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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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

Applicant

and

THE DEPARTMENT OF HEALTH FOR NORTHERN IRELAND

Proposed Respondent

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Mr Ronan Lavery QC with Mr Sean Devine (instructed by Brentnall Legal Ltd Solicitors) for the Applicant
Dr Tony McGleenan QC with Mr Philip McAteer (instructed by Departmental Solicitor's Office) for the Proposed Respondent

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COLTON J

Introduction

[1] I am obliged to counsel for their written and oral submissions in this application.

[2] The applicant is a gentleman of 52 years of age. He has not availed of any Covid-19 vaccines and does not intend to do so in the short to medium term.

[3] By this application he seeks to challenge regulations that were made by the Department of Health and laid before the Assembly under section 25Q (Emergency Procedure of the Public Health Act) (Northern Ireland) 1967 ("the 1967 Act"). These regulations, The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (Amendment No: 19) Regulations (Northern Ireland) 2021 ("the Regulations") came into operation at 5pm on 29 November 2021. The effect of

the Regulations was to introduce provisions requiring Covid-Status certification in the following settings which were deemed high risk:

- Indoor events (where some or all of the audience are not normally seated) with 500 or more attendees.

- Outdoor events (where some or all of the audience are not normally seated) with 4,000 or more attendees.

- Events where more than 10,000 people would be present, regardless of whether or not they would be seated.

- Nightclubs.

- Licenced hospitality premises which serve food and/or drink on the premises.

- Premises to which the public have access and where consumption of intoxicating liquor is permitted (with some identified exceptions).

- Cinemas, theatres and conference halls.

[4] These settings may only admit "qualifying persons" who can evidence the following pursuant to Regulation 16C:

(a) Proof of full vaccination by paper or electronic form more than 14 days prior.

(b) A negative Covid-19 Rapid Antagen Test proven by the NHS Covid-19 Reporting App or onsite taken within the previous 48 hours.

(c) Valid notification of proof of recovery from a positive Covid-19 PCR test within the previous 30-180 days.

(d) Confirmation in writing of participation in a clinical trial for vaccination against Coronavirus.

(e) Evidence of medical exemption.

[5] By these proceedings the applicant challenges the making of and the implementation of the Covid Certification Scheme provided for in these regulations.

[6] Specifically, the applicant seeks the following primary relief:

(i) A declaration that the decision/policy introducing the Covid Passport Requirement is substantively and/or procedurally unlawful. (This should correctly be referred to as the Covid Certification Scheme.)

(ii) An Order of Certiorari quashing the decision/policy introducing a Covid Passport Requirement (again, this should accurately be described as the Covid Certification Scheme).

[7] The applicant sets out a myriad of grounds of challenge asserting that the proposed respondent failed to take into account material considerations; that the decision was procedurally unfair, failing to carry out a public consultation and "a societal and economic impact assessment"; that the decision was irrational in the *Wednesbury* sense; that there was a breach of statutory duty/requirement relying on 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 of the applicant's rights under the European Convention on Human Rights (ECHR). In the course of oral submissions the applicant sought to rely on an argument based on a breach of Article 14 of the ECHR in conjunction with Article 8 ECHR alleging unlawful discrimination.

[8] The applicant also alleges 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 and it was agreed that the court would deal with this issue in that case, there being no material difference between the applicants' cases on this issue.

[9] In the course of these proceedings the proposed respondent disclosed 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.

[10] The court accepts that the restrictions arguably engage the applicant's Article 8 rights. 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.

[11] In those circumstances it is for the proposed respondent to justify such interference. 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.

[12] Although this is a leave hearing the court has 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 ("the Department") response to the Covid-19 pandemic, commencing with the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 introduced on 28 March 2020 and subsequent regulations of 23 July 2020 and 9 April 2021. On 19 October 2021 the Northern Ireland Executive

published its "Autumn/Winter Covid-19 Contingency Plan" which contained a series of measures which the Executive might deploy if needed, based on the need of keeping our society and economy open to the fullest possible extent and, hopefully, in totality. At that stage certain "baseline" measures were in force.

[13] 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.

[14] After 19 October 2021 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.

[15] 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.

[16] 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.

[17] The court has been provided with a copy of the document which provides the scientific evidence for Covid Certification, which informed the proposed respondent's decision to introduce the scheme.

[18] 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 evidence 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."

