewed every 28 days.

vi. The MQS is subject to the various exemptions and mitigations that have been referred to above.

vii. Those who are on income-related benefits are able to make use of a 12-month deferred payment plan.

26. **Thirdly**, the impacts of the MQS on groups such as children, the family unit and those less able to pay the MQS Fees were given extensive consideration in the Equality Analysis and the Family Test Analysis.

27. For example, the Equality Analysis specifically mentioned that:

i. "*Elderly people on average have less disposable income so the cost of managed quarantine and the mandatory testing regime may adversely affect their ability to enter England"*: §32;

ii. "*Children of school age and young people who are international students at higher education may be affected by the need to book managed quarantine and/or mandatory test."*: §36.

28. In relation to the Family Test Analysis:

i. A series of measures were designed specifically to mitigate the impact of the MQS on family life: §§8-10;

ii. It considered the issue of couples planning to have weddings abroad:

> *"13. Some couples may have planned weddings that involve international travel or may wish to get married in the UK. If they arrive from a red list country, they will be required to quarantine in a managed quarantine hotel for 10 days. This may affect planned weddings, and/or delay the formation of their family as they cannot afford the cost or disruption of quarantine. It may also affect guests attending. However, international travel is currently discouraged, and under the current lockdown Regulations weddings are only permitted in exceptional circumstances."*

iii. It considered the impact on families not being able to visit each other:

[7] Unless an exemption applied.

"15. The cost of quarantining in a managed quarantine hotel may mean that some families cannot afford to travel to visit each other (if they need to visit red-list countries to do so) and may find themselves separated for the time being. However, there is support for those who will face genuine and significant financial hardship as a result of this charge. People in receipt of income support benefits may be able to sign up to a payment plan. There may also be cost reductions/waivers for individuals in extreme financial hardship to be dealt with on a case by case basis. In addition, international travel is currently discouraged, and people in England are only able to leave their homes to travel for legally permitted reasons (visiting family is not generally one of them)."

iv. It considered the impact on unaccompanied children with separated parents:

"34. Due to parental separation, there may be children who arrive in the country unaccompanied as one parent resides in a red list country and the other in the UK. There is a provision for a parent/guardian to join the unaccompanied child or those requiring care in the managed quarantine hotel which will mean that children are properly cared for and parents and children can still interact during the time they are in quarantine and children will be appropriately supported."

v. It, nonetheless, concluded that:

"49. It is sensible to strengthen the measures at the border to reduce the risk of spread of variants of concern, which might put the vaccine programme at risk and increase pressure on NHS by leading to rising cases. The vaccination strategy is an essential component of the UK's public health response to, and recovery from, the virus. Consequently, the measures in the Regulations are considered to be a proportionate means of achieving the legitimate aim of protection the public health from the threat of overseas variants.

50. The requirement for managed quarantine with no physical interaction with others outside their place of quarantine will further increase barriers to family formation and increase the risk of family breakdown. There are mitigations and safeguards in place such as allowing families to quarantine together (who have travelled together) and the support services on offer. The impacts will be temporary.

51. We have considered the family impacts of the policy and consider that the restrictions on transmission, and public health benefits presented by the measures are measured, proportional and justified."

29. **Fourthly**, the MQS is not unlawful for purportedly cutting across the right contained within s.2 of the Immigration Act 1971. The MQS does not cut down, negate, conflict with or render nugatory the right of abode. Those with the right of abode are fully able to enter the UK just as they were before the MQS came into effect. They must now adhere to the MQS or face a fine once they have entered, but that does not render the s.2 right nugatory in the sense considered in *R v SSHD ex p JCWI* [1997] 1 WLR 275 (CA) ("***JCWI"***). Indeed, the Claimants have not provided evidence of anyone who is currently unable to return to the UK because they cannot afford the MQS Fees.

30. Moreover, the reliance on *R (PRCBC) v SSHD* [2021] EWCA Civ 193 ("***PRCBC***") is misplaced. *PRCBC* stands for the proposition that the issue raised at §§44-45 of the Pre-Action Letter, and considered in cases like *JCWI*, is one of statutory interpretation: *PRCBC*, §61 (David Richards LJ), §122 (Singh LJ). In other words, the question is whether, in amending the 1984 Act to include s.45F(2)(f), Parliament intended that those travelling to the UK with the right of abode here could nonetheless be charged for the benefit of health protection measures. It plainly did. Section 45F of the 1984 Act applies specifically to the health protection regulations referred to in ss.45B and 45C, which themselves allow the Secretary of State to make regulations for quarantining arrivals from aircraft. In those circumstances, it follows as a matter of logic that Parliament sanctioned the MQS Fees notwithstanding s.2 of the Immigration Act 1971.

