CO/943/2010

Neutral Citation Number: [2010] EWHC 742 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 8 February 2010

B e f o r e:

MR JUSTICE WYN WILLIAMS

Between:
THE QUEEN ON THE APPLICATION OF V

Claimant

v

SOUTH LONDON & MAUDSLEY NHS FOUNDATION TRUST

First Defendant

LONDON BOROUGH CROYDON

Second Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
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(Official Shorthand Writers to the Court)

Mr Matthew Seligman appeared on behalf of the Claimant
Mr Vikram Sachdeva appeared on behalf of the Defendant
Mr Martin Russell appeared on behalf of the Second Defendant

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE WYN WILLIAMS: Last Thursday 4 February 2010 this application was listed before Sir Michael Harrison for hearing. By that date it had become clear to the parties that there was a need for further evidence. The evidence to which I refer is evidence from a lady called Miss Yvonne Palin, who was centrally connected with the decision to detain the applicant. Accordingly, Sir Michael Harrison adjourned the hearing, ordered the London Borough of Croydon (Miss Palin's employers) should be made a party to the proceedings and either directed or invited her to make a witness statement. Miss Palin made a witness statement, dated 4 February 2010.

2. On 5 February I heard the substantive application. At the commencement of the proceedings, Mr Seligman, on behalf of the claimant, made an application to cross-examine Miss Palin. That was to some extent opposed by counsel for the defendant and counsel for Croydon, although by the end of their submissions I think they both accepted that a degree of cross-examination was probably inevitable. Accordingly the proceedings commenced with Miss Palin giving oral evidence.

3. I now propose to give the reasons which led me to the conclusion which I expressed last Friday. Inevitably the focus of this judgment will be upon ground 1 since, to repeat, that was the issue most debated during the course of the hearing.

4. The claimant is aged 42. He was born in Singapore, but he has lived in the United Kingdom since he was about 11. It is clear that in recent times at least the claimant has suffered from a psychiatric illness or illnesses although the precise diagnosis has been a matter of some debate. In 2004 and/or 2005 the claimant was an in-patient at the Bethlem Royal Hospital. In June 2009 he was admitted to that hospital again for an assessment. On this occasion he was an in-patient for two weeks. The Social Services Department of Croydon has been involved with the claimant at least since the period just identified, ie since 2004 or 2005. I am not told precisely when such involvement began but that is essentially irrelevant.

5. On 31 December 2009 the claimant was detained at the Bethlem Royal Hospital under the provisions of Section 3 of the Mental Health Act 1983. That detention was at the instigation of the local authority. After some days had gone by the defendant took the view that the claimant's detention may not have been in accordance with proper procedure. Accordingly, as from 7 January 2010, the defendant ceased to rely on the power to detain under Section 3 of the 1983 Act. Rather on 7 January the defendant exercised powers under Section 5 (2) of the 1983 Act so as to justify the claimant's continued detention.

6. Section 5 (2) of the 1983 Act authorises the detention of a person who is already a patient at hospital. The authority to detain subsists for 72 hours. It is common ground in this case that the defendant was entitled to detain the claimant, pursuant to Section 5 (2) at hospital until 7.30 pm on 10 January. It is clear that by 8 January consideration had been given to a further exercise of the power to detain under Section 3. I say that because on that date a doctor was asked to provide a report upon whether detention for treatment under that section was justified. In summary, the doctor in question - Dr Mufti - provided such a report. However following the completion of that report

nothing further was done prior to 7.30 pm on 10 January to ensure that the claimant could be detained lawfully at hospital from that time.

7. Probably the best indication of what was happening on 8, 9 and 10 January can be gleaned from what I will call clinical notes made by various professionals who were involved with the claimant during this period. These notes are to be found at pages 254 to 256 of the second volume of the trial bundle. I do not propose to read out the notes for the three days in question. To repeat, however they are the best guide as to what was happening to the claimant during that period.

8. It is right however that I should draw specific attention to the notes for 10 January. The notes begin with a nursing report. It is apparently a note made early in the morning of 10 January and refers to events during the night of 9/10 January. The note reads:

> " [the claimant's first name] was in his bedroom from the start of the shift. He only came out at some point around 23.10 hours but went back for a while. He remains isolated and keeping to himself."

