CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

Are vaccination or immunity 'passports' lawful under the Human Rights Act? An analysis by the Committee on the Administration of Justice (S522)
April 2021

Executive Summary

This paper is an initial exercise in subjecting the proposals for a vaccination or immunity passport or app to a human rights analysis. It focuses on 'Convention rights', as defined in the Human Rights Act 1998, which are most of the substantive rights in the European Convention on Human Rights. It also uses only the jurisprudence of the European Court of Human Rights rather than drawing on UK domestic case law.

Note that this paper does not constitute legal advice, merely an analysis of possible proposals in human rights terms, using the jurisprudence of the European Court of Human Rights as a guide.

The analysis suggests that the proposals do not engage Article 5 (right to liberty) but may engage Article 8 (right to a private life), and Article 14 (freedom from discrimination in relation to other ECHR rights). The paper goes on to examine the scope of positive obligations under Article 2 (right to life), Article 3 (freedom from torture and inhuman and degrading treatment), and Article 8. It concludes that there are positive duties on the state to protect life and physical integrity but that these could not amount to an obligation to specifically develop an immunity passport or app.

The analysis finds that an immunity app would amount to an interference with the rights to a private social life and privacy, thus engaging Article 8. The interference is (a) with the rights of those who could avail of an immunity app, requiring the production of proof of identity combined with health status to access aspects of social life, and (b) with those who could not or would not qualify for an immunity certificate, whose access to social life would be restricted.

Since Article 8 is engaged, Article 14 will also be engaged if there is differential treatment on protected non-discrimination grounds. In the case of an immunity, or vaccination certificate, passport or app, differential treatment is its fundamental purpose. It is designed to allow access to various services, freedoms or aspects of a social life for those who have such a passport and to deny that access to those who do not.

If people cannot access an app because of disability, medical conditions or genetic features there is clear interference with their right not to be discriminated against. If such people are given an exemption, there might still be discrimination by gatekeepers to social facilities. The measure may also discriminate on the grounds of ethnicity and economic status, given the unequal take up of vaccinations. A digital app may

discriminate against people living in 'digital poverty' or those unable to use digital devices.

To be justified, any interference with rights must be in accordance with law, for a legitimate aim and necessary in a democratic society (which also means the interference must be proportionate to the aim pursued). The analysis finds:

(a) The interference is such as to require dedicated legislation giving explicit power to create an immunity app, protecting the data involved and providing for adequate regulation
(b) There must be an evidential link between the measure proposed and the legitimate aim whether that be the protection of health, the release of vaccinated persons from lockdown restrictions or the general ability to open up society in the interests of economic well-being
(c) Such evidence will have to demonstrate the necessity and proportionality of an app whether or not vaccination is widely available and effective in preventing the spread of disease

The analysis concludes that the introduction of an immunity app could be unlawful under the Human Rights Act but that it would be up to a court to determine that on the basis of evidence, including how widely it was applied. It notes that the Northern Ireland Act 1998 states that Ministers and Departments have no power to legislate or take action contrary to the Human Rights Act and should reflect carefully on the human rights implications of an immunity app.

****

Introduction

This paper is an initial exercise in subjecting the proposals for a vaccination or immunity passport or app to a human rights analysis. For the sake of relative simplicity, it focuses on 'Convention rights', as defined in the Human Rights Act 1998 (HRA), which are most of the substantive rights in the European Convention on Human Rights (ECHR).[1] It also uses only the jurisprudence of the European Court of Human Rights (ECtHR or 'European Court') rather than drawing on the case law generated in the UK domestic courts during 23 years of the HRA. It is noteworthy, however, that the proposals in question will impinge on a range of socio-economic rights contained in treaties to which the UK is a party, but which have not been incorporated in domestic law. These have relevance as the ECHR should be interpreted in the light of such international legal instruments.

Note that this paper does not constitute legal advice, merely an analysis of possible proposals in human rights terms, using the jurisprudence of the European Court of Human Rights as a guide.

[1] See below for more details.

Proposals

The Covid-19 pandemic has required quite serious limitations on human rights. At this stage (March 2021), vaccination programmes are being rolled out in Northern Ireland, the rest of the UK, Ireland and the EU and in many countries around the world. The reopening of our economies and social life in general are in prospect. In these circumstances, there are some who see 'passports', which contain information on vaccination or other routes to some level of 'immunity' as a necessary tool. The airline industry has said they want to be able to verify certificates of vaccination before people can travel. Employers may require it – particularly if a job involves working in confined spaces or with the public. Governments may in the future require it to access some services (healthcare or schools), places (public events and sporting events), and at checkpoints and borders.

