



Neutral Citation Number: [2021] EWHC 2993 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SITTING AT GRIMSBY

Date: 9 November 2021

Before :

MR JUSTICE POOLE

Re: C (Looked After Child) (Covid-19 Vaccination)

Mr Goodwin (instructed by Alison Skipsey of the Local Authority's Legal Services)
for the **Applicant**
The First Respondent in person
The Second Respondent in person
Miss Blackmore (instructed by Zoe Atkinson of Lockings Solicitors) for the **Third**
Respondent

Hearing dates: 4 November 2021

JUDGMENT

This judgment was delivered in private. 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 children 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 Poole :

Introduction

1. C, who will soon turn 13, is a child looked after by the Applicant Local Authority following a care order made in 2015. He wishes to be vaccinated with the Covid-19 and winter flu vaccines. He is supported by his Guardian and Local Authority who both consider it to be in C's best interests to have the vaccinations. His father, the Second Respondent, has given his support for C's decisions. However, the First Respondent ("the mother") is strongly opposed to her son being vaccinated.
2. The Local Authority believes that it is in C's best interests to have the vaccinations and that it has the right under section 33 of the Children Act 1989 to exercise parental responsibility by arranging for and consenting to the two vaccinations for C. However, it seeks a confirmation that it is so authorised to act and applies to the High Court for three reasons:
 - i) The mother's opposition to the vaccines being given now to C – her opposition to the Covid-vaccine being given to him now is implacable and very strongly put.
 - ii) Although the Court of Appeal in *Re H (A Child) (Parental Responsibility: Vaccination)* [2020] EWCA Civ 664 held that a local authority with a care order can arrange and consent to a child in its care being vaccinated where it is satisfied that it is in the best interests of that individual child, notwithstanding the objections of parents, the point has not been tested in relation to the Covid-19 or winter flu vaccines.
 - iii) If it is wrong about its power under s.33 of the Children Act 1989, the Local Authority invites the court to permit it to apply for the court to exercise its inherent jurisdiction to declare that it is in C's best interests to have the vaccinations.
3. The issues for the court to determine are:
 - i) Does a Local Authority with a care order have the right under s.33 of the Children Act 1989 to exercise parental responsibility by arranging for and consenting to vaccinations for the child for Covid-19 and/or the winter flu virus notwithstanding parental objection?
 - ii) If not, is it nevertheless in C's best interests to have one or both vaccinations? If so, should the court exercise its inherent jurisdiction to authorise the vaccinations?
4. At the beginning of the hearing the mother applied for an adjournment in order that she could seek legal representation and expert evidence. In relation to the question of expert evidence, for the reasons explained later in this judgment, I do not regard it as necessary for the court to receive expert evidence to assist it to resolve these proceedings justly – s.13(6) Children and Families Act 2014. In relation to legal representation, I note that

as long ago as 13 September 2021 the mother raised strong objection to the Covid-19 vaccination but that the Local Authority's application is much more recent. The mother says that she has contacted solicitors, but there is no communication from any solicitors and no indication that she would secure the services of solicitors within a short period. In any event, I am satisfied that the mother's Art 6 rights to a fair hearing are met without the need for her to have legal representation and that, applying the overriding objective, it would be disproportionate to adjourn this case for the purpose of allowing the mother time to seek legal representation. This case has come to court swiftly following the application but the issues are not complex and the mother's position can be simply stated and is clearly understood. Delay will be adverse to the child's best interests. I refused the application for an adjournment.

