

Neutral Citation Number: **[2018] EWCA Civ 805**
Case No: B4/2018/0856

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr JUSTICE HAYDEN
HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2018

Before :

LORD JUSTICE DAVIS
LADY JUSTICE KING
and
LORD JUSTICE MOYLAN

Between :

(1) Mr THOMAS EVANS
(2) Ms KATE JAMES Appellants
- and -
(1) ALDER HEY CHILDREN'S NHS FOUNDATION TRUST
(2) ALFIE EVANS
(By an Officer of CAFCASS and his Children's
Guardian) Respondents

Mr Paul Diamond (instructed by **Direct Access**) for the **Appellants**
Mr Michael Mylonas QC (instructed by **Hill Dickinson**) appeared on
behalf of the **First Respondent**
Ms Sophia Roper (instructed by **CAFCASS**) appeared on behalf of
the **Second Respondent**

Hearing date : 16 April 2018

Judgment Approved

Lord Justice David, Lady Justice King and Lord Justice Moylan :

Introduction

1. This is the judgment of the court.
2. The parents of Alfie Evans, Mr Thomas Evans and Ms Kate James, appeal to the Court of Appeal from the order made by Hayden J on 11th April 2018. By that order he declared that it would be lawful for artificial ventilation, which is currently being provided to Alfie, to be withdrawn at the date and time specified in the order.
3. Hayden J made his order on the application for directions of the First Respondents to this appeal, Alder Hey Children's NHS Trust. That application was made following the dismissal by the Supreme Court of the parents' application for permission to appeal from the dismissal by the Court of Appeal on 6th March 2018 of their appeal from the order made by Hayden J on 20th February 2018. That order had declared that it was not in Alfie's best interests for ventilation to continue to be provided to him and that it would be lawful for ventilation to be withdrawn. The order specifically provided that it was lawful and in Alfie's best interests that the further treatment and palliative care "shall take place at Alder Hey Hospital".
4. In dismissing the appeal the Court of Appeal had directed that, in the absence of agreement by 23rd March 2018 as to the date and time on which ventilation should be withdrawn and as to the terms of the end of life plan, the parties should obtain Hayden J's directions. That it was occurred on 11th April.
5. In addition, the parents had made an application under Part 18 of the Family Procedure Rules 2010 for a writ of habeas corpus and an application for further medical experts to be given access to Alfie's medical records. Hayden J made no order in respect of those applications. He considered the habeas corpus application as "entirely misconceived" not least because the parents' argument as to the priority which should be accorded their rights had been "comprehensively rejected by the Supreme Court".
6. The parents' appeal is confined to the issue of habeas corpus. Mr Diamond submits that their appeal does not require permission because CPR r.52.3(1)(a)(iii) provides that permission to appeal is not required from "a refusal to grant habeas corpus". This is, he submits, the effect of Hayden J's order. In substantive terms, he submits that the judge was wrong to apply the test of Alfie's best interests to the application for a writ of habeas corpus. It should have been determined by answering only the question of whether there was any lawful basis for his alleged "detention" in hospital.
7. Mr Mylonas on behalf of the Trust did not press the point that permission to appeal is required.

8. Given the circumstances of this case we do not consider it appropriate to address this question in this judgment. We propose to assume, for the purposes of this judgment, that permission is not required.

Background

9. The background to this case is set out comprehensively in the judgments of Hayden J dated 20th February 2018 ("February judgment") and of the Court of Appeal dated 6th March 2018 ("March judgment"). As every judge who has been involved has said, the circumstances of this case are profoundly sad.

10. Although it only became apparent when Alfie was a few months old, he is terminally ill with a severe and progressive neurodegenerative condition. The stark nature of the effect of this condition is that an MRI scan undertaken at the beginning of February 2018 revealed, to quote from the Court of Appeal's previous judgment "the almost total destruction of his brain" [13]. As Hayden J said in his judgment of 11th April the "terrible reality" was that "almost the entirety of Alfie's brain (has) been eroded leaving only water and cerebral spinal fluid. By the end of February the connective pathways within the white matter of the brain which facilitate rudimentary sensation – hearing, touch, taste and sight, had been obliterated. They were no longer even identifiable on the MRI scan" [3]. The effect of what had occurred was that Alfie's brain was "entirely beyond recovery": February judgment [16]. Further treatment is futile, as all experts agree, both from the United Kingdom and abroad. Alfie's degenerative condition is remorseless and he will never make any developmental progress.

