

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

Claim No. CO/1743/2021

BETWEEN

THE QUEEN

(on the application of

(1) [REDACTED] ('BB')

(2) [REDACTED] ('MAM')

(3) [REDACTED] ('TE'))

Claimants

and

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

**AMENDED STATEMENT OF FACTS AND GROUNDS OF
APPLICATION FOR JUDICIAL REVIEW**

Amended on 27 May 2021

References to the claim bundle are in the form [CB/Tab] or [CB/Tab/Page].

Suggested essential reading:

- The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (SI 2020/568), Schedule B1A [CB/C9/122].
- The Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations (SI 2021/582), Schedule 11 [CB/C9A/133].
- International Health Regulations 2005, Article 40 [CB/C11/153].
- Pre-action correspondence [CB/B3-B8/68].
- Witness statement of Thomas Arthur Morgan Goodhead, Barrister, on behalf of the Claimants, dated 13 May 2021 [CB/F29/540].
- Witness statement of the First Claimant [REDACTED] dated 13 May 2021 [CB/F30/597].
- Witness statement of the Second Claimant [REDACTED] dated 14 May 2021 [CB/F31/614].
- Witness statement of the Third Claimant [REDACTED] dated 14 May 2021 [CB/F32/682].

A. INTRODUCTION

1. The Claimants are three British citizens who are, respectively, a retiree, an NHS employee, and a worker in the 'gig economy'. They have been or will be subject to the 'hotel quarantine' scheme operated by the Defendant pursuant to Schedule B1A of The

Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (as amended) (**‘the Travel Regulations’**) [CB/C9/122] and, from 17 May 2021, the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021/582 (**“the New Travel Regulations”**) [CB/C9A/131]. They each had pressing reasons to travel outside of the UK but have very limited financial means and face significant hardship, and other interferences with their rights, because of the £1,750 cost of the hotel quarantine package that the Defendant requires them to pay in full.

2. The Claimants challenge the Defendant’s decision to impose charges for the hotel quarantine scheme or, alternatively, to impose the same charge for all persons without taking individual circumstances into account, including the decisions to impose the full charge upon each of the Claimants and not waive or reduce those charges. In summary, the Claimants contend that:
 - a. Ground 1: The imposition of charges under the Travel Regulations and New Travel Regulations is *ultra vires* the general power to “permit or prohibit” the levying of charges for things done under sections 45B and 45C of the Public Health (Control of Disease) Act 1984 (**‘1984 Act’**) [CB/C13/161]. The empowering provision must be read subject to the International Health Regulations 2005 (**“IHR 2005”**), an international instrument binding on all World Health Organization Member States. Article 40 of the IHR 2005 expressly prohibits charges for quarantine [CB/C11/153].
 - b. Ground 2: It is unlawful to operate a policy (**“Charging Policy”**) which sets the same £1,750 fee for everyone who enters hotel quarantine regardless of their individual or exceptional circumstances. In particular, (a) the Defendant’s Equality Impact Assessment is inadequate as it failed to take into account that persons with no/low incomes have pressing family needs to travel and will be unable to travel because of the prohibitive level of the fee, (b) the level of fee and Charging Policy is an unlawful interference with the right to private and family life protected by Article 8 ECHR [CB/C16/176], and discriminatory contrary to Article 14 ECHR [CB/C16/177], and (c) the prohibitive level of fee prevents the exercise of the statutory “right of abode” to which all British citizens are entitled [CB/C14/170].

B. FACTUAL BACKGROUND

The Claimants

3. The Claimants are three British citizens who have had to travel outside the UK for pressing family reasons and have therefore become subject to the hotel quarantine scheme. The facts of their individual cases are set out, in brief, below, and supported by their witness statements [CB/F30-F32/597].

The First Claimant: BB

4. The First Claimant, BB, is a retired British citizen who lives in [REDACTED] with her adult son. On 18 October 2020, she travelled to South Africa to attend her eldest son's wedding. She was due to return to England on 14 February 2021. However, her flight was cancelled and she was rebooked on a flight to and arrive on 15 February 2021. BB had not booked or paid for her managed self-isolation package. She completed her quarantine on 26 February 2021 [CB/F30/599].
5. BB has been advised that she will be contacted about payment and is concerned about how she will meet the debt [CB/F30/599].
6. Because BB is retired she receives no income from work. Instead, she relies on a pension of £566.24 per month and a pension credit of £138.81 per month. This pension provision is used to cover her expenses including mortgage payments of £403.38 per month as well as her health, home and heating insurance, which cost around £64 per month [CB/F30/599].
7. Her 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 her pension payments, as well as her expenses, BB is not able to pay the £1,750 she owes under the Charging Policy. Although the Government has put in place the Deferred Repayment Plan, even if BB were eligible, she would still be unable to cover the costs under the Charging Policy, which would amount to approximately £146 per month [CB/F30/600].

