Case No: B4/2018/3046

Neutral citation no: [2018] EWCA Civ 2962

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(Mr Justice Hayden)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 21 December 2018

Before:

LORD JUSTICE BAKER

Between:

A LOCAL AUTHORITY

Applicant

- and -

BF

Respondent

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Tel No: 020 7404 1400 Email: civil@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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KATIE SCOTT (instructed by the Local Authority Legal) appeared on behalf of the **Applicant**

PARISHIL PATEL QC (instructed by Bindmans - Pro Bono) appeared on behalf of the **Respondent**

Judgment

(Approved)

LORD JUSTICE BAKER:

1. This is an application for permission to appeal by a local authority against orders made by Hayden J under the inherent jurisdiction of the High Court sitting in the Family Division, in respect of a 97-year-old man (hereinafter referred to as "BF"). The order requires BF until further order (a) not to live or reside at the bungalow which has been his home for many years; (b) not to reside with his son (hereinafter referred to as "KF") at any other address; and (c) to reside at a care home (hereafter referred to as "B House") or such other address, excluding his home, as may be agreed between the applicant local authority and BF, the agreement of the local authority not to be unreasonably withheld.

2. This order is an interim order, expressed to last until a further hearing to take place no later than 31 January 2019 at which Hayden J will consider the local authority's application for discharge of the injunctions. I was told this morning that that hearing has now been fixed for 16 January 2019, that is to say some three and a half weeks hence.

3. The appeal notice was filed at the start of this week and referred to me. In view of the urgency and the sensitivity of the issues, I decided to list the permission to appeal application for an oral hearing today. I am very grateful to counsel and to the solicitor for the local authority who have prepared for this hearing at very short notice, and also to Mr Parishil Patel QC, and his instructing solicitor, Ms Hobey-Hamsher, who have appeared today on behalf of BF acting pro bono in support of the local authority's application.

4. The background to the case and the history of the proceedings are set out Ms Scott's very helpful skeleton argument and can be summarised as follows. As set out above, BF is 97 years old. He suffers from a range of health problems, including blindness in both eyes, diabetes and osteoarthritis. For many years he has lived in a two-bedroom bungalow, initially with his wife until she sadly died some years ago, and subsequently with his son, KF. It is plain from the evidence put before Hayden J, which I reviewed, that the relationship between BF and KF is a complex one. As BF explained to Ms

Hobey-Hamsher's colleague as recorded in a telephone attendance note put before me this morning, BF promised his wife that he would look after KF after she had died and he has tried to adhere to that promise, notwithstanding the very great difficulties that KF himself has faced arising from long-term problems with alcoholism and drugs addiction.

5. The local authority started these proceedings in March 2017 because it was concerned that BF was being prevented from receiving necessary care services as a result of the conduct of KF. By that date the local authority had commissioned up to ten different care agencies to provide support and care to BF, all of which had been withdrawn as a result of the behaviour of KF, coupled with the condition of the property. There had been apparently 50 incidents logged on the local authority's computer system involving allegations about KF's behaviour, ranging from what's described in Ms Scott's note as "low physical altercations" to "aggressive and obstructive behaviour".

6. In addition, as I have said, the property was in a poor condition. It was dirty, cold and unsafe. There was live electrical wiring visible in the kitchen, rubble on the floor, no working boiler, a flooded kitchen floor, no running water, very little furniture, a broken toilet, a broken cooker, and in addition, the gas pipe had been dismantled by KF. BF was unsafe moving around the house and therefore spent much of his time in his room, which was itself dirty, cluttered and damp.

7. At the start of these proceedings, on 30 March 2017, Moor J made injunctions under the inherent jurisdiction in respect of KF restraining him from behaving in an aggressive or intimidating manner towards health, social care or housing professionals attending the property, or from impeding or interfering with repair and remedial works to the property.

