

Neutral Citation Number: [2016] EWHC 851 (Fam)

**IN THE HIGH COURT OF JUSTICE**

**FAMILY DIVISION**

15 April 2016

Before:

**THE HONOURABLE MR JUSTICE PETER JACKSON**

Sitting at Manchester Civil Justice Centre

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Between :

David Spencer

**Applicant**

-and-

Carol Spencer

-and-

Darren Hall

-and-

Valerie Anderson

(Personal Representative of the Estate of  
William Brian Anderson Deceased)

**Respondents**

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**James Kemp** (instructed by TM Solicitors Ltd) for the Applicant

**Michael Mylonas QC** and **Amy Street** (instructed by Slater Gordon) for the Respondents

Hearing date: 14 March 2016; Judgment date: 15 April 2016

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**JUDGMENT**

## **JUDGMENT:**

### **Spencer v Anderson (Paternity Testing: Jurisdiction)**

**Mr Justice Peter Jackson:**

#### **Introduction**

1. These proceedings raise the issue of whether the Court can direct scientific testing of the DNA of a person who has died for the purpose of providing evidence of paternity.
2. The facts are unusual. David Spencer, who was born on 13 August 1986, has applied under Section 55A of the Family Law Act 1986 for a declaration that his father was the late William Anderson, who died intestate on 23 July 2012. The respondents to the proceedings are Mr Spencer's mother Carol Spencer, her former husband Darren Hall (who is named as Mr Spencer's father on his birth certificate), and the late Mr Anderson's mother, Valerie Anderson, who is the personal representative of his estate.
3. Mr Spencer now seeks a direction that a stored DNA sample extracted for medical purposes during Mr Anderson's lifetime should be tested alongside a sample of his own to establish whether or not he is Mr Anderson's son. The application is apparently unprecedented in this jurisdiction, though similar requests have been made in other countries. It is supported by Mrs Spencer and opposed by Mrs Anderson, Mr Hall remaining neutral. The arguments have been presented by Mr James Kemp on behalf of Mr Spencer and Mr Michael Mylonas QC and Ms Amy Street on behalf of Mrs Anderson.
4. My conclusions are that:
  - (1) There is no statutory power to direct post-mortem scientific testing to establish biological relationships.
  - (2) The High Court possesses the inherent power, to be exercised sparingly, to direct such testing in cases where the absence of a remedy would lead to injustice.
  - (3) In the present case testing should be directed.
5. This judgment is arranged in this way:
  - A. The background
  - B. The proceedings

## JUDGMENT APPROVED FOR PUBLICATION

- C. Statutory provisions
  - (1) The Family Law Act 1986
  - (2) The Family Law Reform Act 1969
  - (3) The Human Tissue Act 2004
  - (4) The Human Rights Act 1998
- D. First Issue: Does the FLRA 1969 apply?
- E. Second Issue: Does the High Court have an inherent power to order testing?
- F. Third Issue: If the Court has the power, should testing be ordered in this case?

### **A THE BACKGROUND**

- 6. Mr Spencer's case, based on his mother's account, is that he was conceived in the course of a relationship between his mother (then Ms Potter) and Mr Anderson which ended when she was about three months pregnant. His mother then began a relationship with Mr Hall and they registered him as the child's father at birth, knowing that this was not the case. Recently, DNA testing has confirmed that Mr Hall is not Mr Spencer's father.
- 7. The relationship between Mr Spencer's mother and Mr Hall later broke down and his mother married a Mr Spencer. Thereafter, in 1996, when he was aged 9, David Spencer's surname was changed from Potter (his surname at birth) to Spencer.
- 8. There was no contact between Mr Spencer and Mr Anderson during Mr Anderson's lifetime and it is not clear from the evidence whether Mr Anderson knew of Mr Spencer's existence, though everyone lived in the same general area. Mr Spencer states that as a child he was told by his mother that his real father had moved away. He never made any attempt to trace his father. At some point Mr Spencer's mother named Mr Anderson, but it was not until 2013, when Mr Spencer was 26 and Mr Anderson deceased, that Mr Spencer sought to establish his paternity.
- 9. The means by which Mr Spencer now seeks scientific testing arose in this way. In 2006, Mr Anderson was diagnosed with bowel cancer and underwent treatment at Central Manchester University Hospital. Because of a family history of bowel cancer, a blood sample was taken and DNA was extracted from it. This was used for testing for two high risk genes, which were not found. The hospital retains a single DNA sample and no longer holds blood or tissues.
- 10. In 2010 and 2012, the hospital wrote to Mr Anderson enclosing a consent form regarding testing to allow recommendations to be made in relation to his siblings. He did not sign and return these forms.
- 11. Mr Anderson died of a heart attack on 23 July 2012. He did not leave a valid will and on 1 May 2013, Mrs Anderson became his personal representative.

