Neutral Citation Number: [2022] EWCA Civ 1221

Case No: CA-2022-001707

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Hon Mr Justice Hayden
FD22F00036

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 September 2022

Before :

LORD JUSTICE SINGH
LORD JUSTICE BAKER
and
LORD JUSTICE PHILLIPS
- -

A (A CHILD) (WITHDRAWAL OF TREATMENT: LEGAL REPRESENTATION)
- -
- -

Bruno Quintavalle (instructed by **TKD Solicitors**) for the **Appellants**
David Lawson (instructed by **Hill Dickinson**) for the **First Respondent Hospital Trust**
Jack Anderson (instructed by **Duncan Lewis**) for the **Second Respondent child, by his children's guardian**
Yasmin Jamil (instructed by **Local Authority Solicitor**) for the **Intervener**

Hearing dates : 7 September 2022
- -

Approved Judgment

LORD JUSTICE BAKER (reading the judgment of the Court at the invitation of Lord Justice Singh):

1. This is the judgment of the Court to which all members have contributed.

2. This tragic case concerns a small baby, A, born in April 2022, who is being kept alive on a ventilator after sustaining two devastating injuries to his brain, the first following a series of haemorrhages and the second a hypoxic ischaemic encephalopathy following a cardiac arrest. The medical opinion of the treating clinicians is that there is no hope of any recovery and that he is dying. Although it is impossible to be certain about it, there is no evidence that he is suffering pain. But his condition is deteriorating rapidly and it is proving very difficult to treat him.

3. The clinical judgment is that it is not in his best interests to be kept alive by artificial means any longer. His parents have a good relationship with the medical staff but are firmly of the view that treatment should not be withdrawn. They are devout Muslims and, fortified by their faith, believe that the decision whether he lives or dies is a matter to be decided by Allah, not by man.

4. The NHS Trust responsible for the hospital where A is being treated therefore applied to the Family Division for orders permitting treatment to be withdrawn. In contrast with a number of similar cases that have come to court in recent years, there is, with the consent of all parties, a reporting restrictions order in place preventing the identification of the child, his parents, and the hospital and medical professionals at which and by whom he is being treated. The terms of that RRO are considered later in this judgment.

5. The hearing of the application took place before Hayden J on 25 August. In circumstances described in more detail below, the parents were present but unrepresented at the hearing. At the outset of the hearing, the judge refused an application by the parents for an adjournment to allow them to be represented and proceeded to hear evidence. On the following day, he delivered a judgment in which he said that "it is impossible to escape the conclusion that treatment is futile, it protracts death rather than promote life". He made an order declaring that it was lawful and in A's best interests for mechanical ventilation to be withdrawn on 28 August and pending withdrawal for other interventions, such as enteral or intravenous antibiotics and cardio-pulmonary resuscitation, to be withheld, in accordance with a care plan appended to the order.

6. Permission to appeal was refused by the judge and no notice of appeal was filed with this Court for several days. Consequently, the time specified by the judge for withdrawal of ventilation passed without any stay being sought or granted. Knowing that an application for permission to appeal was imminent, however, the hospital did not in fact withdraw ventilation. On 31 August, an appeal notice was filed, and a stay granted immediately by Underhill LJ. On 2 September, a case management hearing took place before Underhill and Baker LJJ at which the case was listed for hearing on 7 September for consideration of the application for permission to appeal with appeal to follow if permission granted.

7. The ambit of the appeal, however, is different from similar cases which have come before this Court in recent years. Although the parents' counsel informed the Court that they do not accept the medical opinion that A is beyond recovery and want him to

remain on ventilation to allow him a further chance to recover, there is no direct challenge on this appeal to the judge's analysis of best interests. The appeal notice contained only two grounds, one of which has now been withdrawn. The remaining ground is: "by failing to adjourn the proceedings to allow the proposed appellants to be legally represented, the court breached the proposed appellants' fair trial rights protected by Article 6 ECHR."

8. In those circumstances, the background to this appeal can be summarised relatively briefly, without extensive reference to the detailed medical evidence put before the judge.

9. A was born on 7 April 2022. Nine weeks later, on 10 June, he was admitted to hospital having suffered the intracranial injuries summarised above. It was estimated that his brain had been deprived of oxygen for approximately 30 minutes. He was transferred to a specialist children's hospital with a paediatric intensive care unit where he was intubated and ventilated.