8. When the matter returned to court a few weeks later in April 2017, the local authority reported that it had not been able to get any co-operation from KF or for that matter BF, concerning the repairs to the property. The local authority sought a declaration that it had done all that it could be reasonably expected to do to provide BF with care and therefore discharged its duties to him. At that hearing, KF and BF agreed to move out

of the property to enable repair works to be carried out and, as a result, Moor J concluded that it was not necessary immediately to grant the application for the declaration sought by the local authority, but he further directed that they would be entitled to the declaration sought if BF and KF failed to comply with their agreement to move out of the property, and he ordered that such a declaration should take effect on 12 May in the event that they did not do so. As things turned out, both KF and BF moved out of the property within that time period. The works were started and completed by the end of July 2017. New wiring was installed, together with a new wet room, a new kitchen. The property was decorated and shortly afterwards BF and KF returned.

9. However, the local authority continued to encounter difficulties in providing support to BF because of the problems associated with KF's behaviour. After extensive negotiations, another care agency hereafter referred to as “S Agency”, which had provided care to BF in the past, agreed to become involved again, but only on the condition that the local authority met certain safeguards, including the provision of personal safety devices for the care staff to wear. S Agency duly began daily visits to BF in November but, by 6 December 2017, the agency was advising the local authority that, due to the constant intimidating behaviour and aggressive outbursts from KF, coupled with unco-operative behaviour by BF, they were withdrawing their care services. At that stage the local authority social workers themselves stepped in to provide weekly welfare visits. During those visits, there were yet further instances of intimidating behaviour by KF towards the social worker staff. Furthermore, and worryingly, a further renewed deterioration of the property was observed by the local authority team.

10. By May 2018, it had become clear to the local authority, according to Ms Scott's submissions, that BF did not want the help of the social workers. In any event, the local authority had been unable to secure any other contract with any other care provider who was willing to attend the property. All offers of respite support made to BF had been refused. Accordingly, the local authority issued an application seeking a declaration that, having done all that could be reasonably done to provide BF with care, it should be discharged from all duties owed to him. That application was granted at a

hearing by Moor J on 5 June 2018. Thereafter, the arrangement in place was that the local authority would continue to provide a meal to be delivered to BF daily and that, should BF change his mind about wanting to receive services of the local authority, he would contact them and seek their assistance.

11. Perhaps unsurprisingly given the history, between June and September 2017, the situation deteriorated again. BF had a number of hospital admissions and was reporting to the Care Line emergency line of the local authority that he had not eaten or drunk anything. Matters finally came to a head on 27 September when BF called the Care Line 15 times and the local authority visited the property again. The description of the scene is set out in graphic detail in the witness statement of Ms C, social worker, who reported in summary that she and her colleagues found BF sitting bare-bottomed on the wooden slats of his bed. He had no mattress or sheets. He was surrounded by flies, blood, food, faeces and clutter. He was in pain. He reported he had had nothing to eat or drink for several days. He was hallucinating.

12. After very great difficulty, the local authority finally persuaded him, after several hours, to go via ambulance to respite at a care home B House. The local authority was at that stage concerned that, as a result of his age, his increasing infirmity, in particular a urinary tract infection, dehydration and generally poor physical health, have lost capacity to make decisions about his residence. Accordingly, they issued a further application within these proceedings seeking an urgent *ex parte* hearing out of hours. That was heard by Francis J on the telephone that evening. At the conclusion of that hearing, the judge made an order restraining BF from returning to his home or living with KF and requiring him to live at B House pending further order.

13. The matter came back to court a week later on 3 October. At that stage, BF informed the court that he understood he could not return to his home until works had been done to the property, that he did not want KF to continue to reside at his home and that he would not return to live at his home until the next hearing. BF also made clear his intention to comply with the assessment of capacity which the local authority had instigated. The injunctive relief made on the phone by Francis J was continued, and the matter listed for a further hearing on 5 November.