11. Alfie has been treated at Alder Hey Hospital since November 2016. As referred to in the Court of Appeal's March judgment, Alder Hey is "a tertiary referral centre and one of the country's leading centres for the assessment and treatment of children suffering from neurodegenerative disorders. The unit has a team of 12 consultant paediatric intensivists and 6 paediatric neurologists together with a complement of specialist paediatric nursing staff" [7]. In his February judgment Hayden J paid tribute to the "diligent professionalism of some truly remarkable doctors and the warmth and compassionate energy of the nurses whose concern and compassion is almost tangible" [56].

12. Hayden J paid tribute to the parents for their love, care and dedication for Alfie. He identified the father's core dilemma as being that "whilst he recognises and understands fully that the weight of the evidence spells out the futility of Alfie's situation he is, as a father, unable to relinquish hope" [37].

February 2018 Judgment

13. At a 7 day hearing in February 2018 Hayden J heard a considerable volume of evidence including from a number of independent experts some of whom had been instructed by the parents. All the experts agreed that Alfie has a neurodegenerative disorder which has caused "devastating erosion of his brain" and that "the degeneration is both catastrophic and untreatable": February judgment [19].

14. The medical evidence given during the trial in February also addressed whether Alfie experiences pain. Hayden J summarised the evidence as follows:

"All agree that it is unsafe to discount the possibility that Alfie continues to experience pain, particularly surrounding his convulsions. The evidence points to this being unlikely but .. it cannot be excluded."

15. The father's case on behalf of himself and the mother was that Alfie should be permitted to travel to a hospital in Rome – the Bambino Gesù Hospital – and provided with a tracheostomy and PEG feeding. If that "offered no solution" he proposed a further transfer to a hospital in Munich.

16. The Guardian, acting on behalf of Alfie to give him a separate, independent voice from that of both the Trust and his parents, "expressed her clear support for the Trust's application": February judgment [53].

17. Accordingly, Hayden J had to decide whether Alfie should be transferred to another hospital as sought by the parents or whether he should continue to be cared for at Alder Hey and cared for as the hospital proposed. The test for determining which should happen was what was in Alfie's best interests. Hayden J referred to a number of authorities including *Yates and Gard v Great Ormond Street Hospital for Children NHS Foundation Trust* [2018] 4 WLR 5

18. Hayden J determined that transferring Alfie to another hospital, as proposed by the parents, was "irreconcilable with Alfie's best interests". He was driven "reluctantly and sadly to one clear conclusion. Properly analysed, Alfie's need now is for good quality palliative care. By this I mean care which will keep him as comfortable as possible at the last stage of his life. He requires peace, quiet and privacy in order that he may conclude his life, as he has lived it, with dignity." [62]

19. Hayden J explained his decision in respect of the parents' proposals as follows:

"63. The plans to take him to Italy have to be evaluated against this analysis of his needs. There are obvious challenges. Away from the

intensive care provided by Alder Hey PICU, Alfie is inevitably more vulnerable, not least to infection. The maintenance of his anticonvulsant regime, which is, in itself, of limited effect, risks being compromised in travel. The journey, self-evidently will be burdensome. Nobody would wish Alfie to die in transit.

64. All of this might be worth risking if there were any prospect of treatment, there is none. For this reason the alternative advanced by the father is irreconcilable with Alfie's best interests. F continues to struggle to accept that it is palliation not treatment that is all that can now be offered to his son."

20. Hayden J concluded by saying:

"66. It was entirely right that every reasonable option should be explored for Alfie. I am now confident that this has occurred. The continued provision of ventilation, in circumstances which I am persuaded is futile, now compromises Alfie's future dignity and fails to respect his autonomy. I am satisfied that continued ventilatory support is no longer in Alfie's best interest. This decision I appreciate will be devastating news to Alfie's parents and family. I hope they will take the time to read this judgment and to reflect upon my analysis."

21. Hayden J made an order giving effect to his decision, as referred to above. He declared that it was not in Alfie's best interests for ventilation to continue to be provided to him. He also declared that it was lawful and in his best interests that ventilation be withdrawn; that he should receive only palliative care; and that "the extubation and palliative care shall take place at Alder Hey Hospital".

