

THE QUEEN
on the application of
BIG BROTHER WATCH LIMITED

Claimant

-and-

WELSH MINISTERS

Defendants

STATEMENT OF FACTS AND GROUNDS OF CLAIM

References are to the tabs and sequential page numbers of the Permission Bundle ("B")

Essential reading:

- *The Claimant's 9 November 2021 pre-action letter ("**the PAP Letter**") (B/D/547)*
- *The Defendant's 26 November 2021 pre-action response letter ("**the PAPR**") (B/D/568)*
- *The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021 ("**the October Covid Pass Regulations**") (B/E/789)*
- *Regulations 2, 16, 16A and 18 of The Health Protection (Coronavirus Restrictions) (No 5) (Wales) (Amendment) (No 17) Regulations 2021 amended the Health Protection (Coronavirus Restrictions) (No 5) (Wales) Regulations 2020 ("**the Principal Regulations**") (B/E/640)*
- *'COVID Pass: guidance for businesses and events' ("**the Covid Pass Guidance**") (B/E/801)*
- *The Claimant's letter of 2 December 2021, regarding disclosure (B/D/599)*
- *The Defendant's response letter of 7 January 2022, regarding disclosure (B/D/608)*
- *The witness statement of Ms Silkie Carlo ("**Carlo WS**") (B/B/53)*

I. INTRODUCTION AND SUMMARY

1. The Claimant seeks judicial review of the following decisions and/or continuing acts of the Defendants:

- (a) The Defendants' decision to implement in Wales by means of the October Covid Pass Regulations (B/E/789)¹, a mandatory Covid Pass Scheme. That scheme made the right to access a range of events, venues or gatherings conditional on individuals obtaining and presenting a Government issued pass ("**a Covid pass**") which confirms that they have either (i) completed a full course of approved Covid-19 vaccination, (ii) obtained a recent negative result in a qualifying Covid-19 test, or, until recently

¹ The October Covid Pass Regulations amended the Principal Regulations (B/E/640)

- (iii) previously tested positive for Covid-19 and recovered within a defined period (and so may have some level of so called ‘natural immunity’ in respect of Covid-19)² (“**the Covid Pass Scheme**”); and
- (b) The Defendants’ subsequent decisions, or on-going decision or acts: (i) to maintain (and expand) the application of the Covid Pass Scheme in Wales, and/or (ii) not to withdraw or disapply the Covid Pass Scheme in Wales.
- (together, “**the impugned measures**”).
2. The Claimant is a non-partisan public interest organisation 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. The domestic and European courts have recognised the Claimant's standing to bring public interest litigation in respect of the privacy rights of individuals: see e.g. *Big Brother Watch & Others v United Kingdom* (Applications nos. 58170/13, 62322/14 and 24960/15). The issues raised by the Covid Pass Scheme fall squarely within the Claimant’s remit as an organisation and, to that end, the Claimant submitted a detailed response to the UK Government’s consultation on the use of Covid Status Certification on 29 March 2021.
3. The Defendants include the Minister within the devolved Welsh Government responsible for the running of the National Health Service (“**NHS**”) in Wales and all aspects of public health and health protection in Wales, and the First Minister who was responsible for the making of the September Covid Pass Regulations. Pursuant to s 57(4) of the Government of Wales Act 2006, any act of the First Minister or any of the Welsh Ministers is to be treated as an act of each of them.
4. Requiring people to provide to other private citizens and/or public officials, by way of a pass, information as private and personal as their vaccination or health status, before they may engage in social, personal and cultural activities is a profound step for any government to take. It significantly encroaches on fundamental rights and liberties and alters the

² On 10 December 2021 the Health Protection (Coronavirus Restrictions) (No. (Amendment) (No. 22) Regulations) amended reg. 16A of the Principal Regulations to provide that a Covid Pass would no longer be available on grounds of an individual having a positive result from a polymerase chain reaction test taken by the person no more than 180 days and no less than 10 days before entering relevant premises.

relationship between private individuals and private businesses, and that between individuals and the state. The impact upon individuals, and society as a whole, is consequently far-reaching: see paragraphs 10 - 11 (B/B/56 - 57) of the Witness Statement of Silkie Carlo ("**Carlo WS**"), setting out the impact on individuals, which the Court is respectfully requested to read in full.

5. As a responsible, public interest organisation, the Claimant actively supports the adoption of public health measures to address the risks to public health arising from Covid-19 – provided they are lawful and proportionate. It is the Claimant’s case that the Covid Pass Scheme is not.
6. In summary, the Claimant’s case is that coercive State measures with far-reaching and significant implications for individual rights and liberties such as the Covid Pass Scheme must be supported by evidence that demonstrates their necessity, proportionality and rationality and a lawful decision-making process should take place that can be comprehensibly explained. In the present case, regrettably, the Defendants have to date failed to identify or disclose any such evidence justifying the impugned measures. Such evidence as the Claimant has, by its own investigations, been able to identify indicates that the impugned measures are neither necessary nor proportionate. Further, the Defendants’ explanations of the evidential basis for what the measures seek to achieve differ between what has been said publicly and in their Judicial Review Pre-Action Protocol ("**PAP**") response letter ("**PAPR**") (B/D/576).

The Claimant, by its own PAP Letter (B/D/547), requested (§8.1) that the Defendants provide disclosure of (*inter alia*):

“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; all documents recording the Welsh government's analysis of the evidence at subparagraph a. above and the conclusions reached; ... 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...”