14. BF then prepared, and the local authority served on KF, a notice terminating his licence to reside at the property. As I have mentioned, KF is a man with his own difficulties, not only his behavioural difficulties as described above, but long-term problems with alcoholism and drug addiction. The local authority's plan at that stage was focused more on KF's needs seeking to assist him to move out of the property and to facilitate his access to services to address in particular his drug addiction. Regrettably, that plan has not worked. KF remains living at the property.

15. The hearing on 5 November was adjourned because it was thought that further time would be needed to resolve the issues regarding KF and also because the capacity assessment had not been completed. That assessment was, however, completed shortly afterwards, prepared by Dr Francis, consultant psychiatrist, actually dated 2 November, although in fact not available, as I have said, until after the hearing on 5 November. In the report Dr Francis described his meeting with BF and his conversation with him and concluded:

> "Mental state examination revealed an appropriately dressed gentleman. His speech was coherent and relevant. His mood is currently euthymic. He denied any suicidal ideations or plans. There were no abnormal perceptions. He was orientated in time, place and person."

Dr Francis concluded that BF has the capacity to decide on his living arrangements and added that he was aware of the risks, not only to himself but to others were KF to continue to live at the property.

16. The matter therefore returned to court on 10 December before Hayden J. In addition to the report from Dr Francis, the judge had further statements from social workers in which the judge was told that no repairs to the property had been undertaken because of KF's continued occupation and that, at the time of a visit to the property by the social worker on 16 November, BF's room remained uninhabitable, with no bed, rubbish piled in the corner and dirt, possibly faeces, all over the floor. A further visit attempted on 3 December, was unsuccessful, although the social worker looking through the window was able to see that the living room and kitchen appeared to be somewhat improved,

but that BF's room still appeared dirty, cluttered and without a bed. The social services also reported to the judge that BF had been told that, if he returned home to live with KF, as by this stage he wished, the local authority would be unable to secure any care for him as a result of the state of the property and KF's behaviour. BF had also been told that the local authority could not arrange for any repairs to the property whilst KF remained living there. Despite those warnings, it was BF's firm wish to return home to resume living with his son, a wish first expressed on 6 November and reiterated in subsequent conversations.

17. The matter was listed before Hayden J on 10 December last week in the urgent applications list, which was, (as it was invariably the case, particularly in December(, extremely busy. At the hearing, the judge not only heard evidence and submissions on behalf of the local authority, but also arranged for BF to take part by telephone (BF was unrepresented at that stage) and heard arguments from BF in which he urged the judge to allow him to return home. At the conclusion of the hearing, the judge delivered an *ex tempore* judgment in which he accepted that BF had capacity to make decisions about his residence pursuant to the Mental Capacity Act 2005, and further accepted, in the light of the evidence given by the social worker and the observations by BF himself, that he was not happy in the care home and wanted to return home to his bungalow to live with his son. However, Hayden J declined the application of the local authority to lift the injunctions and instead extended the injunctions on the terms indicated at the start of this judgment, until a further hearing when he could hear full argument on whether the relief could be granted pursuant to the inherent jurisdiction.

18. It seems that such was the pressure of time before the judge that it was not possible for counsel for the local authority to put forward all the arguments that she would have wished to deploy in relation to the local authority's application. In particular, in the oral hearing before the judge, it seems that no submissions were made as to Article 5 of the European Convention.

19. Subsequent to the hearing, Ms Scott sought to address the judge with a further submission that to extend the orders preventing BF returning home and requiring him to remain at B House, would infringe Article 5. As I understand it, at the judge's

direction, Ms Scott then submitted by email some written submissions expanding upon that argument and invited the judge to review or vary is order. But in the event, Hayden J declined to take that course.

20. Since the hearings before the judge, I am told that the local authority has visited BF in his care home to ascertain his views. I am told he is extremely upset and angry that he is not able to return home, particularly at this time of year. A more expanded picture of BF's views is set out in the attendance note prepared by Ms Hobey-Hamsher's colleague, following a telephone conversation with BF, and it is certainly clear that it is his ardent wish to return home.

