

IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of his family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Case No: 13768445

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

Before: Her Honour Judge Hilder

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 22nd August 2021
[2021] EWCOP 65

THE ROYAL BOROUGH OF GREENWICH

Applicant

and

**(1) IOSK
(by his Litigation Friend, the Official Solicitor)
(2) NK
(3) MOK**

Respondents

Hearing: 19th August 2021

Ms. Rowlands (instructed by the Local Authority) for the Applicant
Ms. Daly (instructed by Mackintosh Law) for the First Respondent through his Litigation Friend
the Official Solicitor



NK appeared in person, with Daniyel Thomas acting as McKenzie Friend
Mr. Nabi (instructed by Edwards Duthie Shamash Solicitors) for the Second Respondent

The hearing was conducted in public subject to a transparency order made on 14th July 2021.
The judgment was handed down to the parties by e-mail on 23rd August 2021. It consists of 9
pages, and has been signed and dated by the judge.

The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

JUDGMENT

1. This application concerns IOSK who is presently 17 years of age, turning 18 next month. The issue for determination is whether or not it is in his best interests to receive vaccination against covid-19.

The background

2. IOSK has autism and severe learning disability. He is non-verbal. It is common ground, and I am satisfied on the basis of evidence filed, that IOSK lacks capacity to make a decision as to covid-19 vaccination for himself.
3. IOSK is also asthmatic.
4. The Second and Third Respondents are IOSK's mother and father respectively. They are separated but present a united approach in respect of the issue of covid-19 vaccination, both of them objecting to their son being given it.
5. IOSK has been known to social services since 2007, when he was about 4 years old. He was made the subject of a Care Order (**F1**) on 22nd February 2019, when he was aged 15.
6. Mr. and Mrs. K opposed the care proceedings and remain strongly opposed to the state's intervention in the care of their son. Relations between them and the Local Authority are, to put it mildly, very strained.
7. IOSK's first residential placement under the Care Order came to an abrupt end when Ofsted suspended its registration. IOSK was allowed to begin a pre-arranged break with his parents earlier than originally planned. At the end of the pre-arranged period, IOSK's parents did not return him to his new placement at P College as intended. In October 2019 a recovery order was granted and police assistance was deployed to take IOSK to



the new placement. Unfortunately, P College gave notice to end IOSK's placement apparently because of MOK's conduct. Mr. and Mrs. K made an application to discharge the Care Order but it was not successful.

8. In respect of MOK's alleged conduct, a non-molestation order was granted on 2nd October 2019 and subsequently extended twice, and a civil injunction was granted on 4th October 2019 and has been extended until 1st November 2021. Committal proceedings and charges are being pursued for alleged breaches of these orders. MOK has elected jury trial and a hearing is set for 7th September 2021. A hearing date is awaited for the committal proceedings. MOK denies all allegations against him.
9. Meanwhile, on 14th September 2020 IOSK moved to X placement, a children's home whose address has not been disclosed to MOK, on a "bridging basis." Efforts were made to identify a long-term educational placements for IOSK but ultimately those efforts were unsuccessful and so a decision was made to secure instead a supported living placement for him.
10. A COP1 application was made, dated 14th June 2021, to authorise IOSK's move to the supported living placement, and to authorise deprivation of his liberty in the arrangements for his care there. Preliminary directions were given by orders made on 15th and 29th [B29] June 2021 and then, at a hearing before me on 14th July 2021, an interim order [B33] was made providing for IOSK to move to his current placement, the address of which is not to be disclosed to MOK. A further hearing is listed on 24th September 2021.
11. During the relatively short duration of these proceedings to date, MOK and NK have made numerous COP9 applications, all have which have been considered separately. In particular, applications to discharge the appointment of the Official Solicitor as Litigation Friend for IOSK have been refused. MOK in particular has also sent high volumes of intemperate e-mail communications to the Court.
12. The vaccination issue arose in the context of the wider welfare proceedings. Directions for this hearing were also given on 14th July 2021 [B7]. Subsequently the Applicant local authority made an application [B15] for special measures around the presentation of its evidence. In respect of that application, a hearing was conducted (by telephone at 4pm on 12th August 2021). NK was unable to attend that hearing but MOK was represented by Counsel. By agreement, I made an order which provided that the social worker could give oral evidence remotely; that if he was unrepresented, MOK would not permitted to cross-examine the social worker directly but may put questions in writing which would be asked of the witness by the judge; and that if MOK was represented, no special measures would apply.
13. MOK has been represented today. Without prior notice, NK requested the assistance of a McKenzie Friend, Daniyel Thomas. He describes himself as "from a grassroots organisation that supports fathers and families that are fighting for contact with or



