Neutral Citation Number: [2018] EWHC 147 (Fam)

Case No: FD17P00299

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2018

Before:

THE HONOURABLE MR JUSTICE MACDONALD

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Between:

Kings College Hospital NHS Foundation Trust	**Applicant**
- and –	
Takesha Thomas	**First Respondent**
-and-	
Lanre Haastrup	**Second Respondent**
-and-	
Isaiah Haastrup	**Third Respondent**

(No 2)

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Ms Fiona Patterson (instructed by **the NHS Foundation Trust**) for the **Applicant**
Mr Ian Wise QC and Mr Bruno Quintavalle (instructed by **Barlow Robbins**) for the **First Respondent**
The Second Respondent appeared in Person
Ms Shabana Jaffar (of **CAFCASS Legal**) for the **Child**

Hearing dates: 31 January 2018

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Judgment Approved

THE HONOURABLE MR JUSTICE MACDONALD

The judge has given permission for this version of the judgment to be published, including the names of the parties and of the child. There is a reporting restriction order in force in respect of this case. Permission to publish this version of the judgment is given expressly subject to the terms of the reporting restriction order.

Mr Justice MacDonald:

1. On 29 January 2018 I handed down judgment in these proceedings granting the declarations sought by King's College Hospital NHS Foundation Trust in respect of Isaiah Haastrup, aged 11 months old who is currently admitted to the paediatric intensive care ward of King's College Hospital. My reasons for granting those declarations are set out in full in my judgment.

2. At the conclusion of the hearing, and with the agreement of all parties, I indicated that I would deal with any applications for permission to appeal on paper.

3. By an email dated 31 January 2018, the Second Respondent and the father of Isaiah, Mr Lanre Haastrup (hereafter 'the father'), applies for permission to appeal my decision and, absent such permission being granted, for a stay pending an application to the Court of Appeal for permission to appeal. The father relies on the following grounds of appeal:

    i) The court should have adjourned further to hear evidence from other experts.

    ii) The decision not to adjourn is a breach of Article 6 of European Convention of Human Rights.

    iii) The court did not consider treatments available in the community which could improve Isaiah's brain injury and related symptoms.

    iv) The order to allow the extubation to proceed and Isaiah to die of suffocation would amount to breach of Article 3 from the evidence that was put before the court, particularly Dr G and Dr B.

4. In the event that this court refuses the father permission to appeal, the father applies for a stay of the order pending an appeal to the Court of Appeal.

5. Having considered the grounds of appeal advanced by the father, I am satisfied that those grounds have no real prospect of success.

6. With respect to the first ground, I set out in full my reasons for refusing to further adjourn the hearing to hear evidence from other experts in Paragraphs [77] to [84] of my judgment. On the basis of the totality of the evidence before the court, and for the reasons set out in those paragraphs of the judgment, I consider that I was fully entitled to conclude that further expert was not "necessary" within the meaning of s 13 of the Children and Families Act 2014 in order to resolve the proceedings justly.

7. In the circumstances, having regard to the reasons set out at Paragraphs [77] to [84] of the judgment, I am satisfied that the father has no real prospect of establishing that I was wrong to refuse a further adjournment of the proceedings in order to hear evidence from other experts.

8. With respect to the second ground of appeal, I consider that my refusal to further adjourn the proceedings did not amount to a breach of the Second Respondent's right to a fair trial under Art 6 of the Convention.

9. The court determined the application made by the Trust at a three-day final hearing during which, having considered the documentary evidence filed in the proceedings, the court heard extensive oral evidence from the treating clinicians responsible for

Isaiah's care, the independent experts instructed on behalf of the mother, the mother herself and the Children's Guardian. The court further heard the oral submissions of the parties, which submissions included argument about whether a further adjournment of the proceedings was necessary. The father participated fully in the hearing, was given the opportunity to cross examine the witnesses called and the opportunity to make comprehensive closing submissions, all of which opportunities he utilised to the full.

10. Following the hearing, I came to a reasoned decision in a public judgment, based on the totality evidence and submissions available to me, that further expert evidence was not necessary within the meaning of s 13 of the Children and Families Act 2014 in order to resolve the proceedings justly for the reasons set out at Paragraphs [77] to [84] of my judgment.

11. In the circumstances, as to his second ground of appeal, I am satisfied that the father has no real prospects of establishing that my refusal to further adjourn the proceedings was in breach of his Art 6 right to a fair trial and therefore wrong.

12. With respect to the third ground of appeal, in paragraphs [48] to [49] and [98] the court gave full consideration to the feasibility of continuing Isaiah's treatment in the community and the evidence that the only treatment available in the community in principle would be to replicate Level 2 ICU care in the community. In addition to the evidence before the court that this was, at least in principle, the only type of treatment available to Isaiah, I also dealt extensively at Paragraphs [23], [27] to [28], [42] and [47] with the unanimous evidence before the court was that Isaiah's brain injury was irreversible and, accordingly would not improve with treatment, whether in the community or otherwise.

