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Compulsory Childhood Vaccination: Human Rights, Solidarity and Best Interests

David Archard, Joe Brierley, Emma Cave

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ABSTRACT

Across Europe an increasing number of States have set out policies which limit the right of parents to refuse routinely administered vaccinations on their children's behalf. The Grand Chamber of the European Court of Human Rights in *Vavříčka and Others v the Czech Republic* has found that compulsory vaccination can be compatible with the European Convention on Human Rights. We argue that the Court's consideration of the collective and individual best interests of children and the value of solidarity are pertinent to parental vaccine disputes and to the broader debate as to whether quasi-mandatory measures could be accepted in the United Kingdom.

I. INTRODUCTION

In *Vavříčka and Others v the Czech Republic*,¹ the Grand Chamber of the European Court of Human Rights ('the Court') considered for the first time whether compulsory childhood vaccination can be compatible with the European Convention on Human Rights (ECHR). The majority² found the Czech Republic's vaccination policy to be 'fully consistent with the rationale of protecting the health of the population'³ and within the wide discretion ('margin of appreciation') given to Member States on health issues.⁴ The policy struck a fair balance between the protection of children against serious diseases and the protection of families from the consequences of refusal.

Dissenting Judge Wojtyczek agreed that mandatory vaccination *can* be Convention-compliant but argued that the facts did not support such a conclusion in this case. He thought that the majority's consideration of the public interest did not give adequate weight to the best interests of individual children, as opposed to the interests of children in general, or to the particular risks, costs, side effects and benefits⁵ of each vaccine as opposed to the 'general consensus over the vital importance of this means of protecting populations against diseases.'⁶

¹ *Vavříčka and Others v the Czech Republic* (Applic. nos. 47621/13, 3867/14, 73094/14, 19306/15, 19298/15, and 43883/15, 8 April 2021), at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-209039%22%7D> (last visited 5 May 2021).

² Annexed to the judgment are separate opinions from partly concurring and partly dissenting opinion of Judge Lemmens and dissenting opinion of Judge Wojtyczek.

³ n 1 above, para [306].

⁴ *ibid* paras [274], [280], [285].

⁵ *Ibid*, dissenting opinion of Judge Wojtyczek, para [9].

⁶ *ibid* para [135].

Filed before the COVID-19 pandemic, the case will be of broad interest given the long-term political and legal debate around compulsory childhood vaccination. Whilst the UK is one of several European countries⁷ which maintain a voluntary vaccination programme, a growing number impose restrictions on voluntariness.⁸ Moreover, there is emerging evidence of a link between mandatory vaccination and uptake of vaccinations and reduction in disease.⁹ We explore the reasoning in the judgment and its implications for children's rights and in the debate around COVID-19 vaccination.

II. FACTS AND FINDINGS

In the Czech Republic, the Public Health Protection Act and an implementing ministerial decree require childhood vaccinations against nine diseases.¹⁰ If parents do not comply without good reason, they commit an offence and may be subject to sanction. The first applicant, Mr *Vavříčka*, was fined when he refused to have his 14 and 13-year-old children vaccinated against poliomyelitis, hepatitis B and tetanus as required by the State. The domestic courts dismissed his appeals. The other five applicants refused some or all of the nine vaccinations, resulting in their children's exclusion from preschool. The Novotná's, for example, declined the measles, mumps, rubella (MMR) vaccine for their daughter, who was

⁷ For example Austria, Cyprus, Denmark, Estonia, Finland, Ireland, Lithuania, Luxembourg, the Netherlands, Norway, Portugal, Spain and Sweden: *ibid* para [238].

⁸ *ibid*, para [238].

⁹ O.M. Vaz, M.K. Ellingson, P. Weiss, S.M. Jenness, A. Bardají, R.A. Bednarczyk, S.B. Omer, 'Mandatory Vaccination in Europe' (2020) 145(2) *Pediatrics* e20190620.

