R (on the application of GP) v Derby City Council (2012) [2012] EWHC 1451 (Admin)

CO/3871/2012

HHJ Pelling QC

Date: Friday 27th April 2012

27/04/2012

His Honour Judge Pelling QC:

1. The claimant (referred to hereafter as "GP") is presently detained at Kedleston Low Secure Unit, Kingsway Hospital in Derby purportedly pursuant to section 3 of the Mental Health Act 1983, to which I will refer in more detail below. He was first detained under those provisions on 29 July 2011. He challenges his detention from inception to date on the basis that the safeguards contained in section 11 of the Mental Health Act 1983 by which administrative detention under Part II of the 1983 Act is made Article 5 compliant were not complied with.

2. This is an application for *habeas corpus*. It was released for hearing by a judge sitting as a judge or deputy judge of the High Court pursuant to either section 9(1) or 9(5) of the Senior Courts Act by Mitting J by an order made on 19 April 2012. It is common ground that, since this is an application for *habeas corpus*, the court has no discretion to refuse the order sought if satisfied that the claimant's detention is unlawful. It is accepted by the defendant that, if and to the extent that the case is approached on the alternative basis as being an application for judicial review, in practice the same consequence will follow having regard to the status of the defendant as a public authority.

3. These proceedings have been commenced in the name of the claimant. There was before me and included within the hearing bundle medical evidence which is relatively recent which suggests that the claimant is suffering and has suffered for some time from the relevant mental disorder and, since the proceedings have been commenced in his name, that caused me to enquire at the outset about the capacity of the claimant to initiate and prosecute these proceedings.

4. If the claimant lacked capacity, then he was a protected party to whom CPR Part 21 would apply and, if he did have relevant capacity, then it was not clear why, as in fact was the case on the papers before me at the start of this hearing, the provisions relating to the filing of evidence in support contained in SC 54.1(2) and (3) had not been complied with. In the result these difficulties were rectified at the outset, firstly by the provision of evidence coming from the claimant's solicitors concerning capacity and a letter from the defendant's solicitors accepting that the claimant had relevant capacity to bring and proceed with this litigation.

5. In relation to the failure to comply with the technical requirements of the rules applicable to applications of this sort that was rectified by the filing of a very short witness statement from the claimant confirming the proceedings were brought with his knowledge and consent.

6. Against that background I now turn to the substance and first turn to the statutory framework. Section 2 of the Act provides, insofar as is material:

"(1) an application for admission for assessment

7. Subsection (4) refers to a period not exceeding 28 days beginning with the day on which the person concerned was admitted and provides also that he should not be detained after the expiration of that period unless, before it has expired, he had become liable to be detained by virtue of a subsequent application order or direction under the following provisions of the Act.

8. By section 3 of the 1983 Act it is provided as follows:

an application for admission for treatment

he is suffering from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and ...

(c)it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and

(d)appropriate medical treatment is available for him.

(4)In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case."

9. The powers contained in section 3 are to be read subject to the provisions of section 11, for the reasons I have already indicated. Insofar as is material, section 11 of the 1983 Act provides:

approved mental health professional ...

approved mental health professional, that professional

(4)An approved mental health professional may not make an application for admission for treatment or a guardianship application in respect of a patient in either of the following cases—

(a)the nearest relative of the patient has notified that professional, or the local social services authority on whose behalf the professional is acting, that he objects to the application being made; or

(b)that professional has not consulted the person (if any) appearing to be the nearest relative of the patient, but the requirement to consult that person does not apply if it appears to the professional that in the circumstances such consultation is not reasonably practicable or would involve unreasonable delay.**"**

10. It is true to say that the nearest relative referred to in section 11 retains the ability to challenge detention subsequent to admission, but that is not of the same quality of detention challenge as that referred to in section 11, because section 11 reposes an outright veto subject to removal in the hands of the nearest relative; whereas the powers which apply after admission under section 3 provide merely that the nearest relative can seek discharge, which may be trumped by a decision of the hospital and which ultimately then must be resolved by a tribunal.

11. A code of practice has been issued under section 118 of the Mental Health Act which summarises the principles which apply to AMHPs when making decisions under section 11.

12. In relation to section 11(4) the Code of Practice is to the following effect:

"4.58 Before making an application for detention under section 3, AMHPs must consult the nearest relative, unless it is not reasonably practical or would involve unreasonable delay.