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7. This material comprises the essential decision-making documents relating to the impugned measures.
8. Unfortunately, the Defendants (by the PAPR and subsequent correspondence) refused to provide the essential decision-making documents on which the impugned measures are based and which record their own conclusions. The Claimant submits that:
 - (a) The Defendants' refusal to provide these essential documents constitutes a breach of the duty of candour;
 - (b) Given the different ways in which the Defendants have explained the evidence for, and advice on, the Covid Pass Scheme in public, and in the private PAPR (see further below), it is critically important that the underlying documents on which the Defendants rely for the lawfulness of the scheme are disclosed (see *R(Citizens UK) v SSHD* [2018] 4 WLR 123 at §106-107; *R(Hoareau) v SSFCA* [2018] EWHC 1508 at §20);
 - (c) If they are not so disclosed the only reasonable inference to be drawn from the available evidence, is as summarised below, namely that there was no or insufficient evidence to justify the impugned measures.
9. The Claimant's case is that the Defendants' decisions and/or continuing acts were unlawful because:
 - (a) Section 45D of the 1984 Act (as defined below) provides (in relevant part) that a restriction or requirement may not be implemented unless the responsible Minister considers, when making the regulation(s), that the restriction or requirement is proportionate to what is sought to be achieved by imposing it. The Claimant submits, in summary, that the evidence before the Defendants did not provide a lawful, proportionate or rational basis establishing the necessity or proportionality of the impugned measures (putting matters at their lowest, the Defendants have not, to date, demonstrated or provided any evidence base providing lawful justification for the relevant restrictions or requirements).
 - (b) The Defendants have failed to take any, or any adequate, measures to monitor or measure the effectiveness of the Covid Pass Scheme in practice, thereby perpetuating the inadequacy of the evidence base for the scheme, even now that it is being implemented, and even though the Defendants have a statutory obligation to review the scheme to ensure it remains necessary and proportionate.

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- (c) Following the introduction of the Covid Pass Scheme, the Omicron variant has become dominant in Wales, community prevalence of Covid-19 has significantly increased and clinical advice has confirmed that a course of vaccination provides significantly reduced (and limited) efficacy in preventing transmission and infection by Omicron. Each of these considerations reduces any justification that might have existed to support the introduction of the Covid Pass Scheme of which completion of a course of vaccination is a significant component. Notwithstanding this, the Defendants have maintained, expanded and failed to withdraw the Scheme. The Claimant submits that these decisions, or continuing acts of the Defendants, are neither lawful, proportionate or rational.

II. LEGAL FRAMEWORK

10. Section 45C(1) of the Public Health (Control of Diseases) Act 1984 ("**the 1984 Act**") (B/E/621) provides that the Defendants may 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.*"
11. Section 45(3)(c), of the 1984 Act (B/E/621) provides that the power to make regulations encompass provisions "*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.*"
12. Section 45D of the 1984 Act (B/E/622) provides (in relevant part) that a restriction or requirement may not be implemented unless the responsible Minister considers that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.
13. Reg 2 of the Principal Regulations (B/E/644) requires the Defendants to review the need for the restrictions and requirements imposed by the Principal Regulations (including the impugned measures), and whether those restrictions and requirements remain proportionate to what the Defendants seek to achieve by them, at least once in every period of 21 days ("**the Mandatory 21-day Review**").
14. In discharging their functions in the present case, the Defendants were required to act rationally, make due enquiry, have regard to relevant considerations, disregard relevant considerations and not make material errors of fact.

15. Section 6 of the HRA (B/E/635) requires the Defendants to comply with the obligations imposed by Arts. 8 and 11 ECHR in discharging their functions relating to the Covid Pass Regulations.

III. BACKGROUND FACTS

A. The UK's Covid-19 vaccination program and the relevance of vaccination to likelihood of Covid-19 transmission and infection

16. In January 2021, the UK Government published its plan (B/C/116) for a national program to vaccinate priority groups (based on increased risk of serious illness or death) in respect of Covid-19. The relevant priority groups comprised:
 - (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.
17. Individuals falling within the priority groups represented 99% of deaths in the UK caused by Covid-19 as at 13 January 2021.
18. As at 19 October 2021, more than 2.23 million people in Wales had received their full course of vaccination in respect of Covid-19 (B/C/413). Best practice is described by the Government as vaccinating 75% of total population cohorts. This was achieved in Wales as at 19 October 2021.
19. The two Covid-19 vaccines most widely used in the UK vaccination program are the Astra-Zeneca ("AZ") and Pfizer vaccines. Materially, neither the AZ or Pfizer vaccines provide a guarantee or high level of protection against the transmission of Covid-19, i.e. the fact that an individual has been vaccinated under the UK national vaccination programme does not

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mean that they will not, or are very unlikely to, be infected by Covid-19 and/or transmit that infection to others with whom they come into contact. This is the case, in particular, in respect of the Omicron variant that is now dominant within Wales and the United Kingdom (see further below).

20. This is reflected in NHS guidance (B/C/541), which advises of the risk of vaccinated individuals transmitting and being infected with Covid-19 and recommends that social distancing measures should be applied and masks worn where it is difficult to maintain physical distancing.

