

Date: 23 December 2021

Secretary of State for Health and Social Care
Department of Health and Social Care
39 Victoria Street
London
SW1H 0EU
United Kingdom

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

Dear Secretary of State for Health and Social Care

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 you, the Secretary of State for Health and Social Care. 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 England by means of the Health Protection (Coronavirus, Restrictions) (Entry to Venues and Events) (England) Regulations 2020 (“the Regulations”). The scheme came into force on 14 December 2021. In summary, it is unlawful because:

- a. there is no, or no sufficient, evidence base for the decision to introduce COVID Passes as a measure to address the spread of the coronavirus, particularly given this was not a recommendation by SAGE;
- b. the nature of the decision to introduce COVID Passes is such that the law demands that adequate and intelligible reasons must be given for it, but the reasons given do not meet that standard;

SENIOR CONSULTANTS
Sir Geoffrey Bindman QC*
Stephen Grosz QC*
Saimo Chahal QC*
Lynn Knowles

PARTNERS
Tayab Ali
Tamsin Allen
Liz Barratt
Jules Carey
Jon Crocker
Yagmur Ekici
Kate Goold
John Halford
Laura Hobey-Hamsher
Charlotte HaworthHird
Alison Leivesley
Siobhan Kelly
Alla Murphy
Olivia Piercy
Jamie Potter
Paul Ridge
Amrit Rana
Amy Rowe
Alison Stanley
Anna Thwaites
Katie Wheatley

ASSOCIATES
Melissa Arnold
Salima Budhani
Emma Cohen
Maud Davis
Ashley-Jayne Fleming
Roberta Haslam
Catherine Jackson
Jude Lanchin
Alison Mackintosh
Robert Maddox
Karen May
Jessica Skinns
Sheetul Sowdagur

SOLICITORS
Karan Ahluwalia
Sumaiyah Anwar
Christina Ashibogu
Unkha Banda
Clara Barry Born
Joanna Bennett
Jessie Brennan
Hester Cavaciuti
Elizabeth Cleaver
Samuel Cronin
Alicia Davis
Rachael Davis
Emily-Jade Defriend
Abigail Evans
Christian Hansen
Rachel Harger
Adele Harrison
Ella Jefferson
Shirin Marker
Hannah Marshall
Marianna Michaelides
Theodora Middleton
Carla Mirallas
Joseph Morgan
Oliver Oldman
Patrick Ormerod
Megan Owen
Shelly Pastakia
Jen Parker
Caroline Robinson
Megan Rothman
Basmah Sahib
Daniel Shaw
Alex Temple
Emma Varley
William Whitaker
Rosaleen Wyllie
Louisa Zangina

CONSULTANTS
Tony Taylor

*Honorary

*Contracted with
the Legal Aid
Agency*

Fraud Panel

Bindmans LLP

236 Gray's Inn Road London WC1X 8HB
DX 37904 King's Cross Telephone 020 7833 4433 Fax 020 7837 9792
www.bindmans.com info@bindmans.com

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- c. 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”); and
 - d. the scheme is in breach of s. 149 of the Equality Act 2010 (“the EA 2010”) since equality considerations do not appear to have been taken into account when formulating the COVID Pass Scheme and this will inevitably impact on those subject to the Scheme.
- 2.2 This is a formal Letter before Claim sent pursuant to the Pre-Action Protocol for Judicial Review. It concerns a proposed claim which, absent of a satisfactory response to this letter, we are instructed to file in the Administrative Court imminently.

3. **Proposed Reply Date**

- 3.1 We request a response by 4pm on 6 January 2022 in accordance with the Pre-Action Protocol for Judicial Review.
- 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 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 Secretary of State responsible for the work of the Department of Health and Social Care, including oversight of delivery and performance of the National Health Service (“NHS”) and oversight of social care policy.