4.59 Circumstances in which the nearest relative need not be informed or consulted include those where:

· it is not practicable for the AMHP to obtain sufficient information to establish the identity or location of the nearest relative, or whether to do so would require an amount of investigation involving unreasonable delay; and

· consultation is not possible because the nearest relative's own health or mental incapacity."

13. As I have already indicated, the provisions of section 11 are designed to make the relevant provisions of the Mental Health Act compliant with Article 5 of the European Convention on Human Rights. This point is emphasised in paragraph 4.61 of the Code of Practice, which is to the following effect:

"4.61 Consulting and notifying the nearest relative is a significant safeguard for patients. Therefore decisions not to do so on these grounds should not be taken lightly. AMHPs should consider all the circumstances of the case, including:

· the benefit to the patient of the involvement of their nearest relative;

· the patient's wishes (taking into account whether they have the capacity to decide whether they want their nearest relative involved and any statement of their wishes they have made in advance);

· any detrimental effect that involving the nearest relative would have on the patient's health and well-being; and

· whether there is any good reason to think that the patient's objection may be intended to prevent information relevant to the assessment being discovered."

At paragraph 4.62 of the Code of Practice it is said that:

"4.62 AMHPs may also consider the degree to which the nearest relative has been willing to be involved on previous occasions …

4.63 If they do not consult or inform the nearest relative AMHPs should record their reasons. Consultation must not be avoided purely because it is thought that the nearest relative might object to the application."

14. The requirements imposed by section 11 have been considered in a number of authorities, mainly at first instance. The relevant authority for present purposes which most accurately and comprehensively summarises the relevant principles is contained in the judgment of Wyn Williams J in R(V) v South London and Maudsley NHS Foundation Trust and LB Croydon [2010] EWHC 742 (Admin). The issue that arose in that case was summarised by Wyn Williams J at paragraph 32 as being whether the relevant professional in that case "should not have made an application when she did since she could not conclude that a consultation with the nearest relative would cause unreasonable delay." In paragraph 33 Wyn Williams J said:

"An approved mental health professional has to form a judgment upon the issue of whether holding a consultation would involve unreasonable delay. In reaching that judgment or decision, he or she must consider the circumstances. Those circumstances, in my judgment, can only be those which are known to the professional or believed by the professional to subsist."

This statement of principle made by Wyn Williams J is reflected in the Code of Practice to which I have referred and

is reflected in the common ground between the parties which places emphasis upon the subjective nature of the decision making undertaken by the approved professional.

15. However, there are limits to what can be permitted and the limits are those summarised in paragraph 35 of Wyn Williams J's judgment in V. In particular at paragraph 35 he approves the statement of principles contained in paragraph 42 of the judgment of Burnett J in GD v The Hospital Managers of the Edgware Community Hospital and Anr [2008] EWHC 3572 (Admin), which were to this effect:

"...given the circumstances engaged in cases of this sort, the court will inevitably be sensitive to the difficulties faced by those who have to make difficult decisions, sometimes in fast-moving and tense circumstances. The question might be, for example, whether it was open to the decision maker on the information available to him to reach the conclusion he did. In both Re D and the case of WC the court used the words 'plainly wrong' as shorthand for that concept."

16. That, then, is the primary legal basis on which this challenge was advanced. There was an alternative basis upon which the claim was advanced by reference to the principles to be derived in E v SSHD [2004] QB 1044, [2004] EWCA Civ 49. The issue which arose in that case, very shortly, was that facts relevant to the fairness of a decision taken by an immigration tribunal came to light only after that decision had been promulgated and before an appeal could be heard, and the issue was whether the tribunal could direct the re-opening of its proceedings for the purpose of taking account of those material facts. It was held by the Court of Appeal that mistakes of fact giving rise to unfairness was a separate head of challenge on an appeal on a point of law, at least in statutory contexts where the parties shared an interest in cooperating to achieve the correct result. The general principle is that identified in the leading judgment of Carnwath LJ, as he then was, at paragraph 66 where he said this:

"In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

17. The point which is advanced by reference to these principles, in summary, is that, as will become apparent shortly, the mobile phone number of the claimant's nearest relative as maintained in the records of the first defendant was an old mobile phone number. It is apparently that number that was called by the professional seeking admission of the claimant to hospital under section 3, possibly amongst other numbers called, and in those circumstances it is submitted that an error of that sort engages the principles identified by the Court of Appeal in E. I will return to that issue at the end of this judgment.

18. The evidence as to substance was given by the relevant AMHP and by the nearest relative. I refer to the nearest relative hereafter as "Ms P". I do so because Mitting J directed that these proceedings were to be anonymised in relation to the name of the claimant and it seems appropriate to refer to the nearest relative in the way I have described in order to avoid the risk of that anonymisation process being undermined.