B. The evidence base regarding the proportionality of Covid Pass measures in preventing Covid-19 transmission and infection

21. In March 2021, the UK Government commenced a review (B/C/159) regarding the potential introduction of COVID Status Certifications ("CSCs"). These measures were described by the UK 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.*", i.e. a form of Covid pass regime.
22. In response to this announcement, the Public Administration and Constitutional Affairs Committee ("the PACAC") undertook an inquiry into the implications of, and concerns arising from, the potential introduction of a Covid Pass regime.
23. On 12 June 2021, the PACAC published its inquiry report (B/C/172). So far as is relevant, the PACAC concluded that the UK Government had failed to identify or establish any sufficiently strong scientific case to justify introducing CSCs, and that there appeared to be no scientific rationale supporting the proposals regarding what premises or events would be subject to the CSC regime. The PACAC concluded that the UK Government appeared to be "*making decisions on a largely arbitrary basis*" (B/C/176). The UK Government in its response nonetheless maintained that it had identified a public health benefit and intended to introduce Covid passes in future.
24. On 5 July 2021, the Scientific Advisory Group for Emergencies ("SAGE") released a paper (B/C/84) providing its advice relating to Covid pass scheme proposals. So far as is relevant,

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the executive summary recorded SAGE's conclusions and advice in the following terms (B/C/86):

"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.

...

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." (emphasis added)

25. In summary, SAGE concluded and advised that a Covid pass regime should not be considered unless there was a high degree of confidence (based on appropriate scientific evidence) that vaccinated individuals would not transmit Covid-19 to others.

26. On 9 September 2021, the PACAC stated, in relevant part (B/C/253):

"...the latest analysis 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." (emphasis added)

27. The PACAC's Chair (William Wragg MP) stated (B/C/254):

"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... 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... 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..."

28. The Technical Advisory Cell ("TAC") is the body "tasked with providing coordination of scientific and technical advice to support Welsh government decision makers during emergencies.". On 14 September 2021, TAC issued a report entitled 'Advice on 'Vaccine Passports' ("the

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September TAC Report") (B/C/279). The September TAC Report concluded, so far as material (B/C/281):

- 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. 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 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. 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)."*
29. There have been a range of other studies and reports which have addressed Covid Passes in one form or another (see, for example, Carlo WS at §43-64). A TAC report dated 2 December 2021 addresses their possible benefits as follows:

While applying COVID passes alongside other protective measures has the potential to reduce the number of infectious people in the relevant settings, at the time of writing there remains no peer-reviewed published evidence to demonstrate this. However, it is important to recognise an absence of evidence of impact should not necessarily be interpreted as evidence of absence of an impact.

Previous advice has also identified the need for caution in implementing vaccine certification schemes, summarised by TAG, SAGE and the wider literature, as well as recognising the potential for disbenefits to impact disproportionately on socially excluded populations...'

30. The report also stated:

“any public health measures should only exist whilst there is a real likelihood of measurable societal harm (e.g. from overwhelming healthcare provision) and that every step should be taken to measure the benefits and harms of protective measures and seek to improve their effectiveness through iteration, and to reduce associated harms (e.g. economic support) or remove them if they cannot be evidenced as affording proportionate protection.”

C. **The Defendants’ decision to implement the impugned measures, and the evidence base relied upon by the Defendants**

31. On 16 September 2021, the Defendants conducted a Mandatory 21 Day Review under the Principal Regulations (B/C/288).

32. On 17 September 2021 (3 days after the date of the September TAC Report), the Defendants announced an intention to introduce a Covid Pass Scheme. One of the Defendants, First Minister Mr Mark Drakeford stated, in relevant part (B/C/292):

“...the alert level [in respect of Covid-19] will remain at zero for the next 3 weeks.

...

The very strong advice we have from our scientific advisers is to take early action to prevent infections increasing further.

*The last thing we want is further lockdowns and for businesses to have to close their doors once again. That’s why we must take **small but meaningful action** now to control the spread of the virus and reduce the need for tougher measures later.” (emphasis added)*

33. The public statement of 17 September 2021 demonstrates that the Defendants’ position was, and is:

- (a) That the effect of the impugned measures, and nature and extent of the interference to which they give rise with protected rights and liberties, was (and is) “small”.
 - (b) That there is evidence to support a proposition that the Covid Pass Scheme will make a “meaningful” contribution to preventing or reducing Covid-19 transmission.
34. It appears that it was on this basis that the Defendants considered it appropriate to proceed to introduce the measures notwithstanding that the position in Wales in respect of Covid-19 was such that the alert level would remain at zero for the next three weeks, i.e. the alert level at which none of the restrictions or measures to mitigate risks arising from Covid-19 provided for under the Principal Regulations would be activated.
35. On 5 October 2021, there was a Welsh Senedd vote relating to the Defendants’ Covid Pass Scheme proposal (B/C/369). Prior to the vote, the Defendants stated (B/C/389):
- “We fully understand that businesses want to remain open, and this measure will help us to do that throughout the winter. And let me be clear: not supporting this measure today will be an act of gross irresponsibility when it comes to public health in Wales. And this measure will allow the facilities to stay open in the face of one of the most challenging winters that we are yet to face. The public is on our side on this, and they are watching you in this Chamber today, and I urge you to support this measure...”*
36. 28 Senedd members voted in support; 27 members voted in opposition (B/C/397). It has been publicly reported that one Senedd member, Mr Gareth Davies, was prevented from voting due to technical issues and would have voted against the proposal (B/C/393). This would have resulted in the vote being a tie, with the effect that the impugned measures would not have been approved.
37. On 6 October 2021, the First Minister said the following on BBC’s Today programme (B/C/394):
- “[We] take the advice of SAGE, which says that you need to take measures early, and you need to take those low hanging measures that you can put into place easily, and that builds your defence against coronavirus as we go into the most difficult time of the year. But Covid Pass is very easy to use, it’s widely used already, we are focusing on the high risk venues, it will help to keep Wales open, and to keep Wales safe.”*