9. Later on 10 January there is an important note made by the Social Services Department. Again I do not propose to read the whole of it, but these two paragraphs appear to me to be important:

> "12.30 pm: contact with EDT co-ordinator Zena Green. Whilst dealing with another referral, Zena said she had been contacted by the wards to again request a MH Act assessment. I discussed the previous knowledge of the case and it appears the request is not an emergency. I understand due to the administrative error this does not constitute an emergency assessment needing out-of-hours team ? work and further causes difficulty (implication or proper consultation with treatment professionals involved who know the patient/the type of treatment involved and consultation with NR [nearest relatives] for the AMHP. Currently the patient is settled and it would be appropriate for a 5 (2) order to elapse and for [there is obviously a misprint] to reconsider and review as and when if the circumstances change ..... SPR on call for Croydon, a doctor who has had discussion with the ward. It appears the ward of the view that the order ends at 9.00 hours today and, if need be, in the unlikely event the patient is insistent to leave, the SHO will need to review at the time. It may be another 5 (2) - appears to be the advice from Chris Allen on Friday - is considered at the time but only in the event of absolute necessity to use such an order. The ward to consider in advance all other least restrictive options first. This may include review/use of medication, increased staff support if patient is irritable. SPR on call has agreed to discuss this with the ward."

10. Shortly afterwards another note was made at 1300 hours. This note was made by medical staff at the ward:

> "Croydon duty SPR, Sunday 10.1.10 discussion with duty AMHP re CV's

section 5 (2) elapsing at some point today. Discussion to the fact that his section 3 was made invalid due to a typo (treating hospital not specified) and that there was no acute justification for MHA for section 3 today as duty AMHP does not know the case and did not feel comfortable with assessing for section 3. Indeed this would seem poor practice to re-assess for s.3 in light of reasoning for invalidation of previous forms."

Later in the same not but obviously referring to a different time -

"Discussed with NS at 2000 on 10.1.10 who stated that CV was settled and agreed to remain informally until he was reviewed by his community team on Monday."

11. It seems to me that on the basis of those notes it is reasonable to conclude that the medical staff in particular were content to let matters take their own course. There was no need to invoke powers under the Mental Health Act on Sunday 10th since it seemed to the staff that the claimant would probably remain in hospital voluntarily and await events on 11 January.

12. On 11 January, at some time during the morning, Miss Yvonne Palin (the lady to whom I have already made reference) was asked to go to the Royal Bethlem Hospital in order to undertake an assessment of the claimant under the Mental Health Act. She is for these purposes an approved social worker. In summary, what occurred was that Miss Palin and a doctor - to whom I will refer, as she did, as Dr Samby - attempted to undertake an assessment of the claimant. He refused to be assessed. Accordingly at a point in time - and I shall deal with that in detail in due course - Miss Palin decided to make an application to the staff on the ward for his detention under Section 3 of the Mental Health Act. She did that - as is always the case - by completing the relevant documentation. From that time - whenever it was - until I made my order last Friday the claimant was detained by the defendant at the Bethlem Royal Hospital apparently under the power given to the defendant by Section 3 of the 1983 Act.

13. In a moment it will be necessary to scrutinise what happened on 11 January with considerable care. It is convenient at this stage however to detail the relevant statutory provisions.

14. I am grateful to Mr Seligman for setting out the important statutory provisions in his skeleton argument. As Mr Seligman points out, Sections 2 to 5 of the 1983 Act are introduced under the sub-heading "Procedure for hospital admission".

15. Section 3 is obviously central to this case and the relevant parts read as follows:

"3 (1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as 'an application for admission for treatment') made in accordance with this section.

(2) An application for admission for treatment may be made in respect of a patient on the grounds that -

(a) he is suffering from 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 a 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.

(3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in sub-section (2) above are complied with and each such recommendation shall include -

(a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraphs (a) and (b) of that sub-section; and

(b) a statement of the reasons for the opinion so far as it relates to the conditions set out in paragraph (c) of that sub-section specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate.