COVID vaccination programme

- 4.4 Coronavirus disease (“COVID-19”) is an infectious disease caused by the SARS-CoV-2 virus. Since March 2020, the UK government has introduced a range of measures intended to prevent or limit the spread of COVID-19. These measures have included national and regional ‘lockdowns’, mandating the wearing of face-masks in certain public places and restricting travel abroad.
- 4.5 In addition, the UK Government has commissioned the mass production of vaccines. On 11 January 2021, a plan was published to vaccinate the population by order of priority, starting with those judged at increased risk of serious illness or death. Once vaccines were provided to those at increased risk, they were then offered to the remaining population.
- 4.6 The two vaccines most widely used in the UK are Astra-Zeneca and Pfizer, neither of which provides complete protection against COVID-19. The vaccines primarily work by providing a high level of protection against serious disease or symptomatic disease, rather than infection. 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 required.¹ Having administered first and second dose vaccines, in September 2021 the NHS started delivering booster jabs for those who had had their second dose vaccine at least six months previously.²
- 4.7 From 6 November 2021, the number of people testing positive for COVID-19 began to increase.³ On 26 November 2021, the UK Health Security Agency (“UKHSA”) announced the emergence of Omicron, a new COVID-19 variant.⁴ Following research into the new variant, it was reported that two dose COVID-19 vaccine regimes would not induce enough neutralising antibodies against Omicron.⁵ According to the World Health Organisation, preliminary evidence also

¹<https://www.bbc.co.uk/news/health-58322882>

²<https://www.england.nhs.uk/2021/09/nhs-begins-covid-19-booster-vaccination-campaign>

³<https://coronavirus.data.gov.uk/details/cases?areaType=overview&areaName=United%20Kingdom>

⁴ <https://www.gov.uk/government/news/covid-19-variants-identified-in-the-uk>

⁵<https://www.reuters.com/business/healthcare-pharmaceuticals/two-dose-vaccines-induce-lower-antibodies-against-omicron-study-finds-2021-12-13/>

suggests a reduction in vaccine efficacy against infection with two doses and transmission associated with Omicron.⁶ The government's website states:

“The latest preliminary data has shown vaccine efficacy against symptomatic infection is substantially reduced against Omicron with just 2 doses, but a booster pushes protection back up to over 70%, showing how vital the top-up jab is to bolster immunity.”⁷

- 4.8 On 13 December 2021, the NHS consequently outlined plans to accelerate the booster programme.⁸

Introduction of COVID Passes in England

- 4.9 COVID Status Certifications (“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*

- 4.10 In September 2021, the UK government set out its ‘COVID-19 Response: Autumn and Winter Plan’, in which it stated:

“Taking into account the latest data on the state of the epidemic, mandatory vaccine-only certification will not be implemented from the end of September. It would, however, be part of the Government’s Plan B if the data suggests action is required to prevent unsustainable pressure on the NHS.”¹⁰

- 4.11 On 27 September 2021, the UK government published a ‘Proposal for mandatory COVID certification in a Plan B scenario’¹¹. It stated, in respect of the rationale, that:

“The proposal on the settings where certification would apply is based chiefly on public health evidence, including from the Scientific Advisory Group for Emergencies (SAGE) and the Events Research Programme (ERP). The highest risks of transmission are

⁶ [https://www.who.int/publications/m/item/enhancing-readiness-for-omicron-\(b.1.1.529\)-technical-brief-and-priority-actions-for-member-states](https://www.who.int/publications/m/item/enhancing-readiness-for-omicron-(b.1.1.529)-technical-brief-and-priority-actions-for-member-states)

⁷ <https://www.gov.uk/government/news/chief-medical-officer-urges-public-to-get-boosted-now>

⁸ <https://www.england.nhs.uk/2021/12/nhs-sets-out-next-steps-to-accelerate-covid-19-booster-rollout/>

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

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1020982/COVID-19-response-autumn-and-winter-plan-2021.pdf

¹¹ <https://www.gov.uk/government/publications/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario>

associated with indoor settings, particularly those which are poorly ventilated and unstructured where people are likely to mix in close proximity, and settings where people engage in energetic activity, including dancing, shouting and singing.