Background

5. A decision to offer vaccination for Covid-19 to all 12-15 year old children was announced on 12 September 2021. The provision of the winter flu vaccine for children in school years 7 to 11 was added to the flu vaccine programme on 13 October 2021.
6. There is no dispute about the following chronology of events:
 - 4.12.15 By court order C was placed in the care of the Applicant Local Authority, where he remains.
 - 13.9.21 Upon it being reported nationally, on 12.9.21, that children aged 12 to 15 would now be offered the Covid-19 vaccine, the mother contacted Children's Social Care to inform them that she would be opposed to vaccination of C.
 - 22.9.21 During supervised contact, C informed his mother that he would wish to have the Covid 19 vaccine.
 - 23.9.21 C confirmed, to his social worker, his wish to be vaccinated.
 - 23.9.21 The mother wrote to the Local Authority enclosing a signed 'Vaccine Refusal Declaration'.
 - 25.10.21 The Local Authority issued its application for a declaration under the inherent jurisdiction of the High Court.
 - 25.10.21 Directions upon issue by His Honour Judge Whybrow including making C a party to the application and the appointment of a Children's Guardian.
 - 27.10.21 The Child Looked After Health Advisor informed C's social worker that there were no medical issues specific to C which raised concerns about the administration of the Covid 19 vaccine.

The Law

7. Sub-Sections 33(3) and (4) of the Children Act 1989 provide,

(3) While a care order is in force with respect to a child, the local authority designated by the order shall –

(a) have parental responsibility for the child; and

(b) have the power (subject to the following provisions of this section) to determine the extent to which –

(i) a parent, guardian or special guardian of the child; or

(ii) a person who by virtue of section 4A has parental responsibility for the child

may meet his parental responsibility for him.

(4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

The exceptions to the general power set out in other sub-sections of s.33 do not apply to the present case. King LJ observed in *Re H* at [27] that, although the power granted to local authorities by ss. 33(3) appears to be otherwise unlimited,

... local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in *Re C (Children)* [2016] EWCA Civ 374; [2017] Fam 137 (Re C), the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of such cases is not closed, but they will chiefly concern decisions with profound or enduring consequences for the child.

Thus a local authority should not use s.33(3)(b) to override the wishes or views of a parent in relation to serious or grave matters with profound or enduring consequences for the child.

8. In relation to the application of s.33 to questions of childhood vaccination, King LJ conducted a detailed review of the case law before concluding at [104]:

i) 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.

ii) Under s.33(3)(b) CA 1989 a local authority with a care order can arrange and consent to a child in its care being vaccinated where it is satisfied that it is in the best interests of that individual child, notwithstanding the objections of parents.

iii) The administration of standard or routine vaccinations cannot be regarded as being a 'serious' or 'grave' matter. Except where there are significant features which suggest that, unusually, it may not be in the best interests of a child to be vaccinated, it is neither necessary nor appropriate for a local authority to refer the matter to the High Court in every case where a parent opposes the proposed vaccination of their child. To do so involves the expenditure of scarce time and resources by the local authority, the unnecessary instruction of expert medical evidence and the use of High Court time which could be better spent dealing with one of the urgent and serious matters which are always awaiting determination in the Family Division.

iv) Parental views regarding immunisation must always be taken into account but the matter is not to be determined by the strength of the parental view unless the view has a real bearing on the child's welfare.

9. The Court of Appeal in *Re H* was concerned with the specific immunisations which are recommended for children in this country as set out in the routine immunisation schedule which is found in the *Green Book: Immunisation against infectious disease*, published in 2013 and updated since. At the time of the judgment in *Re H* those included immunisation against diphtheria, tetanus, whooping cough, polio, meningitis B and C, measles, mumps and rubella. It is right to note therefore that the judgment did not concern the vaccinations at issue in the present case. Nor was the Court of Appeal concerned with a 12 year old child who has views of their own about the proposed vaccinations.