10. Medical examinations led the doctors to suspect that his injuries may have been inflicted non-accidentally. As a result, the parents were arrested by the police, interviewed and then released on bail.

11. In the days following A's admission to hospital, EEG and MRI scans revealed his brain injury. Brain stem tests carried out over four days in mid June all showed that he had no brain stem reactions. As a result, the hospital concluded that he met the criteria for brain stem death and a medical declaration of death was made giving the date and time of death as 19 June 2022 at 13:15 hours. On 27 June, the Trust applied to the High Court for a declaration of death and authorisation to withdraw life support. A preliminary hearing took place the following day before Peel J when directions were made including the appointment of a guardian. At that hearing, the parents were represented on a pro bono basis by Ms Helen Mulholland of counsel who prepared a detailed position statement on their behalf. On 4 July, the parents filed a witness statement in the proceedings.

12. In early July 2022, A began to show some small respiratory effort which indicated a degree of brain stem function. The Trust immediately rescinded the medical declaration of death and amended its application to the court so as to seek a declaration that it was in A's best interests for life support to be withdrawn.

13. On 13 July, a further case management hearing took place before Hayden J. The parents were again represented by Ms Mulholland who prepared another position statement. Directions were made for the filing of further evidence including second opinion medical reports and independent expert evidence. In particular, the order permitted the parents, either alone or jointly with the guardian, to file and serve a report from a consultant in paediatric intensive care and a consultant paediatric neurologist.

14. At around this time, Messrs Irwin Mitchell Solicitors were instructed on behalf of the parents and made an application for legal aid. Expert evidence was filed in accordance with the court's directions, including a response to specific questions raised by the parents from the paediatric neurologist instructed to provide a second opinion. On 17 August, the application for legal aid was refused on the grounds that the parents' means exceeded the limits under the regulations. Irwin Mitchell initially said they would try

to obtain other funding but their efforts were unsuccessful and it was not until 19 August (a Friday) that they said they would no longer be able to act. The parents therefore only had three clear days before the hearing to find other representation or prepare to conduct the hearing themselves. Ms Mulholland, whose instructions had apparently been withdrawn, was now no longer available to appear pro bono and the parents were unable to obtain alternative representation for the hearing. Extensive efforts were made by the parents, assisted by the Trust's lawyer, to find alternative [free] representation, to no avail.

15. On 24 August, the day before the hearing, the parents filed an application seeking an adjournment of the hearing for three weeks. In the application they recited the efforts made to obtain representation, stated that they were working to organise crowdfunding to be able to pay for it, and identified a lawyer who was able to act for them from 5 September if they were in funds. They added:

> "In any event our new legal advocates will need time to prepare our case, they will also need time to instruct an independent expert for the case, in this light we request that the case is adjourned for a minimum of three weeks."

16. No transcript of the hearing on 25 August is available but we have been supplied with notes from two of the legal representatives present. At the outset, the judge refused the application to adjourn. In the course of the hearing, he read and heard evidence from six experts – treating clinicians, plus consultants who had been asked to provide a second opinion, and a consultant paediatric intensivist who had been jointly instructed by the parents and the guardian to provide an independent opinion. The notes show that the father asked brief questions of just one of the medical witnesses. All the medical witnesses were unanimous in their opinion that A had suffered a severe and irreversible brain injury, that there was no intervention that could promote recovery, and that mechanical ventilation was futile and not in A's best interests. Furthermore, the treating consultant paediatric intensivist gave evidence of a deterioration in A's condition, incorporating increased stiffness in his neck, abdomen and trunk, which necessitated a higher level of ventilation pressure, less consistent and effective breathing when off the ventilator, a greater risk of lung collapse, and the loss of the ability to control body temperature. The doctors are unable to say definitely whether or not A is able to feel pain, although he is not showing any brainstem reaction to pain.

17. After the doctors had given their evidence, the parents, principally through the father, gave what the notes describe as unsworn evidence. They described in moving terms their faith in Allah, their confidence that medical science is improving, their hope that A could receive more treatment, and their observations about A's movements. The note of his evidence concludes:

> "My kind request to everybody and to you – A needs some time – if ask to give certificate and how doctor previously certified. Can only feel him and tell you he will recover – my trust because of how he's recovered. Nobody had an answer. How can I believe the answer [?]"