¹⁰ Including 'diphtheria, tetanus, whooping cough (pertussis), Haemophilus influenzae type b infections, poliomyelitis, hepatitis B, measles, mumps, rubella and – for children with specified health indications - pneumococcal infections.' n 1 above, para [76].

consequently refused admission to preschool on the ground that she posed a health risk to the other children. Their challenge in the domestic courts was also unsuccessful.

The Chamber relinquished jurisdiction to the Grand Chamber of 17 judges due to the serious and controversial nature of the questions raised. Several governments¹¹ and non-governmental organisations were given leave to intervene. Some of those governments (notably France, Poland and Slovakia) also restrict voluntariness. Indeed, the Court noted a European trend towards mandatory vaccination ‘due to a decrease in voluntary vaccination and a resulting decrease in herd immunity.’¹²

The Court did not consider there to be ‘any appearance of a violation’ of Articles 2, 6, 13 or 14 of the Convention.¹³ Nor was there found to be a breach of Article 9, which protects the right to freedom of religion and conscience. Most of the judgment is given over to the potential violation of Article 8. Article 8 is a right in two parts. To show a violation, Article 8(1) must be engaged, and there must be no justification under Article 8(2). Article 8(1) states that ‘Everyone has the right to respect for his private and family life, his home and correspondence’. Previous judgments of the Court make clear that compulsory vaccination constitutes such an interference,¹⁴ and the Court accepted that this was so in *Vavříčka*.¹⁵

¹¹ French, German, Polish and Slovakian Governments were given leave to intervene.

¹² n 1 above, para [278].

¹³ *ibid* para [347].

¹⁴ *Solomakhin v Ukraine* (applic. no. 24429/03, 15 March 2012), para [33].

¹⁵ n 1 above, para [263].

Article 8(2) qualifies the Article 8(1) right. This means that public authorities can interfere with the right where it is justified on the basis that it is lawful, pursued in accordance with one of the legitimate aims set out in Article 8(2) (which include *inter alia* the protection of health and the protection of others), and is ‘necessary in a democratic society’. Applying Article 8(2), the Court found there was no violation of Article 8. It was ‘in accordance with law’ because it was based on accessible domestic law, which made the requirement and penalties for non-compliance clear.¹⁶ It followed a legitimate aim because it protects the health and the human rights of others:

the objective of the relevant legislation is to protect against diseases which may pose a serious risk to health. This refers both to those who receive the vaccinations concerned as well as those who cannot be vaccinated and are thus in a state of vulnerability, relying on the attainment of a high level of vaccination within society at large for protection against the contagious diseases in question.¹⁷

The requirement of necessity merits further explanation. An interference with Article 8(1) is ‘necessary’ to achieve a legitimate aim (the protection of health and the protection of others, in this case) if it answers ‘a pressing social need’ in a manner proportionate to the legitimate aim pursued. The Court recognised a wide margin of appreciation in relation to health issues, particularly those involving ‘sensitive moral or ethical issues’, such as compulsion.¹⁸ The Court accepted that:

¹⁶ *ibid* para [271].

¹⁷ *ibid* para [272].

¹⁸ *ibid* paras [273], [279].

there is a general consensus ... that vaccination is one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population ... Accordingly, there is no doubt about the relative importance of the interest at stake.¹⁹

The value of childhood vaccination rendered compulsion an acceptable mechanism in answer to a pressing social need, particularly in light of the positive obligation of States to protect citizens' lives and health.²⁰ As we shall explore below, it was pertinent that children's collective and individual best interests²¹ 'are of paramount importance'.²²

Also relevant to establishing that an interference is 'necessary' is the proportionality of the action to the legitimate aim pursued. Proportionality was of central importance in *Vavříčka*. It was assessed in relation to the particular facts in the various applications before the Court rather than in a wider abstract sense.²³ Relevant factors included (*inter alia*) the limited number of vaccines mandated (nine), the exemptions that apply with respect to contraindications and conscientious objection,²⁴ the nature of the compulsion which does not force compliance if people are willing to accept the fines and limitations on preschool provision,²⁵ the effectiveness of the vaccinations in question,²⁶ the availability of adequate

¹⁹ *ibid* para [277].