[19] Mr Lavery on behalf of the applicant is highly critical of this evidence as a basis for introducing the impugned regulations. Indeed, the central plank of his argument is that there is either no, or insufficient, scientific data to justify the restrictions about which the applicant complains.

[20] When one analyses the evidence he points out that Covid Certification only "potentially" contributes to decreasing the transmission risk from potentially infectious persons. He submits that the fact that the measure might only "potentially" help to achieve less transmission is simply not adequate justification for what he describes as such an intrusive measure.

[21] He is particularly critical of the lack of evidence that the restrictions will actually have the effect of reducing transmission. This is because the "recent evidence" which suggests that in the event of a vaccinated individual becoming infected with the Delta variant they have a reduced likelihood of transmitting the virus is based on a publication which had not been peer reviewed or evaluated and "should not be used to guide clinical practice." Furthermore, he points to a VEE: Vaccine Effectiveness Table published on 24 September 2021 which indicates that in terms of "vaccine effectiveness; two doses" there is "insufficient data" when it comes to "transmission."

[22] In short, he says that there is simply insufficient evidence to say that those who have received vaccinations are less likely to infect others should they themselves become infected.

[23] He is also highly critical of the fact that the document refers to the fact that there is evidence that the use of mandatory Covid-19 Certificates leads to an increase in vaccine uptake. He hints that this is the real reason behind the decision to introduce the regulations. In fact, in submissions the applicant goes so far as to describe this as a *de facto* mandatory vaccination policy.

[24] Returning to the proposed respondent's 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.

[25] The Impact Assessment goes on to consider how the scheme might work. It sets out 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. It goes on to consider alternative certification measures for those, like the applicant, who are not vaccinated. It looks at exemptions both in terms of settings and individuals. It also considers ongoing measures as part of mitigating the effects of the pandemic. It 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.

[26] The court turns now to an assessment of the legality, legitimate aim, necessity and proportionality tests.

Legality

[27] The legality test requires that measures interfering with a qualified right such as provided for by Article 8 must have a basis in domestic law and be compatible with the rule of law.

[28] The applicant is critical of the fact that these regulations were made without public consultation. He further argues 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.

[29] The relevant regulations are entitled The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (Amendment No. 19) Regulations (Northern Ireland) 2021.

[30] They were made by the Department of Health in exercise of the powers conferred by sections 25C(i), 3(c), 4(d) and 25F(2) of the Public Health Act (Northern Ireland) 1967 ("the 1967 Act").

[31] They are one of a series of regulations that have been made in response to the public health emergency arising from the Covid-19 pandemic. The regulations recite that they are made in response to the serious and imminent threat to public health which is posed by the incidence and spread of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) in Northern Ireland. The preamble goes on to state:

> "The Department of Health considers that the restrictions and requirements imposed by these regulations are

> proportionate to what they seek to achieve, which is a public health response to that threat.
>
> In accordance with section 25Q of that Act the Department of Health is of the opinion that, by reason of urgency, it is necessary to make these regulations without a draft having been laid before it, and approved by resolution of, the Assembly."

[32] The matter was discussed at the Executive Committee meetings on 17, 23 and 26 November when the regulation were approved. The regulation were subsequently debated in the Northern Ireland Assembly on 13 and 14 December 2021.

[33] It will be 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.

[34] 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

[35] 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."

[36] 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."

[37] In the court's view this is plainly a legitimate policy aim. The court rejects the suggestion put forward on behalf of the applicant that in reality this was an attempt to introduce a *de facto* mandatory vaccination scheme. In the court's view this is simply not arguable.

Necessity/Proportionality

[38] Whilst these are separate concepts the court proposes to deal with these two matters together as the factors which influence the court's consideration overlap to a large extent.

[39] In accordance with well-established jurisprudence "necessary" needs to be construed as "reasonably necessary" rather than absolutely or strictly necessary. To a large extent this issue turns on the applicant's central submission that there is no, or insufficient, scientific justification for the introduction of the measures. 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 referred to in paragraph [18] above.

[40] 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.

[41] In assessing whether or not the interference about which the applicant complains was necessary or proportionate the court takes into account a number of matters. It follows that 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.

[42] As set out above 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.

[43] The decision was taken in the context of a deteriorating situation in local hospitals.

[44] The measures had the support of the Chief Medical Officer and the Chief Scientific Advisor.