19. Ms P's evidence was accepted in its entirety by the defendants in the sense that she could have been but was not required to attend for cross-examination on her statement. Insofar as it is material, that statement establishes that :

a. Ms P was the maternal aunt of the claimant;

b. On the afternoon of 29 July 2011 she was not contacted by any mental health professional about any issue concerning the claimant or at all;

c. Ms P could not specifically remember if she had missed any mobile calls on 29 July but thinks that she would have noticed if she had, as she was especially concerned in relation to the claimant because of his move from London to the defendant's hospital in Derby. In relation to that point the documentation which has been filed within the claim bundle demonstrates that contact was made by the hospital in London where the claimant was initially detained under section 2 with the nearest relative;

d. Ms P's mobile telephone number at relevant time. She confirms that it was a contract not pay-as-you-go telephone and also that the hospital in London where the claimant was initially detained had that number available to them and had used it to call her on a number of occasions. The evidence is not entirely satisfactory as to what material was available to the defendants but it would appear that the notes maintained by the hospital in London were transferred with the claimant to Derby and therefore it seems reasonable to assume that the relevant number would appear within those records given the circumstances identified by Ms P concerning communication between her and the London hospital where the claimant was initially detained;

e. At paragraph 6 of her witness statement, that she had an earlier mobile number which she stopped using in March 2011. She confirmed that that number had a voicemail facility but that the phone was unused and the SIM card relevant to it had been destroyed when she acquired her new phone. I was told in the course of submissions, and there was no challenge to it at the time, that the defendants had been invited to confirm the existence of the voicemail facilities on the two telephones and it was not suggested that what was contained in the witness statement was incorrect;

f. As Ms P says at paragraph 7 of her witness statement as follows:

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"No one told me anything about [GP] being detained under his current Section 3. The day he arrived at the Radbourne unit at the Royal Derby Hospital [GP] rang me to say he was in the hospital so I rang the hospital to find out what was going on. I spoke to someone on the ward who was quite vague and said they were reviewing his mental health and he needed to see the doctor about it. They didn't say he was under a Section 3 or about to be put on one. The conversation was about [GP's] mental health and how he was doing. The first I knew of [GP's] detention under Section 3 was when I went to the Radbourne unit about a week later and there was a review where the doctor said they had sectioned him for six months and wanted to move him to the Kedleston unit."

20. It is common ground that the claimant arrived at the second defendant's hospital at about 1pm on 29 July and that Mr Griffiths Jones, the relevant approved professional employed by the first defendant, attended shortly thereafter. It is also common ground that the claimant's section 2 certification was due to expire at or around midnight on 29 July 2011.

21. Mr Jones's description of what occurred as set out in his witness statement was to the following effect. In relation to his initial involvement and decision-making Mr Griffiths Jones says at paragraph 4 of his witness statement:

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"[GP] arrived on the enhanced care ward at Radboure Unit Royal Derby Hospital at around 1pm on the afternoon of 29 July 2011. [GP's] Section 2 was due to expire at 23.59 that night. Upon reviewing his medical records it became apparent to me that the medical recommendations for treatment were incorrect as they recommended he be treated in the London hospital rather than naming the Derby hospital. I therefore took the decision that it was necessary to

obtain two further medical recommendations for treatment. There was one Section 12 doctor already on the ward and I arranged for a second doctor to come to the ward to undertake the assessment. The second doctor arrived at approximately 15.30 hours. Upon arrival of the second doctor we undertook the assessment with [GP]. The assessment took approximately 40 minutes. Following the consultation with GP I discussed the recommendations with the doctors."

It is thus clear that the process of assessment had been completed by no later than about 4.15 to 4.30 on the evening of 29 July.

22. The information to be culled from GP's medical records is summarised in paragraph 5 of Mr Jones's witness statement. I do not need to set that out in detail beyond saying that they record a long history of mental health difficulties, at least one period of detention under section 37 and 41 of the 1983 Act following a robbery and that the present situation had followed from the claimant becoming unwell while in Gloucester and having thrown a brick at a police van.