(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."

16. Section 6 of the Act provides as follows:

"(1) An application for the admission of a patient to a hospital under this Part of this Act be duly completed in accordance with the provisions of this Part of this Act shall be sufficient authority for the applicant or any person authorised by the applicant to take the patient and convey him to the hospital at any time within the following period, that is to say, in the case of an application other than an emergency application, the period of 14 days beginning with the date on which the patient was last examined by a registered medical practitioner before giving a medical recommendation for the purposes of the application.

(2) Where a patient is admitted within the said period to the hospital in such an application as is mentioned in sub-section (1) above or, being within that hospital is treated by virtue of Section 5 above as if he had been so admitted, the application shall be sufficient authority for a manager to detain the patient in a hospital in accordance with the provisions of the Act.

(3) Any application for the admission of a patient under this Part of this Act, which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it."

I interpose at this stage to mention that if a person is taken into hospital under the provisions of Section 3 of the Act, it is open to the hospital to keep him there for treatment for a period of up to six months. That arises by virtue of Section 20 of the Act.

17. Section 11 of the Act is of critical importance in this case, and the relevant parts are as follows:

> (1) Subject to the provisions of this section, an application for admission for treatment ..... may be made either by the nearest relative of the patient or by an approved mental health professional, and every such application to specify the qualification of the applicant to make the application.
>
> .....
>
> (4) An approved mental health professional may not make an application for admission for treatment ..... in respect of a patient in either of the following cases -
>
> (a) the nearest relative of the patient has notified that professional ..... 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."

18. There is one further statutory provision which, at least on the papers, appeared to have considerable significance in this case. That is Section 15 which deals with rectification. Section 15 (1) provides:

> "(1) If, within the period of 14 days beginning with the day on which a patient has been admitted to a hospital in pursuance of an application for admission for assessment or for treatment, the application or any medical recommendation given for the purposes of the application is found to be in any respect incorrect or defective, the application or recommendation may, within that period and with the consent of the managers of the hospital, be amended by the person by whom it was signed and upon such amendment being made the application or recommendation shall have effect and shall be deemed to have had effect as if it had been originally made as so amended."

19. In this case it is common ground that the claimant's nearest relative was not consulted before Miss Palin submitted her application to the defendant under Section 3.

20. How did this come to be the case? There are a number of sources of evidence as to the relevant circumstances. First, there is a form which was completed by Miss Palin on 11 January. Second, there is a report which she compiled for her employers dealing with the claimant's admission to hospital. I am not entirely clear whether this report was made on 11 January, but certainly it was made very shortly thereafter if not on 11 January.

21. The next source of evidence is a witness statement made by Miss Palin and dated 4 February.

22. The final source of evidence is Miss Palin's oral evidence. It is with her oral evidence that I begin. Miss Palin told me that she attended the ward at which the claimant was a patient - Gresham 2 - at or about 12.30 pm on 11 January. She had been asked to attend by her employers. The first thing she did when she arrived at the ward was to approach a staff nurse to obtain information about the current state of affairs. She told me that she was informed by the staff nurse that the claimant was then being detained at the ward under Section 5 (2) of the 1983 Act. Miss Palin asked when the authority under that sub-section would expire. She was told that it would expire at 7.30 pm that night.

23. Having been provided with that information, the next thing that Miss Palin did was to attempt to assess the claimant. At all material times Miss Palin was accompanied by Dr Samby, and he was authorised from the medical point of view to provide the necessary assessment and opinion should it be the case after such assessment that Section 3 of the Act was to be invoked. When the doctor and Miss Palin attempted to assess the claimant, he would not co-operate. Some short time went by and then, as I understand it, a second attempt was made at an assessment. Again the claimant essentially failed to co-operate.