10. In *M v H and PT* [2020] EWFC 93 MacDonald J considered the question of the same routine vaccinations as were considered in *Re H*, but in a private law dispute. The father in that case additionally raised the issue of the Covid-19 vaccination. MacDonald J expressly confined his decision to “the vaccines that are currently included on the NHS vaccination schedule, including the MMR vaccine” [2]. His judgment was given in the early stages of the Covid-19 vaccination programme for adults and before there was a national programme for vaccinating children against Covid-19. Nevertheless, in *obiter* comments, he said at [4] :

...it is *very* difficult to foresee a situation in which a vaccination against COVID-19 approved for use in children would not be endorsed by the court as being in a child’s best interests, absent peer-reviewed research evidence indicating significant concern

for the efficacy and/or safety of one or more of the COVID-19 vaccines or a well evidenced contraindication specific to that subject child. [emphasis in the original]

11. The parties have not been able to identify a judgment in a public law case concerning the Covid-19 or winter flu virus vaccination programmes.
12. The test of competence for a young person to make decisions, including consent to treatment, was set out in the House of Lords decision of *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 WLR 830, [1986] 1 AC 112 in which Lord Scarman held,

The underlying principle of the law ... is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. ...

I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law.

It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved.

13. The assessment of whether a child is Gillick competent will be child-specific and decision-specific – see Cobb J in *In re S (A Child) (Child Parent: Adoption Consent)* [2017] EWHC 2729 (Fam), [2019] Fam 177, [2018] 2 FLR 111. A child of 12 cannot be conclusively presumed to be Gillick competent in relation to a vaccination decision. The decision of a Gillick competent child will not necessarily be determinative and the court may override it - *In re W (A Minor) (Medical Treatment: Courts Jurisdiction)* [1993] Fam 64 as discussed by Sir James Munby in *In the Matter of X (A child) (No. 2)* [2021] EWHC 65 (Fam).

The Mother's Case

14. The mother is opposed to C receiving the Covid-19 vaccine at least until there is what she would regard as compelling evidence that it is safe and effective. She contrasts other vaccines that she views as tried and tested with the Covid-19 vaccine which she believes is not. As for the flu vaccine, she is opposed to C receiving it together with the Covid-19 vaccine, which she believes is unsafe, and wishes to have more time to look into the safety of the flu vaccine before taking a position in relation to its safety and efficacy. The mother accepts that C does not have any known health conditions and

says that her objections would apply to any child and to any responsible parent faced with a decision whether to have the vaccines in question. She asked the court who would be responsible if C suffered an adverse reaction, including fatal complications, following vaccination because she would hold them responsible. The mother did not accept that either vaccine would be effective in protecting C or other children. She did not accept that the decisions about the national programmes of vaccination were based on sound evidence.

The Evidence

15. The Local Authority has adduced a witness statement from a social worker, Ms S, who assists with the uncontested chronology of events and alerts the court to information from the Immunisation Nurse, Hull and East Riding IntraHealth as of 5 October 2021 which states, “We are not undertaking Gillick consent for young people in schools for the Covid vaccinations. The only children who will be vaccinated will be those aged 12 to 15 years, who have a completed consent form saying yes by parents or those with parental responsibility”. The Local Authority has not sought to rely on expert evidence. It relies almost entirely on published guidance from the government and public bodies. Specifically, it relies on the publication of advice by the UK Health Security Agency, a new body, created in 2021, which has replaced Public Health England. In relation to Covid-19,

UK Health Security Agency, Guidance, COVID-19 vaccination programme for young people: guidance for parents. Updated 19 October 2021:

The UK's Chief Medical Officers (CMOs) all agree that while COVID-19 is typically mild or asymptomatic in most young people, it can be very unpleasant for some and 1 dose of the vaccine will provide good protection against severe illness and hospitalisation.

Vaccinating 12 to 15 year olds should also help to reduce the need for young people to have time-off school and reduce the risk of spread of COVID-19 within schools. The COVID-19 secondary schools vaccine programme should therefore provide protection to young people and reduce the disruption to face to face education. This will help to keep young people emotionally well and happier and this was an important consideration for the CMOs.

And in relation to the winter flu vaccination, the Local Authority directs the court's attention to UK Health Security Agency, Guidance, Flu vaccination programme 2021 to 2022: briefing for schools - October 2021 update, updated 13 October 2021. It begins,

For the 2021 to 2022 flu season, the flu vaccination programme that already includes all children in primary school will be

expanded to additional children in secondary school so that those in years 7 to 11 will now be offered flu vaccination. This significant expansion in the programme is part of the government's wider winter planning to reduce flu levels in the population, and therefore the potential impact on the NHS, when we are likely to see both flu and coronavirus (COVID-19) in circulation.