13. In the circumstances, I both considered the treatment available to Isaiah, in principle, in the community, and the likelihood that Isaiah would benefit from such treatment. In the circumstances, I am satisfied that the father has no real prospect of succeeding on his third ground of appeal.

14. The argument that the extubation of Isaiah would amount to torture, or to inhuman or degrading treatment or punishment in breach of Art 3 of the ECHR was not advanced by the father in terms at the hearing. In any event, having regard to the totality of the evidence before the court, and for the reasons set out in my judgment, I was satisfied that Isaiah has a profoundly depressed level of consciousness and that, if he is aware, he is more likely than not only to be minimally so. That conclusion was based on a medical consensus that, if Isaiah is aware, he has an extremely low level of conscious awareness and that, within this context, an absence of objective evidence that he feels pain or pleasure.

15. Within this context, the court also had before it the evidence of Dr R that the extubation of Isaiah would be undertaken in the context of a comprehensive plan of palliative care designed to minimise any symptoms he may display upon extubation.

16. In these circumstances, I am further satisfied that the father has no real prospects of succeeding on his fourth ground of appeal.

17. Having regard to the matters set out above, I am satisfied that the father has no real prospects of succeeding in an appeal of the court's decision. In the circumstances, I refuse the father permission to appeal to the Court of Appeal.

18. In the alternative, the father further applies for a stay of the order pending an appeal to the court of appeal. The mother does not object to a stay.

19. The Trust submits in writing that the appropriate way forward is not to grant a stay but rather, in accordance with certain obiter comments of the Supreme Court in the *Gard* case on 19 June 2017, for the Trust to submit to a recital by which the Trust agrees not to extubate Isaiah or withhold ventilation (both invasive or non- invasive) from him, pending a further order of the Court.

20. The Trust also now seeks a range of new declarations in respect of Isaiah's treatment on the basis that there is a risk (albeit, the Trust concedes, a relatively small one) that his condition will deteriorate further before the conclusion of the appeal proceedings. For this reason, that the Applicant seeks a declaration that it is in Isaiah's best interests that he does not receive certain forms of treatment if he his condition deteriorates or he suffers an infection.

21. CAFCASS has indicated that it does not oppose a stay in circumstances where appeals of this nature concerning medical treatment are ordinarily dealt with by the Court of Appeal expeditiously and having regard to the fact that were a stay of the order not granted the Trust could proceed with the palliative care plan for Isaiah which includes planned extubation.

22. The passage in judgment of the Supreme Court in the *Gard* case relied on by the Trust reads as follows:

> "By that judgment, this court explained why it had decided to refuse permission to the parents to appeal to it against the order of the Court of Appeal dated 25 May 2017. But its refusal was subject to a reservation of jurisdiction to grant a further stay of the declarations dated 11 April 2017. There is a logical problem about a stay of a declaration (as opposed to an order) but this is no time to wrestle with it. As is agreed, the practical effect of any stay would be that, for as long as it continued, it would not be unlawful for the doctors and other staff at Great Ormond Street Hospital ("the hospital") to continue to provide artificial ventilation, nutrition an hydration ("AVNH") so as to keep Charlie Gard alive."

23. In *NB v Haringey LBC* [2011] EWHC 3544 (Fam), [2012] 2 FLR 125, Mostyn J reviewed the case law in civil proceedings and held that in determining whether to grant a stay the following factors should be considered by the court:

    i) the court must take account of all the circumstances of the case;

    ii) a stay is the exception rather than the general rule;

    iii) the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;

iv) the court must apply a balance of harm test in which the likely prejudice to the successful party must be carefully considered;

v) the court must take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.

24. Notwithstanding the submission of the Trust, I likewise take the view that now is not the time to go into the apparent logical problem about a stay of a declaration. The Supreme Court has made clear that in cases of this nature, the practical effect of any stay is that, for as long as it continued, it would not be unlawful for the doctors and other staff at King's College Hospital to continue to provide artificial ventilation to Isaiah. In the circumstances, I am satisfied that if an order is to be made then a stay is the appropriate form of order.

25. The effect of the implementation of the court's order will be the withdrawal of life sustaining treatment from Isaiah, leading to his death. In the circumstances, not to stay the order would render any appeal nugatory. However, with respect to the balance of harm, a stay would also mean that Isaiah continues to be given treatment that the court has determined is not in his best interests for the reasons set out in my substantive judgment. I must also bear in mind that a stay is the exception and not the rule and, for the reasons I have given, I am of the clear view that it cannot be said in this case that there are strong grounds of appeal or a strong likelihood of success.

26. Balancing these competing factors, and having refused the father permission to appeal, I am prepared to grant the father a short stay until 2pm on Friday 2 February 2018 to permit the father time to make an urgent application for permission to appeal to the Court of Appeal. Any application to further extend the stay granted by this court will need to be made to the Court of Appeal.

27. I am not prepared at this point to grant the range of new declarations sought by the Trust. The other parties have not had notice that such declarations are sought and the court has not heard submissions in respect of the same. In my judgment, the better way to meet these difficulties is to ensure that the stay is only made for such period as is sufficient to allow an urgent application to be made by the father to the Court of Appeal.

28. That is my judgment.