24. Miss Palin told me that she knew that it was necessary for her to consult the claimant's nearest relative before making any application under Section 3 of the Act. She also knew that the claimant's nearest relative was his mother. She had a telephone number for the mother. Consequently, before completing the application necessary under Section 3, Miss Palin telephoned the number which she had in order to speak with the claimant's mother. As it happened, the claimant's mother was not at home. His father was there. Miss Palin left a message with the father asking that he ask the mother to contact Miss Palin as soon as she returned from wherever she was. In her evidence-in-chief Miss Palin suggested that this conversation took place sometime between 1.30 pm and 2 pm on the afternoon of 11 January. She told me that it was after this telephone call that Dr Samby completed his part of the relevant section 3 form, as I so describe it.

25. Miss Palin told me that she made a second call to the telephone number where she expected the claimant's mother to be. Still she was not at home. By now - said Miss Palin - it was approximately 2.30 pm. Accordingly, she decided to make an application under Section 3. She completed the Section 3 form and then handed it to a nurse on the

ward, thereby completing the making of the application. The nurse on the ward accepted it. Apparently from that moment the claimant was detained under Section 3 of the Act.

26. Immediately after completing the application, Miss Palin went to make another assessment at the hospital. This lasted for approximately half-an-hour. She then decided to return to her office, which was a journey of about 35 minutes from the hospital. On that timescale, it seems likely that Miss Palin arrived at her office at about 4 pm. In any event, by the time that she had returned to her office there was a telephone message for her from the claimant's mother. She had returned Miss Palin's call. She was able to do so because she had Miss Palin's direct line. Miss Palin immediately returned the call, had a short conversation with the mother and satisfied herself that the claimant's mother did not object to the admission to hospital of her son.

27. That oral evidence was in substantial agreement in important respects with the evidence which Miss Palin gave in her witness statement. It is also similar to the written records which she made on or shortly after 11 January. There is however at least one very important difference, and that relates to the timing of the events which I have just described. To recap, Miss Palin in her oral evidence was suggesting that she arrived at the hospital around about 12.30 pm and left at around about 3 to 3.30 pm and that the relevant events were occurring between those times.

28. The contemporaneous documents however show that that is probably wrong. First, there is the Section 3 form itself. As I understand the documentation - and I confess I may have this wrong - the Section 3 form is made up of a number of parts, one part completed by the relevant medical professionals, another part completed by Miss Palin or the relevant social worker and a third part which is completed by a nurse, if it be a nurse, to whom the application form is delivered at the ward. Whether this constitutes in the end one form or is simply a series of forms does not matter. But it does appear as if the intention is that at the end of the process there will be one document albeit made up of a number of parts. The important point is the part of the Section 3 document which shows that the application was made and when it was made. Page 72 of bundle 1 is signed by Mary Kearns, who is accepted to have been the nurse on the ward where the claimant was a patient.

29. Miss Kearns said (on page 72) she received the application under Section 3 on 11 January - that of course is not controversial - but at 12.15 pm. That is significantly before Miss Palin told me that she had made the application. I have asked myself whether there is any reason to doubt the likely validity of the time specified by Miss Kearns on the form. I can think of none. Accordingly, it seems to me to be highly probable that the application for the claimant's admission under Section 3 was made at 12.15 pm that day. If I had been in doubt about the accuracy of the form, my doubt would have been allayed by the clinical notes for the same day. Miss Palin herself clearly completed clinical notes in respect of the Section 3 admission (they appear at page 253 of Vol 2 of the trial bundle). On the basis of that clinical note it would appear she had completed the application by 11.42 am that morning and that she had arrived at the ward at about 10.30 am that morning. To repeat, therefore, it seems to me that the contemporaneous records demonstrate that this application for admission was

formulated between about 10.30 and 12.15 pm and submitted to the ward at 12.15 pm that day.

30. Another important aspect of Miss Palin's evidence related to what she was told about the claimant's status at the hospital. To repeat, she was told that on 11 January he was still being detained pursuant to powers under Section 5 (2) of the Act, albeit that the time would expire at 7.30 pm later that day.

31. I have scrutinised her evidence about this aspect with care but I can find no reason to reject it. I am quite satisfied that that is what she believed. I am quite satisfied that she believed it because she was told it by a member of the defendant's nursing staff. Support for it is to be derived from the part of the Section 3 form which Miss Palin completed on 11 January. As will become apparent shortly, this form contains mistakes. However Miss Palin wrote upon it -

> "Section 5 (2) expires today 11.1.10, 7.30 pm."