The Second Claimant: MAM

8. The Second Claimant, MAM, is a British citizen and NHS worker who travelled to Ethiopia on 6 March 2021 to care for his mother, who was undergoing a procedure for

congestive heart failure, and to say goodbye to his uncle who was receiving end-of-life care for prostate cancer and who died on 22 April 2021. MAM originally planned to return home to England on 5 April 2021 to resume work. When he travelled to Ethiopia on 6 March 2021, Ethiopia was not on the red list. It was added to the red list just over a month after the Hotel Quarantine Regulations had come into force and after he had already departed for Ethiopia. MAM is unable to return to his home and work in England because he cannot afford to pay £1,750 for his managed-isolation package [CB/F31/617].

9. MAM is employed by the NHS as a [REDACTED] and receives a monthly income of £2,313.79, which is used to cover his expenses including: his rent, council tax payments and loan and debt repayments. He is left with very little disposable income (if any) at the end of each month. He has limited access to credit. Given that he is not in receipt of any income-related benefits, he did not qualify for the Deferred Repayment Plan, as it operated at the date of his intended return. He has written to the Defendant to seek financial assistance to enable him to return home on 9 and 30 April [CB/F31/619-620, 665]. On 12 May 2021 MAM received an email to inform him that the Deferred Repayment Plan was now available to those in financial hardship, even if they do not receive income-related benefits [CB/F31/619, 670]. However, at the time of these Grounds, the booking portal still requires a person booking to confirm, on pain of conviction of fraud, that they are in receipt of income-related benefits. MAM has tried making this declaration, so as to proceed through the portal, but found that it ends at yet another email address to contact for support. He has written to this email address, again, setting out the same financial circumstances and plea for assistance first raised over a month ago [CB/F31/620, 680].

10. MAM has recently sought counselling to cope with his poor mental health, which has been severely impacted by a variety of factors including increased hours and stress at work during the COVID-19 pandemic and his family's ill health. He is now experiencing a further deterioration in his mental health as he deals with the uncertainty and financial difficulties of arranging a return to his home and work in England [CB/F31/617].

11. MAM is urgently attempting to borrow funds to attempt to pay the upfront hotel quarantine charge. He is also highly concerned about the consequences of not being able

to return to England as planned, including managing the increased cost of staying in Ethiopia and negotiating potential issues with his employer (for example whether he will be able to take further leave). He is grappling with these unexpected challenges while trying to support his ill mother [CB/F31/617].

The Third Claimant: TE

12. The Third Claimant, TE, is a British citizen who lives in [REDACTED] with his wife and 15-year-old daughter. TE travelled to Pakistan on 4 April 2021 to be with his father who was critically ill with COVID-19 and who died days after his arrival in Lahore, Pakistan. TE's sister paid for his return flights. To be able to return to England on 26 April 2021, he was required to exhaust his family's emergency savings to book and pay for a managed-isolation package. TE completed his ten-day quarantine in a hotel near Heathrow Airport at midnight on Thursday 6 May 2021 and returned home to [REDACTED] on Friday 7 May 2021 [CB/F32/684].
13. TE works as a fast food delivery driver on a zero-hours contract and earns a minimum wage of £8.91 per hour. His monthly income ranges from £900 to £1,300. TE's wife also works as a fast food delivery driver. Their income barely covers (and at times falls short) of their family's expenses. They are struggling to financially survive [CB/F32/684].
14. When TE left England for Pakistan, he knew that Pakistan would shortly be added to England's red list and that he would be required to pay the hotel quarantine charges to return home. He did not know how he would meet this cost, but he felt that he had no choice but to travel. He knew that his father was critically ill with COVID-19 and that this would be his last chance to see him. Ultimately he and his wife decided to use their emergency savings to pay the £1,750 fee. The family are now without any financial reserves, which is a particular concern where both income-holders receive no support from their employer if they fall ill or are otherwise unable to work. TE has been unable to work while in Pakistan and in mandatory hotel quarantine and received no income in this time. He is in fear of falling behind on the family's mortgage repayments and facing repossession of their home [CB/F32/685].

