Neutral Citation Number: [2022] EWCA Civ 1055

Case No: CA-2022-001392

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE HAYDEN
[2022] EWFC 80 (15 July 2022)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2022

Before:

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

- -

Between:

(1) HOLLIE DANCE
(2) PAUL BATTERSBEE
- and -
(1) BARTS HEALTH NHS TRUST
(2) ARCHIE BATTERSBEE (A child by his Children's Guardian)

Appellants

Respondents

- -
- -

Edward Devereux QC, Bruno Quintavalle and Robert George (instructed by **Andrew Storch Solicitors**) for the **Appellant Parents**

Gavin Millar QC and Fiona Paterson (instructed by **Kennedy's Law**) for the **Respondent NHS Trust**

Claire Watson QC and Maria Stanley (instructed by **Cafcass Legal**) for the **Child by his Children's Guardian**

Hearing dates: 21 & 22 July 2022

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Approved Judgment

Sir Andrew McFarlane P:

Introduction

1. This judgment is given following a hearing in connection with an application for permission to appeal made by the parents of Archie Battersbee, a 12-year old, who for some weeks now has been in a deep coma and on a life support regime in hospital. Tragically, on 7 April 2022, Archie was found to be in a very profoundly damaged state by his mother, with a ligature around his neck in their home. He was taken to hospital where he has remained ever since. As I understand it, he has not regained consciousness and his mother has most creditably not left his side since. The family, as best they can, have visited regularly, as have many of Archie's friends. He is a much-loved boy who is at the centre of these proceedings and at the centre of his loving family.

2. Initially, proceedings were commenced by Barts Health NHS Trust, seeking declarations from the High Court. These developed into an application before Arbuthnot J, who in a judgment on 13 May 2022 made orders providing for brain stem testing and also directed a further MRI scan. In the hearing before her, the focus was on whether the court could and would make a declaration that Archie was brain-stem dead, thereby permitting the trust, if the declaration were made, to withdraw treatment. On 13 June 2022 this was the decision that Arbuthnot J came to, and she made the declarations sought. On 29 June 2022, in the Court of Appeal, the Master of the Rolls, myself, and Lady Justice King allowed an appeal against that decision and directed that the matter should be returned to the High Court. That judgment was handed down on 6 July 2022. The case was subsequently allocated to Hayden J, who is the Vice President of the Court of Protection and a Judge of the Family Division. On 11 July 2022, a full day hearing took place before that judge, and he handed down his judgment on 15 July 2022. Ultimately, he concluded that it was not in Archie's best interests for life sustaining treatment to continue and declared it lawful for this treatment to be withdrawn.

3. In determining issues of this nature a court is required to afford paramount consideration to the best interests, in the widest sense, of the individual child. The judge must maintain a keen and unwavering focus upon the child's best interests throughout the hearing and this must be the central core of the concluding judgment. The question of whether the judgment of Mr Justice Hayden demonstrates that this was his approach is now at the centre of the parents' case on appeal.

The judgment

4. It is helpful at this stage to summarise the content of the judgment. At the start the judge was clear that the investigation of where Archie's best interests now lie "requires unswerving focus on Archie" [paragraph 3]. In paragraphs 5 to 24 the judge gives a detailed account of Archie's current medical condition. At paragraph 25 he then said:

> 'Determining where Archie's best interests lie is not solely a medical issue. It is important that I place him, his personality, his wishes, at the centre of this process. Respect for Archie, as a person, involves a clear recognition that as a human being,

> he is more than the raft of medical complexity that I have set out above. He is not, in my judgment, simply who he is now, but he is also who he has been throughout his short life.'

5. Mr Edward Devereux QC, leading counsel for Archie's parents on appeal, described that paragraph as being the "right direction" for the judge to have given to himself at that stage. The judgment then continues from paragraphs 26 to 31 with a detailed account, drawn from the written statements together with the oral evidence of both parents and Archie's children's guardian, in which the judge developed a detailed pen-portrait of this previously lively and most engaging boy.

6. Archie's religious beliefs are a prominent aspect of the case presented by the parents to this court, as was clearly the case before Mr Justice Hayden, who summarised matters in this way at paragraph 30 of his judgment:

> 'Intermittently throughout his life, Archie's mum told me he spoke about God and life after death. He first raised it when he was 5 years of age, but it was not raised again until much later. Archie was fully aware that MMA [Mixed Martial Arts in which Archie took a keen interest] can be a dangerous sport. He related to his Mum how the MMA fighters prayed for protection when they entered the ring. He requested a crucifix for which he paid £5 a week from his pocket money to buy it. Mum tells me that Archie had frequently requested to be Christened. In the daily bustle of life, they never got round to it. But, in hospital, the chaplain had baptised Archie, [brother] Tom, his sister and Mum into the Anglican Church. I am considering Archie's best interests in the context of a young man who believed in God and whose family believe in God.'

7. Another important factor for the judge to consider was Archie's view on the very question that was before the court. He summarised the evidence at paragraphs 31 and 32 in this way:

> '[31] Though I have not heard from Tom, Archie's mum relates a conversation that is said to have occurred between Archie and his brother. They discussed what would happen if either of them was in a car accident on a life support machine. My own judicial experience of these kind of conversations, most particularly in the Court of Protection, is that conversations of this kind … occur regularly amongst family and friends, with varying degrees of detail. Tom was clear that, for himself, he would want to "turn the machine off". Archie is said to have responded "I wouldn't want to leave Mum and I would try to get out of bed". I accept the abroad accuracy of this conversation, not least because it resonates entirely with what Dad told me about Archie's concern for his mum's welfare. It says a great deal about Archie that when contemplating existence on a life support machine, his thoughts were not for himself at all, but for his mother.
>
> [32] My concern is with Archie, but what he might have wanted is integral to my evaluation of his best interests. Archie's mum described him as her "best friend", but for all the reasons considered above, it also strikes me that he also sees himself as her protector, her Chevalier. Mum told the guardian that she "knows" that Archie "would not want to leave her". She also told the guardian that "I think he would want me to fight for him; for time... think he would be saying I'm going to get there, don't give up on me. That's the fighting spirit. He wouldn't give up... no way".

