Neutral Citation Number: [2020] EWCA Civ 1377

Case No: B6/2019/2986

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
The Honourable Mr Justice Mostyn
FD16P00221

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2020

Before :

LORD JUSTICE HICKINBOTTOM
LORD JUSTICE NEWEY
and
LORD JUSTICE BAKER

- -

Between :

AAMIR MAZHAR	**Appellant**
- and -	
BIRMINGHAM COMMUNITY HEALTHCARE FOUNDATION NHS TRUST (1) **NAHEED MAZHAR (2)** **THE LORD CHANCELLOR (3)**	**Respondent**

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- -

Hugh Tomlinson QC and Nick Armstrong (instructed by **Irwin Mitchell**) for the **Appellant**
Jonathan Auburn (instructed by **Government Legal Department**) as **Advocate to the Court**
The First and Third Respondents were neither present nor represented at the hearing. The Second Respondent was not represented but attended via video link.

Hearing date: 18 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Tuesday 27 October 2020.

LORD JUSTICE BAKER :

1. This is an appeal against an order made on 22 April 2016 under the inherent jurisdiction of the High Court authorising the removal of the appellant to hospital.

Background

2. The appellant, Aamir Mazhar, is now aged 30. At the date of the order under appeal he was aged 26. He suffers from Duchenne Muscular Dystrophy. He comes from a close family which includes a younger brother with the same condition. For much of his life, his care has been supervised by his mother, hereafter referred to as Mrs Mazhar, assisted by his two sisters.

3. The appellant attended university where he studied computer science and graduated with a 2:1. During his time there, he lived in a hall of residence with a package of care support. It was, and remains, his intention to pursue further studies for a master's degree and to that end he started a postgraduate course in software engineering. In 2012, however, he became ill with respiratory problems, underwent a tracheostomy and was placed on a ventilator. Fortunately he recovered and, although he remains on a ventilator, is fed through a PEG tube, and though his ability to speak is restricted, his mental capacity is unimpaired. It is accepted by the professionals who have treated and supported him, and by the parties to this litigation, that he has the capacity to make decisions about his life, including about his care and treatment.

4. It is unnecessary to describe in detail in this judgment the history of the provision of care and support services to the appellant in the years following his illness. Suffice it to say that in the period immediately preceding the events with which this case is concerned he was receiving a package of support commissioned by the Sandwell and West Birmingham Clinical Commissioning Group ("the CCG") and delivered by a unit of the Birmingham Community Healthcare NHS Foundation Trust ("the Trust"), known as "Complex Care". Staff from that unit provided 24-hour care on a 2:1 basis. The appellant's family was not part of the support team, although in a statement filed in these proceedings his mother said that she and her daughters were trained to use his equipment and helped out on occasions, for example when a staff member was absent.

5. In the first months of 2016, relations between the carers and the appellant and his family deteriorated. The appellant and his family alleged that the quality of care was sub-standard. They also raised specific complaints about the behaviour of several of the carers and at their request those individuals were removed from the team. Matters came to a head in April 2016. On 18 April, a further complaint was made about another carer who was also removed. According to the Trust, the effect of this latest complaint was that it would not be possible to arrange sufficient care support over the following weekend.

6. On the morning of Friday 22 April, Ms Tracey Littlehales, Acting Clinical Lead for Complex Care, visited the Mazhar family home. She told the family that the latest complaint left her unable to provide more than one professional carer overnight on Friday 22 April 2016. She suggested that Mr Mazhar be admitted to hospital over the weekend. Mr Mazhar and his family did not agree with this suggestion, and Ms Littlehales agreed to make further inquiries. That afternoon she telephoned the home and spoke to Mrs Mazhar. She told her that despite extensive inquiries she had been

unable to identify anyone to cover the shift. Mrs Mazhar did not accept that it was not possible to find carers. At about 7pm that evening, Ms Littlehales visited the home again, accompanied by Ms Liz Walsh, the Trust's interim services manager. Ms Littlehales said that she had still not been able to find carers to look after Mr Mazhar overnight. Mr Mazhar and members of his family continued to challenge her about this. In the alternative, Mrs Mazhar suggested that she and her daughters should step in and provide support overnight if required as they had on previous occasions. The appellant's evidence is that, following that meeting, he and his family were under the impression that the Trust had agreed to this proposal.

7. According to statements subsequently filed in the proceedings on behalf of the Trust, Ms Littlehales formed the impression during her visits to the home and telephone conversations that Mr Mazhar was under the influence of his mother and other family members. In their statements filed in the proceedings, both Mr Mazhar and his mother deny that this was so.

8. In the early evening, Ms Walsh telephoned Ms Tracey Lucas, a partner at Capsticks Solicitors. According to a statement later filed by Ms Lucas, she had been alerted to the case earlier in the afternoon and informed that a place of safety might urgently be required for Mr Mazhar. Ms Walsh told Ms Lucas that Mr Mazhar and his family did not agree that he should be transferred to a place of safety, that Mr Mazhar was vulnerable, that Ms Littlehales had not been allowed to speak to him alone and was concerned that he had not been able to express his views freely. Ms Walsh instructed Ms Lucas to apply to the court to obtain authorisation to move Mr Mazhar to a place of safety. The Trust's staff had some difficulty locating an emergency hospital bed for Mr Mazhar but eventually found one in the Queen Elizabeth Hospital in Birmingham where he could be accommodated over the weekend pending a move to a specialist respiratory unit in London. Ms Lucas then instructed counsel, Mr Adam Fullwood, to make the application. She also attempted to contact the Official Solicitor to see if anyone would be available to represent Mr Mazhar at a court hearing that evening, but was unable to get through to his office.

9. During the evening, Mrs Mazhar spoke to the family's solicitor, Mr Yogi Amin of Irwin Mitchell, and informed him of her concerns about the Trust's conduct. She did not mention any imminent court application. It is Mr Mazhar's case that, had he known about the proposed application, he would have asked his mother to seek advice about it from Mr Amin and to ask him to represent him at any court hearing.

10. Meanwhile, the carers who had been in attendance during the afternoon and early evening left the home at about 9.30pm. According to Mrs Mazhar, Ms Littlehales telephoned at about the same time. In a subsequent statement filed in the proceedings, Mrs Mazhar said that she had recorded this conversation and exhibited a transcript of the call. According to the transcript. Ms Littlehales told her that "at this present moment in time, there is actually a court order out to put Aamir into a place of safety, into an ITU bed". Mrs Mazhar asked why she had not discussed this with them before. An argument followed about what had or had not been said earlier in the day. Mrs Mazhar asked for further information about what was being done. According to the transcript, Ms Littlehales said that she would get someone to call and explain "the legal advice".

11. According to a statement later filed by Mr Fullwood, he received instructions to make the out-of-hours application to the court at about 6pm on the evening of 22 April. He

telephoned the Royal Courts of Justice out-of-hours number and spoke to a security guard who passed on his details to the duty officer. An hour later, he was telephoned by the duty officer to whom he explained the background to the case and was asked to provide a draft order and a statement in support of the application. At 22.39, Mr Fullwood sent to the duty officer by email a draft order and a statement signed by Ms Walsh.

