

CORONAVIRUS AND HUMAN RIGHTS FAQ

FACEMASKS, VACCINES, AND VACCINE PASSES

IS HAVING TO WEAR A FACEMASK AN ABUSE OF HUMAN RIGHTS?

No. First it is important to remember that you cannot invent specific human rights. Human rights are set out in international standards developed by the UN or the Council of Europe (the regional body overseeing the European Court of Human Rights, which is a separate body from the EU.)

Human rights standards set both positive and negative obligations. Negative obligations prevent public authorities from doing particular things (e.g. torture, arbitrary arrest, unfair discrimination). Positive obligations oblige public authorities to proactively intervene and take protective measures, including taking reasonable steps to protect life and safeguard the right to health.

There is no ‘right not to wear a facemask’ in human rights law.

Conversely, there are positive obligations on public authorities to take reasonable and proportionate steps to prevent the transmission of coronavirus to protect human right to life and the health of others. As there is clear evidence facemasks reduce the risks of covid transmission, promoting the use of such masks in such a context furthers positive human rights obligations.

Even when we consider the extent to which being made to wear a facemask relates to restricting actual recognised human rights, there would still not be a *breach* of rights provided this restriction can be *justified* under human rights law.

AREN'T HUMAN RIGHTS ABOUT PROTECTING MY PERSONAL LIBERTY TO ACT AS I WISH AND MAKE MY OWN INDIVIDUAL CHOICES?

No. The Universal Declaration of Human Rights says, at Article 1: “All human beings are born free and equal in dignity and rights.” Freedom and rights for all can only be achieved through equality and dignity. As the Preamble to the Universal Declaration says: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” We must live as a human family, not with a selfish disregard for the rights and freedoms of others.

Human rights standards are quite different from arguments grounded in individual libertarianism which pay no regard to the rights of others. The language of rights may be used by such persons opposed to vaccines, social distancing, or facemasks, particularly when referring to personal choices and actions, but that does not mean it is grounded in human rights law.

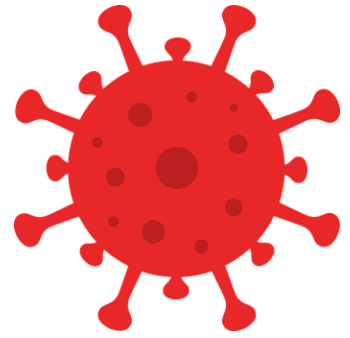
To give a practical example, whilst one person may argue it is their ‘right’ not to wear a face mask, or refuse to socially distance, this may in practice restrict the freedom of another person who is elderly or who has a health condition and wishes to get the bus or go to a shop. The choices of the vulnerable individual are therefore choices limited by the heightened risks of catching covid through proximity to an unmasked person.

HAS A HUMAN RIGHTS APPROACH ANYTHING TO SAY ABOUT RESTRICTIONS INTRODUCED IN RESPONSE TO COVID?

Yes. Whenever the State takes powers that allow it to restrict people’s lives and activities, these powers



may come into the scope of human rights laws. International human rights law, and our own Human Rights Act, which incorporates the European Convention of Human Rights (ECHR) into domestic law, protect many rights, such as the right to life, the right not to be tortured, the right to a fair trial, the right to a private life, and many others. However, those rights, except the right not to be tortured, are not absolute. They can be restricted in strictly defined circumstances if there are justifiable reasons. In many practical circumstances, the exercise of certain rights can be restricted to meet a recognised 'pressing social need' or competing rights need to be balanced. When that happens, we need to apply the human rights test.



CAN YOU DEFINE THE HUMAN RIGHTS TEST?

