



Date: 09 November 2021

Minister for Health and Social Services
Welsh Government
5th Floor
Tŷ Hywel
Cardiff Bay
CF99 1NA

By email only: [REDACTED]

Copy to: [REDACTED]

**URGENT FORMAL LETTER BEFORE CLAIM
PURSUANT TO THE JUDICIAL REVIEW PRE-ACTION PROTOCOL**

Dear Minister for Health and Social Services,

1. **The Parties**

1.1 We act for Big Brother Watch Limited, Chinaworks, London, SE1 7SJ ("the Claimant").

1.2 The proposed Defendant to the claim is the Minister for Health and Social Services. Please indicate if you consider there are other appropriate Defendants.

2. **Summary of Claim**

2.1 The Claimant proposes to challenge the introduction of the COVID Pass Scheme in Wales, which came into force on 11 October 2021, on the basis that:

- a. there is no, or no sufficient, evidence base for the decision to introduce the passes, particularly given this was not a recommendation by SAGE or TAC and such enquiries that have been made are legally inadequate; and

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Stephen Grosz QC*
Saimo Chahal QC*
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Tony Taylor

*Honorary

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Fraud Panel

b. the scheme is unnecessary and disproportionate, in breach of Article 8 of the European Convention on Human Rights (“ECHR”) and section 45D(1) of the Public Health (Control of Diseases) Act 1984 (“the 1984 Act”).

2.2 The Claimant reserves the right to amend its grounds of challenge if necessary, particularly as a result of the forthcoming vote on extending the COVID Pass Scheme in Wales, which is due to take place on 9 November 2021.

2.3 This is a formal Letter before Claim sent pursuant to the Pre-Action Protocol for Judicial Review. It concerns a proposed claim which, absent a satisfactory response to this letter, we are instructed to file in the Administrative Court imminently.

3. Proposed Reply Date

3.1 Given the urgency of the matters addressed in this letter considering that the scheme is already in place and there are proposals to extend it, we request a response by 4pm on 16 November 2021.

3.2 In the absence of a satisfactory response within the above timescale, our instructions are to issue judicial review proceedings without further notice. Should this be necessary, we also place you on notice of our intention to recover our costs in accordance with the principles from *M v London Borough of Croydon* [2012] EWCA Civ 595.

4. Background to the proposed claim

The Claimant

4.1 The Claimant is a non-partisan campaign group in the UK that campaigns for individual privacy rights and that works to inform and empower the public to collectively reclaim privacy and defend civil liberties. The Claimant’s work involves engaging in public interest litigation as well as public and political campaigns.

4.2 The domestic and European courts have previously recognised the Claimant’s standing to bring public interest litigation to defend the privacy rights of individuals: see for example *Big Brother Watch & Others v United Kingdom* (Applications nos. 58170/13, 62322/14 and 24960/15).

The Defendant and its responsibility for public health matters

- 4.3 The Defendant is the minister responsible for the running of the National Health Service in Wales and all aspects of public health and health protection in Wales. Relevant responsibilities as listed on the gov.wales website include “*Public health: Covid 19 response, screening and vaccination*” and “*Research and development in health and social care*”.

COVID vaccination programme

- 4.4 Since March 2020, the Welsh government has introduced a raft of measures intended to prevent or limit the spread of COVID-19. On 20 December 2020, the Welsh government announced a national ‘lockdown’ in an attempt to control a surge of COVID-19 infections, attributed to a new variant of the virus which was between 50% and 70% more transmissible. The Welsh population was instructed to ‘stay at home’ and only permitted to leave for limited reasons permitted under law. Schools were closed and those who were ‘clinically extremely vulnerable’ were advised to ‘shield’ and keep a distance from those in their own household.
- 4.5 In addition, the UK Government commissioned the mass production of vaccines. On 11 January 2021, a plan was published to vaccinate the following nine groups by order of priority, starting with those judged at increased risk of serious illness or death:
- a. all residents in a care home for older adults and their carers;
 - b. all those 80 years of age and over and frontline health and social care workers;
 - c. all those 75 years of age and over;
 - d. all those 70 years of age and over and clinically extremely vulnerable individuals;
 - e. all those 65 years of age and over;
 - f. all individuals aged 16 years to 64 years with underlying health conditions which put them at higher risk of serious disease and mortality;
 - g. all those 60 years of age and over;
 - h. all those 55 years of age and over;
 - i. all those 50 years of age and over.

