Neutral Citation Number: [2021] EWHC 3359 (Admin)

Case No: CO/3148/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
9th December 2021

Before:
MR JUSTICE FORDHAM

- -

Between:

The Queen on the application of	**Claimants**
(1) FELIPE KENZO MASUKO HOTTA	
(2) FLAVIA FERREIRA PAOLI WHITEWAY	
(3) JEAN GAWTHROP	
- and -	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**
-and-	
THE SECRETARY OF STATE FOR TRANSPORT	**Interested Party**

- -
- -

Jamie Burton QC, Adam Wagner, Juliet Wells and Cian Murphy
(instructed by Excello Law Ltd) for the **Claimants**
Julia Smyth and Yaaser Vanderman
(instructed by Government Legal Department) for the **Defendant**

Hearing date: 9/12/21
Judgment as delivered in open court at the hearing

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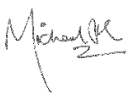
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission for judicial review. Permission was refused on the papers by Jay J on 13 October 2021. The target of the challenge is the Managed Hotel Quarantine (MHQ) scheme, whose design is found in Schedule 11 to the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 (SI 2021 No.582) ("the 2021 Regulations"). The 2021 Regulations were made on 14 May 2021 and came into force on 17 May 2021. They have been amended at various stages subsequently. Also amended have been the practical arrangements and, in particular, for the purposes of this case, a list of countries known as the "Red List" countries.

2. The substance of the claim for judicial review, for which permission is sought, is that the MHQ scheme violates the Article 5 ECHR rights of those who are subjected to it. A particular focus of the proposed claim for judicial review is to identify the category of travellers who come to (or back to) England from Red List countries into the MHQ scheme, and who are required to remain within the scheme, notwithstanding that they can demonstrate that they have been vaccinated. Reference is made in the papers to Ireland and Norway who it is said – which I accept for the purposes of this hearing – have similar schemes but in applying it draw the distinction between those who are, or are not, demonstrably vaccinated.

3. The 2021 Regulations were described in detail in the judgment of the Divisional Court in the case of R (Manchester Airports Holdings Ltd) v Secretary of State for Transport [2021] EWHC 2031 (Admin) [2021] ACD 114. Set out in that judgment is a detailed description of the design of the statutory scheme for the Green, Amber and Red List, to which description I invite attention. It is neither necessary nor proportionate for me to traverse the same ground in this permission judgment in the present case.

4. The "methodology" for identifying Red List countries is described at §36 of the Manchester Airports judgment, by reference to the evidence that was before the Divisional Court in that case. As Ms Smyth for the Defendant emphasises, at the heart of the "risk assessment" methodology that lies behind identification of the Red List countries, and lies behind the measures which arise in relation to those arriving from a Red List country, are concerns relating to "Variants", whether they have been identified as "Variants of Concern" or "Variants under Investigation". One specific concern relates to the risks arising out of potential imperviousness to vaccination of such Variants.

The Khalid case

5. Front and central to the present case is a judgment of Linden J, delivered on 14 July 2021, in the case of R (Khalid) v Secretary of State for Health and Social Care [2021] EWHC 2156 (Admin). That judgment, which (like the Manchester Airports judgment) is in the public domain (at www.bailii.org), has the citation [2021] EWHC 2156 (Admin). In the Khalid case, Linden J was concerned with what, in my judgment, and beyond argument, was in substance the same claim as is now before me. In Khalid, it was one of three grounds that were being advanced, and on which Linden J was being asked to grant permission for judicial review. Part of the claim was that the MHQ

scheme, by reference in particular to its design under the 2021 Regulations, violates the Article 5 rights of those who are subjected to the scheme. That means being subject to the 10 days' quarantine, in a designated hotel (Sch 11 §10), restricted to their individual rooms (Sch 11 §14), having arrived here from a Red List country (or not having been in a non-Red List country for a period of 10 days, after leaving a Red List country, prior to their arrival: Sch 11 §1). Linden J explained (Khalid §12) the aim of the scheme, being to reduce the risk posed by people arriving into England and in particular associated with the Variants to which I have already referred. He set out his own description of Red Listing and the process for it (Khalid at §§13-14). I am told there are currently some 11 countries on the Red List, arrival from which engages the MHQ quarantine scheme. I am also told that in June of this year there were some 50 countries on that list.