Here in Northern Ireland, CAJ and other human rights groups have met with the Digital Health and Care section of the Department of Health at their request to give our views. In the invitation e-mail, Dr E.G.J. O'Neill, Consultant Medical Adviser, Department of Health Northern Ireland says: "As any implementation of a vaccine verification process is likely to necessitate digital solutions, we would very much welcome your insight, and guidance, as to the issues which we should address if designing such solutions for citizens in NI."

The presentation that officials made to the meeting included the possibility of a digital app being used in a variety of contexts, including travel, events and the hospitality sector. It also drew attention to the fact that the World Health Organisation is developing principles and guidelines and aspires to developing a "shared and trusted global vaccine certificate architecture". It noted that the European Union is considering the development of a 'digital green certificate' for use within its borders. It was stressed, however, that there is currently no official policy around any vaccination certificate or app either in Northern Ireland or the UK generally.

So, many and various proposals have been made and the human rights implications are likely to differ. These 'passports' could apply just to international travel or might be applied to travel restrictions within a country; they could be imposed, or at least verified, by the state; or might be demanded by private businesses such as pubs or shops or, as noted above, by ones' employers. Obviously, if the contexts in which they applied were minimised, the possible interference in human rights would be lessened. A requirement for a vaccination passport for international travel for holidays, would probably involve less interference with rights than a broad application across many areas of domestic social life.

We should note that health-related restrictions on travel to some countries already exist. For example, if you travel to some countries where yellow fever is a problem you

need to get vaccinated against it and you will receive an International Certificate of Vaccination or Prophylaxis. These vaccinations are not available on the NHS, you must visit a Yellow Fever Vaccination Centre (often a designated pharmacy or GP practice) and the paper document is validated with a stamp. There does not appear to be a central register of who has received the vaccine. While this system is a precedent of a kind for a Covid vaccination passport, it is a very different process to one designed to be accessed by millions of people, using digital (probably smart phone) technology and necessarily involving a central digital database.

However, even where the proposals are of limited scope, there is the constant threat of 'mission creep' where measures designed for one purpose are increasingly used for different ones and with broader effect. One problem is that all of these proposals bring together health information and individual identity. That opens the way to their use as identity guarantees in other kinds of context. As Privacy International says:

> "We have also expressed our deep concern with the "function creep" aspect of 'immunity certificates': how it becomes a segue to the more general rollout of digital ID, or for new applications such as in sectors of 'law enforcement,' counter-terrorism and immigration enforcement."[2]

For the purposes of this analysis, and in light of the consultation with the digital section of the Department of Health, we will assume the relevant proposal to be one which contains personal health information relating to vaccination history, test history and/or other information relating to a person's possible immunity from contracting and passing on Covid-19. We will assume that this information is produced and validated by the public authority, that it is digital but might also involve a paper version, that the use of the app or passport is not compulsory but that a range of public and private entities might require its production for the purposes of accessing services. As we have said, the exact scope and application of any measure will determine the extent to which it might interfere in people's human rights.

Articles 5, 8 and 14

The Human Rights Act 1998 (HRA) provides for the enforcement of certain European Convention of Human Rights (ECHR) articles ('Convention rights' in the HRA):

(a) Articles 2 to 12 and 14 of the Convention, [basic rights and discrimination]

(b) Articles 1 to 3 of the First Protocol, and [property, education and elections]

[2] https://privacyinternational.org/long-read/4350/anytime-and-anywhere-vaccination-immunity-certificates-and-permanent-pandemic

(c) Article 1 of the Thirteenth Protocol [abolition of death penalty]

In what follows, when we say that we think a set of facts or circumstances might 'engage' the rights protected in a particular Article, we mean that they are within the subject area of an Article and there is a potential infringement of protected rights. When we use the term 'interference' in rights, we mean that some rights are limited or restricted – the question then is whether such an interference in rights is justified. If the interference is justified, there is no legal breach of the Article; if it is not, there is.