8. In considering Archie's best interests, the judge and, now, this court must engage with the full detail of this 12 year old's medical condition. The judge summarised the evidence of Doctor F, a consultant paediatric intensivist. He considered that her evidence casts some light on "the reality of Archie's day-to-day experience". The summary is short but devastating in describing the all-embracing nature of the damage that has resulted from the original brain injury three months ago:

> 'She told me that with brain injury as devastating as that sustained by Archie, the loss of brain function, inevitably, causes adverse cardiovascular, respiratory, endocrine, metabolic and haematological change. This in turn creates instability in organ function and in the heart. In her statement, Dr F lists the treatments that seek to manage or mitigate this instability.'

9. The judge then went on [paragraph 18] to list no fewer than 17 interventions or other aspects of the treatment regime which are required to maintain the functioning of Archie's body at a very basic level. The description given is more, far, far more, than that of a boy who is simply "on a ventilator". For example, the ability of the brain to monitor, moderate and control bodily fluid and the discharge of urine has completely gone. Whilst, impressively, a drug, Vasopressin, can be given to seek to do what the brain would normally do, this is, as the judge said, a second rate understudy for the main actor, the brain itself.

10. A further consequence of the brain's failure is that Archie's gut has also failed. Archie has lost a very significant amount of weight. Again, medication has been given in an attempt to slow down the gut in order to facilitate better food absorption, but this is second best to what would otherwise have been moderated by brain activity. Archie has become anaemic with, in the words of the judge, the following consequences: 'inevitably, anaemia adds to the burdens that have been discussed above. It further increases the risk of infection, intestinal disorders, abnormal heart rhythm and low blood pressure. Archie needs blood tests every hour or two to monitor the acids and salts in his blood. He requires intermittent transfusions.'

11. Although this is contrary to his mother's experience of feeling Archie squeeze her hand on one occasion, none of the medical staff has witnessed any sign of spontaneous life in him during this extended period of intensive observation. The following account appears in the report of the children's guardian [paragraphs 53 and 54]:

> '[54] G [an advanced nurse practitioner] told me that she has never witnessed a response from Archie to any procedure. There is no cough, no gag reflex. Even when uncomfortable or painful procedures are taking place, she said there is no response from Archie.
>
> [55] G is aware that nurses on the unit are finding it difficult. They feel it "upsetting to look after someone who they know has an irreversible injury and sadly, every intervention feels futile". I was told that Archie looks like a completely different child from the one who was admitted in terms of his pallor, weight loss and muscle tone. They "all feel incredibly sad for this family".'

Archie's condition and the awful predicament that he and his family are in have achieved widespread Press and media publicity, much of which has included a photograph showing Archie as a most engaging boy. Tragically, the consequence of the

catastrophic brain injury that he sustained on the 7th April is that Archie is no longer the boy in the photograph. He is, as the detailed description given by Mr Justice Hayden and confirmed in the short account of Nurse G demonstrate, someone whose every bodily function is now maintained by artificial means.

The Choice

12. Before turning to a brief description of the legal context, it is helpful to be clear as to the choice of options that was placed before the judge. Given the parlous state of Archie's condition, the choice was, necessarily, bleak and the difference between the options, whilst important, was narrow.

13. The outcome sought by the Hospital Trust, supported by the children's guardian, which I will call "Option 1", was for life-sustaining treatment to be withdrawn from Archie at an arranged time at which family members might be present and during which the process that would then follow would be supported by the presence of all the relevant medical personnel. "Option 2", strongly favoured by Archie's parents and family, is for the current life-sustaining treatment regime to be continued until such time as Archie's body may give up and he would die, to use their word, "naturally" and, again to use the family's phrase, at a time "chosen by God".

14. On 10 July 2022, in an open letter written to the solicitors for the other parties and to the judge's clerk, the solicitors then acting for the parents described the choice to be made in these terms:

> 'As all parties now accept, the central issue in this case is about the timing and manner of Archie's death. Your clients' medical evidence is clear that his life expectancy is now measured in weeks rather than months or years. Our clients however have a strong moral objection to the proposed act of removing Archie from the ventilator in the knowledge that this will inevitably lead to his death. Our clients believe, based on their knowledge of Archie and what he had told his mother and his brother, that his own view would have been the same. On that basis, our clients strongly advocate that Archie's death should be as 'natural' as possible, and the exact timing of his death should be determined only by God.
>
> …
>
> Whilst they continue to hope and pray for a miracle our clients acknowledge the medical evidence about the severity of Archie's condition and the clinicians' view that he has no prospect of recovery.'

15. In the course of his oral submissions to this court, Mr Devereux confirmed that the letter represented the parents' position both in terms of their acceptance of no prospect of recovery and that Archie's death is most likely to occur within weeks, as opposed to a period of months or longer.

16. Although the judge did not spell the choice out with the same degree of precision, it is clear that the choice between Option 1, an arranged removal of life sustaining treatment with the inevitability of death a short time later, and Option 2, the continuation of life-sustaining treatment in the knowledge that in the very near future Archie's bodily functions would collapse in an unplanned manner, was before the court.

The legal context

17. No point of substantive law is raised in the grounds of appeal and it is accepted that the judge gave himself an accurate self-direction as to the law. It is therefore only necessary to spend a short time summarising the approach that is to be found in the Supreme Court decision of *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67. I am only going to make one or two short quotations from this judgment. The first is to identify the relevant test on appeal. At [42], Baroness Hale of Richmond said:

> "… if the judge has correctly directed himself as to the law, as in my view this judge did, an appellate court can only interfere with his decision if satisfied that it was wrong: *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911. In a case as sensitive and difficult as this, whichever way the judge's decision goes, an appellate court should be very slow to conclude that he was wrong."