²⁰ *ibid* para [282].

²¹ *Ibid* para [288].

²² *ibid* para [287].

²³ *ibid* para [291].

²⁴ *ibid* para [292].

²⁵ *ibid* para [293].

²⁶ *ibid* para [300].

compensation²⁷ and their safety record.²⁸ Regarding the last of these, the Court heard that out of 100,000 children vaccinated annually in the Czech Republic, there were five or six cases of serious adverse effects.²⁹ They are rare but serious, and so the Court reiterated³⁰ the importance of taking precautions before vaccination. Precautions include checking for contraindications in each case and safety monitoring. In the case before it, the Court accepted that national methods kept the vaccines ‘under continuous monitoring by the competent authorities.’³¹

The Court also considered the nature of the penalties imposed for non-compliance. The fine was not excessive and did not impact on Mr Vavříčka’s children’s education.³² With regard to the other applicants, it was accepted that the refusal of a preschool place impacted the opportunities afforded to the young children, but this ‘choice’ could be avoided by accepting the legal duty to vaccinate.³³ The Court considered that the impact was time-limited, and the parents in the cases before the Court were able to ensure their children’s development in other ways. In sum, invoking the argument of a duty of easy rescue,³⁴ the Court said:

²⁷ *ibid* para [302].

²⁸ *ibid* para [301].

²⁹ *ibid* para [301].

³⁰ *ibid* para [301]. See *Solomakhin v Ukraine* (applic. no. 2449/03, 15 March 2012), para [36]; *Baytüre and Others v Turkey* (applic. no. 3270/09, 12 March 2013) para [29].

³¹ n 1 above, para [301].

³² *ibid* para [304].

³³ *ibid* para [306].

³⁴ On which see A. Guibilini, R. Douglas, J. Savulescu, ‘The Moral Obligation to be Vaccinated: Utilitarianism, Contractualism, and Collective Easy Rescue’ (2018) 21 *Medicine, Health Care and Philosophy* 547.

[I]t cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure as a matter of legal duty and in the name of social solidarity for the sake of the small number of vulnerable children who are unable to benefit from vaccination.³⁵

III SOLIDARITY

As is evident from this quotation, the Court endorses the basis of the Czech Republic's compulsory vaccination policy:³⁶ solidarity towards the most vulnerable.³⁷ Submissions from the German Government also emphasised the principle of solidarity in the formation of their policy, which requires proof of measles vaccination, immunity or evidence of contraindication as a prerequisite for enrolment in schools, subject to a penalty of EUR 2,500 and exclusion from educational institutions:³⁸

Compulsory vaccination aimed to protect not only those vaccinated but also society as a whole and, in particular, vulnerable persons who cannot be vaccinated themselves on account of their age or state of health.³⁹

The appeal to solidarity is interesting. It has one of its most obvious applications, as here, within the public health context. At the same time, solidarity is more familiar within

³⁵ n 1 above, para [306].

³⁶ *ibid* para [62].

³⁷ And see the partly concurring and partly dissenting opinion of Judge Lemmons, *ibid* para [2].

³⁸ *ibid* paras [216]-[221].

³⁹ *ibid* para [217].

European countries than it is in the United Kingdom. It also needs to be carefully distinguished from other notions, such as those of reciprocity and justice. Hence, the claim is not that it is fair to distribute the burdens and benefits of vaccination in a certain way, nor that the vaccination of some is owed in reciprocity to those vulnerable to disease.

A helpful definition of solidarity that does distinguish it from these other terms is given in the Nuffield Council on Bioethics Report, *Solidarity: Reflections on an Emerging Concept in Bioethics*, where it is stated to be ‘shared practices reflecting a collective commitment to carry ‘costs’ (financial, social, emotional or otherwise) to assist others.’⁴⁰ As the Report makes clear, solidarity is both a description of the nature of certain practices and a prescription of these as ideal. In other words, solidarity characterises what is valuable about certain social forms and what is needed to maintain their valued character. In simpler terms, solidarity is about all being in it together and, as a result, all being prepared to share the burdens of a collective enterprise.

