

Neutral Citation No: [2023] NICA 28

Ref: TRE12154

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 21/98292

Delivered: 16/05/2023

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RISTEARD O'MURCHU
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Between:

RISTEARD O'MURCHU

Applicant/Appellant

and

MINISTER FOR HEALTH FOR NORTHERN IRELAND

and

DEPARTMENT OF HEALTH FOR NORTHERN IRELAND

Respondents/Respondents

Mr Ronan Lavery KC with Mr Sean Devine (instructed by Brentnall Legal Ltd Solicitors)
for the Appellant

Dr Tony McGleenan KC with Mr Philip McAteer (instructed by Departmental Solicitor's
Office) for the Proposed Respondents

Before: Keegan LCJ & Treacy LJ

TREACY LJ (*delivering the judgment of the court*)

Introduction

[1] The appellant appeals against the judgment of Colton J refusing leave. Our decisions on this appeal should be read together with our judgment in the case of *Williams* reported at [2023] NICA 29.

[2] By his judicial review the appellant sought to challenge regulations that were made by the Department of Health ("the Department") in the exercise of powers

conferred by the Public Health Act (NI) 1967. These regulations, the Health Protection (Coronavirus, Restrictions) Regulations (NI) 2021 (Amendment No. 19) Regulations (NI) 2021 (“the Regulations”). Their effect was to introduce provisions requiring Covid status certification in various settings set out in the Regulations which were deemed high risk.

Covid Status Certification Scheme

[3] The primary relief sought was a declaration that the decision/policy introducing the Covid Certification scheme (incorrectly described as the “Covid Passport Requirement”) is substantively and/or procedurally unlawful and an order of certiorari to quash the scheme.

[4] The appellant set out what Colton J described as a myriad of grounds of challenge – failure to take into account material considerations, irrationality, procedural unfairness, failing to carry out a public consultation and “a societal and economic impact assessment”, breach of section 75 of the Northern Ireland Act 1998 and a breach of section 6 of the Human Rights Act 1998, alleging a breach of article 8 ECHR. During oral submissions below he also sought to rely on an alleged breach of article 14 in conjunction with article 8 alleging unlawful discrimination.

[5] The appellant also alleged a breach of Articles 5 and 9-2(i) of the General Data Protection Regulations (“GDPR”). This issue was raised in the case of Darren Williams. It had been agreed by Colton J that he would deal with this issue in that case, there being no material difference between the appellants’ cases on that issue. In a separate judgment in that case he refused leave because the matter was wholly academic, and the appellant lacked standing. That judgment was unsuccessfully appealed to this Court and is reported.

[6] In the course of the proceeding below the proposed respondent disclosed to the court and the parties a number of documents material to the decision to introduce the Regulations under challenge. These included a document headed “Scientific evidence for Covid Certification”, a Covid-19 vaccine effectiveness table dated 24 September 2021 and a Human Rights Act Impact Assessment carried out by the proposed respondent.

[7] Colton J accepted that the restrictions arguably engage the appellant’s article 8 rights in that they impose a restriction on the appellant’s ability to attend certain social venues and in the event that he does attend such venues he is required to disclose aspects of his medical status.

[8] The judge correctly noted that in order to justify the interference the proposed respondent must establish that there was a legal basis for the interference, that the policy behind the interference pursues a legitimate aim, that the interference is necessary in a democratic society and that the interference is proportionate.

[9] Although a leave hearing, Colton J observed that he had the benefit of the material upon which the decision to introduce the Regulations was based including, importantly, the Human Rights Act Impact Assessment carried out in relation to the introduction of the impugned Regulations. That assessment sets out the background to the Department of Health’s response to the Covid-19 pandemic. The judge also had the “Autumn/Winter Covid-19 Contingency Plan” published by the Executive which contained a series of measures which it might deploy if needed, based on the need of keeping society and the economy open to the fullest possible extent. At that stage certain “baseline” measures were in force. The Executive stated that further measures may be introduced to include the potential to deploy a Covid Status Certification Scheme, if considered appropriate and necessary at that time.

[10] The Department continued to review the statistics in relation to Covid-19 infections, Covid-19 deaths, and the effect of the pandemic on the state of the health and hospital system.

[11] Based on those statistics as of 16 November 2021 the Department formed the view, informed by the opinion of the Chief Medical Officer and the Chief Scientific Advisor, that further interventions were needed. As a result the Covid Status Certification Scheme was proposed to the Executive on 16 November 2021.

[12] In light of the serious and increasing pressure on the hospital system and the continuing high number of Covid cases the Executive agreed in principle on 16 November 2021 to implement the Covid Status Certification Scheme.

Scientific evidence for Covid Certification

[13] We have seen the scientific evidence for Covid Certification, which informed the proposed respondent’s decision to introduce the scheme and set out below the material extract.