38. Later the same day, the Defendants made the October Covid Pass Regulations (B/E/789), introducing the impugned measures. The Regulations were made pursuant to ss. 45C(1) and (3)(c), 45F(2) and 45P(2) of the 1984 Act (B/E/620). On 11 October 2021, the impugned measures came into force.
39. The October Covid Pass Regulations introduced the impugned measures by amending the Principal Regulations (B/E/640) by the insertion of a new reg. 16A.
40. Reg. 16A as introduced (B/E/659), provided (in material part):
“Specific measures applicable to premises where music is provided for dancing or at which specified events are held
- 16A. – (1) *Where regulation 16(1) applies to a person responsible for premises described in paragraph (2), the reasonable measures to be taken by the responsible person under Step 3 of that regulation must include measures to ensure that a person aged 18 or over is only permitted to be present on the premises if the person possesses evidence –*
- (a) complying with the requirements in paragraph (6), that the person has completed a course of doses of an authorised vaccine,*
 - ...*
 - (c) of a negative result from a qualifying test taken by the person no more than 48 hours before the person enters the premises, or*
 - (d) of a positive result from a polymerase chain reaction test taken by the person no more than 180 days and no less than 10 days before the person enters the premises.*
- (2) *The premises referred to in paragraph (1) are –*
- (a) premises that meet all of the following conditions –*
 - (i) the premises are authorised for the sale or supply of alcohol,*
 - (ii) the premises provide live or recorded music for members of the public or members of the venue to dance, including nightclubs, discotheques and dance halls, and*
 - (iii) the premises are open at any time between midnight and 5.00 a.m. (however where this condition is met, the requirement in paragraph (1) applies to the premises at any time they are open, subject to paragraph (3)(a) or (e));*
 - (b) premises at which an event is taking place and more than 10,000 people are in attendance at any time;*
 - (c) premises at which an event is taking place to any extent indoors, where –*
 - (i) more than 500 people are in attendance at any time, and*
 - (ii) not all the persons attending the event are normally seated during the event;*

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- (d) premises at which an event is taking place outdoors, where –
 - (i) more than 4,000 people are in attendance at any time, and
 - (ii) not all the persons attending the event are normally seated during the event.

...

- (6) For the purposes of paragraph (1)(a), the evidence that a person has completed a course of doses of an authorised vaccine must –

- (a) show that –

- (i) the course of doses was administered to the person in the United Kingdom, under the United Kingdom vaccine roll-out overseas, or in a relevant country, and

- (ii) the day on which the person enters the premises is more than 14 days after the day on which the person completed that course of doses;

- (b) in relation to course of doses of vaccines administered in the United Kingdom, be provided to the person by or on behalf of the Government of the United Kingdom, the Scottish Ministers, the Welsh Ministers or a Northern Ireland department (including by means of letter, text message, e-mail, the NHS COVID Pass website or the NHS smartphone app developed and operated by the Secretary of State);

..."

41. Pursuant to reg. 25 of the Principal Regulations (B/E/673), the enforcement of the impugned measures is a matter for local authority enforcement officers. Under reg. 26 (B/E/674), provision for enforcement is made by Schedule 8 to the Principal Regulations. The enforcement scheme in Schedule 8 provides that, if an enforcement officer considers that a responsible person is not complying with the obligations imposed on him or her by reg. 16A, the enforcement officer may issue a premises improvement notice setting out necessary and proportionate steps in order to ensure that the responsible person complies with those obligations (see paragraph 1 of Schedule 8; (B/E/741)). Under reg 42(3) (B/E/682) a person who fails without reasonable excuse to comply with a premises improvement notice commits a criminal offence.

42. If a responsible person fails to comply with a premises improvement notice, and the enforcement officer considers that the closure of the relevant premises is necessary for the purpose of minimising the risk of exposure to the coronavirus, the enforcement officer may issue a premises closure notice (see paragraph 2 of Schedule 8; (B/E/741)). Where a premises closure notice is issued, the responsible person must ensure that the relevant premises are closed as soon as reasonably practicable after the notice takes effect (see

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paragraph 3(1) of Schedule 8; (B/E/742)). Under reg 42(4) (B/E/682), a person who without reasonable excuse contravenes paragraph 3(1) of Schedule 8 commits a criminal offence.

43. The October Covid Pass Regulations also recorded, inter alia, that:
- (a) The Defendants considered that restrictions and requirements imposed by the Regulations were proportionate to what they sought to achieve, which was a public health response to the public health threat posed by Covid-19 (B/E/643).
 - (b) However, no regulatory impact assessment was prepared as to the likely cost and benefit of complying with the Regulations (B/E/790).
44. On 8 October 2021, pursuant to reg. 18 of the Principal Regulations (B/E/668), the Defendants published the Covid Pass Guidance (B/E/801). The Guidance explained the Defendants' reasoning and justification for making the October Covid Pass Regulations in the following terms (B/E/802):
- "There has been an increase in the number of COVID cases and community transmission across Wales. We are preparing for a winter which could 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" which may reduce the need for tougher measures later to control the spread of the virus. We take this advice seriously because none of us want to see businesses having to close again and further lockdowns introduced, if they can be avoided.*
- COVID Passes have been introduced – to form part of the range of reasonable measures to mitigate the spread of COVID through the community, and the associated harms that it brings. There is also some evidence of so-called super spreading events associated in the UK and globally with nightclubs, sports events, and festivals."*
45. So far as is material for present purposes, the Covid Pass Guidance:
- (a) Repeated the Defendants' position that the impugned measures were a "low cost" (or "small") interference.
 - (b) Stated that the objective of the impugned measures was to mitigate the spread of Covid-19 in the community.
 - (c) Referred to, but did not describe or identify, evidence of "super spreading events" that were "associated with" nightclubs, sports events and festivals.