23. At paragraph 7 Mr Jones says that, following his discussions with GP, he concluded that he ought to be placed on section 3 because he was suffering from a chronic enduring illness, namely paranoid schizophrenia, and clearly presented a risk to himself and others in combination with the fact that he was of no fixed abode and was at risk that his mental health would further deteriorate if he was discharged from hospital. And then Mr Jones says this at paragraph 8 of his witness statement:

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"I then decided to establish who [GP's] nearest relative was in accordance with Section 26 of the Mental Health Act 1983. I had sight of the AMHP assessment report from his Section 3 detention in 2009 and it stated that [Ms P] [GP's] aunt was his nearest relative. I also consulted the hospital's electronic records which listed Ms P as his nearest relative in an entry dated 3 June 2009. If the nearest relative had changed since this date it would have been amended on the electronic system, the entry on the system said 'main carer/nearest relative ' was [Ms P]. I also noted that [GP's] aunt's name appeared in the notes more frequently than his mother's."

In relation to the question of contact Mr Jones said at paragraph 10 of his witness statement:

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"I attempted to contact [Ms P] by telephone on the number which we held on his records. During that afternoon I telephoned [Ms P] on five or six occasions but was unable to make contact and there was no voicemail facility for me to leave a message. I made various calls to [Ms P] in between reviewing the records, arranging medical assessments and speaking to [GP]. The ward staff advised me that they were very concerned as to whether they would be able to nurse [GP] safely on this ward and whether he may require more intensive care in a psychiatric intensive care unit. The staff were very anxious about [GP's] presentation and health and wanted a Section 3 in place as this would provide them with the scope to send him to a more suitable ward. Hearing of the ward staff's concerns in conjunction with the conclusions that I have reached from my discussions with [GP] I decided that I needed to complete the Section 3 papers there and then despite not having been able to make contact with his nearest relative. "

24. There is some other evidence of attempts to contact Ms P elsewhere in the records maintained by the second defendant, so at B60 within the bundle there is a note in handwriting prepared by a nurse which says:

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"GP on Section 2 MHA at present waiting for SW to complete Section 3 MHA. Attempted to contact NOK [that is next of kin] on number in notes. Message left without giving details of person."

In the course of his oral evidence I asked Mr Jones whether these contacts here referred to were attempted contact by him or attempted contact by the nursing staff. He considered they were attempts at contact by the nursing staff rather than him, though he expressed the view that this might have been after rather than before admission although the terms of the note suggest otherwise.

25. When the section 3 application was made, a form had to be completed by Mr Jones by which the various statutory requirements of the Mental Health Act are complied with. The relevant document completed at the time starts in the bundle at B5. The form, headed “form A6”, sets out as is required that it is addressed to the managers of the Derbyshire Health Care NHS Foundation Trust and a particular ward is identified, being the enhanced unit to which in the end the claimant was admitted. The form identifies the claimant by name and his address is being of no fixed abode and identifies Mr Jones as acting on behalf of the first defendant and as approved to act as an approved mental health professional for the purposes of the Act.

26. In relation to the question of contact with the nearest relative, the relevant parts provide, first of all at paragraph C on page B6, that the nearest relative has been identified as being Ms P and her address in Derby was given and then the form says this:

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"… in my opinion it is not reasonably practical/would involve unreasonable delay (delete as appropriate) to consult that person before making this application because … "

And there is then inserted in handwriting the following:

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"I have tried to contact several times but the mobile went to answer machine. As GP Section 2 is due to lapse later today and given his current state I felt it would involve unreasonable delay to consult with Ms P,"

27. There was a typed version of the assessment which was prepared and ultimately lodged in the computer records maintained by the defendants in which the issues I am now concerned with were rehearsed again. The nearest relative as identified as Ms P. Her relationship with GP was identified and her address given (see E63). At box 8 within the form, the medical assessment by the relevant section 12 medical practitioners is identified. There is a description of the claimant as being "hostile, guarded and paranoid”. A reference is made to the history of violence to others and, in particular, a recent assault on two members of staff at the hospital in London where the claimant had been detained under section 2 and referred to the fact that he had a number of convictions for robbery and burglary. At box 9 it is rehearsed as follows:

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"I was unable to contact GP's nearest relative Ms P who in the past has been involved with his care provision as his Section 2 was due to expire I decided that it would involve unreasonable delay and made Section 3 application without speaking to her."

In the “action taken” section of the form, at section 10, Mr Jones has inserted the following:

"As GP had been admitted to the enhanced care ward his status has now been upgraded from Section 2 to Section 3."

