[2021] EWCOP 19

IN THE MANCHESTER COUNTY COURT
COURT OF PROTECTION

Case No. 1372001T

March 12th 2021

Before:

HIS HONOUR JUDGE BUTLER

NHS Tameside & Glossop CCG

V

CR
(by his litigation friend CW)

v

SR

Counsel for the Applicant: Mr Wenban-Smith
Counsel for the First Respondent: Ms Haines
Counsel for the Second Respondent: Litigant in Person

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1. Introduction

1.1. The sole issue in this case is to determine whether it is in the best interests of CR to have a declaration made to enable the Applicant ('the CCG') to administer a vaccination to CR against Covid 19. There is no dispute that CR does not have the capacity to make this decision himself. This is the first such application of which I am aware in this Region (and which geographically covers the North West of England). The application was made on 23rd February 2021.

1.2. The CCG rely upon the following assertions to support its application. It states that the professionals involved in the care of CR all share the opinion that it is in his best interests to have the vaccination. These comprise his GP (Dr M); a clinical psychologist (Dr P);Dr B (CLDT); his social worker (Mr F); his community learning disability nurse (Mr K); the manager of the care home where he currently resides ('the care home'); his relevant persons representative (CW, and who is also his litigation friend in this application) and the author of a witness statement (Ms W) who is employed by the CCG and which statement summarises the professional opinions of those listed above together with other matters of fact as well as opinion drawn from Government Guidance on the issue in dispute. The vaccine that will almost certainly be used is that manufactured by Astra Zeneca.

1.3. CR himself is 31 years old. He has been diagnosed with a lifelong severe learning disability, autism and epilepsy. He has been living at the care home since 3rd January 2021. This may be a temporary arrangement. His litigation friend (CW) supports the application made upon behalf of CR. CR himself is classed as 'clinically vulnerable' as opposed to 'clinically extremely vulnerable' as a result of his epilepsy and severe learning difficulties. He is also overweight, and it is estimated that this now 22 stone. His classification as being clinically vulnerable

is by reference to the opinion and advice of the Joint Committee on Vaccination and Immunisation (30th December 2020). He falls within the priority group for a vaccination. CW agrees with the evidence of the CCG that CR lacks capacity to make decisions as to whether to have a vaccination or not.

1.4. SR is the father of CR. There have been a number of meetings between him and the CCG (together with the involvement of the professionals listed at 1.2. above). He objects to the vaccination being given to his son for the following reasons;

(a) he has background health issues;

(b) these are severe learning and behavioural difficulties, epilepsy, attention deficit hyperactive disorder and autism;

(c) the vaccine is not mandatory;

(d) it has not been tested sufficiently;

(e) it does not stop a person contracting covid 19;

(f) the long term side effects upon people with severe health issues are unknown;

(g) there is a concern that the vaccine may modify DNA/RNA;

(h) some people have died after having the vaccine;

(i) some people who have had the vaccine are now saying that it should not be administered;

(j) the period of testing of the vaccine was less than 12 months, and which is to be contrasted with 7 years as the most rapid period of testing for any other vaccine;

(k) there are a 200,000 doctors, nurses and carers who have refused to have the vaccine (and thus, it would appear, a body of professional opinion who are opposed to the vaccine);

(l) the survival rate of those who do not have the vaccine but who contract Covid 19 is 98% (and thus, it would appear the risks outweigh the alleged benefit);

(m) there has been no testing on patients such as CR (that is to say patients with the conditions that he has);

(n) there is no information as to the contents of the vaccine;

(o) the latter makes it unlawful for the vaccine to be administered.

1.5. These objections are taken from a document supplied by SR to the Court, and dated 9th March 2021 (and pursuant to my order dated 5th March 2021). In response to questions from myself, he stated that he had no objections to the vaccination in principle, but that this was not the right time for his son. This was based (mainly) on the lack of data as to the consequences of such a vaccine for those who fell into the same category as his son. He (and his family) did not think that there had been enough testing for those with learning disabilities (and as a result of which the relevant evidence was absent). He was also concerned that the contents of the vaccine itself might interact with the other medication that his son is receiving and in particular those that were used to control his epilepsy, and treat his ADHD. He agreed that (in part) his concerns were linked to the (now) discredited theories proposed by Dr Andrew Wakefield as regards the link between autism and the MMR vaccine, and which he still believed were accurate.

1.6. Thus, it appears that the autism which CR has, is attributed by SR to an MMR vaccination that he received at birth. He has had no vaccinations at all since that time.

2. Summary of Evidence

2.1. The only evidence considered by the Court is referred to at paragraph 1.2 above. It is dated 23rd February 2021 and the author is Ms W. The contents of the statement are (in effect) to provide a brief chronology and some context to the application, and well as drawing on government guidance in this area.