It has been argued that the lockdown and associated restrictions would engage Article 5 of the Convention, which protects the right to liberty and security of the person.[3] This appears to be on the grounds that Article 5 enshrines a "right to freedom of movement". In fact, the Guide to Article 5 of the ECHR specifically notes: "It [Article 5] is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4."[4] The Guide goes on to say: "The difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance."[5] The case law makes clear that even restrictions on movement including a night time curfew do not engage Article 5.[6]

The right to freedom of movement is clearly restricted by the lockdown and is likely to be, for some people at least, by any immunity passport. However, although Protocol 4 has been signed by the UK, it has not been ratified and is not one of the 'Convention rights' incorporated in the HRA. We will not, therefore, deal with it in this paper, though we should note that the right to freedom of movement is contained in other treaties which the UK has ratified and should be regarded as binding on the state.[7]

In terms of substantive Convention rights, the most likely right to be engaged is Article 8 which states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

Article 14, which prohibits discrimination, may also be engaged in certain circumstances. It provides that:

[3] https://jme.bmj.com/content/46/10/660
[4] COM P.8 para 1
[5] Ibid. P.8 para 2.
[6] *De Tomasso v. Italy* http://hudoc.echr.coe.int/eng?i=001-171804
[7] E.g. Article 12 International Covenant on Civil and Political Rights https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

> The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

We will examine whether and to what extent a proposal for an app or passport such as defined above would engage with Article 8 and whether it would meet the requirements for any lawful limitation of the right and, if the proposal comes within the 'wider ambit' of Article 8, irrespective of whether it is in violation of it, whether and in what circumstances Article 14 would apply.

Preliminary point

The preliminary question here is whether Article 8, or other Articles, impose a positive obligation on the state to provide a service such as an immunity passport or app.

There is no right to health in the European Convention, but the European Court has held that there is a baseline positive obligation arising out of Article 8 to protect the physical integrity of people. However, the current jurisprudence holds that this amounts to: "firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, secondly, to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation for damage."[8]

It is possible to envisage circumstances where it would be reasonable and, indeed, necessary to prevent infected persons coming into contact with people particularly vulnerable to Covid-19. The current regulations in regard to hospitals and care homes do seriously restrict people's ability to visit people in those institutions. At one level these can be seen as a restriction of visitors' Article 8 rights (to a family life, for example) in the interest of protecting the patient's or resident's Article 8 right to physical integrity. It is, however, highly doubtful that the absence of some kind of immunity app would constitute a failure to protect the right to physical integrity of the population at large or in broadly defined contexts.

Having said that, it could be persuasively argued that lockdown and other restrictions engage the Article 8 rights of the general population. In this context an immunity passport or app could be seen as one route by which many people could be released from these restrictions and their rights returned. The question then would be whether a different imposition on Article 8 rights, through the need to carry a health/ID passport to access aspects of social life, could be justified by removing other forms of restriction

[8] Guide on Article 8 of the Convention – Right to respect for private and family life. COE p. 32

on social life. If an immunity app was also seen to engage Article 14 (i.e. was discriminatory against some people) that argument would be harder to make. This issue will be further discussed under the 'Justification?' heading.

The positive duty to protect life under Article 2 imposes a general obligation on the state to put in place a legal and administrative framework to protect the lives of those within the jurisdiction. That framework arguably required the State to introduce regulations and guidance to address the risk from Covid-19 which would ensure that the lives of those within the state were protected, including for example the lives of those within care homes and residential institutions, or the lives of healthcare workers who were exposed to greater risk of contracting the virus. This duty has been confirmed to apply in the sphere or public health[9] and can arise where the threat is to society in general.[10]

There are similar positive obligations under Article 3 (prohibition of torture and inhuman and degrading treatment). The European Court has, in fact, tended to see a spectrum of physical or mental harm stretching downwards in terms of seriousness from Article 3 to 8.[11]

The positive duties on the state to protect life and physical integrity are therefore real and could be pleaded as a legitimate justification for restriction of the Article 8 rights of people through the requirement of some kind of immunity passport. It would be a huge stretch, however, to plead that the positive obligations of Articles 2, 3 or 8 required the state to impose such a particular measure on the general population.

Is Article 8 engaged?

The question here is whether the development by a public authority of an immunity app of the kind described earlier engages the Article 8 rights of either the general population or of those who, for one reason or another, have not been vaccinated against Covid-19.