The Third Claimant's evidence

6. The practical experience of being subjected to the MHQ scheme is brought to life in the moving witness statement of the Third Claimant in this case. She describes how, being a regular visitor to her parents in South Africa, she received a call at the end of July 2021 about the seriously deteriorating health of her father. She was aware of the Red List and the 10-day MHQ scheme. She booked flights to South Africa, to see her dying father, returning to England and underwent quarantine under the scheme. During her period of quarantine, her father passed away. She describes – in detail that has assisted me to understand the human implications of this case – what it was like to be in quarantine. That included restrictions (as to which see Sch 11 §11-13, 17-18) which meant not being able to associate with her husband, who "dropped off some groceries" and could be seen beyond a fence from the exercise yard ("I … spoke to my husband on the phone, while looking at him from a distance through a gap of a few inches"). She explains the practical implications of the regime, including as to the limited opportunity – in difficult surroundings – to exercise (Sch 11 §13(1)(c)). She describes the "discomfort" and "intimidation" that she experienced ("As least once a day, I was made to feel either uncomfortable, intimidated, or like a prisoner"). Ultimately, this is not a challenge which turns on distinctions between different experiences of different individuals. As Mr Smyth rightly points out, this is a challenge to the MHQ scheme and the way that it has been designed and operates. But I accept Mr Burton QC's submission that the Third Claimant's evidence is relevant when the Court is considering the realities of the scheme and its operation.

Request for a hybrid hearing

7. Before I turn to deal with the legal issues which are my responsibility at this hearing, I need to explain the position, and give some reasons, in relation to a request regarding this hearing with which I dealt on the papers. I told the parties that I would embody this feature, and my reasons, in any ruling at this hearing, as I now do. Having made arrangements for this case to be listed in open court as an in-person hearing, as it has been, a request was made by the Claimants' solicitors for the lead solicitor (whose witness statement appears in the bundle in support of the claim) to be able to observe the hearing from a designated office address in Brazil. That was in circumstances where, I was told, he had needed to travel to Brazil in relation to other work and it was not practical for him to physically return. There was no request for an adjournment. What was sought was a direction for a hybrid hearing. I interpose that my attention was very properly drawn by the Claimants' representatives to Gubarev v Orbis Business

Intelligence Ltd [2020] EWHC 2167 (QB) [2020] 4 WLR 122. I refused that request. As I explained, I did so for these reasons. The representations which had been made did not satisfy me that I had the power to make the direction that was sought. This was a hearing in court. This was not a situation of a witness giving evidence from overseas by a live link (cf. Gubarev at §§9, 13), for which provision is made in CPR32.3. Nor was this a situation involving a location in England and Wales which the court could direct be "designated as an extension of the court" (cf. the order set out in Gubarev at §20(3)). Independently of the question of whether I have the power, I concluded that – in any event – the representations made did not satisfy me that it would be appropriate, in the exercise of my judgment and discretion, to grant that request. There was no obvious Covid-related imperative. The situation where an instructed solicitor travels overseas is not a novel one. The request appeared to me to be unprecedented and unjustified.

Linden J's conclusions in Khalid

8. The conclusions to which Linden J came in relation to the Article 5 challenge to the MHQ scheme were as follows. He concluded (see Khalid at §34) that it was not properly arguable that the scheme violates the Article 5 rights of those who are subjected to it. He analysed the Article 5 arguments by reference to 3 stages which it is common ground are the correct three stages. The first (see §§35-42) was the question of whether there is a deprivation of liberty. If not, Article 5 is not applicable. The second (see §43) was the question of whether the relevant prescribed limb, for Article 5-compliant deprivation of liberty, namely Article 5(1)(e) (see §32) covered the MHQ scheme. If not, deprivation of liberty would be incompatible with Article 5. The third question (see §44) related to proportionality and non-arbitrariness and whether the scheme satisfied the legal standards of "necessity and proportionality". If not, deprivation of liberty would be incompatible with Article 5 even though falling within Article 5(1)(e). Linden J analysed those three questions and determined each of them adversely to the claimants (see §§42, 43 and 44). It follows that the argument failed on two bases. The first was that Article 5 was not arguably applicable because there was no arguable deprivation of liberty. The second was that, having concluded that (beyond argument) Article 5(1)(e) was applicable, the MHQ scheme (beyond argument) was necessary and proportionate and satisfied the applicable legal standards.