JUDGMENT APPROVED FOR PUBLICATION

12. Mr Spencer's case is that Mrs Anderson contacted him out of the blue in June 2013 to express her concern that Mr Anderson had died from a rare form of hereditary cancer and that in consequence Mr Spencer may be at risk and should take a DNA test. Having raised the issue, Mrs Anderson then progressively withdrew her co-operation.
13. Mrs Anderson's case is that Mrs Spencer contacted her out of the blue to announce that she was the mother of Mr Anderson's son and that Mr Spencer thereafter badgered her at a time when she was mourning the death of her son.
14. It is not necessary to resolve this conflict in the evidence, the known facts being sufficient for present purposes.
15. At all events,
  - (1) there is no reason to believe that Mr Spencer was aware of the history of bowel cancer in Mr Anderson's family before Mr Anderson's death, and
  - (2) the hospital states that Mrs Anderson contacted it in September 2013 to discuss paternity testing.
16. Further, in February 2015, Mrs Anderson gave Mr Spencer a handwritten letter to take to his GP. It read:

*"Dear Doctor,*

*The question has arisen as to whether your patient David Spencer is the unknown son of the late William B Anderson who I am the mother of.*

*Since there is a history of colon cancer in the family, it is essential we know David's parentage. The Manchester Centre for Genetic Medicine at the University Hospital have agreed to see David Spencer to establish one way or the other as they hold DNA samples on my son. That is, David would be tested to see if he is at risk of bowel cancer and clarify paternity.*

*Under the NICE guidelines I am requesting that you refer David as soon as possible using the reference [number given]. The consultant genetic counsellor is [name, address and telephone number given].*

*Many thanks for your co-operation,*

*Yours sincerely,*

*V Anderson"*

## JUDGMENT APPROVED FOR PUBLICATION

17. However, in April 2015, Mrs Anderson and one of her daughters contacted the hospital to request that the stored DNA sample should be destroyed.
18. In May 2015, Mr Spencer was seen by the hospital's genetic counsellor. She wrote to him after the consultation, saying that Mr Anderson had been diagnosed with bowel cancer at the age of 38 and that Mr Anderson's father and grandfather had both had the condition. This suggested that if Mr Spencer is Mr Anderson's son, he himself would have a 50% risk of inherited predisposition to bowel cancer, a condition known as Lynch Syndrome. Bowel screening by colonoscopy every two years was recommended and could dramatically reduce the risk of developing the disease. The counsellor asked to be informed of the outcome of any paternity testing.
19. A consultant surgeon has advised that the pattern of colonoscopy surveillance would not apply if Mr Spencer was unrelated to Mr Anderson and that the risks of colonoscopy are an approximately 1:1000 risk of bowel perforation.
20. The hospital takes a neutral stance and does not seek to participate in the proceedings. In a letter to Mr Anderson's sister in August 2015, the Chief Executive, stated the hospital's position:

*"Your brother provided the sample on the understanding that it would be used for genetic testing in respect of hereditary/genetic conditions in relation to himself and for other family members, specifically in relation to potential bowel cancer. As the DNA sample does not come under the jurisdiction of the Human Tissue Act because... it does not contain human cells, we have been advised that we can only release his sample if we receive written consent from both Mrs Anderson (as your brother's next-of-kin) and from the putative son or on receipt of a court order. Otherwise, we will retain the DNA sample indefinitely, as is our usual practice."*

21. It should be noted that the words "and for other family members" go further than the hospital's previous position, which is that the test was taken for Mr Anderson's own health benefit, with only the implicit possibility that the sample might be used for the medical benefit of other family members. It is nonetheless clear that the sample was not given or stored with any contemplation of, still less consent for, its use in paternity testing.
22. As appears below, the hospital has been asked to clarify the basis on which it retains the sample.

### **B THE PROCEEDINGS**

23. The application under s.55A was issued on 18 September 2015. His Honour Judge Duggan made a series of directions, giving the respondents and the hospital the opportunity to make representations, and listing the DNA testing issue for decision. He identified the following questions:

## JUDGMENT APPROVED FOR PUBLICATION

- (1) Does the phrase “*bodily samples*” in section 20(1)(b) Family Law Reform Act 1969 extend to DNA material already extracted?
  - (2) Alternatively, does the inherent jurisdiction of the High Court extend beyond the ambit of the Family Law Reform Act 1969 to permit comparison of the DNA of an applicant with samples of DNA already extracted from bodily samples of the deceased and kept in storage?
  - (3) What is the legal basis of paragraph 66 of Mrs Justice Thirlwall’s judgment of *Goncharova v Zolotova* [2015] EWHC 3061 (QB)?
  - (4) Does the testing of the DNA already extracted from a deceased person require consent and if so from whom?
  - (5) Is the refusal of consent by the deceased’s estate capable of creating an adverse inference whether under the Family Law Reform Act 1969 or the inherent jurisdiction of the High Court?
24. I will consider each of these questions in the course of this judgment.

### C STATUTORY PROVISIONS

#### (1) The Family Law Act 1986

25. Section 55A of the FLA 1986, which came into effect in 2001, provides:

#### **55A** *Declarations of parentage.*

- (1) *Subject to the following provisions of this section, any person may apply to the High Court, or the family court for a declaration as to whether or not a person named in the application is or was the parent of another person so named.*
- (2) *A court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, either of the persons named in it for the purposes of that subsection—*
  - (a) *is domiciled in England and Wales on the date of the application, or*
  - (b) *has been habitually resident in England and Wales throughout the period of one year ending with that date, or*
  - (c) *died before that date and either—*
    - (i) *was at death domiciled in England and Wales, or*
    - (ii) *had been habitually resident in England and Wales throughout the period of one year ending with the date of death.*

## JUDGMENT APPROVED FOR PUBLICATION

- (3) *Except in a case falling within subsection (4) below, the court shall refuse to hear an application under subsection (1) above unless it considers that the applicant has a sufficient personal interest in the determination of the application (but this is subject to section 27 of the Child Support Act 1991).*
- (4) *The excepted cases are where the declaration sought is as to whether or not—*  
*(a) the applicant is the parent of a named person;*  
*(b) a named person is the parent of the applicant; or*  
*(c) a named person is the other parent of a named child of the applicant.*
- (5) *Where an application under subsection (1) above is made and one of the persons named in it for the purposes of that subsection is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child.*
- (6) *Where a court refuses to hear an application under subsection (1) above it may order that the applicant may not apply again for the same declaration without leave of the court.*
- (7) *Where a declaration is made by a court on an application under subsection (1) above, the prescribed officer of the court shall notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration.*
26. It is common ground between the parties that Mr Spencer is entitled to bring his application and that the court must hear it. There is narrative evidence that would doubtless enable a conclusion to be reached on the balance of probabilities. However, DNA testing would answer the question of parentage with near certainty and would in effect determine the outcome.