- 4.6 Individuals in the above groups represented 99% of deaths as at 13 January 2021.¹ Once vaccines were provided to the above, they were offered to the remaining population.
- 4.7 As at 19 October 2021, more than 4.6 million doses of the vaccine had been administered in Wales, more than 2.4 million of whom had had their first dose, amounting to 76.4% of the population², and more than 2.23 million of whom had received their full course of vaccine.³ Best practice is described by the Government as vaccinating 75% of total population cohorts,⁴ so Wales had achieved this as at 19 October 2021.

Vaccine efficacy

- 4.8 The two vaccines most widely used in the UK are Astra-Zeneca and Pfizer, neither of which provides complete protection against COVID-19.
- 4.9 The vaccines primarily work by providing a high level of protection against serious disease or symptomatic disease, rather than infection. Astra-Zeneca reports that two doses of its vaccination have 79% efficacy at preventing symptomatic COVID-19 and 100% efficacy against severe disease and hospitalisation.⁵ Pfizer reports that its vaccine is 95.6% effective after the second vaccine dose.⁶ However, there is emerging evidence that protection amongst those who have been double-vaccinated is waning five to six months after vaccination and a booster vaccine is therefore required.⁷
- 4.10 The NHS advises of the risk of getting or transmitting the virus even with the vaccine and suggests that social distancing advice should still be followed and masks should be worn where it is hard to stay away from other people.⁸

¹<https://www.gov.uk/government/publications/uk-covid-19-vaccines-delivery-plan/uk-covid-19-vaccines-delivery-plan>

²<https://www.bbc.co.uk/news/uk-wales-55855220>

³<https://gov.wales/covid-19-vaccination-programme-weekly-update-19-october-2021>

⁴<https://www.gov.uk/government/publications/uk-covid-19-vaccines-delivery-plan/uk-covid-19-vaccines-delivery-plan>

⁵<https://www.astrazeneca.com/media-centre/press-releases/2021/covid-19-vaccine-astrazeneca-confirms-protection-against-severe-disease-hospitalisation-and-death-in-the-primary-analysis-of-phase-iii-trials.html>

⁶<https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-announce-phase-3-trial-data-showing#:~:text=In%20the%20trial%2C%20a%20booster,did%20not%20receive%20a%20booster.>

⁷<https://www.bbc.co.uk/news/health-58322882>

⁸<https://www.nhs.uk/conditions/coronavirus-covid-19/coronavirus-vaccination/coronavirus-vaccine/>

COVID Status Certification in England

- 4.11 In March 2021, the UK Government launched a review into the use of COVID Status Certifications (“CSCs”) to help “*handle COVID-19 from summer onwards*”. CSCs have been defined by the government as “*the use of testing or vaccination data to confirm in different settings that individuals have a lower risk of getting sick with or transmitting COVID-19 to others.*”⁹
- 4.12 In response to this announcement, the Public Administration and Constitutional Affairs Committee (“**PACA Committee**”) undertook an inquiry into the implications of, and concerns surrounding, the potential introduction of a certification system. The PACA Committee released its report on 12 June 2021, in which it was highly critical of CSCs.
- 4.13 Amongst its criticisms were that the Government had failed to make a sufficiently strong scientific case for introducing CSCs and there appeared to be no scientific rationale for the places they indicated were under consideration, such as nightclubs and large events. This led to the PACA Committee’s concern that the Government appeared to be “*making decisions on a largely arbitrary basis*”.¹⁰
- 4.14 In July 2021, the government separately concluded that it would not mandate CSCs for entry into any setting. It found that any public health benefit would be outweighed by the burden on organisations and those not yet offered a full vaccination course.
- 4.15 On 9 September 2021, the PACA Committee issued the following statement:

“Covid passports are being introduced for entry to some venues, including nightclubs and live sporting events, to control the spread of the virus. However, new analysis and a lack of evidence provided by the Government in its response to the Committee’s report casts doubt on whether this will work in practice.