The permission filter and 'lookalike' claims

9. The first reason given by Jay J, for refusing permission for judicial review on the papers in the present case, was this:

> ***… there are no material differences between this case and Linden J's decision in Khalid.***

There was a second reason given by Jay J to which I will need to return. This first reason raises an important question about the permission stage filter in judicial review.

10. Mr Burton QC submits that he is entitled, on behalf of his client, to bring this claim before this Court and that the Court is obliged to deal with it, on the legal merits of the claim that is put forward. That means the Judge dealing with the claim forming that Judge's own view of those legal merits. He recognises that Khalid has considered the same three stages on which he has addressed the Court in this case, in writing with his team, and orally today. He emphasises that, far from 'putting Khalid to one side', he

and his team have grappled with it head-on. The burden of his submissions has been that Linden J's conclusions in Khalid as to the arguability of the claim are "wrong". In developing his submissions, Mr Burton QC draws attention to features of the analysis in Khalid which he says are significant. He points to the fact that Linden J did not have any "evidence" as to the "particular circumstances" faced by individuals quarantined under the scheme (see Khalid at §36). He submits that it is significant that this Court has evidence, including the Third Claimant's witness statement to which I have referred. He says that evidence is of particular significance in relation to the first question – deprivation of liberty – because of the importance of examining the "concrete situation" (as to which see the principle identified in Khalid at §35) faced by those who are the subject of the scheme, and ultimately the "intensity" of the controls on them through the scheme. He also emphasises aspects of the case where his arguments are fuller, more far-reaching and more informed than were those before Linden J. He has pointed to authorities that he says do not appear to have been cited to Linden J. He says that, so far as concerns the third question, §44 of Linden J's judgment in Khalid clearly indicates that the Court was in that case considering necessity and proportionality, and "alternatives", with either little or nothing by the way of developed submission from the claimants in that case. He urges this Court, in the light of all of those features, not to be deterred or detrimentally influenced by the fact that another Judge in this Court has rejected as unarguable what is, in substance, the same claim.

11. This feature of the case has caused me concern. The implications of claims being brought before the Court and 'repeat claims' subsequently being put before different Judges in the Court is a matter, in my judgment, of legitimate concern. There must, in my judgment, be public interest considerations which serve to operate in that kind of situation. Otherwise, to take the present case – and in the context of the significant numbers of individuals who go through the MHQ scheme – it would be open to later quarantined individuals, with different lawyers, and before different Judges, to seek to advance what in substance is the same claim that has already been rejected by this Court. Mr Burton QC submits that the answer to this concern is to be found ultimately in controls applicable to "irresponsible conduct". The Court certainly does have powers to deal with claims that are an "abuse of process". A Judge, on the papers, would be able to certify a claim as "totally without merit" which would preclude a right of renewal into open court (see CPR54.12(7)).

12. The fact is that Sir Ross Cranston refused permission for judicial review on the Khalid claim on the papers on 25 May 2021; Linden J refused permission in open court on 23 September 2021; Jay J refused permission on the papers in this case on 13 October 2021; and I am now the fourth Judge in a short period of time to be seised of substantively the same claim and be asked to grant permission for judicial review.

13. The principled resolution to this problem is, in my judgment the principle which was identified in the submissions of the Defendant. In the Defendant's summary grounds of resistance, the case of Willers v Joyce [2016] UKSC 44 [2018] AC 843 at §9 is cited for the proposition that the High Court should follow the previous decision of the High Court "unless there is a powerful reason for not doing so". That echoes, and is probably in substance the same as, the well-known principle in Ex p Tal [1985] QB 67 at 81: that a judge of the High Court "will follow a decision of another judge of first instance, unless … convinced that that judgment is wrong, as a matter of judicial comity". Mr Burton QC points out, rightly, that those authorities are considering substantive

decisions of the High Court. They are not concerned with decisions on permission. In his written submissions he cites the case of Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988 at §§40-43 for the proposition that permission decisions in judicial review cases (or on permission to appeal) are not "binding". In my judgment, it must be open to a Judge, dealing with the judicial review permission stage filter, operating with its public interest imperative, to choose, in an appropriate case, to apply the approach in Willers and Tal and to adopt the position of following a High Court decision refusing permission for judicial review on grounds of unarguability, on a materially identical claim, unless there is a "powerful reason" to take a different view or unless "convinced" that the earlier decision is wrong on the question of the arguability of the claim.

