



Neutral Citation Number: [2022] EWCOP 20

Case No: 13860597

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2022

Before:

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

Between:

MC
AC

Appellant

- and -

A CCG

and

First
Respondent

DC (by his litigation friend, the Official Solicitor)

Second
Respondent

Francis Hoar (instructed by **Broad Yorkshire Law**) for the **Appellant**
Philip d Berry (instructed by **Hill Dickinson**) for the **First Respondent**
Nicola Kohn (instructed by **Irwin Mitchell**) for the **Second Respondent**

Hearing dates: 3rd May 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR JUSTICE HAYDEN:

1. This is an appeal from His Honour Judge Simon Burrows, the Regional Lead Judge for the Court of Protection in the Northwest. The judgment, dated 31st January 2022, was handed down following a remote hearing on the 17th January 2022.
2. The case concerned DC, who is a 21-year-old man facing a raft of challenges in his life. He was born with a profound learning disability and now lives in a residential care home. His medical history includes schizencephaly, a rare congenital brain malformation in which abnormal slits or clefts form in the cerebral hemispheres of the brain. The signs and symptoms of this condition include developmental delay, seizures, and problems with brain spinal-cord communication; microcephaly and cerebral palsy. DC is also described as non-verbal.
3. It is important to note, in the context of the application before the Judge, to which I shall turn, that DC suffers a range of respiratory issues and has experienced pseudomonas infections to which he remains vulnerable. DC uses a suction machine and, where necessary, a nebuliser and oxygen machine to support his breathing. There is no dispute, nor could there be, that DC is clinically vulnerable (as described by the Joint Committee for Vaccination and Immunisation (JCVI)).
4. It is equally important to emphasise that whilst DC may live a life which is circumscribed by his condition, it is life which has meaning and dignity and is suffused by the love of his parents. At 21 years of age, DC has already, and by some distance, outstripped his life expectancy. All the professionals who have been involved in his care consider that this is not merely in consequence of the high quality of medical support he has received, but primarily due to the practical and attentive commitment of his parents. Both have been heavily involved but, DC's mother has been his mainstay.
5. The question that His Honour Judge Burrows was asked to resolve was whether it is in DC's best interest to be vaccinated against Covid-19. What is alarming is that, on the application of the available guidance, DC has been eligible for vaccination since February 2021. In February 2021, DC's parents were contacted by his GP to discuss the Covid-19 vaccination. It became obvious, and is recorded, that both parents had "strong views" opposing this vaccination. HHJ Burrows made the following observations of DC's parents in his judgment. Nobody has taken issue with any of these:

"[43] [F] is a professional risk assessor, albeit not in the medical/pharmaceutical field. During the period after March 2020, he has been unable to practise in his professional field and has been largely at home. He has carried out an enormous amount of research on-line into the literature on the developing mRNA type vaccines. He has accessed research data and reports from trials worldwide.

"[44] He described himself as an "overthinker" and he considered every eventuality arising out of the vast reading he had done. I read his statements and the other supporting documentation. I listened to his oral evidence very carefully, too. I hope I do him no injustice when I summarise his position as follows. The pandemic has led to the rapid development of new

vaccines- new not only in their use, but also in their science. These mRNA vaccines have not gone through the usual tests and regulatory scrutiny as they would in normal times. He describes the vaccine as "experimental". Having looked at figures from around the world, from emerging studies and data, he is not satisfied that the vaccine his son is being offered is as safe and efficacious as he (and the rest of us) have been led to believe. He points to concerns over myopathy and other respiratory, vascular and neurological issues that may arise, and about which there is an inadequate database for a decision to be made. He is particularly concerned about blood clots because there are a number of examples of family members with illnesses due to blood clots."

6. The Judge made the following observations in respect of DC's mother:

"[46] [M] is also opposed to the vaccination. She told me that she was brought up in the Church of Scientology, which in the past has opposed vaccinations. However, she was not opposed to vaccines per se- indeed both [M] and her daughter have had vaccines with their parents' consent. Her opposition is that she believes that DC is a very delicate young man who has in the past recovered very rapidly from apparently serious health problems. She believes that administering this vaccine might send him into ill health from which he will not recover."

The thrust of these observations remains important but it is important to M that I correct a factual error. M has been brought up as a Christian Scientist and not a Scientologist. All agree that this was a simple factual error on Judge Burrows' part.