custody of their children.” Mr. Thomas signed a handwritten statement confirming that he had no adverse interest in the matter. I read to him extracts from Practice Guidance: McKenzie Friends (Civil and Family Courts) 12th July 2010, confirming what a McKenzie Friend may do and may not do. He agreed to those parameters.

Matters considered

14. In respect of the vaccination issue I have considered all documents collated into the hearing bundle and additional statements filed late, including:
 - a. a letter from Dr. B Onwochei (GP) dated 27th July 2021 [E1]
 - b. on behalf of the Applicant Local Authority, statements by Amanda Wood (Social Worker) dated 11th June [C1] and 28th July 2021 [C18]:
 - c. on behalf of NK, an undated statement [B25] and a statement signed and dated at the hearing;
 - d. on behalf of MOK, an undated statement [C22] and a further statement dated 17th August 2021;
 - e. on behalf of IOSK, a statement by Kris Jackson dated 10th August 2021 [C39].
15. I have heard oral evidence from Amanda Wood. The parties agreed that it was not necessary to hear oral evidence from NK or MOK. I heard oral submissions from Counsel on behalf of the Applicant, IOSK and MOK, and from NK herself.
16. The undisputed medical evidence is as follows:
 - a. IOSK is “classed as high risk for covid-19 infection. It is recommended that such patients have the covid-19 vaccination for their own protection, the benefits of which are considered to outweigh the risks”: [E1] Dr. B Onwochei
 - b. “There is no known interaction between the vaccine and the medication [IOSK] is currently taking. The vaccine will protect [IOSK] from contracting the infection and even if he was infected with COVID-19, it will be unlikely that he will need hospitalisation”: [E4] Dr. Mona Botros, Consultant Child & Adolescent Psychiatrist (who “support[s]” the local authority request for IOSK to receive COVID-19 vaccination.)
 - c. JCVI statement on COVID-19 vaccination of children and young people aged 12 – 17 years: 15 July 2021 [E6]
 - i. “The Pfizer-BioNTech BNT162b2 COVID-19 vaccine has been authorised for use in persons aged 12 years and over in the UK... There is good evidence that the vaccine is relatively reactogenic in this age group, with short-lived



side effects including fever being common. There are emerging reports from the UK and other countries of rare but serious adverse events, including myocarditis (inflammation of the heart muscle) and pericarditis (inflammation of the membrane around the heart) following the use of Pfizer-BioNTech BNT162b2 and Moderna mRNA-1273 vaccines in younger adults.”

- ii. “JCVI advises that children and young people aged 12 years and over with specific underlying health conditions that put them at risk of serious COVID-19, should be offered COVID-19 vaccination.”
- iii. “At the current time, children aged 12 to 15 years of age with severe neuro-disabilities, Down’s syndrome, underlying conditions resulting in immunosuppression, and those with profound and multiple learning disabilities, severe learning disabilities or who are on the learning disability register are considered at increased risk for serious COVID-19 disease and should be offered COVID-19 vaccination. Young people aged 16 to 17 years of age who are at higher risk of serious COVID-19, as currently set out in the Green Book, should continue to be offered COVID-19 vaccination.””

