Neutral Citation Number: [2022] EWCA Civ 1106

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

1 August 2022

Before :

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

- -

Between :

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

- -
- -

Edward Devereux QC and Bruno Quintavalle (instructed by Andrew Storch Solicitors) for the Appellant Parents
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 date : 1 August 2022

- -

Approved Judgment

President of the Family Division:
This is an extempore judgment, we will do our best to see if a note can be prepared after the hearing as swiftly as possible.

PROCEDURAL BACKGROUND

1. These proceedings relate to Archie Battersbee, who is a 12 year old boy who has been in a deep coma since 7 April 2022. The proceedings before the court in England and Wales have been driven by a requirement under the Children Act 1989, s 1 to make decisions at all stages by affording paramount consideration to Archie's welfare. Put in another context, and in a way that is normally used in these cases, the question for the Court to determine at the substantive hearing is: what is in the best interest of Archie.

2. Archie's welfare has been before the High Court and Court of Appeal in that context since 13 May, that is some 2 ½ months. The best interest decision finally came for determination before Mr Justice Hayden, who handed down his judgment on 15 July. An application was immediately made on behalf of the parents for permission to appeal against Mr Justice Hayden's determination which was that it was not in Archie's best interest to continue with life sustaining treatment and that it would be lawful for the Hospital Trust to withdraw life sustaining treatment.

3. Following a hearing before the Court of Appeal [President FD, Lady Justice King and Lord Justice Peter Jackson] judgment was given last Monday, 25 July. The parents' application for permission to appeal, which was based on a number of grounds, was refused, on all grounds and that represented the conclusion of the parents' attempt to appeal against the substantive decision within the jurisdiction of England and Wales.

4. In order to allow initially for the parents to consult with lawyers and specifically to allow an application, should they wish to do so, to the European Court of Human Rights, a stay was put upon the operation of the order of the court for 48 hours, following the decision on 25 July.

5. As is well known, most unfortunately, Mr Battersbee had been taken ill at Court and taking instructions from him proved therefore to involve a delay and a further extension of 24 hours was added to the stay.

6. The Court of Appeal had been specifically asked to allow for the stay to include a facility for the parents to approach the United Nations Commission for The Rights of People of Disability, it being the parents' case that the operation of the proceedings in England and the decisions that had been made had failed to afford due respect to the rights of Archie under that Convention. The Court of Appeal expressly did not afford an additional period of stay to allow for that, but that decision, of course, did not prevent the parents approaching UNCRPD, as I will call it now in this judgment. In order to allow them to do so in a longer time period, an application was made to Supreme Court of the United Kingdom for permission to appeal against the Court of Appeal's refusal of the stay. That application was made on 28 July, as I understand it, and was determined on the same day. The note of the determination indicates that it was considered by three justices of the Supreme Court and the order included the following statement:

> 'The panel has great sympathy with the plight of Archie's devoted parents and recognises the emotional pain which they are suffering. But, having considered the careful judgment of the Court of Appeal delivered by Sir Andrew McFarlane, President of the Family Division and the application for permission

to appeal the Court of Appeal's decision in relation to the stay, the panel refuses permission to appeal.

The panel is satisfied that (if the Supreme Court has jurisdiction to hear this application – a matter on which the panel has not been addressed) the application does not raise an arguable point of law that the Court of Appeal has fallen into error in exercising its discretion in the way in which it did.'

7. As a result therefore of refusal of permission to appeal, the stay that this court had imposed for 72 hours, expired at 2:00pm on 28 July. It was on 28 July that the parents issued their application to UNCRPD, relying upon Articles 10 and 12 of that Convention. Article 10 relates to right to life and is in very similar terms to Article 2 of the European Convention on Human Rights and Article 12 requires contracting States to afford persons with disabilities equality under the law and in various specific circumstances.

8. The UNCRDP secretariat were commendably swift in engaging with the application and responding. They issued letters to the parties the following day, on 29 July, and in terms stated this: "*Under art 4 of the optional protocol to the Convention of Rights of People with disabilities"* pausing there, that is a protocol that the UK government has signed up, Committee's rules and procedure, *"the Committee, acting through its Special Rapporteur on Communications, requests the State party to refrain from withdrawing life-preserving medical treatment, including mechanical ventilation and artificial nutrition and hydration, from the alleged victim whilst the case is under consideration by the Committee. This request does not imply that any decision has been reached on the substance of the matter under consideration. The Committee may review the necessity of maintaining the request for interim measures once the State's observations have been received*." Then the communication makes provision for the State – that is the UK – to respond, in particular to respond on admissibility by 29 September, some two months from the date of the letter.