28. Notwithstanding the terms of Mr Jones's witness statement and his later oral evidence before me, where emphasis is placed upon the representations of nursing staff concerning alleged difficulties in arranging the

admission of the claimant to a psychiatric intensive care unit, that has to be viewed in context. The context is, first, that in fact the claimant was not admitted to a psychiatric intensive care unit for at least 14 days following his admission and certification under section 3. Secondly, there was nothing in the notes which suggests that that was being contemplated as a serious possibility at the time when the section 3 certification was made nor is there anything within the notes which suggests that GP's condition was anything other than stable, albeit stable in the way I have described, and indeed Mr Jones frankly confirmed that that was so.

29. That, then, is the factual background and the question which has to be addressed is whether or not Mr Jones was entitled to dispense with consultation of the nearest relative in the way described in the documentation.

30. As is apparent from section 11(4)(b) a relevant professional is entitled to dispense with consultation of the nearest relative in two disjunctively described circumstances, that is where either: a) consultation is not reasonably practicable or b) it would involve unreasonable delay. At the outset there was a question mark, at any rate in the mind of counsel for the claimant as to which of these two grounds had been relied upon by the defendant, but counsel for the defendant -- entirely fairly -- indicated that the defendant sought to rely exclusively upon the second of the two alternatives, namely that to consult the nearest relative would involve unreasonable delay, and the question which arises on an application of this sort is whether that plainly wrong, or whether that was within the range of appropriate decisions available to Mr Jones.

31. Before turning to a consideration of that issue, I emphasise for the avoidance of all doubt that at no stage was it indicated -- entirely properly by the claimant -- that Mr Jones's evidence was being attacked on the basis that he was acting in a way which was in any sense either dishonest or reckless. What was being suggested in the end was that the exercise that he undertook was one in the circumstances which could not be justified, having regard to the fact that section 11(4) constitutes a vital protection to the liberty of the subject in circumstances where the effect of a section 3 admission is to deprive the person concerned of liberty, in circumstances where to obtain a discharge from such an admission may take many months and involve a number of different and difficult procedural steps.

32. In the end the justification advanced for contending that the requirement of section 11 was satisfied in the circumstances of this case, that is to say that consultation would involve unreasonable delay, depended upon the information that had been supplied to Mr Jones by the nursing staff. It is an oddity of this case that, notwithstanding that the relevant health authority is a defendant to these proceedings, none of the relevant nursing staff have been produced in order to confirm the opinions apparently expressed, and no independent check was undertaken by Mr Jones at the time concerning the information which he understood was being supplied to him by the nursing staff concerned.

33. Thus, whilst it was apparently the case that Mr Jones was being informed that there might be difficulties in admitting the claimant to a PICTU without prior section 3 certification, no attempt was made to check whether that was so, either with the relevant PICTU or at all. It became apparent from the evidence that was given by Mr Jones that admission to the PICTU was primarily a security and intensive level of care issue and thus was likely to be driven by a deterioration in the condition of the claimant such as to suggest that staff, in the rather more open unit where he was in the end admitted, would be unable to cope with the claimant.

34. In the end, as I have said, GP was admitted to the very ward in which his assessment had taken place and there is nothing in the medical records to suggest that at any stage during the period from his arrival at about 1pm until the point at which the certification was issued under section 3 at about 5 pm that there was any marked or indeed any deterioration in his condition and behaviour beyond that which had manifested itself from the outset. Since he was not in the end admitted to a PICTU immediately following his certification, the conclusion that I reach from that material is that his condition did not at any stage during that period warrant that extreme move.

35. The other point which needs to be made in the context of this case is that Mr Jones told me very frankly, in the course of his evidence, that it was his practice to visit, and he had on occasion sought to comply with section 11(4) by visiting, the nearest relatives' homes for the purpose of carrying out the consultation necessary. It is a

noticeable feature of this case that Ms P lived at an address which was at all material times known to both Mr Jones and the defendants because it was apparent and patent on the face of the records maintained by the defendants to which I have referred and the address of Ms P was in Derby. Whilst driving to and from the nearest relative's home would have taken a little time, estimated by Mr Jones as half an hour or perhaps a little more, there can be no suggestion that it would have taken a disproportionate amount of time.

36. Thus, on the evidence that is available, the question has to be asked as to whether it was plainly wrong to proceed with an immediate certification in the circumstances as they were. I conclude that it was because, as I have attempted to explain, section 11 provides constitutional protection for those that are faced with detention under the Mental Health Act. Compliance with the requirements of section 11(4) is therefore the price which is paid for the ability of those charged with the treatment of those with mental illnesses and disabilities to detain people without immediate recourse to a court and in a way which is compliant with Article 5. Thus there is a heavy duty on those who carry out these tasks to ensure that those statutory provisions are complied with.