A fair and rational balance needs to be struck between public health impact and proportionality. The attendance thresholds included in the proposal are broadly related to the relative riskiness of the activity. This would help to reduce economic disruption and disproportionate burdens, such as door checks, on smaller venues. In very large settings (that is 10,000 or more attendees), although the evidence shows that seated activities are less risky, there is likely to be an additional risk of crowding, for example on public transport outside the venues or at pinch points within the venues. The impact of a super spreader event on the community would also be greater where a higher number of people are infected. Any setting with 10,000 or more attendees would therefore be included.”

4.12 On 26 November 2021, the government published its findings from Phases II and III of its Event Research Programme (“ERP”).¹² The findings consisted of a ‘Capping summary’ and the following two scientific notes:

- a. ‘Emerging findings from studies of indicators of SARS-CoV-2 transmission risk at the Events Research Programme: environment, crowd densities and attendee behaviour’
- b. ‘A self-controlled case series study to measure the risk of SARS-CoV-2 infection associated with attendance at an Events Research Programme event.’

4.13 In the Capping summary, it was stated that (emphasis added):

“Phases II and III of the ERP were set against a background of rising infection rates driven by the Delta variant (B.1.617.2), plus an increasingly vaccinated population, and results should be considered through this lens. It should also be noted that a different epidemiological situation may have resulted in different results from the studies conducted, and it is possible that we see new variants arise that are more transmissible and possibly less responsive to vaccines than those encountered in our studies, which could change transmission risk.”¹³

¹²<https://www.gov.uk/government/publications/events-research-programme-phase-ii-and-iii-findings>

¹³ <https://www.gov.uk/government/publications/events-research-programme-phase-ii-and-iii-findings/event-research-programme-erp-capping-summary>

4.14 Section 2.5 of the Capping Summary is entitled ‘NHS App trial and COVID-status Certification Learning’. Whilst it is stated that *“Insights from the wider testing of certification through the ERP have informed the proposal for mandatory vaccine certification in a Plan B scenario”* it is not clear what those insights are or the way in which they have informed the proposal. Annex A of the Capping Summary discusses ‘COVID-status certification learnings’ and outlines the practical issues arising from certification, for example, communication of requirements, testing capacity, stewarding and crowd management considerations. There is, however, no positive recommendation of CSCs or any stated evidence of their utility.

4.15 The main findings from the ERP were that:

- a. *“Environmental and behavioural risk factors associated with COVID-19 transmission at events are complex and contextual.*
- b. *Good air quality, for the given occupancy levels, was found in nearly all venues, however there were situations leading to poor air quality in some spaces: mostly due to pockets of overcrowding but occasionally due to ventilation strategies needing improvement.*
- c. *Adherence to safety measures including physical distancing and face covering usage were higher at events or locations within an event where they were required rather than discretionary.*
- d. *Individual risk while attending an event is dependent on social interactions, on the interaction with the environment, and on the individual journey through an event.*
- e. *There was little evidence of increased transmission by attendance at the following categories of events (although these should be treated with caution due to capacity constraints in operation at the time):*
 - (i) *mainly outdoor seated*
 - (ii) *mainly outdoor partially seated*
 - (iii) *indoor seated theatre events*
- f. *Attendance at the mainly outdoor unseated events studied (Goodwood, Latitude and Tramlines) was associated with a 1.7 fold increased risk of COVID-19 transmission amongst attendees (albeit from a very low base line).”*

4.16 The recommendations were set out at paragraphs 9 and 10:

9. Venues and event organisers should consider their ventilation strategy, occupancy, operations, space utilisation, and people movement outcomes within an overall risk assessment tailored to each venue. While ventilation can reduce the risk of long-range airborne transmission, it does not eliminate the risks posed by other modes of transmission amongst close contacts (i.e. surface and droplet transmission). Appropriate mitigations are best adopted as part of a hierarchy of controls such as an enhanced ventilation strategy, requiring the wearing of face coverings and reducing crowding. High resolution fixed monitoring of air quality and people movement can be used to determine ventilation effectiveness and identify areas of higher risk to prioritise their improvement. For complex or large venues or high-occupancy events, specific mitigations are best developed in consultation with ventilation and crowd movement experts.

10. Additional consideration of the ventilation requirements in UK building regulations may be needed with a view to improve post-occupancy indoor air quality and build resilience to future infectious diseases. Analysis of the data from ERP continues and further modelling and investigation of key risk factors will be carried out.