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- (d) Did not refer to, describe or identify any empirical or clinical evidence of any sort establishing or supporting a proposition that a Covid pass regime would be effective to reduce community transmission.
 - (e) Did not refer to, consider or have regard to the September TAC Advice or its contents.
46. The PAPR (at §15; (B/D/579)) states that before making the October Covid Pass Regulations the Defendants were advised that:
- “...there was limited information available about the effectiveness of a vaccine certificate scheme, although it was assessed that, on balance, there **might** be a **small marginal gain** to be derived from such a scheme. In particular, Cabinet were advised that a vaccine certificate scheme would be unlikely significantly to reduce case numbers in Wales.”* (emphasis added)
47. The PAPR also states that the Defendants were advised that (§15; (B/D/579)):
- (a) any small marginal gain a Covid Pass Scheme might produce would be further diminished if community prevalence of Covid-19 increased; and
 - (b) the Executive Board of Directors of Public Protection Wales (i.e. the most senior body of Public Health Wales – the Defendants’ own expert adviser) had advised that vaccination certificate schemes did **not** have a public health benefit, and could provide a false sense of security to individuals who attended a venue or event covered by such a scheme.
48. The PAPR (at §19; (B/D/580)) seeks to characterise the overall advice received by the Defendants prior to making the October Covid Pass Regulations in the following terms:
- “The overall advice from officials concluded that although the Covid Pass Scheme might not have a significant public health benefit under the conditions then prevailing, it could have some limited benefits.”*
49. The Claimant submits that this does not accurately summarise the overall advice which the PAPR states the Defendants received: which was: (i) it was “unlikely” that a Covid Pass Scheme would significantly reduce Covid-19 case numbers in Wales (see PAPR, §15), but on balance there ‘might’ be a ‘small marginal gain’ and (ii) in the expert view of the Executive Board of Directors of Public Protection Wales, the Defendants’ own expert body, vaccine certificate schemes did not have a public health benefit.
50. The PAPR also states (at §41; (B/D/586)):

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“the Welsh Ministers accept that the Covid Pass Scheme might make only a small, and probably unmeasurable, contribution to reducing (or slowing the growth in) serious cases of COVID-19, hospitalisations and deaths.”

51. Materially, the PAPR does not suggest that the Defendants received any advice or evidence establishing that the impugned measures would, were likely to or even had a significant or realistic prospect of achieving, either alone, or by way of contribution as one of a series of measures, any significant reduction in (or slowing the growth in) serious cases of COVID-19, hospitalisations and deaths.
52. Despite the Claimant’s repeated reasonable requests, the Defendants have to date refused to disclose either: (i) the *“limited information available about the effectiveness of a vaccine certificate scheme”*, or (ii) the assessment *“...that, on balance, there might be a small marginal gain to be derived from such a scheme”*.
53. On 28 October 2021, the Defendants made a decision to expand the scope of the Covid Pass Scheme to cinemas, theatres and concert halls in Wales (B/C/416).
54. In a Plenary session on 9 November 2021, to consider the extension of the Covid Pass Scheme to include other venues, the Defendants stated (B/C/476):

“[e]xperts tell us that we should go early and they tell us that every little contribution adds to our ability to contain what is a deadly virus. It's no surprise that the evidence is still building – this is a new virus, and it's constantly changing.”
55. If this was further expert advice on the ongoing utility and contribution of the Covid Pass Scheme, it has not been disclosed, however.
56. On 9 November 2021, the Defendants proceeded to make the Health Protection (Coronavirus Restrictions) (No 5) (Wales) (Amendment) (No 19) Regulations 2021 (**“the November Covid Pass Regulations”**) (B/E/822), which came into force on 15 November 2021. The November Covid Pass Regulations amended reg. 16A of the Principal Regulations to extend the Covid Pass Scheme to cinemas, concert halls and theatres. On 18 November and 9 December 2021, the Defendants conducted Mandatory 21 Day Reviews (B/C/481-482 and 498-500).

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57. On 10 December 2021, the Defendants made the Health Protection (Coronavirus Restrictions) (No. (Amendment) (No. 22) Regulations 2021 (“**the 10 December Covid Pass Regulations**”) (B/E/825). So far as relevant, the Regulations amended reg. 16A of the Principal Regulations to provide that a Covid Pass would no longer be available on grounds of an individual having a positive result from a polymerase chain reaction test taken by the person no more than 180 days and no less than 10 days before entering relevant premises. In summary, the effect of the amendment was that a Covid pass would henceforth only generally be available to individuals who had either completed a full course of approved vaccination or obtained a negative result from a qualifying Covid-19 test within 48 hours of the proposed time or entry to the relevant premises.

D. Subsequent relevant measures and developments

58. On 16 December 2021, Imperial College London published ‘Report 49 - Growth, population distribution and immune escape of Omicron in England’ (“**the Imperial Omicron analysis**”) (B/C/501). Using data from the UKHSA and NHS for all PCR-confirmed SARS-CoV-2 cases in England who had taken a COVID test between November 29th and December 11th 2021, the study identified that a full course of vaccination in respect of Covid-19 (as defined in the Principal Regulations and the impugned measures), i.e. two doses, would only provide efficacy of between 0-20% in preventing Omicron transmission and infection.

59. On 17 December 2021, the Defendants announced that with effect from 27 December 2021, all nightclubs in Wales would be closed (B/C/513). On 21 December 2021, the Defendant announced that all sporting events in Wales would be played behind closed doors (B/C/515).