The mother, whose ability to speak English is more limited, added that it was only four months since he had collapsed, that he needed more time, that he was breathing very

little but still breathing. The judge observed that the father had been one of the most eloquent litigants in person who had appeared in his court. Finally, the guardian gave evidence supporting the Trust's application. There was then a discussion about whether CPR should be undertaken and the parents agreed that it should not. It seems that no submissions were made after the evidence, and the judge adjourned judgment to the following day.

18. On the following day, the judgment was handed down at a remote hearing, the parents attending by video link from the hospital. In view of the narrow ambit of the appeal it is unnecessary to recite in detail the judge's assessment of the medical evidence or his explanation of the reasons for his decision. We confine citation from the judgment principally to aspects relevant to the issue raised on appeal.

19. At paragraphs 21-22, the judge considered the impact of the declaration of brain stem death and its subsequent rescission:

> "21. All the treating clinicians led by Dr Z [the treating intensive care consultant] have expressed real professional concern at the impact on the parents of A's spontaneous recommencement of breathing after his parents had been so consistently reassured that he was dead. It is hardly surprising in these circumstances that they query the medical prognosis. During the course of F's evidence, he told me that medical science does not know everything and professional views change. He told me that he put his faith in *"my Allah"* to intervene. F and M wish their son to be ventilated in the hope that there will be some seismic change in the medical understanding, delivered through divine intervention. F spoke on behalf of the couple, though M was able to say a few words. I found F to be immensely articulate, reflective, and honest. The magnitude of his love for his son was palpable. He was dignified, strong, and resilient. His evidence was deeply moving.
>
> 22. Dr Z and Dr B [the independent expert instructed by the guardian and the parents] both recognised and articulated the need for professional humility in this most challenging situation. I pause, simply to say, that which is obvious but might get lost in the detail of the medical evidence. A had been declared dead and started, spontaneously, to breathe, not gasping but in a regular rhythm with barely any need for a ventilator in this very short period. For this couple, committed to their faith and to the power of prayer, this must truly have seemed to be a miracle."

20. At paragraphs 38 to 39 the judge recorded the parents' agreement to the proposal that CPR should not be undertaken, adding:

> "For reasons which I entirely understand, they make a distinction, in their faith, between that which is the will of Allah, which they would perceive cardiac arrest to be, and the obligation in their faith to promote life at all costs."

He continued:

> "40. My unwavering focus must be fixed on that which I assess to be in A's best interests. I have taken time to survey the broad canvas of the evidence in this case, as I am obliged to do, and not merely the medical evidence. The spectrum here, given A's short life, is narrower and more circumscribed than in some cases. Nonetheless, the culture and faith into which A has been born is an important factor, however difficult it might be to calibrate the weight to be afforded to it. Ultimately, the severity of A's brain injury, the complete absence of any ability to benefit from treatment, the impossibility of excluding potential for residual pain and the burden of the treatment itself illuminate mechanical ventilation as contrary to A's best interests.
>
> 41. There is unique value in human life, frequently referred to as the 'sanctity of life'. That does not dissipate where awareness diminishes, or the capacity of the brain becomes so corroded that all autonomy is lost. It is perhaps in these circumstances that it requires the most vigilant protection. The evidence is clear that A is now dying and will die, at some indeterminate point, whether ventilated or not. To continue ventilation will serve here only to protract death. In simple terms, it would confer harm without conveying benefit. That cannot be reconciled with the ethical obligations of the treating clinical team nor can it be in A's best interests. For this reason, the ventilation should be withdrawn, and palliative care provided.
>
> 42. This case has raised real and important questions as to the confidence that can be placed in the **Code of Practice for the Diagnosis and Confirmation of Death** in cases involving infants. The identified conditions necessary for the prognosis and confirmation of death (para 5) may need to be reviewed, as Dr B suggests, particularly in the context of babies under 6 months of age and those with open fontanelles (as here). I have been told that the Royal Academy of Medical Colleges are considering their guidelines and that these are being reviewed, both at a national and international level. In other countries, for example, the USA and Australia, a test of whole brain death is applied. I should record that I have been told that the application of this test here, would have yielded the same results. Dr Z has told me that the advice and guidelines are anticipated relatively quickly. Though I do not want to be prescriptive, I record that it strikes me that the appropriate application in most cases concerning infants, or at least until further guidance is received, is to make an application predicated on the patient's best interests rather than to seek a certification of brain stem death."