These Proceedings

15. The Claimants' solicitors sent the Defendant a pre-action letter on 5 March 2021 on behalf of BB challenging the lawfulness of the Hotel Quarantine Regulations [CB/B3/68]. The Defendant was asked to confirm by 15 March 2021 that all charges for the hotel quarantine scheme would be removed. The Defendant declined by letter of 26 March 2021 [CB/B4/84].
16. The Claimants' solicitors sent a further pre-action letter to the Defendant on 16 April 2021 setting out the facts of MAM's case and again challenging the lawfulness of the Hotel Quarantine Regulations [CB/B5/93]. The Defendant was once again asked to confirm that all charges would be removed, and declined by letter of 30 April 2021 [CB/B6/98].
17. The Claimants' solicitors sent a final pre-action letter to the Defendant on 10 May 2021 to set out the facts of TE's case, and maintain the challenge to the lawfulness of the Regulations [CB/B7/101]. A reply was received on 13 May 2021 [CB/B8/106].
18. If the Defendant raises a limitation issue (particularly relating to promptness) in relation to BB's claim, which was issued just under three months after she began her period of hotel quarantine on 15 February 2021, the following submissions are made:
 - a. Although she completed her period of hotel quarantine on 26 February, she has not yet been pursued by the Defendant for the fee. The failure by the Defendant to put in place a scheme which would properly take into account her personal consequences is therefore an ongoing failure and limitation does not yet arise;
 - b. In any event, she has acted promptly in the circumstances. Since her return to the UK and period of hotel quarantine she has been concerned as to whether to pursue legal action, in part because the Defendant has not yet sought payment of her debt. She was also unable to contact her solicitor for a period of time due to technical difficulties (see paragraphs 19-25 of her witness statement [CB/F30/600]). She submits that in the circumstances, her claim is nevertheless prompt.

19. This claim was filed on 14 May 2021. On the same day, the New Travel Regulations were published, coming into force on 17 May 2021 [CB/C9A/131]). The New Travel Regulations do not change the hotel quarantine scheme or the Charging Policy in any way material to this claim. The claim by BB and MAM is historic insofar as it relates to the Travel Regulations, and ongoing insofar as it relates to the New Travel Regulations (BB remains subject to a debt that has not yet been collected; MAM is unable to return because of the costs imposed by the Charging Policy). The claim by TE relates to the Travel Regulations only.

C. LEGAL FRAMEWORK

Public Health (Control of Disease) Act 1984 (“1984 Act”)

20. Section 45B of the 1984 Act [CB/C13/161] 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.”*

21. Subsection (2) provides, that regulations may in particular provide: *“for the medical examination, detention, isolation or quarantine of persons, ...”*.

22. Section 45F(2) provides that regulations may *“(f) permit or prohibit the levy of charges”* [CB/C13/167].

Hotel Quarantine Regulations

23. In early January 2021, the Government 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.

24. On 9 February 2021, the Defendant announced a new hotel quarantine system that would come into force the following Monday, 15 February 2021.

25. On Friday, 12 February the Hotel Quarantine Regulations were made and laid before Parliament. The regulations, promulgated under section 45B of the 1984 Act [[CB/C13/161](#)], amended the Travel Regulations to introduce the hotel quarantine system. The New Travel Regulations, which replaced the earlier regulations, were made on Friday, 14 May and came into force on Monday, 17 May 2021 [[CB/C9A/131](#)]. Rather than setting out both regimes in full, given that they are materially identical, reference is made below to the Travel Regulations and footnotes have been added to indicate where the equivalent provision is in the New Travel Regulations.

26. Schedule B1A of the Travel Regulations¹ applies to any person not falling within an exemption (none of which is material to this Claim) and who arrives in England from a country listed in Schedule B1² or who has been in such a country in any of the 10 days before they arrive in England (paragraph 1).³ The person is required to be in possession of a “managed self-isolation package” (paragraph 5)⁴ which includes a booking for accommodation, transport to the accommodation (paragraph 8),⁵ and a testing package. The person must proceed directly to the accommodation using the means of transport provided (paragraph 6)⁶ and self-isolate there 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 (paragraph 10).⁷

27. A Government policy entitled “*Managed quarantine: what to expect*” published on 14 February 2021 provides that travellers will not be allowed to leave quarantine until they

¹ [New Travel Regulations, Schedule 11 \[\[CB/C9A/133\]\(#\)\]](#).