14. In the present case, it is significant that Linden J's judgment was very different from the "reality" described in Clark at §41, as to the standard 20-minute oral hearing and brief reasons. The hearing in Khalid before Linden J was a one day hearing that led to a detailed judgment. Moreover, the judgment was certified at §68. That was specifically because the judgment was recognised as appropriately capable of being cited in future cases, notwithstanding that it was a permission decision. In this case, in dealing with the important filter stage for judicial review, I am satisfied that the principled approach would be for the Court to ask whether there is a "powerful reason" for not following the judgment of Linden J or whether I have been "convinced" that his conclusion on the unarguability of the Article 5 claim was wrong.

An independent analysis

15. Having said all that, I turn to the second reason given by Jay J when refusing permission on the papers, as I said I would. He went on to say this:

> ***I would have come to the same conclusions independently.***

In other words, Jay J had asked himself whether – independently of the analysis arrived at by Linden J – he would have concluded that the present claim, with its evidence, arguments and citation of authority, was unarguable. In all the circumstances, and notwithstanding what I have said about what I see as the "principled approach" to concerns arising at the permission stage where cases are 'rerun' with different lawyers and different nuances of evidence and argument, in the present case what I am going to do is this. I will proceed to give my own independent analysis of whether this claim is properly arguable. That way, the Claimants will know that, whatever my concerns in relation to the Court being asked to revisit a claim so recently rejected as unarguable, they have nevertheless ultimately had my own freestanding and independent evaluation of arguability.

Question 1: deprivation of liberty

16. For the purposes of arguability of this claim, I propose to begin by assuming that it is arguable that the MHQ scheme involves a deprivation of liberty for the purposes of Article 5. A considerable volume of argument, in writing and orally, has assisted me in relation to whether that point is arguable. I will assume for present purposes that it is. Upon that assumption, I proceed to questions 2 and, if it arises, question 3.

Question 2: the scope of Article 5(1)(e)

17. Question 2 is whether the deprivation of liberty – if that is what it is - falls within the reach of Article 5(1)(e) ("the lawful detention of persons for the prevention of the spreading of infectious diseases").

18. In my judgment, beyond argument, the MHQ scheme does fall within the reach of Article 5(1)(e). In my judgment, it is not reasonably arguable that Article 5(1)(e) is restricted to action taken in respect of 'individuals identified as infectious'. Nor, in my judgment, is it reasonably arguable that Article 5(1)(e) is confined to that category of individual, together with a further category of individuals 'who have been individually assessed as to whether they are infectious' or 'assessed as to whether they individually pose a high risk of being infectious'. Mr Burton QC, rightly in my judgment, concedes that it would be within the ambit and reach of Article 5(1)(e) to have a scheme which involved a deprivation of liberty for the purposes of testing people, in order to conduct the 'individualised assessment' which is central to his submissions on this part of the case. That demonstrates, already, that Article 5(1)(e) is not simply concerned with those individuals 'found to be infectious'. The fact that the leading case (see Khalid at §43) of Enhorn v Sweden (2005) 41 EHRR 633 (25 January 2005) concerned an individual who had been so assessed does not drive the conclusion, even arguably, that Article 5(1)(e) is so confined. In my judgment, it plainly is not. It would have been very easy for the drafters of Article 5 to have confined it in that way. Indeed, elsewhere in that same subparagraph (Article 5(1)(e)) there are parameters which are referable to the individual. That language is: "the lawful detention … of persons of unsound mind, alcoholics or drug addicts or vagrants". The language of Article 5(1)(e), so far as concerns infectious diseases, is broader. What it contemplates is deprivation of liberty, "in accordance with a procedure prescribed by law" (Article 5(1)), by way of "lawful" detention (Article 5(1)(e)), "of persons for the prevention of the spreading of infectious diseases". It is, in my judgment, impossible to treat as read into that limb the need for an individualised assessment of infectiousness or for that matter of individually-posed risk. As Ms Smyth powerfully submitted, if one posits the situation where there is not yet a test, there could be no individualised assessment of whether an individual is "infectious", if it is not yet possible to conduct that assessment. What the wording and purpose of the limb are clearly, beyond argument in my judgment, encompassing are steps which are protective and precautionary. The word is "prevention". Prevention can arise out of an individualised assessment of risk. But it may very well arise, from a relevant set of circumstances applicable to a group of individuals, without or outside of an individualised assessment of risk. That is why it is so important in the present case that the clear focus of the MHQ scheme, and the Red List on which it is based, is that it relates in particular to the concerns arising from the vaccination-imperviousness of Variants of Concern and Variants under Investigation. In my judgment, the claim is not arguable so far as the second of the three questions is concerned.

