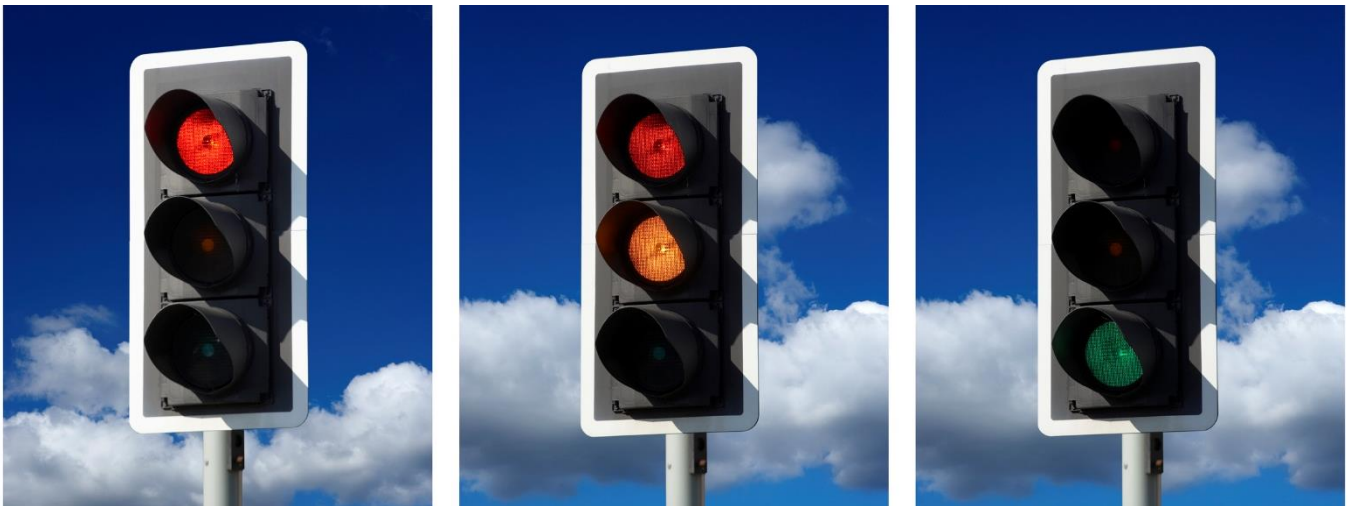


# 3 HARE COURT

## Judicial Review Challenge to the ‘Traffic Light’ travel restrictions dismissed in *R (on the application of Manchester Airports Holdings Ltd) v Secretary of State for Transport & Anor* [2021] EWHC 2031 (Admin)

By [Adam Riley](#)



In a [judgment](#) handed down last week, the High Court of Justice granted the Claimant, Manchester Airports Holdings Ltd, permission to apply for judicial review before then subsequently dismissing their substantive judicial review challenge to the ‘traffic-light’ system which provides, among other matters, the rules individuals must follow on entering England after travel from red, amber or green list countries. The relevant traffic light colour corresponds, broadly, to the COVID-19 risk in a given country.

### Background

The *Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations* (‘the International Travel

Regulations’) were made on 14 May 2021 and came into force on 17 May 2021. These were made pursuant to powers in the *Public Health (Control of Disease) Act 1984*. These restrictions have not arisen in a vacuum: restrictions requiring individuals entering England to self-isolate were first put in place in June 2020 and have remained in place in varying guises since that time.

The International Travel Regulations established the ‘traffic light’ system of restrictions on individuals entering England from countries outside the common travel area (i.e. the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland).

The traffic light system places countries outside the common travel area in one of three categories. Each category is contained in a Schedule to the International Travel Regulations. Different restrictions apply to each category and are referred to colloquially as the green, amber and red lists.

On 3 June 2021 the Secretary of State for Transport took decisions which required the amendment of the International Travel Regulations. These were put into effect by the *Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 2) Regulations 2021* ('the Amendment Regulations'). Their institution was rapid: being made on 6 June 2021, laid before Parliament on 7 June 2021, and coming into force on 8 June 2021.

Among other matters, the Amendment Regulations caused Portugal to cease to be on the Green List and moved to the Amber List, whilst Afghanistan, Bahrain, Costa Rica, Egypt, Sri Lanka, Sudan and Trinidad and Tobago were added to the Red list.