9. On the following day, Saturday 30 April, the NHS Hospital Trust, who have charge of Archie's medical care, made it plain to the parties that they regarded the absence of any further stay as meaning that they were in a position to implement the plan to withdraw life sustaining treatment from him and that they would do so on or after 2:00pm on Monday 1 August, today.

10. Yesterday, on Sunday 31 July, the solicitors acting for parents wrote a letter to me as President of the Family Division, indicating the developments that I have summarised. Also on the same day, the Government Legal Department – who had been required to consider the situation as it developed in particular following communication from UNCRPD – wrote to the urgent out of hours judge of the Family Division, indicating that the Government regarded any question of any further stay as being a matter for the court.

11. Having had sight of those communications yesterday evening and having discussed the matter with Lady Justice King, we decided to list the question of any further stay for an oral virtual hearing this morning. And we are grateful to all parties and to the court staff and to all those who have assisted the lawyers in enabling this hearing to go ahead.

12. Last night we made an order that provided a stay to 1:00pm today, Monday 1 August. It was accepted at the beginning of the hearing by Miss Fiona Paterson, counsel for the NHS Trust, that the hospital would regard the stay as continuing until judgment has been given this afternoon.

THE APPLICATION

13. The application is, in short terms, for a stay to be granted pending the determination by the UNCRPD of the parents' complaint to the CRPD alleging breach of the convention's terms. In the alternative, Mr Devereux QC, for the parents, says at the very least, a stay should be granted to allow the court to obtain further information from Geneva, which is where the office of the UNCRPD is situated, as to how long they would need in circumstances where a decision is regarded by this court as being urgent. And secondly to direct that the Sectary of State should be joined as a party to proceedings. The application for any further stay is opposed not only by the Hospital Trust, but also by the Children's Guardian who acts for Archie in these proceedings.

RELEVANT SUBSTANTIVE BACKGROUND

14. Having summarised the procedure, it is now necessary to focus on Archie and his circumstances. In the course of submissions, Mr Devereux asserted that Archie was in a 'stable' condition and that therefore any further stay might be tolerated. With respect to Mr Devereux, that is not in accordance with the findings of the court. I do not propose to read substantial parts of it, but the background is summarised in detail of the judgment of Mr Justice Hayden, which has been published and also in the judgment of the Court of Appeal that was delivered last Monday. In [8] of that judgment, I said this:

> "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."

15. And then I went on to quote Mr Justice Hayden's judgment, he said this about Dr F's evidence:

> "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."

16. It is plain from that evidence, which was accepted by the judge, that Archie's condition is unstable rather than stable. It is also plain, as Mr Justice Hayden, found that Archie has experienced "very significant weight loss". In short, his system, his organs and ultimately his heart are in the process of closing down. The options before the court have always been stark. They are – and we characterised them in the Court of Appeal's previous judgment as Option 1 or Option 2 – either Option 1: the immediate removal of life sustaining treatment with the inevitable consequence that Archie would die almost immediately thereafter; or Option 2, which is favoured by the parents, and which is to maintain the life supporting treatment but in the knowledge that his body will indeed fail and that he will die at some unpredictable time, in their words "chosen by God", in the course of the coming weeks.

17. At [12] – [16] of my judgment in the Court of Appeal, I summarised the choice to be made. So the choice, awfully, is about how he dies. There is no other option, and it is how he dies in the coming weeks. Against that bleak background, Mr Justice Hayden concluded, after attributing paramount consideration to Archie's welfare, that it was not in Archie's best interests for life supporting treatment to continue that it was lawful for it to be withdrawn.

18. Insofar as disability rights are concerned and the UNCRPD, this was raised before Mr Justice Hayden, but not expressly dealt with in his judgment. It was raised again before the Court of Appeal. The wording of Article 10 which is relied upon is in these terms:

> 'States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.'

19. Article 12 deals with "equal recognition before the law" and for example, at paragraph 1 of Article 12 reaffirms that:

> 'States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.'

And so it continues over the course of five further paragraphs in total.

20. As I have indicated, permission to appeal in relation to the arguments the parents have under the UN Convention was refused. At [26 (iv)] I said this:

> "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*, to which I have already made reference, 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."

21. Put another way, or in shorter terms, it is not apparent that there is any gap between the provision in the European Convention on Human Rights and the UNCRPD in these two respects. If anything, and this is an observation rather than stating any principle of law, the statement of right to life in the ECHR would seem to be in clearer and stronger terms even than that in the UNCRPD.

The parties' submissions

22. Having described the relevant parts of the substantive background, I turn now to submissions made by Mr Edward Devereux QC and Mr Quintavalle on behalf of the parents with respect to the application for a stay.