60. On 26 December 2021, the Defendants made the Health Protection (Coronavirus Restrictions) (No. (Amendment) (No. 25) Regulations 2021 (“**the 26 December Covid Regulations**”) (B/E/830). The 26 December Covid Regulations provided, in material part, that the whole of Wales would move from Alert Level 0 to Alert Level 2 with effect on 26 December 2021, meaning that the restrictions and requirements in Schedule 2 to the Principal Regulations would take effect on that date. So far as relevant, those restrictions and requirements, included the requirement that “[n]ightclubs, discotheques, dance halls or

other venues authorised for the sale or supply of alcohol where live or recorded music is provided for members of the public or members of the venue to dance” in Wales must close (B/E/701).

61. On 29 December 2021, the Defendants’ Deputy Chief Medical Officer (Dr Christopher Jones) publicly confirmed that the Omicron variant was now the dominant strain of Covid-19 in Wales and that the extent of that dominance would increase further due to the Omicron variant’s exponential rate of transmission and growth (B/C/518). This meant that the efficacy of the Covid Pass Scheme, such as it was, was reduced even further: The evidence before the Defendants at the time of its introduction had indicated (see the September TAC Report; (B/C/281)) that its effectiveness was likely to be lower when infection rates are high, and a full vaccination (i.e. two doses) was significantly less effective at preventing infection with the Omicron variant than with Delta.

E: Implementation of the Covid Pass Scheme

62. Regulation 18 of the Principal Regulations (B/E/668) requires businesses and venues governed by the requirement in Regulation 16A(1) to have regard to the Covid Pass Guidance (B/E/801) about the reasonable measures they must take. That guidance explains that:
- (a) What is reasonable depends on the venue and the circumstances. Some venues with smaller capacity such as nightclubs would ordinarily be expected to check the Covid Pass of each individual; others with a larger intake might not be required to do so. A venue will be required to prepare risk assessments to *‘justify what it considers to be a reasonable measure in the context of checking, taking account of its other statutory duties for example health and safety of its customers, wider public order issues and potential terrorism risks’* (B/E/809).
 - (b) Individuals can demonstrate the required status either with the digital NHS Covid Pass, a paper based certificate of vaccination or a text or e-mail from the government confirming a negative test result (B/E/811).
 - (c) Businesses or events will be able to either scan the NHS COVID pass via a Verifier App or will be able to operate *‘validation of the pass by sight’* (B/E/816).
 - (d) Lateral flow test results which should be taken within 24 hours of entry and must be taken within 48 hours beforehand (there is a distinction between the Guidance and the Regulation) can be evidenced either via the NHS Covid Pass (a QR code) or with an e-mail or text message (B/E/819).

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(e) For those claiming to be exempt on the grounds they can neither be vaccinated or take a lateral flow test, the reason for the exemption (but not the details) should be requested. *“If individuals claim they are clinically unable to take a lateral flow test, then the venue should recognise the exemption and allow that individual entry. In these circumstance, venues will not be required to consider evidence of the exemption”* (B/E/807). However, in future, a clinical exemption will be certified via the Covid Pass.

63. The Defendants have recognised that the scheme is vulnerable to abuse not least because individuals can easily falsify lateral flow tests (B/C/401). For that reason an offence has been introduced under Regulation 40A (B/E/681) of possessing evidence of the kind required by Regulation 16A(1) which is false or misleading. The offence is punishable by conviction with a fine, or a fixed penalty notice with a fine of £60.

F: Review of the Covid Pass Scheme

64. Reg 2 of the Principal Regulations requires the Defendants to review whether the impugned measures remain proportionate to what the Defendants seek to achieve by them, at least once in every period of 21 days: see §13 above and (B/E/644).

65. As indicated above, the Defendants have explained that *“the Welsh Ministers accept that the Covid Pass Scheme might make only a small, and probably unmeasurable, contribution to reducing (or slowing the growth in) serious cases of COVID-19, hospitalisations and deaths”* (PAPR §41; (B/D/586)). When asked to disclose what steps they were nonetheless taking to attempt to measure the contribution of the Covid Pass Scheme to protecting public health and the information which was the result of that monitoring (see letter of 2 December 2021 at §4; (B/D/600)), the Defendants (see letter of 7 January 2022 at §25; (B/D/614)) repeated the assertion that the contribution of the Covid Pass Scheme was probably unmeasurable and stated (§26; (B/D/614)):

“...it has not been possible to collate evidence of the effectiveness of the Covid Pass Scheme. However, the fact that it is difficult to collate evidence of effectiveness cannot be equated with a lack of effectiveness, and the Welsh Government will continue to give consideration as to whether, and if so how, it might be possible to measure the impact of interventions such as the Covid Pass Scheme, whether individually or cumulatively.”

66. The Defendants’ response indicated that no further evidence of the effectiveness of the Covid Pass Scheme was available when it has been reviewed (see §27).

IV. GROUNDS OF CHALLENGE

A. **Ground one: The impugned measures do not satisfy the proportionality requirement imposed by s. 45D of the 1984 Act, are without a rational basis in evidence and are therefore *ultra vires***

67. The impugned measures constitute significant and far-reaching interferences with the liberties, rights and interests of: (i) the individuals within Wales who are required to produce a Covid Pass containing personal, sensitive medical information in order to be permitted to access large gatherings and affected venues, and (ii) business owners whose economic activities are materially affected by only being permitted individuals who are able and willing to obtain and present the pass.