The Parties’ Positions

17. **The Applicant Local Authority** considers that it is in IOSK’s best interest for him to have vaccination against covid-19. The Applicant is concerned that IOSK’s overall health conditions, including severe learning disability and asthma, make him particularly vulnerable to the virus. He is unable to understand the need to avoid contact to minimise risks of infection, and he is unable to communicate if he feels unwell. He has had other vaccinations, including flu vaccination recently, without issue and he has no medical conditions which contra-indicate covid-19 vaccination. The mild discomfort associated with the vaccination process, and the possibility of adverse side-effects are outweighed by the protective benefits of vaccination.
18. The Applicant Local Authority also contends that it is in the best interests of IOSK’s carers that he receive the vaccine, so as to minimise risk to them. Under cross-examination, this was expressed as an indirect benefit to IOSK: if his regular carers catch the virus from him, or even if they are required to isolate because of their contact with him, his care will be disrupted which would give rise to concerns for his emotional wellbeing.
19. Ms. Woods gave oral evidence confirming that she had no concerns about the staff at IOSK’s current placement to monitor him properly after being vaccinated. When asked



about weight gain suggesting that IOSK was not being well cared for, Ms. Woods explained that IOSK is presently taking medication which stimulates appetite but he is now under the care of a dietician, his physical activities have increased, and it is hoped that his medication may reduce as he settles. She said “I think he is being very well looked after” in his current placement.

20. Following the hearing, a written “plan” for the vaccination process was submitted. Notably, it confirms a process of familiarisation, that no restraint will be used, and that IOSK would be “monitored for signs of distress and discomfort...by staff who are familiar with him...over at least 72 hours after the vaccine is given.”
21. **NK** informs the Court that she has a degree in Health and Social Care and is a final year student in Nursing. She believes that IOSK’s “health problems” started after and as a result of MMR vaccination. Although she has agreed to other vaccines for him in the past, she is concerned that IOSK will have a negative reaction to covid-19 vaccination. She points out that vaccination is not “bullet-proof” and considers that “research has shown that the best way for protection against COVID is through hygiene.” She questions why IOSK’s asthma is considered relevant given that he “never had asthma attacks throughout his stay with me.” She says that CAMHS and IOSK’s GP are only supporting his vaccination “to protect their jobs”. She considers that “social services do not care about [IOSK’s] health and wellbeing” and she does not trust IOSK’s carers to be able to recognise if he is suffering from side-effects of vaccination. It is her view that the Local Authority “has used their power and authority to degrade my child to nothing, a nobody.” She asserts that she “will hold all responsible if [IOSK] develops a negative reaction, however mild or severe it might be.”
22. **MOK’s** written evidence sets out several bases for his objection to the vaccination for IOSK. In a COP9 application [B22] he referred to “alternative to covid-19, hence its emergency status is void” and asserted that the vaccine “contains nano-particles.” In a statement prepared before he had representation [C22] he asserts that IOSK’s vaccination should be done “after granting parents visitation rights and after confirming claiming responsibility for any reaction however mild or severe.” In his latest statement he expresses (at paragraph 5) a need to tell the court that “I am a Christian and we are not allowed to put such medication into our body” and (at paragraphs 6 & 8) his concerns about possible side-effects and the standards of care being provided to IOSK. However (at paragraph 9) he concludes that “if the government says that people should take the vaccine I would not have any objection to [IOSK] having this provided he is living with his biological parents.”
23. Counsel’s submissions on MOK’s behalf focussed on their being a real risk of negative reaction to the vaccination and serious side-effects. He emphasised MOK’s belief that IOSK had had such a reaction to the MMR vaccine, and the absence of any guarantee in respect of the covid-19 vaccine, without which it was submitted that the vaccine could not be said with sufficient certainty to be in IOSK’s best interests. If, as MOK believes,



IOSK is not being properly looked after, adverse side-effects may not be recognised in time.