Article 8 encompasses the right to respect for private and family life, home and correspondence. In general, the Court has defined the scope of these four areas of Article 8 broadly, even when a specific right is not set out in the Article. The right to a private life is perhaps the broadest area of protection and the one which is most relevant to this discussion.

---

[9] See *Calvelli and Ciglio v Italy* [GC] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60329%22]} at [48]-[49]),

[10] See *Mastromatteo v Italy* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60707%22]} at [69] – [72] though no breach was found on the facts of that case.

[11] E.g. *Wainwright v UK* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-76999%22]} – in relation to strip searching

The Article 8 Guide divides its discussion of the right to private life into three main categories – physical, psychological or moral integrity, privacy and identity and autonomy.[12] It notes that:

> "The notion of private life is not limited to an 'inner circle' in which the individual may live his own personal life as he chooses and exclude the outside world. Article 8 protects the right to personal development, whether in terms of personality or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees. It encompasses the right for each individual to approach others in order to establish and develop relationships with them and with the outside world, that is, the right to a 'private social life.'"[13]

The scope of this protection can involve professional and business activities, although there is no general 'right to employment'.[14]

It is clear that an immunity passport or app which is needed to access various social facilities, or which is required by an employer, engages this general aspect of the right to a private life. Of course, whether there is an actual violation depends on the particular facts, but there can be little doubt that the matter comes within the ambit of Article 8.

The right to physical integrity can mean the right not to be subjected to forced medical treatment or compulsory medical procedures.[15] There does not appear to be any European case law regarding vaccinations which are legally or in practice compulsory, though the court has refused a remedy to someone injured by a non-compulsory vaccination.[16] The Article 8 Guide notes that "in the context of taking evidence in criminal proceedings, the taking of a blood and saliva sample against a suspect's will constitutes a compulsory medical procedure which, even if it is of minor importance, must consequently be considered as an interference with his right to privacy".[17] Whether such an interference is justified, will depend on the particular facts. It is interesting to note that vaccination against a range of diseases is not compulsory for school attendance in the UK, though changing this has been discussed at Ministerial level.[18]

There can be little doubt that a vaccination is a medical procedure. Even if it is not compulsory in a legal sense, there might be an argument that negative social

---

[12] Op. cit. p.21 et seq.
[13] Ibid. p.21 para 68
[14] Ibid. p.23 para 81
[15] Ibid. p.29 para 108 et seq.
[16] *Y F v Turkey* http://hudoc.echr.coe.int/eng?i=001-61247
[17] Op. cit. p.30 para 111. There is no power to make regulations to enforce vaccination under the Public Health (NI) Act 1967 – see below at footnote 25
[18] https://www.theguardian.com/society/2019/sep/30/no-plan-to-require-vaccinations-at-state-schools-says-no-10

consequences such as preventing travel or employment make it compulsory in practice. It is relevant to the development of a state-verified immunity passport since it would be the absence of the app that brought the negative social consequences and hence an element of compulsion. There is no real guide as to how courts would interpret an action mounted on this basis.

When it comes to privacy, the engagement of Article 8 by an immunity passport may be clearer. The Guide to Article 8 says explicitly: "The unnecessary disclosure of sensitive medical data in a certificate, which has to be produced in various situations such as obtaining a driving licence and applying for a job, is disproportionate to any possible legitimate aim."[19] This statement is based on *P T v The Republic of Moldova*[20] in which an exemption certificate from military service had to be produced to a number of authorities and to prospective employers. The certificate contained medical information which, in the case of the applicant, included the fact that he was HIV positive. The finding of a violation of Article 8 in that case does not in itself mean that the finding would be the same when the certificate in question related to a vaccination, particularly when it would be the non-production of an immunity passport which would produce negative consequences, rather than the disclosure of a socially shunned medical condition. Nonetheless, it seems to us that this case on its own would demonstrate that Article 8 rights would be engaged by an immunity app.

There are two sets of rights bearers in this situation. One is the large group of people who have been vaccinated or who would otherwise be entitled to carry an immunity passport or app. Their access to a normal social life would be conditional, not on the general extent to which the virus had been contained, but on a personal certificate. It may be that some people in that situation would prefer to have access to social life governed by a certificate of some kind, rather than be prevented from accessing it at all. However, in the context of a mass vaccination campaign, if it is successful in reducing the disease to a minimum, that is unlikely to be the choice. Restrictions on movement and access to social life would not be necessary if vaccination were successful. At most, an app of this kind would accelerate the ability of some people to access some services a little earlier.