[14] The Scientific Advisory Group for Emergencies (“SAGE”) noted in April 2021 that in relation to Covid-19:

“There are three main ways in which baseline measures can reduce transmission (from most to least effective):

1. Reducing the likelihood that people who are infectious mix with others.
2. For those potentially infectious people who are not isolated, reducing the likelihood that they enter high risk settings or situations.
3. Decreasing the transmission risk from the potentially infectious person in any given environment.

While Covid Certification potentially contributes to each of the three mechanisms above, it does not on its own provide a complete solution, it must be used in conjunction with other non-pharmaceutical interventions, with effective implementation through high adherence to guidance or enforcement of regulation.

The aim of the combination of these measures is to allow as much of society and the economy to function in a near normal way as possible, and to minimise the potential need for more severe restrictions to avoid the hospital system from becoming overwhelmed.

Covid-19 Certification will therefore have the following benefits:

- It will reduce virus transmission, primarily by reducing the likelihood of infectious individuals entering high risk settings.
- Hence, it will reduce the risk of serious illness and death and in doing so alleviate current and future pressure on the health care system.
- It will increase the likelihood that higher risk settings can continue to operate as an alternative to closure or more restrictive measure.
- There is also likely to be a secondary benefit in relation to increased vaccine uptake.
- There is overwhelming evidence that vaccination reduces the risk of becoming infected with the virus and, in particular, that it reduces the risk of serious illness requiring hospitalisation.
- In addition, there is recent evidence that in the event of a vaccinated individual becoming infected with the Delta variant, they have a reduced likelihood of transmitting the virus to others.
- Previous infection (as evidenced by a positive PCR between 30-180 days ago) is also associated with a reduced risk of reinfection, though the degree of

immunity is likely to be more variable than after vaccination.

- A negative lateral flow test within 24-48 hours of an event will reduce the risk of the most infectious individuals entering the setting, although there is concern about the potential for self-reporting to allow the manipulation of test results.
- If attendance at high risk settings is limited to individuals who are less likely to be infectious there will be a reduced risk of virus transmission in those settings.
- In addition, there is evidence that the use of mandatory Covid-19 certificates leads to an increase in vaccine uptake, which will make a further contribution to reducing infections and protecting against severe illness requiring hospital admission.”

Human Rights Impact Assessment

[15] In the Impact Assessment it is noted that both the Chief Medical Officer, Professor Sir Michael McBride, and the Chief Scientific Advisor, Professor Ian Young, strongly supported the introduction of the Covid Certification Scheme.

[16] The Impact Assessment articulates the basis upon which the settings were chosen, that is that they were deemed to be high risk settings; it looks at both digital and non-digital means by which vaccination certification could be established; considers alternative certification measures for those, like the appellant, who are not vaccinated; looks at exemptions both in terms of settings and individuals; considers ongoing measures as part of mitigating the effects of the pandemic; compares the use of Covid Status Certification Schemes in other countries and confirms that a full Data Protection Impact Assessment has been carried out which will be submitted to the Information Commissioner’s Office.

Legality, legitimate aim, necessity, and proportionality

[17] Having considered the above materials the court turned to its assessment of the legality, legitimate aim, necessity, and proportionality tests. Following a detailed analysis Colton J concluded that there “plainly” was a basis in law for the Regulations. They are clearly *intra vires* the powers conferred by the 1967 Act, comfortably meet the legality test and the interference clearly has a basis in domestic law. The judge’s reasoning and conclusion on this issue is, in our view, manifestly correct.

Legitimate Aim

[18] The Regulations were made in response to the serious and imminent threat to public health posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV2) in Northern Ireland. The Department considered that the restrictions and requirements imposed by the Regulations were proportionate to what they were seeking to achieve which was a public health response to that threat.

[19] The policy aim of the Covid Status Certification Scheme is described in the Impact Assessment as:

- “(i) to protect the health of the population by limiting the spread of COVID-19 infection in order to minimise the numbers of cases and deaths, and
- (ii) to ensure as far as possible that the health care system has the capacity to care for COVID-19 patients and care for all patients, present and future.

It is in addition to the above, a further aim of the Covid Status Certification Scheme:

- (iii) to allow higher risk settings to continue to operate as an alternative to closure or more restrictive measures.”

[20] The Assessment goes on to state:

“While increasing vaccine uptake is not regarded as a policy objective, the potential for this to be a secondary benefit is acknowledged, particularly amongst the younger age groups.”

[21] We agree with the judge that this is plainly a legitimate policy aim. The judge rejected the suggestion put forward on behalf of the appellant that in reality this was an attempt to introduce a *de facto* mandatory vaccination scheme. We see no reason to depart from the judge’s finding made after a very thorough review by him of all the material, that this point is unarguable.

Necessity/Proportionality

[22] Whilst these are separate concepts Colton J dealt with these two matters together as the factors which influence the court's consideration overlap to a large extent.