18. Earlier, at [35] Baroness Hale stressed the importance of the right to life. She said this:

> "The authorities are all agreed that the starting point is a strong presumption that it is in a person's best interests to stay alive. As Sir Thomas Bingham MR said in the Court of Appeal in Bland's case [1993] AC 789,808, "A profound respect for the sanctity of human life is embedded in our law and our moral philosophy. Nevertheless, they are also all agreed that this is not an absolute. There are cases where it will not be in a patient's best interests to receive life-sustaining treatment."

19. Then at [39] Baroness Hale drew together her summary of the approach to determining best interests:

> "The most that can be said, therefore, is 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 what his attitude to the treatment is or would be 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."

20. Finally, in terms of wishes, at [45] Baroness Hale stressed that it was a subjective test, namely one focussed on the individual, and not an objective one. She said this:

> "Finally, in so far as Sir Alan Ward and Arden LJ were suggesting that the test of the patient's wishes and feelings was an objective one, what the reasonable patient would think, again I respectfully disagree. The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament. In this case, the highest it could be put was, as counsel had agreed, that it was likely that Mr James would want treatment up to the point where it became hopeless. But in so far as it is possible to ascertain the patient's

wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being."

The proposed appeal

21. The parents' Notice of Appeal was filed on 18 July 2022 and was supported by six proposed grounds of appeal as follows:

    1. 'The learned Judge failed to give any or adequate reasons for not accepting submissions made by the Appellants in relation to Article 6 CRC, Articles 10 and 12 CRPD and Article 8 ECHR.

    2. The learned Judge failed to give proper effect or proper weight to Archie's previously expressed wishes to be maintained on life support (clearly expressed in his conversation with his mother and brother and supported by wider evidence about Archie's character and ethical views). This approach is wrong in law because it:

        a. is in breach of the state's positive obligation under Article 2 ECHR as explained in *Lambert v France* (2016) 62 EHRR 2;

        b. is in breach of Archie's Article 8 right to choose the manner of his death: *Haas v Switzerland* (2011) 53 EHRR 33;

        c. is in breach of Archie's rights under Article 6 CRC;

        d. amounts to substituted decision-making on behalf of a disabled person contrary to Articles 10 and 12 CRPD.

    3. In making his best interests determination, the learned Judge [erred] in making the following factual findings which materially affected his best interests determination:

        a. by finding, contrary to the factual evidence, that "there can be no hope at all of recovery";

        b. by accepting the expert evidence of Dr Playfor when this evidence was, as a result of subsequent developments confirmed by the Court of Appeal, entirely unreliable;

        c. by accepting that Archie could not breathe as a result of damage to his brain.

    4. In making his best interests determination, the learned Judge erred in fact and in law in holding that Archie's LST:

        a. was "burdensome";

        b. was "futile";

c. "compromised his dignity, deprives him of his autonomy and becomes wholly inimical to his welfare".

5. The learned Judge failed to apply the well-established 'strong presumption' in favour of prolonging life: *Airedale NHS Trust v Bland* [1993] AC 789 at p.825 and made a manifestly incorrect finding that Archie's LST treatment served "only to protract his death whilst being unable to prolong his life".

6. The learned Judge made a procedural error in taking into account extraneous evidence he found "in the public domain", which had not been properly admitted in the proceedings.'

22. The application for permission to appeal was listed to be heard by the full court, with appeal to follow, on the afternoon of Thursday 21 July. The court is most grateful to all those involved who enabled this very short time for case preparation to be met. In the event oral argument continued the following morning, with judgment being given today Monday 25 July.

23. Mr Devereux, who did not appear below and who had been instructed after the proposed grounds of appeal and supporting skeleton argument had been filed, in presenting the parents' case at the oral hearing, chose to devote the entirety of his address to the court to a further ground of appeal which, whilst not expressly pleaded as an amendment to the Notice of Appeal, can be found in the short headline note of submissions that he helpfully provided to the court:

> 'The overall case of the parents is that Mr Justice Hayden's decision was driven almost wholly by Archie's medical best interests and not by a careful, clear, understandable and comprehensive evaluation of Archie's best interests in the widest sense.
>
> In particular, it is argued:
>
> (1) The Judge failed to give any real or proper weight to Archie's previously expressed wishes and his religious beliefs;
>
> (2) The Judge failed to give any real or proper weight to Archie's family's wishes and views as to the continuation of life sustaining treatment;
>
> (3) The Judge failed to carry out a careful, clear and comprehensive evaluation of the benefits and burdens of the continuation of life sustaining treatment; and
>
> (4) In making his best interests determination, the Judge fell into error in concluding that Archie's life sustaining treatment was: (i) burdensome; (ii) futile; (iii) compromising his dignity, depriving him of his autonomy and wholly inimical to his welfare.'

I shall refer to this new ground as 'the parents' primary ground'. Although there was no express application to do so, I would give leave for the Notice of Appeal to be amended so as to add the primary ground as a further ground of appeal.

24. Mr Devereux informed the court that the parents still relied upon grounds 1 to 5 of the original grounds of appeal, together with the written submissions in support of them in

the skeleton argument drafted by Mr Quintavalle, who, with Professor George, is junior counsel for the parents. Ground 6 is, however, no longer pursued.

25. In order to concentrate fully upon the parents' primary ground, I propose to deal shortly with the application for permission to appeal on the five remaining grounds.