[45] The scheme was endorsed by the Northern Ireland Executive which is made up of five different political parties.

[46] The scheme was thereafter subject to Equality Impact Screening, Human Rights Impact Assessment and Data Protection Impact Assessment.

[47] The scheme ensured that hospitality venues could remain open over the Christmas period.

[48] The scheme identified high risk settings and provided for exemptions in relation to both settings and individuals who were subject to the regulations.

[49] The scheme specifically provided an alternative method of certification for those who are not vaccinated such as the applicant.

[50] 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. At the time of writing it is understood that it is contemplated that the remaining restrictions in relation to the scheme will be removed in the near future.

[51] Although the court accepts that arguably there has been interference with the applicant's Article 8 rights it considers 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. It is noted that such tests are free and easily available in this jurisdiction. In his affidavit the applicant describes this an "inconvenience." The court agrees with this assessment. That inconvenience has to be seen in light of the legitimate and overwhelming aim of protecting public health.

[52] The applicant in the course of oral submissions argued that the regulations were also in breach of Article 14 of his ECHR rights in conjunction with Article 8. Leaving aside the legal hurdles required to establish such a breach, most recently 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 recently discussed by Maguire LJ in *Hilland v Department of Justice* [2021] NICA (10/12/2021), 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.

[53] Although Mr Lavery points out that a certificate scheme was not introduced in England and Wales it will be seen that in comparison with other countries similar, and often more restrictive measures were introduced. Thus, in Scotland a Vaccine Only Scheme was introduced. In Wales a Vaccine or Negative Test Result Scheme was introduced. In Austria, Belgium, France, Germany, Italy and the Netherlands a Vaccine or Negative Test Result or Proof of Recovery Scheme was introduced. In Ireland a Vaccine or Proof of Recovery Scheme was introduced (a negative test not being accepted).

[54] There is ample authority that the state enjoys a wide margin of appreciation in making the judgement calls on issues of this type. Ultimately, the assessment of proportionality in this case resolves itself into the question as to whether the Department has made the right judgement.

[55] The court is conscious of the fact that this is a leave hearing and of the low threshold required for the granting of leave. On the question of the appropriate test the court endorses the view of Scoffield J in the case of *In the matter of an Application by Caoimhe ni Chuinneagain for leave to apply for Judicial Review* [2021] NIQB 79 when he said at paragraph [14]:

> "[14] … I propose therefore to address the issue of the grant of leave on the basis of whether the applicant's grounds are arguable and have a realistic prospect of success. This formulation of the test for the grant of leave was adopted by the Court of Appeal in this jurisdiction in *Re Omagh District Council's Application* [2004] NICA 10 at paragraphs [5] and [43]. In *Sharma v Antoine* [2006] UKPC 57, at paragraph [14](4), Lord Bingham suggested that it was now "the ordinary rule" that the court would refuse leave to apply for judicial review '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.'
>
> [15] For my part, I consider that this somewhat enhanced test – rather than a threshold of simple arguability – is likely to be appropriate in many cases in this jurisdiction, where leave cannot be refused without providing the applicant an opportunity of being heard (see RCJ Order 53, Rule 3(10)) and where it is the almost

> invariable practice of the court to invite the proposed respondent to attend any leave hearing and make submissions."

[56] 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, again 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 paragraph [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])

[57] 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."*

[58] The court considers that this is precisely the situation here. The court has had an opportunity to assess the material upon which the proposed respondent's decision was made. With the benefit of having seen that material it is not for the court to interfere with the policy decision made by the Department.

[59] The court considers 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.

[60] It will follow from the above that the court rejects any argument based on irrationality.

[61] For the sake of completeness the applicant alleges a breach of section 75 of the Northern Ireland Act 1998. It will be noted that an Equality Screening, Disability duties and Human Rights Assessment Template was completed in compliance with section 75 which concluded after the detailed consideration set out therein that a full Equality Impact Assessment was not required.

[62] In any event, in accordance with the well-established legal precedent in this jurisdiction, if the applicant wishes to make any complaint in relation to compliance with section 75 he should avail of the appropriate and alternative remedy open to him in that regard by way of complaint to the Equality Commission for Northern Ireland.

[63] Leave to apply for judicial review is therefore rejected. In the court's view the case is unarguable and has no realistic prospect of success.