37. If the position had been that this claimant had been deteriorating markedly and acutely during the period of the assessment and immediately thereafter; if the medical evidence had been that there was no alternative but to admit to a PICTU immediately; if the evidence was such that demonstrated that the congestion in the PICTUs available to the defendant was such that admission would only be permitted notwithstanding an acutely deteriorating patient; if the person concerned had been certified under section 3; then the approach adopted by Mr Jones would have been beyond reproach. However, that is not the evidence in this case. The evidence in this case establishes that the claimant was essentially stable, albeit demonstrating all the symptoms identified in the records and, on any view, attempts could have been made to contact the nearest relative at her home either in the course of the afternoon or early evening and that contact and consultation process completed many hours before the section 2 certification expired at midnight.

38. I was assured that there was no practical difficulty in arranging the transfer of a patient from the ward to which in the end the claimant was admitted to a PICTU if the medical need demonstrated such a transfer to be required irrespective of the day or time at which such became necessary. The process which was described by Mr Jones involved admission into the ward to which the claimant was admitted and then administrative transfer thereafter as clinical need required.

39. Thus, as I see it at the moment on the evidence which is available, there was no obvious pressing need to certify and in circumstances where, even doing the best one can in favour of the defendants, there was a substantial period from about 4.30 in the afternoon through until midnight in which the consultation process could have been undertaken before the section 3 admission request was signed.

40. As I have said, the position would have been different if there had been a spiralling and acute deterioration of condition coupled with evidence of significant risk to nursing staff and the like but there is no such evidence. The defendants emphasised -- entirely correctly -- that the margin of appreciation is extended by the authorities to someone in the position of Mr Jones, but that is a fact-sensitive issue. The margin of appreciation will extend to protect an official faced with a rapidly deteriorating situation of the sort I have described earlier in this judgment when the court will not for a moment judge the decision-making of the official concerned with a fineness that is not justified in such a difficult factual situation. However, the evidence in this case does not establish that there was any such acutely difficult situation. There was a patient who suffered from mental disorder who was transferred from the London hospital whilst subject to section 2 certification to Derby and who clearly did not wish to be in Derby or wish to be detained, but the evidence does not establish that there was a violently deteriorating situation which required immediate certification notwithstanding a failure to comply with section 11. In those circumstances I conclude, as I say, without any criticism of Mr Jones beyond that I have identified already, that was unlawful.

41. In those circumstances it is not necessary that I consider at any length the alternative submission that was advanced by reference to the decision in the case of E. However, I should make it clear that, had this been the basis on which this application was advanced, I would have found some difficulty in acceding to the submissions

made on behalf of the claimant. As I have already emphasised, section 11(4) creates a subjective requirement and it is difficult to see how the subject nature of the requirement could be qualified by reference to the essentially objective concept of a mistake of fact as identified in E and therefore I prefer to leave that issue to one side to be resolved in a case where the facts of the case require the resolution of that question, which is not this case.

42. In the circumstances, however, I will grant the declaration of unlawfulness which I was required to grant.

43. JUDGE PELLING: Right is that it?

44. MR SACHDEVA : My Lord, yes. We simply ask for our costs and secondly detailed assessment.

45. JUDGE PELLING : Is that opposed?

46. MR BURROWS : No. I don't think it can be.

47. JUDGE PELLING : No. Well then, are you legally aided?

48. MR SACHDEVA : We are, yes.

49. JUDGE PELLING : Well then, it would be the normal order wouldn't it?

50. MR SACHDEVA : Detailed assessment of public funds and then the defendant to pay the claimant's costs.

51. JUDGE PELLING: Yes, absolutely so you can draw up an order in those terms.

52. MR SACHDEVA : My Lord, can I thank you for sitting late. I am sorry you have had to sit late. I am most grateful to you dealing with the case.

53. JUDGE PELLING : Do you want to say something?

54. MR BURROWS : Well only that I assume that in due course there will have to be a directions hearing for the further proceedings if there are to be any.

55. JUDGE PELLING : Would you like me to reserve those to myself on the basis it will speed things up?

56. MR SACHDEVA : I would invite you to do that, yes.

57. JUDGE PELLING : I will do that and can I ask you please to consider, in the interests of saving costs all round whether if there has to be directions, either they can be agreed, in which case obviously well and good, or if not they can be dealt with either by written submission or by telephone.

58. MR SACHDEVA: The telephone I am sure will …

59. JUDGE PELLING : Thank you very much

60. MR SACHDEVA: Thank you, my Lord.