Grounds 1 and 2: ECHR, CRC and CRPD

26. In grounds 1 and 2 it is asserted that the approach adopted by the judge, which involved disregarding or reinterpreting Archie's express wishes and desires, was wrong in law because it was in breach of the rights established by a number of international conventions (ground 2) and that the judge was in error in failing to give reasons for his decision on each of those matters (ground 1). I am clear that permission to appeal should be refused on these two grounds on the basis that they have no prospect of success. I have come to that conclusion for the following reasons:

i) ECHR, Art 2 relating to the right to life, places a positive obligation upon a state. The decision of the European Court of Human Rights, in *Gard v UK (Application 39793/17)*, declaring the application inadmissible, demonstrates that the court in Strasbourg will evaluate whether a domestic regulatory framework is in place that is compatible with the requirements of Art 2, whether account has been taken of the patient's previously expressed wishes and feelings and those close to him (as well as the opinions of medical personnel), and whether it is possible for parties to approach a domestic court in the event of a dispute [paragraph 80]. Different states have differing approaches and a margin of appreciation is to be afforded on this issue, albeit, as in the case of *Lambert v France*, the ECtHR reserves a power of review [paragraph 84]. The challenge under Art 2 in *Gard* in the context of the regime in England and Wales in end of life cases was declared to be manifestly ill-founded. Ground 2 in the present case is on the basis that 'the UK law *obliges* the withdrawal of life-sustaining treatment where someone is in an irreversible state of unconsciousness with no prospect of recovery' [original emphasis]. That basis has no foundation, the law in this jurisdiction does not 'oblige' that outcome in every case. Each case is determined on its own facts, with the best interests of each separate individual being the sole determining factor. The second limb of this submission, that where a patient's known wishes are for the preservation of life, then, absent any breach of Art 3, Art 2 obliges that life-sustaining treatment should be continued, is similarly without foundation (and none is offered in the skeleton argument).

ii) The parents' case under ECHR, Art 8 is that a patient has the right to choose the manner of their death (*Pretty v UK* [2002] ECHR 2346/02, at paragraph 64 and *Haas v Switzerland* (2011) 53 EHRR 33 at paragraph 51) and it is not therefore for the court to substitute its own view of best interests which conflicts with those views. Again, this submission is misplaced. The cases in both *Pretty* and *Haas* concerned capacitous adults who had investigated the options facing them and who had come to a considered decision. Rather than reference to these two authorities, the appropriate ECtHR decision is, once again, that of *Gard* where, at paragraphs 106 to 108, it was held that the child's best interests must be the primary consideration and that there is a broad international consensus that they, indeed, should be the paramount consideration.

iii) The UN Convention on the Rights of the Child, whilst not incorporated into domestic law, is an instrument of influence upon the ECHR and is one to which regard should properly be had. Art 6 recognises a child's inherent right to life. The parents' case is that none of the exceptions permitted under Art 6 apply here, and the state, therefore, has a duty to preserve the right to life of a child to the maximum possible extent. No authority is put forward to suggest that a regime based upon a best interests determination is in breach of the CRC and, as counsel for the Hospital Trust observe, the relevant authority, to which regard must be had on this point, is, again, the case of *Gard* where, as I have indicated, the ECtHR expressly endorsed the domestic regime based upon paramount consideration being afforded to best interests.

iv) Article 10 of the UN Convention on the Rights of Persons of Disability affirms the right to life of every human being and asserts a right for disabled people to ensure its effective enjoyment on an equal basis to others. By Art 12, disabled people should have equal status with others under the law. The parents' counsel's submission is that 'a decision to remove [life sustaining treatment] from someone who previously had capacity, can only be made on the basis of the person's will and preferences and failing this then according to the "best interpretation of will and preferences"'. These submissions, in the context of a person who is so disabled that they have no free-standing capacity for life without artificial and intensive medical intervention, appear to stretch the parameters of this convention beyond its intended boundaries. Be that as it may, it is clear from paragraphs 39 and 45 of *Aintree* and elsewhere that the approach in domestic law does afford due respect to wishes and feelings in a manner that would be compatible with the principles of CRPD, Arts 10 and 12.

v) It is correct that the judge did not give attention in his judgment to these four convention based submissions. On the basis, as I have held, that they are without foundation, he was right not to do so and there is therefore no prospect of success on appeal on grounds 1 and 2.

Ground 3: Erroneous findings of fact

27. The judge held that 'there can be no hope at all of recovery' [paragraph 45]. I have already referred to the parents' solicitors' letter of 17 July in which the medical opinion as to there being no prospect of recovery was accepted. The parents' counsel's skeleton argument, nevertheless, presses a challenge to the judge's finding on recovery by relying on the evidence of one of the medical experts who, it is said, had referred to there being a chance of recovery in the order of "1%".

28. Counsel for the Hospital Trust point out that the witness was giving an illustration of the prospects of recovery drawn from data relating to adults with a similar pattern of injuries. Secondly, the evidence of that witness was that the degree of "recovery" described was extremely limited and was to move a patient "from a comatose state into some sort of persistent vegetative or minimally conscious state".

29. The judge's finding on the absence of any prospect of recovery was based upon a comprehensive review of all of the medical evidence. The determination of questions of fact are pre-eminently matters for a trial judge, and the Court of Appeal will only interfere when there are clear grounds for regarding any particular finding as unsafe.

Reference to the short evidence of this one witness could not possibly provide the foundation for such a challenge. In any event, even if a patient were to move slightly up the coma scale, that would, sadly, have no impact up on the accepted probability in this case Archie will die in any event during the course of the next few weeks.

30. The second factual challenge is that the judge was in error in relying upon the evidence of an independent expert, Dr Playfor, who conducted an informal brain-stem evaluation on the occasion that he visited Archie. Formal pre-brain-stem testing was subsequently undertaken and revealed that Archie's peripheral nervous system was unable to respond to stimulation, which, in turn, indicated that full brain-stem testing could not be undertaken. As paragraphs 16 and 17 of the judgment demonstrate, Dr Playfor's evidence was based upon a full examination of Archie and his medical history. The informal brain-stem evaluation, which is not mentioned by the judge, was but one aspect of a full and comprehensive assessment which, as the judge states, included finding Archie to be 'entirely unresponsive with absent pupillary, cough, gag, corneal and ocular-vestibular reflexes' and 'no respiratory effort during a 2-minute informal apnoea test'.

31. The third factual challenge, relating to the judge's finding that Archie could not breathe as a result of damage to his brain, is based upon a potential alternative mechanism described in the skeleton argument:

> 'In fact, the secondary spinal cord damage which was discovered as a result of the MRI of the 31st May 2022 was likely to make breathing impossible and thus invalidated the apnoea test.'