4.17 Notably, the above recommendations do not include the introduction of CSCs. Moreover, as set out at paragraph 4.13 above, caution was advised when interpreting the results of the ERP as “they may not generalise to other contexts”. Indeed, it was explicitly stated that Phases II and III were set against the backdrop of the Delta variant and that a different epidemiological position, including other variants, may have resulted in different results from the studies conducted - and therefore inevitably different recommendations.

4.18 On 8 December 2021, the Prime Minister confirmed a move to 'Plan B', in light of the spread of the Omicron variant. As part of Plan B, the Prime Minister announced the implementation of a CSC in the form of the COVID Pass Scheme:

*"from Wednesday 15 December, and subject to parliamentary approval, the NHS Covid Pass on the NHS App will become mandatory for entry into nightclubs and settings where large crowds gather - including unseated indoor events with 500 or more attendees, unseated outdoor events with 4,000 or more attendees and any event with 10,000 or more attendees."*¹⁴

4.19 On 14 December 2021, despite a large-scale rebellion within the Conservative Party, Parliament voted in favour of the use of COVID

¹⁴<https://www.gov.uk/government/news/prime-minister-confirms-move-to-plan-b-in-england>

Passes in England¹⁵, with the relevant legislation coming into force on the same date.

The Regulations

- 4.20 As mentioned above, the legislation governing COVID Passes is found in the Regulations.
- 4.21 The venues and events subject to the Regulations are set out at Regulation 4 and Schedule 1, and include:
- 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.
- 4.22 Under Regulation 5, the onus is on the person responsible for the relevant premises to ensure that a relevant person is only admitted to their premises if they satisfy the criteria set out in Regulation 8 or the exemptions set out in Regulation 10.
- 4.23 Under Regulation 8, the relevant criteria are that:
- a. the person has completed a course of vaccination with the final dose having been received 14 days prior to entry to the premises;¹⁶ or
 - b. the person has received a negative test result within the past 48 hours;¹⁷
- 4.24 Regulation 9 sets out the forms of “*acceptable evidence*” to prove an individual meets the above criteria. These include:
- a. electronic evidence of vaccination, whether it be the NHS COVID Pass or other equivalent electronic form;
 - b. proof of a negative test; or
 - c. proof of participation in a clinical trial.

¹⁵ <https://www.theguardian.com/world/2021/dec/14/covid-plan-b-mps-back-tougher-rules-face-masks-england-omicron>

¹⁶ Regulation 8(1)(a)

¹⁷ Regulation 8(1)(b)

4.25 Regulation 6 provides that a person responsible for any event other than “nightclubs, dance halls and discotheques” can conduct spot checks on entry to their premises, where they have determined that it is “not reasonably possible to carry out a check on every person without endangering the safety of any other person attending, or providing services, at the venue or event in question”.¹⁸

4.26 Under Regulation 6(1)(a), spot checks can be carried out if:

“(a) a majority of the persons attending are expected to arrive together for the start of an event, or the opening of a venue, at a fixed time,

(b) it is not possible to set up checkpoints away from the entry points, and carrying out a check on every person would lead to a crowd gathering outside the venue or event,

(c) that crowd would—

(i) present a risk to the safety of the persons in the crowd, or to any other person, or

(ii) provide a potential target for terrorist action, and

(d) the responsible person—

(i) has carried out an assessment of—

(aa) the potential risks to the safety of persons attending the venue or event in question (“attendees”), or of any other person, which may be caused by carrying out a check on every person, and

(bb) what percentage of people within regulation 5(3) it is reasonably possible to check without endangering the safety of attendees and other persons, and

(ii) in carrying out that assessment has taken into account any guidance issued by the government which is relevant to the event or venue.”

4.27 Under Regulation 6(3), where the above determination is made, a responsible person must apply to the relevant local authority at least 10 working days before the date on which the person intends to invite entry to the event, with a written description of the assessment set out in subparagraph (1)(d).