[...] the latest analysis¹¹ by Public Health England (PHE) found that although being fully vaccinated protects against infection and severe symptoms, it unlikely to do much to stop the spread of the virus if people become infected. Jabbed and unjabbed individuals

⁹<https://www.gov.uk/government/consultations/covid-status-certification-review-call-for-evidence/covid-status-certification-review-call-for-evidence>

¹⁰https://publications.parliament.uk/pa/cm5802/cmselect/cmpubadm/42/4203.htm#_idTextAnchor000

¹¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009243/Technical_Briefing_20.pdf

carry similar amounts of the virus. Researchers call this having a similar viral load.

- 4.16 The PACA Committee's Chair was also highly critical of COVID passports, stating:

"We have often heard throughout the pandemic that the Government will follow the science, but when afforded the opportunity to provide it on Covid passports, it has failed to do so. All we have is a flimsy claim that there is a public health case, but without any foundation for the claim to stand on.

With recent analysis suggesting that vaccinated people carry as much of the virus as the unvaccinated into any setting, the disappointing lack of any scientific basis for the Government's decision to go ahead could reasonably lead people to conclude that there is in fact no such basis. If the real goal is to drive vaccine uptake, then it is a deeply cynical approach that will be counterproductive.

Following through on such a costly, discriminatory and, potentially, ineffective policy will have consequences for trust in and acceptance of the Government's measures to tackle the pandemic. It's surely either time to prove how this'll work or to put an end to it."¹²

- 4.17 The Claimant is also aware of recent reporting that the UK Treasury and Cabinet Office's COVID-19 Taskforce has calculated that "alternative strategies", including COVID certification, would have an unclear effect on preventing the spread of the virus. According to reports, the Taskforce's assessment was that:

"a COVID certification scheme would reduce transmission at these events by 40-45 percent. But it warns that, because only 2-13 percent of overall community transmission takes place in venues covered by the scheme, there would only be a "moderate impact from reduced community transmission." The figures suggest certification would reduce overall community transmission by 1-5 percent.

¹²<https://committees.parliament.uk/committee/327/public-administration-and-constitutional-affairs-committee/news/157355/covid-passport-policy-lacks-scientific-evidence-base/>

*Vaccine passports would have a "high impact" on the economy and could cause "wider impacts" exacerbating Britain's supply chain crisis, the assessment finds."*¹³

Scientific evidence regarding CSCs and COVID Passes

4.18 There is a wealth of scientific evidence, most notably from the UK and Welsh Government's own scientific advisors, criticising the utility of CSCs and COVID Passes. We draw your attention to a few recent examples:

SAGE evidence

4.19 On 5 July 2021, the Scientific Advisory Group for Emergencies ("SAGE") released a paper on the ethics of certification. In the Executive Summary, it advised caution regarding certification, stating (emphasis added):

- a. *"Certification that a person is virus-free could increase some people's freedom but is unlikely to be scientifically valid other than in very limited circumstances because those certified could contract the virus at any stage after certification. A false sense of security would risk increasing harm not minimising it.*
- b. *If there is a high degree of confidence that a person who had natural immunity could not be an asymptomatic carrier then certification could enhance freedom. However, if confidence is medium or low, certification would increase risks to public health.*
- c. *If vaccination only protects the person vaccinated and does not reduce risk of transmission, then certification might be misunderstood as suggesting a reduced risk to others and should be avoided. A high degree of confidence that those vaccinated would not be asymptomatic carriers would be required before certification, beyond a simple record of the vaccination, was considered.*
- d. *Equality impact assessments should be undertaken to ensure certification did not increase disadvantage and to identify the scope for addressing inequalities through prioritisation of those communities who have suffered most from Covid-19.*

¹³<https://www.politico.eu/article/coronavirus-plan-b-cost-uk-billions-document/>