21. As to the support package that would be available to BF were he to return home, the position is that the local authority would endeavour to try to progress his attendance at a day centre in accordance with what he has indicated he will be willing to do, that it will arrange for and pay for a hot meal to be delivered to BF and would facilitate any respite care he requests in due course and he will continue to have access to a Care Line. In other words, the package is broadly similar to the package that was in place between June and September 2018.

22. I turn to the law, and as so often is the case in this area of the law, any analysis of the jurisprudence is heavily indebted to the insights and labours of Sir James Munby. As Munby J, it was he who drew the various threads together about use of the inherent jurisdiction in this field in his seminal judgment in *Re SA* [2005] EWHC 2942; [2006] 1 FLR 867. That judgment was subsequently endorsed and amplified by this court in *Re DL* [2012] EWCA Civ 253; [2012] CPLR 504. No summary of the principles can do full justice to the learning and insight of Munby J and the judges of the Court of Appeal in *DL*, particularly in an *ex tempore* judgment such as this, but in outline I offer the following.

(1) The inherent jurisdiction of the High Court for the protection of vulnerable and incapacity adults remains available notwithstanding the implementation of the Mental Capacity Act 2005: *Re DL* per McFarlane LJ (as he then was) at [52] et seq and Davis

LJ at [70] et seq. In the memorable phrase first deployed by Lord Donaldson in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, it is "the great safety net".

(2) The jurisdiction extends to protecting vulnerable persons who do not fall within the categories of those covered by the Mental Capacity Act 2005: see, for example, *Re DL* itself and *London Borough of Wandsworth v M & Ors* [2018] 1 FLR 919; [2017] EWHC 2435 Fam, and further to providing additional protection to adults lacking capacity within the meaning of the Mental Capacity Act 2005 when the remedy sought does not fall within those provided in the Act: see, for example, *City of Westminster v IC* [2008] EWCA Civ 198 and *NHS Trust v Dr A* [2013] EWHC 2442 COP.

(3) As to the definition of vulnerability in these cases, the picture is comprehensively outlined in the judgment of Munby J in *Re SA* at paragraphs 77 and 78:

> "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.
>
> 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."

At paragraph 82 he added this:

> "In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive."

(4) Insofar as such actions infringe with rights under Article 8 of the Human Rights Convention, the interference may be justified to protect the health of the individual but only if they are necessary and proportionate: see *Re DL*, Mcfarlane LJ at [86] and Davis LJ at [76].

(5) In an appropriate case, orders can be made depriving someone of their liberty under the inherent jurisdiction provided the exercise of the jurisdiction is compatible with Article 5 of ECHR: see *Re PS (Incapacitated or vulnerable adult)* [2007] EWHC 623 Fam per MunbyJ.

(6) In cases involving incapacitated or vulnerable adults, Article 5(1) of the Convention provides, so far as relevant to this case:

> "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 a 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..."

Article 5(4) provides:

> "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."

(7) "...[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..." *Winterwerp v Netherlands* [1979] 2 EHRR 387 at [39].

(8) Under Article 5(4), the lawfulness of the detention has to be reviewed under the principles set out in the Convention. It must therefore be wide enough to bear on those conditions that are essential for the lawful detention. In particular, with a view to ascertaining whether there still persists unsoundness of mind of a kind or degree warranting compulsory confinement: see *Winterwerp* at [55] and *Re PS* at [20.

(9) As explained by Munby J in *Re SA*, the inherent jurisdiction in this context is exercisable not merely where a vulnerable adult is but also where he is reasonably believed to be incapacitated. Munby J added:

> "... 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." (Paragraph 80)

See also *Re SK* [2004] EWHC 3202 Fam; [2005] 2 FLR 230 and *London Borough of Wandsworth (Supra)* at [84]-[86]. But, as McFarlane LJ pointed out in *Re DL* at [68]:

> "Whilst such interim provision may be of benefit in any given case, it does not represent the totality of the High Court's inherent powers."