In so writing, I am satisfied that she was simply expressing what she had been told by a member of the defendant's medical team.

32. The primary ground advanced by Mr Seligman, or at least the ground which I elevated to his primary ground during the course of the oral submission, was that Miss Palin 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. As I have indicated, Section 11 (4) provides that if it appears to the approved mental health professional that in the circumstances a consultation with the nearest relative would involve unreasonable delay, he or she is authorised by Section 11 to make the application notwithstanding the absence of a consultation.

33. During the course of the oral hearing there was a debate about the proper interpretation of sub-section (4). In my judgment, its meaning is clear. 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. To suggest, as Mr Sachdeva did, that it would be an appropriate decision under the sub-section even though the circumstances which justified the decision were unknown at the material time to the approved mental health professional would, in my judgment, run contrary to the use of the word "appears" in sub-section (b) and its reference to the circumstances in sub-section (b).

34. Accordingly, to repeat, in my judgment, something can only appear to the professional if he or she is acting upon circumstances which are known to him or her or believed by him or her to exist. If the approved mental health professional reaches a decision that it appears to him or her that the circumstances are such that consultation would involve unreasonable delay then, to repeat, an application for admission can be made without consultation.

35. How is this court to review, if it is entitled to review, a decision made by an approved mental health professional under Section 11 (4)? In my judgment it is to embark upon that task by applying the principles which have been formulated in a number of cases but which are conveniently summarised in the decision of Mr Justice Burnett in GD v The Hospital Managers of the Edgware Community Hospital and Another [2008] EWHC 3572 (Admin). At paragraphs 40 to 45 of his judgment Mr Justice Burnett said this:

> "40 In R (WC) v South London & Maudsley NHS Trust [2001] EWHC Admin 1025 ..... Scott Baker J (as he then was) came to a similar conclusion, confirming that the test was a subjective one with which the court would not interfere unless, for example, the social worker had failed to apply the legal test in section 26, which explains who is to be regarded as the nearest relative, or acted in bad faith or in some way reached a conclusion which was plainly wrong.
>
> 41 What both these judgments [that is reference to an earlier case] demonstrate is no more than a well-recognised proposition that when a statute imposes a subjective test of the sort one sees in section 11(4) of the Act, this court will not interfere with the decision made save on well-recognised public law grounds.
>
> 42 Furthermore, in that review exercise, 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.
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> 43 Ms Street, who appeared, as I say, on behalf of the defendants, submitted that unless the assertion contained in Form 9, from which I have read, was dishonest, this court should not interfere. She focused on the word 'dishonest' because it had been found in paragraph 15 of the judgment of Otton LJ in Re D.
>
> 44 In my judgment, that is too austere an approach. The court should look at the question on a wider basis because it is concerned with the legality of the process. In doing so, the court will recognise that the decisions can only be questioned on a public law basis and, as I have already indicated, in an environment where some sensitivity to the difficulties faced by those making the decisions is required.
>
> 45 Scott Baker J alluded to bad faith. Misuse of power, which is an aspect of the same thing, would be another label that might be attached. Both are classic grounds of review which, if made out, would result in the process under consideration being adjudged unlawful. His reference to

misconstruing section 26 was also an example of his recognising that a decision might be flawed because a wrong legal approach had been taken."

36. For my part, I am content to proceed on the basis that I should interfere with the decision made by Miss Palin only if I am satisfied that it was plainly wrong. In my judgment, it was. She was proceeding on the basis that the claimant was lawfully detained in hospital and would remain lawfully detained until 7.30 pm on 11 January 2010. That was her state of mind throughout the relevant period. Yet she decided at 12.15 pm that it was to be the case that no consultation would take place with the claimant's nearest relative, since to do so would cause unreasonable delay.