² [New Travel Regulations, Schedule 3 \[\[CB/C9A/131\]\(#\)\]](#).

³ [New Travel Regulations, Schedule 11, paras 1-2 \[\[CB/C9A/133\]\(#\)\]](#).

⁴ [New Travel Regulations, Schedule 11, para 5 \[\[CB/C9A/136\]\(#\)\]](#).

⁵ [New Travel Regulations, Schedule 11, para 8 \[\[CB/C9A/136\]\(#\)\]](#).

⁶ [New Travel Regulations, Schedule 11, para 6 \[\[CB/C9A/136\]\(#\)\]](#).

⁷ [New Travel Regulations, Schedule 11, para 10 \[\[CB/C9A/137\]\(#\)\]](#).

no longer show any COVID-19 symptoms,⁸ so there is no maximum limit on the total number of days that a person can be required to quarantine [CB/D21/223].

28. Travellers are allowed to quarantine with the people they travelled with. Once travellers are in their hotel, they must remain in their rooms until their quarantine ends. Security guards are present at hotels to enforce compliance. They are, in principle, allowed to be outside their rooms for certain “permitted reasons” such as exercise or to attend a funeral of a close family member (Schedule B1A, para 13).⁹ In relation to certain permitted reasons, in particular exercise, travellers must be given prior permission from a person authorised by the Defendant and comply with any reasonable requirements imposed by that person. At the end of the quarantine period, travellers are returned to the airport they were collected from.

29. Paragraph 9 of Schedule B1A¹⁰ purports to allow the Defendant, or a person authorised by him, to impose a charge for a managed self-isolation package [CB/C9/124]. 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.”

30. Failure to comply with the provisions of Schedule B1A can result in one or more fixed penalty notices, with the first breach subject to a penalty of £5,000, and subsequent breaches rising to penalties of up to £10,000 (regulation 7).¹¹

31. At the date of these Grounds, over forty countries were on the Government’s red list.¹²

⁸ Department of Health and Social Care, “Managed quarantine: what to expect” (20 April 2021), paragraph 11. Available at: <https://www.gov.uk/government/publications/managed-quarantine-what-to-expect/managed-quarantine-what-to-expect>

⁹ New Travel Regulations, Schedule 11, para 13 [CB/C9A/138].

¹⁰ New Travel Regulations, Schedule 11, para 9 [CB/C9A/136].

¹¹ New Travel Regulations, regulation 19.

¹² Department of Transport, “Red, Amber and Green List Rules for Entering England” (12 May 2021) Available at: <https://www.gov.uk/guidance/red-amber-and-green-list-rules-for-entering-england#red-list>

Permitted reasons to travel outside the UK

32. On 29 March 2021, The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 came into force (“**Steps Regulations**”) [CB/C10/144]. Regulation 8 provides that no person may, without a reasonable excuse (a) leave England to travel to a destination outside the UK, or (b) travel to, or be present at, an embarkation point for the purpose of travelling from there to a destination outside the UK. Schedule 5 contains a non-exhaustive list of reasonable excuses which include visiting a close family member, a member of the same household or a friend who is receiving treatment in a hospital or who is dying and accompanying them to a medical appointment (paragraphs 8(e), 9(a) and 9(c)) [CB/C10/147].
33. On 17 May 2021 Regulation 8 of the Steps Regulations was repealed¹³ therefore removing the requirement to have a “reasonable excuse” to travel. The requirement was replaced with guidance, which depended on whether a travel destination fell within the “green”, “amber” or “red list”.¹⁴

Charging Policy

34. The amount of the charge is not specified in the Travel Regulations or New Travel Regulations. The rates for the managed self-isolation package are set out in the Charging Policy [CB/D19/204]. One adult must pay £1,750 for one room. Each “additional adult” or child over 11 sharing a room will need to pay a fee of £650. The rate for children aged 5 to 11 is £325 per child.
35. The Charging Policy provides that people facing financial hardship may apply for a deferred repayment plan (the “**Deferred Repayment Plan**”) when booking their managed self-isolation package. Anyone granted a Deferred Repayment Plan will be required to pay back the debt to the government in 12 monthly instalments. The linked

¹³ The Health Protection (Coronavirus, Restrictions) (Steps and Other Provisions) (England) (Amendment) Regulations 2021.