23. Firstly, Mr Devereux submitted that the request made by the UN Commission in Geneva is in mandatory terms and if this court were to ignore them, the court would be acting in 'flagrant' breach of international law. It is submitted by Mr Devereux that it is irrelevant that this Court has considered arguments under the UNCRPD, as now the Court is dealing with a request from the Commission and it is that request which has to be respected and acted upon. Mr Devereux went so far as to submit that the court has no discretion in the matter and must grant a stay until UNCRPD process has run its course. Not to do so would be to fail to comply with this court's obligations under the European Convention of Human Rights, because under that Convention, the court must consider the UNCRPD.

24. Mr Devereux went on to submit, separately, that the Equality Act 2010 within our domestic jurisdiction also required the court to grant a stay and afford full respect to the obligations under the UNCRPD. When asked which provisions of the Equality Act 2010 he was relying upon, Mr Devereux was not able to point to any provision which made reference expressly to the Convention. The high point of his submission was to refer to a reply of a Minister in Parliament to the effect that the Government had intended that the 2010 Act would comply with the obligations under the UNCRPD and that its obligations under that Convention were met through the Act.

25. Secondly, in terms of the central themes of the submissions that he made, Mr Devereux relied upon the terms of the Protocol to the UNCRPD, Article 4 which makes provision for an interim request to be made. Article 4 deals with it in these terms:

> '1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.
>
> 2. Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.'

26. In terms of the language, plainly Article 4 envisages "a request" and that is what expressly the communication received last week from the Commission is said to be. Also what Article 4 requires is "urgent consideration" of that request and "such measures as may be necessary".

27. Mr Devereux seeks to make good his submission that Article 4 requires the State to act in response to the request by reference to similar provisions within the ECHR, in particular Article 34, which requires State parties to take no action which might "hinder" the process of the court in Strasbourg when considering an application or complaint that has been made to it, and Rule 39 of the Rules of the ECHR which support that provision. Reference is made to the decision of the Court in *Mamatkulov v Turkey* [2005] 41 EHRR 25, where all of the substantive complaints made by the applicant were dismissed by court in Strasbourg, but a complaint that the State of Turkey had effectively compromised the party's claim by action taken prior to the decision of the Court in Strasbourg was upheld on the basis of a breach of Article 34 read with Rule 39 and Mr Devereux submits that same approach applies.

28. Thirdly, Mr Devereux took the court to the Supreme Court decision in the case of *Charlie Gard* where the panel dealing with the application for permission to appeal in the Supreme Court were faced with a similar application for a stay to permit – on that case – an application to the Court in Strasbourg. And in the judgment of UKSC the following was said:

> "17. We three members of this court find ourselves in a situation which, so far as we can recall, we have never previously experienced. By granting a stay, even of short duration, we would in some sense be complicit in directing a course of action which is contrary to Charlie's best interests.
>
> 18. But, from a legal point of view and in this very limited procedural context, are the best interests of Charlie necessarily always paramount? There is, says Mr. Gordon QC on behalf of the parents, another requirement in play, namely that such rights as they have under Articles 2 and 8 (and, added Mr. Gordon, possibly also under 5) should be effective. Until the ECtHR has had at any rate some opportunity to consider the application to be filed today, would not the court be violating their right to an effective remedy by taking the course suggested by Charlie's guardian?"

29. The outcome in *Gard* was that a short stay was granted by the Supreme Court to allow an application to be made. Mr Devereux says that that decision by the Supreme Court is precedent that this Court should follow and that a similar stay should be granted albeit that an application has been made to a different body, namely the UNCRPD.

30. For the Hospital Trust, Ms Fiona Paterson roundly submits that the submissions of Mr Devereux have no foundation in law. She took the Court to the decision of Supreme Court *in R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 615, in particular, she referred to judgment of Lord Reed at [74] – [79] but continuing from there. Ms Paterson submitted that Lord Reed puts the issue beyond doubt. I do not intend to insert those lengthy extracts from Lord Reed's judgment, I mean no disrespect in describing them in that way, into this judgment, but the matter is summarised, in my view neatly, at [84]:

> "There is, accordingly, no basis in the case law of the European court, as taken into account under the Human Rights Act, for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties."

31. The reference to unincorporated international treaties is apposite in the present case because the UNCRPD is an unincorporated international treaty. It has been signed by the UK but it has not been directly incorporated into law by Parliament. In that respect, it is different from the ECHR which has, via the Human Rights Act, been partly incorporated.

32. Ms Paterson submits that there is no distinction between matters of substance and procedure, the UN Convention simply has no force in law within the UK. And she observes that Mr Devereux simply does not engage with the central point that is made based on *R(SC).*

33. Ms Paterson submitted that there was no call for there to be an adjournment for the Government to be joined as a party to these proceedings, they have had notice of them and have chosen not to take part but has passed the matter on to Court for determination.