7. Neither parent is vaccinated against Covid-19. Their daughter, DC's sister, who is an adult, has also chosen not to take the Covid-19 vaccine. Judge Burrows records his impression of the family in these terms:

"[49] The impression I got from DC's parents is that they are highly intelligent, articulate and highly independently minded. I suspect their daughter is probably the same. If he were a capacious adult and had not been suffering from the disabilities he has, there is every reason to believe DC would be similarly independent."

8. That last comment is somewhat ambiguous in the context of the paragraph as a whole. Independence, by definition, indicates resistance to influence.
9. No sensible or coherent explanation has been offered, either to me or to Judge Burrows, to explain the extraordinary delay in bringing the matter to Court. The Judge made the following pertinent observations:

"[5] One issue that I must address before moving on to the substance of this case is delay. There has been a very substantial lapse in time since DC's need for the vaccine was first identified

by the CCG and this matter reaching court. Having briefly considered some of the other recent cases concerning the COVID-19 vaccine, this seems to be a common theme. I appreciate there has been an attempt by the CCG and DC's parents to discuss and consult over the vaccine. However, as long ago as February 2021 it was clear that there was a dispute over this issue. There was then a delay until July 2021 for a review of DC's unvaccinated status. It was not until September 2021 that a best interests meeting was convened. Then there was a further delay until December 2021 until these proceedings were issued.

[6] It seems to me this is unacceptable. If, as the CCG contends, DC is a highly vulnerable person for whom infection with COVID-19 could be extremely serious, then they have a duty to act speedily to protect him. Once it becomes clear there is a dispute between clinicians and the family on an urgent matter over important treatment of a mentally incapacitous adult, an application to the Court of Protection should be brought- and determined- with urgency."

10. As I have stated, it is beyond any contrary coherent argument that DC is within the category of those vulnerable to Covid infection. He was amongst the first cohort to be approached for vaccination. The lengthy and avoidable delay exposed him to risk of harm, including death. It was the responsibility of the CCG to bring the dispute before the Court as a matter of urgency. The delay here was egregious and requires to be identified as such. Whilst there may have been attempts to negotiate with the parents, Judge Burrows was entirely correct to identify a clear dispute by February 2021.
11. At the time of this appeal, i.e., 14 months later, DC has still not been vaccinated. DC has, as I have set out, a profound learning disability. This signals that his rights have properly to be scrutinised and meticulously protected. His condition does not occlude his rights as an autonomous adult. In the negotiations between the doctors and the parents, DC's voice was effectively silenced. In the court process, that is restored through the appointment of the Official Solicitor on his behalf.
12. Following the handing down of judgment, permission to appeal was sought by the Appellants and refused by the Judge. However, the order was stayed, pending determination of the Appellants' renewed application for permission to appeal to this Court. The Appellants' Notice, dated 7th February 2022, renewed the application to appeal on the following grounds:

"(1) The learned judge erred in not either having adjourned the matter to allow for DC to be tested for his potential natural immunity to SARS-CoV-2 or concluded that, without such a test, it was premature to make a decision to vaccinate.

(2) The learned judge erred in principle in his approach by taking insufficient account of the lack of evidence about the effect of the vaccine on adults with the weight of a small child.

(3) The learned judge erred in deciding that it was in DC's best interests to be vaccinated in the absence of expert evidence.

(4) The learned judge gave insufficient weight to the unchallenged public domain evidence before him of:

(a) the lack of severity for persons of DC's age, including those with co-morbidities (going directly to the risk the vaccine was designed to reduce); and

(b) the serious side-effects from the vaccines - particularly for young men (going to the risk of the vaccine).

(5) Had the learned judge taken account of the evidence demonstrating a dramatic decline in the severity of SARS-CoV-2 infections, he would have exercised differently the 'fine balance' in favour of not ordering vaccination with two adult doses and unlimited boosters”

13. At paragraph 61 of the judgment, the Judge identified what he considered to be a “very demanding balancing exercise”. He expressed himself in these terms:

“[61] In this case, I have found the balancing very demanding. I see a young man who could hardly be more vulnerable. His parents, who love him and have cared for him full time until relatively recently, have very strong views against him being vaccinated. They are strong emotionally. But they are also backed up with a rational analysis. AC was very upset at the thought of DC having the vaccine. She is fearful it will do him more harm than good, maybe even kill him. Her evidence was powerful. I hesitate to go against DC's mother's instinct and his parents' analysis.”