[23] The determination of this issue largely turns on the appellant's central submission that there is no, or insufficient, scientific justification for the introduction of the measures. He said:

"In the court's view this submission is misconceived. It is right to say that there is a reasonable argument that there is insufficient evidence to suggest that a vaccinated person is less likely to transmit the virus if infected. Given the nature of the emergency arising from the spread of the virus and its evolving effects it is unsurprising that there is a lack of conclusive, peer reviewed data on this issue at this stage. What, however, is unarguable is the fact that vaccination reduces the risk of becoming infected with the virus. Thus, those who attend "high risk settings" and who are vaccinated are less likely to be infected and inevitably therefore there is less risk of vaccinated persons, or those with a negative test, transmitting the infection. This is described as the most effective measure set out in the SAGE Note."

[24] In assessing whether or not the interference was necessary or proportionate the court took into account a number of matters:

- Those who are less likely to be infected are less likely to transmit the infection.
- Those who attend venues subject to the certification scheme can do so in the knowledge that they are mixing with persons who are less likely to be infected with the virus.
- There was scientific evidence to support the argument that restricting access to vaccinated or non-infected persons in high risk settings has the potential to reduce transmission of the virus.
- The decision was taken in the context of a deteriorating situation in local hospitals.
- The measures had the support of the Chief Medical Officer and the Chief Scientific Advisor.

- The scheme was endorsed by the Northern Ireland Executive which is made up of five different political parties.
- The scheme was thereafter subject to Equality Impact Screening, Human Rights Impact Assessment and Data Protection Impact Assessment.
- The scheme ensured that hospitality venues could remain open over the Christmas period.
- The scheme identified high risk settings and provided for exemptions in relation to both settings and individuals who were subject to the Regulations.
- The scheme specifically provided an alternative method of certification for those who were not vaccinated such as the appellant.
- The scheme was kept under review. The Executive Committee met again on 20 January 2022 and agreed that the scheme would only continue to apply in relation to nightclubs and indoor unseated or partially seated events with 500 people or more meaning they applied in a much-reduced form.
- At the time of the judgment below it was understood that it was contemplated that the remaining restrictions would be removed in the near future. They were removed some time ago as then anticipated.

[25] Whilst the court properly accepted an arguable interference with the appellant's article 8 rights it considered rightly that this interference was limited - he was not prohibited from attending high risk settings identified in the scheme; it was open to him to avail of the option of proof of a negative lateral flow test within the previous 48 hours; such tests being then free and easily available. The appellant described this as an "inconvenience" but that inconvenience has to be seen in light of and set against the legitimate and overwhelming aim of protecting public health. We consider it unarguable that the necessity/proportionality tests are not met.

[26] The appellant argued in his oral submissions below that the Regulations were also in breach of article 14 of his ECHR rights in conjunction with article 8. The judge referenced the legal hurdles required to establish such a breach set out by the Supreme Court in *R(On the Application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions (Respondents)* [2021] UKSC 26 and discussed by Maguire LJ in *Hilland v Department of Justice* [2021] NICA 68. Leaving those hurdles aside there was simply no evidential basis to support such a claim as the judge correctly recognised in the following passage:

"The applicant has simply put forward no evidential basis for such a claim. What is the status on which he relies? Presumably he relies on his status as a non-vaccinated person, although this is not clear. What is the relevant

comparator? Presumably a vaccinated person, although again this is not clear. However, as indicated above he is not excluded from the relevant settings under the scheme and, in any event, it seems to the court that the respondent would easily establish that the difference of treatment between non-vaccinated and vaccinated persons was justified”

[27] In *R(Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 the claimant sought to challenge restriction regulations in England on a wide range of grounds relating to qualified rights in the context of measures relating to the Covid-19 virus. The case had been dismissed by the High Court in England and Wales and his appeal to the Court of Appeal was rejected. The Court of Appeal at para [95] rejected the argument that where interference with the right was arguable leave had to be granted. Rather, it concluded that there is no such general principle and “if it is possible for a court to say with confidence, even at the permission stage, that there was unarguably a justification for any interference with a qualified Convention right, it may properly refuse permission.” The court went on to conclude that there was no doubt that the regulations did constitute an interference with article 8 but that such interference was justified:

“It was clearly in accordance with law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate.” (para [96])

[28] The court concluded at paragraph [97] that:

“In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.”

[29] This is the situation in the present case, as Colton J found. He had an opportunity to assess the material upon which the proposed respondent’s decision was made and with the benefit of having seen that material declined to interfere with the policy decision made by the Department. He concluded that in the field in question, the Regulations at issue were in accordance with the law and served a

legitimate aim and were proportionate and justifiable. We agree with the reasoning and conclusion of the judge on this issue. The case is unarguable with no realistic prospect of success and the judge was right to reject the application for leave. We also make it clear that so far as the point grounded on section 75 of the Northern Ireland Act 1998, we agree that, for the reasons he gave, a full Equality Impact Assessment was not required and, in any event, there was an appropriate and alternative remedy by way of complaint to the Equality Commission

[30] Accordingly, for all of the above reasons, the appeal is rejected.