37. In my judgment such a decision was not open to a reasonable decision-maker and was plainly wrong on the facts. That of course is a comparatively harsh judgment upon her decision. Nonetheless, in my view, it is justified. When she was asked questions by Mr Seligman about her state of mind that morning she freely conceded that she was in a hurry. She was not in a hurry, however, because of particular pressure of work that day. She told me that prior to attending Gresham 2 ward, she had attended an earlier mental health assessment. As I have already related, after dealing with the claimant, she attended a third mental health assessment and then returned to the office.

38. I make it clear that I fully recognise - and do not wish to diminish in any way - the suggestion made to me that all social workers with functions like Miss Palin work under pressure and things can change very quickly. However I can only seek to analyse what happened on that day.

39. On that day, in my judgment, she was not under such pressure of work which would have caused her to reach the view that a consultation would have caused unreasonable delay. Her approach that day is made clear by the fact that she made important mistakes in the form which she completed. The relevant page in Vol 1 of the trial bundle is page 70. Miss Palin had to complete three pages of this document. Page 69 was the first page; she completed that accurately. Page 70 was the second page; it contained these inaccuracies. First, she specified that she was unable to ascertain who was the patient's nearest relative within the meaning of the Act. She was not pressed to explain why she made that mistake. All in court proceeded on the basis that it was a mistake made without there being any suggestion of bad faith on her part. Nonetheless it was a fundamental and important mistake. She had been dealing with this family for many months, as is clear from the documentation. It is very hard to understand how she could have said she was unable to ascertain who the patient's nearest relative was.

40. Miss Palin made a second mistake on the same page. She specified that the first medical recommendation for the purposes of Section 3 was made on 11 January; that also was wrong. The first medical recommendation had been made on 8 January. It was the second medical recommendation which was made on 11 January.

41. In my judgment, those mistakes do cast light upon whether or not on this occasion Miss Palin was properly exercising the powers conferred upon her. However quite regardless of the completion of the form, Miss Palin had to make a judgment about

whether to delay for a consultation given that she believed that the claimant would remain in hospital under the lawful exercise of powers until 7.30 pm that night. She was not able to explain, in my judgment, how it could be that she formed the view that a delay of some hours that day would be unreasonable delay in the context of the statutory provision. I am left with the strong impression that Miss Palin took the view that she would make the application in the absence of the consultation because she believed that the claimant's nother would consent.

42. In reaching that conclusion, she was not, on the face of it, acting unreasonably. The claimant's mother had consented in the past, and it was a reasonable conclusion to draw that she would consent again. That however is not the point. Consultation is an appropriate safeguard in this statutory procedure. In my judgment, the approved professional should not make assumptions even if they appear to be justified assumptions about what the result of consultation would be.

43. For the reasons which I have sought to elucidate therefore, it is my judgment that the decision made by Miss Palin shortly before 12.15 pm that day was plainly wrong in the circumstances as were known to her and as she believed them to be. It is an irony that central to her belief was itself a mistake. That was a mistake induced by a member of staff of the defendant. However she was acting on the basis of that information. To repeat, that was one of the circumstances which she knew or believed. Had the true state of affairs been explained to her, we do not what she would have done. It would be speculation on my part and unjustified speculation to consider what she would have done had the true state of affairs been described to her.

44. Accordingly, it seems to me that ground 1, as presented by Mr Seligman, is made out. Since this is an application for habeus corpus, no question of discretionary withholding of relief arises. I make it clear that once the illegality has been identified then - certainly in the vast majority if not all cases - the remedy should be granted. No suggestion was made to the contrary in the submissions made to me.

45. I do not propose to deal with the other grounds raised by Mr Seligman in this judgment; it is already long enough. They were disposed of somewhat summarily during the course of the hearing. If anybody needs to scrutinise them, no doubt the relevant part of that transcript can be obtained.

46. There is however one point I should raise before finishing. It had been part of the defendant's case that even if there were errors on the face of the documentation completed by Miss Palin and even if those errors led to the conclusion that there had been illegality, it was open to Miss Palin to rectify her errors by relying on Section 15 of the Act. That came about in summary in this way. The letter of claim was sent by the claimant's solicitors to the defendant on 20 January 2010. It was a full letter of claim intended to comply with the pre-action protocol. There was a quick response, a response on the same day which acknowledged, in effect, that the Section 3 form completed by Miss Palin, may contain errors but suggesting that those could be rectified.