32. Here, the crucial finding is not concerned with the mechanism (as suggested in the skeleton argument) but with the fact that Archie is unable to sustain breathing independently of the ventilator. A reading of the judgment as a whole does not indicate that the judge regarded this as being solely caused by brain damage. However, as the judge was not concerned, in contrast to Arbuthnot J in the earlier hearing, to diagnose brain-stem death, the point does not have any impact on the judge's overall findings and therefore has no relevance in terms of any potential appeal.

Ground 4: 'burdensome', 'futile' and 'compromised dignity'

33. Ground 4 asserts that, in making his best interests determination, the judge erred in fact and in law in holding that Archie's treatment was 'burdensome', 'futile' and 'compromised his dignity, deprives him of his autonomy and becomes wholly inimical to his welfare'.

34. In relation to 'burden', the parents' counsel's skeleton argument seeks to limit the meaning of 'burden' in this context to that described in the Royal College of Paediatrics and Child Health guidance, by restricting it only to any consequence of treatment that cause pain or distress. The judge accepted the medical evidence that Archie was likely to be beyond experiencing pain. The Hospital Trust submit that the judge's findings that the multiple elements of treatment and its impact on Archie's body are evidence of burden, was a finding that he was entitled make.

35. At paragraph 46 the judge held that 'the treatment is futile'. The parents' counsel accept that it is not the purpose of mechanical ventilation to bring about recovery from brain

injury, but, they submit, that does not mean the treatment is futile in circumstances where it is the very means of keeping the child alive. Reference is made to paragraph 40 in the judgment of Baroness Hale SCJ in *Aintree* where futility was considered in the context of treatment that is ineffective or of no benefit to the patient. Paragraph 40 is, in my view, to be read as a whole where, firstly, the focus is on whether, as the Court of Appeal in *Aintree* had held, treatment must have a real prospect of curing, or at least palliating, the underlying condition, and secondly the court was looking at alternative treatments which might allow Mr James to resume a quality of life that he would consider worthwhile. On that basis, if, as I read his words, Hayden J was indicating that the current treatment could not achieve any improvement in Archie's condition, his words were in keeping with those of Baroness Hale and are not, therefore, open to criticism.

36. The parents' case on 'dignity' is, firstly, that some element of indignity is always present in cases such as this, and is therefore to be accepted. Secondly, it is submitted that any such indignity cannot outweigh the sanctity of life principle and the right to life that is protected by international conventions.

37. With regard to 'autonomy', it is submitted that it is the original injury, and not the treatment, that has deprived Archie of his autonomy and that, secondly, effect can still be afforded to Archie's autonomy by allowing his wishes and feelings to prevail.

38. Standing back, against the judge's findings on the medical evidence, in circumstances where Archie is unable to experience anything that occurs to him or around him (either painful or pleasurable), the judge was entitled to hold, as he did, that the medical regime 'serves only to protract his death, whilst being unable to prolong his life'. In those circumstances his findings as to dignity and autonomy, futility and burden were fully open to him and entirely justified. Specifically, the judge was entitled to find that the treatment carried a burden for Archie, even though he has no capacity to experience pain and no conscious awareness: see *Parfitt v (1) Guy's and St Thomas' Children's NHS FT (2) Knight* [2021] EWCA Civ 362 at [57] to [62].

Ground 5: The presumption in favour of prolonging life

39. By ground 5 there is a direct challenge to the judge's finding that the current treatment serves "only to protract his death whilst being unable to prolong his life" [47]. The parents' counsel submit that: 'this can be interpreted in only two ways: the first, that, as a matter of fact the [life-sustaining treatment] is unable to prolong Archie's life; the second, that any "life" that is being prolonged does not qualify as a "life" of sufficient quality to be protected by the sanctity of life presumption or by Article 2 ECHR'. Both possible interpretations, they submit, are not tenable and are wrong.

40. It is plain that Hayden J had full regard to the strong presumption in favour prolonging life. He makes express reference to ECHR, Art 2 and quotes directly from *Burke v UK* (App 19807/06) referring to 'the presumption of domestic law [being] strongly in favour of prolonging life where possible' [judgment paragraph 39]. He later quotes Lady Black in *A NHS Trust v Y* [2018] UKSC 46 who said 'no life is to be relinquished easily'.

41. In response to this ground, the Hospital Trust submit that the presumption regarding the preservation of life must, and, on the authorities, does have to yield to stronger counter-

prevailing best interests factors in those cases where permission is given to withdraw life-sustaining treatment. The Trust, correctly in my view, interpret the judge's reference to protracting Archie's death as referring to the medical findings which are that, should treatment continue, all that will occur is a further deterioration in Archie's condition, with resulting organ and/or heart failure leading to death in some weeks, with no prospect of achieving any improvement in his condition. On that interpretation the judge's analysis, whilst being bleak in the extreme, is fully justified and is in accordance with the established principles.

Conclusion on pleaded grounds of appeal

42. On the basis of that analysis, and on the basis that ground 6 is not being pursued, I would refuse permission to appeal on the pleaded grounds of appeal numbered 1 to 5 on the basis that both individually and taken together they do not have a reasonable prospect of success.

The parents' primary ground

43. I turn, finally, to what I have described as the parents' primary ground, which was advanced orally, and for the first time, during the hearing. I have already set out Mr Devereux' formulation of the ground. In essence, his submission is that, whilst the judge may have mentioned all of the relevant factors in the body of his judgment, nowhere does he demonstrate that he conducted the required balancing exercise, or indicate what weight he attributed to each element, before reaching his final determination on best interests. Put another way, if the medical factors might be listed as (a) to (f), and the non-medical factors at (g) onwards, with the best interests conclusion being at (z), the judge, submits Mr Devereux, has simply gone from (a) to (f) and then to (z) without taking account of any non-medical factor.