12. The statement started with a summary of the appellant's medical condition and the family's allegations about the carers' behaviour. It continued:

> "As a result of these allegations, the staff involved had been removed from the care package due to safeguarding concerns and attempts have been made to obtain further staff. So far, these attempts have been unsuccessful and mother has been advised that some of the shifts of care cannot be covered as a result. From 9:30 pm tonight (22.4.16) there are no care staff available to care for Aamir.
>
> Mrs Mazhar has asked the Trust to bring back the staff who have been removed, to cover the care but this is not a possibility for two reasons:
>
> 1. There is an open safeguarding investigation into the staff and it would be potentially dangerous to allow them to provide care until the investigation has been concluded;
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> 2. These staff are no longer available to provide care.
>
> Mrs Mazhar has been advised that if the care package cannot be staffed, Aamir will need to be transferred to a centre that can provide care as a place of safety until the package can be staffed adequately. This will mean transferred to an intensive care unit in order for staff with experience of ventilation to care for him.
>
> For most of the day Mrs Mazhar has refused access to Aamir to staff from the Trust who wanted to discuss the care package and the need for ITU care if the package breaks down tonight. At approximately 7pm tonight Tracey Littlehales, Acting Clinical Lead Complex Care Coordinator was allowed to speak to Aamir. Aamir confirmed that he had a right to be at home but at the same time, needed to have care. Due to the breakdown of the care package this is not possible. With Aamir at home when he was communicating with Ms Littlehales were his mother, aunt, two sisters, brother and another unknown adult. It is Ms Littlehales' opinion that this number of people being with Aamir was oppressive and she cannot say that Aamir was not influenced by their views, which were forcefully expressed.
>
> Aamir requires suctioning of secretions through his tracheostomy tube 4-5 times every one to two hours so will need regular suctioning over night. The present carers finish their shifts at 9.30pm and are not able to stay later. This leaves Aamir at significant and likely risk of severe injury or death if he is not given appropriate care over night. Mrs Mazhar has demanded training this evening to provide suctioning to Aamir but this is not possible in such a short timescale. On a telephone call this evening Mrs Mazhar is now saying that she can provide care and is trained to do so, but this is not the case. We have advised her we will need to make an application to the court and she still refuses to allow us to move Aamir to an intensive care unit.

I and my colleagues are now extremely concerned that if we are not able to remove Aamir to an intensive care unit as a matter of urgency, he will have no ventilator/tracheostomy care tonight and could suffer injury or death."

13. According to Mr Fullwood, at 11.40pm he received confirmation by email that the order had been granted in the terms of the draft save for some minor changes. An unsealed copy of the order was attached to the email which he then forwarded to Ms Lucas. According to her statement, she received it at 11.50 pm and immediately forwarded it to Ms Walsh.

14. The order was headed

"IN THE HIGH COURT OF JUSTICE

COURT OF PROTECTION

Before Mr Justice Mostyn (also sitting as a Judge of the Court of Protection) at the Royal Courts of Justice, Strand, London WC2A 2LL on an out of hours emergency telephone application at 23.10 on 22 April 2016

IN THE MATTER OF AN APPLICATION UNDER THE INHERENT JURISDICTION OF HIGH COURT

AND IN THE MATTER OF AAMIR MAZHAR".

15. After setting out the names of the parties, the order continued with the following recitals:

"ON

A. an application made by telephone by Mr Fullwood of counsel, instructed by Birmingham Community Healthcare NHS Foundation Trust (the Trust);

B. reading the witness statement of Liza Walsh made today;

C. the court being informed in that witness statement that (i) Mr Aamir Mazhar (dob 6.11.89) resides at home at [address] with his mother Mrs Naheed Mazhar where he receives care from specialist carers trained in providing tracheostomy care to ensure that his ventilator continues to function safely including suctioning 4 to 5 times every hour; (ii) that Mrs Mazhar has refused to allow carers to continue to provide such care and has otherwise behaved in such a way so as to cause the care providers to refuse to continue to provide such care; (iii) that the Trust has been unable to secure suitable alternative care at home at such notice despite taking proper steps to do so; (iv) that Mr Mazhar told a senior nurse from the Trust that he was allowed to stay at home whilst also saying that he needed care and treatment but not appearing to understand that he could not receive such care and treatment at home and that without it he would be at serious risk of harm or even death; and (v) that Mrs Mazhar has been repeatedly asked to agree to Mr Mazhar being admitted to hospital but has refused such requests stating that she has been trained to provide specialist care when she has not received any such training.

D. Mr Fullwood of counsel undertaking on behalf of the Trust that the application together with the relevant fee will be lodged with the court by 4pm on 25 April 2016."

16. The order then continued in the following terms:

"IT IS ORDERED:-

1. It is lawful for the police and any medical professionals, as are required, to enter [address] (the property) and use reasonable and proportionate force to do so.

2. It is lawful for the police and any medical professionals, as are required, to remove Mr Aamir Mazhar from the property and to convey him to an ambulance.

3. It is lawful for the ambulance service, together with any other medical professionals and police as are required, to convey Mr Aamir Mazhar to the Queen Elizabeth Hospital, Birmingham.

4. It is lawful until further order for Mr Aamir Mazhar to be deprived of his liberty at the Queen Elizabeth Hospital, Birmingham for the purposes of receiving care and treatment from his arrival on 22 April 2016 and then to be conveyed to the specialist respiratory centre at Guy's Hospital, London until suitable care can be put in place for him at home, or for him to be transferred to an alternative specialist respiratory unit.

5. The matter shall be listed for urgent hearing on the first available date after 25 April 2016 (upon application to the Clerk Rules [sic]).

6. There be leave to serve this order without a Court Seal until 16:00 on Monday, 25 April 2016.

Dated 22nd Day of April 2016."

17. Shortly before one o'clock the following morning, Ms Littlehales telephoned Mrs Mazhar and told her that an order had been made to move Mr Mazhar to hospital. Shortly afterwards, two uniformed police officers, accompanied by three paramedics, arrived, showed Mr Mazhar and his mother a copy of the order, and proceeded to remove him from the house. Such is the extent of the appellant's physical disability, however, that it took a further two hours to prepare him for the move and it was not until 3 o'clock in the morning that he left in the ambulance for Queen Elizabeth Hospital in Birmingham. Later that day, he was transferred to Guy's Hospital in London and then, two days later, to a specialist respiratory hospital in Surrey.