2.2. CR himself is currently in a placement that may be temporary and is described as being for the purposes of an assessment. It is my understanding that

this is connected with matters that are unrelated to the application before the Court but are connected with his conditions. It states that CR can communicate via a limited range of Makaton and will respond to physical cues. He can be resistant to intervention, including medical intervention. Indeed, there is a reference to him having a phobia of hospitals and health interventions (F8 of the bundle). However, in January 2021 he did permit blood samples to be taken from him by Dr B, and with staff at the care home to provide him with reassurance. I was informed that at that time CR was sedated (as a result of medication for one of his conditions) but that physical intervention was not needed and nor did CR pull away. Indeed, the CCG will not administer the vaccination if any form of physical intervention is required. This was confirmed by way of evidence in the form of minutes of a meeting which took place on 11th March 2021.

2.3. There have been meetings to discuss the vaccination on 28th January 2021; 1st February 2021; 4th February 2021; 8th February 2021; 11th February 2021; 16th February 2021.

2.4. In particular, Dr M (his GP) '*discussed at length the highly likely risk of severe illness to those who contract Covid, with underlying health conditions and residing in high risk environments*'. The care home is a high risk environment for contagion, albeit thus far there are no cases within that setting. Dr M was also of the opinion that the risk to CR should he contract Covid 19 '*would be significant and serious, with a risk of severe ill health and possibly death*'. Dr B set out the known side effects as being '*soreness to the arm for a few days post vaccination and symptoms similar to flu, [and] such side effects can be conservatively managed*'. The level of such risk is said to be 1 in 10.

2.3. Post vaccination, he will be monitored and any medication administered if there are side effects, ie by the use of paracetamol.

3. **The Law/Principles**

3.1. The only part of the Mental Capacity Act 2005 which has a direct bearing is Section 4 as follows. I have marked **in bold** those parts which are most salient in this case.

Best interests

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) **He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.**

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) **He must consider, so far as is reasonably ascertainable—**

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) “Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is

necessary to sustain life.

(11)"Relevant circumstances" are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

3.2. In **Aintree University Hospitals NHS Trust v James** [2013] UKSC 67 Baroness Hale said that '*in considering the best interests of this particular patient at this particular time, decision makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be ; they must try and put themselves in the place of the individual patient and ask themselves what his attitude to the treatment is or would likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be*'.

3.3. In this instance, it is not possible to determine what CR's views or wishes might be. He is still a young man, but his condition has endured throughout his 31 years. His ability to communicate is compromised, and he is not able to understand the consequences of not having a vaccination, or having a vaccination.

3.4. As I have determined that it is not possible to reasonably ascertain his wishes, it seems to me that the position is akin to that proposed by the Law Commission and also referred to by Baroness Hale in **Aintree University Hospitals NHS Trust v James** [2013] UKSC 67 at [24] '*but the best interests test should also contain* '*a strong element of substituted judgment (para 3.25) taking into account both the past and present wishes and feelings of patient as an individual and also the factors which he would consider if able to do so (para 3.28)*'

3.5. What factors would he be able to consider if he were able to do so? On the basis of the actual evidence in existence it would be as follows (and as summarised in the helpful skeleton argument provided on behalf of the Applicant and First Respondent):

(a) That the vaccination has MHRA approval in the UK;

(b) There are no contra-indications for the use of this vaccine which apply to CR;

(c) Astra Zeneca vaccines significantly reduce the risk of sustaining serious illness requiring hospitalisation (an 80% reduction in those over the age of 80) (cf The Lancet 3.2.21)

(d) a 75% reduction of asymptomatic infection (University of Cambridge 24th February 2021);

(e) that he is living in a care home (albeit covid 19 free at present) and where there have been more than 25% of deaths caused by Covid 19;

(f) he has a relevant underlying health condition and which places him in a vulnerable group;

(g) he is unable to comply with social distancing and hygiene measures;

(h) the UK has one of the highest per capita death rates in the world;

(i) he does not appear to have any anxiety about a medical intervention and which has involved the use of something sharp as recently as January 2021 (albeit that this was whilst he was sedated with a medication that is now not being administered as a part of his treatment);

(j) the documented common side effects are mild;

(k) if he did contract Covid 19 then the consequences for his health due to the health conditions that he does have might be serious illness or death;

(l) he is overweight.

3.6. It is accepted that CR falls outside what might be termed the more conventional cohort of individuals who live in care homes. He is, for example

young and other than his epilepsy has no conditions that cause him to be frail. There is no Covid 19 in the care home at present, but as visiting becomes more relaxed then unvaccinated visitors from outside the care home will increase the risk of such contagion. I was also told at the hearing that the vaccination programme for other residents at the care home has started.