68. In particular, by requiring such business owners to demand production of this type of information as a condition of entry and by also requiring them to deny entry to those who i) are unable or unwilling to produce a Covid Pass or ii) whose health status does not meet the requirements of the Covid Pass Regulations, the Defendants are:

- (a) Effecting a fundamental alteration in the relationship between private persons, by forcing sensitive matters of personal significance to be revealed between strangers as a condition of exercising freedom of access to places, gatherings of people and the provision of services in the public sphere.
- (b) Interfering in the private lives of individuals by simultaneously i) limiting their access to cultural and social events and spaces, ii) requiring them either to be vaccinated or take tests proving their health status **and** iii) requiring them to disclose sensitive personal information to others.

69. These significant encroachments on cherished rights and liberties are why the Covid Pass Scheme is controversial. It is also why, as the legislation recognises, the scheme must be justified as necessary and proportionate.

70. The fundamental nature of the rights and liberties in play is underlined by Blackstone's Commentaries on the Laws of England which provide, in relevant part:

"Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists of the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations

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as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause" (Commentaries, Book I, Ch 1, p130).

71. Equally Article 8(1) ECHR provides that "Everyone has the right to respect for his private and family life, his home and his correspondence" and Article 11 ECHR provides the basic right to freely to associate with others. 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 (*Connors v UK* (2005) 40 EHRR 9 at §82)). It thus includes: (i) the protection of private personal information, especially medical data (*I v Finland* (Application no. 20511/03); *Z v Finland* (1997) 25 EHRR 71); (ii) personal autonomy, including the right to conduct one's life in a manner of one's own choosing (*Pretty v United Kingdom* (2002) 35 EHRR 1 at §§61-62), (iii) the right to personal development or fulfilment, which includes the right to have relationships with other human beings and the outside world (*Niemitz v Germany* (1992) 16 EHRR 97 at §29), social ties with the community (*Uner v Netherlands* (2007) 45 EHRR 14 at §59) and relationships in the sphere of employment (*Sidabras v Lithuania* (2006) 42 EHRR 6 at §§47-48).
72. It follows that the material reliance by the Defendants in their decision-making process on the proposition that the effects of the impugned measures can properly be characterised as "small" (B/C/292) and that they were "low-hanging" (B/C/394) was flawed and unlawful³. Indeed, the September TAC Report (B/C/279) identified the potential risks to public health of the Covid Pass Scheme in the form of perverse incentives **against** vaccination in terms which echo the reasoning in *I v. Finland*, a case concerning private data about the applicant's HIV status, where the European Court of Human Rights explained at §38:

*"The protection of personal data, in particular medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. **It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.** The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent*

³ The Defendants' PAPR equally fails to appreciate the nature and gravity of the interference, erroneously comparing the Covid Pass Scheme to the ban on hunting (see §63-65)

with the guarantees in Article 8 of the Convention (see Z v. Finland, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, §§ 95-96)." (emphasis added)

73. Section 45D of the 1984 Act provides, in relevant part, that regulations may not include restrictions or requirements (B/E/622):
- "unless the appropriate Minister considers, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved."*
74. The relevant statutory criterion imposes a standard of proportionality review. As explained by the Supreme Court in *Bank Mellat v HM Treasury* [2014] AC 700 at §20, per Lord Sumption, this requires consideration of:
- "(i) whether its objective is sufficiently important to justify the limitation...; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."*
75. The Defendants have stated that the legitimate aim which the impugned measures are said to pursue is the reduction of Covid-19 transmission and infection in the community. The Claimant accepts that this constitutes a legitimate aim. However, the Claimant submits that the impugned measures do not satisfy stages 2 to 4 of the proportionality test, nor could the Defendants be so satisfied.
76. At the date of making the October Covid Pass Regulations, there appears to have been no evidence or clinical advice before the Defendants establishing that the Covid Pass Scheme would make any significant contribution to reducing Covid-19 transmission and infection, that such a significant contribution was likely, or even that there was a realistic possibility of such a significant contribution. To the contrary, the highest it could be put was that there **might** be a small marginal gain and the PAPR (at §15; (B/D/579)) indicates that the Defendants were positively advised that it was *"unlikely"* that a Covid Pass Scheme would have any such effect (even in the circumstances as they obtained in September 2021, (i.e. before the onset of the Omicron variant)).
77. The likely ineffectiveness of the scheme highlighted by some of the evidence before the Defendants is increased by the manner of their implementation of the scheme in practice. Where it is impractical to do so, business owners are not necessarily required to check the passes of all those who enter a venue but to take *"reasonable measures"*, which the

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Defendants' Covid Pass Guidance makes plain depends on the circumstances (B/E/803). The checks furthermore, which can be purely visual, rather than by for example scanning a code, are susceptible to human error. Lateral flow tests are also susceptible to error. Finally, they are vulnerable to abuse, as the Defendants have recognised, because it is relatively easy to falsify evidence of a negative lateral flow test. The resulting offence of falsification is difficult to enforce, so that its main purpose seems to be to communicate to people that "*this is a serious matter*" (B/C/402).