18. In statements subsequently filed in these proceedings, Mr Mazhar described feeling "traumatised" by being removed from home without warning in the middle of the night. He said that

"the Trust's actions made me feel undignified, worthless and irrelevant, like a small person …. I have never had any involvement with the police before and the presence of the police officers made me feel like a criminal in my own home. I believe that the only reason why I survived that night was because my family was

> with me. I pleaded with the police to let me stay at home but they wouldn't agree to this …. I felt distraught, disorientated and frightened with so many people in my room …. I felt that I had no rights. I was scared of leaving my home and going to a hospital through no fault of my own and for no medical reason. The journey to hospital was extremely stressful …. I was strapped in a stretcher …. Whilst in a stretcher my back becomes extremely uncomfortable and the pain is excruciating … When at home in bed, I need a number of pillows to support my head, legs and feet. I did not have anything to support me and this made the long journey very painful indeed. The ambulance had to move very slowly because I felt every bump in the road …. Once I got to the ward, I could not fall asleep. Every time I tried to, I would wake up with a feeling of anxiety and uncertainty as to what would happen to me. My transport to [the unit in London] on Saturday afternoon was equally stressful. Following my removal from home I was in a state of shock … I started to have frequent seizures. This continued for about 2 or 3 days until I was given medication … I was unable to speak properly for two weeks following the removal from home. I was in shock at being torn away from my family and my home in this way. I could not believe what was happening to me, an educated person and a university graduate. I felt worthless …. I truly feel that I was abandoned and let down by the professionals who were supposed to have cared for me and that my removal from home in these circumstances was unfair and completely unnecessary."

Mr Mazhar concluded his statement by saying that he sincerely hopes that what he has experienced will never happen to him, or anyone else, again.

19. On 25 April, the Trust duly filed a notice of application in accordance with the undertaking given to the court. As recorded above, the order provided for the matter to return to court for an urgent hearing on the first available date after 25 April. According to Ms Lucas, when she telephoned the duty officer on 26 April about a minor amendment to the order, she inquired about the need for a further hearing referred to in the order and was told that, as the application had been issued, there was no need to apply for a further hearing. The duty officer subsequently filed a statement in these proceedings which she said she does not recall telling Ms Lucas that it was unnecessary to apply for a further hearing, that where the court has ordered a further hearing it is her normal practice to inform the party that they should contact the listing office to apply for the hearing, and that she can think of no reason why she would have said anything different on this occasion. She said that she thought it likely that there had been a misunderstanding between her and Ms Lucas. Subsequently solicitors acting for Mr Mazhar applied for a further hearing but the listing was delayed because, as Mr Mazhar was now in a unit in Surrey, the Trust stated that it had no further role in his care and that, if there were to be ongoing proceedings about his future care, they should be taken by the CCG.

20. In the event it was not until 23 May 2016 that the case returned to court where it was listed before Holman J. By that date, Mr Mazhar and his family were negotiating with the CCG to secure Mr Mazhar's return home with a further package of support. Through his counsel, Mr Mazhar challenged the lawfulness of the order of 22 April and indicated that he wished to pursue a claim for breach of human rights. Holman J directed that counsel who had been instructed on behalf of the Trust on 22 April file a statement giving a full account of the course and content of the application and that the Trust

should file a further statement explaining why the matter had not been listed for an urgent hearing after 25 April. He also directed Mr Mazhar to file a statement setting out his allegations as to the irregularities in the making and implementation of the without notice application and order. Paragraph 4 of the order of 22 April authorising the appellant's detention was discharged but the other paragraphs left in force. Statements were duly filed in accordance with the directions given by Holman J. At a hearing on 13 June 2016, an order was made by consent that the proposed human rights claim would be determined within the existing proceedings. By further order dated 28 June 2016, the Lord Chancellor was added as a party to the proceedings.

21. On 31 August 2016, particulars of claim were served by solicitors on behalf of Mr Mazhar seeking a declaration and damages against the Trust as first defendant and the Lord Chancellor as second defendant. It was claimed that the two defendants were "jointly and severally liable for the breaches of the claimant's rights" under article 5, 6 and 8 of the ECHR. The particulars of breach alleged against the Trust were that it

    (a) failed to take any or any reasonable steps to secure alternative care provision for the claimant;

    (b) failed to provide sufficient information to the judge;

    (c) misrepresented to the judge that the claimant's mother was not trained to provide care and that she had refused access to the claimant;

    (d) failed to identify the jurisdiction it was seeking to invoke and failed to identify how the inherent jurisdiction was engaged;

    (e) applied for an order in excess of the inherent jurisdiction;

    (f) failed to take any reasonable steps to enable the claimant to participate in the application;

    (g) failed to apply for an urgent further hearing as required by the order;

    (h) failed to provide any evidence that the claimant was of unsound mind, and

    (i) unlawfully procured the deprivation of the claimant's liberty.

    The particulars of breach alleged against the Lord Chancellor were that

    (a) the judge had exceeded the inherent jurisdiction of the High Court;

    (b) the order was made by the judge

        (i) without speaking to the Trust's counsel or seeking any further information beyond the two-page statement and the draft order;

        (ii) without speaking to the claimant and/or his mother;

        (iii) without seeking any information as to the claimant's wishes and feelings or as to his capacity;

(iv) without giving the claimant any effective opportunity to participate;

(v) without considering whether he had jurisdiction to make the order;

(c) the judge had unlawfully authorised the deprivation of the claimant's liberty.

The claimant sought a declaration that each defendant had breached his rights and claimed damages against the Trust for breach of all of the rights identified and against the Lord Chancellor for breach of his rights under article 5.

22. At that stage, no issue was taken by the Lord Chancellor that the proceedings were procedurally flawed. Defences were served and a trial fixed for December 2016. Shortly before the trial, however, the claim against the Trust was settled on the basis of a payment of damages in the sum of £10,000. The proceedings against the Trust were therefore stayed and the trial date vacated. In a letter dated 14 December 2016, Mr Mazhar's solicitors informed the court that:

> "In light of the settlement with the First Defendant, the Claimant no longer seeks a payment of damages against the Second Defendant. However, the Claimant still seeks a declaration from the Second Defendant …."

In February 2017, the Lord Chancellor changed his position and filed an Amended Defence asserting that the court had no jurisdiction to grant a declaration against him in these circumstances.

23. The trial was re-listed in May 2017 before Sir Ernest Ryder, Senior President of Tribunals, who in a judgment delivered in October 2017 and reported at [2017] EWHC 2536 (Fam) and [2018] Fam 257 dismissed the claim for a declaration against the Lord Chancellor.

24. Mr Mazhar filed a notice of appeal against the SPT's decision and was granted permission to appeal. On 2 October 2019, the Court of Appeal (Sir Terence Etherton MR, Singh and Baker LJJ) dismissed the appeal but for different reasons than those given by the SPT. The judgment is reported as *Mazhar v Lord Chancellor* [2019] ECWA Civ 1558 and [2020] 2 WLR 541. In summary, having considered the proper interpretation of the relevant provisions of the Human Rights Act 1998 ("HRA"), in particular sections 7 to 9, the Court held that

(1) an action cannot be brought against the Lord Chancellor for a declaration under the HRA in respect of a judicial act;

(2) the only permissible freestanding claim under the HRA in respect of a judicial act is for damages for unlawful detention in breach of Article 5;

(3) save in those circumstances, a judicial act can only be the subject of proceedings under the HRA by way of an appeal or (where available) judicial review.