- e. *If vaccination gives protection to individuals but does not prevent them carrying and transmitting the virus then the benefit to the vaccinated individual would be at the expense of others who would in fact face increased risk if those certified were permitted wider social interactions. This would seem to amount to treating vaccinated individuals as if they mattered more than the non-vaccinated.”*
- 4.20 As you will know, the function of SAGE is to provide scientific and technical advice to support UK cross-government decision makers during emergencies. Its advice therefore needs to be given real weight by public authority decision-makers.
- 4.21 In terms of concerns common to certification options, SAGE stated (author’s emphasis):
- a. *“The connection between such incentivisation and trust is unclear. Mandatory vaccination programmes have often failed because of lack of trust. There is a possibility that encouraging vaccination and testing through promotion of the benefits of certification could make people suspicious that they were unsafe and could not be recommended on their own merits.*
- b. *Trust might be undermined; not only in the certificates themselves, but also in the tests and vaccines on which they are based, and the Government that proposes them. If trust in these is lost, then the adverse impact on successful responses to Covid-19 might outweigh any gains from certification.*
- c. *Historical comparisons suggest that, in practice, disease certification is more easily accessible to socially advantaged groups and that it leads to stigmatisation of the uncertified. This suggests that statutory anti-discrimination provisions may be required to guard against such problems emerging.”*
- 4.22 The Technical Advisory Cell (“TAC”) describe themselves as being *“tasked with providing coordination of scientific and technical advice to support Welsh government decision makers during emergencies.”*¹⁴

¹⁴ <https://gov.wales/technical-advisory-cell>

4.23 On 14 September 2021, TAC issued a report entitled ‘Advice on ‘Vaccine Passports’¹⁵, which was far from encouraging of COVID Passes. It began by summarising previous TAG advice (author’s emphasis):

- a. *“Even with careful planning and application there may not be a net benefit to the introduction of immunity certification. Reference to “immunity” may result in unreasonable expectations about the level of protection provided. A recent review concluded certificates have the potential for harm as well as benefit.*
- b. *Levels of infection in the community will have an important impact on the level of risk and any effectiveness of certification, with effectiveness likely to be lower when infection rates are high.*
- c. *Given the limited evidence and uncertainty around outcomes, SAGE has previously recommended use of **pilot studies** to understand the impact and practicalities of certification, including consideration of behavioural and ethical issues linked to variable vaccination uptake across groups in the population.*
- d. *In addition to reduced transmission risk, certification based on vaccination could possibly encourage vaccine uptake although evidence is limited. **Several concerns are identified**, including the possibility of perverse incentives, complacency with regard to other personal protective behaviours and the possibility of increased opposition to vaccination among some groups.*
- e. *While evidence on vaccine uptake is limited, **two recently published studies have suggested use of vaccine passports could backfire**. The first presents UK data from a large-scale survey and modelling exercise carried out in April 2021.¹⁶ The findings suggest the introduction of vaccine passports will likely lower the inclination to get vaccinated once baseline vaccine intent has been adjusted for, the decrease being larger if passports were used for domestic purposes (i.e. not for international travel). The authors conclude passports may result in lower vaccine inclination in socio-demographic*

¹⁵<https://gov.wales/sites/default/files/publications/2021-09/technical-advisory-group-advice-on-vaccine-passports.pdf>

¹⁶[https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(21\)00389-8/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(21)00389-8/fulltext)

groups that cluster geographically, possibly contributing to concentrated areas of low uptake and an epidemic risk. The second presents data from 1300 adults in the UK and Israel in May 2021.¹⁷ The authors conclude that vaccine passports may have detrimental effects on people's autonomy, motivation, and willingness to have the vaccine, and affect longer-term relationships with local governments and health authorities (that are crucial for public health adherence and behaviour change to occur)."

4.24 It then set out a section on 'SAGE Advice', stating, *inter alia* (emphasis added):

- a. *"Looking at SAGE papers in more detail, SAGE has not advised whether vaccine certification should be recommended per se. However SPI-B's detailed paper from December 2020 advises if they are introduced, this should be done with caution as a result of the extremely limited evidence on the nature and scale of its impacts, only provided key ethical considerations are met (particularly concerning equality and fairness) [...]*
- b. *Certification is an imperfect tool and a risk-based approach should be adopted. The prevalence of infection in the community will have an important impact on the level of risk and effectiveness of certification (it may be very effective when prevalence is low, but less effective at high prevalence).*
- c. *Trust in both the information provided and security of certification data storage will likely influence uptake, particularly in marginalised communities, but the scale of this is unknown.*
- d. *SPI-M also suggested NHS pressure could be kept manageable if a 'basket of measures, light enough to keep the epidemic flat' were brought in early. More 'light touch' measures listed by SAGE include:*
 - (i) *clear messaging that recommends people acting cautiously,*
 - (ii) *more widespread testing,*