47. On 22 January 2010 Miss Palin purported to rectify the form. Essentially she corrected what she had said about being unable to ascertain the nearest relative. She also specified that the authorisation under Section 5 (2) had expired before she completed the form. It had been part of the defendant's case that rectification pursuant to Section 15 was open to the defendant. However when I posed with Mr Sachdeva the bald question, which was along these lines, "If my view of ground 1 is as I have set it out in this judgment would you be able to rely upon rectification? - after taking instructions - he said that he could not. For the reasons which I have sought to formulate, this is a case in which it is appropriate to grant the writ of habeus corpus.

48. MR SELIGMAN: I have an application for my cost to follow the event. The order is in the terms of the draft set out before you although paragraph 2 may require further - - - - '

49. MR JUSTICE WYN WILLIAMS: When we were last together I di not know whether anybody would appear. I appreciated that some people would appear but whether there would be appearances to deal with all consequential matters. As it happens, all three of you are here. I will not resile from what I said. I presume Mr Sachdeva's clients wish to oppose costs. I will either hear their submissions now or receive written submissions since I indicated that I would do that on Friday.

50. MR SACHDEVA: I can be quite brief. I do not know if you have Mr Seligman's order. It might assist me to run through my objections. I do agree part of it.

51. MR JUSTICE WYN WILLIAMS: Do you mean the formal draft order?

52. MR SACHDEVA: There is one today.

53. MR JUSTICE WYN WILLIAMS: No. I have not had it yet; I do not think so anyway. Is it in the bundle?

54. MR SACHDEVA: There was one attached to the grounds.

55. MR JUSTICE WYN WILLIAMS: I have, yes.

56. MR SACHDEVA: The change to the title would be to include Croydon as the second defendant, and upon hearing counsel for the first and the second defendant. The rest of the first page seems fine. Point 1 you granted on Friday over the page. Point 4 we have no objection to. Mr Seligman has yet to make his application under Section 139. I should point out though that in law what is required for the leave of the High Court is the act purporting to be done under the Act to be done either in bad faith - that has never been suggested - or without reasonable care. There has been again nothing in writing as to why it is said - although this court has held that it is not a decision that should have been made - why that amounts to want of reasonable care because that is a rather different concept. That application has not actually been made in any way, in writing or orally.

57. There is a further problem. You will see at page 133 in the bundle that there is a case of Mr Justice Burton of 11 February 2009, bundle 1. The issue that arose in that case

right at the end was whether you can have any damages application attached to a habeus corpus application. Obviously with judicial review there is not a procedural problem. It starts at page 133.

58. The particular point about damages is at 151 onwards, paragraph 49. Obviously there is a potential claim for damages. Paragraphs 49 to 51 discuss Mr Justice Burton's uncertainty about whether an action for damages can properly attach to an action for habeus corpus. It is obviously up to the claimant how they wish to put their case. I would respectfully suggest to the court that it is highly unclear, putting it as favourably to this claimant as possible, that there can be any action for damages attached to a habeus corpus application as opposed to an application for JR. Mr Justice Burton - although he obviously wished that you could do it - resiled from deciding that you could.

59. If Mr Seligman seriously wishes to seek permission under Section 139 to bring an action for damages, he is going to have to set out his case as to why that is even attachable in principle as a matter of procedure to action habeus corpus. That is why we object to the Section 139 application for those two separate reasons.

60. As to costs, apart from the nitpicking that it should be assessed rather than taxed, we accept that there is some liability for costs. We say we should only pay half of the costs. If you look at page 351 you will see that Mr Seligman had four different points to make. He succeeded only on one of them. The other three points he would not have succeeded on. They include statements such as - - the admission under Section 3, even if it had been perfected in theory, amounted to an improper use of the Section 3 power. And it was actually improper not to rectify under Section 15 rather than - - having taken legal advice from a respected solicitor in the field, simply act on that. That was a simply hopeless submission, with the greatest respect to Mr Seligman.