14. Addressing the balance directly, the Judge came to the following conclusion:

“[62] I have to place DC at the centre of my decision-making. I am persuaded that without the vaccine he is at risk of COVID-19 causing him much greater harm than if he has it. He is at high risk. There are risks associated with the vaccine, and these are not yet fully understood. However, I am satisfied on the basis of the CCG's evidence that those risks do not outweigh the advantages. The main reason I will allow the application from the CCG is because I can see it having a positive effect on DC's enjoyment of life by allowing him to be more involved in the life of his care home and with his parents. If DC were able to make a decision for himself, I am satisfied that would be a magnetic factor for him.”

15. I granted permission to appeal, on all grounds.

16. The Appellants seek a review of the decision below, in the alternative, they invite this Court to direct a rehearing. The applicable rules are set out in Part 20 of the Court of Protection Rules 2017 (COPR 2017) and the Supplementing Practice Direction, 20A. Guidance on “**Administration of Appeal Procedure in the Court of Protection**”, was given by me in January 2020.

“19. COPR 20.14 provides:

(1) an appeal shall be limited to a review of the decision of the first instance judge unless –

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the appeal judge considers that in the circumstances of the appeal it would be in the interests of justice to hold a re-hearing.”

17. A few days before the commencement of the appeal, the Appellants’ lawyers learned of an important development. DC had contracted Covid-19 in early April 2022. Though this information had been given to DC’s General Practitioner, his parents did not inform the Court or their lawyers of this significant change of circumstance. Following infection, DC was symptomatic, experiencing high temperature, pain, and some respiratory distress.
18. I should note that the parents have minimised these symptoms of infection, as Mr de Berry, on behalf of the CCG, established. I have no doubt that they did this to justify their longstanding belief that DC would not, were he to be infected, be seriously impacted. They love their son deeply and unconditionally but, they could not have known what his response to infection might be. Their minimisation of his symptoms is a facet of their own belief structure. DC’s health was never compromised to a degree that threatened his life, nor did he require hospitalisation. However, his experience of Covid infection must not be minimised to support a particular perspective on the vaccination. This not only risks suppressing DC’s voice, it goes further, it misrepresents him. It must also be remembered that DC does not have the capacity to communicate any symptoms. Happily, he has made a full recovery.
19. As Mr Hoar, Counsel for the Appellants recognises, the intervening event of DC’s infection causes many of his arguments to fall away. So too, do many of the responses prepared by counsel on behalf of the CCG and the Official Solicitor. It is obvious that a great deal of time, effort, and public expense could have been saved had the fact of the infection been communicated in a timely way. I do not propose to say anything further on the point.
20. The real question for the parties has been, how to incorporate the fact of DC’s Covid infection into the framework of this appeal, or indeed, to establish whether it is relevant at all. I have been referred by the parties to ‘**COVID-19 vaccination programme: Information for healthcare practitioners (Republished 9 March 2022)**’, a publication by the UK Health Security Agency. This makes clear that following infection, it is unadvisable for an individual to take a vaccination for a period of 28

days. That period has, very recently, expired. Thus, DC is now eligible to receive the vaccinations.

21. The fact of DC’s Covid infection cannot sensibly be ignored by this Court. It would be entirely artificial to do so and potentially contrary to the interests of DC himself. Thus, the fact of it requires to be admitted. The route for admission is founded in the dicta of Lord Denning in *Ladd v Marshall* [1954] 1 WLR 1489:

“The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

Manifestly, those criteria are met here.

22. Having admitted the new evidence, the argument now advanced becomes fundamentally different from that put before Judge Burrows. It crystallises into two points: having had the infection, it is likely that DC now retains some degree of natural immunity. The question arises as to whether such immunity may be broadly similar to that which would be achieved by vaccination. The second point, which resonates to some degree with the fifth Ground of Appeal, is whether the available, up to date, guidance is sufficiently robust for it effectively to stand without interrogation.
23. I have been referred, by all Counsel, to the document, **Immunisations against infectious diseases**, known as the ‘Green Book’. The green book has the latest information on vaccines and vaccination procedures for all the vaccine preventable infectious diseases that may occur in the UK. Again, it is published by the UK Health Security Agency and the Department of Health and Social Care. It is edited by Dr Mary Ramsay, Consultant Epidemiologist at the Health Security Agency. In recent times and in the context of the pandemic, it has been necessary for the chapters addressing Covid-19 to be regularly updated. The most recent update is Chapter 14a, 28th February 2022.
24. In the course of submissions, it was agreed by all Counsel, that there was nothing in the available evidence to suggest that DC falls within the narrow category of individuals for whom vaccination for Covid-19 is contraindicated. The generic contraindicators for vaccines, generally, are set out in Chapter 6 of the Green Book and considered in Chapter 14a (February 2022), the Chapter dealing specifically with Covid-19:

“Almost all individuals can be safely vaccinated with all vaccines. In very few individuals, vaccination is contraindicated or should be deferred. Where there is doubt, rather than withholding vaccine, advice should be sought from an appropriate specialist.”

Vaccination providers should consider whether to avoid specific vaccinations in the following:

- *individuals with a history of a confirmed anaphylactic reaction to a previous dose of the vaccine*
- *individuals with a history of a confirmed anaphylactic reaction to a component of the vaccine*
- *individuals with primary or acquired immunodeficiency*
- *individuals on current or recent immunosuppressive or immunosuppressive biological therapy*
- *infants born to a mother who received immunosuppressive biological therapy during pregnancy*
- *those in contact with an individual with immunodeficiency, current recent immunosuppressive including biological therapy*
- *pregnant women*

While certain vaccines may be contraindicated in individuals falling into one of the categories mentioned above, this is not automatically the case. In some instances, the benefit of that vaccination may outweigh the risk. In other instances, vaccination should be delayed rather than withheld, or alternative measures considered (see Chapter 7). Further detail is outlined below and, in the disease-specific chapters”

25. Whilst application of these criteria can never be regarded as eliminating all risk, they do identify the risk as vanishingly small. However, I recognise that a very small risk of a serious adverse outcome is, nonetheless, an invidious calculation for an anxious parent.
26. HHJ Burrows heard evidence from Dr H, a General Practitioner. He is also the Medical Director at the CCG, responsible for the roll out of the vaccination programme in the relevant area. He did not claim to be an expert on the subject of vaccinations. He follows the guidance that I have referred to and considered that on an application of the principles, DC was at high risk of serious consequences because of the complexity of his condition, the profundity of his learning disability and his residence in a care home. At that stage i.e., before infection and apparently absent any antibody reaction, Dr H considered that a failure to get a vaccination exposed DC to significant risk, whereas any risk from the vaccination was effectively remote. Thus, he analysed the adverse risks of the vaccine to be greatly outweighed by the protection it offers towards a virus that could be catastrophic for DC. Judge Burrows records this explicitly at paragraph 39 of his judgment.
27. Dr H was cross examined on issues entirely outside his area of expertise. He explicitly and unambiguously disavowed any expert knowledge on the wide-ranging questions he

was asked on behalf of the parents. He was asked about data emerging from Israel; the relevance and size of dosage by reference to weight; the significance of age etc. His role he regarded as an extension of general practice in ensuring good public health. On this basis and on the basis of his own experience over the pandemic, he remained clear under challenge that the balance fell decisively in favour of immunisation.

28. At paragraphs 13 and 14 above, I have set out those paragraphs of the judgment in which Judge Burrows explains his decision. It is plain that the Judge found the decision “very demanding”, and that he identified “a delicate balance”. On my own reading of the judgment, and of the transcripts, I confess that I did not consider the balance to be delicate. On the contrary, the evidence identified a compelling case for vaccination. Thus, HHJ Burrows’ decision is entirely unimpeachable, but for the intervening Covid-19 infection, the appeal would have been dismissed.
29. In his judgment, Judge Burrows correctly identified the legal framework in which his decision fell to be taken and the applicable principles identified within the authorities. The Courts, including the Court of Appeal, have considered the issue of vaccination in a variety of circumstances, and including, within the context of Covid-19 vaccinations. In paragraph 28, the Judge noted:

“I must consider the views of family members, but those expressions of opinion must be considered critically by the Court, with P’s interests at the centre: see Mr Justice Hayden in Abertawe Bro Morgannwg University Local Health Board v RY [2017] EWCOP 2.”