Yes. For many ECHR rights any measure which results in the restriction of or interference with a right must be 'in accordance with the law', for a 'legitimate aim', and 'necessary in a democratic society' (which also means it must be proportionate to the aim pursued). So, any restriction on these human rights must have lawful authority, usually under a new or existing piece of legislation. It must be for a recognized legitimate aim. It must be necessary, which doesn't just mean 'desirable' or 'convenient', rather it means there is a pressing social need to implement that restriction and no lesser method will do. Lastly, the interference with a right must be proportionate – the harm to be prevented must be significantly greater than the harm done by restricting rights. All that has, of course, to be evidenced, not just asserted by the state.

IS IT COMPATIBLE WITH THE HUMAN RIGHTS TEST TO BE MADE TO WEAR SOMETHING LIKE A FACEMASK IN CERTAIN SITUATIONS OR RISK A FINE?

Yes, where there are good public health reasons to do so. For a long time, the law has obliged people, on threat of a fine, to wear seat belts or crash helmets for similar reasons - namely that it is effective in saving lives and preventing other bodily harm.

To the extent to which a restriction engages rights like the right to private life, the human rights test, as well as assessing whether the measure is clearly set out in law, will look at whether the restriction follows a permitted 'legitimate aim'. In this case it is straightforward to identify at least two permitted legitimate aims namely:

- ◆ The "protection of health" and
- ◆ The "protection of the rights and freedoms of others." (this latter right refers to recognised human rights of others, including the right to life).

The next step would be to assess the proportionality of the restriction. This would include consideration of the limited nature of the restriction (wearing a facemask is not particularly onerous), and the proportionality of the sanction. One important consideration is the extent to which the measure would contribute to achieving the legitimate aims identified above. In this instance, since there has been an increasing body of evidence showing that face coverings reduce the risks of Covid-19 transmission, there will be little difficulty in these tests being met. It should be noted that with a new or mutated virus, the full evidence base may only emerge over time and a precautionary approach may be taken.

Another relevant consideration would be the likelihood of having to introduce measures that are much more restrictive in human rights terms - such as 'lockdown' type provisions - if lesser restrictions - such as obliging the wearing of facemasks - are not implemented.

A *blanket* requirement for facemasks *without exemption* would, however, engage risks of discrimination



against people who are not able, or cannot reasonably be expected to, wear face masks. The present NI Regulations, in addition to being restricted to particular circumstances, do provide exemptions, including for persons with a disability or particular health conditions that make wearing a facemask very difficult.

It is important to stress that under human rights law any form of differential treatment does not necessarily constitute discrimination and discrimination must, in any case, be on the basis of a recognised *protected characteristic*. Protected characteristics include disability, ethnicity, and gender. Consistent with human rights standards, the long overdue NI Bill of Rights was also to protect against unfair discrimination on the basis of health status.

Holding personal views that deny the science around Covid or vaccines have not been held to be a *protected characteristic* on which a legitimate claim of discrimination can be founded.

DOES HUMAN RIGHTS LAW PREVENT VACCINE MANDATES?

No, not necessarily. In general terms, vaccination - like other medical interventions - is to be based on informed consent. However, the European Court of Human Rights has held that whilst levels of compulsion *interfere* with a person's rights under Article 8 of the ECHR (right to private and family life), this interference can be *justified* in certain circumstances where it is necessary to control diseases and as such would be found to meet the human rights test we have outlined above.

In a case relating to childhood vaccinations ([*Vavříčka and Others v the Czech Republic*](#)), where vaccines were not physically enforced, but parents could face a fine and unvaccinated children be excluded from pre-school, the Court found that the policy was compatible with the ECHR in the particular circumstances examined.

Some anti-vax groups have argued vaccine mandates breach the post-WWII 'Nuremberg Code' drawn up on the back of the actions of Nazi doctors in concentration camps. Notwithstanding the broader absurdity of comparing Nazi atrocities to public health measures, the Code related to persons being subject to forcible *medical experiments*, not to the provision of vaccines.



CAN YOU APPLY THE HUMAN RIGHTS TEST TO VACCINATION PASSES?

Yes. A vaccination pass being required for access to aspects of social life can amount to an *interference* with the right to a private life, thus engaging Article 8 of the ECHR. This does not, however, in itself mean that the interference could not be *justified* under the terms of the human rights test.