44. Whilst Mr Devereux was at pains to avoid insistence upon the judge expressly using a 'balance sheet' of pros and cons regarding Archie's future treatment, he submitted that there must, in any judgment of this nature, be a section which is 'the engine' of the judicial analysis where the judge's working out of the competing factors is explained. In doing so he relied upon a recent judgment of my lord, Lord Justice Peter Jackson, in the case of *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407 in which helpful guidance was given on the content and structure of judgments. At paragraph 59 it is said that a good judgment should have within it, at some point and as concisely as possible, a number of elements including:

> '(7) evaluate the evidence as a whole, making it clear why more or less weight is to be given to key features relied upon by the parties;
>
> (8) give the court's decision, explaining why one outcome has been selected in preference to other possible outcomes.'

45. Mr Devereux submits that, whilst the judge referred correctly to the legal context, in particular from the *Aintree* case, he failed to engage with the exercise that is required by that authority. From the parents' perspective, the all-important factors in this decision are Archie's stated wishes and his religious belief.

46. Mr Devereux listed the seven factors that he submits were before the judge and which should have been taken into account in the balance in favour of maintaining the current treatment regime. They are:

    i) The presumption in favour of prolonging life;

    ii) Archie's wishes and feelings;

    iii) Archie's religious beliefs and values;

    iv) The family's wishes and beliefs;

    v) The fact that Archie does not experience pain;

    vi) The benefit of allowing Archie to die at a random time and in a natural way;

    vii) The prospect of there being some limited recovery.

47. Where, at paragraph 25 of the judgment, the judge expressly stated that "determining where Archie's best interests lie is not solely a medical issue", Mr Devereux accepts that that was a correct self-direction, but he submits it is one that the judge then failed to follow.

48. At paragraph 30 the judge stated "I am considering Archie's best interests in the context of a young man who believed in God and whose family believe in God." At paragraph 32 the judge stated "my concern is with Archie, but what he might have wanted is integral to my evaluation of his best interests." Again, Mr Devereux submits that although the judge made these statements, he did not carry these factors forward into his ultimate evaluation of best interests.

49. Mr Devereux took the court through the structure of the judge's judgment in which he gives an account of the medical evidence, the evidence from the family and the legal context before turning to the final five paragraphs setting out his conclusions. In view of the challenge that is now made to the judge's analysis, it is necessary to set out paragraphs 42 to 47 in full:

> '42. Archie's Guardian made the following observations both in her evidence and in her report:
>
> > "Archie is a 12-year-old boy who was physically fit and well before his tragic accident. He is the youngest son of his parents. He has a loving family around him. Ms Dance spoke with me about Archie's religious beliefs. She thinks that Archie would wish more time. He would not want to leave her."
>
> 43. She continued, if I may say so, with great sensitivity, to observe the following:
>
> > "I have little doubt that if Archie could, he would find his way back to his mother and to his close and loving family. To the life that he so clearly enjoyed up to just a few months ago. But sadly, I do not think that possible. The clinical evidence provided regarding the prognosis is undisputed and overwhelming. He

> will not get better. I have given great thought to Archie's wishes as reported by his family, and particularly with regard to his religious beliefs, but for the reasons highlighted above I do not consider that he could have in any way foreseen the circumstances where they are being relied upon now. Given what I have been told about him, I would expect him to find the restrictions of his current situation difficult to bear."

44. It is impossible, for all involved, not to feel the tragic contrast between Archie's boundless energy and enthusiasm which has characterised his past life and his corroded ability to enjoy any aspect of it, either now or in the future. Archie's highly experienced Guardian engaged with the challenging, but in my judgment, unavoidable obligation to evaluate his dignity in his present situation. She said this:

> "I was impressed with the care that I observed Archie receive from the nursing staff. I am pleased that Ms Dance reports her relationship to be "brilliant" with them. I certainly observed this brilliant relationship when I visited. Whilst I consider all those who care for and treat Archie to be doing so with the greatest of dignity and respect, I have to consider whether his life being sustained indefinitely, in light of the medical evidence would be dignified for Archie and in his best interests. I have outlined the benefits that Archie's family derive from his life being supported in the way it is currently, however the medical evidence finds that for Archie improvement is not possible. Whilst receiving the highest level of love and care Archie is unlikely to be able to benefit from it and his life is characterised by intensive care with the many interventions and techniques that involves. Furthermore, there is an ever-present risk that Archie may experience a medical event requiring recovery procedures, or that the ability to provide him with the medical intervention his body needs is compromised. There is unfortunately no treatment possible to reverse the damage that has been caused to Archie's brain following his awful accident."

45. Drawing together these conclusions led the Guardian to the view that it would not be in Archie's best interests for treatment to continue. The Guardian is required, as I have been, to confront the appalling realities of Archie's situation. There can be no hope at all of recovery. Archie's mum, in particular, but the family more generally, recoil from this terrible reality. Nobody criticises them in any way for this. When it comes to evaluating the medical evidence, they have been ambushed by their emotions and overwhelmed by an intensity of grief that has compromised their objectivity.

46. This court has to ask itself whether continuation of ventilation in this case is in Archie's best interests. It is with the most profound regret, but on the most compelling of evidence, that I am driven to conclude that it is not. Accordingly, the Court cannot authorise or declare lawful the continuation of this present treatment. It is obvious from the detail of the treatment that I have set out above that it is intrusive, burdensome and intensive. If there were even a possibility that it could achieve some improvement to Archie's condition, it might be both proportionate

> and purposeful. Where, as here, the treatment is futile, it compromises Archie's dignity, deprives him of his autonomy, and becomes wholly inimical to his welfare. It serves only to protract his death, whilst being unable to prolong his life.
>
> 47. Having come to this conclusion, there emerges the prospect of an end to Archie's life, which reverberates more closely with the way he lived in the past. Arrangements can be made, with which I need not burden this judgment, that afford Archie the opportunity for him to die in peaceful circumstances and in the embrace of the family he loved.'