On this account, immunising children against infectious diseases is justified because this ensures that everyone – all children and, indeed, the rest of society to which any child belongs – benefits. This is not best understood as being about balancing individual and collective benefits and burdens. Instead, it is about protecting what matters in our society: that we are all bound together by shared ties, and everyone must play their part in maintaining those ties.

⁴⁰ B. Prainsack, A. Buyx, ‘Solidarity: Reflections on an Emerging Concept in Bioethics’ (NCOB, 2011), para 30, at <https://www.nuffieldbioethics.org/publications/solidarity> (last visited 5 May 21).

Solidarity is an important ideal and has had noticeable appeal in the current pandemic, where the need to secure high levels of vaccine take-up across society is pronounced. Judge Wojtyczek, however, points out that the case for social solidarity as a justification for mandate is most robust in relation to infectious disease. It is less relevant to tetanus, one of the nine mandated vaccines in *Vavříčka*, which is not contagious and where vaccination has no bearing on herd immunity. Solidarity is not *wholly* irrelevant as long as tetanus remains a public health issue⁴¹ and as long as the goal extends to solidarity between countries with the aim of reducing global health inequalities. But this was not explored in *Vavříčka*, where solidarity is inadequately defined. Moreover, the ideal sits oddly alongside any talk of interests and rights when these are understood in terms of what each individual, considered in isolation, may lay claim to. Indeed, it is hard to see how one might justify the compelled vaccination of children by appeal *both* to solidarity and to the best interests of the child, especially if the latter is understood to be paramount.

IV INDIVIDUAL AND COLLECTIVE BEST INTERESTS

In *Vavříčka* the Court said:

It is well established in the Court's case-law that in all decisions concerning children their best interests are of paramount importance. This reflects the broad consensus on this matter ... It follows that there is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development.⁴²

⁴¹ World Health Organisation, 'Tetanus' at https://www.who.int/health-topics/tetanus/#tab=tab_1 (last visited 5 May 2021): 'The disease remains an important public health problem in many parts of the world'.

⁴² n 1 above, paras [287]-[288].

The decision is based on both the collective and individual interests of children. The Court speaks of the best interests of *children* being of paramount importance, but refers in the same paragraph to Article 3 of the UN Convention on the Rights of the Child, which says ‘In all actions concerning children ... the best interests of *the child* shall be a primary consideration’ (our italics). Dissenting Judge Wojtyczek found this aspect of the majority judgment problematic. He argued that:

[T]he central question around the best interests of the children is not whether the general health policy of the respondent State promotes the best interests of children as a group, but instead how to assess in respect of each and every specific child of the applicant parents.⁴³

Yet, as is often noted, public health ethics, where what is at stake is the appropriateness of measures to ensure the good health of a population rather than a single person, cannot easily be rendered in the familiar terms of traditional medical ethics. These concern the appropriateness of bilateral relations between individuals, such as a doctor and patient or researcher and participant. What usually matters to such ethics is whether the individual – patient or research participant – consents to the other’s proposal, and what is key is the value of individual autonomy.

In the case of a young child, there can be no appeal to their autonomous choices since, unless shown otherwise, children are presumed not capable of exercising such choice. Where a child

⁴³ *ibid*, dissenting opinion of Judge Wojtyczek, para [13].

is not competent to consent, parents and sometimes the court make decision on their behalf, taking the child's wishes into consideration. For the proxy, what is crucial is what is in the child's best interests.

For older children, many jurisdictions recognise their ability to consent if they are competent to do so. In England and Wales the court retains a power to veto competent children's decisions to protect their best interests, at least where the child's decision would put him or her at grave risk.⁴⁴ A parental power to veto a child's competent refusal of treatment has been recognised in the past but is now in doubt.⁴⁵

Applying these general principles to childhood immunisation, 'the child' whose interests we should take account of is ambiguous. It can mean each and every individual child, or it can mean the children as a collective group.