Court of Appeal March Judgment

22. The Court of Appeal gave the parents permission to appeal in respect of one ground only, namely that "the readiness of the court to override parental choice under its inherent jurisdiction in the absence of proof of significant harm is incompatible with Article 14 ECHR (read with Article 8)". The court rejected this argument. The best interests of the child were the "determining factor" and those interests could not be overridden by the views of the parents. The Court of Appeal therefore dismissed the parents' appeal, agreeing with the judge's conclusion as to what was in Alfie's best interests.

23. The Court of Appeal specifically refused the parents' application for permission to appeal under Ground 3 which argued that the judge had failed properly to weigh the alternative care plans including the proposed transfer to another hospital in Italy. In dealing with this Ground and the proposal that Alfie should be transferred to a hospital in Italy, the Court of Appeal agreed with the judge's conclusions:

"55(ii). In relation to the proposed air transport of Alfie to Italy, this was dealt with in written and oral evidence and in the judgment. The judge concluded [45] that the evidence of Dr Hubner could not safely be relied upon. The judge was entitled to take into account the views of Dr Samuels, Dr S and the Bambino Gesù experts all of whom shared the view that Alfie could suffer increased seizures in transit which have the potential to cause further brain damage, together with the evidence as to the possibility of Alfie experiencing pain and discomfort. The judge additionally set out the inherent risks to Alfie of travel outside the hospital.

iii) In relation to the tracheostomy and gastrostomy which the parents sought, it was common ground that the provision of either or both could not in any way impact upon the fundamental fact that Alfie's condition is "catastrophic and untreatable" [19]. Dr S's evidence was that, if Alfie was able to feel pain, provision of either surgical procedure would cause further discomfort. The judge did not however close his mind to the parents' proposals taking the view that notwithstanding the risks had there been any prospect of treatment it may yet have been worth subjecting Alfie to the journey [64]."

24. Earlier in its judgment, the Court of Appeal had referred to the strength of the father's "wish that Alfie should be permitted to travel to the ... hospital in Rome and, if necessary, (that) he thereafter be transferred to ... the Munich hospital". So strong was his wish that, through counsel, he had told the court "that although he did not wish Alfie to die being transported to Italy, he would rather that happened than ventilation being withdrawn". In considering the father's position the Court of Appeal noted that: "The father understandably, and as was conceded by (his then counsel), really has no clear plan. Neither of the hospitals were "offering Alfie any hope for the future".

25. The Court of Appeal was clear that the transfer of Alfie to another country "could not possibly be in (his) best interests" [56].

26. The Court of Appeal dealt substantively with the submission made on behalf of the parents that Hayden J's decision had breached *their* rights. Articles 8 and 14 of the ECHR were relied on in support of this submission. Reference was made to a number of cases including the Court of Appeal's decision in *Yates and Gard*, the Supreme Court's decision in the same case, *In the matter of Charlie Gard* 8th June 2017, and the ECtHR's admissibility decision in the same case reported as *Gard v United Kingdom* (2017) 65 EHRR SE9 81.

27. In the Court of Appeal decision in *Gard* McFarlane LJ dealt with the importance of parental views and the legal position if those views conflict with the child's best interests:

"112 It goes without saying that in many cases, all other things being equal, the views of the parents will be respected and are likely to be determinative. Very many cases involving children with these tragic conditions never come to court because a way forward is agreed as a result of mutual respect between the family members and the hospital, but it is well recognised that parents in the appalling position that these and other parents can find themselves may lose their objectivity and be willing to "try anything", even if, when viewed objectively, their preferred option is not in a child's best interests. As the authorities to which I have already made reference underline again and again, the sole principle is that the best interests of the child must prevail and that must apply even to cases where parents, for the best of motives, hold on to some alternative view."

We stress this last sentence.

28. In the Supreme Court in *Gard*, Lady Hale addressed the issue of the legal test which must be applied to the provision of medical treatment to or the withdrawal of medical treatment from children and, in particular, the rights of the parents. She said:

"4. The legal test which he applied was whether further treatment would be in Charlie's best interests and in his order he expressly found that it would not be.