### **(2) The Family Law Reform Act 1969**

27. Part III of the FLRA 1969 provides a structured regime within which the court can direct the use of scientific tests for the purpose of determining parentage in the course of civil proceedings. In its original form, this was by means of blood testing to provide evidence of the probability of paternity. The Family Law Reform Act 1987 updated the legislation to take account of the advances in DNA science (though it did not consistently update the part and section headings used in the original Act).
28. It is necessary to set out the relevant provisions of the legislation extensively.

### **PART III**

#### **PROVISIONS FOR USE OF BLOOD TESTS IN DETERMINING PATERNITY**

##### **20 Power of court to require use of blood tests.**

JUDGMENT APPROVED FOR PUBLICATION

*(1) In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction—*

*(a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and*

*(b) for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;*

*and the court may at any time revoke or vary a direction previously given by it under this subsection.*

*(1A) Tests required by a direction under this section may only be carried out by a body which has been accredited for the purposes of this section by—*

*(a) the Lord Chancellor, or*

*(b) a body appointed by him for the purpose.*

*(2) The individual carrying out scientific tests in pursuance of a direction under subsection (1) above shall make to the court a report in which he shall state—*

*(a) the results of the tests;*

*(b) whether any party to whom the report relates is or is not excluded by the results from being the father or mother of the person whose parentage is to be determined; and*

*(c) in relation to any party who is not so excluded, the value, if any, of the results in determining whether that party is the father or mother of that person;*

*and the report shall be received by the court as evidence in the proceedings of the matters stated in it.*

*(2A)...*

*(3) A report under subsection (2) of this section shall be in the form prescribed by regulations made under section 22 of this Act.*

*(4) – (6) ...*

**21 Consents, etc., required for taking of bodily sample.**

*(1) Subject to the provisions of subsections (3) and (4) of this section, a bodily sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent.*



(2) ...

(3) *A bodily sample may be taken from a person under the age of sixteen years, not being such a person as is referred to in subsection (4) of this section,*

*(a) if the person who has the care and control of him consents; or*

*(b) where that person does not consent, if the court considers that it would be in his best interests for the sample to be taken.*

(4) – (5) ...

**22 Power to provide for manner of giving effect to direction for use of scientific tests.**

(1) *The Lord Chancellor may by regulations make provision as to the manner of giving effect to directions under section 20 of this Act and, in particular, any such regulations may—*

*(a) provide that bodily samples shall not be taken except by registered medical practitioners or members of such professional bodies as may be prescribed by the regulations;*

*(aa) prescribe the bodily samples to be taken;*

*(b) regulate the taking, identification and transport of bodily samples;*

*(c) require the production at the time when a bodily sample is to be taken of such evidence of the identity of the person from whom it is to be taken as may be prescribed by the regulations;*

*(d) require any person from whom a bodily sample is to be taken, or, in such cases as may be prescribed by the regulations, such other person as may be so prescribed, to state in writing whether he or the person from whom the sample is to be taken, as the case may be, has during such period as may be specified in the regulations suffered from any such illness or condition or undergone any such treatment as may be so specified or received a transfusion of blood;*

*(e) prescribe conditions which a body must meet in order to be eligible for accreditation for the purposes of section 20 of this Act;*

*(f) prescribe the scientific tests to be carried out and the manner in which they are to be carried out;*

*(g) regulate the charges that may be made for the taking and testing of bodily samples and for the making of a report to a court under section 20 of this Act;*

## JUDGMENT APPROVED FOR PUBLICATION

- (h) make provision for securing that so far as practicable the bodily samples to be tested for the purpose of giving effect to a direction under section 20 of this Act are tested by the same person;*
  - (i) prescribe the form of the report to be made to a court under section 20 of this Act.*
  - (j) make different provision for different cases or for different descriptions of case.*
- (2) The power to make regulations under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.*

### **23 Failure to comply with direction for taking blood tests.**

- (1) Where a court gives a direction under section 20 of this Act and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances.*
- (2) Where in any proceedings in which the paternity of any person falls to be determined by the court hearing the proceedings there is a presumption of law that that person is legitimate, then if—*
- (a) a direction is given under section 20 of this Act in those proceedings, and*
  - (b) any party who is claiming any relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any step required of him for the purpose of giving effect to the direction,*
- the court may adjourn the hearing for such period as it thinks fit to enable that party to take that step, and if at the end of that period he has failed without reasonable cause to take it the court may, without prejudice to subsection (1) of this section, dismiss his claim for relief notwithstanding the absence of evidence to rebut the presumption.*
- (3) Where any person named in a direction under section 20 of this Act fails to consent to the taking of a blood sample from himself or from any person named in the direction of whom he has the care and control, he shall be deemed for the purposes of this section to have failed to take a step required of him for the purpose of giving effect to the direction.*

### **24 Penalty for personating another, etc., for purpose of providing bodily sample.**

*If for the purpose of providing a bodily sample for a test required to give effect to a direction under section 20 of this Act any person personates another, or proffers a child knowing that it is not the child named in the direction, he shall be liable—*

JUDGMENT APPROVED FOR PUBLICATION

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, or

(b) on summary conviction, to a fine not exceeding £400.