21. The judge's original draft judgment concluded at that point. Subsequently, having realised that he had omitted to set out his reasons for refusing the parents' adjournment application, he added the following paragraphs:

> "43. It is important that I record that a preliminary application was made by the parents for an adjournment to seek legal representation. The application was made on the morning of the final hearing. I was unable to allow it. By this stage, the proceedings had already been before the Court for over a month. The treating clinicians and the court appointed expert were in attendance at Court to give evidence.
>
> 44. A is in a parlous condition. It was said, by the Trust, that he was "dying on the ventilator". As is clear from the above, I have accepted this evidence. Withdrawal of ventilatory support was scheduled to take place on the day immediately following judgment.
>
> 45. It must be emphasised that, notwithstanding the sad history of this case, there is a very high level of mutual respect between the clinicians and the parents. The parents have broadly accepted the weight of the medical evidence, which permits of little ambiguity and reflects a consensus. The parents have queried A's present level of awareness both at this hearing and at their meeting with Dr B, the independent expert. They put their questions to Dr B in a meeting with him and he addressed them in his report. They were covered again at the hearing and with the assistance of Ms Watson QC for A. As Dr B had identified in his report, the central dispute, properly analysed, is a conflict between medicine and faith.
>
> 46. F, in particular, spoke at length and in a very articulate manner about his faith, his culture and his hope for A's future. I found him to be a kind and impressive man. In his honest and simple eloquence, he advanced his views in a forceful and effective way. I commented on this at the conclusion of his evidence. He was, if I may say so, an impressive advocate for his own beliefs and those of his wife."

22. In his written submissions to this Court, Mr Bruno Quintavalle, who with his instructing solicitors has represented the parents pro bono on the appeal, focused his attention on Article 6. That, of course, provides inter alia as follows

> "Right to a fair trial
>
> (1) In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ….
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (3) Everyone charged with a criminal offence has the following minimum rights:

> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

23. Mr Quintavalle argued that both the "criminal limb" and "civil limb" of Article 6 were engaged in this case. So far as the criminal limb is concerned, he submitted that

(1) the concept of "charge" in Article 6 is an autonomous concept which is not confined to cases where an individual has been formally charged with an offence but extends to circumstances where the individual has been notified of an allegation that he has committed an offence;

(2) it therefore includes the parents' current circumstances having been arrested, interviewed and bailed in the course of the police investigation;

(3) the parents therefore have the rights granted by Article 6 (3), in particular (b), (c) and (d);

(4) although the court's decision on the Trust's application would be based only on the child's best interests, the consequences of the decision to authorise the withdrawal of treatment could have serious implications for the parents since it might expose them to the possibility of being prosecuted for a very serious criminal offence;

(5) accordingly, Article 6 requires that they have the opportunity to be legally represented in the proceedings so as to be able effectively to challenge the evidence relied on by the Trust.

24. Under the civil limb of Article 6, Mr Quintavalle submitted that

(1) these proceedings engage a number of the parents' civil rights and/or obligations, including their rights under Article 8, their parental responsibility under the Children Act 1989, and their common law parental rights to give or withhold consent to medical treatment of their child (*Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112;

(2) the proceedings have been brought because the Trust is asking the court to override the parents' refusal to consent to the withdrawal of treatment;

(3) Article 6 obliges the provision of legal representation in certain serious cases, where such assistance is indispensable for effective access to the court (*Airey v Ireland* (1979-80) 2 EHRR 305, *McVicar v UK* (2002) 35 EHRR 22);

(4) there are a number of factors in this case which require the parents to be legally represented, including the complexity of the procedure, the necessity of cross-examining expert witnesses, the intense emotional involvement of the parents themselves, the speed with which such proceedings have to be conducted and concluded, the fact that the parents are not native English speakers, and the serious consequences of the proceedings;

(5) in a situation where legal representatives are required under Article 6 and the State is unwilling to grant legal aid, it falls to the court to give effect to the State's obligation, in this case by granting a short adjournment to enable legal representation to be obtained.