The price of this would be the need to carry an app which combined identity and health information. As we noted above, this combination opens the way to the much broader use of identity information and the possibility of 'mission creep' where a mechanism designed for a limited time and purpose could open the way to a much broader regulation of society.
A digital app also raises complex issues of data protection which, in detail, are outside the scope of this paper but are highly important and can engage Article 8 rights.

[19] Ibid. p.48 para 198
[20] http://hudoc.echr.coe.int/eng?i=001-202520

Rigorous protection of personal data held centrally is the minimum that must be required.

The other group of rights bearers are those who, for one reason or another, cannot or do not avail of vaccination or some other means of qualifying for an immunity passport. Their situation is discussed further in the following section on Article 14.

Is Article 14 engaged?

Article 14 of the Convention enshrines the right not to be discriminated against in 'the enjoyment of the rights and freedoms set out in the Convention'. It is therefore not a free-standing prohibition of discrimination but an ancillary Article relating to the enjoyment of other rights in the Convention. In fact, as the Guide to Article 14 of the Convention (prohibition of discrimination) puts it: "For Article 14 to be applicable it is necessary, but also sufficient, for the facts of the case to fall within the wider ambit of one or more of the Convention Articles."[21] Since we have already determined that an immunity passport would almost certainly engage Article 8 rights, it is clear that Article 14 would be engaged were there to be discriminatory impact.

To demonstrate discrimination an applicant has to answer the following questions:

1. Has there been a difference in treatment of persons in analogous or relevantly similar situations – or a failure to treat differently persons in relevantly different situations?
2. If so, is such difference – or absence of difference – objectively justified? In particular,
   a. Does it pursue a legitimate aim?
   b. Are the means employed reasonably proportionate to the aim pursued?[22]

The applicant must also demonstrate that the difference in treatment is "based on an identifiable, objective or personal characteristic, or 'status', by which persons or groups of persons are distinguishable from one another".[23] The Convention lists a number of specific grounds of discrimination (see text above) but concludes with the words "or other status". The European Court has interpreted these words broadly, including on the grounds of health status (see below).

The 'justification' aspect of the 'discrimination test' at 2 above has conceptual similarities with the justification of limitations on the right to a private life contained in the second section of Article 8 (see below). We will therefore look at possible

[21] COE p. 8 para 10
[22] Guide to Article 14 COE. P.16 para 51
[23] Ibid. p.24 para 87

differences in treatment that might be occasioned by the deployment of an immunity app and whether they might be on protected grounds before looking at possible justifications with the rights under both Article 8 and 14.

The first question in the 'discrimination test' (above) is whether the relevant measure results in differential treatment of persons. In the case of an immunity, or vaccination certificate, passport or app, differential treatment is its fundamental purpose. It is designed to allow access to various services, freedoms or aspects of a social life for those who have such a passport and to deny that access to those who do not. Its whole point is to discriminate between those who are deemed to be a threat to public health and those who are not. Policy makers in this area must grasp this indisputable fact.

The next question is whether the discrimination in question is based on some common characteristic or status.

The roll-out of vaccinations against Covid-19 is continuing at pace in the regions of the UK but is a long way from completion. There is therefore still a situation of scarcity. In other words, at this moment in time (March 2021) not everyone who wishes to be vaccinated can access the procedure. While scarcity exists, an immunity app would inevitably discriminate against those not offered the vaccine. The vaccine is being rolled out on the basis of who is most vulnerable to Covid-19 according to the available medical and scientific information. In general, the older and otherwise sicker you are, the more likely you are to receive the vaccine earlier.

The expert Joint Committee on Vaccination and Immunisation has decided that this is the fairest and most effective way to proceed in vaccination. It is, however, important to remember that this discussion is not about the roll-out of the vaccine but the development of a new, distinct measure which uses vaccination status as a ground for discrimination in access to services, justified or not. There must be a serious social policy question mark about the deployment of an immunity app before vaccination is available to all those who want it.