25. Whilst dismissing the appeal against the SPT's decision, however, this Court also granted the appellant permission to appeal out of time against the original order of 22 April 2016. Notwithstanding that over three and a half years had passed since the order was made, no objection to the grant of permission to appeal was taken by the Lord

Chancellor on either grounds of delay or that an appeal would have no real prospect of success. The Court noted that no issue had been taken by the Lord Chancellor that the proceedings for a declaration were procedurally flawed until a relatively late stage. As it was only as a result of the Court's decision on the appeal against the SPT's order as to the correct interpretation of section 9 of the HRA that it has become clear that the appellant had no right to the claim for a declaration, the Court held (at paragraph 118 of its judgment) that it would be contrary to the interests of justice if an appeal that had a real prospect of success were to founder now only on the ground that the wrong procedure was used. Whilst it was generally correct that the Lord Chancellor would not be a necessary or even appropriate person to be joined to such an appeal, in the present case there remained a formal claim for damages against the Lord Chancellor and, in view of the Lord Chancellor's late change of position as to jurisdiction, there was no reason why the damages claim should not be continued against him. In those circumstances, the Court concluded (at paragraph 121) that the Lord Chancellor was a person interested in the outcome of any appeal against the order of 22 April 2016 and a proper person to be joined to it, although the Court stayed the appellant's claim for damages against the Lord Chancellor pending determination of the appeal.

26. At paragraph 123 of its judgment, the Court observed that the appeal would have to be against the Trust as well as the Lord Chancellor but, as the Trust did not appear at the hearing, it was given permission to apply for a stay of the order granting permission to appeal, or to be discharged as a party. Subsequently the Trust applied to be discharged as a party to the appeal and on 20 February 2020 I granted that application.

27. In a letter dated 6 April 2020, the Government Legal Department informed this court that

> "the Lord Chancellor does not wish to advance any submissions as to whether the order under appeal in this matter (the order made by Mostyn J on 22 April 2016) was unlawful. The Lord Chancellor's only role is as the defendant in respect of the stayed claim for damages under section 9 of the Human Rights Act 1998."

As a result, the Court was faced with the prospect of there being no opposition to the appeal at the hearing. For that reason, the Court asked the Attorney-General to appoint an advocate to the Court. Acceding to that request, the Attorney duly appointed Mr Jonathan Auburn to act in that capacity.

28. In their skeleton argument for the appeal hearing before us, Mr Hugh Tomlinson QC and Mr Nick Armstrong on behalf of the appellant, having set out their submissions on the appeal (considered below), concluded by inviting the Court to overturn the order of 22 April 2016 and "declare that the appellant is entitled to damages in accordance with s.9(3) of the HRA". Mr Auburn, advocate to the court, submitted that the appellant's attempt to have this Court make some ruling, or grant some relief, in the damages claim, was contrary to the stay imposed by this Court in its order of 2 October 2019. He contended that the appellant's proposal of obtaining a declaration as to an entitlement to damages to be paid by the Lord Chancellor would circumvent this Court's decision in its earlier judgment that the only kind of action that can be brought against the Lord Chancellor under the HRA, in respect of liability arising from a judicial act, is an action for damages, and not a declaration. Mr Auburn submitted that the Court could, if it wished, rule on whether the judge's order should be set aside partly or wholly due to breach of Convention rights, or simply address any such breach in its judgment.

However, the stay on the damages claim would only lift once this Court determined the appeal. Only then could the Lord Chancellor be expected, or required, to take steps to defend the damages claim.

29. In a subsequent note to this Court dated 15 June 2020, however, the appellant's legal representatives stated that their client

> "only maintains a damages claim because that is necessary to found jurisdiction. If he obtains the remedy which he actually wants, namely, a declaration that Mostyn J's order was wrong and should not have been made, he will not pursue a claim for damages or, if necessary, confine his claim to nominal damages."

At the start of the hearing, Mr Tomlinson confirmed that he was content to proceed on the basis that this Court would not be dealing with the damages claim.

The law

(a) The inherent jurisdiction

30. It is now clearly established that the inherent jurisdiction of the High Court for the protection of vulnerable and incapacitated adults remains available notwithstanding the implementation of the Mental Capacity Act 2005: *DL v A Local Authority* [2012] EWCA Civ 253, [2013] Fam 1, per McFarlane LJ at [52] et seq and Davis LJ at [70] et seq. The leading exposition of that jurisdiction remains the decision of Munby J in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, approved by this Court in *DL* where McFarlane LJ (at paragraph 68) gave his

> "unreserved endorsement of the full jurisdiction described by Munby J in *Re SA* and applied subsequently in a number of cases at first instance".

31. In *Re SA*, having considered in detail the earlier authorities, Munby J described the jurisdiction in these terms:

> "77. It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.
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> 78. I should elaborate this a little:
>
> i) Constraint: It does not matter for this purpose whether the constraint amounts to actual incarceration. The jurisdiction is exercisable whenever a vulnerable adult is confined, controlled or under restraint,

even if the restraint is only of the kind referred to by Eastham J in *Re C (Mental Patient: Contact)* [1993] 1 FLR 940. It is enough that there is some significant curtailment of the freedom to do those things which in this country free men and women are entitled to do.

ii) Coercion or undue influence: What I have in mind here are the kind of vitiating circumstances referred to by the Court of Appeal in *In re T (Adult: Refusal of Treatment)* [1993] Fam 95, where a vulnerable adult's capacity or will to decide has been sapped and overborne by the improper influence of another. In this connection I would only add ... that where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it, be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.

iii) Other disabling circumstances: What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others.

79. I am not suggesting that these are separate categories of case. They are not. Nor am I suggesting that the jurisdiction can only be invoked if the facts can be forced into one or other of these headings. Quite the contrary. Often, indeed, the facts of a particular case will exhibit a number of these features. There is, however, in my judgment, a common thread to all this. The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors.

80. It will be noticed that I have referred to the inherent jurisdiction as being exercisable not merely where a vulnerable adult is, but also where he is reasonably believed to be, incapacitated. As I have already pointed out, it has long been recognised that the jurisdiction is exercisable on an interim basis "while proper inquiries are made" and while the court ascertains whether or not an adult is in fact in such a

> condition as to justify the court's intervention. That principle must apply whether the suggested incapacity is based on mental disorder or some other factor capable of engaging the jurisdiction. As Singer J put it in *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3203 (Fam) para [9], and I agree, the court has power to make orders and to give directions designed to ascertain whether or not a vulnerable adult has been able to exercise her free will in decisions concerning her civil status."

32. It follows that the inherent jurisdiction to protect a vulnerable adult may be exercised on an interim basis where there are reasonable grounds to believe that his "capacity or will to decide has been sapped and overborne by the improper influence of another".