¹⁴ See Red, amber and green list rules for entering England; <https://www.gov.uk/guidance/red-amber-and-green-list-rules-for-entering-england>.

hotel quarantine booking portal, administered by Corporate Travel, warns that the debt and any missed payments “*will also be pursued by the government*”.¹⁵

36. It is unclear who is eligible for the Defendant’s Deferred Repayment Plan. When the Charging Policy was first published on 11 February 2021, it stated that the Deferred Repayment Plan was available for people who were (1) facing significant financial hardship and (2) already in receipt of income-related benefits:

“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 you already receive income-related benefits, and you will be required to pay back your debt to the government in 12 monthly instalments” [CB/D20/214].

37. The Defendant’s pre-action response of 26 March 2021 confirmed at paragraph 15 “*those who are liable for the [managed quarantine system 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*” [CB/B4/87].

38. On 20 April 2021, the Defendant removed the reference to income-related benefits from the Charging Policy¹⁶ [CB/D19/204]. However, the Charging Policy directs people wishing to book their managed self-isolation package to use a booking portal administered by Corporate Travel Management. People who are “*facing financial hardship and unable to pay immediately*” or who are “*facing emergency financial hardship*” are directed to apply for the Deferred Payment Plan through a separate portal page. The portal page requires travellers to declare that they meet the Government’s eligibility criteria to proceed to apply for relief, including that they already receive income-related benefits. The full criteria are [CB/F31/675]:

“We Corporate Travel Management (CTM) are authorised to administer financial support packages on behalf of the Government provided you meet the eligibility criteria in full, which is set out below;

¹⁵See <https://quarantinehotelbookings.ctmportal.co.uk/>.

¹⁶ The description of the 20 April 2021 update records that the Defendant has “*Removed references to limitations on eligibility for hardship support.*”

1. *By agreeing to these Terms and Conditions, you are confirming your acceptance that you want to apply for deferred payment due to financial hardship on the booking portal.*
2. *Approval of these Terms and Conditions will be shared with UK Government in order to process your application and to set up regular payment plan.*
3. *This agreement is only available for UK residents who already receive DWP income-related benefits, and you will be required to pay back your debt to the government in 12 monthly instalments. The debt, and any missed payments, will also be pursued by the government.*
4. *By agreeing to these terms and conditions, you are confirming that you are currently in receipt of income related benefits.*
5. *Eligibility is only for people on income related benefits.*

In agreeing to these terms and conditions you are confirming that you meet all parts of the eligibility criteria and terms and conditions.”

39. On 13 May 2021 the Defendant informed the Claimants that the Deferred Payment Plan is now available to those who are facing “Emergency financial hardship and are unable to pay the fees immediately” [CB/B8/106]. However, at the time of these Grounds, when a potential traveller clicks “confirm” at the end of the eligibility criteria on the portal, there is no further action, and a pop up directs the traveller to contact CTM via telephone or email [CB/F31/677].

International Health Regulations (2005)

40. The United Kingdom is a founding member of the World Health Organisation (“WHO”) and signed its Constitution on 22 July 1946.¹⁷ Article 21 of the WHO Constitution 1948 which grants the World Health Assembly the power *inter alia* to adopt regulations, the International Health Regulations (“IHR”), 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 [CB/C12/160].

¹⁷ United Nations, “Constitution of the World Health Organization New York, 22 July 1946”. Available at: https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IX-1&chapter=9&lang=en.

41. The IHR were first adopted in 1969 and were substantially amended on 23 May 2005 by the 58th World Health Assembly. Pursuant to Article 22 of the WHO Constitution [CB/C12/160] 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 did not enter any reservation.

42. 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” [CB/C11/152].

43. Article 40 of the International Health Regulations provides [CB/C11/153]:

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:

[...]

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...”

44. Certain of these terms are defined:

- a. *““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;”*

- b. ““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;”.

45. Article 43 provides for certain derogations from the provisions of the Regulations **[CB/C11/154]**:

Additional health measures

1. *These Regulations shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which:*
 - (a) *achieve the same or greater level of health protection than WHO recommendations; or*
 - (b) *are otherwise prohibited under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33*

provided such measures are otherwise consistent with these Regulations.

Such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.”

Human Rights Act 1998

46. The Human Rights Act 1998 incorporates the European Convention on Human Rights into national law, including the following relevant articles the right to private and family life, into national law, including:

Article 8

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others* **[CB/C16/176]**.