At the present time (March 2021), as the vaccine is still being rolled out, there would be clear discrimination on the grounds of age. The decision to vaccinate older people earlier will be justified by reference to the medical evidence. No such justification could apply to an app certifying the fact of vaccination. We should also note, in passing, that there does not seem to be any intention of vaccinating children. We assume that there would be an exemption from the obligation to carry a vaccination passport or app for children; otherwise there would be clear discrimination which would be as impractical as it would be wrong.

Assuming for a moment that the vaccine becomes theoretically available to all those who want it, who are likely to make up the ranks of the un-vaccinated? First, of course,

will be those whose existing medical condition or disability makes them unable to take a vaccine. At the moment, for example, Covid vaccines are only given to pregnant women after consultation with their doctors. Those with compromised immune systems can often not take vaccines. Medical condition or disability is a clear ground of discrimination under Article 14:

> "The Court has confirmed that the scope of Article 14 of the Convention …includes discrimination based on disability, medical conditions or genetic features."[24]

This would be definite discrimination, based on a well-accepted ground, that would require objective justification. In this respect, an immunity passport could well fall foul of domestic anti-discrimination legislation as well as relevant international law. Disability of various kinds leads to social exclusion across a range of fields – to add to that with a measure which identifies individuals as not fit to engage in ordinary social activities would be an egregious interference in their human rights.

It is, of course, possible that a scheme would provide for medical exemptions for those who could not take vaccines. That might either grant a vaccination certificate or, in some way, indicate that the person concerned was exempt for medical reasons. In the former case, the public health justification for an app would be compromised and in the latter case private actors would be highly likely to refuse access to the service in question involving substantive discrimination.

We know that take-up of the vaccine is unequal across ethnic groups and differs according to social status. We are not aware of statistics relating to Northern Ireland and will pursue this with the Department of Health, but in England the take-up of 65 to over 80-year-olds is 89% amongst the white population and 60% amongst the black community. For the same age group, take-up in the least deprived areas is 90% and in the most deprived 81%.[25] There can be little doubt that a vaccination passport would reinforce existing social inequalities and extend them into new social areas.

There will also be a group of people who, for ideological or possibly religious reasons, actively refuse to take a vaccination. There may be less public sympathy with this group than with those who cannot be vaccinated through no fault of their own. There are two important points to make, however. First, both religion and political opinion are explicit grounds for protection against discrimination both in Article 14 itself and in Article 9 of the Convention – though we are by no means sure that an anti-vaccination position would fall within these categories. Second, this is not simply a matter of someone taking responsibility for their own beliefs – such as someone who refuses a blood transfusion

[24] Ibid. p.37 para 160
[25] https://www.bbc.co.uk/news/health-55274833

for religious reasons and dies as a consequence. An immunity app or passport would operate to go beyond the personal health consequences of such a stance and extend it into discrimination in unconnected social spheres. Of course, the argument that people in such categories are a threat to public health themselves, may well be put as part of the objective justification for immunity apps. If 'anti-vaxxer' conspiracy theories gain significant public traction, this argument might be considerably strengthened.

There is also the matter of 'digital poverty'. This refers generally to the fact that digital devices are expensive and so not available to all. Some elderly or frail people are unable or unwilling to learn how to use such devices or may simply not want to avail of them. A digital app will, by its very nature, discriminate against such people. Mitigation of this would require extensive outreach and support measures.

Justification?

We believe we have established that the introduction of an immunity or vaccination passport or app would engage both Article 8 and Article 14 of the Convention in respect of those who were not able, or were unwilling, to be vaccinated and that the Article 8 rights of those who did avail of the app would also be engaged.

The second paragraph of Article 8 says:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This gives a set of conditions that must be satisfied if the interference with rights is to be justified. As regards Article 14, the second part of the 'discrimination test', printed above, reads:

2. If so, is such difference – or absence of difference – objectively justified? In particular,
    a. Does it pursue a legitimate aim?
    b. Are the means employed reasonably proportionate to the aim pursued?

The Article 8 test, if it is fulfilled, would be sufficient to meet the objective justification test of Article 14, so we will continue the discussion under the headings of: in accordance with law, further a legitimate aim and necessary in a democratic society.

In accordance with law

The Guide to Article 8 says:

> The Court has repeatedly affirmed that any interference by a public authority with an individual's right to respect for private life and correspondence must be in accordance with the law. This expression does not only necessitate compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law.[26]

The Guide goes on to give more detail on the nature of the law concerned. In Paragraph 14 it says:

> The national law must be clear, foreseeable, and adequately accessible.