25. We can see no merit in the argument that the parents' rights under the criminal limb of Article 6 are engaged in this case and would refuse permission to appeal on that ground. The specific rights identified in Article 6(3) relate to the criminal process, and not to a different civil process the outcome of which may have some repercussions for the criminal investigation. On the other hand, we accept that the parents' civil rights under Article 6 are engaged, as counsel for the guardian accepted, although counsel for the Trust did not. We grant permission to appeal on the basis of the "civil limb".

26. In our judgment, however, Mr Quintavalle was mistaken in focussing his submissions solely on Article 6. He was starting in the wrong place.

27. The Supreme Court has stressed in recent years that the Human Rights Act 1998 ("HRA") should not normally be treated as the starting point in any case in which human rights issues arise. Although the importance of the Act is "unquestionable", it does not supersede the protection of human rights under the common law or statute, or create a discrete body of law based on the judgments of the European Court of Human Rights: see *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, at paragraphs 54-63, in particular paragraph 57, where Lord Reed said: "Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate."

28. As Lord Reed pointed out at paragraph 55, the guarantee of a fair trial under Article 6 is fulfilled primarily through detailed rules and principles to be found in several areas of domestic law, including the law of evidence and procedure, administrative law, and the law relating to legal aid. The correct approach was summarised by Lord Reed at paragraph 62 as follows:

> "… The ordinary approach to the relationship between domestic law and the Convention [has been] described as being that the courts endeavour to apply and if need be develop the common law, and interpret and apply statutory provisions, so as to arrive at a result which is in compliance with the UK's international

> obligations, the starting point being our own legal principles rather than the judgments of the international court."

29. There are at least two fundamental reasons why procedural fairness is important. The first is that it helps to improve the chances of reaching the right result. In *John v Rees* [1970] Ch 345, at 402, Megarry J noted that there are some who would say that, when the outcome of a case is obvious, why force everybody to go through the tiresome waste of time involved in framing charges against a person and giving them an opportunity to be heard? Megarry J eloquently answered that question in the following way:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

30. This leads to the second reason why fairness is important. The last point made by Megarry J in that passage in *John v Rees* was one also noted by Lord Reed JSC in *Osborn*, at paragraphs 68-70. When setting out the values which underlie the concept of procedural fairness, Lord Reed pointed out that the purpose of a fair hearing is not only that it improves the chances of reaching the right decision. Those values also include the avoidance of the feelings of resentment which will arise if a person is unable to participate effectively in a decision-making process which affects them. In this way the law seeks to protect the value of human dignity.

31. As Lord Reed put it at paragraph 68:

> "… justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken."

32. These principles apply to all litigation, including in the protective jurisdictions in the family courts and the Court of Protection. The fact that the welfare of a child is the paramount consideration in proceedings under the Children Act 1989 and the inherent jurisdiction relating to children, and that any act done, or decision made, under the Mental Capacity Act 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests does not obviate the requirement for a procedure which pays due respect to persons whose rights are significantly affected by such decisions. The specific procedural requirements will, however, be tailored to take into account the nature of the protective jurisdiction and the extent to which such persons are permitted to participate will depend on the specific circumstances of the case.

33. Applying the principles of fairness there were plainly a number of strong arguments in favour of granting the parents an adjournment of the hearing on 25 August.

34. First, the issue before the court was the gravest and most important matter any parent could ever face - the life and death of a child. Decisions about the medical treatment of a child are normally made by the parents without any involvement of the State. Here, the State through the court was being asked to take this responsibility away from the parents. There is clearly an argument that the State should provide non-means tested public funding for all parents in this situation, as it does for the parents faced with an application to place a child in the care of a local authority under Part IV of the Children Act 1989. But as MacDonald J observed in *Barts Health NHS Trust v Raqeeb (Costs)* [2019] EWHC 3322 (Fam) at paragraph 52,

> "whilst … there is an apparent inconsistency in the approach to public funding as between a parent who is facing care proceedings concerning the welfare of their child brought by the State, in the guise of the local authority, and a parent who is facing proceedings of the instant nature brought by the State, in the guise of an NHS Trust, that is a matter for Parliament and not for the court."

Nonetheless, the importance of the issue to the parents is manifestly a relevant factor to be considered by any judge faced with an application to adjourn the hearing to allow the parents to seek legal representation.

