Changes to green/amber/red travel lists were lawful (R (Manchester Airports Holdings Ltd) v Secretary of State for Transport)

This analysis was first published on Lexis®PSL on 10 August 2021 and can be found here (subscription required)

Public Law analysis: The claimant owns and operates three airports in England. It challenged amendments made to the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021, SI 2021/582 (the Regulations). One such change was the removal of Portugal from the 'green list'. The primary thrust of its claim was that the amendments were made without proper reasons being given and without proper notice of the criteria applied. The claim, brought on various grounds (such as transparency, legitimate expectations, and breach of Article 1 of Protocol 1 of the European Convention of Human Rights) (A1P1) was dismissed. Written by Jonathan Lewis, barrister at Henderson Chambers.

Manchester Airports Holdings Ltd, R (on the Application of) v Secretary of State for Transport and another [2021] EWHC 2031 (Admin)

What are the practical implications of this case?

It is trite that it will be difficult successfully to judicially review changes made to statutory instruments when such changes are driven by policy considerations, themselves informed by health data. This decision provides further confirmation that there are no free-standing public law duties of 'good administration' or 'transparency' (at para [43]).

This case provides some useful insight as to how the doctrine of legitimate expectations is to be applied in circumstances where government increasingly gives press conferences to set out important policy. It is clear that one is unlikely to be able to found a legitimate expectation claim purely on what is said in an 'off-the-cuff' response at a press conference: 'responses are not prepared and are therefore unlikely, reasonably, to be regarded as setting out promises that should be taken as enforceable at law' (at para [51]). The suggestion that this type of interaction might ordinarily give rise to legal obligation would discourage ordinary communication.

What was the background?

The Regulations, SI 2021/582 were made pursuant to powers in the Public Health (Control of Disease) Act 1984 (PH(CD)A 1984) and came into effect on 17 May 2021. They were made under the negative resolution procedure following a report produced in April 2021 by the Global Travel Taskforce:

> 'The Safe Return of International Travel.'

The Regulations, SI 2021/582 established a traffic light system of restrictions on persons entering England from countries outside the common travel area. The system places countries outside the common travel area in one of three categories: each category is contained in a schedule to the Regulations. Different restrictions apply to each category. The categories are referred to colloquially as the green, amber and red lists. The 'Risk assessment methodology to inform international travel traffic light system' (the Methodology) explained how countries came to be placed in each of the traffic light lists when the Regulations were made. The default position was that every country would be on the amber list (taken as a precautionary measure). Any decision to move a country from the amber list will depend on the existence of specific evidence.

On 3 June 2021 the Secretary of State (SS) published a press release explaining what was described as the result of the 'first traffic light review'. The Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No 2) Regulations 2021 (Amendment Regulations) amended the schedules to the Regulations, with the consequence that Portugal ceased to be on the

green list (defaulting to the amber list) and each of Afghanistan, Bahrain, Costa Rica, Egypt, Sri Lanka, Sudan and Trinidad and Tobago was added to the red list.

The court characterised the claim as falling into two parts (at para [16]). The first part concerned the meaning and effect of the Regulations, SI 2021/582, reg 24 which provides that the SS must 'review the need for the requirements imposed by these Regulations by 14 June 2021 and at least once every 28 days thereafter'. The second part comprised the claimant's case that the SS is under a legal obligation to publish reasons for changes made to the Regulations. The claimant maintained that the reasons should include the methodology relied upon for the contents of the lists and all the data relied upon.

What did the court decide?

The court accepted the claimant's contention that the review required by the Regulations, SI 2021/582, reg 24 encompasses reconsideration of whether countries should stay where they are on the traffic light lists or move from one list to another (at para [19]). The requirements in the Regulations, SI 2021/582, reg 9 are that persons travelling from certain countries must self-isolate on coming to England and it is the need for those requirements that is to be reviewed. This interpretation was reinforced by considering the purpose of the Regulations (at para [20]). As the SS had in fact reviewed the contents of this lists, he had acted lawfully (at para [22]).

The claimant relied upon the principle set out in *R (Oakley) v South Cambridgeshire District Council* [2017] 1 WLR 3765 that, while there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so. The court decided that this dicta did not assist the claimant for the following reasons. There is no express statutory obligation, either in PH(CD)A 1984 or the Regulations to give reasons for amending the Regulations (at para [25]). Relying upon the decision in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, the court derived the principle that 'a court ought not to rewrite or supplement a legislative scheme for the adoption of secondary legislation' (at para [26]). It said that 'It will rarely be appropriate to supplement a prescribed parliamentary procedure for making secondary legislation by imposing additional requirements' (at para [28]).

The court distinguished *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 on the basis that that case concerned a 'targeted restriction' whereas the Regulations 'are genuinely legislative in nature' (at para [30]). In any event, it found that what the SS had said was sufficient to discharge any obligation to give reasons that could arise at common law (at para [31]). It found that there was no duty to explain why countries remained on the amber list for two reasons: first, because what the SS said had to be taken together with the Methodology (at para [32]), and second, because any further obligation would impose unrealistic burdens on the SS (at para [33]).

The court rejected the proposition that there is a common law requirement that information should be published that is sufficient to permit the claimant to see precisely how every conclusion has been reached (at para [37]). First, it was not realistic to expect that further detail could be published. Second, the proposition assumes a level of legal scrutiny that at common law does not and never has existed. It is not for a court to make, or assess the correctness of, such assessments of what measures should be adopted to address the public health problems posed by coronavirus (COVID-19). Any legal obligation to give reasons or provide other information relevant to decisions taken must be framed with this legal reality in mind (at para [38]). It also rejected the claimant's argument for the existence of a free-standing common law duty of transparency (at paras [39]–[45]).

The claimant argued that, based on an answer given by the SS to a question during a press conference on 7 May 2021, it had a legitimate expectation that the SS would publish all information relating to decisions contained in the Amendment Regulations, and all information explaining why countries on the amber list did not move from that list (at paras [46]–[47]). The court rejected this argument finding that what was said at the press conference could not properly be understood as a promise (at para [49]).

The claimant argued that the decisions contained in the Amendment Regulations are a control of use, which interferes with property within the protection provided by A1P1. Further, it argued that because the SS had not published criteria by which he decides which list a country is assigned to, that control of use is not 'provided for by law' as required by A1P1 (at para [54]). The court was prepared to assume that the variations made by the Amendment Regulations amounted to a form of control of use.

The claimant's A1P1 claim nonetheless failed. A1P1 does not extend to protect rights to the prospect of income in the future, save to the extent that such prospect might be an aspect of the goodwill

attaching to a business (that goodwill being an existing and present asset) (at para [57]). It found that the harm inflicted on the claimant's business was attributable to coronavirus, not the Amendment Regulations (at para [58]) and that the claimant's claim was in respect of future income, which is not covered by A1P1. In any event, the Amendment Regulations, which brought about the control of use, did not lack of certainty: their effect was clear so far as concerned the content of the traffic light lists (at para [60]). The court considered it necessary to take a pragmatic approach to assessing whether the changes were in accordance with the law, noting that the case law was primarily concerned with arbitrary action.

Case details

- Court: Queen's Bench Division, Divisional Court, High Court of Justice
- Judges: Lord Justice Lewis and Mr Justice Swift
- Date of judgment: 20 July 2021

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