**25 Interpretation of Part III.**

*In this Part of this Act the following expressions have the meanings hereby respectively assigned to them, that is to say—*

*“bodily sample” means a sample of bodily fluid or bodily tissue taken for the purpose of scientific tests;*

...

*“scientific tests” means scientific tests carried out under this Part of this Act and made with the object of ascertaining the inheritable characteristics of bodily fluids or bodily tissue.*

29. A number of observations bearing on the present case can be made:

- (1) ss.20(1), by the use of the word *“and”* between its sub-sections, plainly contemplates a single direction being given for testing and sampling, the sampling being described in s.25 as being *“for the purpose of”* the testing.
- (2) ss.20(1), by the use of the words *“within a period specified in the direction”* in sub-section (b), plainly contemplates that sampling and testing will take place in the future.
- (3) ss.21(1) prevents the taking of a sample from an adult without consent. The provision of a sample cannot be enforced in any circumstances. A refusal to provide a sample can only be met by the drawing of inferences under s.23.
- (4) The testing process is governed by regulations made under s.22, currently the Blood Tests (Evidence of Paternity) Regulations 1971 (as amended).
- (5) s.25 defines *“bodily sample”* as being a sample of bodily fluid or bodily tissue. The definition does not include DNA itself, which is a chemical derived from chromosomes that are found in cells.
- (6) s.25 defines *“bodily sample”* as being a sample taken for the purpose of scientific tests, and *“scientific tests”* as being tests to identify inheritable characteristics. It does not cover tests taken for other reasons.
- (7) When amending the Act in 1987, Parliament did not make provision for the posthumous testing of samples taken in life.

**(3) The Human Tissue Act 2004**

30. The HTA does not apply to the present case as it does not regulate the use to which DNA itself can be put. s.45 defines bodily material as material which (a) has come from a human body, and (b) consists of or includes human cells. The Human Tissue Authority guidance states that:

*"DNA in itself is not bodily material so someone holding extracted DNA does not commit an offence under the Act if they analyse it and use the results."*

31. This is therefore not the occasion for a detailed examination of the HTA. It is sufficient to say that its purpose, as appears from the Explanatory Notes, is to provide a consistent framework relating, amongst other things, to the storage and use of human tissue. The Act arose from concern raised by events such as those at Bristol Royal Infirmary and Alder Hey Children's Hospital, where organs and tissue from children who had died were retained and used without proper consent. It was the product of a number of reports and of wide-ranging consultation.

32. Part 1 makes the use of human tissue lawful if the appropriate consent has been obtained and provides that an offence is committed if it has not. In the case of a person who has died, the appropriate consent can come from a range of family members and others. Further, section 45 provides that a person commits an offence if he has any bodily material intending that DNA in the material should be analysed without qualifying consent and that the results of the analysis should be used otherwise than for an excepted purpose. Excepted purposes are defined in Schedule 4, paragraph 5, to include such things as the functions of a coroner, the prevention or detection of crime or the purposes of national security. Sub-paragraph 5(g) gives as an excepted purpose *"implementing an order or direction of a court or tribunal, including one outside the United Kingdom."* but sub-paragraph 5(5) states that this shall not be taken to confer any power to make orders or give directions.

33. Guidance has been issued in this field by the Government and number of professional bodies. Examples are:

- (1) *Good Practice Guide on Paternity Testing Services - For organisations that provide genetic paternity testing services direct to the public:* Department of Health, 2008.

This Guidance touches on the importance of consent to testing (p16); the confidentiality of samples (p29); the requirement to test samples only for those purposes for which has been given (p29). In relation to the storage and destruction of samples it states:

*"...specimens...should not be retained longer than is necessary for the purpose for which they were collected."* (p30)

## JUDGMENT APPROVED FOR PUBLICATION

- (2) *Consent and confidentiality in clinical genetic practice: Guidance on genetic testing and sharing genetic information*: Joint Committee on Medical Genetics (Royal College of Physicians, Royal College of Pathologists and British Society for Human Genetics), 2nd ed., 2011

This Guidance emphasises the topics for discussion as part of the consent process (pp5-6) and the need for the scope of the original consent to be considered in relation to any future use of a sample (p8).

- (3) *The retention and storage of pathological records and specimens*: Royal College of Pathologists and the Institute of Biomedical Science, 5th ed., April 2015.

In relation to DNA, this states at paragraph 140:

*“The need for retention of diagnostic specimens should be assessed at the time of sampling, and appropriate consent obtained; see The Joint Committee on Medical Genetics report Consent and Confidentiality in Clinical Genetic Practice: Guidance on genetic testing and sharing genetic information (2011). Once DNA/RNA has been legitimately extracted from the tissue, this material does not fall under the remit of the Human Tissue Act, because it no longer contains human cells; but ethical requirements impose a duty to apply similar restrictions to use and storage....”*