47. In relation to the prohibition on discrimination, the ECHR provides:

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status
[CB/C16/177]

48. Section 6(1) of the Human Rights Act provides that “*It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*”

Equality Act 2010

49. Section 149 of the Equality Act 2010 is entitled ‘Public sector equality duty’, and provides [CB/C17/178]:

(1) A public authority must, in the exercise of its functions, 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.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) *Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.*

(7) *The relevant protected characteristics are—*

- *age;*
- *disability;*
- *gender reassignment;*
- *pregnancy and maternity;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

(8) *A reference to conduct that is prohibited by or under this Act includes a reference to—*

- (a) *a breach of an equality clause or rule;*
- (b) *a breach of a non-discrimination rule.*

(9) *Schedule 18 (exceptions) has effect.*

Immigration Act 1971

50. Section 2(1) of the Immigration Act 1971 provides [**CB/C14/170**]:

A person is under this Act to have the right of abode in the United Kingdom if—

(a) *he is a British citizen; or*

(b) *he is a Commonwealth citizen who—*

(i) *immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and*

(ii) *has not ceased to be a Commonwealth citizen in the meanwhile.*

D. GROUNDS

Ground 1: the imposition of charges for quarantine is *ultra vires*

51. The imposition of charges for quarantine packages is *ultra vires* the Secretary of State's powers under the 1984 Act, in particular when that Act is interpreted consistent with the UK's international legal obligations as a Member of the WHO.

52. The 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 [CB/C13/167]. It provides no guidance on what can be charged for or the level of charges.

53. The section must, in particular, be read subject to the IHR 2005, an international instrument which is binding on all WHO Member States including the UK. Part VII of the IHR 2005 provides for charges. Article 40 prevents the imposition of charges for quarantine [CB/C11/153]. The definitions of “quarantine” and “suspect” clearly apply to the managed self-isolation package imposed by the Regulations, because 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 variant of coronavirus.
54. Article 43 of the IHR 2005 permits Member States to implement additional health measures that would otherwise be prohibited under a small number of specified provisions, provided they achieve the same or greater level of protection than WHO recommendations [CB/C11/154]. The application of Article 43 IHR 2005 is exceptionally narrow. Article 43(b) allows derogations from select provisions only, which do not include Article 40. Further, any derogation from the specified provisions is subject to the requirement that the measures are “are otherwise consistent with these Regulations” – including Article 40.
55. It follows that charging for managed self-isolation is contrary to the IHR 2005.
56. 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] [CB/E22/237].
57. 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 [CB/C15/174]:

“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.”

58. It is no answer to this to suggest that the provisions do not “*mirror precisely the [IHR] or transpose each and every obligation*” as is stated by the Defendant in the pre-action response [CB/C4/88]. The prohibition on charges for quarantine is one which does not require transposition. Rather, what is required is that powers which are transposed, or purported to be exercised in furtherance of the international legal obligations, are exercised compatibly with those obligations. In *R (Adams) v Secretary of State for Justice* [2011] UKSC 18 [2012] 1 AC 48 at [14] Lord Phillips held:

“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” [CB/E23/259].

59. It also does not assist the Defendant to rely on *R v SSHD ex parte Brind* [1991] 1 AC 696 (HL) [CB/E24/350]. There, the House of Lords declined to constrain the Secretary of State’s power by reference to the (then) entirely unincorporated ECHR. In this case, the constraint in question relates to a power created specifically in pursuit of international legal obligations arising from the IHR 2005.

60. Two further principles of construction are relevant:

- a. 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] [CB/E25/434].
- b. 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] [CB/E26/472].

61. 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 [CB/C11/151]. 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.

62. It therefore follows that either:

- a. Paragraph 9 of Schedule B1A of the ~~Hotel Quarantine~~ Travel Regulations, and Paragraph 9 of Schedule 11 of the New Travel Regulations are *ultra vires* insofar as they purport to authorise the Defendant to impose charges for quarantine, and should be severed from the Regulations; or
- b. The discretion conferred by those provisions cannot be exercised in a manner that is contrary to Article 40 of the IHR 2005 and the charging regime imposed by the Defendant under the Charging Policy is therefore *ultra vires*.

Ground 2: The policy setting the level of fee and preventing it being waived or reduced is unlawful

63. It is unlawful to operate a policy which sets an inflexible £1,750 fee for everyone who enters hotel quarantine regardless of their individual circumstances, or any exceptional circumstances, and does not allow for discretion to be applied so that the fee can be waived or reduced. This amounts to an unlawful fettering of discretion and prevents, in the particular cases of these three Claimants, their exceptional circumstances and the hardship caused by the imposition of the fee being considered and addressed.