35. Secondly, these particular parents had a stronger argument having lost their legal representation only a few days before the hearing through no fault of their own. Some parents may choose to represent themselves from the outset and only decide to seek legal representation at the last minute. Others may instruct lawyers and then withdraw those instructions and seek an adjournment. In those circumstances, there is obviously less merit in the adjournment application. In this case, the parents had wanted to be represented at all times. They initially instructed an experienced and specialist barrister to represent them pro bono. Then they instructed a specialist firm of solicitors who agreed to act on their behalf provided they were publicly funded and acted under their delegated authority while the application for funding was being processed. At the last minute, public funding was refused and the solicitors withdrew. We make no criticism of any of the lawyers instructed (indeed it is evident that all the lawyers involved in these proceedings, for all parties including the parents at an earlier stage, have worked conscientiously and diligently on this difficult case). We observe that in future cases it might be advisable to make contingency plans by identifying alternative lawyers who would be available to represent the parents at short notice on a pro bono basis if public funding is refused. In the event, at very short notice in the middle of August, the parents found themselves unable to find another lawyer to represent them at the hearing, notwithstanding their efforts and those of the Trust lawyers who very creditably attempted to help them find one. As a result, these parents who had not been expecting to represent themselves were suddenly faced with that prospect.

36. Thirdly, the task they faced in representing themselves was daunting. The preparation and conduct of cross-examination in these cases and the preparation and presentation of legal argument are difficult tasks even for an experienced lawyer. Cases of this sort invariably involve complex medical evidence and usually voluminous medical records.

Even a parent who had been involved in the proceedings and was familiar with the evidence and issues would find it very challenging to conduct a hearing when they had not been expecting to do so. And they would be required to do so at a time when their child was lying desperately ill in hospital. In our judgment, the fact that the parents are the subject of a criminal investigation adds nothing to the weight of the argument. But for this couple, who are not native English speakers, such a task would be even more difficult.

37. All these points were arguments in favour of the judge granting a short adjournment. He may have had them in mind when refusing their application. But none of them is mentioned in the reasons for his decision set out at paragraphs 43 to 46 of the judgment. Looking at those paragraphs, the judge took into account (a) the fact that the proceedings had been going on for a month, (b) the fact that the medical witnesses were in attendance to give evidence, (c) the child's parlous condition, (d) the judge's impression that the parents "broadly accepted the weight of the medical evidence, which permits of little ambiguity and reflects a consensus", (e) the fact that some questions had been put on the parents' behalf to Dr B before the hearing, (f) the fact that other questions reflecting the parents' position were put on behalf of children's guardian during the hearing, and (g) the judge's assessment that the issue was "a conflict between medicine and faith".

38. Most of these arguments seem to us to carry little if any weight on the adjournment application. The fact that proceedings had been continuing for a month was of little relevance, given the circumstances in which the parents found themselves without representation. The fact that the witnesses were at court was of course regrettable but not a matter which should have carried any significant weight in the decision. If there was a strong case for an adjournment, arrangements would have to be made for an adjourned hearing when the witnesses could attend again. Of course, it is now the normal practice for medical witnesses to give evidence by video link which allows for much greater flexibility.

39. We are not convinced that the points made by the judge about the parents' case in his explanation of his reasons for refusing the adjournment should have carried significant weight, and, whilst we accept that in assessing fairness one must consider the proceedings as a whole, we are not persuaded by the argument advanced both by Mr Lawson for the Trust and Mr Anderson for the guardian that the appeal should be dismissed because the proceedings as a whole were fair. At the outset of the hearing, it could not be said with precision what points would be put on behalf of the parents or the extent to which they would wish to challenge the medical evidence. The fact that through the solicitors previously instructed they had put questions to the expert had narrowed the issues did not eradicate the parents' right to challenge that evidence at the hearing. It was helpful of the guardian's counsel to put questions which she thought the parents might wish to raise but this cannot be a completely satisfactory alternative to the parents putting their own questions through their own lawyer. And even if the judge was right to say that the central dispute was "a conflict between medicine and faith", that did not undermine the strength of their argument for an adjournment.

40. The fact that on paper the medical evidence all seems to point one way does not mean that the parents should not have an opportunity to challenge it. Earlier in this case, the treating clinicians had declared A dead on the basis of several brain stem tests, only to rescind the declaration when he started breathing again. The Trust then withdrew its

application to the court for a declaration of death. Although the parents may have characterised this as a miracle, it can also be seen as one of those examples identified by Megarry J in *John v Rees* of "open and shut cases which, somehow, were not".