¹⁷ <https://www.mdpi.com/2076-393X/9/8/902/htm>

(iii) *a return to requiring all contacts of cases to isolate,*

(iv) *and more mask-wearing.*

e. *Certification was not considered in this list, although it was highlighted that certification for access to some venues is currently being reviewed by UK Government.”*

4.25 TAC then set out the contemporaneous epidemiological position, noting that *“in general, the ratio of cases to hospitalisations and deaths remains low”* and that whilst incidences continue to rise, *“there is not enough information about the purpose of admission for a determination of whether people are being admitted because of COVID-19 or with COVID-19.”*

COVID Passes in Wales

4.26 Despite the above, in September 2021 (a matter of days after the TAC report was published), the Welsh government took steps to introduce the COVID Pass Scheme. It appears to have done so without doubting or questioning the SAGE and TAG advice, less still on the basis of alternative weighty advice.

4.27 The legislation governing the coronavirus restrictions in Wales is The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (“**Wales Regulations**”).

4.28 The Wales Regulations require a review of the coronavirus restrictions to be undertaken every three weeks. Following one such review, on 17 September 2021 the Welsh government announced that people attending large events and nightclubs (or similar premises) would have to prove they were either fully vaccinated by presenting an NHS COVID Pass or have taken a negative COVID-19 test.¹⁸

4.29 On 5 October 2021, during a Parliamentary vote at the Welsh Senedd, the requirement to show an NHS COVID Pass was agreed by an incredibly slim majority of just one person, with 28 MPs voting in favour and 27 MPs voting against it.¹⁹ It has been reported that one MP, Gareth Davies, would have voted against the measure but was prevented from doing so due to technical issues. According to reports, if he had been able to vote the result would have been a tie and the measure would not have passed.²⁰

¹⁸ <https://gov.wales/covid-pass-for-events-and-nightclubs-announced>

¹⁹ <https://www.bbc.co.uk/news/uk-wales-politics-58789467>

²⁰ <https://www.gbnews.uk/news/vaccine-passports-in-wales-get-green-light-after-tory-ms-misses-vote-over-tech-issues/137813>

- 4.30 The measure subsequently came into force on 11 October 2021, by way of the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021 (“**the Welsh Amendment Regulations**”).
- 4.31 Under the measure, all over-18’s would need to have a NHS COVID Pass to enter:
- a. nightclubs;
 - b. indoor, non-seated events for more than 500 people, such as concerts or conventions;
 - c. outdoor non-seated events for more than 4,000 people; and
 - d. any setting or event with more than 10,000 people in attendance.
- 4.32 These settings are categorised as “*higher risk*” premises under the relevant Welsh Government Guidance²¹ (“**the Guidance**”) on the basis that it is not easy to introduce reasonable measures such as ventilation or social distancing and because there is “*some evidence of so-called super spreading events associated in the UK and globally with nightclubs, sports events, and festivals.*” No such evidence was identified in the Guidance and, whilst the Claimant is aware of evidence of transmission at nightclubs and large events, this includes in situations where COVID pass schemes were in use.
- 4.33 Under Regulation 2 of the Wales Amendment Regulations, the onus is on the person responsible for the relevant premises to ensure that a person aged 18 or over is only permitted entry with valid proof of COVID status. Under the Guidance, such proof can be demonstrated via:
- a. the digital NHS covid pass - people who are fully vaccinated in Wales can already download a certificate proving their status;
 - b. a paper based certificate of vaccination - this does not include vaccination cards; and
 - (i) confirmation of a negative test result within the past 48 hours, evidenced by email or text from gov.uk; or
 - (ii) confirmation of a positive test within the last 6 months which has been followed by the appropriate period of

²¹ <https://gov.wales/covid-pass-guidance-businesses-and-events-html>

isolation i.e. 10 days - this can be evidenced in the COVID pass or by text or email.