61. The other three grounds were not to the point at all. There was a submission about the language of the medical recommendations not being sufficient to constitute section 3 applications. Yet the forms clearly indicate they were Section 3 forms and they ticked the right parts of the section. They are not meant to set out chapter and verse in an acute situation. That is why half the costs at most should be granted because these bundles are much larger than one would expect if the point was that you should not have concluded that on the 11th that consultation would have caused unreasonable delay. If that was the point we would have had a bundle one-quarter the size and the action would not have taken nearly as long.

62. MR RUSSELL: The Section 139 point, Croydon takes no costs.

63. MR JUSTICE WYN WILLIAMS: No, sure.

64. MR RUSSELL: It is not an application of which Croydon had notice until this morning, nor is it an application which is foreshadowed in the draft final order at pages 24 and 25 in the bundle, nor, as far as Croydon can ascertain, is it something that is foreshadowed in the lengthy points of claim or rather grounds of claim as they are titled or the skeleton argument, the grounds of claim running from page 6. In those

circumstances Croydon respectfully supports the stance taken by the hospital. If the claimant wishes to identify the particular grounds on which he wishes to proceed in an action for damages, he should identify those and make an application in the ordinary way rather than seeking to attach it in a rather informal way at the conclusion of the habeus corpus application. Certainly, as far as Croydon is concerned, we had no indication that this formed any part of these proceedings for which they have taken a co-operative rather than an adversarial stance.

65. MR JUSTICE WYN WILLIAMS: Mr Seligman, it may be that the defendants, as I now call them, are entitled to ask you to particularise your claim in writing. Whether in the end that is cost effective and who those costs will fall upon is a matter for them to consider. But that is what they are asking you to do. I do not think I will take a plunge and give you permission without having first sight of the basis upon which you put it precisely.

66. MR RUSSELL: Yes.

67. MR JUSTICE WYN WILLIAMS: It may be that it will turn out to be an unnecessary step but we should not pre-judge it especially by a judge who has been saying that people should not pre-judge the issue of consultation. I will not make order 2. So far as the costs are concerned, I certainly have no difficulty with you having a substantial proportion of your costs against the defendant. It is becoming more common where there is more than one ground to be a bit more flexible than one used to be.

68. MR RUSSELL: Yes. My Lord is aware of the time spent focussing on the ground, or possibly the two grounds, that you will see. We dealt only summarily at the end with the others.

69. MR JUSTICE WYN WILLIAMS: You were not as convinced that they were as hopeless as Mr Sachdeva and I seemed to think.

70. MR RUSSELL: In that respect perhaps I would have been given a little more time.

71. MR JUSTICE WYN WILLIAMS: I think it was more important from your client's point of view to identify the ground that was going to succeed. That is why we did that way. It is a matter of discretion. I think what is fair here is that you should recover 75 per cent of your costs against the defendant, and paragraph 4 will be - - paragraph 1 is as formulated. I do not make paragraph 2. I say at paragraph 3 I will say first defendant - so that there is no confusion about it - should pay 75 per cent of the claimant's costs of these proceedings to be assessed on the standard basis if not agreed and paragraph 4 is as drawn.

72. To save anybody having to re-read this case for the purposes of any permission that you seek under Section 139 of the Mental Health Act, I direct that any application for permission pursuant to Section 139 of the Mental Health Act be made within seven days and it is reserved to me. Any written response must be served within three days of that and then I will make a decision and then everybody will know where they are and I can depart from London knowing that my work has been done.

73. MR RUSSELL: Can I ask that the transcript of your judgment be expedited?

74. MR JUSTICE WYN WILLIAMS: Yes. I suppose that is fair enough given that we want to get on with it.

75. MR SACHDEVA: I have one further application and that is for permission to appeal.

76. MR SELIGMAN: My friend does not need it on an application for habeus corpus.

77. MR SACHDEVA: I am not totally persuaded that that is right.

78. MR JUSTICE WYN WILLIAMS: I think the easiest way for me to deal with this is the orthodox way. If permission is necessary, I refuse it because I think I am right. If you do not need permission, that is fine. If you need permission, you should seek to persuade the Court of Appeal.
