BETWEEN THOMAS EVANS AND KATE JAMES

Appellants

AND

ALDER HEY CHILDREN'S NHS FOUNDATION TRUST

First Respondent

AND

ALFIE EVANS (by his Children's Guardian)

Second Respondent

1. Mr Thomas Evans and Ms Kate James ("the parents") seek permission to appeal to the Supreme Court against the order of the Court of Appeal dated 6 March 2018.

2. Under this court's Practice Direction 3.3.3 the court will give permission for an appeal to be brought only if it would raise an arguable point of law of general public importance.

3. On 20 February 2018 Mr Justice Hayden determined Alder Hey's application by reference to his assessment of Alfie's best interests. He declared that it was no longer in his best interests for ventilation to be provided to him. It followed that it was not lawful for ventilation to continue to be provided to him, whether at Alder Hey or anywhere else. So the judge proceeded to declare that it was lawful and in his best interests that Alfie be extubated, that ventilatory support be withdrawn from him and that he receive only palliative care.

4. The Court of Appeal dismissed the appeal of the parents against the declarations made by Mr Justice Hayden and in doing so held that he had been correct to make them

by reference to his assessment, which the Court of Appeal endorsed, of where Alfie's best interests lay.

5. The parents accept that they cannot bring to this court a challenge to the conclusion that it is in Alfie's best interests for his ventilation to be withdrawn. That would not have raised any point of law. Anyway, in this profoundly tragic and painful case, there was a mass of evidence, including from experts instructed on behalf of the parents, which justified the judge's conclusion.

6. But the parents do raise a point of law which the Court of Appeal rejected and which they wish to put before this court. The question for us at this stage is whether the point is arguable.

7. The point is developed on behalf of the parents by Mr Knafler QC and his two juniors in lengthy sections of the Notice of Appeal; and we pay tribute to their industry and to the clarity of their exposition.

8. It is wrong (say the parents) for an issue such as the present to be determined by reference only to a child's best interests. The law of England and Wales is (they say) illogical and the Supreme Court must set it right. The first question should (according to them) be whether their proposals for Alfie's future care would cause him to be likely to suffer "significant harm". And they cast these arguments within a complaint that, in the enjoyment of their right to respect for their family life under article 8 of the European Convention on Human Rights, the courts have discriminated against them contrary to article 14.

9. We should add here that the parents' proposals for Alfie's future care are that, with continued ventilation, he should be transported by air ambulance to a hospital in Rome and later, perhaps, from there to a hospital in Munich, for further treatment; that in one or other of the hospitals he should undergo a tracheostomy and a gastrostomy in order perhaps to enable ventilation to be given in a home environment; that consideration should therefore be given to his living with them in one or other of those countries, close to hospital support; but that if, after about six months, there remained no prospect of improvement in his condition, they would, with whatever degree of difficulty, accept withdrawal of his life support. It follows from what we have already said that the judge found the parents' proposals not to be in Alfie's best interests. He found, with obvious sadness, that they would achieve nothing. But he was not asked to consider whether they would cause Alfie "significant harm" and so he made no finding to that effect. So the parents are entitled to say that it has never been established that their proposals would be

likely to cause significant harm to Alfie, particularly in circumstances in which, on the evidence, it is unlikely, albeit possible, that he has an awareness of pain.

10. So on what basis do the parents say that it is wrong and illogical for the present issue not to be decided by reference, in the first instance, to a concept of significant harm?

11. If a child was in the care of a local authority under a care order and in hospital with a condition such as that of Alfie and if the parents disputed the course proposed by the local authority (and presumably by the hospital), section 100 (3) and (4) of the Children Act 1989 would disable the local authority from applying to the court for a declaration unless there was reasonable cause to believe that otherwise the child would be likely to suffer significant harm. One difficulty with this scenario is that it is highly unlikely that the local authority would be the applicant. It is much more likely that the application would be made by the hospital, to which section 100 would not apply.

12. But the parents suggest a wider analogy, in particular with proceedings for a care order but also with adoption proceedings. Section 31 of the Children Act disables a court from granting a care order to a local authority unless the child has suffered or is likely to suffer significant harm, attributable to care below a level which it would be reasonable to expect a parent to give. Here, in the panel's view, one reaches the nub of the parents' argument. If significant harm (or its likelihood) has to be established before a child can be removed – perhaps only temporarily – from the home of his parents under a care order, why does it not need to be established before he can be removed, permanently, from them and from everything in this world, by death ?

13. A child, unlike most adults, lacks the capacity to make a decision in relation to future arrangements for him. Where there is an issue in relation to them, the court is there to take the decision for him as it is for an adult who lacks that capacity.

14. The gold standard, by which most of these decisions are reached, is an assessment of his best interests. The first provision in the Children Act is that the child's welfare shall be the court's paramount consideration. Parliament's provision reflects international instruments, particularly the UN Convention on the Rights of the Child. And in the Human Rights Convention, the rights of a child under article 8 will, if inconsistent with the rights of his parents, prevail over them.

15. But Parliament has provided that in care proceedings there should be an initial hurdle, namely the establishment of significant harm or its likelihood, attributable to the

parents, before an assessment of the child's best interests can be reached. For in such proceedings a powerful extra objective is in play, namely to avoid social engineering. These are proceedings by the state to remove a child from his parents. Families need protection from too ready a removal of him. It might be arguable that a child growing up in many households today would be better off elsewhere. But Parliament has provided that that should not be a strong enough reason for removing him. Significant harm must be established.

16. The present proceedings are quite different; and the gold standard needs to apply to them without qualification. Doctors need to know what the law requires of them. The founding rule is that it is not lawful for them (or any other medical team) to give treatment to Alfie which is not in his interests. A decision that, although not in his best interests, Alfie's continued ventilation can lawfully continue because (perhaps) it is not causing him significant harm would be inconsistent with the founding rule.

17. We are satisfied that the current law of England and Wales is that decisions about the medical treatment of children, like those about the medical treatment of adults, are governed by what is in their best interests. We are also satisfied that this does not discriminate against the parents of children such as Alfie in the enjoyment of their right to respect for their family life because their situation is not comparable with that of the parents of children who are taken away from them by the state to be brought up elsewhere.

18. The proposed appeal is unarguable so, notwithstanding our profound sympathy for the agonising situation in which they find themselves, we refuse permission for the parents to appeal.

_____

Lady Hale

_____

20 March 2018 Lord Kerr

_____

Lord Wilson