5. The parents argue that this is not the right legal test. In this sort of case the hospital can only interfere in the decision taken by the parents if the child is otherwise likely to suffer significant harm. But that apart, it is argued, decisions taken by parents who agree with one another are non-justiciable. Parents and parents alone are the judges of their child's best interests. Any other approach would be an unjustifiable interference with their status as parents and their rights under Article 8 of the European Convention on Human Rights. But there are several answers to this argument.

6. Firstly, applications such as this are provided for by statute: the Children Act of 1989. There was an application for a specific issue order in this case, as well as under the inherent jurisdiction of the High Court. Both are governed by the same principles. Section 1, subsection 1 of the Children Act 1989 provides that the welfare of the child shall be the paramount consideration in any question concerning the upbringing of the child in any proceedings. This provision reflects but is stronger than Article 3.1 of the United Nations Convention on the Rights of the Child, which says that in any official action concerning the child, the child's best interests shall be a primary consideration.

7. Furthermore, where there is a significant dispute about a child's best interests the child himself must have an independent voice in that dispute. It cannot be left to the parents alone. This has happened in this case because Charlie has been represented by a guardian.

8. The guardian has investigated the case in his best interests and the guardian agrees with the hospital and with the judge's decision.

9. So, parents are not entitled to insist upon treatment by anyone which is not in their child's best interests. Furthermore, although a child can only be compulsorily removed from home if he is likely to suffer significant harm, the significant harm requirement does not apply to hospitals asking for guidance as to what treatment is and is not in the best interests of their patients ...

10. Finally, the European Court of Human Rights has firmly stated that in any judicial decision where the rights under Article 8 of the parents and the child are at stake, the child's rights must be the paramount consideration. If there is any conflict between them the child's interests must prevail."

29. In *Gard* the ECtHR did not consider it necessary to come to "any definitive conclusion on the application" of Article 5. This was in part because it concluded that the arguments being advanced on behalf of the parents, that their rights as parents were not being properly respected and that there had been breaches of Article 2 and 5 of the ECHR in respect of both them and their child, were "manifestly ill-founded": [75].

30. The court summarised the relevant international law and practice by reference, among other provisions, to Article 3 of the UNCRC 1989 and the 1997 Oviedo Convention.

31. In respect of the alleged violation of Article 5 of the ECHR, the court found that it was manifestly ill-founded because the process in England fulfilled the three requirements established in the "landmark" Grand Chamber case of *Lambert v France* (2016) EHRR 2 p. 89, namely [80]:

"- the existence in domestic law and practice of a regulatory framework compatible with the requirements of (the article);

- whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel;

- the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests (*Lambert* (2016) 62 E.H.R.R. 2 at [143])."

32. The ECtHR court also found that the case advanced by the parents, namely that there had been a violation of their rights as parents, was manifestly unfounded. The "relevant principles" included the critical question of whether "the fair balance that must exist between the competing interests at stake – those of the child, of the two parents and of public order – has been struck" [107]. The court reiterated that "there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see X (2014) 59 EHRR 3 at [96] with further references)" [108].

33. As referred to above, the application by Alfie's parents for permission to appeal was refused by the Supreme Court which, exceptionally, gave detailed reasons. The Supreme Court began by saying:

"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."

34. The Supreme Court then addressed the substantive argument advanced by the parents which was to the effect that their rights as parents were being unlawfully breached as they were not being permitted to take Alfie to the hospital in Rome as they wanted. The Supreme Court rejected the parent's case which the Court considered to be unarguable. They said:

"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."

35. The parents made an application to the ECtHR which was also unsuccessful.

Hearing 11th April 2018

36. Despite what the Guardian describes as "extensive efforts" it proved impossible for the parents and the Trust to agree how Hayden J's February order should be implemented. The Guardian points out that Alfie has, therefore, continued to receive treatment which has been determined not to be in his best interests.

37. The Trust appropriately and consistently with the Court of Appeal's directions brought the matter back before the court to seek the directions. It was in response to that application that the parents made their application for a writ of habeas corpus.

Habeas Corpus Application

38. The application for a writ of habeas corpus was made to Hayden J on

the basis that Alfie is being "unlawfully detained" in hospital. This was founded on the submission (a) that Alfie has a right to "self-discharge" himself from hospital and (b) that the parents are entitled to remove Alfie from the hospital and to take him to the BG hospital in Italy. By refusing to allow Alfie to discharge himself and by refusing to allow the parents to remove him, it was submitted that the hospital is unlawfully detaining Alfie.