24. **IOSK's** solicitor visited him on 9th August. His statement describes [C40] observing positive engagement between IOSK and his carers: IOSK “seemed to be at ease with the staff and moved around the placement as he wanted” [C41]. There are photographs of the visit exhibited to the statement.
25. Being unable to express any views about vaccination, it is submitted on behalf of IOSK that his wishes and feeling are best understood through his behaviour. He has had vaccinations recently without difficulty. In contrast, he has no comprehension of the virus, is unable to mitigate the risks and would find it challenging to cope with symptoms and treatment if he did contract the virus.
26. Ms. Daly identified relevant circumstances of the pandemic, namely that as of 11th August 2021, 196 347 people in the UK excluding Wales tested positive for covid-19 in the previous 7 days, and 607 died within 28 days of a positive test; and vaccination is now recommended for under-18s of a category which includes IOSK. In terms of side-effects, she drew my attention to JCVI advice of 4th August 2021 confirming that most common side-effects are mild, self-limiting and short lived, with more serious side-effects extremely rare and more frequently experienced after the second dose.
27. IOSK's Litigation Friend considers that vaccination is in IOSK's best interests provided that particular steps are taken. He should be given opportunity to familiarise himself with the vaccination venue (a church hall) by prior visits, and an appropriate appointment time should be arranged taking into account his needs. No restraint or sedation should be used. The situation should be reviewed after the first dose and before the second, with any issue arising to be considered at the next hearing in the wider welfare proceedings (currently listed on 24th September).

The Law

28. I remind myself of the principles at section 1 of the Mental Capacity Act 2005, and the provisions in respect of best interests at section 4.
29. I have reread the decision of the Supreme Court in *Aintree University Hospitals NHS Foundation Trust v. James* [2013] UKSC 67 and not in particular paragraph 39:

“...in considering the best interests of this particular patient at this particular time, decisionmakers 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 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.”

30. I have been referred to a number of recent decisions about covid-19 vaccination:

- a. *Re H (A Child)(Parental Responsibility: vaccination)* [2020] EWCA Civ 664 – in which the Court of Appeal set out (at paragraphs 43 – 54) the history and ultimately the refutation of any credible link between the MMR vaccine and autism, and concluded that “scientific evidence now clearly establishes that it is in the best 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” and “the matter is not to be determined by the strength of parental views unless the view has a real bearing on the child’s welfare.”
- b. *E v. London Borough of Hammersmith & Fulham & W* [2021] EWCOP 7: where it was concluded that vaccination was in the best interests of an 80 year old woman living in a care home, despite the objections of her son.
- c. *SD v. Royal Borough of Kensington & Chelsea* [2021] EWCOP 14: where it was stated (at paragraph 33) that there is no presumption in favour of vaccination but “it is P’s voice that needs to be heard”. On the facts of the matter, vaccination was in the best interests of P.
- d. *NHS Tameside & Glossop v. CR & SR* [2021] EWCOP 19 : the father of a 31 year old man, clinically vulnerable within JCVI terms, had concerns linked to fears around autism and the MMR vaccine, and P had had no vaccinations since. On the facts of the matter, vaccination was in the best interests of P, subject to the caveat that physical intervention to achieve vaccination was not authorised.
- e. *SS v. London Borough of Richmond upon Thames & South West London CCG* [2021] EWCOP 31: an 86 year old care home resident, had refused the vaccine in the context of increasing resistance to medical intervention of any kind. On the facts of the matter, vaccination was not in the best interests of P.
- f. *A CCG v. AD & AC* [2021] EWCOP 47: for a man in his 30s who had moderate learning disabilities, Downs Syndrome and autism, was clinically overweight, and lived in supported accommodation, vaccination was in his best interests. Mild sedative could be used in advance of the vaccination procedure, but not physical restraint.

