Judicial Communications Office

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COURT DISMISSES CHALLENGES TO COVID VACCINE PASSPORT

Summary of Judgment

Mr Justice Colton, sitting today in the High Court, dismissed two separate applications for judicial review challenging the legality of the Covid Vaccine Passport system.

DARREN WILLIAMS

Darren Williams ("Applicant One") sought to challenge the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (Amendment No. 19) Regulations (Northern Ireland) 2021 ("the Regulations") that introduced the Covid-Status Certification scheme (also referred to as the scheme which required proof of covid vaccination or evidence of negative covid tests for entry to certain hospitality services which were deemed high risk). Applicant One's affidavit indicated that he had not availed of any covid vaccinations. His focus was on the use of the Cert NI App which was developed to help businesses check customers' vaccination status. The applicant claimed that the use of the App was unlawful on the following grounds:

- The Minister of Health/the Department of Health ("the proposed respondents") had failed to comply with Article 5(1) of the General Data Protection Regulations ("GDPR") and section 68 of the Data Protection Act 2018 ("DPA") and Article 6 GDPR/section 8 and Schedule 9 to the DPA 2018 in allowing the unlawful processing of sensitive special category personal data in relation to data subjects in circumstances where it was not necessary to process personal data at all to achieve their legitimate aims;
- The proposed respondents failed to comply with Article 35 GDPR and section 64(3)(d) DPA in that they did not carry out an adequate data protection impact assessment ("DPIA") prior to the regulations being brought into operation;
- The proposed respondents failed to consult pursuant to the implied statutory duty under section 64 DPA and/or at common law.

First Ground

The court commented that the scanning of the QR Code on the digital certificate constitutes the processing of "sensitive special category personal data" (the individual's medical data) irrespective of whether the hospitality premises owner keeps a record of it. This makes the premises owner a "data controller." Article 5(1)(a) of the GDPR provides that personal data shall be "processed lawfully, fairly and in a transparent manner in relation to the data subject."

Applicant One's focus was on the lawfulness requirement. Article 6 GDPR provides that processing is lawful only if one or more specific conditions are satisfied. Article 9 GDPR sets out special categories of personal data which attract a higher level of protection and imposes a complete prohibition on processing data in those categories, subject to specified exceptions. The prohibition applies to, inter alia, data concerning health. Applicant One's case was that the processing of data via the Covid-19 NI Cert App was not "necessary" as persons seeking to enter premises could present proof of vaccination by way of digital proof of vaccination or a vaccination card (although the latter is not included in the regulations). It was contended that these methods would have

provided a verification method which met the legitimate aim but did not require the processing of data. Thus, it was argued that the process of data by scanning QR codes as required by the regulations was not "reasonably necessary."

Second Ground

Applicant One's second ground was that there has been an inadequate DPIA carried out by the proposed respondents.

Third Ground

Data controllers are required as part of the DPIA to take into account the rights and the legitimate interests of the data subjects and other persons concerned; section 64(3)(d) DPA. Applicant One argued that this creates an implied statutory duty to consult. The court noted that the obligation is, however, qualified and there are circumstances in which a consultation does not need to be conducted. It is only required "where appropriate" and "without prejudice to the protection for commercial and public interest or the security of the processing operation": Article 35(9) GDPR. The proposed respondents' DPIA outlined that as a result of "the urgent requirement to establish and operationalise the service a form of consultation was not undertaken". The DPIA noted, however, that informal engagement was ongoing with stakeholders and the scheme had been agreed by the Executive.

Consideration of the Issues

The court said the first and obvious issue that arose in this case related to Applicant One's standing. It said that because he is not someone who is vaccinated then the processing about which he complained would never apply to him. The court also noted that Applicant One is not a data subject in respect of the provisions about which he complains and that he has not been prohibited from entering the various venues referred to in the Regulations as there is an alternative means for him to certify his status.