39. It was further submitted that the parents have "an unfettered right to make choices and exercise those rights on Alfie's behalf". Additionally, the case was said to raise an important constitutional principle because the previous decisions in this case had been made by application of the test of Alfie's best interests. It was submitted that the court's assessment of his best interests "cannot override the law of the land".

40. In support of the application reference was made to Article 5 of the ECHR, Article 56 of the TFEU, the right to health and the right to health protection including under Article 11 of the European Social Charter. In respect of Article 5, and relying on the ECtHR's decision in *Nielsen v Denmark* (1989) 11 EHRR 175, it was submitted that preventing the parents from removing Alfie from the hospital would breach his Article 5 rights.

41. Hayden J rejected Mr Diamond's argument in support of the application for a writ of habeas corpus as being entirely misconceived. The argument that the parents were entitled to make decisions for Alfie had been "comprehensively rejected by the Supreme Court" which had made plain that decisions are reached by an objective assessment by the court of the child's best interests.

Subsequent Events

42. On 12th April 2018 the father went to the hospital with some other people who included a foreign doctor and air ambulance staff. The father had a letter written to him by Mr Pavel Stroilov of the Christian Legal Centre which, we were told, is a campaigning organisation. In the letter Mr Stroilov, who we have been told is not a lawyer, purported to give the father legal advice. He said that it would be lawful for the father to remove Alfie from the hospital and take him to any other place he chose. The previous order made by Hayden J was said not to have circumvented "your parental rights".

43. The letter, which was disseminated on social media (presumably with the knowledge and consent of Mr Stroilov), stated that:

"as a matter of law it is your right to come to (the) hospital with a team of medical professionals with their own life- support equipment and move Alfie to such other place as you consider is best for him.

You do not need any permission from (the) Hospital or the court to do so".

44. This letter was misleading to the extent of giving the father false advice. We have been told that it had the most regrettable consequences in that it led to a confrontation in which Alfie was involved. The Police had to be called. An application had to be made as a matter of urgency to Hayden J.

45. The letter gave false advice because the previous decisions made by the courts in *this* case have directly addressed whether the parents have the right to decide what should happen to Alfie. The clear answer which has been given is that the parents' wishes are not determinative. The court has also expressly decided that removing Alfie from the hospital as the parents wanted was "irreconcilable with (his) best interests" and that his treatment and care "shall" be given by this hospital. To act inconsistently with or contrary to the court's determination and order would be to act without lawful authority. This includes the hospital which would have been acting in breach of the court's order if they had permitted Alfie to be removed from the hospital.

Submissions

46. At this hearing, Mr Diamond has advanced the submissions he made to Hayden J as summarised above. His case can be summarised as follows:

(i) The previous decisions made by the courts in this case have been wrong. The courts did not recognise that the jurisdiction they were exercising was limited and did not appreciate the constitutional issues engaged in this case. Further, the February order was an order which was beyond the scope of the court's jurisdiction;

(ii) The court's inherent jurisdiction is limited to providing protection for treating medical staff from claims for damages as referred to by Lord Donaldson MR in *Re W (A Minor)(Medical Treatment: Court's Jurisdiction)*[1993] Fam 64 p.84 para 7;

(iii) Alfie's best interests are irrelevant to the arguments now being advanced on behalf of the parents. The parents views and wishes "trump" Alfie's best interests because, as his parents, they are entitled to make decisions for him even if, as we have said, what is proposed is inimical to his best interests;

(iv) Alfie is being unlawfully detained in hospital. This is in breach both of common law rights and under Article 5 of the ECHR. The legal action available to remedy this wrong, as of right, is a writ of habeas corpus. Alfie is being detained because he is not being permitted to

"self-discharge" and/or because his parents are not being permitted to remove him from the hospital. This is unlawful because nobody, not even the courts, are entitled to stop the parents acting as they wish in respect of Alfie.

47. Mr Diamond referred to a number of other authorities including *In re X (A Minor)(Wardship: Jurisdiction)* [1975] Fam 48; *R v Human Fertilisation and Embryology Authority ex parte Blood* [1999] Fam 151; and *Al-Jedda v The United Kingdom* (27021/08) ECtHR 7th July 2011. These were relied on in support of his submission that the parents have unfettered rights. During the course of the hearing, Mr Diamond initially drew back from this submission but ultimately he did not shy away from submitting that the parents do indeed have unfettered rights.