41. Ultimately, the only argument against an adjournment which should have carried any significant weight was what the judge described as the child's "parlous condition". Plainly, there may be cases where, balancing the arguments, a judge may conclude that the child's condition is so serious that no adjournment however short is possible. But such cases will be rare and in this case there is nothing in the note of hearing or the judgment to indicate whether and if so how the judge took into account the factors in favour of an adjournment and balanced them against the child's condition. They are not mentioned at all.

42. In the rare case where a judge concludes that a child's condition is so serious that the hearing must proceed, very great care must be taken by the court to ensure that the parents have every opportunity to put their case. Here, the notes of the hearing and the judgement show that the judge was typically compassionate and understanding towards the parents. He plainly allowed them to participate. We do not accept Mr Quintavalle's characterisation of their involvement as being "mere spectators". But their contributions were limited to the cross-examination of one witness and the giving of unsworn evidence. Their case was not as central to the hearing as it would have been had they been represented.

43. It was common ground before us that, although the decision whether or not to adjourn proceedings is a case management one, in which the first instance judge enjoys a wide discretion, and that an appellate court will be reluctant to interfere with that decision, the question for the appellate court is whether the refusal to adjourn was unfair: see *Solanki v Intercity Technology Ltd* [2018] EWCA Civ 101, at paragraphs 32-34 (Gloster LJ).

44. In the circumstances, we conclude that the judge's decision to refuse the adjournment was unfair and must be set aside. We reach that conclusion by applying common law principles of fairness. In the circumstances, it is unnecessary to rely separately on Article 6, and consequently we do not address the detailed submissions made to us on the application of the article to the circumstances of this case, nor the extensive range of legal cases cited. The key proposition is that expressed by McFarlane LJ (as he then was) in *Re G-B (Children)* [2013] EWCA Civ 164 at paragraph 49:

> "It therefore seems to me that issues such as the one raised in the present case will of necessity be fact specific; it will be necessary to look at all of the elements that were in play before the judge who decided to adjourn or not adjourn a set of proceedings."

That is how we have approached this appeal. Looking at the specific facts of this case, the judge seemingly did not have regard to a number of the elements relevant to the decision to adjourn.

45. The Trust's application must be relisted before another judge at the earliest opportunity. In the first instance, we would direct that it be listed for a case management hearing next week, and we have established that Poole J will be able to conduct that hearing on the afternoon of Tuesday, 13 September. Although it will be a matter for him to

determine the directions, the substantive application must plainly be heard as soon as possible in view of the child's serious condition. Although the parents' application dated 24 August referred to seeking further expert evidence, it may be that Poole J will consider this unnecessary and disproportionate, given that Dr B has already been instructed jointly by the parents and guardian to provide just such an opinion. In all the circumstances, we would hope that legal representation can be obtained, if necessary on a pro bono basis, to enable the substantive hearing to take place in the next two weeks.

Reporting restrictions

46. In the High Court proceedings a reporting restriction order ("RRO") was made by Peel J on 28 June 2022. That order named the Trust as being a party but otherwise anonymised the parties, including the local authority intervener. As a precautionary measure, the RRO was extended by this Court on 6 September 2022 to cover the hearing that was to take place before us on the following day. At that stage we had not had submissions and so we considered whether the order should be modified before the start of the substantive hearing before us on 7 September. We heard submissions, including from a representative of the Press Association and on behalf of the local authority.

47. The substance of the RRO was set out in paras. 4-6 as follows:

> "4. ***Publishing Restrictions***
>
> This Order prohibits the publishing or broadcasting, in any newspaper, magazine, public computer network, internet site, social network or media including Twitter, Facebook, WhatsApp, SnapChat, You Tube and any other sound or television broadcast or cable or satellite programme service of:
>
> a. any information (including any photograph, name and/or address) that is likely to lead to the identification of any of the following
>
> i. Any of the Respondents or any member of their family including other children of the family.
>
> ii. Any individual having day-to-day care of or medical responsibility for the First Respondent and/or in the withdrawal of treatment from the First Respondent.
>
> iii. Any clinician who has provided second opinions or advice to the Applicant in the management of the First Respondent's care, treatment and/or diagnoses.
>
> iv. Any witness (other than any expert witness) who gives evidence in these proceedings whether by statement or otherwise in writing or orally

b. Any picture including any picture of any of the Applicant's witnesses and/or of the individuals identified in paragraphs 4(a)(i)-(iv) above.

c. Any other particulars or information relating to the Applicant's witnesses and/or of any individuals identified in paragraphs 4(a)(i)-(iv) above.

d. Any reference to the following matters:

i. the question of non-accidental injury;

ii. the involvement of the police in investigations of the First Respondent's injuries;

iii. potential criminal proceedings, including charges (if any) which might come to be made;

iv. the existence, resolution or termination of any care proceedings.