33. Can an order can be made under the inherent jurisdiction depriving a vulnerable adult of their liberty? This question has never arisen for consideration before this Court. There are a number of decisions at first instance in which it has been held that the jurisdiction can be exercised to deprive a vulnerable adult of their liberty, provided the exercise of the jurisdiction is compatible with Article 5 of ECHR: *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083, (Munby J), *An NHS Trust v Dr A* [2013] EWHC 2422 (Fam), [2014] Fam 161, (Baker J), *Guys and St Thomas' NHS Foundation Trust, South London and Maudsley NHS Foundation Trust v R* [2020] EWCOP 4, [2020] 4 WLR 96, (Hayden J), and see also my summary of the law when refusing permission to appeal in *A Local Authority v BF* [2018] EWCA Civ 2962, [2019] COPLR 150. On the other hand, Cobb J in *Wakefield MDC v DN* [2019] EWHC 2306 (Fam), [2019] COPLR 525, reached a contrary conclusion, relying in part on the observation of McFarlane LJ in *DL* (at paragraph 67) that the inherent jurisdiction should be used for "facilitative rather than dictatorial" reasons.

(b) Article 5 ECHR

34. Article 5 of ECHR provides, so far as relevant to this case:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:
>
> …
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> …
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

35. There is a substantial body of case law from the European Court of Human Rights on the application of Article 5 in cases of persons of "unsound mind", starting with *Winterwerp v Netherlands* (1979) 2 EHRR 387 in which the Court said (at paragraph 39):

> "...[E]xcept in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the component national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends on the persistence of such a disorder...."

36. The requirement for medical evidence establishing a mental disorder has been emphasised in subsequent decisions of the Court. We were not referred to any further authority in which the Court has qualified the requirement in the way expressed in *Winterwerp* ("except in emergency cases"). In *Varbanov v Bugaria* [2000] ECHR 457, the Court suggested that it may be acceptable, in urgent cases, for medical opinion to be obtained immediately after the detention (paragraph 47). More recently, however, in *Ilnseher v Germany* [2018] ECHR 991, [2019] MHLR 278, the Grand Chamber, drawing together dicta from earlier decisions of the Court, stated (at paragraph 129):

> "the permissible grounds for deprivation of liberty listed in Article 5(1) are to be interpreted narrowly. A mental condition has to be of a certain severity in order to be considered as a "true" mental disorder for the purposes of sub-paragraph (e)."

At paragraph 137, the Court also observed:

> "In order for the detention to be "lawful" and not arbitrary, the deprivation of liberty must be shown to have been necessary in the circumstances …. The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest …."

37. On the need for medical evidence, however, we were reminded of the observations of this Court in *G v E* [2010] EWCA Civ 822, [2012] Fam 78 , an appeal from the Court of Protection, where Wall LJ, giving the judgment of the Court, said at paragraph 77:

> "there will be times in heavy Family Division lists where a judge will have to strike a balance between, on the one hand, the urgency of the need for a decision and, on the other, the length and nature (oral or written) of the evidence needed to make that decision. There will therefore be cases where oral or further expert evidence is simply impractical in the light of the urgency of the need for a decision. Into issues of fairness and proportionality has to be factored the impact which the intervention of the case may have on other ongoing or waiting cases in the judges list."

(c) Breach of human rights by a judicial act

38. Under s.6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right, and under s.6(3), "public authority" includes a court. Proceedings and remedies against public authorities for

breach of Convention rights are governed by ss 7 and 8 of the Act, and proceedings in respect of judicial acts by s.9. The interpretation of s.9 was the subject of the previous decision of this Court in these proceedings, reported as *Mazhar v Lord Chancellor*, supra, as summarised above.

39. In *LL v Lord Chancellor* [2017] EWCA Civ 237, [2017] 4 WLR 162, a judge found a party to be in contempt of court and sentenced him to 18 months' imprisonment. The Court of Appeal quashed the finding of contempt and the sentence, holding that the judge had been guilty of numerous procedural errors, and the party was released after spending nine weeks in prison. He then brought a claim against the Lord Chancellor under section 7 of the HRA seeking damages under section 9(3) for breach of his right to liberty in Article 5. The High Court dismissed the claim but the Court of Appeal overturned the decision.

40. In summarising the law, Jackson LJ started by observing, at paragraph 60, that:

> "It is a fact of life in every legal system that individuals sometimes go to prison pursuant to court orders which are subsequently set aside. Both under our domestic law and under Strasbourg jurisprudence, there are strict limits upon the rights of such individuals to recover compensation."

Having then set out that law and jurisprudence in some detail, he distilled from the authorities the following principles relevant to the case then before the Court:

> "(1) A period of detention is lawful if, and only if, it complies with the applicable subparagraph of article 5(1).
>
> (2) In the case of detention under article 5(1)(b):
>
> (i) the underlying court order or legal obligation must be one with which it was feasible for X to comply. And
>
> (ii) the period of detention must be proportionate to that which X was required to do, but failed to do …
>
> (3) Detention under article 5(1)(a) or (b) will not be lawful if:
>
> (i) the court acted without jurisdiction. Or
>
> (ii) there was a gross and obvious irregularity in the court's procedure. Or
>
> (iii) the court made an order that had no proper foundation in law, because of a failure to observe a statutory condition precedent. Or
>
> (iv) X's detention was arbitrary. In other words the stated grounds for that detention did not comply with the general principle of certainty. Or
>
> (v) there was one or more breaches of article 6 during the proceedings which was so serious as to amount to a flagrant denial of justice ….

(4) In considering whether the court's errors amounted to 'gross and obvious irregularity' or 'flagrant denial of justice', where appropriate the cumulative effect can be considered."

In that case, the Court held that the judge's errors amounted to "gross and obvious irregularity".

Submissions to this court

41. On behalf of the appellant, Mr Tomlinson acknowledged that the out-of-hours judge in the Family Division is in a difficult position faced with a late-night application of this kind in what was asserted to be an emergency situation. Where, however, the order sought is for the deprivation of an individual's liberty, and the application is made without notice to the individual, the judge is always under an obligation to ensure that the proper evidential and legal foundation for the order is made out. In this case, the important safeguard of judicial scrutiny was absent. It was submitted that, insofar as the order of 22 April 2016 authorised his detention, it was wrong because the appellant was not a person of "unsound mind" and, on a proper analysis, there was no substantive evidence of any form of duress. It was further submitted that the order was an unlawful infringement of article 5(1) because the judge's errors taken together amounted to a "gross and obvious irregularity" in the proceedings and led to a "flagrant denial of justice".

42. In support of those submissions, Mr Tomlinson identified the following errors made by the judge:

(1) He did not analyse, probe or test the evidence. As a result, he made an order which had no proper evidential basis. The appellant was very vulnerable and therefore someone for whom particular care was required. But there was no evidence before the judge that he suffered from any mental disorder and no medical evidence of any kind. It is now clear and undisputed that he was not of "unsound mind". Furthermore, there was no substantive evidence of any form of duress and certainly not enough to justify the making of an order for the detention of a person a full capacity.

(2) He did not take any proper steps to satisfy himself as to the jurisdictional basis for the order. Had he done so, he would have understood the need for clear evidence of duress and would have appreciated that there was no such evidence.