48. Mr Mylonas submits that Alfie's parents do not have unfettered rights and that, accordingly, their case has no valid foundation. The manner in which they can exercise their parental responsibility has been circumscribed by the February order. He further submits that Alfie is not being deprived of his liberty but is in hospital for the purposes of receiving care and treatment in accordance with the court's order. He relies on *R (Ferreira) v HM Senior Coroner for Inner South London* [2017] EWCA Civ 31. Additionally, he submits that even if Alfie was being detained this would not be unlawful. The orders made by the court in this case define the parameters of what is lawful and what is not lawful. Indeed, he submits, having regard to the court's determination as to what is in Alfie's best interests, it would not be lawful for the hospital to permit him to be removed by his parents.

49. Ms Roper on behalf of the Guardian also opposes this appeal. She submits that Alfie is not being detained in hospital in the Article 5 sense and that even if he was it would be lawful because of the terms of Hayden J's February order.

Determination

50. It is clear that by their present application the parents are seeking the same outcome that they were seeking from the court in February and March 2018. They wanted to take Alfie to the hospital in Italy and opposed his remaining in hospital in England. The court had to decide whether the parents should be permitted to do what they wanted or whether Alfie should remain in Alder Hey and receive treatment and care there. As set out above, the court decided that the parents' views were not determinative; that moving him to hospital in Italy was contrary to his best interests; and that it was in Alfie's best interests for him to receive the proposed treatment at Alder Hey hospital. An order was made which, as we again repeat, expressly declared that it was lawful and in Alfie's best interests that treatment and care "shall take place at Alder Hey Hospital".

51. The application of a different legal label, namely habeas corpus, does not change the fact that the court has already determined the issues which the parents now seek, again, to advance. Their views, their rights do not take precedence and do not give them an "unfettered right" to make choices and exercise rights on behalf of Alfie. As the Supreme Court said in this case the rights of the child will, if inconsistent with the rights of the parents, prevail over them. The "gold standard" for determining the rights of a child, including decisions about medical treatment, is by an objective assessment of and decision as to what is in his best interests. There has been a thorough, rigorous assessment leading to a decision which has been upheld by the Court of Appeal and the Supreme Court. There is no scope for the same issues to be re-litigated through a different legal label.

52. Additionally, we deal specially with Mr Diamond's submission that Alfie's best interests are irrelevant. In any context, but specifically in the circumstances of this case, that is a startling proposition. The universal consensus as to the importance of the rights and interests of children is reflected in the extent to which the UNCRC has been ratified. Further, it can, we think, now safely be said that the courts of England and Wales are vigilant guardians and promoters of the rights and interests of children. This has not always been the case but it has become a fundamental aspect of our justice system. This does not mean, of course, that those rights and interests override all other rights and interests but, as has been determined with considerable clarity in this case, Alfie's best interests are determinative when a court has to decide what treatment he should or should not receive. It is wholly wrong, therefore, to suggest that the parents own views can trump the judicial determination made in this case. It is also precisely because of that judicial determination that Alfie has been lawfully kept in Alder Hey hospital.

53. The other rights to which Mr Diamond has referred – the rights of the parents; the right to free movement; the right to access medical treatment – are not unlimited rights. This is apparent from the authorities relied on by Mr Diamond. For example in *Ex parte Blood* the court made clear that the right to receive medical treatment in another member state could be limited if justified.

54. *Nielsen v Denmark*, does not assist him because the court did not decide that parents have unfettered rights to make decisions for their children. The court decided the opposite: "The Court accepts ... that the rights of the holder of parental responsibility cannot be unlimited" [72]. The court also decided that the child in that case was not being deprived of his liberty when receiving treatment in a child psychiatric ward in a hospital because: "The conditions in which (he) stayed ... did not, in principle, differ from those obtaining in many hospital wards where

children with physical disorders are treated" [72].