30. Later, he observed:

“In SD v Royal Borough of Kensington & Chelsea [2021] EWCOP 14, when the vaccine was still very new, Hayden, J. had to consider arguments around the vaccine’s safety and efficacy. In an important passage he stated:

...it is not the function of the Court of Protection to arbitrate medical controversy or to provide a forum for ventilating speculative theories. My task is to evaluate [P’s] situation in light of authorised, peer reviewed research and public health guidelines and to set those in the context of the wider picture of [P’s] best interests.”

31. Finally, the Judge commented:

“In cases involving children and the exercise of parental responsibility there is a clear pointer from the Court of Appeal (albeit obiter) as to the approach the Court should take. It favours the Court being guided by Public Health England and the Green Book: see Re H (a child) (Parental Responsibility: Vaccination) [2020] EWCA Civ. 664 Eleanor King, L.J.”

32. For completeness, the Judge noted that following those first few reported cases, “*vaccination cases have become a sub-group of their own, and I have been addressed in writing and orally on many of these*”.
33. My approach, in the cases cited by the Judge and by Counsel in their written submissions, has been to follow that set out by King LJ in **Re H (a child) (Parental Responsibility: Vaccination) [2020] EWCA Civ. 664**. Though the Court of Appeal was there considering the question of MMR vaccinations, the approach is applicable by parity of analysis. At paragraph 104, King LJ observed:
- “Although vaccinations are not compulsory, the scientific evidence now clearly establishes that it is in the best medical interests of children to be vaccinated in accordance with Public Health England’s guidance unless there is a specific contra-indication in an individual case.”*
34. The public health guidance here is set out in the Green Book (see paragraph 23 above):
- “There is no convincing evidence of any safety concerns from vaccinating individuals with a past history of COVID-19 infection, or with detectable COVID-19 antibody so people who have had COVID-19 disease (whether confirmed or suspected) can still receive COVID-19 vaccine. This is because it is not known how long antibodies made in response to natural infection persist and whether immunisation could offer more protection. If antibodies have already been made to the disease following natural infection, receiving COVID-19 vaccine would be expected to boost any pre-existing antibodies.”*
35. The above passage indicates that vaccination is likely to boost pre-existing antibodies arising from pre-existing infection. Thus, DC’s interests would appear to remain best protected by receiving the vaccination. I have considered whether on application of the general principles identified above, and following the approach in the established authorities, this appeal should therefore be dismissed. It may well fall to be in due course.
36. However, an understanding of the impact and effects of the Omicron variant must, inevitably at the time the publication of Chapter 14a, have been incomplete. Additionally, it strikes me that what is most likely contemplated by ‘vaccination’ here, is a series of both vaccinations and/or boosters. It seems likely, in the light of DC’s clinical vulnerability, that he might be advised to receive a greater number of injections than the average member of the population. I have no doubt that this will cause real and visceral distress to the parents. As Judge Burrows noted, DC’s father advanced an argument which he sought to root in emerging studies and data. The Judge found he was not a ‘*conspiracy theorist*’ and did not identify himself with some of the more extravagant prejudices ventilated in some social media outlets.
37. In the courtroom in this appeal, I was struck by the parents’ almost palpable anxiety. I have no doubt that they will attempt to conceal this distress from DC, but I very strongly suspect they will be unable to do so. I have equally little doubt that in this very intimate relationship, DC will in some way sense their distress and in turn, at very least

potentially, become distressed himself. Thus, the parents' reaction to the vaccination process indirectly becomes one of the factors illuminating DC's best interests.

38. I have concluded, at this stage, that this Court, sitting in a reviewing capacity, can take the rare course of ordering further evidence before reaching a final conclusion. In particular, I should like to ascertain, if it is possible to do so, the following facts:
- i. How many injections is DC likely to require?
 - ii. Given that DC was most likely infected by the Omicron variant, is it necessary for him to have both an injection and a booster?
 - iii. Given his 'clinical vulnerability', is it likely that DC will require any medication or vaccination presently targeted to this particular group?
 - iv. Is it the case that vaccination, post natural infection by the Omicron variant, is likely to boost immunity?
39. Mr Hoar has told me that his attempts to identify appropriate experts, willing to assist in this case, have been unsuccessful. With respect to him, I do not think he has been sufficiently clear of the expertise that he wishes to target. It strikes me that an opinion from an epidemiologist has the potential to be helpful and I propose to adjourn this appeal, for a very short period, to investigate these identified and tightly circumscribed issues.