(3) He did not speak to counsel for the Trust in order to the test or probe the contention that this was the case of duress or undue influence. Had he spoken to counsel, he would have appreciated the claimed jurisdictional basis for an order, the need for proper evidence of duress, and its absence.

(4) He did not make any enquiries as to whether the appellant or his solicitor could be contacted in order to make representation. Had he made such an enquiry, he would have been given their contact details and heard their submissions which would have made it clear that the appellant was of full capacity and not under duress and that his family were able to care for him.

43. Mr Tomlinson submitted that the inherent jurisdiction of the High Court, developed in the line of cases starting with *Re SA* which exists for those who have mental capacity but are subject to duress and so incapable of exercising choice for that reason, can never be used to deprive someone of their liberty. The use of the jurisdiction in that way could not be article 5 compliant because such a person is not of "unsound mind" in the way that has been construed in Strasbourg, and is therefore outwith the (exhaustive) sub-paragraphs of that article. If the courts can go further, in an emergency situation, this is a highly exceptional jurisdiction which should only be exercised with the greatest of care and the highest level of scrutiny. Having advanced that argument, however, Mr Tomlinson conceded that the existence of the jurisdiction does not in fact fall to be determined in this case because, insofar as there is such a power, there was no basis upon which it could lawfully have been exercised in this case. The only evidence which could conceivably amount to evidence of duress, coercion or influence was the double negative in Ms Walsh's statement that it was

> "Ms Littlehales' opinion that this number of people being with Aamir was oppressive and she cannot say that Aamir was not influenced by their views, which were forcefully expressed".

It was submitted that this was manifestly insufficient to justify an order depriving the appellant of his liberty.

44. In response, the advocate to the Court, Mr Auburn, properly and helpfully identified factors which, if accepted, would support a conclusion that the judge's order was valid.

45. First, he suggested that, in situations of real or reasonably perceived emergency, the full requirements imposed by Strasbourg for deprivations of liberty to be compatible with Article 5(1)(e) should not apply in the same way. In *Winterwerp* at paragraph 39, the ECtHR prefaced the requirements for Article 5 compliant deprivations of liberty with the important words "except in emergency cases". The Court has not expressly addressed the circumstance of a decision to deprive someone of their liberty, where it was believed that that decision needed to be made in an emergency. Mr Auburn suggested that the test for an interim declaration authorising the deprivation of a person's liberty under the inherent jurisdiction is, or should be, that there is "reason to believe" that the conditions for the making of a final order are satisfied. He submitted that the observations of Wall LJ in *G v E* cited above were applicable to applications made to the out-of-hours judge.

46. Mr Auburn suggested that, when considering whether that threshold was crossed, the extent of the judge's inquiry and analysis would be determined in part by the time available. The quality of evidence required will vary according to the degree of urgency of the application and the reasonably understood impending risk of harm. In some urgent situations, it might be necessary to modify the requirement for evidence from a medical practitioner as to "unsoundness of mind". While the Strasbourg Court has generally required evidence from a medical practitioner, it cannot be assumed that such evidence would necessarily be required, in the same way, in an urgent case. In this case, the judge was informed, and so reasonably believed, that the situation was an emergency, in which there was an imminent risk to life. In those circumstances, he was entitled to proceed on the basis of a lower evidential threshold than would otherwise apply.

47. On the other hand, Mr Auburn accepted that some evidence is still required to satisfy the test for authorising a deprivation of liberty under the inherent jurisdiction. In this case, it is difficult to see what evidence was relied upon when making the order which could be said to have given the judge reason to believe that any such test was satisfied. Even in the apparently very urgent circumstances presented to the judge late on a Friday night, counsel for the applicant NHS Trust was still available to speak to the judge, as were Mr Mazhar and members of his family. It is difficult to find any explanation in the papers as to why the judge made no attempt to involve either in the telephone hearing.

48. Mr Auburn reminded the Court, however, that the judges of the Family Division are regularly required to make difficult decisions in urgent out of hours hearings on the basis of limited evidence – sometimes, in the words of Johnson J in an unreported case cited by Butler-Sloss LJ in *Re MB* [1997] EWCA Civ 3093 at paragraph 24, "only the scantiest information". Mr Auburn noted that in such urgent out of hours applications, there is often a chain of professional trust being relied upon. The Court is relying on the professional training and duties of the advocate to put before the Court all relevant information, including that adverse to his or her application. The advocate is relying on the professionalism of the instructing solicitor to ask the right questions and obtain the right information from the lay clients, who are usually doctors or other healthcare or social care professionals. Along this chain, and working at speed, there is scope for human error due to miscommunication, misunderstanding, and misjudgment. Furthermore, as Mr Auburn points out, all the professional people within that chain may be fulfilling, or believe they are fulfilling, their operational duty to prevent a risk to life. Not to take action, or to take action too slowly, may give rise to a breach of Article 2 ECHR: see *An NHS Trust v Dr A* [2013] EWHC 2442 (COP), [2014] Fam 161.

49. Mr Auburn proposed that in such cases the steps to be taken by the judge will depend on the time available, or believed to be available, but are likely to include asking the following questions:

    (1) Is it possible for a representative of the person to be subject to the order, to be informed of the application and given an opportunity to make representations? Reasonable efforts should be made to contact the person, family (if appropriate) or any known representative, if there is no good reason for not doing so (i.e. a need for the hearing to be *ex parte*), and there is time for the court to do this.

    (2) What jurisdiction am I being asked to apply or am I considering applying, and what order is sought under it?

    (3) What test do I need to be satisfied of to exercise that jurisdiction and make the order sought under it?

    (4) To what standard?

    (5) Is there sufficient evidence before me that the test is satisfied to the appropriate standard?

50. Mr Auburn submitted that, had the judge asked himself these questions in the present case on the evening of 22 April 2016, the answers would have been as follows:

(1) Mr Mazhar and/or his solicitors could have been contacted and were available to participate. There was no need for secrecy.

(2) The jurisdiction was the inherent jurisdiction and the order being sought included authorising the deprivation of Mr Mazhar's liberty.

(3) The test for use of the inherent jurisdiction in this case was that Mr Mazhar's will was overborne by the influence of members of his family. The test for authorising the deprivation of his liberty was "unsoundness of mind" within article 5.

(4) The standard required for an interim order was whether Mr Mazhar was reasonably believed to be deprived of the capacity to make the relevant decision.

(5) The evidence adduced by the Trust was insufficient to satisfy the test to the appropriate standard.

Discussion and conclusion

51. Before assessing whether the judge's decision was wrong, I make the following five preliminary points.

52. First, I agree with counsel that it is unnecessary for the purposes of this judgment to consider the extent of the inherent jurisdiction in respect of vulnerable adults and, in particular, whether it extends to the making of an order that has the effect of depriving a vulnerable adult of liberty, provided the provisions of article 5 are met. The preponderance of authority at first instance supports the existence of this jurisdiction, but there is some authority to the contrary. There is also uncertainty as to whether it is permissible in urgent situations to depart from the *Winterwerp* criteria, in particular the requirement for medical evidence. The qualification in *Winterwerp* itself ("except in emergency cases") suggests that some limited departure may be permissible, although more recent decisions of the European Court have not repeated that qualification. But it could be said that the pragmatic approach of this court in *G v E* about the difficulties faced by judges dealing with a busy court list applies also, for different reasons, to judges sitting out of hours.