(10) In exercising its powers as set out above, the court must attach due weight to the individual's personal autonomy. The court must, furthermore, be careful to avoid the so-called protective imperative to which I first referred in the case of *CC v KK* [2012] EWHC 2136 (COP) at [25].

23. For present purposes, the important points from that summary are as follows.

(a) The inherent jurisdiction may be deployed for the protection of vulnerable adults.

(b) In some cases, a vulnerable adult may not be incapacitated within the meaning of the 2005 Act, but may nevertheless be protected under the inherent jurisdiction.

(c) In some of those cases, capacitous individuals may be of unsound mind within the meaning of Article 5(1)(e) of the Convention.

(d) In exercising its powers under the inherent jurisdiction in those circumstances, the court is bound by ECHR and the case law under the Convention, and must only impose orders that are necessary and proportionate and at all times have proper regard to the personal autonomy of the individual.

(e) In certain circumstances, it may be appropriate for a court to take or maintain interim protective measures while carrying out all necessary investigations.

24. In this case, Hayden J, having heard submissions as to the powers of the court, and the application in this case, reached the following conclusion at the end of his judgment, [23] to [24]:

> "23. ... It was submitted that once an individual had capacity the inherent jurisdiction had no reach. The Court of Appeal roundly and unequivocally rejected that and did not attempt to circumscribe the scope/ambit of the inherent jurisdiction. Whether it extends to the kind of protection that BF needs is moot. ... It strikes me as an important application of the law to the facts of this case. It requires an analysis of the scope of the law to impose welfare decisions on vulnerable adults who otherwise have capacity.
>
> 24. I am driven to adjourn this application so I can receive full argument on this point. All parties, not just BF and the local authority, are entitled to nothing less. In the meantime, and on an interim basis, BF should remain where he is. I know he is eager to go home and I do not discount the possibility that that he might be able to as a result of my final decision. At the moment and in the present circumstances, I am satisfied that the inherent jurisdiction reaches that far."

25. As explained above, the deprivation of liberty point under Article 5 was not taken before Hayden J at the hearing and, when raised subsequently before him, he declined to vary the order.

26. The local authority has reached the conclusion that (1) on the basis of medical assessments, BF has capacity to make decisions concerning his residence and care pursuant to the Mental Capacity Act 2005; (2) BF wishes to return to his own home to live with his son; (3) BF is not of unsound mind within the meaning of Article 5(1)(e) of the Convention; and (4) in those circumstances, notwithstanding the fact that BF is a vulnerable adult, the inherent jurisdiction cannot be used to override his capacitous decision to return home.

27. It is plain, however, that Hayden J agreed with the local authority's conclusions on (1) and (2) above, but at this stage did not accept its conclusions under (3) and (4). I infer that to be the case by reason of his refusal to vary the order when the deprivation of liberty point was subsequently put to him by email.

28. In submissions to this court, Ms Scott contends that there is no objective medical evidence that BF is of unsound mind, that he has not been diagnosed with any sort of mental disorder, let alone one that warrants compulsory confinement, and he has been assessed as having the mental capacity to make his own decisions. Hayden J found, as he said in his judgment, his intellect to be "intact and effervescent". In those circumstances she submits the case falls outside the proper ambit of the inherent jurisdiction and the injunction should have been discharged.

29. Her submissions are supported by Mr Patel on behalf of BF. He contends that it is arguable, indeed strongly arguable, that Hayden J erred in law in making the orders set out above and that the consequences of the errors made are very serious for BF who is being unlawfully detained at a place against his capacitous wishes over the Christmas period. Through Mr Patel, BF asks the court to allow permission to appeal and to list an appeal hearing urgently before Christmas, although Mr Patel notes that the reality of the situation may prevent the court from taking that course. In those circumstances, Mr Patel invites the court to stay the order until the determination of the appeal. Whilst he acknowledges that the judge made the order based on extremely serious concerns for BF's welfare if he returned home – risks which Mr Patel does not shrink from describing as risks to life as well as dignity – there are, he submits, equal, if not greater, risks if the stay is not granted in circumstances under which BF would be unlawfully deprived of his liberty and his autonomy not respected.