¹⁸ Regulation 6 (1)

- 4.28 Under Regulation 6(5), the local authority has the power to approve the assessment unconditionally or with conditions, or reject the assessment. Where the assessment is rejected, the responsible person must either carry out the relevant checks on every person or cancel the event.
- 4.29 Under Regulation 6(7), if the local authority does not reply to an application or does not reply until 5 working days before the event date, the application will be treated as approved without condition.
- 4.30 If a premises fails to require proof of COVID status, it can be subject to a range of civil penalties including fines or closure.

Lack of evidence of the utility of the COVID pass scheme

- 4.31 In its rationale for introducing COVID Passes, set out at paragraph 4.11 above, the government stated that it was based on public health evidence, including evidence from SAGE and the ERP. However, the UK government has not published any scientific evidence which supports the rapid implementation of COVID passes to meet the threat posed by COVID-19 in general or the Omicron variant in particular; on the contrary, the evidence in the public domain points against their effectiveness or is, at best, inconclusive.
- 4.32 Previous SAGE advice cautioned against CSCs (“**the July Report**”) and the Minutes from the most recent SAGE meeting on 7 December 2021 convened to address the threat from the new variant (“**the SAGE Minutes**”), do not advocate for the use of Covid Passes.
- 4.33 As you will know, the function of SAGE is to provide scientific and technical advice to support UK cross-government decision makers during emergencies. If COVID passes had been a strategy deemed potentially effective to address the new variant, it is likely they would have been one of a series of measures recommended for consideration. Equally, if the government has an alternative scientific basis for introducing COVID passes, it is essential that it is transparent about it. The COVID pass scheme unquestionably intrudes on the rights and liberties of both individuals and businesses. It must be properly justified.

The July Report

- 4.34 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 including on the following basis:

“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.

The SAGE Minutes

4.35 On 8 December 2021, the UK government published the minutes from SAGE’s meeting on 7 December 2021. The SAGE Minutes noted (emphasis added):

- a. *“Given the rapid increase [in numbers of those infected with Omicron], decision makers will need to consider urgently which measures to introduce to slow the growth of infections if the aim is to reduce the likelihood of unsustainable pressure on the NHS. The effectiveness of these will be dependent on the measures chosen, and also on behavioural responses. Evidence suggests that measures could be reintroduced with expectation of a similar level of adherence as has been seen in the past. Adherence is likely to be higher if messaging and policy have clear rationales and are consistent. Consistency across the UK may help with messaging.”*
- b. Measures which *“reduce airborne spread such as ventilation, well-fitting masks and distancing or reduced density of people in indoor environments may be even more important.”*

4.36 The Consensus Statement¹⁹ published alongside the minutes stated:

“It is not yet clear whether and or how omicron escapes from natural immunity and or vaccine-induced immunity and which of these is the likely main driver of its apparent fitness advantage.”

4.37 Notably, neither the Consensus Statement nor the Minutes posit or advocate the use of CSCs in any form.

PACA Committee Report

4.38 It is worth also noting that the government has previously been criticised for considering introducing CSCs without any scientific basis. In March 2021, the UK Government launched a review into the use of CSCs to help *“handle COVID-19 from summer onwards”*. In

¹⁹ <https://www.gov.uk/government/publications/spi-m-o-consensus-statement-on-covid-19-7-december-2021/spi-m-o-consensus-statement-on-covid-19-7-december-2021>

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.

- 4.39 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*”.²⁰
- 4.40 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.²¹
- 4.41 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 analysis²² 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 carry similar amounts of the virus. Researchers call this having a similar viral load.

- 4.42 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

²⁰https://publications.parliament.uk/pa/cm5802/cmselect/cmpubadm/42/4203.htm#_idTextAnchor000

²¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999408/COVID-Status-Certification-Review-Report.pdf

²²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009243/Technical_Briefing_20.pdf

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."²³

- 4.43 The PACA Committee Report was published prior to the spread of the Omicron variant, but the criticisms raised at that time apply with even greater force to the present situation: the Government has not provided any scientific rationale for the COVID Pass Scheme. Further the justification for it is diminished rather than increased in the context of Omicron. That is because the scientific evidence in the public domain, including that referenced on the government's COVID website, suggests double vaccination provides substantially decreased protection against infection with Omicron making the utility of a measure which is partly based on double-vaccination highly questionable. That lack of protection from double vaccination is the central reason why the booster programme has been accelerated.