The granting of leave in judicial review is a discretionary matter for the court. In addition to the question of standing, the court has to consider the overall context of the case. The court noted that the regulations had been subject to regular review by the Executive Committee; as of 20 January 2022 they only applied to nightclubs and indoor venues with 500 or more attendees; and that it is anticipated the remaining restrictions will shortly be removed. Further, the regulations were introduced as emergency measures in the midst of a pandemic by an Executive Committee in which five political parties participate. Also, there had been ongoing engagement between the proposed respondents and the Information Commissioner's Office ("ICO") which had not vetoed or opposed the scheme. The court also said it had not received any legal challenge to the regulations from any person who is vaccinated:

> "The key question for the court in exercising its discretion to grant leave for judicial review relates to the utility of the court hearing and determining the matter. The court accepts that there is a legal argument about whether or not the data processing complained about in this case is "necessary" within the context of the statute and regulations. However, the court is also conscious that it will be slow to interfere in a decision as to what is reasonably necessary in the context of a public health emergency when decisions are taken by elected representatives, who are best placed to assess the

> public interest. Notwithstanding the legal issue raised … the court is not persuaded that this is an appropriate case in which to grant judicial review."

In coming to that conclusion the court said it was influenced by the fact that Applicant One himself was not affected by the illegality he alleged and had insufficient standing. It further said that, in reality, there was little or no real live issue to be determined in light of the much reduced application of the regulations. The court did not consider there was a public interest in conducting a review of the regulations in this context and considered that a review would be of no utility. The court also noted the ongoing engagement between the proposed respondents and the ICO which was a further factor in ensuring compliance with data protection obligations.

The court refused leave to apply for judicial review.

RISTEARD O'MURCHU

Risteard O'Murchu ("Applicant Two") is also unvaccinated. He sought to challenge the regulations introducing the Covid Certification Scheme seeking the following primary relief:

- A declaration that the decision/policy introducing the Covid Certification Scheme ("the Certification Scheme") is substantively and/or procedurally unlawful;
- An Order of Certiorari quashing the decision/policy introducing the Certification Scheme.

Applicant Two set out a number of grounds of challenge:

- The Department of Health ("the proposed respondent") failed to take into account material considerations including the failure to carry out a public consultation;
- The decision was irrational in the *Wednesbury* sense;
- There was a breach of section 75 of the Northern Ireland Act 1998 and a breach of section 6 of the Human Rights Act 1998. There was also a breach of Applicant Two's Article 8 and Article 14 rights under the European Convention on Human Rights ("ECHR") and a breach of Articles 5 and 9-2(i) of the General Data Protection Regulations ("GDPR")[1].

The court accepted that the restrictions arguably engaged Applicant Two's Article 8 rights in that they impose a restriction on his 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. It said that in those circumstances it was for the proposed respondent to justify such interference. In order to do so the proposed respondent must establish that there was a legal basis for the interference, that the policy behind the interference pursued a legitimate aim, that the interference was necessary in a democratic society and that the interference was proportionate.

The court was provided with the materials upon which the decision to introduce the regulations was based including the Human Rights Act Impact Assessment and data in relation to Covid-19 infections and the impact on the health and hospital system. Based on statistics dated 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. The court was also provided with a

[1] This issue was raised in Darren Williams's case and it was agreed that the court would deal with it in that case, there being no material difference between the applicants' cases on this issue.

copy of the document prepared by the Scientific Advisory Group for Emergencies ("SAGE") outlining the benefits of Covid certification, namely, "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".

The central plank of Applicant Two's argument was that there was either no, or insufficient, scientific data to justify the restrictions. Counsel submitted that covid certification only "potentially" contributes to decreasing the transmission risk from potentially infectious persons and the fact that the measure might only "potentially" help to achieve less transmission was simply not adequate justification for what he described as such an intrusive measure. Counsel was particularly critical that the evidence was based on a publication which had not been peer reviewed or evaluated and should not be used to guide clinical practice. He was also highly critical that the SAGE document referred to the fact that there was evidence that the use of mandatory Covid-19 certificates leads to an increase in vaccine uptake and hinted that this was the real reason behind the decision to introduce the regulations. In submissions, counsel for Applicant Two went so far as to describe this as "a *de facto* mandatory vaccination policy".