Question 3: necessity and proportionality

19. It is important to emphasise that it does not flow from the conclusion that Article 5(1)(e) is applicable(question 2) that, so far as concerns infectious diseases, state authorities are given by Article 5(1)(e) a 'blank sheet of paper' to design and implement schemes for the deprivation of liberty which are preventative and precautionary. If there is a deprivation of liberty, the legal standards of "necessity and proportionality" and the absence of "arbitrariness" apply by virtue of Article 5. That is the third question that arises in relation to the case. In Enhorn, that third question arose and the particular

measures which had been imposed – there, in the context of an individual about whom the Swedish authorities were concerned regarding the spread of HIV – was examined by reference to necessity and proportionality (see Enhorn at §36) and by reference to whether "less severe measures" had been "considered" and "found to be insufficient to safeguard the public interest" (at §§36 and 55) and whether a "fair balance" had been struck (at §55).

20. There are other standards too, but they do not directly arise on the arguments in this case. I have already referred to the need for any deprivation of liberty to be "in accordance with a procedure prescribed by law" and to involve "lawful" detention. It is not in dispute in the present case that those standards are satisfied by the MHQ scheme.

21. The question then becomes whether the claim in this case is arguable so far as concerns this third question. Notwithstanding the points put forward by the Claimants by Mr Burton QC and his team in writing, and him orally, and the authorities which they have cited, in my judgment – beyond argument – it is clear that this MHQ scheme satisfies the rigours of the standards of necessity and proportionality for the purposes of Article 5. In my judgment, even having assumed in the Claimants favour deprivation of liberty, it must be the case – at this point in the analysis – that the features, which were identified (see Khalid at §§38-42) by Linden J (and which have been emphasised by Ms Smyth) as combining to mean that there is no deprivation of liberty (question 1), are features which must inform the assessment of necessity and proportionality (question 3).

22. In this context, and against the premise (on question 1) which I have explained, it must in my judgment be relevant (see Khalid at §39): that there is an element of choice on the part of individuals who travel to Red List countries and then come back from them; and there is also an element of choice in those returning individuals coming back directly from a Red List country and not having spent a 10-day period in a third country. In my judgment, it is plainly also relevant that the backcloth of that travel to a Red List country to face quarantine is "Government advice that individuals should not travel to Red List countries"; that "such travel is possible, but it carries a consequence in the interests of protecting public health that the individual be subject to the [MHQ scheme] on their return".

23. I have considered all of the features, and all of the evidence that has been put forward, in this case, against the principled standards of justification, namely: necessity; proportionality and protection against arbitrariness. In my judgment, having regard to those features, including those which were emphasised by Linden J (Khalid at §§38-42) – the nature of the relatively "short duration" (Khalid at §40), the existence (Khalid at §§41-42) of certain, albeit narrow, exceptions under the regulations (as to which, see Sch 11 §§11-13, 16-19) – and the position so far as concerns alternatives (see Khalid at §44), this case does not cross the arguability threshold, for the purposes of a viable judicial review on this third question of necessity and proportionality. It follows, from that conclusion, that the claim for judicial review is not arguable.

24. Mr Burton QC has submitted that the so-called "wide margin of appreciation" (as it is described by the Strasbourg Court) and "margin of discretion", described in the context of "qualified rights" (as to which see, for example, R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605 [2021] 1 WLR 2326 at §97), does not translate across into the stricter world of the deprivation of liberty of the individual and Article 5. I accept that that proposition is at least arguable. But, in my judgment, even

taking a strict approach to necessity and proportionality, there is a fundamental truth that remains, and remains applicable in the present case.

25. A golden rule of judicial review is that the Court does not substitute its own judgment on evaluative policy questions. Those are matters entrusted to Government, with the scrutiny of Parliament and public scrutiny. I accept, without hesitation, Mr Burton QC's submission that this is not a "non-justiciable" area. I accept that the Courts have an important responsibility, and that that responsibility does not 'disappear' when circumstances become difficult, controversial and policy-laden. Further, I have had well in mind the evidence of the Third Claimant which I described at the outset of this judgment, as to what the practical experience can be for those individuals affected. But the question will never be, for the judicial review Judge: "what scheme would I have designed, if I had been the Secretary of State?" The question will always, necessarily, be the principled question. It is whether, applying the standards of necessity and proportionality, and having regard to the latitude which must be afforded to primary decision-makers and policy-makers, the measure in question is unjustified. And, in addressing that question, the onus is on the State to provide the justification.