55. We do not shy away from this conclusion and its effect. We can also say that any other conclusion would be of profound concern. It would be of profound concern because the effect of Mr Diamond's submission is that the court would have to permit or allow Alfie to be treated in a manner which the court has previously determined is "irreconcilable" with his best interests. How could this be other than a serious breach of Alfie's rights? Such an approach would also render all best interest hearings undertaken in the family courts nugatory because they would be capable of simple circumvention.

56. Accordingly, we agree with Hayden J that the application for a writ of habeas corpus was misconceived.

57. However, given the circumstances and the concerns engendered by this case we propose to address the issue of whether Alfie is being deprived of his liberty and whether any such deprivation is not lawful.

58. In summary, a writ of habeas corpus is a long established remedy which is available to the court when it is established that a person is being unlawfully detained. The common law concept of unlawful detention, for the purposes of this case, is the same as the concept of unlawful deprivation of liberty in Article 5. For either to apply there has to be a detention, meaning a deprivation of liberty, and that detention has to be one which is not in accordance with the law, i.e. unlawful.

59. Is Alfie being deprived of his liberty?

60. In *Ferreira* the Court of Appeal decided that a person is not being deprived of their liberty where they are receiving treatment and are physically restricted by their physical infirmities and by the treatment they are receiving: [10]. In reaching this conclusion the court referred to *Nielsen v Denmark* in which the ECtHR had concluded that the hospitalisation of the child in a child psychiatric ward did not amount to a deprivation of liberty. A critical part of the court's assessment was that [72]:

"the restrictions to which the applicant was subject were no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital. The conditions in which the applicant stayed thus did not, in principle, differ from those obtaining in many medical wards where children with physical disorders are treated".

61. In *Ferreira* Arden LJ adopted the expression used in the ECtHR's decision of *Austin v UK* when excepting from the scope of Article 5

"commonly occurring restrictions on movement". Arden LJ concluded, [88/89], that restrictions resulting from the administration of treatment, because they are the "well-known consequences of a person's condition, when such treatment is required", do not amount to a deprivation of liberty.

62. This clearly applies to Alfie's situation. We see no basis for any submission that he is being deprived of his liberty in terms either of Article 5 or the doctrine of habeas corpus.

63. Further, even if there was a deprivation of liberty, it would be clearly be lawful. Indeed, the whole purpose of the substantive proceedings and the previous decisions by the court in this case were to determine whether the provision of the proposed treatment at Alder Hey would or would not be lawful. The court expressly determined that it would be lawful because, to repeat, this was in Alfie's best interests and no other available or proposed course would be.

64. In our view the arguments advanced on behalf of the parents provide no basis on which Alfie could be said to be detained or, even if he was, on which it could be said that he was being unlawfully detained.

65. We consider we should add the following.

66. It is not surprising that Alfie's tragic situation should cause emotions to run high. But, we cannot conclude this judgment without recording our dismay and concern at what we have been told have been the consequences of what has taken place at the hospital in recent days. These matters have not been the subject of any court determination. However, if true they are alarming. We were told that some members of the hospital staff could not get to the hospital because of road blockages; that staff, patients and family members were upset and frightened by what was taking place; that a group supporting the parents went into the Paediatric Intensive Care Unit to the concern of staff. If these events have taken place it is not difficult to see how they would impact negatively on the treatment being provided to patients at the hospital. Hospitals must be places which provide peace and calm. What we have been told has occurred is the very opposite.

67. In conclusion, the case advanced on behalf of the parents again seeks to make their own views prevail. This is the foundation on which their present application is based. That it provides no foundation at all has already been made established by the previous decisions in this case. Preventing them from removing Alfie from hospital does not breach their rights. Indeed, it would breach *Alfie's* right to have decisions made as to what treatment he should receive by application of the test of his best interests. That this is the right test – the "gold standard" – is clear. The

decision *must* be governed by an objective assessment by the court of what is in the child's best interests. By that test the court determined whether Alfie's future treatment, including the withdrawal of ventilation, should take place at the hospital in England or whether, as the parents sought, they should be permitted to take him to another hospital for the purposes of his receiving treatment there. Hayden J determined that the parents' proposals were "irreconcilable with Alfie's best interests". This decision was upheld by the Court of Appeal which expressly stated that "transfer to another country could not possibly be in Alfie's best interests". The Supreme Court refused permission to appeal.

68. In our view, for the reasons we have given, the application for habeas corpus was wholly misconceived. This appeal must be dismissed.