This is another way of formulating the requirement for legal clarity. In this case, there needs to be detailed legal authority to develop an immunity app and a clear description of its ambit and likely effect. It would, in our view, be insufficient to rely on any general power to take anti-infection measures in a statute. The interference in Article 8 rights and the discriminatory impact under Article 14 should be specifically legislated for.

It might be objected that an app which is voluntary does not require statutory authorisation. We would strongly disagree with that position. This would be a state created measure, using data gathered by the state in a novel area of activity. Furthermore, although its use would be voluntary in a formal sense, if people were not to avail of it, whether they were able to or not, they would face serious social and perhaps economic consequences. This brings into question the voluntary character of the measure as well as leading to potential concrete breaches of their Convention rights.

This is a measure of a different character to the contact tracing app previously developed by the Department of Health. While people were encouraged to download it and use it as a public health preventative measure, there were no negative consequences to not using it, and indeed no knowledge of whether any individual was using it or not. The whole point of the proposed immunity app is that it would have to be produced in public or semi-public settings so that people could access services.

Current regulations designed to protect public health are made under the Public Health Act (Northern Ireland) 1967 mainly using powers inserted in that Act by the Coronavirus Act 2020. There is no obvious provision which would provide for the development of an immunity app. In fact, Section 25E of the Act specifically excludes making regulations requiring a person to undergo medical treatment, a term held to

[26] P.10 para 14. See also *Halford v UK* http://hudoc.echr.coe.int/eng?i=001-58039

include vaccinations and other prophylactic treatment.[27] It is arguable that an immunity app would breach the spirit if not the letter of that Section.

In short, there would have to be a clear legal basis for this measure, giving clarity to the public on its potential consequences, as well as fulfilling the other conditions necessary to justify interference with rights. It would also need to guard against data theft or accidental disclosure and provide for adequate regulation.

A legitimate aim?

"…in the interests of… the economic well-being of the country… for the protection of health…or for the protection of the rights and freedoms of others". These are three of the examples of legitimate aims found in the second paragraph of Article 8. However, it is not enough for a state to simply assert that a measure is in pursuit of a listed or otherwise legitimate aim. There has to be a 'link' between the measure and the desired result.[28] Presumably, in this case, the government would seek to argue that the interests of the economic well-being of the country and/or the protection of health and/or the Article 8 rights of others (possibly also Articles 2 and 3 rights – see 'preliminary point' above) were the legitimate aims of an immunity passport or app. As we argue below, the evidential link between the measure proposed and the legitimate aim may be hard to make.

It could be argued, as we noted earlier, that a legitimate aim for a vaccination app could be to release many people from lockdown restrictions and thereby return some of their Article 8 rights. There might also be a more general and nebulous argument that an app would lead to increased ability to reduce lockdown restrictions and get the economy and society moving, hence restoring some of the Article 8 rights of the population in general. We also noted, however, that if a vaccination programme were successful in minimising virus transmission, a wide-ranging passport would be unnecessary. If it were unsuccessful, the value of a certified vaccination would be reduced.

There is, however, a possibility of some intermediate stage, especially taking into account the uneven roll-out internationally of vaccination programmes, where a vaccination app could allow people to return to work, to travel and perhaps access other social facilities which would be denied to the unvaccinated. In that case, the government could argue that an app was protecting the rights of others, even though it would discriminate against the unvaccinated. A court would have to balance the right to international travel, say, against the right not to be discriminated against on the grounds, for example, of disability. However, it is in the demonstration of the necessity and proportionality of the measure proposed that its legality is more rigorously tested.

[27] https://www.legislation.gov.uk/apni/1967/36/section/25E
[28] See Guide to Article 14 p. 18 para 64.

Necessary in a democratic society?

The Guide to Article 8 says:

> In order to determine whether a particular infringement upon Article 8 is "necessary in a democratic society" the Court balances the interests of the Member State against the right of the applicant. In an early and leading Article 8 case, the Court clarified that "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable" but implies the existence of a "pressing social need" for the interference in question… A restriction on a Convention right cannot be regarded as "necessary in a democratic society" – two hallmarks of which are tolerance and broadmindedness – unless, amongst other things, it is proportionate to the legitimate aim pursued.[29]

The 'necessity' test therefore implies that there is a 'pressing social need' for the measure. It is important to recognise that this phrase does not refer to the legitimate aim but to the measure which purports to achieve it. So, the state in this case would have to demonstrate, not that there was a pressing social need for the protection of health in general but for this interference in the Article 8 rights of affected persons in particular. If the legitimate aim argued was the protection of the rights of others, the state would have to demonstrate that there was a pressing social need to allow the vaccinated to access travel and other social services. Again, the state would have to demonstrate with convincing evidence that a passport app was in the interests of economic well-being, if that were the legitimate aim relied upon.