30. In my judgment, however, there is no real prospect of an appellate court concluding that the time-limited order made by Hayden J was wrong, for the following reasons.

31. On any view, BF is a vulnerable adult. His age, blindness and other infirmities, combined with his traumatic experiences living in squalid and dangerous conditions at home, render him particularly vulnerable. He has an extremely complex relationship

with his son, which, on the evidence which I have read, seems to me at least to have elements of the insidious, persuasive undue influence described by Butler-Sloss LJ in the passage quoted by Munby J in *Re SA* quoted above. He is, without question, a person who falls in the category of vulnerable adults for whom this expanded role of the inherent jurisdiction is intended. Indeed, as Mr Patel conceded, BF seemingly falls within all three of the categories identified by Munby J in *Re SA*.

32. Notwithstanding the expert evidence that BF is not incapacitous within the meaning of the inherent jurisdiction – evidence which, as I have described, is set out in a brief report quoted above – he is unquestionably in need of protection for a variety of reasons. The protection which the local authority can provide were he to return home would be limited and unquestionably insufficient to protect him. In those circumstances, it is the duty of the High Court to step in.

33. Secondly, although the expert evidence is that he has capacity to make decisions concerning his care and residence, there is certainly *prima facie* evidence that he is of unsound mind by reason of his infirmity and/or all the extraneous circumstances identified above. In assessing whether someone is of unsound mind, a judge looks not only at the expert evidence, but at all the evidence directed to the particular issue. Manifestly, the test of "unsound mind" is different from the test of capacity under the Mental Capacity Act. It is at this stage unclear whether he is of unsound mind, but there are certainly *prima facie* grounds for thinking that he may be.

34. Thirdly, further or alternatively, it is plain from the *Winterwerp* decision and consequential jurisprudence that, in an emergency situation, someone may be deprived of their liberty in the absence of evidence of mental disorder without infringing Article 5. In my judgment, that plainly encompasses a situation such as this. BF has been in residential care on an interim basis whilst assessments as to his capacity have been undertaken. Those assessments have concluded that he has capacity. For reasons that I have just explained, that is not necessarily conclusive as to whether he is or is not of unsound mind. That is a matter for the judge to determine when he has had a proper opportunity to assess all the evidence. But even if the evidence was conclusive on the question of unsound mind, his vulnerability is such that he could not conceivably be

returned home without very careful planning and a programme of support, buttressed, as may be necessary, by court orders - for example, possibly in this case, court orders directed at KF.

35. In circumstances where someone is found not to be of unsound mind, they cannot, of course, be detained in circumstances which amount to a deprivation of a liberty, but a move home in these circumstances is something which requires very careful planning and support. This is a crucial component of the protection afforded by the inherent jurisdiction and, in my judgment, entirely consistent with BF's overall human rights.

36. In reaching any decision of this sort, a judge must of course have proper regard to the principle of personal autonomy and not fall into the trap of being excessive protective. In this case, however, I am entirely satisfied that Hayden J, whose deep sense of humanity imbues every line of his judgment, was fully aware of those matters and gave them due respect. I therefore conclude that Hayden J was not wrong to refuse to make an order authorising BF's return home in the summary circumstances in which he found himself on 10 December. It is perhaps regrettable that the judge did not have more time to consider the matter, sitting as he apparently was as the urgent applications judge, but the ultimate decision whether to sanction BF's return home and if so on what basis, requires very careful thought. It is not a decision which can be made summarily, although it must be taken as soon as possible. The evidence of what is proposed must be carefully assembled and considered. Hayden J was entirely justified to conclude that such a decision should be adjourned until January.

37. I am extremely sorry that BF will not be going home for Christmas, but in my view, the judge was entirely right to refuse to permit him to do so and permission to appeal for those reasons is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400
Email: civil@epiqglobal.co.uk