64. There are three further reasons why the policy is unlawful:

(a) Inadequate impact assessment/failing to take into account relevant consideration

65. First, the Defendant's Equality Assessment is inadequate as it fails to take into account that persons with no/low incomes have pressing family needs to travel and will be unable to travel because of the prohibitive level of the fee [CB/D18/181].

66. The Government has wrongly assumed that individuals who are on low incomes are less likely to travel and are therefore not adversely affected by the Charging Policy. As evidenced by the Claimants' circumstances, individuals with financial difficulties will find themselves in situations where they must travel for certain urgent family reasons. This was at the time of BB and MAM's travel to the UK a 'reasonable excuse' for travel, as recognised by Regulation 8¹⁸ and Schedule 5 of the Steps Regulations [CB/C10/145,147]. No/low-income individuals who could otherwise afford to travel for these needs, including MAM and TE, are only prevented from doing so of the additional costs imposed under the Charging Policy. For example, MAM paid £487.12 for return flights from London to Addis Ababa [CB/F31/627]. The £1,750 fee would increase the cost of his trip by over 300%.
67. Where no equality impact assessment, or only one that is inadequate, has been made, 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] [CB/E27/503].
68. In this case, the Equality Analysis and Family Test Analysis completed by the Defendant failed adequately to assess the impact of the hotel quarantine scheme and Charging Policy on lower-income individuals [CB/D18/181]. While the Equality Analysis recorded that the mandatory quarantine regime and the cost of £1,750 may "disadvantage lower income individuals, especially minority ethnic groups, disabled people, females and younger people", it concluded the approach was "proportionate" on the basis that travel is predominantly a choice rather than a requirement. This ignores, or materially under-appreciates, the fact that those travelling while the Steps Regulations are in force will often be doing so for compassionate or emergency reasons. This kind of "reasonable excuse" is presently a requirement to be able to travel abroad [CB/C10/145]. As the Equality Analysis itself acknowledged at paragraph 26, "*non-work-related travel may also be more likely to be seen as a necessity by ethnic minorities*

¹⁸ This provision has since been repealed and there is currently (as at the date of the Amended Grounds) no legal requirement that there be any particular reason to travel out of and into the UK – regardless of whether travel is to or from a "Red", "Amber" or "Green" list country.

or foreign nationals if they need to travel for personal, family or care reasons” [CB/D18/187].

69. The Equality Analysis further failed to recognise the inadequacy of the alternatives to full upfront payment under the Charging Policy. The Equality Analysis relied on the Deferred Repayment Plan for persons in receipt of income-related benefits and other “case-by-case” considerations to mitigate the risks to persons who would find costs more difficult to meet. [CB/D18/186] But the Deferred Repayment Plan is highly limited. There is no clear process to seek a broader “case-by-case” exemption. Despite the Defendant’s change to the policy, to permit those facing “emergency financial hardship” to apply for a Deferred Repayment Plan, the portal still requires travellers to declare receipt of income-related benefits to be able to seek financial assistance, and then simply redirects them to another email address, with no information on the timeframe for any response or process.
70. Without any appropriate fee waivers or payment plans in place, the imposition of charges under the Charging Policy has particularly negative impacts on persons with low-incomes or who receive no income from work due to being retired or unemployed. The effect is to prevent people who receive no income or low incomes from being able to travel for legally permitted reasons, such as to provide care and assistance to vulnerable relatives or to visit a relative who is critically ill or dying. In many cases, the costs will impede and even prevent family units from being together.

(b) Breach of s.6 of the Human Rights Act 1998

71. Second, the level of fee in addition to the policy which prevents it being reduced or waived is a breach of section 6 of the Human Rights Act 1998, and particularly the right to respect for family and private life protected by Article 8 ECHR, and the prohibition on discrimination under Article 14 with Article 8 ECHR [CB/C16/176-177].
72. The Hotel Quarantine Regulations are an interference with the right to private and family life insofar as they may prevent, or hinder, individuals travelling for permitted reasons such as to visit a dying family member. This is particularly the case for those with no or low incomes. The Claimants accept that the Travel Regulations and Charging Policy have the legitimate aim of protecting public health. However, they are disproportionate. The potential interference with the right to private and family life in cases such as the Claimants’ far outweighs the cost to the state of a system of financial

relief in exceptional cases. Deferral of payment over 12 months, even if available to all travellers, would not assist those who cannot afford the fee on the basis of their annual income, and/or who cannot increase that income.