In a public health context, what matters is the good of the public, the population as a whole. This is the case with immunisation against infectious disease. Of course, the requisite consent must be in place for a person to be vaccinated. Yet what is important – and what a vaccination programme seeks to secure – is sufficient numbers agreeing to be vaccinated with population immunity thereby secured. In this distinct context, many think it does not help to think simply in terms of individual autonomous choice. Considerations of justice, as well as

⁴⁴ *Re R (A Minor) (Wardship Consent to Treatment)* [1992] Fam 11 and *Re W (A Minor) Medical Treatment Courts Jurisdiction*) [1993] Fam 64; *Re X (A Child) (No 2)* [2021] EWHC 65 (Fam).

⁴⁵ *AB v CD & Ors* [2021] EWHC 741, [60] per Lieven J.

the balance of harms and benefits to the population as a whole, are also important.⁴⁶ For the majority in *Vavříčka*, vaccinating this particular child is in their interests *and* also in the interests of all children, in as much as a vaccine both protects someone against contracting the relevant illness and prevents transmission to others. Indeed, if a vaccine does the latter, then vaccinating a child (and indeed all children) serves the interests of everyone, adults included, who might otherwise contract the illness.

But if our perspective is a public health ethics one, and we should take account of the overall balance of harms and benefits fairly distributed across a whole population, vaccinating each child is not justified by its being in their best interests alone. That being the case, we cannot say that the best interest of the individual child is paramount where that means of greater weight than other interests. For, as we have seen, ethical considerations of justice and of the aggregation of a populace's interests are relevant and weighty.

In England and Wales, parents can refuse vaccinations for young children. In disputes about child vaccination between those with parental responsibility, the court must consider each child individually with his welfare as the paramount consideration.⁴⁷ In such cases, the courts have recognised that vaccination against the wishes of a parent but with appropriate consent of another parent or (if the child is in care) the local authority⁴⁸ is not a disproportionate

⁴⁶ R. Faden, J. Bernstein, and S. Shebaya, 'Public Health Ethics' in E.N. Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Fall 2020 Edition), section 3, at <https://plato.stanford.edu/archives/fall2020/entries/publichealth-ethics/> (last visited 5 May 2021).

⁴⁷ Children Act 1989, s 1(1). The paramountcy principle applies where the court is determining any issue relating to the upbringing of a child or the administration of a child's property.

⁴⁸ See *Re T (A Child)* [2020] EWHC 220 (Fam).

breach of the Article 8 rights of either the parent or the child.⁴⁹ Furthermore, the courts have found in each case that routine vaccination is in the best interests of individual children.⁵⁰ In a recent Court of Appeal decision King LJ said:

(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.⁵¹

Public Health England, quite naturally, incorporates a collective view of the interests of children and judicial reliance on their guidance can bring the collective interests of children into the consideration of the best interests of the particular child.⁵²

V COMPULSION

⁴⁹ *In Re H (A Child)(Parental Responsibility: Vaccination)* [2020] EWCA Civ 664, [98] (King LJ).

⁵⁰ Note three recent Court of Protection cases finding it was in the interests of adults lacking capacity to have a COVID-19 vaccine administered notwithstanding objections of family members in *E (Vaccine)* [2020] EWCOP 14, *SD v Royal Borough of Kensington and Chelsea* [2021] EWCOP 14, and *Re C* [2021] EWCOP 19. An as yet unreported case found that vaccination would be contrary to the best interests of a care home resident in light of their wishes and preferences. See A. Heaven, ‘Why Covid Vaccination is NOT in This Care Home Resident’s Best Interests’ (Open Justice Blog) at <https://openjusticecourtsofprotection.org/2021/05/04/why-covid-vaccination-is-not-in-this-care-home-residents-best-interests/> (last visited 5 May 2021).

⁵¹ n 49 above, [104].