34. At my request, the hospital has clarified the basis upon which it holds Mr Anderson’s DNA. It follows the guidance just referred to from the Royal College of Pathologists and the Institute of Biomedical Science, which recommends at paragraph 139 that DNA samples are retained for at least 30 years *“if needed for family studies in those with genetic disorders or if stored as donor/recipient material in the context of cell or tissue transplantation”*. It also refers to the advice to the same effect at paragraph 5.4 of the report of the Joint Committee on Medical Genetics (also referred to above). It notes that there is no obligation to store DNA for longer than 30 years and that thereafter it can be disposed of by the Trust as with any other clinical waste. A request for disposal of a DNA sample can also be made in writing by the individual from whom the sample was obtained.
35. These conclusions can be drawn concerning the HTA:
  - (1) Although not directly applicable in the present case, the HTA shows how Parliament has chosen to reconcile the various interests that arise in this sensitive social context in relation to the closely allied question of the lawful use of human tissue (as opposed to DNA) after death.
  - (2) The scheme of the Act extends to the creation of criminal offences where tissue is used without consent or kept for the purpose of extracting DNA.
  - (3) Other than in the case of an excepted use, the fundamental dividing line between lawful and unlawful use is the existence of consent. This is reminiscent of the

legislation regarding the taking, storage and use of gametes and embryos, originally the Human Fertilisation and Embryology Act 1990. In *U v Centre for Reproductive Medicine* [2002] EWCA Civ 565, Hale LJ said at [24]:

*"The whole scheme of the 1990 Act lays great emphasis upon consent. The new scientific techniques which have developed since the birth of the first IVF baby in 1978 open up the possibility of creating human life in ways and circumstances quite different from anything experienced before then. These possibilities bring with them huge practical and ethical difficulties. These have to be balanced against the strength and depth of the feelings of people who desperately long for the children which only these techniques can give them, as well as the natural desire of clinicians and scientists to use their skills to fulfil those wishes. Parliament has devised a legislative scheme and a statutory authority for regulating assisted reproduction in a way which tries to strike a fair balance between the various interests and concerns. Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught up in it."*

While it would be wrong to equate the use of human material for paternity testing with the even more profound ramifications of assisted reproduction, both arise from simultaneous, rapid advances in science and both give rise to ethical difficulties of the kind spoken of by Hale LJ.

- (4) With regard to DNA, the guidance recommends that it is treated as an important part of the clinical record and kept for a lengthy period to enable clinical study for the benefit of the patient and family members. Although governmental and professional guidance is voluntary and does not carry the force of law, it is persuasive in proportion to the calibre of its authorship and its thorough and extensive nature: *cf Ali v London Borough of Newham* [2012] EWHC 2970 (Admin). As a minimum, this guidance informs the court of the practices and expectations of those working in the medical field.

#### **(4) The Human Rights Act 1998**

36. s.6 of the HRA makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. s.3 provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. s.4 provides that if the court is satisfied that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of that incompatibility.
37. Article 8 of the European Convention on Human Rights provides that:
1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
38. The effect of Art. 8 in this context was considered by the European Court of Human Rights in *Jaggi v Switzerland* [2008] 47 EHRR 30. The applicant, by then in his 60s, had striven throughout his life to ascertain the identity of his natural father. The alleged father had refused to undergo testing during his lifetime and successive proceedings brought by or on behalf of the applicant had been dismissed by the Swiss courts. Finally, after the death of the alleged father, the applicant sought DNA testing using his remains. The Swiss court held that the applicant had been able to develop his personality despite his uncertainty as to his parentage. The Government justified the refusal to allow the DNA test by citing the need to preserve both legal certainty and the interests of others. The ECHR held by a majority that there had been a violation of Article 8. The right to know one's ascendants fell within the scope of "private life". The state was not only compelled to abstain from interference, but might also be subject to positive obligations (paragraph 33):

*"These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the state's positive and negative obligations under Art. 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation."*

The Court further held that:

- The choice of means calculated to secure compliance with Art. 8 is a matter for the individual state, depending on the particular aspect of private life that is in issue.
- The right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life and in such cases particularly rigorous scrutiny is called for when weighing up the competing interests.
- Persons seeking to establish their identity have a vital interest, protected by the Convention, in receiving the information necessary to under to uncover the truth about an important aspect of their personal identity. At the same time, it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing.
- In weighing up the different interests, consideration should be given, on the one hand, to the applicant's right to establish his parentage and, on the other hand,

## JUDGMENT APPROVED FOR PUBLICATION

to the rights of third parties, to the inviolability of the deceased's body, the right to respect for the dead, and the public interest in preserving legal certainty.

- With regard to the deceased's rights, it had been held in *The Estate of Kresten Filtenborg Mortensen v Denmark* [App No 56581/00, May 15 2006] that the private life of a deceased person from whom a DNA sample was to be taken could not be adversely affected by a request to that effect made after his death.
- With regards to the preservation of legal certainty, that cannot in itself be a ground for depriving the applicant of the right to ascertain his parentage.
- Having regard to the circumstances of the case and the overriding interest at stake for the applicant, the Swiss authorities did not secure for him the respect for his private life to which he was entitled under the Convention.

39. I note the circumstances that arose in *The Estate of Mortensen v Denmark*, referred to above. After the death of Mr Mortensen, two putative sons asked for DNA testing to be carried out and for his body to be exhumed for that purpose. The Danish High Court refused the application. It found that Danish law did not allow for the taking of body samples by compulsion and that an order for this purpose after death interfered with the sanctity of the grave in a way that was comparable with compulsion in life. Such interference could not be effected without an explicit legal basis, which the High Court found did not exist in domestic law. Accordingly, the High Court refused to order the exhumation of Mr Mortensen and the taking of samples for use in the paternity suit. This decision was reversed by the Danish Supreme Court by a narrow majority. It held that:

*"The fact that the [legislation] does not contain any specific rules on forensic genetic testing of deceased persons should not lead to the existing rules, according to which [in a paternity case] the court may decide to compel the parties to undergo genetic testing, being narrowly construed to mean that the existing legal basis does not cover testing of deceased persons... In these circumstances we consider that... if deemed necessary, the court may decide that forensic genetic tests should be carried out, even on a deceased party. In its assessment, however, having regard to the principle of proportionality, the court must balance the extent of such interference with the need to elucidate the particular case."*

The estate of the deceased man applied to the ECHR, complaining that the exhumation for the purpose of taking DNA samples constituted a breach of Art. 8, as it was not *"in accordance with the law"* as required by Art. 8(2). The Court declared the complaint by the estate to be manifestly ill-founded: it was not a claim brought by the deceased during his lifetime or by one of his relatives, but a complaint brought on behalf of someone who had died. The substance of the Supreme Court's decision was therefore not scrutinised.