The 'legitimate aims' pursued by such a measure would, as with facemasks, centre on the protection of health and protection of the rights of others (i.e. the right to life, etc). In terms of assessing the proportionality of requiring vaccine passports in certain circumstances for the protection of health, we must consider both the health of those in the social situation in question (including the evidence of reduced transmission of the virus where persons are vaccinated or tested), the knock on effect of reducing pressure on the NHS caused by hospitalisations, and the extent to which the measure is likely to encourage vaccine take-up.

In terms of assessing the proportionality of the restriction and the risks of discrimination on the basis of protected characteristics, an assessment should balance the likely impact of the measure on rights in light of any provisions to provide *exemptions*.

Relevant issues arise for (a) the rights of those who could avail of a vaccine passport that requires the production of proof of identity combined with vaccination status to access aspects of social life, and (b) the rights of those who could not or would not qualify for a vaccine certificate, or do not wish to avail of one whose access to social life would therefore be restricted.



The proportionality test will also depend on the arenas to which a requirement for a vaccine passport is imposed. For example, requiring the production of a vaccine passport to enter a restaurant or nightclub (with the latter being particularly high risk) does not amount to limiting access to essential services.

In relation to the first category of people who are vaccinated and eligible for a vaccine pass issues around privacy and non-discrimination will depend on the accessibility of vaccines and the pass. In relation to the accessibility of passes, digital access may be convenient for many, but alternative means would be needed to mitigate against 'digital exclusion' of groups who cannot access or use the technology, including on the basis of protected characteristics (such as age, disability, etc). A paper based alternative and digital models that do not store records of usage also reduce privacy concerns. (The current Northern Ireland digital app does not record usage related to an individual.)

In relation to the second category of people, a restrictive impact for persons who are not vaccinated or will not take the vaccine pass can be mitigated by the provision of safe alternatives, such as taking a negative test. People whose health status prevents them from taking the vaccine would also require an exemption to a vaccine pass to prevent discrimination engaging a protected characteristic.

The measures would also have to be clearly set out in law to meet the legal certainty tests, and be time bound for only as long as there is a clear proportionate benefit to the measures in human rights terms.

If all the above those conditions are met, it is highly likely the vaccine passport will be compatible with human rights law if we remain in circumstances where there is a pressing need for additional public health measures to deal with the pandemic.

ARE THERE ISSUES WITH THE WAY VACCINE PASSPORTS HAVE BEEN LEGISLATED FOR?

Yes. Vaccine passports have been under discussion for some time and, in common with a range of other Covid measures, we do not think it is necessary to use the 'emergency procedure' - whereby the legislation is only debated by the Assembly **after** it has already come into force.

There also appears to be an error in the NI legislation that will require photo ID to be shown even when the CovidCertNI app is used on a mobile phone, which was not the policy intention.

BUT ISN'T THE PRICE OF LIBERTY *STILL* ETERNAL VIGILANCE?

Yes. CAJ has closely monitored the use of emergency powers to control the Covid-19 virus, as well as their enforcement. Our first briefing paper on emergency regulations was shared in March 2020 and we have published five formal submissions since then, covering, for example, travel restrictions and their impact on the Common Travel Area, the impact of the pandemic on the right to protest, and an analysis of the human rights implications of vaccination passports. We criticized the use of 'Covid fines' by the PSNI against Black Lives Matters protesters on the basis of discriminatory treatment, and a lack of legal certainty over the application of the coronavirus regulations in this particular circumstance. Our position was vindicated by reports from the Police Ombudsman for NI and the NI Policing Board.

A good human rights slogan is "**Keep your eyes open**" - we will continue to do just that.

For more information on CAJ's body of work on Covid-19 and human rights, please visit our website: www.caj.org.uk. If you have any comments or questions, email info@caj.org.uk or call **028 9031 6000**.