- 4.34 If a premises fails to require proof of COVID status, it can be subject to a range of civil penalties including fines or closure.
- 4.35 Under the same guidance, the following reasons are given for introducing the COVID Pass:

“There has been an increase in the number of COVID cases and community transmission across Wales. We are preparing for an autumn and winter that could potentially be very difficult, with COVID and seasonal flu both in circulation, potentially putting the NHS and wider services under enormous pressure.

SAGE’s very clear advice was to take early and what it calls “low-cost interventions” now which may reduce the need for tougher measures later to control the spread of the virus. We take this advice seriously and none of us want to see businesses having to close again and further lockdowns introduced, if they can be avoided.

We are introducing COVID Passes - to form part of the range of measures to mitigate the spread of COVID through the community, and the associated harms that brings.”

- 4.36 COVID passes are due to be extended to ticketed indoor venues such as cinemas, concert halls and theatres on 15 November 2021, pending a vote in the Senedd on 9 November 2021.

5. Legal Framework

Evidence base

- 5.1 Public bodies are required to have an adequate evidence base for their decisions, especially those that impact significantly on fundamental rights and freedoms. As explained by Saini J in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin) (emphasis added):

“32. A more nuanced approach in modern public law is to test the decision-maker’s ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel’s expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.

*33. I emphasise that this approach is simply another way of applying Lord Greene MR’s famous dictum in *Wednesbury*... but*

it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?

34. This may in certain respects also be seen as an aspect of the duty to give reasons which engage with the evidence before the decision-maker. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion.”

- 5.2 This is a case in which a heightened level of scrutiny is required, given the nature of the measure and its impact.
- 5.3 Public bodies must also take reasonable steps to acquaint themselves with the relevant information to enable them to answer the questions they have to answer, which in this case concern the utility and necessity of Covid passes. The relevant principles were set out by the Court of Appeal in *R (Balajigari) v SSHD* [2019] 1 WLR 4647, §70:

“The general principles on the Tameside duty were summarised by Haddon-Cave J in R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2015] 3 All ER 261, paras 99-100. In that passage, having referred to the speech of Lord Diplock in Tameside, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see R (Khatun) v Newham London Borough Council [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State’s duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that

he has all the relevant material to enable him properly to exercise it.”

Necessity and proportionality

- 5.4 The Welsh Amendment Regulations were made pursuant to section 45C(1) of the Public Health (Control of Diseases) Act 1984 (“**the 1984 Act**”), which gives the appropriate Minister the power to make regulations:

“for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere.”

- 5.5 The power is relatively wide and includes, under section 45(3)(c), the power to make regulations “*imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.*”

- 5.6 The power is subject to the following restrictions in section 45D (emphasis added):

- (1) *Regulations under section 45C may not include provision imposing a restriction or requirement by virtue of subsection (3)(c) of that section unless the appropriate Minister considers, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.*
- (2) *Regulations under section 45C may not include provision enabling the imposition of a restriction or requirement by virtue of subsection (3)(c) of that section unless the regulations provide that a decision to impose such a restriction or requirement may only be taken if the person taking it considers, when taking the decision, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.*
- (3) *Regulations under section 45C may not include provision imposing a special restriction or requirement mentioned in section 45G(2)(a), (b), (c) or (d).*
- (4) *Regulations under section 45C may not include provision enabling the imposition of a special restriction or requirement unless-*

- (a) *the regulations are made in response to a serious and imminent threat to public health, or*
- (b) *imposition of the restriction or requirement is expressed to be contingent on there being such a threat at the time when it is imposed.*

5.7 The introduction of COVID passes are therefore subject to a statutory test of proportionality pursuant to section 45D(1).

5.8 It is settled law that demonstrating a measure or decision is proportionate involves showing that it:

- a. has a sufficiently important objective;
- b. is rationally connected to accomplishing that objective;
- c. cannot reasonably be achieved by a less intrusive alternative; and
- d. strikes a fair balance between individual rights and public interests

See *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, per Lord Sumption at [20].