### **D FIRST ISSUE: DOES THE FLRA 1969 APPLY?**



## JUDGMENT APPROVED FOR PUBLICATION

40. On behalf of Mr Spencer, Mr Kemp initially sought to argue that a direction might be given under the FLRA. However, in the course of the argument he conceded that this argument could not succeed. In my view, the concession was rightly made for the reasons analysed above, which can be summarised by saying that the FLRA:
- governs the taking of samples from living people
  - makes no provision for samples being taken after death
  - does not contemplate separate directions for sampling and testing
  - does not provide for the testing of existing samples
  - does not provide for the testing of samples that had been taken for reasons other than establishing parentage
  - requires samples to be collected in accordance with regulations
  - does not provide for the testing of DNA itself.
41. Mr Kemp rightly described the difficulties as being insurmountable and accepted that in the circumstances of this case a direction under s.20 is not available to his client.
42. There being no other legislation in point, I therefore conclude that there is no statutory power to direct post-mortem scientific testing to establish a person's biological relationships and consequently no statutory power to make a direction for the testing of Mr Anderson's stored DNA.
43. For completeness, I refer to the decision in *Goncharova v Zolotova* [2015] EWHC 3061. In that case, a Georgian businessman died in London. A post-mortem examination was carried out, giving rise to a number of stored samples from which DNA could be extracted. In inheritance proceedings in Russia and Georgia, the applicant claimed that the deceased was her father, a claim disputed by his widow. The Russian court ordered DNA testing and requested the English court to secure transmission of the samples to Moscow for that purpose. The request was placed before the English court by the applicant and opposed by the widow.
44. The application was granted by Thirlwall J. She considered that there was a risk of injustice in depriving the Russian court of the best evidence upon which to determine whether the applicant was the deceased's daughter, *"a question to which she has a right to an answer irrespective of her rights to a share in the estate."*
45. In the course of her judgment, Thirlwall J referred to the FLRA at a number of points. In particular, she said this at paragraphs 57 and 66:

*"Were the proceedings taking place in the High Court for (e.g.) a declaration of parentage under the Family Law Act 1986 or for relief under the Inheritance Act 1975 and paternity was in issue the court could and would make an order for DNA samples to be tested (pursuant to its powers under the Family Law Reform Act and/or CPR 25.1)."*

*"I am satisfied that were the English Court concerned with determining the parentage of someone in Ms Goncharova's position (in Inheritance Act proceedings or proceedings under the Family Law Act 1986) and post-mortem samples were available in the circumstances that pertain here it would have no hesitation in ordering DNA testing of the samples for the reasons I have already given. It is not unlawful to carry out DNA testing in accordance with an order of the court."*

46. In the present case, it was initially argued on behalf of Mr Spencer that this decision may justify a wider interpretation of the 1969 Act to encompass the testing of post-mortem samples. I do not accept that argument for these reasons:
- (1) Thirwall J was not deciding the issue that arises in the present case. She was considering a request by the Russian court for assistance under the Evidence (Proceedings in Other Jurisdictions) Act 1975. The question was whether the court should transmit evidence in the form of samples for testing in Moscow. The English court was not determining the prior question of whether the samples should be tested or not.
  - (2) As a result, the court in *Goncharova* did not have to consider the arguments that arise in the present case.
  - (3) Thirwall J (at paragraph 8) described DNA testing as an "*obvious step*". It is true that in a case of a paternity dispute falling within the FLRA, the approach would be very much as she states in the paragraphs quoted. But the present application does not fall within the FLRA and I do not consider that a pro-testing disposition can be read across without consideration of the wider issues.

**E SECOND ISSUE: DOES THE HIGH COURT HAVE AN INHERENT POWER TO ORDER TESTING?**

47. On behalf of Mr Spencer, it is argued that there are two possible sources of such a power: Civil Procedure Rules r.25.1 (or its equivalent, Family Procedure Rules r.20.2) or the inherent jurisdiction.

***CPR 25.1 / FPR 20.1***

48. There is no practical difference between the two sets of Rules but, strictly speaking, the provisions of FPR 20 (as opposed to the CPR) apply to an application under s55A: see CPR 2.1, s.73(3) Courts Act 2003 and s.61(1) and Sch. 1 para 3(e) Senior Courts Act 1981.
49. FPR 20.1 gives the court the power to grant interim remedies. A long illustrative list includes:
- An interim injunction
  - An interim declaration
  - An order for inspection, sampling, or experimenting on or with relevant property