The guidance continues,

Why is flu vaccination important for children?

Flu is unpredictable and the levels of flu activity vary each year. Some years are much worse than others. For instance, in 2014 to 2015, a bad flu year, there were 28,000 deaths. There are several strains of the flu virus that cause flu and virus mutations also occur.

Flu can be a serious illness that leads to complications like bronchitis and pneumonia, and painful ear infections in children. Children under the age of 5 years old have the highest rate of hospital admission of any age group.

The main purpose of the programme is to help protect children themselves and to stop them spreading flu to their families and the wider community, given the role that children have in transmission of the flu virus. Those most at risk from the complications of flu (such as pregnant women, older people, and those with underlying health conditions) are also offered flu vaccination, and it is also free for anyone aged 50 years old and over this year.

16. There are multiple documents published on the Agency's website, the NHS website, and government websites setting out the justification for the inclusion in national vaccination programmes of Covid-19 vaccinations for 12-15 year olds, and, for this year, a flu vaccination for children in school years 7 to 11.
17. The mother has not suggested that C has any known individual characteristics or conditions that might contraindicate the use of either of the vaccines under consideration but says that he may have an unknown condition that would put him at risk. She has adduced a number of items that can only be described as anti-Covid-19 vaccination propaganda. For example, she has produced a sheet of photographs said to be of people who have died following Covid-19 vaccination. All parties accept that vaccinations are not risk-free. Adverse reactions and complications can arise. However, the material does not even try to reason that the deaths of those depicted were *caused* by vaccination, let alone to give context in terms of numbers affected or to weigh in the balance evidence of the number of lives that might have been saved by vaccination. To

give a flavour of the nature of the material on which the mother relies, it asserts that the deaths of those pictured are the fault of people who wear masks or who undergo Covid-19 tests because they allow the government to manipulate the figures in order to “destroy these lives”. The material is devoid of evidence or even rational argument and does not point to any peer-reviewed research evidence that raises any significant concern about the efficacy or safety of either vaccine.

18. The Children’s Guardian has provided evidence through her position statement of C’s own views following a lengthy meeting with him. He is very frustrated by his mother’s stance. He has weighed up evidence about the vaccines and has a settled view that he wishes to have them both. He is particularly concerned that there is a disabled child in his current placement whom he does not want to infect. The Guardian is satisfied that C understands the decision about vaccination and can weigh up the pros and cons for himself. He regards his mother’s opposition as not being “smart”.

Conclusions

19. I do not consider it appropriate for this court to embark on an investigation into the merits of any competing theses as to whether national programmes of vaccination of 12-15 year olds for Covid-19 or for children in school years 7-11 for the flu virus, are justified as being generally in the best interests of children in those age ranges. In cases that concern vaccines that are part of national programmes, the question of whether expert evidence is necessary will only arise if there is an identifiable, well-evidenced, concern about whether, due to their individual circumstances, a vaccine is contraindicated for a particular child, or if there is, as MacDonald J put it in *M v H*, “new peer-reviewed research evidence indicating significant concern for the efficacy and/or safety” of one or more of the vaccines that is the subject of the application...”. Even if such new research were available, I have serious reservations about whether an individual expert or individual judge could or should engage in a wholesale review of the evidence behind an established and continuing national vaccination programme. However, perhaps an expert could assist the court as to the quality and relevance of such new research. In the present case the issue does not arise - mere assertion that a vaccine is unsafe, however strongly expressed, does not meet either of the conditions under which expert evidence might be considered necessary to assist the court.
20. In my judgement, the principles set out by the Court of Appeal in *Re H* (above) apply equally to both the Covid-19 vaccination for 12-15 year olds and the winter flu virus vaccination for children in school years 7-11, as they do to the specific childhood vaccinations considered in that case. Like the standard vaccinations for infants, the Covid-19 and winter flu virus vaccinations are now part of national programmes of vaccination for children approved by the UK Health Security Agency, the successor body to Public Health England. The court can be satisfied, without the benefit of expert evidence, that the decisions to include the vaccinations in national programmes are based on evidence that they are in the best interests of the children covered by the programmes. Given the oral submissions that I received from the mother, it is worth emphasising that vaccination programmes may be in the best interests of children even though administering the vaccines is not free from risk. Very few activities in medicine or life more generally are free from risk. Administering a vaccine gives rise to a risk of harm to a child. Not giving a vaccine gives rise to a risk of harm to a child. Voluminous