### The Claimant's challenge: Ground 1

The claim was in essence two-fold. Ground 1 concerned the meaning and effect of regulation 24 of the International Travel Regulations which provided that:

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

Specifically, the question raised by the Claimant was whether the obligation to "review the need for requirements" imposed a requirement to review whether countries should stay in their existing traffic light list or move to a different list.

The Secretary of State argued that the obligation under Regulation 24 to review "the need for the requirements imposed by these Regulations"

corresponded to an obligation to review the need for the system of restrictions itself. However, the Court accepted the submission of the Claimant that, having regard to the wording, structure and underlying purpose of the Regulations, the obligation created under Regulation 24 encompassed a need to review the need for self-isolation restrictions for individuals travelling to England from either an amber or red-list country.

However, and of crucial dispositive importance, the Court held this was precisely what the Secretary of State had in fact been doing: - "That being so, the Secretary of State has carried out the review required by regulation 24 in a lawful manner". The consequence of this was that although the Court had accepted the Claimant's submission on the interpretation and effect of Regulation 24, no practical implication arose from this and no relief was made available to the Claimant.

### The Claimant's challenge: The remaining grounds

At paragraph [23] of the judgment the Court summarised the second ground of challenge as follows:

*"The Claimant's overall submission is that by reason of one, all, or any combination of the remaining grounds of challenge the Secretary of State is subject to a legal obligation which requires him to publish reasons why the Amendment Regulations moved Portugal from the green to the amber list and other countries from the amber to the red list; reasons why countries on the amber list were not changed by the Amendment Regulations; the criteria that were applied, and the data relied on, when taking all these decisions. Although the Claimant advances the remaining grounds collectively, it is important for sake of clarity to consider each in turn. We do not consider the cumulative effect of these arguments is greater than the sum of the parts."*

As regards the Claimant's challenge which centred on a common-law duty to give reasons, the Court held that the superimposition of such an obligation was not appropriate in the instant case [30], and that, even if this was wrong, the Secretary of State's announcement contained sufficient detail to discharge any obligation to give reasons that could arise at common law [31]-[32].

The Claimant additionally argued that a common law principle of transparency existed requiring the Secretary of State to publish the criteria against which decisions taken to allocate countries within specific traffic light lists were made. It was contended that the Risk Assessment Methodology published by the Secretary of State on 11 May 2021 was insufficiently detailed, and that the common law required sufficient information to be published to enable anyone to see how every conclusion has been reached. The Court rejected this argument, finding that it would not be realistic to expect that further detail could be published. In any event, the Court additionally held that no free-standing general common law duty of transparency assuming the level of scrutiny contended for by the Claimant *'does not and never has existed'*.

The Court held that the Claimant had not established a legitimate expectation that information would be provided for why countries on the Amber list remained on that list. Of particular import, the Court noted that: *"Statements on matters of general policy affecting the public at large will often not be matters capable of being enforced as legal obligation through the mechanism of legitimate expectation"* [52].

The Court rejected the additional argument of the Claimant that the Amended Regulations had infringed their Convention Rights pursuant to Article 1 of Protocol 1 of the European Convention on Human Rights ('A1P1 ECHR'). The Court held that:

- (1) The Claimant had failed to provide evidence showing that the Amendment Regulations had affected 'property' as defined in A1P1 ECHR, given the Convention does not extend protection to the prospect of future income (save for exceptions relating to the protection of 'goodwill attaching to a business' which did not apply in the instant case);
- (2) The measures enacted by the Amendment Regulations were sufficiently certain and foreseeable, and so were 'provided for by law'; and
- (3) The protection in A1P1 ECHR was concerned with preventing arbitrary action by the executive; the Amendment Regulations were not arbitrary because it was held that the contents of the Risk Assessment Methodology sufficiently identified the principles which applied in determining which countries should be included in each traffic light list.

## Comment

This is not the outcome which many in the travel and aviation sector will have been hoping for. The Court was put in the invidious position of having to rule on regulations which the Government has put in place in an attempt to balance the risks of facilitating the opening up of international travel with the continuing need to contain the spread of COVID-19. The Court adopted a deferential posture and broadly found that there was no need for the Government to be any more transparent in its decision-making in future. One effect will be that airlines, and others, will be left in the same difficult position as before the litigation. At the time of writing it is unclear whether any of the parties will seek to appeal any part of this judgment.



[Adam Riley](#) (Call 2018) Adam commenced pupillage in October 2020 and was offered and accepted tenancy in July 2021, in which he will become a full tenant in October 2021. He has an interest in all of Chambers' core practice areas.

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