⁵² See E. Cave, ‘Adolescent Refusal of MMR Inoculation: F (Mother) v F (Father)’ (2014) 77(4) MLR 630, at 635.

In what sense is childhood vaccination compulsory? There was no *coercion* in *Vavříčka* because the children in each of the cases were not vaccinated against their parents' will: rather, the parents were complaining about the penalties imposed.⁵³

The Nuffield Council on Bioethics 2007 Report on *Public Health: Ethical Issues*⁵⁴ provided a highly influential 'intervention ladder' whereby the various measures a Government might institute to promote a public health goal should be ranked from the least to the most intrusive. The more intrusive the measures, and the higher up the ladder, the greater the required justification of the action. Public health policies, it further argued, should use the least intrusive means to achieve the required public health benefit.

Clearly, the substantial public benefit of a vaccination programme is population immunity. Such a collective benefit can be secured even if the personal benefit to each vaccinated individual is none or small. If the public benefit can only be secured if sufficient numbers of children are vaccinated, then the question presses of what measures to ensure that this happens are proportionate and ethically justified being the least intrusive needed? The question presses insofar as young children cannot usually give their consent to being vaccinated, and in England and Wales, their best interests are argued to be paramount. Proportionality was central to the judgment, but Judge Wojtyczek opined that greater focus should have been given to the availability of less restrictive alternatives.⁵⁵

⁵³ n 1 above, para [263].

⁵⁴ At <https://www.nuffieldbioethics.org/publications/public-health> (last visited 5 May 2021).

⁵⁵ n 1 above, dissenting opinion of Judge Wojtyczek para [14].

Again, the Nuffield Council on Bioethics Report helps in distinguishing three options: ‘quasi-mandatory’ policies that penalise non-compliance; ‘incentivised’ ones that reward compliance; and those that neither penalise nor reward but provide education and information to facilitate compliance. In *Vavříčka*, ‘quasi-mandatory’ measures were in question, comprising both directly penalising the parents – by fines – for failing to have their children vaccinated and denying the children a good, namely access to education.

This latter ‘penalty’ inflicts harm directly on the child by refusing them schooling and indirectly on the parent by damaging their children’s educational progress, but the Court said:

that was the direct consequence of the choice made by their respective parents to decline to comply with a legal duty, the purpose of which is to protect health, in particular in that age group.⁵⁶

The harm to a child is balanced by the gains to the child’s schoolmates, who are consequently not exposed to the risks of infection. Indeed, on this account, the balance of harms and benefits favours excluding the unvaccinated child. The parents who choose not to vaccinate their child have their freedom to make decisions for their offspring limited. Yet, no liberal jurisdiction grants unconstrained parental choices, and no parent can choose to do what seriously harms (or risks harming) their child.

Notwithstanding the Court’s conferral of a wide margin of appreciation and limited focus on less restrictive measures, the justification of the Czech republic’s policy in *Vavříčka* does not

⁵⁶ *ibid* para [306].

mean that quasi-mandatory policies could never breach the Article 8 rights of children or parents. The Court focused on the method of compulsion rather than the empirical effects, but only because those effects were limited in the cases before it. This position can be contrasted with Lord Hershell's justification of the controversial Vaccination Acts to require smallpox vaccination in Victorian England, where it was said:

When vaccination is spoken of as 'compulsory', it is only meant that, in case a child is not vaccinated as prescribed by law, a pecuniary penalty is imposed which may be followed by distress and imprisonment. The liability to this penalty no doubt in many cases leads to vaccination where it would otherwise be neglected; but, whether the penalty is enforced once or repeatedly, it does not compel vaccination in all cases. If a parent is content to pay the penalty, his child remains unvaccinated ... Vaccination could be made really compulsory only by taking the child from the parent and vaccinating it against his will, if he would not himself procure or consent to its vaccination.⁵⁷

The empirical effects of quasi-mandatory measures have the potential to influence the proportionality assessment: those who cannot afford the fine or for whom paid work would be impossible without childcare might be compelled in ways that those with greater financial resources would not. And conversely, some limitations on voluntariness may pose only an indirect interference with personal autonomy if, for example, lack of uptake is driven by inconvenience rather than personal belief.