The court will also assess whether a given interference with rights is proportionate to the end to be achieved. The questions that need to be answered in determining proportionality can be formulated as follows:

- Is the purpose sufficiently important to justify the restriction (i.e. are there relevant and sufficient reasons to justify the restriction)?
- Will the measures proposed achieve that purpose?
- Are the measures to be taken the least restrictive to achieve the intended purpose?
- Are the restrictions to ECHR rights necessary to meet the legitimate aims set out in the ECHR rights concerned?

[29] P.12 para 26. The case in question was from Northern Ireland *Dudgeon v UK* paras 51-53 http://hudoc.echr.coe.int/eng?i=001-57473

If the legitimate aim argued is the protection of public health, the seriousness of the threat to public health must be considered, clearly based on expert medical advice. Then the effectiveness of the proposed measures needs to be assessed – again, in this case, based on the best scientific evidence available. Then we must employ a presumption against restrictions on human rights to assess whether any less intrusive or restrictive measures would achieve the needed protection of public health. Lastly, taking all these matters into account, we must decide whether these restrictions are really necessary.

It is not our purpose here to discuss the scientific evidence for and against immunity certificates in terms of effectiveness. However, just to give a flavour of the evidential mountain to climb in justifying such measures, it is our understanding that the efficacy of existing vaccines in preventing serious illness has been demonstrated but not their effectiveness in preventing transmission. The extent and duration of any immunity achieved by previous infection is unknown. New variations of the virus are appearing with as yet not fully known characteristics in respect of existing vaccines and previous infection.

These issues would also come into play if it were argued that the legitimate aim was the protection of the Article 8 rights of the vaccinated or, more generally, the rights of all those negatively impacted by lockdown measures which might be relieved by an immunity app. Again, arguing that an app which discriminated against those who could not be vaccinated was necessary and proportionate in order to open up society, improve economic well-being or provide access to social facilities by the vaccinated might be a considerable evidential task.

The distribution and effectiveness of the vaccination process itself will also impact on the proportionality of introducing an immunity app. If vaccination is fully available, and there is a high rate of take-up, and the vaccination is effective in preventing the spread of infection, the need for an app is thrown into question. If, on the other hand, either the vaccination is not fully available or, unfortunately, is ineffective, the value of a certified vaccination will be much reduced. In either case, the need for the introduction of an app will be hard to demonstrate.

Conclusion

This analysis is not sufficient to declare definitively that a vaccination or immunity passport or app would be unlawful under the Human Rights Act, but there is an arguable case that it would be. At the end of the day, it would be an evidence based judgement and it would be the responsibility of the courts to rule on it were such a measure to be introduced. The scope of application of the app would be an obvious component of the evidence base. An app solely for use in international travel would involve considerably less infringement of people's rights and so its proportionality might be easier demonstrated. In that case, there would have to be ways of preventing

the app's 'informal' use in other spheres. In any event, we have set out above the tests which the proponents of relevant measures would have to meet.

We would caution against any suggestion that the responsibility for dealing with human rights in general and the HRA in particular lies with the superior levels of the UK Government. On the contrary, the Northern Ireland Act 1998 lays down that the actions of devolved departments, as well as the legislation of the devolved Assembly, must be in accordance with Convention rights as defined by the HRA. Section 24 (1)(a) says:

> (1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—
> (a) is incompatible with any of the Convention rights;

Any action or expenditure on a project which turned out to be incompatible with the HRA would be *ultra vires* and hence unlawful. The Department of Health should reflect long and hard on the human rights implications of an immunity passport or app.

CAJ, April 2021

Committee on the Administration of Justice (CAJ)
1st Floor, Community House, Citylink Business Park
6A Albert Street, Belfast, BT12 4HQ
Tel: (028) 9031 6000
Email: info@caj.org.uk
Website: www.caj.org.uk