50. 21.2 defines 'relevant property' as *"property (including land) which is the subject of a claim or as to which any question may arise on a claim."*
51. 21.3 provides that the fact that a kind of interim remedy does not appear on the list does not affect the court's power to grant that remedy. The White Book notes to the CPR state that this sub-rule is intended to make clear that absence from the list does not cast doubt on the existence of other powers derived from statute.
52. I note that in *Goncharova* at paragraph 76, Thirwall J stated that:
- "Whatever the precise nature of the application, the court in civil proceedings has comprehensive powers under the CPR to order inspection of property, the taking of samples, the carrying out of experiments (see CPR 25.1). The Family Law Reform Act also permits DNA testing."*
53. The terms of the Rules accordingly do not stand in the way of a direction for DNA testing. However, I do not see the Rules as being the source of a non-statutory power. Even if a DNA testing direction can properly be described as an interim remedy, a procedural rule surely cannot be the origin of a power of this nature. A further mild indication that the rules did not intend to create a wider power is found in CPR PD.23B, which relates specifically to applications under the 1969 Act: there is no reference in the CPR or FPR to paternity testing by any other means.
54. The position in respect of the Rules is in my view analogous to that found in *Re F (Sterilization: Mental Patient)* [1990] 2 AC 1, where Lord Brandon, speaking of the jurisdiction of the High Court to make declarations said this:
- "I do not think that it is right to describe this jurisdiction as being 'under RSC Ord. 15 r.16'. The jurisdiction is part of the inherent jurisdiction of the High Court, and the rule does no more than say that there is no procedural objection to an action being brought for a declaration ..."*

***The inherent jurisdiction***

55. The inherent jurisdiction of the High Court is a description of the court's common law powers insofar as they have not been removed or supplanted by statute. In the Court of Appeal in *Re F* (above) Lord Donaldson MR described the common law as
- "... the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges. It is not a legislative function or process – that is an alternative solution the initiation of which is the sole prerogative of Parliament. It is an essentially judicial process and, as such, it has to be undertaken in accordance with principle."*

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56. The inherent jurisdiction is therefore a jurisdiction of long-standing that nowadays exists in a number of important contexts. With regard to children, it has been used in a wide variety of creative ways to supplement statutory powers, both through the medium of wardship and otherwise. As recorded in FPR PD 12D, the court can, for example, make orders to restrain publicity, to prevent an undesirable association, to endorse medical treatment, to protect children abducted from abroad and to recover children from abroad. These orders not only affect the individual family members but are also directed towards third parties, either as orders or requests.

57. More recently, the jurisdiction has been developed to provide remedies for the protection of vulnerable but not legally incapable adults. In *Re SK* [2004] EWHC 3202 (Fam), Singer J said:

*"I believe that the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values."*

That manifestation of the jurisdiction was cemented by Munby J in *Re SA* [2005] EWHC 2942 (Fam) and the Court of Appeal has confirmed that it has survived the enactment of the Mental Capacity Act 2005: see *DL v A Local Authority* [2012] EWCA Civ 253.

58. These cases and others concerned the protection of vulnerable individuals at risk of coercion or abuse. At the other end of the scale, the inherent jurisdiction can relate to the court's power to control its own procedures, as in *Bremer Vulkan v. South India Shipping* [1981] 1 AC 909, where Lord Diplock said this at 977:

*"The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. ... The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an "inherent power" the exercise of which is within the "inherent jurisdiction" of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."*

59. The inherent jurisdiction is plainly a valuable asset, mending holes in the legal fabric that would otherwise leave individuals bereft of a necessary remedy. The present case (DNA testing) might be said to fall between the above examples of the court's inherent powers (protection of the vulnerable, striking out).

60. At the same time, the need for predictability in the law speaks for caution to be exercised before the inherent jurisdiction is deployed in new ways. The court is bound to be cautious, weighing up whether the existence of a remedy is imperative or merely

desirable, and seeking to discern the wider consequences of any development in the law.

61. Against that background, I turn to the parties' submissions.

*Submissions on behalf of Mr Spencer*

62. Mr Kemp argues that the existence of a power to make the order requested in this case is necessary in the interests of justice and to protect the Art.8 rights of his client. He draws attention to a number of reported cases.

63. In *Re H and A (Paternity: Blood Tests)* [2002] EWCA Civ 383, the Court of Appeal overturned the judge's refusal to order scientific tests to establish the paternity of young children because of the risk to the stability of their family. Thorpe LJ recalled the statement of Lord Hodson in *S v McC, W v W* [1972] AC 24 at 58:

*"The interests of justice in the abstract are best served by the ascertainment of the truth and there must be few cases where the interests of children can be shown to be best served by the suppression of truth. Scientific evidence of blood groups has been available since the early part of the century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of paternity. Why should the risk be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong?"*

Thorpe LJ then summarised the points of principle to be drawn from the earlier cases:

*"... first that the interests of justice are best served by the ascertainment of the truth and second that the court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences."*

64. Mr Kemp relies heavily on *Jaggi* (above). He further cites *CM v The Estate of EJ* [2013] EWHC 1680, a decision of Cobb J. A passing doctor went to the aid of a dying woman who had fallen from a building. Fearing that she might have become infected with a blood-borne disease, the doctor began to take antiretroviral medication that had significant side-effects. She wished for the deceased's blood to be tested to clarify any medical risks. A sample taken during the post-mortem examination was held by the Coroner, but the approval of the court was requested as the legal situation was thought to be unclear. Cobb J considered the provisions of the Human Tissue Act 2004. He found that a cousin was capable of giving the requisite consent and had done so. However, (and it may be that in doing so he wished to put the matter beyond doubt) he also went on to authorise the use of samples under the inherent jurisdiction, balancing up the considerations that applied.

65. In *Roberts v HM Coroner for North and West Cumbria* [2013] EWHC 925 (Admin), the Divisional Court ordered a new inquest after DNA testing on the remains of a body washed up on a beach established the previously unknown identity of the deceased.