3.7. In relation to this specific issue Hayden J has recently adjudicated in the following terms (**SD v Royal Borough of Kensington & Chelsea** [2021] EWCOP 14). He also cited within that decision his own earlier judgment (**Re E (Vaccine) [2021] EWCOP 7**) thus '*The risk matrix is not, to my mind, a delicately balanced one. It does not involve weighing a small risk against a very serious consequence. On the contrary there is for Mrs E and many in her circumstances a real and significant risk to her health and safety were she not to have the vaccine administered to her*'. Further, in **SD [2021] EWCOP 14** Hayden J also held (on the same issue) '*I find that the risk to V's life and health, if she were not to have the vaccine, would be unacceptably high and that it is in her best interests to receive it. In such cases as this, there is a strong draw towards vaccination as likely to be in the interests of a protected party (P). However, this will not always be the case, nor even presumptively so. What is important to emphasise here, as in so many areas of the work of the Court of Protection, is that respect for and promotion of P's autonomy and an objective evaluation of P's best interests will most effectively inform the ultimate decision. It is P's voice that requires to be heard and which should never be conflated or confused with the voices of others, including family members however unimpeachable their motivations or however eloquently their own objections are advanced*' [33].

3.8. I accept that CR is not elderly, and therefore the same level of risk does not exist for him, but the evidence is still that such a risk exists (and which is why he is categorised as being in a clinically vulnerable group) and the consequences of infection are also still high, and engage his rights pursuant to Article 2 of the

ECHR ('*Everyone's right to life shall be protected by law*'). CR, of course, has the same rights as everybody else who has capacity. So, notwithstanding that CR has the advantage of youth on his side, in my judgment CR still faces a real and significant risk to his safety if the vaccination is not administered. For the avoidance of doubt this applies to both doses. I am also reminded by Mr Wenban-Smith that '*There is a very strong presumption in favour of taking all steps to prolong life, and save in exceptional circumstances …. The best interests of the patient will normally require such steps to be taken. In the case of doubt, that doubt has to be resolved in favour of the preservation of life*' (Munby J **R (Burke) v GMC** [2004] EWHC 1879 (Admin) and which was approved in the Court of Appeal).

3.9. The views of SR (and which are apparently shared by his mother and twin brother) are genuinely held. He spoke to me at Court with conviction and with great clarity. I have no doubt whatsoever that his objections are founded on a love for CR and a wish to ensure that he comes to no harm as a result of another vaccination and until there is greater clarity in terms of medical science. His objections were not intrinsically illogical. They were certainly not deliberately obstructive. They were made upon the basis as to what he regards as being in the best interests of CR. That concern for his son does him credit, in my view.

3.10. However, the reasons for opposing the administration of the vaccine have no clinical evidence base. In particular the objections (and this is *subjectively* understandable) are based on objection to this vaccination for his son as a result of what SR believes were the consequences of the MMR injection and the autism of his son. *Objectively*, however, this is based upon the discredited theories of Dr Andrew Wakefield (advanced in 1998) and which were (a) found to have no basis in science; (b) were formally retracted by Dr Wakefield in 2020 and (c) resulted in Dr Wakefield being struck off the Medical Register.

4. Conclusions

4.1. (4) **He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.**

4.2. It has not been possible to involve CR directly in these proceedings, for reasons that are I hope self-evident. This is in itself an unusual (but far from unique) aspect of cases which come before the Court of Protection.

4.3. (6) **He must consider, so far as is reasonably ascertainable—**

> **(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),**
>
> **(b) the beliefs and values that would be likely to influence his decision if he had capacity, and**
>
> **(c) the other factors that he would be likely to consider if he were able to do so.**

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

> **(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,**
>
> **(b) anyone engaged in caring for the person or interested in his welfare**

4.4. For similar reasons as those referred to at 4.2 above, it has not been possible to consider the past and present wishes of CR. However, in my judgment he would have been likely to have considered (in respect of (b) and (c)) those factors that I have set out in my judgment and which point towards the evidence based advantages of having a vaccination.

4.5. I have been able to consider the views of all professionals engaged in caring for him and interested in his welfare, as well as the views of his immediate family. Indeed, this is the only basis upon which I have been able to make this decision in respect of this part of the MCA 2005.

4.6. **(11)"Relevant circumstances" are those—**

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

4.7. In my judgment, the 'relevant circumstances' in this case must include the specific vulnerability of this man (notwithstanding his relatively young age), together with the overwhelming objective evidence of the magnetic advantage of a vaccination.

4.8. For these reasons, I grant the relief requested by the CCG but with the important caveat that I am **not** authorizing physical intervention in order so to do.

His Honour Judge Jonathan Butler

Manchester Family and Civil Justice Centre

Bridge Street

Manchester

12th March 2021