evidence establishing the extent and balance of risks and benefits needs to be obtained before a decision is made to roll out a national programme of vaccination for children.

21. In the absence of any factors of substance that might realistically call into question whether the vaccinations are in an individual child's best interests, decisions for the child to undergo standard or routine vaccinations that are part of national vaccination programmes are not to be regarded as "grave" decisions having profound or enduring consequences for the child.
22. There is one qualification that I would make to the general principles stated above. The Court of Appeal in *Re H* was concerned with vaccinations for infants or very young children. In this case, C may well be Gillick competent to make the decisions to be vaccinated. I have not undertaken an assessment of his Gillick competence because I consider it unnecessary to do so to answer the primary question raised in this case. The view of a Gillick competent, looked after child of C's age deserves due respect when considering any question of their best interests. Given that C consents to the vaccinations, there is no conflict between him and the Local Authority. If, however, such a child refused vaccination, that would raise different questions, namely whether the local authority with parental responsibility could override the child's decision and whether the issue should be brought before the court. As I noted in the brief review of the law above, it is established that the court may override a Gillick competent child's decision. Those questions do not arise in this case. There is advantage in this being a short and clear judgment and so I shall not indulge in an academic exercise.
23. Accordingly, applying the principles articulated by the Court of Appeal in *Re H*, I am quite satisfied that under s.33(3)(b) of the Children Act 1989 a local authority with a care order can decide to arrange and consent to a child in its care being vaccinated for Covid-19 and/or the winter flu virus notwithstanding the objections of the child's parents, when (i) such vaccinations are part of an ongoing national programme approved by the UK Health Security Agency, (ii) the child is either not Gillick competent or is Gillick competent and consents, and (iii) the local authority is satisfied that it is necessary to do so in order to safeguard or promote the individual child's welfare. There is no requirement for any application to be made for the court to authorise such a decision before it is acted upon.
24. In those circumstances it is unnecessary for me to exercise the inherent jurisdiction, but had it been necessary I would have had no hesitation in concluding that it is in C's best interests to have both vaccinations given all the circumstances including the balance of risks of having and not having the vaccinations, and C's own wishes and feelings.
25. S. 33(3) of the Children Act 1989 does not give a local authority *carte blanche* to proceed to arrange and consent to vaccinations in every case. Firstly, it is acknowledged that local authorities should not rely on s.33(3)(b) in relation to grave decisions with enduring or profound consequences for the child. I cannot discount the possibility that an individual child's circumstances might make such a decision "grave". Secondly, pursuant to s.33(4) a local authority must make what has been termed "an 'individualised' welfare decision in relation to the child in question prior to arranging his or her vaccination." (per King LJ, *Re H* at [33]). Thirdly, as King LJ observed in *Re H* at [99]

in the event that a local authority proposes to have a child vaccinated against the wishes of the parents, those parents can make an application to invoke the inherent jurisdiction and may, if necessary, apply for an injunction under section 8 Human Rights Act 1998 to prevent the child being vaccinated before the matter comes before a court for adjudication.

26. Nevertheless, in the great majority of cases involving looked after children, no application will need to be made by the local authority to the court in respect of decisions to proceed with Covid-19 and/or flu virus vaccinations provided under a national programme, even when there is parental objection.