53. For my part, however, I do not consider it appropriate or necessary for this Court to rule on these issues in this case. It is not appropriate because we have not heard full argument, the appeal being unopposed. Mr Auburn's assiduous efforts as advocate to the court have put forward the competing arguments but I would prefer this important point to be determined following full argument. In any event, it is unnecessary to rule on the issues in the light of the decision I have reached on this appeal.

54. Secondly, as both counsel have acknowledged, a judge sitting out of hours is sometimes in a very difficult position. He or she is not infrequently required to make a decision on an important issue in less than optimal circumstances with incomplete evidence. Unable to wait until more information is available, he or she will have to do the best they can on the limited material in front of them. Sometimes, to adopt Johnson J's phrase, this will be no more than the scantiest information.

55. It is essential that any party seeking to invoke the court's jurisdiction in these circumstances spells out as far as possible in the evidence or written submissions the reasons for applying without notice, the jurisdiction they are seeking to invoke, the test to be satisfied in order to exercise the jurisdiction, and the basis on which it is said the test is satisfied in the case in question. In the present case, the information given to the judge was woefully inadequate. As a result, he was placed in an invidious position.

56. Thirdly, in such circumstances, the judge's instinct may well be to err on the side of caution and take the course that seems the least risky to the individual's physical well-being. This is an example of the "protection imperative" to which I referred in *PH v A Local Authority, Z Ltd and R* [2011] EWHC 1704 (Fam) and *CC v KK* [2012] EWHC 2136 (COP), drawing on the observations of Ryder LJ in *Oldham MBC v GW and PW* [2007] EWHC136 (Fam) [2007] 2 FLR 597 – the need to protect the vulnerable child or adult which may draw the professional and the judge to the outcome that is more protective. This tendency may arise whenever a court is exercising a jurisdiction that is substantially protective in nature.

57. The difficulty facing the judge was summarised memorably by Munby J in *Re MM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, another case concerning the exercise of the inherent jurisdiction relating to vulnerable adults, albeit for a different purpose, namely restraining MM's contact and sexual relations with another adult. The comments in the passage cited below refer to protecting the individual from abuse, but applies equally to the protection from other types of harm:

> "118. The fact is that in this type of case the court is exercising an essentially *protective* jurisdiction. The court should intervene only where there is a need to protect a vulnerable adult from abuse or the real possibility of abuse …. The jurisdiction is to be invoked if, but only if, there is a demonstrated need to protect a vulnerable adult. And the court must be careful to ensure that in rescuing a vulnerable adult from one type of abuse it does not expose her to the risk of treatment at the hands of the State which, however well intentioned, can itself end up being abusive of her dignity, her happiness and indeed of her human rights. That said, the law must always be astute to protect the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives, partners or friends ….
>
> 119. …. The court, as I have said, is entitled to intervene to protect a vulnerable adult from the risk of future harm – the risk of future abuse or future exploitation – so long as there is a real possibility, rather than a merely fanciful risk, of such harm. But the court must adopt a pragmatic, common sense and robust approach to the identification, evaluation and management of perceived risk.
>
> 120. A great judge once said, "all life is an experiment," adding that "every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge" (see Holmes J in *Abrams v United States* (1919) 250 US 616 at pages 624, 630). The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not

> always. Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's *happiness*. What good is it making someone safer if it merely makes them miserable?
>
> 121. One of the most important factors to be taken into account is the vulnerable adult's wishes and feelings…. If it is elementary that the inherent jurisdiction is exercised by reference to the vulnerable adult's best interests, it is equally elementary that in determining where such an adult's best interests truly lie it is necessary…."

58. These compelling observations apply whenever a judge is exercising the inherent jurisdiction relating to vulnerable adults. But when a judge is considering an urgent application out of hours, there will often be little time for lengthy reflection and the "identification, evaluation and management of perceived risk" referred to by Munby J at paragraph 119 of his judgment in *Re MM* may have to be carried out at speed. Particular care will be necessary where the application is made without notice. As Charles J observed in *B v A (Wasted Costs Order)* [2012] EWHC 3127 (Fam), [2013] 2 FLR 958, (at paragraph 11):

> "… there is a natural temptation for applicants to seek, and for courts to grant, relief to protect the vulnerable …. But this temptation, and the strong public interest in granting such relief, does not provide an excuse for failures to apply the correct approach in law to such applications. Indeed, if anything, the strong public interest in providing such relief and its impact on the subjects of the relief and their families mean that the correct approach in law should be followed and so the sound reasons for it, based on fairness, should be observed."

59. Fourthly, as Mr Auburn perceptively reminds us, there is often a chain of professional trust relied on in such circumstances. In this case, the chain extended from Ms Littlehales to Ms Walsh to Ms Lucas to Mr Fullwood to the judge. I have no doubt that each of those professionals was seeking to carry out his or her duties conscientiously. Inevitably, however, the scope for human error arose. In addition, each person in the chain was liable to the feelings described as the "protective imperative" above. One can see this most clearly in the statements filed on behalf of the Trust.

60. Finally, and importantly, when evaluating the judge's decision, this Court is hindered by the absence of any indication of the reasons for the judge's decision. It is often impractical to deliver a judgment in these circumstances when sitting out of hours, but practitioners who submit draft orders, and judges who approve them, should record in the order at least a summary of the reasons for the decision, for the benefit of any party not present and any subsequent court conducting the next hearing or considering the matter at a later stage in the proceedings. In this case, the recitals in the court order do not spell out in any or any sufficient detail the reasons for the judge's decision. There is therefore considerable uncertainty as to precisely why the judge decided to make the order.

61. These five points have to be borne in mind when evaluating the judge's decision. Having taken them all into account, however, I am in no doubt that the decision he reached in this case was wrong.

62. I broadly agree with Mr Auburn's analysis as to how a court should approach an application of this sort and how the judge in this case failed to adopt that approach.

63. First, a judge should consider whether it is appropriate for an application to be made without notice to the respondent. FPR rule 27.4(3) provides that "the court shall not begin to hear an application in the absence of a respondent unless (a) it is proved to the satisfaction of the court that the respondent received reasonable notice of the date of the hearing; or (b) the court is satisfied that the circumstances of the case justify proceeding with the hearing." There is an extensive line of authorities providing guidance about without notice applications in the family court (identified by Sir James Munby P in *Re A (A Child)* [2016] EWCA Civ 572, [2016] 4 WLR 111, at paragraph 49). It has been repeatedly said by judges in such cases that applications made without notice require great care and the closest scrutiny by the court.

64. In this case, Ms Walsh's statement included the sentence:

> "We have advised her [Mrs Mahar] we will need to make an application to the court and she still refuses to allow us to move Aamir to an intensive care unit."