IF, BUT ONLY IF, such publication is likely to lead to the identification of those listed at paragraphs 4(a)(i)-(iv) above as being a party to these proceedings, whether such identification be to the public at large or to those who know them or as being a party to these proceedings.

5. ***Other restrictions***

No publication of the text or a summary of this Order (except for service of the Order under paragraph 7 below) shall include any of the matters restricted by paragraph 4 above or any of the information in Schedule 1.

6. ***What is not restricted by this Order***

Nothing in this Order shall prevent any person from:

a. Publishing the identity of the Applicant.

b. Publishing information relating to any part of a hearing in a court in England and Wales (including a coroner's court) in which the court was sitting in public and did not itself make any order restricting publication.

c. Seeking or publishing information which is not restricted by Paragraph 4 above.

d. Inquiring whether a person or place or other matter falls within paragraph 4 above

e. Seeking information relating to those that fall within paragraph 4 above while acting in a manner authorised by statute or by any court in England and Wales.

f. Seeking information for the responsible solicitor acting for any of the parties or any appointed press officer, whose details are set out in Schedule 2 to this Order.

g. Seeking or receiving information from anyone who before the making of this Order had previously approached that person with the purpose of volunteering information (but this paragraph will not make lawful the provision or receipt of private information which would otherwise be lawful).

h. Publishing information which before the service on that person of this Order was already in the public domain in England and Wales as a result of publication by any person in any newspaper, magazine, sound or television broadcast or cable or satellite programme service, or on the internet website of a media organisation operating within England and Wales."

48. At the hearing before us it was submitted on behalf of the Press Association that paragraph 4(d)(i)-(iii) should be deleted from the Order. It was submitted that the other terms of the Order, in particular the anonymity granted to the relevant parties other than the Trust, should suffice to protect the legitimate interests of those concerned and prevent identification of them by the public generally. On behalf of the parents Mr Quintavalle did not object to that course being taken. Counsel for the guardian had no objection to that course being taken either. Counsel for the Trust had no substantial objections to it. Counsel for the local authority did, however, object to that course being taken. It was submitted that there would be a real risk of people in the relevant community being able to identify the persons concerned, through a process of adding pieces of the "jigsaw" together. It was also submitted that this could have a detrimental impact on the welfare of another child.

49. We remind ourselves of the importance in a democratic society of the freedom of the media to report on matters of public interest. The right to freedom of expression is a fundamental right in the common law and is also guaranteed by Article 10 of the ECHR, as set out in Sch. 1 to the HRA. We also remind ourselves of the importance of the principle of open justice, both in our domestic law and under the HRA. We recognise that there are other important interests to be protected on the other side of the balance,

in particular the privacy of the children and parents involved, and the need to avoid the risk of prejudicing any future criminal proceedings.

50. We consider that the matters which are referred to at para. 4(d)(i)-(iii) are of sufficient public interest that the RRO should not restrict reporting of those matters. We have come to the conclusion that the reporting restrictions otherwise imposed by para. 4, together with the anonymity granted by the RRO to all the parties save for the Trust, suffice to maintain a fair balance between the respective rights and interests concerned.

51. The RRO, as modified, in our view, is one that is required so as to be necessary and proportionate in this case. It is regrettable if this does not secure absolute protection for the individuals concerned, including any other children, but this is often the case where family proceedings are taking place. In particular in cases where there is a suggestion of non-accidental injury in family proceedings, there will usually be the possibility of criminal proceedings in the future. However, members of the public generally will not be able to identify the individuals concerned and, in particular, the risk of prejudice to future criminal proceedings is avoided by the anonymity granted and the other terms of the RRO.

52. At the hearing we asked counsel to agree a draft of the RRO as modified and to submit it for our approval. We make the RRO as modified.