73. The disproportionality of the system is evident when contrasted with steps taken by other Governments which ameliorate the impact on individuals and families:

- a. Scotland offers repayment plans to people who feel they may be unable to pay quarantine fees [CB/F29/576].
- b. In Queensland, Australia, citizens or permanent residents who are subject to government-arranged quarantine can apply to have all or part of the quarantine fees waived (as opposed to deferred) on grounds of financial hardship, including those who are unemployed, significantly financially impacted by the pandemic, or are vulnerable [CB/F29/546].
- c. In New Zealand, individuals who are returning permanently are not required to pay for quarantine [CB/F29/571]. For those who are subject to quarantine charges, fee waivers may be available in cases of undue financial hardship and other special circumstances, which include individuals who have travelled to visit a dying or seriously ill close relative or attend a funeral or tangihanga (whether in New Zealand or overseas) [CB/F29/573].

74. Even if the Regulations and Charging Policy were held to be proportionate in the context of Article 8 ECHR, they are a violation of the prohibition on discrimination on grounds of some “other status” under Article 14 ECHR (with Article 8) insofar as the interference with the rights of individuals with no or low incomes may prevent them from exercising their rights entirely, while the impact on individuals with high incomes may be negligible.

75. The Claimants therefore submit that the Charging Policy violates Article 8 and/or Article 14 ECHR, and is therefore unlawful [CB/C16/176-177].

(c) Unlawful stymying of the right of abode

76. Third, the prohibitive level of fee and Charging Policy and prevents the exercise of the statutory “right of abode” to which all British citizens are entitled.

77. In some cases, such as that of MAM, who is currently unable to return home because he cannot afford to do so, the fee prevents individuals from exercising their statutory right of abode in the UK pursuant to section 2 of the Immigration Act 1971 [CB/C14/170]. 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*”) Lord Justice David Richards held that fees imposed on registration for British citizenship, of £1,012, were set at a level that was unaffordable [CB/E28/523-525]. They were therefore unlawful. The hotel quarantine fees are almost double the amount which was held to be unlawful in *PRCBC*.
78. Furthermore, whilst the Court of Appeal in *PRCBC* held that the imposition of fees *per se* 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. 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, as the charges are provided for by statutory instrument). The logic and reasoning of the Court of Appeal therefore supports the Claimants’ 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 [CB/E28/524]:

*“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 *JCWI*,¹⁹ 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.”*

¹⁹ *R v SSHD ex p JCWI* [1997] 1 WLR 275 (CA).

79. In the present case, the general power to impose charges under section 45F(2)(f) of the 1984 Act 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.
80. The only exception to the Charging Policy is the ability of persons receiving income-related benefits, or facing emergency financial hardship, to apply to defer the fees for their hotel quarantine stay under the Deferred Repayment Plan. This does not meet the above points. The scope of the Deferred Repayment Plan is exceptionally limited and indeed irrational. Income-related benefits are 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.²⁰ A repayment obligation of £1,750 (or more) over 12 months is unaffordable to those receiving income-related benefits and to those from low-income backgrounds.

E. REMEDY

81. The Claimants seek the following final remedies:
- a. A declaration that paragraph 9 of Schedule B1A of the Travel Regulations, and paragraph 9 of Schedule 11 of the New Travel Regulations, is *ultra vires* insofar as it purports to authorise the Defendant to impose charges for quarantine, and should be severed from the Regulations; or
 - b. A declaration that the discretion conferred by paragraph 9 of Schedule B1A of the Travel Regulations, and paragraph 9 of Schedule 11 of the New Travel Regulations cannot be exercised in a manner that is contrary to Article 40 of the IHR 2005 and the charging regime imposed by the Defendant under the Charging Policy is therefore *ultra vires*; and
 - c. An order quashing the Charging Policy;
 - d. A mandatory order that the Defendant reconsider each of the Claimants' cases in order to either reduce or waive entirely the hotel quarantine fee; and
 - e. Costs; and

²⁰ Joseph Rowntree Foundation, "UK Poverty 2020/21" (13 January 2021) at 43. Available at: <https://www.jrf.org.uk/report/uk-poverty-2020-21>.

f. Such further or other remedy as the court sees fit.

ADAM WAGNER

CIAN MURPHY

Doughty Street Chambers

14 May 2021

Amended 27 May 2021