31. **Finally**, it is not accepted that the MQS engages one of the functions listed in s.55(2) of the Borders, Citizenship and Immigration Act 2009. It is a public health measure imposed regardless of immigration status or nationality. As a result, the duty in s.55(1) does not apply meaning that the reasoning in *PRCBC*

is inapplicable. In any event, the interests of children were given extensive consideration in the Equality Analysis and the Family Test Analysis.

(c) Ground 3 – Discrimination

32. This ground appears to be a direct challenge to the lawfulness of the MQS in principle, as opposed to relating to the charges that accompany it. It is not clear from the Pre-Action Letter exactly what breaches are being alleged. For example, although §§54-57 of the Pre-Action Letter refer to the HRA 1998, "*Convention Rights"*, sections 29(6) and 149 of the Equality Act 2010, and section 55 of the Borders, Citizenship and Immigration Act 2009, the only purported breach is mentioned at §62. This states that:

> *"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."*

33. **First**, for the reasons set out above, there is now nothing preventing the Second Claimant from attending her school and undertaking the assessments mentioned.

34. **Secondly**, although a breach of Article 14 ECHR is alleged, the Pre-Action Letter either does not mention or attempt to particularise: which substantive ECHR right the MQS is said to be within the ambit of; why the Second Claimant is said to have been treated less favourably than others in an analogous situation; and, whether any difference in treatment is disproportionate, in the sense of being manifestly without reasonable foundation: *Gilham v MoJ* [2019] 1 WLR 5905 (SC), §28 (Baroness Hale); *R (JCWI) v SSHD* [2021] 1 WLR 1151 (CA), §134 (Hickinbottom LJ).

35. **Thirdly**, the Equality Analysis and a Family Test Analysis demonstrate that the Secretary of State gave due consideration to the impact of the MQS on children and their families.

36. For the avoidance of doubt, the Secretary of State considers the current formulation of Ground 3 to be hopeless but reserves the right to provide a fuller response.

Action Requested

For the reasons set out above, the Secretary of State does not agree to remove the MQS Fees. The Secretary of State also does not agree that the provision made for children is inadequate but, in light of Portugal no longer being on the red-list of countries, that request no longer forms a live issue between the proposed parties to the claim.

Anonymity

Any direction for anonymity is a matter for the Court. We anticipate that the Secretary of State will take a neutral stance on any such application.

Costs Capping Order

The Secretary of State is not willing to give any assurances about costs capping at this stage. It is noted that the Claimants have been indemnified against any costs order by their solicitors. In those circumstances, the finances of the Claimants are irrelevant as they are not at risk of having to pay a costs order made by the Court. Rather, it is the finances of the Claimants' *solicitors* that are relevant. Consequently, the Court will have to consider:

a. The financial resources of the Claimant's solicitors: s.89(1)(a) of the Criminal Justice and Courts Act 2015 (the "**2015 Act**");

b. The extent to which the Claimant's solicitors are likely to benefit if relief is granted: s.89(1)(c) of the 2015 Act; and,

c. Whether the Claimants, who are not at risk of an adverse costs order, would withdraw their claim if a costs capping order was not made and that it would be reasonable to do so: s.88(6)(b)-(c) of the 2015 Act.

Requests for Information and Documents

We are content to provide you with copies of the Equality Analysis and the Family Test Analysis on the condition that you confirm, pursuant to CPR r.31.22 and/or the implied undertaking that attends such documents, that they will not be shared more widely. In line with our obligations at this stage of the process and the information set out in the body of this letter, we do not consider it necessary to append any further documents.

Address for further correspondence and service of documents

All future pre-action correspondence should be sent to, and in the event that proceedings are later issued, documents should be served by email on [redacted] and [redacted].

Yours faithfully

[redacted]

[redacted]
For the Treasury Solicitor

D [redacted]
E [redacted]