50. Mr Devereux makes a number of specific points about these paragraphs:

    a) Whilst the choice before the judge was between Option 1 and Option 2 (as they have been characterised during the appeal hearing), the judge did not look at the issues before him in that way;

    b) Paragraphs 42 to 44 are not part of the judge's conclusion. They are simply a recital of parts the guardian's report;

    c) The conclusion is at paragraphs 45 and 46 and they contain no mention of wishes and feelings;

    d) In holding that the family had been 'ambushed' by their emotions, the judge went beyond findings that were open to him on the evidence.

51. In response to the parents' primary ground, Mr Gavin Millar QC for the Hospital Trust, who did not appear below, submitted that the judgment should be read as a whole. He, too, took the court through the structure of the judgment in order to demonstrate that the judge did have regard to all of the relevant factors.

52. Mr Millar drew attention to paragraphs 23 and 24 where the judge describes the likely progression if Archie were to continue to receive life-sustaining treatment with the conclusion, in the judge's words, being that 'eventually, Archie's organs will fail and ultimately, his heart will stop. How, when and in what circumstances is impossible to predict." The judge then goes on to say: "What I have set out above is a bleak prospect but, in invidious circumstances, it is one that his parents are driven to prefer. The alternative is that advanced by those caring for Archie and by his guardian". Mr Millar submits that in those two paragraphs the judge accurately sets out the choice that was facing the court in very clear and certain terms, with the two options that required consideration being squarely identified.

53. At paragraph 33 the judge stated that he is "required to confront the compelling medical reality that Archie no longer has the agency to fight." Mr Millar submits that the judge must have carried forward that finding of "compelling medical reality" to his final determination.

54. Mr Millar disputed Mr Devereux' assertion that paragraphs 42 to 44, which include extensive quotations from the guardian's report, do not form part of the judge's reasoning. Given their place in the structure of the judgment, and the obvious endorsement that the judge attributes to the guardian's analysis, these passages are,

submits Mr Millar, to be taken as part of the judge's own evaluation of the relevant factors.

55. In response to Mr Devereux' criticism that the judge has failed to identify what weight he attributed to any particular element in his assessment, Mr Millar pointed to the quality of the language used by the judge in describing the medical factors at paragraph 46: "on the most compelling of evidence,... I am driven to conclude that it is not" in Archie's best interests for ventilation to continue [Mr Millar's emphasis]. Whilst it is not presented in the form of a balance sheet, Mr. Millar submitted that all of the elements that the judge was required to consider are included within the judgment and must have been taken fully into account by the judge before reaching this determination. Mr Millar submitted that it is obvious which factors fall in favour of Option 1 or Option 2 and there was no need for the judge to itemise them in that way.

56. Finally, Mr. Millar observed that, if there was any merit in the parents' new ground, it was merely to identify a failure of presentation by the judge in not drawing all the factors together in one final summary. Such a failure could not change the outcome.

57. For the children's guardian, Miss Claire Watson QC, who appeared below, submitted that the judge carried out a careful and sensitive best interest analysis that was entirely in accordance with the requirements of the law before reaching a conclusion that was fully open to him. She, too, urged the court to look at the judgment as a whole and to consider paragraphs 23 to 27 and 32 to 34 as part of the judge's "workings" in addition to the later passages. Miss Watson told the court that, as the medical evidence was taken as read, more time was spent during the hearing before Hayden J in focusing on Archie as an individual.

58. Miss Watson drew attention to CA 1989, s 1(3)(a) which requires the court to have regard to the ascertainable wishes and feelings of a child, 'considered in the light of his age and understanding'. Although the judge might have taken account of the fact that Archie was 11 years old at the time that he spoke to his brother about end of life treatment, and the judge would have been entitled to reduce, to a degree, the weight to be afforded to his wishes and feelings when compared to those of an adult, there is no sign that the judge did so in this case.

Parents' primary ground: discussion and conclusion

59. The central criticism made of the judge's judgment by Mr Devereux is that set out at sub-paragraph (3) of the new ground, namely, that "the judge failed to carry out a careful, clear and comprehensive evaluation of the benefits and burdens of the continuation of life-sustaining treatment." Subparagraphs (1), (2) and (4) are illustrative of that central point. It is further argued that the judge's stated reasoning does not allow the reader to see how he has worked through the issues in the case so as to reach his conclusion.

60. It is important to stress that the proposed appeal does not engage with any point of law. The criticism that is made relates entirely to the manner in which the judge conducted his assessment, it being accepted that he gave himself a correct direction on the law. In the absence of any proposed ground of appeal to the contrary, it seems that it is also accepted that the judge's decision was open to him on the evidence. Mr Devereux does not submit that the outcome chosen by the judge is "wrong", in the sense that that word

is used in describing the test on appeal. If the appeal is successful, the parents seek a further re-hearing before a different judge.

61. The parents' primary ground, as developed by Mr Devereux during the course of his skilful oral submissions, is plainly not without some foundation. It would undoubtedly have been better for the judge to have been more explicit in setting out his final conclusions. But, there is a danger that the metaphorical microscope deployed by an appellate court can become over-focussed on particular words, or what is, or is not, said in one sentence or another, so that sight may be lost of the judgment as a whole. If, as Mr. Millar submits, any failure is only one of presentation, the court must be careful not to be drawn into allowing an appeal and possibly ordering a re-hearing where, in reality, there has been no substantive error by the judge. During the hearing my lord, Lord Justice Peter Jackson, observed that all that is missing is one paragraph and, because of what the judge does say, the missing paragraph would write itself as its contents are made clear by what is said elsewhere. If that is so then this new ground of appeal would lack any true substance and must fall away.

62. Putting the appellate microscope to one side, and looking at the judgment as our whole, the first question is whether the judge did consider each of the relevant factors. If so, the second question is whether it is possible to understand what weight he attached to each factor before coming to the ultimate best interests determination.

