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Dear Ms Castle,

URGENT - *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26

We write in connection with the above-mentioned case. We trust you are very familiar with the factual and legal issues involved in it. You will appreciate that the case has attracted a lot of public interest, concern, and controversy.

Christian Legal Centre is a non-profit, pro-life NGO. As such, we take much interest in the jurisprudence on withdrawal of life-sustaining treatment and have been involved in a number of cases involving these issues in varying capacities. Like many others, we are extremely concerned about the implications of Hayden J's judgement in *MSP* case.

This case is unique in that it is not about removing life-sustaining treatment from someone who did not have capacity to make the decision himself. At paragraph 46 of the judgment, Justice Hayden admits that MSP was fully capacitous at the time that he consented to the procedure. It is apparent from the judgment that MSP had full capacity when he consented to the life-sustaining treatment, and unless it is withdrawn, causing his death, he is overwhelmingly likely to have full capacity in the future.

When the patient who has mental capacity has given consent to treatment, that consent is valid, so it is unnecessary for the Court to determine his best interests: see *In Re W. (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 W.L.R. 758 (CA).

Section 4 of the Mental Capacity Act 2005 required Hayden J to consider "*(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and (b) if it appears likely that he will, when that is likely to be.*". Nothing in the judgment answers those questions.

MSP is, by the Court's own description, emotionally and mentally vulnerable. He has a history of self-harming and is on medication following a diagnosis of being bi-polar (para. 16 of the judgment). Despite the fact that MSP was mentally and emotionally vulnerable, no evidence of his mental state is analysed by the court when addressing his earlier statements about not wanting to live with a stoma; and no discussion whatsoever takes place as to whether, with proper therapy addressing his emotional vulnerability, he may have wanted to live. Nor was any analysis undertaken of MSP's maturity level when he made his earlier wishes known, and

how facing the real possibility of death may have dramatically changed his feelings about living with a stoma.

At its core, this judgment is about Mr Justice Hayden rejecting MSP's express desire to have his life saved by inserting himself into MSP's mind and will, suggesting that because of how he lived his life and his previous expressions about not wanting to live with a stoma, that regardless of what MSP actually told the hospital, in truth he actually wanted to die. To a reasonable mind, it appears that Mr Justice Hayden believes he is imputing to MSP his true wish to forsake lifesaving treatment because MSP likely did not have the courage under the circumstances to follow through with his own earlier wishes as expressed in his advanced decision.

This case represents judicial paternalism at its worst, and appears, on the face of the judgment, to amount to court ordered euthanasia. Neither assisted suicide or euthanasia are legal in the United Kingdom. The last time parliament addressed the issue, it voted overwhelmingly, 330 votes to 118, to reject changing the existing safeguards for preserving human life.

The European Court of Human Rights has reiterated that the first sentence of Article 2 of the Convention, the right to life, which ranks as one of the most fundamental provisions in the Convention and enshrines one of the basic values of the United Kingdom (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324), enjoins the State not only to refrain from the "intentional" taking of life (negative obligations), but also to take appropriate steps to safeguard the lives of those within its jurisdiction (positive obligations) (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III).

Furthermore, the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, more commonly known as the *Ovieda Convention*, at Article 9, makes the very clear implication that earlier expressed wishes about medical interventions apply ONLY when the patient is not in a position to express his own wishes: "*The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account.*"

While the court, at paragraph 22, cites *Briggs v. Briggs* [2017] 4 WLR 37and the strong presumption in favour of the sanctity of life, it also notes that *Briggs* stood for the proposition that if the wishes of the patient could be ascertained with some level of certainty, that those wishes should nonetheless prevail over the presumption in favour of life.

Mr Justice Hayden then makes the seismic leap from *Briggs*, where the patient was brain damaged and minimally conscience, thus unable to express his wishes when asked, to his ruling that he could decide with certainty what MSP really wanted despite the fact that MSP had capacity and gave his informed consent to treatment. While Mr Justice Hayden uses the term 'autonomy' 8 times in his judgment, he nonetheless overrides MSP's clear and autonomous expression to live and appears to substitute his own view of what he believed MSP would have really wanted.

The *Case of Lambert and Others v France* [Grand Chamber], application no. 46043/14, judgment of 05 June 2015, goes into great detail about the decision-making process involved in removing life sustaining treatment. As with *Briggs* and the *Ovieda Convention*, the

presumption in all of these instances is that the patient is lacking capacity and that the provision of hydration and nutrition amounted to unreasonable obstinacy. Neither of those pre-conditions existed in the case of MSP, making the decision to engage the *Briggs* balancing test perverse and manifestly unfounded.

Surely Paragraph 45 of the judgment has to be one of the most chilling ever written in modern Britain, where a court of law explains how a young man in the prime of his life who made the conscious decision to live would be sedated and then allowed to die as a consequence of dehydration or starvation because one judge thought he knew what the young man wanted more than he did himself?

Article 2 of the Convention contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life. Its safeguards must be practical and effective (*McCann and Others v the United Kingdom*, § 146) and its provisions must be construed strictly (*id*, § 147).

We appreciate that the decision of Hayden J is in harmony with the position you took in Court, and that you are likely to disagree with our view. Nevertheless, we are also mindful of your statutory role of representing MSP's interests, and also of your obligations under s. 6 of the Human Rights Act. **It is clearly in MSP's best interests, as well as in the public interest, for the case to be reviewed by the Court of Appeal; that is also necessary to safeguard MSP's Convention rights under Articles 2 and/or 8, as well as those of future patients whose destiny may be fatally affected by this precedent.**

We therefore urge you to lodge an urgent appeal against the decision of Hayden J, and to ask Barnsley Hospital to delay the withdrawal of treatment until that appeal is considered.

We would also be grateful if you inform us when the appeal is lodged, as we would consider making an application to intervene in the appeal. It is clearly in the public interest for a 'pro-life' argument to be made before an important case of this nature is determined.

We look forward to hearing from you, and to seeing those steps taken, obviously as a matter of urgency.

Your sincerely,

Andrea Williams,

Chief Executive