Article 8 ECHR

5.9 Relatedly, Article 8 ECHR provides that “*Everyone has the right to respect for his private and family life, his home and his correspondence.*”

5.10 Article 8 ECHR “*concerns rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community*”²².

5.11 Article 8 is a qualified right and interferences can be justified under Article 8(2) as long as they are “*in accordance with the law*” and “*necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the preservation of order or crime, for the protection of*

²² See *Connors v UK* (2005) 40 EHRR 9 at §82.

health or morals, or for the protection of the rights and freedoms of others”.

6. Grounds

Ground 1: there is no, or no sufficient, evidence base for the decision to introduce the passes, particularly given this was not a recommendation by SAGE or TAC and such enquiries that have been made are legally inadequate

- 6.1 The stated purpose of the COVID Pass scheme, under the Guidance, is to effectively mitigate against the spread of infection and therefore ease pressure on the NHS. Critically, however, there is no evidence to suggest that the COVID Pass scheme will have this effect. As set out at paragraph 4.23 above, in a report published a matter of days before the Welsh government’s announcement of COVID Passes, TAC had referred to SAGE guidance which suggested NHS pressure could be kept manageable if “light touch” measures were adopted. Such measures included clear messaging, widespread testing and mask-wearing. TAC further stated that the ratio of cases to hospitalisation and deaths remained low and that there was insufficient evidence to ascertain whether people were being admitted to hospital because of the virus or simply with it. This followed SAGE guidance in July 2021, which found that certification was “*unlikely to be scientifically valid*” as well as the PACA Committee report, which criticised a lack of scientific rationale on the part of the UK government and doubted the effectiveness of such measures. On the evidence, therefore, neither SAGE, TAC nor the PACA Committee positively support the introduction of COVID Passes.
- 6.2 This begs the question of what evidence, if any, the Welsh government obtained to support the necessity of such a measure. The only reference the Guidance makes to scientific evidence is vague, to unspecified “SAGE advice” to take early and “low-cost interventions”. This ignores the fact that SAGE advice has previously criticised certification and, as far as the Claimant is aware, has never positively recommended COVID Passes of the kind being introduced. To rationally impose such a draconian measure, the Welsh government is required to have a cogent evidence base for doing so which meets the standards described in *Wells*; see paragraph 5.1 above. In the absence of such evidence, the decision to introduce COVID Passes is unlawful.
- 6.3 Further, sufficient enquiries needed to be undertaken to ensure the evidence base was comprehensive especially in circumstances where the Welsh Government chose not to consult. The decision

strongly suggests this did not occur and that the decision was instead based on a misunderstanding of SAGE's advice (or at best a legally impermissible extrapolation). The evidence gathering exercise that appears to have been undertaken cannot be squared with the *Balajigari* standard: see paragraph 5.3 above.

Ground 2: the COVID pass scheme is unnecessary and disproportionate

- 6.4 The COVID pass scheme constitutes an unnecessary, disproportionate and therefore unlawful breach of individual rights for the reasons set out below.
- 6.5 In the first instance, there can be no doubt that the COVID Pass scheme engages individuals' rights under Article 8 ECHR as it requires an individual to reveal personal and private information about themselves in order to engage in certain activities. The result of any failure to reveal their personal information is that they are prevented from participating in the chosen activity. Having engaged Article 8, the interference can only be justified if it is necessary and proportionate pursuant to Article 8(2).
- 6.6 It is important to note, in this regard, that current vaccination levels are high in Wales, with nearly 95% of those aged over 60 and 84% of those adults under 60 already vaccinated.²³ There is no indication that the vaccination programme will be halted, so the number of vaccinations is only likely to increase. Accordingly, the spread of transmission is likely to decrease with the passage of time, supported by less intrusive measures such as coherent messaging regarding vaccination and mask-wearing. On this basis, the introduction of the COVID Pass scheme and the resultant infringement on the individual's Article 8 rights is disproportionate even in circumstances where the stated purpose (which is not the case here) is to increase vaccination rates.
- 6.7 In any event, it is evident that the purpose of the measures is not to prevent the entry of individuals with COVID-19 to a particular premises but rather to prevent the entry of those who are unvaccinated. This is demonstrated by the alternative options available under the scheme. One option is to present a negative COVID-19 test result for a test taken within the past 48 hours. However, lateral flow tests are not a reliable indicator of whether an individual has coronavirus²⁴ and this measure does not mitigate