Legality

The legality test requires that measures interfering with a qualified right such as provided for by Article 8 ECHR must have a basis in domestic law and be compatible with the rule of law. Applicant Two was critical of the fact that the Regulations were made without public consultation and, that given the variety of interests concerned and the potential "far reaching and invasive" nature of the regulations, they should only have been introduced by primary legislation. The Regulations are one of a series of regulations which were made in exercise of powers conferred by the Public Health Act (Northern Ireland) 1967 ("the 1967 Act") and in response to the public health emergency arising from the Covid-19 pandemic. The regulations were approved by the Executive Committee and subsequently debated in the Northern Ireland Assembly on 13 and 14 December 2021. The court noted that there is no statutory requirement to consult under the 1967 Act:

> "Given the emergency and developing context in which the regulations were introduced the court considers that there was no enforceable legitimate expectation of consultation under the common law and that fairness did not require such a consultation. On this issue the court considers that there plainly was a basis in law for the regulations. They are clearly *intra vires* section 25Q of the 1967 Act and easily meet the legality test. The interference clearly has a basis in domestic law."

Legitimate Aim

The court considered that the policy aim of the Certification Scheme, described in the Impact Assessment, was plainly a legitimate aim. It rejected the suggestion put forward on behalf of Applicant Two that in reality it was an attempt to introduce a *de facto* mandatory scheme. The court held that this was simply not arguable.

Necessity/Proportionality

To a large extent, this issue turned on Applicant Two's submission that there was no, or insufficient, scientific justification for the introduction of the regulations and the Certification Scheme. The court considered this submission to be 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."

The court said the regulations should not be seen in isolation as they form part of a number of measures introduced to reduce the impact of the virus. In assessing whether or not the interference was necessary or proportionate the court took into account the following 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 had 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 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 are not vaccinated such as the applicant.
- 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 which means they apply in a much reduced form. It is contemplated that the remaining restrictions in relation to the scheme will be removed in the near future.

The court accepted that there has been interference with Applicant Two's Article 8 rights but considered that the interference was limited. It said Applicant Two was not prohibited from attending high risk settings and it was open to him to avail of the option of proof of a negative lateral flow test, which are free and easily available in this jurisdiction, within the previous 48 hours. Applicant Two described this as an "inconvenience." The court agreed with this assessment but said the inconvenience had to be seen in light of the "legitimate and overwhelming aim of protecting public health".

Applicant Two also argued that the regulations were in breach of Article 14 of his ECHR rights in conjunction with Article 8. The court rejected this claim, however, saying that he had not put forward any evidential basis for such a claim, that he had not shown what status he wished to rely on or the relevant comparator. The court said there is ample authority that the state enjoys a wide

margin of appreciation in making the judgement call on issues of this type and ultimately, the assessment of proportionality in this case resolved itself into the question as to whether the proposed respondent had made the right judgment.

The appropriate test for the granting of leave in an application for judicial review is that the court should refuse "unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy". The court noted that in a similar challenge to the Covid regulations in England the court concluded that there was no doubt that the regulations did constitute an interference with Article 8 but that such interference was justified as it was clearly in accordance with the law, pursued a legitimate aim (the protection of health) and the interference was unarguably proportionate. The court considered that the same situation arose in the case. It said it had assessed the material upon which the proposed respondent's decision was made and that it was not for the court to interfere with the policy decision it made:

> "The regulations at issue were in accordance with the law and served a legitimate aim and were proportionate and justifiable. It will follow from the above that the court rejects any argument based on irrationality. "

Applicant Two also alleged a breach of section 75 of the Northern Ireland Act 1998. The court noted that an Equality Screening, Disability duties and Human Rights Assessment Template was completed in compliance with section 75 which concluded, after detailed consideration, that a full Equality Impact Assessment was not required. It added that if the applicant wished to make any complaint in relation to compliance with section 75 he should proceed by way of complaint to the Equality Commission for Northern Ireland.

The court rejected the application for leave to apply for judicial review saying that in its view the case was unarguable and had no realistic prospect of success.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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