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

²³<https://committees.parliament.uk/committee/327/public-administration-and-constitutional-affairs-committee/news/157355/covid-passport-policy-lacks-scientific-evidence-base/>

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 intrusion on rights and liberties.

Reasons

- 5.3 The law recognises a strong principled basis for requiring decision-makers to adequately explain the reasons behind their decision. In *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71 Sales LJ noted that, whilst there was still no general duty to give reasons, where the public interest in ensuring that the relevant decision-maker has considered matters properly is especially pressing, that is a factor capable of generating an obligation to provide reasons. Similarly, where a person's private interest is particularly directly affected by a decision, that may also provide a normative basis for the imposition of a duty to give reasons. Both bases apply in the present context.

Necessity and proportionality

- 5.4 The Covid Pass 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*”²⁴.
- 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 health or morals, or for the protection of the rights and freedoms of others*”.

Discrimination and the public sector equality duty

- 5.12 The Equality Act 2010 (“EA 2010”) prohibits discrimination on the basis of the following protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- 5.13 Section 149 of the EA 2010, sets out the public sector equality duty imposed upon public authorities. This is set out, in relevant part, below:
- (1) “A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) *eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

²⁴ See *Connors v UK* (2005) 40 EHRR 9 at §82.

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and (b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act."

5.14 Under Schedule 19, paragraph 1, Ministers of the Crown and government departments are subject to the duty set out in s.149 EA 2010.

6. Grounds

Ground 1: there is no, or no sufficient, evidence base for the decision to introduce the COVID Passes

- 6.1 The COVID Pass scheme was introduced by the UK government as part of Plan B, in response to the rapid spread of the Omicron variant in the UK.²⁵ Critically, however, no evidence has been provided to suggest that the COVID Pass scheme will have any impact whatsoever in slowing the spread of Omicron. Indeed, it has been widely reported that Omicron is resistant to vaccines, and in particular that double vaccination provides substantially reduced protection against its spread when compared with previous variants.²⁶ The introduction of a vaccine certification scheme at precisely the point at which, according to the available scientific evidence, it is unlikely to work, is not reasonable.
- 6.2 That lack of evidential basis no doubt explains why COVID Passes are absent from the options suggested by SAGE to reduce transmission. Whilst the SAGE Minutes discuss the increase in Omicron and set out various measures that may be required to combat its spread, the option of COVID Passes is notably absent. As indicated above, the PACA Committee report has previously criticised a lack of scientific rationale on the part of the UK government and doubted the effectiveness of such measures. Moreover, the ERP was explicit in stating that its findings (which, in any event, did not recommend certification) were based on the Delta variant and that *“findings from the ERP should be interpreted within the context of the COVID-19 situation and the underlying COVID-19 prevalence at any given time.”* As for the Capping Summary, as noted at paragraph 4.14 above, it did not positively recommend CSCs or offer any evidence as to their utility.
- 6.3 Far from the COVID Passes being based on a *“fair and rational balance... struck between public health impact and proportionality”* which was recognised as the proper approach when considering such measures (see paragraph 4.11 above) there appears to be no evidence underpinning the necessity and proportionality of such a measure at this point in time. Such evidence is crucial in circumstances where, as set out below, the measure intrudes on the liberties and rights of individuals and businesses, and is required to

²⁵<https://www.gov.uk/government/news/prime-minister-confirms-move-to-plan-b-in-england>

²⁶<https://www.nbcnews.com/news/world/omicron-covid-variant-resistant-pfizer-vaccine-south-africa-rcna8678>

pass a proportionality test. In its absence, the decision to introduce COVID Passes is unlawful (see *Wells* above).