Discussion



31. If given time to familiarise himself with the place where it will be given, IOSK has previously accepted vaccinations without difficulty. As long as a similar approach is taken to attending at the church hall for the covid-19 vaccination, there is no reason to think that his approach to covid-19 vaccination would be any different.
32. It is generally agreed by all that IOSK likes being outside and being active. On his own terms, he likes social contact. It is likely that he would want to be able to continue to engage in such things as far as possible in the future.
33. All professionals involved in IOSK's care consider vaccination to be in his best interests. His carers (in discussion with his solicitor), his GP, the Child & Adolescent psychiatrist and the social worker – none of whose jobs in any way depend on the outcome of this decision – are all agreed.
34. IOSK's parents object to him having vaccination against covid-19. Underlying their objection is a belief that IOSK's current presentation and needs were caused by MMR vaccination. They are not alone in holding such a view, and I do not doubt that the fear it causes them is real. However, the medical establishment has gone to considerable lengths to debunk this belief. As set out by the Court of Appeal, there simply is no basis on which it can be considered properly based. I acknowledge that that is their view, and that it will give rise to anxiety for them if IOSK is given the covid-19 vaccine but, particularly given IOSK's current living arrangements, I am satisfied that neither their view itself nor any anxiety it causes them is likely to have any adverse effect of IOSK's welfare. Accordingly, this aspect of their objection can be given no weight in the determination of the issue now before the Court.
35. NK's concern is also founded on her dim view of the care IOSK is presently receiving, particularly in his recent weight gain. She presented a photograph of IOSK taken on a recent contact visit, sitting in the ground outside and with his hands in his groin area, which she considered to demonstrate a present lack of proper care. However, the social worker addressed her concerns, and the independent observations of IOSK's own representatives present a very different view. In my judgment NK's photograph does not demonstrate inadequate care. The evidence of the social worker and IOSK's own solicitor is more compelling.
36. I listened carefully to NK's fears. It is abundantly clear that she is very distressed by IOSK's current circumstances. It did seem to me that she is doing her best to raise understandable concerns in an appropriate manner, to help and support IOSK, rather than to undermine the efforts of those who currently have responsibility for caring for him. I am however satisfied that her fears cannot be determinative of the vaccination issue. I hope she will draw comfort from the planned approach to the vaccination process which emerged during the hearing and has now been set down in writing, at least in so far as her concerns relate to IOSK's care before and after vaccination.



37. MOK may be just as concerned about his son but he expresses himself more vigorously as ‘in opposition to’ the Local Authority. In particular, his written statements expressly make no objection to vaccination if he is first allowed contact, or if IOSK lives with him. The basis for IOSK’s living arrangements has (twice) been determined by the Family Court and is currently the subject of live proceedings in this Court. It would not be appropriate for the vaccination issue to await conclusion of the wider welfare proceedings – that may be some time off, and the risks to IOSK continue every day that he remains unvaccinated. Vaccination can and should be properly considered as a discrete issue. It should not be seen by anyone as a bargaining chip in other disputes.
38. In so far as MOK’s objection is based on denial of the covid-19 pandemic, it flies in the face of overwhelming global experience. In so far as his objection is based on “nano-particles” in the vaccine, I note that MOK has now been provided with a link to all the vaccine ingredients without demur. There is absolutely no credible evidence to support either objection. As was observed by the Vice-President in *SD v Royal Borough of Kensington and Chelsea*, it is not the function of the Court to provide a forum for ventilating speculative theories. I give no weight at all to these objections.
39. In so far as MOK suggests that vaccination would be contrary to his religious beliefs, I express no view as to the validity of such proposition but note that they are *MOK’s* beliefs. He may of course hold whatever religious beliefs he likes. I acknowledge what MK says about his beliefs and confirm that, in so far as his need is “to let the court know in advance” that covid-19 vaccination is against his religion, then his need has been met. However, it is notable that his beliefs have not been a barrier to IOSK being vaccinated with parental consent in the past, and apparently they would not be a barrier in the future if only MOK’s views as to his son’s residence are realised. In my judgment this aspect of MOK’s objection can be afforded little weight in determining the best interests issue.
40. In his submissions on behalf of MOK, Mr. Nabi emphasised that “no one is willing to provide a guarantee that IOSK will not have an adverse reaction to the vaccination.” This is true. There are no guarantees in life. However, the *existence* of risk is not the only factor to be considered. How likely the adverse event is to occur, and how serious the adverse event would be if it does occur, also have to be considered. The information put before the Court by IOSK’s representatives has not been challenged. The most common risk of covid-19 vaccination is side-effects which are mild, self-limiting and short lived; more serious side-effects are extremely rare. The JCVI assessment of risk is that, for persons of a category which includes IOSK, the balance of risk is in favour of vaccination.