26. What is inescapable in the present case is that the context involves the protection of public health. Difficult questions arise so far as concerns the choice from alternatives, and as to the design and implementation of an appropriate response, in the context of the risks arising from Variants. I can see no realistic prospect that this Court, at a substantive hearing, would conclude that the MHQ scheme – as described in the papers in this case – fails the test of legal scrutiny by reference to Article 5 standards of necessity, proportionality and protection against arbitrariness. In my judgment, there is, for example, no realistic prospect that this Court would conclude that an alternative scheme of allowing British citizen returnees from Red List countries to go to their homes to self-isolate there was a 'less intrusive measure', the failure to adopt which renders the MHQ scheme unnecessary and disproportionate. The same is true in relation to positing the alternative of – what I have been told is a Norwegian and Irish model of – a quarantine scheme but implemented only by reference to those who are unvaccinated. That, immediately and obviously, gives rise to the legitimate concerns about risks which arise from Variants. When Courts come to examine 'less intrusive' alternative measures, in the operation and application of principles of proportionality and necessity, they do so remembering what the "legitimate objective" of the measure is. It is not sufficient to point to something that would be 'less intrusive'. The question is, rather, whether there is an alternative which clearly constitutes a 'less intrusive' alternative means of effectively achieving the public interest aim.

Standing

27. There are two further issues which have been raised with which I will briefly deal. The first concerns the First and Second Claimants in this case who, at the time when the case was begun, filed witness statements explaining that they had wished to travel to Red List countries, that they still intended to do so in the near future, and that they were facing the prospect of quarantine under the MHQ scheme on their return. In the event, as has been fairly and candidly explained by Mr Burton QC and his team, those two Claimants in the event have never been the subject of quarantine under the MHQ scheme. The Human Rights Act is clear about the application of the principle of "standing" in the context of the claim that there has been a violation by a public authority of an ECHR right. What is needed (see the Administrative Court Judicial

Review Guide 2021 at §6.3.2.4) is for the claimant to be a "victim" as that term is understood in the relevant jurisprudence. In my judgment, it is clear that neither the First nor the Second Claimants can meet the "victim" test and therefore, had this case been going ahead, I would have refused them permission for judicial review on that basis. No question of any rule of law "lacuna" would arise from that consequence. The Third Claimant would clearly be a "victim", were the case proceeding.

Delay

28. The final point is a delay point. Ms Smyth for the Defendant has submitted, on the authority of R (Badmus) v Secretary of State for the Home Department [2020] EWCA Civ 657 [2020] 1 WLR 4609 at §78 and following, that permission for judicial review ought in this case, in any event, to be refused on the grounds of delay. In my judgment, that is a hopeless submission. What Badmus describes at §78 is the situation where time runs from the time when "the claimant first became affected by the measure or policy". In my judgment, in the present case, the Third Claimant "became affected by the measure" when she was subjected to it. In my judgment, in the present case, that would be the correct focus for the running of time. But even if one runs the clock back earlier, to her situation in having to decide whether to travel to be with her dying father in South Africa, this claim would in my judgment clearly be well within the parameters of the judicial review delay rules. The Third Claimant was in quarantine from 9 August 2021 having returned from the trip which she had booked at short notice (on 30 July 2021). The judicial review claim was commenced on 13 September 2021. Had I concluded that this important case was viable, on the basis of legal arguability, I would not have shut out the Third Claimant on any ground relating to delay or lack of promptness.

Outcome

29. However, for the reasons which I have given and having considered – on their legal merits – the points that have been raised before this Court in this case, I am refusing permission for judicial review because in my judgment the claim is not arguable.

Costs and certification

30. Finally, two things. Mr Burton QC confirms that the Claimants do not maintain the objection to the costs order made by Jay J, that they pay the costs of the Defendant's acknowledgement of service assessed at £9,363.33. That order therefore remains and is undisturbed. Secondly, I am invited to take the same course as did Linden J and to certify that this judgment may be cited. That course is sensibly not opposed by the Claimants. I am satisfied that it is appropriate, and I do so certify.