⁵⁷ Lord Herschell, *Report of the Royal Commission Appointed to Inquire into the Subject of Vaccination* (London: HMSO, 1889–1897), discussed in E. Cave 'Voluntary vaccination: The Pandemic Effect' (2017) 37(2) LS 279.

However, although not vaccinating a child does amount to risking serious harm to the child, the justification of quasi-mandating childhood vaccination cannot be only in these terms. For, as we have seen, what does justify compelling the immunisation of children is the fair distribution of harms and benefits across a whole population. Excluding unvaccinated children from school is in the interests of all and not just the best interests of the child threatened with exclusion.

VI ASSESSING PROPORTIONALITY IN THE COVID-19 CONTEXT

The proportionality of quasi-mandatory measures is highly pertinent in the debate over COVID-19 ‘vaccination passports.’⁵⁸ In the UK, vaccine minister Nadhim Zahawi ruled them out in February 2021, saying: ‘That’s not how we do things. We do them by consent.’⁵⁹ Shortly afterwards, the Government ordered a review, which will report in June 2021.⁶⁰ The potential for exacerbation of inequalities and discrimination will be relevant to proportionality, as will the empirical impacts on voluntariness that flow from linking vaccination status to freedoms to move, work and interact.

⁵⁸ See for example A.L. Phelan, ‘COVID-19 Immunity Passports and Vaccination Certificates: Scientific, Equitable, and Legal Challenges’ (2020) 395(102237) *The Lancet* 1595.

⁵⁹ BBC News, ‘Covid: Minister rules out vaccine passports in UK’ 7 February 2021, at <https://www.bbc.co.uk/news/55970801> (last visited 5 May 2021).

⁶⁰ BBC News, ‘Covid-19: PM promises review on issues of vaccine passports’ 23 February 2021, at <https://www.bbc.co.uk/news/uk-56169616> (last visited 5 May 2021). And see D. Archard, ‘Putting Ethics into the ‘Stuff Like This’’ (Nuffield Council on Bioethics Blog Post, 2 Mar 2021) at <https://www.nuffieldbioethics.org/blog/putting-ethics-into-the-stuff-like-this> (last visited 5 May 2021).

Could children be required to undergo COVID-19 vaccination? It is likely the first children to receive COVID vaccination will be secondary school pupils, and so in the UK, many will be competent to provide their consent to vaccination. For incompetent children and young people, parental consent will be required. For many children, both the risk of vaccination and the personal risk of COVID-19 infection is small, notwithstanding ongoing uncertainty about the prevalence and longevity of novel long-COVID illness.

However, what is challenging is the difference between the scientific justification for routine childhood vaccination, which is clear despite recent controversies and populist opposition, and the limited data available for the efficacy and both short- and long-term safety of all the individual COVID vaccines in childhood, and indeed for the last of these in adults too.

Novel scientific techniques have been used in some COVID-19 vaccines that utilise mRNA.⁶¹

On a background of persistent vaccine hesitancy in some countries for traditional, proven childhood immunisations, it will be interesting to see whether the overt proximity to widespread mortality during the pandemic, both for many personally and in the media, increases vaccine acceptance.

What is unclear is whether the anticipated risks of severe COVID-19 infection will now become higher in the complex paediatric population without national lockdown. If so, this group and their parents may have a better claim to vaccine prioritisation and be more willing to accept any unforeseen risks of novel vaccine techniques.

⁶¹ Centers for Disease Control and Prevention, 'Understanding mRNA COVID-19 Vaccines' at

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html> (last visited 5 May 2021).