The statement did not, however, explain whether and, if so, why it was necessary to proceed without proper notice to Mr Mazhar or affording him the opportunity to make representations. Neither the draft order submitted by counsel nor the sealed order issued by the court referred at all to the fact that the application was made without notice to Mr Mazhar. On that issue, it is impossible to know whether the judge addressed the question of notice and, if so, why he concluded that the circumstances justified proceeding in the absence of Mr Mazhar or a representative acting on his behalf.

65. According to the transcript of the telephone call at about 9.30 on the evening of 22 April between Mrs Mazhar and Ms Littlehales, exhibited to Mrs Mazhar's statement, Ms Littlehales informed her that "there is actually a court order out to put Aamir into a place of safety" and reassured her that she would "get someone" to call and explain "the legal advice". The accuracy of this transcript has not been determined in these proceedings but, if correct, it suggests (1) that the Trust's representatives may have realised they were under an obligation to give notice of the application to Mr Mazhar; (2) that they failed to give proper notice to him; (3) that through Ms Littlehales the Trust undertook to explain the legal position to the family; (4) that no such advice was provided before the order was made, and (5) that Mr Mazhar and his mother objected to his removal from the house. Save for the last point, none of those matters was referred to in Ms Walsh's statement in support of the application, or the draft order and, as the judge did not speak to Mr Fullwood before making the order, he cannot have been aware of them.

66. Secondly, the judge must identify the jurisdiction he is being asked to exercise. As set out above, the sealed order contains a heading "IN THE HIGH COURT OF JUSTICE" and "IN THE COURT OF PROTECTION". As the draft order did not include this heading, it seems likely that this heading was a clerical error by the duty officer. The order does record that it is being made "IN THE MATTER OF AN APPLICATION

UNDER THE INHERENT JURISDICTION OF HIGH COURT". Neither the recitals nor the body of the order, however, contain any reference to the jurisdiction which the judge is being asked to exercise, namely the inherent jurisdiction with regard to vulnerable adults, nor does it specifically refer to the fact that the order would deprive Mr Mazhar of his liberty. In the absence of a judgment, it is impossible to know whether the judge addressed his mind to the question of jurisdiction and the powers which could be exercised under that jurisdiction in respect of vulnerable adults.

67. Thirdly, the court must consider the test to be satisfied when exercising jurisdiction. As the case law demonstrates, in the case of the inherent jurisdiction with regard to vulnerable adults, this is by no means a straightforward matter. Mr Mazhar does not, of course, suffer from any mental impairment. There was nothing in Ms Walsh's statement to suggest that he did. For my part, I am not entirely satisfied that the Trust did in fact consider the basis on which it was applying for the order. It may be that it simply assumed that an order could be granted on the basis that (1) Mr Mazhar was in urgent need of specialist medical care; (2) the Trust could not provide that care at home overnight, and (3) on the Trust's case (contested by Mr Mazhar), the family members were not qualified to provide it. I note that, in the application subsequently filed on 25 April 2016, it is stated that "this application was made under the inherent jurisdiction and was in relation to a vulnerable adult, by the nature of his condition and the fact that he is permanently receiving treatment on a ventilator." On any view of the jurisdiction, that would be insufficient to justify the order. It is possible that the Trust was seeking to advance the argument that Mr Mazhar was unduly influenced by his family and that his will was therefore overborne, but the faint terms in which Ms Walsh speaks of the family's influence – using, as counsel observes, a double negative - leave me uncertain about what in fact was being asserted.

68. Assuming as I do for present purposes that the court has jurisdiction to make an interim order in an emergency situation, the standard required was that the judge had "reason to believe" that Mr Mazhar was being unduly influenced by his family. There is, again, nothing in the sealed order to indicate the judge applied this test or, if he did, whether he concluded it was satisfied and, if so, on what basis.

69. In any event, assuming the judge did apply that test, I find that there was manifestly insufficient evidence to satisfy it.

70. For those reasons, I conclude the judge's decision to make the order was wrong and must therefore be set aside.

71. In my judgment, the Trust's application for, and the granting of, the order for which there was no proper evidence and without giving Mr Mazhar the opportunity to be heard amounts to a clear breach of his article 6 rights and was a flagrant denial of justice. However, notwithstanding my criticisms of how the application was made and granted, I am unpersuaded that this court should go further and declare that the errors in this case amounted to "a gross and obvious irregularity". In the absence of a judgment, or a clear account of the reasons for the judge's decision recorded on the face of the order, such a declaration would not be appropriate, particularly having regard to the difficulties faced by judges hearing cases out of hours to which I have already referred. Justice will be served by the decision of this court to allow the appeal and the observations I have already made.

72. In any event, I note that, whilst seeking remedies for breach of his human rights, Mr Mazhar has to his credit urged the court to focus on taking steps to ensure that this does not happen again. To that end, my final comments are addressed to the lessons to be learned from this unhappy history.

73. I propose that this judgment be drawn to the attention of the President of Family Division to allow him the opportunity to consider whether fresh guidance should be given to practitioners and judges about applications of this sort. Although the judges of this Court have experience of out-of-hours applications, including in some cases applications involving the inherent jurisdiction of the Family Division, I think it preferable for any guidance to be given by the President after appropriate thought and consultation. Such guidance may also extend across a broader range of circumstances than arose in this case.

74. For the time being, I would identify the following clear lessons to be learnt:

(1) Save in exceptional circumstances and for clear reasons, orders under the inherent jurisdiction in respect of vulnerable adults should not be made without notice to the individual.

(2) A party who applies for an order under the inherent jurisdiction in respect of vulnerable adults without notice to another party must provide the court with their reasons for taking that course.

(3) Where an order under the inherent jurisdiction in respect of vulnerable adults is made without notice, that fact should be recorded in the order, together with a recital summarising the reasons.

(4) A party who seeks to invoke the inherent jurisdiction with regard to vulnerable adults must provide the court with their reasons for taking that course and identify the circumstances which it is contended empower the court to make the order.

(5) Where the court is being asked to exercise the inherent jurisdiction with regard to vulnerable adults, that fact should be recorded in the order along with a recital of the reasons for invoking jurisdiction.

(6) An order made under the inherent jurisdiction in respect of vulnerable adults should include a recital of the basis on which the court has found, or has reason to believe, the circumstances are such as to empower the court to make the order.

(7) Finally, and drawing on my own experience of these cases, if an order is made out of hours in this way, it is essential that the matter should return to court at the earliest opportunity. In this case, the order properly included a direction that "the matter shall be listed for urgent hearing on the first available date after 25 April 2016". In the event, however, it did not return to court until four weeks later. It has not been necessary to enquire, or reach any conclusion, as to why such a lengthy delay occurred. I would suggest, however, that it will usually be better for the order to list the matter for a fixed return date, say 2 pm on the next working day, either before the judge making the order or the urgent

applications judge. Had that occurred in this case, the consequences of the errors made on 22 April 2016 might to some extent have been ameliorated.

LORD JUSTICE NEWEY

75. I agree.

LORD JUSTICE HICKINBOTTOM

76. I also agree.