Ground 2: the nature of the decision to introduce COVID Passes is such that the law demands that adequate and intelligible reasons must be given for it, but the reasons given do not meet that standard;

- 6.4 Given the impact on individual privacy rights and other fundamental interests, clear and cogent reasons are required for the introduction of COVID Passes, in a way that would enable the Claimant to understand why the Government has reached its decision: see *South Buckinghamshire District Council v Porter* [2004] UKHL 33 at paragraph 36 and *Oakley*, referred to at paragraph 5.3 above.
- 6.5 The government's rationale for COVID Passes was published in September 2021, prior to the emergence of the Omicron variant. Given the comparatively low vaccine efficacy rate of Omicron in relation to previous variants, the government ought to have given a cogent explanation why the scheme should be introduced in relation to the Omicron variant. No reasons have been provided to date and the ongoing failure to provide any is unlawful.

Ground 3: the COVID pass scheme is unnecessary and disproportionate

- 6.6 The COVID Pass scheme constitutes an unnecessary, disproportionate and therefore unlawful breach of individual rights for the reasons set out below.
- 6.7 In the first instance, the Scheme is unnecessary given the lack of evidential basis to suggest that it will actually assist in reducing transmission of the Omicron variant, as set out at paragraphs 6.1 - 6.3 above.
- 6.8 In addition, there can be no doubt that the COVID Pass scheme interferes with the 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. The interference can only be justified if it is necessary and proportionate pursuant to Article 8(2).

- 6.9 Further, as set out at paragraph 4.35 above, the SAGE Minutes explicitly note that the effectiveness of any measures introduced will be dependent on “*behavioural responses*” and adherence is likely to be higher if messaging and policy have “*clear rationales*”. In the absence of any scientific evidence to support their efficacy, the government has failed to identify a clear rationale for COVID Passes.
- 6.10 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 rights. The scheme is therefore in breach of section 45D(1) of the 1984 Act and the individual’s privacy rights under Article 8 ECHR.

Ground 4: breach of s.149 EA 2010

- 6.11 In designing the COVID Pass Scheme, the Secretary of State was subject to the duty imposed by section 149 EA 2010 to have due regard to the statutory equalities objectives, in particular, when making provision for spot checks under Regulation 6.
- 6.12 The risk of arbitrary and unlawful discrimination arising from systems that provide for “random” spot checks is well established, most obviously in the immigration and policing context. In February 2021, the NHS reported that vaccine hesitancy was highest amongst black and ethnic minorities²⁷, leading to a lower take-up of the vaccine amongst these population groups. As at December 2021, vaccination rates amongst ethnic minority groups remain significantly lower than amongst Caucasians.²⁸ The reduced uptake in vaccines amongst ethnic minorities has been widely reported in the media.²⁹ Ethnic minorities, thus face a twin disadvantage from COVID passes, first that they are less likely to be able to satisfy the requirement and secondly a heightened risk of spot checks on entry to venues. Where such a risk arises, a Minister must assess the risk and extent of any adverse impact before the adoption of the proposal and not as a “*rear-guard action*” (see *R (Bracking) v Secretary of State* [2014] Eq LR 60, per McCombe LJ, at §26).

²⁷<https://www.england.nhs.uk/south-east/wp-content/uploads/sites/45/2021/05/Vaccination-and-race-religion-and-belief-A4.pdf>

²⁸<https://reports.opensafely.org/reports/vaccine-coverage/#Cumulative-vaccination-figures-among-50-54-population>

²⁹<https://www.bbc.co.uk/news/newsbeat-59523439>

6.13 In deciding to make provision for spot checks, under Regulation 6, the Secretary of State had a duty to ensure that adequate safeguards were in place to minimise the risk that individuals subject to the spot checks would not be selected on the basis of a protected characteristic and to ensure that a venue owner would not have unfettered discretion over who they subjected to such checks, without any form of safeguard against unlawful discrimination. At the very least, this was a consideration that the Secretary of State had a duty to have due regard to, to comply with its obligations under s.149 EA 2010. As per the Explanatory Note to the Regulations, no impact assessment was undertaken in respect of the Regulations and it therefore appears that no such consideration has taken place when formulating the COVID Pass Scheme. Such failure is an unlawful breach of s.149 EA 2010.

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 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 UK 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 UK 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 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 **275730/1.JHAL.SMAR**. 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


11.3 We look forward to hearing from you.

Yours faithfully



Bindmans LLP