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Dance & Battersbee v Barts Health NHS Trust – Permission to Appeal decision

2 August 2022

Lord Hodge, the Deputy President of the Court, Lord Kitchin and Lord Stephens (“the panel”) have considered the application for permission to appeal by the parents of Archie Battersbee, who has been in a deep coma since 7 April 2022. The panel has also considered the position statements of the NHS Trust and Archie’s Guardian in response to that application. The panel has also received an application to intervene by the Secretary of State for Health and Social Care, which it grants. It has considered the Secretary of State’s submissions in reaching its decision.

This second application to the Supreme Court concerns an application made to the Court of Appeal for a stay of the order authorising the withdrawal of life–sustaining treatment. The stay is sought to enable the parents to pursue an approach which they have made to the United Nations Committee for the Rights of Persons with Disabilities (“the Committee”), and to allow the Committee to consider the circumstances of his case. The Committee has sent a Note Verbale to the UK Government requesting that life–preserving treatment be maintained while it considers the parent’s application.

As this panel stated in its [note of determination last week](#), the Justices have great sympathy with the plight of Archie’s devoted parents who face a circumstance that is every parent’s nightmare – the loss of a much–loved child.

It is nonetheless the task of the Court to apply the law which requires judges to give paramount consideration to Archie’s welfare. The Court of Appeal in its careful judgment delivered by its President, Sir Andrew MacFarlane yesterday, has exercised its discretion in refusing a stay. This Court can overrule that exercise of discretion only if it is satisfied that the Court of Appeal has made an error of law or principle or has otherwise fallen into error in that exercise.

If this Court has jurisdiction against the refusal of a stay where the Court of Appeal has refused permission to appeal to itself (a matter on which no submissions have been made), the panel is not

persuaded that there is an arguable case that the Court of Appeal has so erred and accordingly refuses permission to appeal to this Court.

It has to be borne in mind that, sadly, the central issue between Archie's parents on the one hand and the NHS Trust, which is supported by Archie's very experienced Guardian, has not been about Archie's recovery but about the timing and manner of his death. As Sir Andrew MacFarlane recorded in his earlier judgment of 25 July, there is no prospect of any meaningful recovery. Even if life-sustaining treatment were to be maintained, Archie would die in the course of the next few weeks through organ failure and then heart failure. The maintenance of the medical regime, as Hayden J held in his very sympathetic judgment, "serves only to protract his death". That conclusion was one which the judge reached only "with the most profound regret".

While there was evidence that Archie was a child with religious beliefs, was very close to his mother and would not have wished to leave her alone, those are only some of the factors which the courts have to consider in their evaluation of where Archie's best interests lie.

It was against that background that Hayden J held that it would not be lawful to continue life-sustaining treatment. The Court of Appeal upheld that judgment and this Court refused permission further to appeal.

Now the application is for a stay of the order authorising the withdrawal of life-sustaining treatment to give time for the Committee to consider Archie's case as the Committee has requested.

The panel is satisfied not only that the Court of Appeal has not erred in the sense mentioned above but that it made the correct decision. It reaches this view for the following reasons:

First, as Sir Andrew MacFarlane has stated in his careful judgment, the courts have reached a decision which is compatible with Archie's rights under the European Convention on Human rights, which has been incorporated in part into domestic law by the Human Rights Act 1998. It is not clear that Archie has any more extensive rights in international law under article 10 and 12 of the UN Convention under which the Committee operates.

Secondly, contrary to Mr Devereux's submission, a decision by the courts in Archie's best interests not to give effect to a request by the Committee to the UK Government for a stay does not involve what he called "a flagrant breach of international law". It is not clear that such a decision involves any breach of international law, and it is not for this court to rule on such an issue. The Court of Appeal treated the Committee's request with great respect. But to give effect to the application for a stay in the circumstances of this case would be to act unlawfully in conflict with the court's duty under domestic law to treat Archie's best interests as paramount as the Committee envisages a procedure for its consideration of the application which will extend into 2023.

Thirdly, and in any event, the Convention under which the Committee operates is an unincorporated international treaty which binds the UK Government on the international plane and is not part of our domestic law. That is the result of our dualist system by which international treaties become part of our domestic law only if legislation is passed to that effect. The courts do not apply an unincorporated international treaty because it is not part of our domestic law.

Fourthly, the Court of Appeal, in exercising its discretion on this latest application, included in its balancing exercise the fact that Archie's parents had made the application to the Committee and the Committee's request. Nonetheless, it concluded for reasons that are sadly all too clear, that it was not in Archie's best interests or in accordance with his welfare that he continues to receive life-sustaining treatment. According to the law of England and Wales, Archie's best interests and welfare are the paramount consideration.

The panel reaches this conclusion with a heavy heart and wishes to extend its deep sympathy to Archie's parents at this very sad time.

For media enquiries, and to subscribe to updates about this case, contact the Supreme Court press office via Sophia.LinehanBiggs@supremecourt.uk and Cloe.Ofori@supremecourt.uk.

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