Forsberg and Skelton have argued for mandatory COVID-19 vaccination in all children. They suggest that it is in children's individual and collective interests to receive COVID-19 vaccines, citing (1) the parental duty to the child, (2) the duty of easy rescue, (3) the duty to protect child well-being by delivering children from the mental and physical effects of lockdown and school closures.⁶²

However, this argument is undermined by the current lack of scientific evidence for safety and efficacy in childhood, compared with, for example, the MMR vaccine, which is still not mandated in many countries despite recent increases in child deaths.⁶³ Mandating vaccines, whichever definition is chosen, is not the panacea its advocates suggest.⁶⁴ Paradoxically, such State control over citizens' lives, in terms of the restriction of their liberties and rights, has been more significant during the pandemic, which might facilitate public acceptance of any limitation of vaccine autonomy.

VII CONCLUSIONS

Where children lack the capacity to decide for themselves, parental consent is generally required. Judge Wojtyczek, in his dissenting opinion, argued that parents are in the best position to judge children's best interests. In countries such as the United Kingdom that adopt

⁶² L Forsberg, A Skelton, 'Mandating COVID-19 Vaccination for Children' (Practical Ethics Blog) at <http://blog.practicaethics.ox.ac.uk/2021/04/mandating-covid-19-vaccination-for-children/> (last visited 5 May 2021).

⁶³ A. Hadjipanayis, H.J. Dornbusch, Z. Grossman, L. Theophilou, J. Brierley, 'Mandatory Vaccination: A Joint Statement of the Ethics and Vaccination Working Groups of the European Academy of Paediatrics' (2020) 179(4) *European Journal of Pediatrics* 683.b

⁶⁴ E. Draeger, H.E. Bedford, D.A.C. Elliman, 'Should Measles Vaccination Be Compulsory?' (2019) 365 *BMJ* 12359.

a voluntary vaccination policy, the focus on parental rights to decide is strong. Recently in the English case of *AB v CD*, for example, Lieven J pointed to judicial reluctance to interfere with parental decisions about their children's treatment,⁶⁵ and in *Re Ashya King (Fam)*, Baker J said:

[I]t is a fundamental principle of family law in this jurisdiction that responsibility for making decisions about a child rest with his parents. In most cases, the parents are the best people to make decisions about a child and the State – whether it be the court, or any other public authority – has no business interfering with the exercise of parental responsibility unless the child is suffering or is likely to suffer significant harm as a result of the care given to the child not being what it would be reasonable to expect a parent to give.⁶⁶

Whilst in England and Wales, parental disputes about immunisation have thus far been resolved in favour of vaccination on the basis that this is the course that is in the child's best interests,⁶⁷ the decision in *Vavříčka* indicates that the step to State mandate is but a small one. Indeed, it is an option the UK Government was exploring even before the pandemic.⁶⁸

⁶⁵ *AB v CD and Others* [2021] EWHC 741 (Fam), [43]-[48]

⁶⁶ [2014] EWHC 2964.

⁶⁷ Most recently in *Re H* n 49 above.

⁶⁸ P. Walker, 'Hancock: Compulsory Vaccinations Being Seriously Considered' *The Guardian*, 29 September 2019, at '<https://www.theguardian.com/society/2019/sep/29/government-seriously-considering-compulsory-vaccinations-matt-hancock> (last visited 5 May 2021).

First, *Vavříčka* will impact on the future assessment of proportionality. It has endorsed a focus on solidarity that is unfamiliar in the United Kingdom and which warrants new consideration. It has balanced individual best interests assessments with the collective interests of others. In particular, this judgment exposes the fact that ‘the child’ whose best interest must be considered should be understood both as the individual child and as the collective group of all children. Vaccination is in the interests of the child who is vaccinated and all other children who benefit from the general administration of a vaccine. Second, there are degrees of compulsion and whilst coercive measures should and would be vigorously resisted, quasi-mandate, incentivisation and facilitation might prove more proportionate and socially acceptable. Third, the COVID-19 pandemic has brought new insights into the necessary and pervasive impact on civil liberties in the absence of an effective medicinal response. Whilst the pandemic has not removed vaccine hesitancy, it has amply demonstrated the potential of vaccinations to relieve severe economic and social pressures.