Conclusions

41. Taking all the circumstances of this matter into account, provided that the process is undertaken with full regard to IOSK’s individual needs as summarised in the written plan attached to this judgment, I am satisfied that the potential benefits of vaccination for IOSK significantly outweigh the possible risks. I am satisfied that it is in the best interests



of IOSK that he has vaccination of a type which complies with JCVI recommendation, and make an order accordingly.

HHJ Hilder
22nd August 2021



IOSK COVID-19 VACCINATION PLAN

1. IOSK will be supported at all times by staff who are familiar with him and with his ways of expressing himself.
2. IOSK will be supported to have the vaccine by a process of de-sensitisation and familiarisation which will include visits to the venue for the vaccination in advance. He will be taken to the venue at quieter times of day if possible. There may be several visits to the venue. The intention is that IOSK becomes familiar with the venue and what is to happen so that he is willing/content for the vaccination to be administered.
3. IOSK will have the vaccination explained to him through a social story.
4. IOSK will not be restrained in order to administer the vaccine.
5. IOSK will not be sedated in order to administer the vaccine.
6. A topical analgesic may be administered to the injection site to facilitate the administration of the vaccine.
7. If he does not co-operate with an attempt to administer the vaccine, for example by walking away or expressing distress, that attempt will be terminated.
8. Physical contact by way of comfort and support may be offered. For example, a gentle reassuring touch of his hand. This must not amount to physical restraint that restricts or reduces his movement.
9. He will be monitored for signs of distress and discomfort after the administration of the vaccine by staff who are familiar with him. This monitoring should take place over at least 72 hours after the vaccine is given. The staff will be provided with the information leaflet given by the NHS to recipients of the vaccine and will look out for any adverse symptoms including taking IOSK's temperature at regular intervals and any nonverbal change in his presentation which is unusual for IOSK.
10. If IOSK has any side effects from the vaccine, medical advice should be sought.
11. If he has a temperature or flu-like symptoms, he should be able to rest and regular fluids should be given to him. Paracetamol may be given. If these symptoms last for more than 3 days, his GP will be consulted.
12. If he has any more serious symptoms, his GP will be consulted immediately. These may include:
 - a. Headache that does not respond to painkillers;
 - b. Vomiting;
 - c. Drowsiness;
 - d. A rash that looks like small bruises or bleeding under the skin;
 - e. Shortness of breath or chest pain;
 - f. Leg swelling;
 - g. Abdominal pain.Given that IOSK cannot express such symptoms verbally staff need to monitor him closely and interpret any change of behaviour appropriately.
13. IOSK will be taken straight to hospital in case of very severe symptoms.
14. Urgent medical advice must be sought if IOSK has any of the following symptoms within a few days of being vaccinated:



- a. Chest pain;
 - b. Shortness of breath;
 - c. A fast-beating, fluttering or pounding heart (palpitations).
15. Nothing in this plan is intended to limit the professionals involved in IOSK's care from taking earlier steps to seek medical advice, call the GP or call 999, or otherwise provide care to IOSK and respond to an emergency as is considered to be in his best interests.