34. On behalf of the children's Guardian, Ms Claire Watson QC effectively aligned her submissions with those of Ms Paterson. She too submitted that this court is not bound by an unincorporated international treaty and in so far as the parents' skeleton argument a paragraph 2 asserts that "interim measures made under the human rights treaties are binding under international law", she argued that that submission is plainly wrong.

DECISION AND REASONS

35. The decision, if my Lady and Lord agree, is that, save for granting a short stay until noon tomorrow, Tuesday 2 August, the parents' application for any further stay is dismissed. The reasons are as follows:

36. Despite the firm and clear submissions in which Mr Devereux put the parents' case in the highest possible terms using phrases such as "mandatory requirement" or "the court has no discretion" or "there would be a flagrant breach of international law" by the Court were his application to be refused, I am satisfied that those submissions are, with respect to him, of no foundation whatsoever. This is an unincorporated international treaty and it is not part of the law of the United Kingdom and, for the reasons set out of Lord Reed in the case of *SC,* it is not appropriate for this Court to apply an unincorporated international treaty into its decision making process, or to investigate whether the UK is in some way in breach of any duty, in particular under UNCRPD.

37. The court in this jurisdiction must decide issues with respect to Archie under domestic law. The proceedings to date *have* considered matters in the context principally of the European Convention of the Human Rights, but as this court held in its decision at [26 (iv)], in a way which is compatible with UNCRPD. If this court were to accede to the parents' application, the court would be acting contrary to what it has determined to be in Archie's best interests, it would be sanctioning a step, namely postponing the implementation of the order, which would be contrary to his best interests, and would be doing so by reference to an unincorporated treaty that is not part of domestic law. That seems to me to be plainly wrong.

38. At all times, as I have indicated the procedures of this court have been compliant with the ECHR. The parents have not made an application to the Court in Strasbourg following the Court of Appeal hearing and have not used the time given to them by the short stay afforded to them to do so. Mr Devereux referred to the case of *Mamatkulov v Turkey,* but the distinction to be drawn in that decision, and the procedure in Strasbourg, and the present case is that there is no equivalent under the UNCRPD for the enforcement of adherence to a request in this jurisdiction.

39. The distinction is that the ECHR is incorporated in domestic law, whereas UN Convention is not.

40. Separately, and with respect to him, the submission that the Equality Act 2010 mandates this Court to grant a stay because it incorporates the UNCRPD in some manner, simply does not get off the ground. As I have already observed, the 2010 Act does not refer to UN Convention at all. One anticipates that many of its terms are compatible with that Convention, but these are procedural matters which Mr Devereux relies upon and for him to mount a case which is that this court has no discretion procedurally to do anything but grant a stay requires explicit provision within the Equality Act, yet that the Act does not refer to Convention at all.

41. So, the question of a stay is not one that is to be dictated by the fact that the request itself has been made. This court must consider the request that the Geneva authorities have made and afford it respect, which I readily do; appreciative of the speed in which they have acted and

understanding the process they would wish to adopt. The approach that this court should adopt in determining whether a stay should be granted is one that is not entirely clear. As the three Supreme Court Justices in the *Charlie Gard* case indicated, this is to a degree untrodden ground and for my part, I do not think it is right to say that the outcome should be dictated entirely on the basis of best interests, ignoring all other factors. Certainly, the decision on whether a stay should be given in the *Gard* case is not a precedent, we are not bound always to grant a stay because that was the outcome in *Charlie Gard's* case. Each case must be determined on its own merits and facts in that sense.

42. Looking therefore at Archie's best interests, but having regard to the fact that the parents have applied to the Geneva authorities and that their application is outstanding and, in the parents' favour, affording that factor a place in the balance on whether a stay should be granted, I am struck that on the side of the balance in favour of a stay there is, for the reasons I have given, really nothing of substance or merit. In terms of best interests however, the case is very strongly in favour of refusing a stay. I have summarised Archie's condition and the narrow choice that was facing the court in terms of choosing how this young man should die, rather than any other more positive outcome. In terms of Archie's best interests, every day that he continues to be given life sustaining treatment is contrary to his best interests. A stay, even for a short time, is against his best interests and not in accordance with his welfare, and that is the decision that has been taken by court in England and Wales. I therefore conclude that there should be no stay granted other than a short stay now for the parents to take stock and consider whether they wish to make any further application to the Supreme Court.

43. That is my judgment.

Lady Justice King: I agree

Lord Justice Moylan: I also agree.