78. Consequently, the case which the Defendants are constrained to advance in the PAPR is that in order for the Defendants to be lawfully entitled to implement the far-reaching and significant restrictions comprised by the Covid Pass Scheme, it is sufficient merely for the Defendants to consider that the impugned measures *could*, or *might*, make some minimal (unquantified and, indeed, unquantifiable) contribution to reducing transmission and infection alongside a series of other measures.
79. The Claimant submits that this approach is incorrect and should be rejected. Applying stages (ii) (iii) and (iv) of the proportionality analysis:
- (a) The impugned measures cannot be regarded as sufficiently rationally connected to the putative legitimate aim of reducing Covid-19 transmission and infection in circumstances where the Defendants had no, or no sufficient, evidence that it was likely or even realistically probable that the measures would make any significant contribution to that objective.
 - (b) The need for one set of invasive measures to be justified by at least some evidence of their potential public health benefit is not lessened by introducing them alongside a series or 'basket' of other measures, on the basis that cumulatively they might make some contribution.
 - (c) That is particularly so where the absence of any evidence to support the impugned measures i) is accompanied by a belief that their benefit is '*probably unmeasurable*', ii) there are no plans to monitor or measure their benefit even once introduced in practice (see Ground 2 below) and iii) there are question-marks about the effectiveness of their implementation (see above).
 - (d) The Defendants' approach means the decision to choose the impugned measures over any other measure is effectively arbitrary, as the PACA report (B/C/176) presciently observed (see §23 above), rather than, as required, a choice of the less intrusive alternative.

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(e) The same absence of evidence means that the impugned measures cannot be considered to constitute a proportionate means of pursuing the stated legitimate aim.

80. On proper analysis the Defendants' case in these proceedings thus rests on a proposition that in the context of responding to a public health risks the Defendants (and, it is assumed, other State bodies) can exercise what amounts in substance to an unfettered freedom to implement measures that significantly interfere with the rights of individuals and businesses, even in the absence of supporting evidence. The Claimant submits that this does not reflect the correct construction and application of reg. 45D of the 1984 Act (B/E/622), and would, if endorsed and repeated, lead to arbitrary interferences with fundamental rights on public health grounds. The Claimant respectfully invites the Court to conclude that the currently available evidence demonstrates that the Defendants' decision to make the October Covid Pass Regulations was not rational or proportionate, and was therefore *ultra vires* section 45D and unlawful.

E. **Ground two: the Defendants unlawfully failed to take any or any adequate steps to monitor or measure the effectiveness of the October Covid Pass Regulations once introduced so that their ongoing proportionality cannot be maintained**

81. Further and/or alternatively it is implicit in the Mandatory 21 Day Review required by the Reg 2 of the Principal Regulations (B/E/644) that the Defendants must take adequate steps to monitor and measure the effectiveness and impact of any restrictions and requirements introduced so that their ongoing proportionality can be assessed, and their maintenance in force justified. The need to so monitor and measure is not diminished but enhanced in a situation such as this, where there was little or no evidence to support the impugned measures upon their introduction, and where the Defendants have avowedly acted on a "*precautionary basis*" (see PAPR at §42; (B/D/586)). Indeed, it is inherent in a scheme introduced as a precaution that upon implementation the Defendants will assess whether the caution was justified in practice by avoidance of the identified harm.

82. Despite this obligation the Defendants have not, in the past three months, taken any or any adequate steps to measure or monitor the effectiveness of the Covid Pass Scheme (see Response of 7 January 2022 §25-26; (B/D/614)). Their failure to do so is a breach of their obligations of review in the Principal Regulations, and means that they cannot rely on those reviews to justify the proportionality of the Covid Pass Scheme or their decision to maintain it. In defence of that failure to monitor, the Defendants rely on the absence of scientific

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evidence in support of the Covid Pass Scheme which characterised the scheme's introduction and the belief that its benefits are 'probably unmeasurable' (PAPR §41; Response of 7 January 2022 §25-26). On analysis, the Defendants' position appears to be that any contribution of the Covid Pass Scheme to limiting the transmission of the virus is probably unmeasurable because, if it exists at all, it is so small (PAPR §41; (B/D/586)):

" the Welsh Ministers accept that the Covid Pass Scheme might make only a small, and probably unmeasurable, contribution"

83. The Claimant does not accept that the Defendants are entitled to maintain as proportionate a measure whose contribution to public health is so small that it cannot be detected even once the measure is in force, nor therefore that the Defendants are entitled to take no steps to monitor, measure or detect its effectiveness on that basis. Neither does the emergence of the Omicron variant absolve the Defendants of their duty to monitor and measure the effectiveness of the pass scheme. That is particularly so when (see Ground 3 below), all the available evidence on that variant suggests that what 'small marginal' benefit the Covid Pass Scheme might have had is now extinguished.

F. **Ground three: the Defendants' failure to withdraw the October Covid Pass Regulations and/or decisions or continuing act in maintaining and expanding the impugned measures was disproportionate**

84. As explained at §59 above, by December 2021 at the very latest the Defendants, if they had acted lawfully, would have concluded that: (i) the Omicron variant was dominant in Wales, (ii) community prevalence of Covid-19 had increased significantly since the making of the October Covid Pass Regulations (with, on the Defendants' own advice (see PAPR §15; (B/D/579)) a corresponding significant reduction in any utility of a Covid Pass Scheme), and (ii) completion of a course of vaccination comprising two doses was ineffective to prevent transmission and infection by the Omicron variant.
85. In these circumstances, any (weak) justification that may have existed in support of the impugned measures as at the date of the introduction of the October Covid Pass Regulations no longer existed, or was very significantly diminished, by mid to late December 2021.
86. The Claimant respectfully submits that it follows for this reason also that the Defendants' decision to maintain the Covid Pass Scheme, their refusal to withdraw the impugned

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measures, and their decision to expand the ambit of the Covid Pass Scheme, was flawed and disproportionate applying the *Bank Mellat* criteria.

VI. Relief

87. The Claimant seeks:

- (a) Declarations that the Defendants' decisions and/or his continuing acts or failures were and are unlawful;
- (b) An order quashing the Covid Pass Scheme in Regulation 16A;
- (c) Such other relief as is necessary to give effect to the Court's judgment, and
- (d) Costs.

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11 January 2022