²³ <https://www.bbc.co.uk/news/uk-wales-52380643>

²⁴ They have in the past been found to have a false negativity rate of between 25% - 60%, depending on which has been used, according to relevant [Parliamentary Updates](#)

the risk of an individual contracting coronavirus less than 48 hours before entry into the relevant premises. The other option is confirmation of a positive test within the last 6 months followed by an appropriate period of isolation. However, it is possible to contract the virus twice, therefore this option does not mitigate against an individual having COVID-19 on entry to the premises. In providing these alternative options under the stated purpose of mitigating transmission, it appears the Welsh government's supposition is that as long as an individual is vaccinated, they will not transmit the virus even if they have COVID-19 at the time of entry. No evidence has been provided to support this. Notably, vaccination does not entirely prevent the risk of transmission, as highlighted by the PACA Committee (set out at paragraph 4.15 above).

- 6.8 If, alternatively, the purpose of the COVID Pass scheme is to prevent the entry to those who are unvaccinated on public safety grounds, this is not justifiable because:
- a. As mentioned above, vaccination levels for high-risk and priority categories are high in Wales.
 - b. Those individuals in high-risk categories who have not been vaccinated are able to choose whether they wish to attend certain premises which may be considered "higher risk". This ability to choose extinguishes the need for a mandatory government-imposed scheme with serious consequences for businesses that fail to comply.
 - c. On the available evidence, those who are unvaccinated and in lower priority categories have minimal risk of serious illness or death. Preventing these individuals from accessing relevant premises does not appear necessary to protect their own health.
- 6.9 Given the lack of evidence in support of the COVID Pass scheme, it is neither proportionate, as it does not significantly improve public health, nor necessary, as no evidence has been made available as to its necessity and any minor positive impact is outweighed by the net negative impact on privacy. The scheme is therefore in breach of section 45D(1) of the 1984 Act and the individual's privacy rights under Article 8 ECHR.

7. Details of the Action Required

- 7.1 The Defendant is required to withdraw the requirement for relevant premises to require a mandatory COVID Pass on entry, pursuant to the Wales Amendment Regulations.

8. Details of Information and Documentation Sought

- 8.1 With a view to resolving the dispute or at least narrowing it and enabling the claim to be pleaded in a properly focussed, fully informed way, the Claimant requests that the Defendant provides copies of all documents relevant to this claim, including but not limited to:

- a. all evidence of the efficacy of the COVID Pass scheme considered by the Welsh government that: (i) demonstrated that the scheme would mitigate the risk of COVID-19 transmission; and (ii) indicated that the scheme would not or might not have that effect;
- b. all documents recording the Welsh government's analysis of the evidence at subparagraph a. above and the conclusions reached;
- c. any further papers, including submissions to and decision-records created after, in respect of any governmental meetings which considered the COVID Pass scheme;
- d. all documents including scientific data and public health data in other countries, including elsewhere in the UK, relevant to or which resulted in the decision to introduce the COVID Pass scheme;
- e. all ministerial submissions and appended documents along with internal impact assessments (if any exist) or equivalent documents prepared to support the proposed introduction of the COVID Pass scheme; and
- f. any options appraisals prepared in relation to how other countries have considered equivalent schemes and their respective success.

9. **Details of Interested Parties**

9.1 We do not currently consider there are other interested parties. If you disagree, please identify the other parties in your response.

10. **Alternative Dispute Resolution**

10.1 The Claimant would be amenable to any alternative means of resolving this matter consensually such as would avoid the need to commence a claim for judicial review. The Claimant is therefore willing to consider any proposed ADR made by the Defendant.

11. **Details of the legal advisors dealing with this matter and the address for reply and service of court documents**

11.1 The Claimant is represented by John Halford (Partner) and Shirin Marker (Solicitor) of Bindmans LLP. Our reference number for this matter is [REDACTED]. Our address for reply and service of court documents is at the head of this letter. We are willing to accept service and other correspondence by email provided all the emails addresses above are used.

11.2 Should you wish to discuss this matter, please contact Shirin Marker at [REDACTED]

11.3 We look forward to hearing from you.

Yours faithfully

Bindmans LLP

Bindmans LLP