63. As I have said, Mr Devereux listed seven points which were in favour of the parents' case, and which, he submitted, had not been brought into the ultimate evaluation exercise by the judge. Save for the final one, each of these points does, however, appear in the judgment:

    i) The presumption in favour of prolonging life – paragraph 39;

    ii) Archie's wishes and feelings – paragraphs 31 and 42;

    iii) Archie's religious beliefs and values – paragraph 30;

    iv) The family's wishes and beliefs – paragraphs 32 and 42;

    v) The fact that Archie does not experience pain – paragraph 23;

    vi) The benefit of allowing Archie to die at a random time and in a natural way – paragraphs 31 and 32 which identify this as being in line with both Archie's and his mother's wishes.

64. The seventh factor, namely the prospect of there being some limited recovery, was plainly not accepted by the judge and I have already dealt with this point at an earlier stage.

65. At paragraph 32 the judge said that 'my concern is with Archie, but what he might have wanted is integral to my evaluation of best interests' and at paragraph 34 'when determining his best interests, I must have regard to the range of Archie's needs and wishes'. After further narrative describing the requirement for consideration of dignity, in addition to needs and wishes, the judge says [paragraph 35]:

> 'It is for these reasons that I have taken care to investigate Archie's life and I am grateful to his parents for opening it up to me. I also regard it as a privilege. I am grateful to Archie's guardian, who has provided a detailed and illuminating report in circumstances which would have been difficult for all involved.'

As Miss Watson confirmed, investigating who Archie was and what his wishes and feelings might be was the central focus of the hearing. It was, in essence, what the case was about in circumstances where the medical evidence was taken as read and was all one way. In those circumstances, it becomes very difficult for a potential appellant to argue that a judge who has on three occasions expressly said that he must consider wishes and feelings, and who sets out and accepts the evidence of religious belief and a stated desire not to have life-support turned off, in some manner then ignores those factors when he comes to his decision some six paragraphs later in the judgment.

66. I do not accept that the judge's analysis is to be limited to paragraphs 45 and 46. It plainly must include paragraphs 42 to 44 in which important quotations from the guardian's report are set out with obvious approval. In paragraph 42 the focus is on Archie's religious beliefs and his mother's view that Archie would wish for more time and would not want to leave her. Against that background, it is not possible to hold that the judge failed to have regard to these important factors in his final analysis. Like the guardian, he plainly treated the views of the family about Archie's best interests with proper respect, and when declining to endorse them he expressed the most profound regret. But he did not, and was not obliged to, give decisive weight to those matters in the face of the overwhelming medical evidence.

67. In terms of the attribution of weight, by his clear endorsement of the guardian's analysis quoted at paragraph 43 – 'she continued, if I may say so, with great sensitivity' – the judge adopted the guardian's words as his own. Within that paragraph Archies wishes are clearly acknowledged, as is the 'undisputed and overwhelming' prognosis that 'he will not get better'. The text then proceeds by recording great thought being given to Archie's wishes and religious beliefs, but these are balanced by the observation that 'for the reasons highlighted above I do not consider that he could have in any way foreseen the circumstances where they are being relied upon now. Given what I have been told about him, I would expect him to find the restrictions of his current situation difficult to bear.' That approach is on all fours with the approach taken in paragraph 45 of *Aintree*.

68. Whilst it might be said that the judge could have been more explicit by indicating expressly that he agreed with and adopted the guardian's analysis, it is plain that is exactly what he was doing.

69. I accept the submissions made by Mr Millar and Miss Watson. In particular, whilst he did not label them as we have done, the judge does, at paragraphs 23 and 24, precisely identify the choice that was to be made.

70. The exercise that was the focus of the oral hearing before this court has been a valuable one and I am grateful to Mr Devereux for embarking upon it as it has caused me to evaluate the judgment both from the perspective of precise consideration of individual sentences or words, but also as a whole. Despite initially identifying some potential validity in the points made on behalf of the parents, arising from the fact that it is true that the judge did not describe his analysis in one or two explicit or structured

paragraphs, the detailed reading of the judgment that I have now undertaken, supported by the helpful submissions of Mr Millar and Miss Watson, has removed any doubt. It is clear to me that the judge discharged the important responsibility laid upon him correctly and in accordance with the law. I recognise that the outcome was not one that Archie's family had hoped for, but the judgment, read as a whole, makes it apparent to all why the judge reached the conclusion that he did.

71. Whilst it is, most sadly, correct that it was the medical evidence that ultimately determined the outcome of the judge's best interest determination, he had clearly taken full account of the countervailing factors. Those factors, and in particular Archie's individual feelings and religious beliefs, were insufficient to avoid a finding that the continuation of life-sustaining treatment was no longer in the best interests of this moribund child, who is weeks away from a death which will otherwise occur from a gradual further deterioration and then failure of his organs followed by the failure of his heart. Consent can only be given to medical treatment where it is in the patient's best interests and the consequence of the judge's assessment is that continued life-sustaining treatment for Archie will not be lawful., even for a period of days or weeks.

72. Permission to appeal can only be granted on the parents' new ground of appeal if there is a real prospect of it being shown that the judge's decision was unjust because of a serious procedural irregularity arising from the manner in which he approached the decision and expressed his reasoning. After a detailed examination, I do not accept that there is any prospect of the decision being shown to be wrong or unjust, whether for procedural reasons or otherwise. The new ground of appeal relates only to matters of form and raises no matter of true substance. In the circumstances, I am satisfied that an appeal on this ground does not have a real prospect of success and that there is no other compelling reason for granting permission to appeal. In this truly tragic case, Archie's best interests have rightly and repeatedly been given the most anxious attention and the judge has made a conscientious decision that this court would not disturb. Permission to appeal on this final ground must, if my lady and my lord agree, also be refused.

Lady Justice King

73. I agree.

Lord Justice Peter Jackson

74. I also agree.

The court having received full submissions from the parties at a hearing where the appeal and the application for permission to appeal were listed together, it is certified pursuant to para. 6.1 of the 2001 Practice Direction on the Citation of Authorities that this judgment may be cited.