66. Finally, Mr Kemp properly draws attention to the decision of the Court of Appeal in *Re Z (Children)(DNA Profiles: Disclosure)* [2015] EWCA Civ 34. The police had taken swabs

of blood at a murder scene, including from the murderer, and DNA profiles were derived. In family proceedings concerning the victim's children, the murderer claimed to be their father but refused to undergo DNA testing. The local authority and the Children's Guardian applied for disclosure of the DNA profiles. This application succeeded before the President, but the Court of Appeal ruled that the relevant legislation (the Police and Criminal Evidence Act 1984 as amended) prohibited the police from disclosing the profiles for any purpose other than criminal law enforcement and that the court could not exercise its inherent jurisdiction to require the police to do something contrary to statute, whether by applying a purposive approach to statutory interpretation or by interpreting the provisions in a way which was compatible with Art. 8. Lord Dyson MR accepted the submission that the alternative outcome would not be *"in accordance with the law"*:

*"What matters in this context is having a law which is clear and certain so that it avoids arbitrary conduct on the part of the state and provide a yardstick by which an independent court or tribunal can measure the lawfulness of conduct. On the other hand there are many contexts where knowledge of the precise scope of a law will enable individuals affected to regulate their behaviour. The two reasons are different facets of the same general principle, namely that the law must be as clear and certain as is practicable in all the circumstances."*

Mr Kemp distinguishes the decision in *Re Z* on the basis that it arose from a statutory prohibition of a kind that does not exist in the present case.

*Submissions on behalf of Mrs Anderson*

67. Mr Mylonas QC and Ms Street advance the following propositions in relation to the existence of an inherent jurisdiction:

- (1) The High Court does not have the power to make any order it wishes; see Hayden J in *Redbridge London Borough Council v A* [2015] Fam 335:

*"The principle of separation of powers confers the remit of economic and social policy on the legislature and on the executive, not on the judiciary. It follows that the inherent jurisdiction cannot be regarded as a lawless void permitting judges to do whatever we consider to be right..."*

- (2) The court's powers are limited by s.19(2) of the Senior Courts Act 1981:

*"Subject to the provisions of this Act, there shall be exercisable by the High Court—*  
*(a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and*  
*(b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision)."*

## JUDGMENT APPROVED FOR PUBLICATION

So, the applicant must, but cannot, show that there was jurisdiction to make an order of this kind before the coming into force of the Senior Courts Act.

- (3) Paternity testing within litigation is regulated by Part III of the 1969 Act. Any power to make a direction for scientific testing to establish paternity under the inherent jurisdiction was ousted by the Act: *Re O (A Minor)(Blood Tests: Constraint)* [2000] Fam 139.

In that case, two men had each obtained directions for the testing of a child to establish paternity, but the mothers, with care and control of the child, refused to consent to the testing. Wall J accepted with reluctance that there was no power to compel the mothers to allow testing when the statute required their consent: this soon led to the enactment of s.21(3). At page 151, he stated:

*“In my judgment, unattractive as the proposition remains, both the inherent jurisdiction to direct the testing of a child’s blood for the purpose of determining paternity and any consequential power to enforce that direction is entirely overridden by the statutory scheme under Part III of the Family Law Act 1969. If the remedy is to be provided it is, accordingly, for Parliament to provide it.”*

It is said that the present position is on all fours with that facing the court in *Re O*. Although the decision was given nine months before the Human Rights Act came into effect in October 2000, the court showed itself well aware of the rights engaged on all sides.

- (4) There are sound policy reasons for the absence of any statutory power to permit testing in the circumstances of this case. DNA testing is an interference of the highest order with the subject’s right to confidentiality and the privacy of their known family members whose genetic relationships will also be revealed by such testing. If the court allows post-mortem DNA testing in the absence of consent, this is likely to discourage patients from providing DNA during medical treatment and encourage those in Mr Spencer’s position to defer making applications until after the death of the alleged father so as to circumvent the absence of consent. If testing in a case such as the present were to be permitted, it ought to be by way of a scheme (i) devised following the kind of consideration, consultation and scrutiny which Parliament but not the High Court can carry out; (ii) which provides for regulation (eg guaranteeing the integrity of samples and testing); and (iii) which provides clear rules which can be easily understood by healthcare professionals, patients, their family members and those who seek testing.
- (5) At present, the law is clear: you cannot test samples taken for one purpose for a different purpose without consent. That clarity would be lost if an inherent power was found to exist. The law must be accessible and sufficiently precise to enable the individual to understand its scope and foresee the consequences of his actions: *R v Purdy* [2010] AC 345 at 390. In the present case, Mr Anderson was deprived of the opportunity to require his samples to be destroyed or of making a will excluding Mr Spencer.

- (6) The decision in *CM v EJ* does not take matters further forward. It was not a case about paternity testing, no arguments were made against the existence of an inherent jurisdiction, and the use of the jurisdiction was consistent with the relevant statutory scheme, not inconsistent with it.
- (7) *Re H and A* is a case in which the power to order testing was not in question. Likewise, the decision in *Jaggi* concerned the failure to exercise a power that existed, not the question of whether a power existed in the first place.
- (8) As *Re O* demonstrates, the interests of justice alone do not provide a basis for ordering testing where no power to do so has been identified.
- (9) Similarly, a series of cases in the analogous field of assisted reproduction show the reluctance of the courts to subvert a carefully-devised statutory scheme.

*Re R (A Child) (IVF: Paternity of Child)* [2005] 2 AC 621: A man, B, wished to be recognised as the legal father of a child born with the use of donor sperm to his former female partner D. After initial unsuccessful IVF treatment together as a couple for the purpose of which B had acknowledged that he would be the legal father, they separated, and D had a further set of embryos successfully implanted without B's knowledge. The House of Lords decided that the provision which would have made B the legal father did not apply because treatment services were not being provided to B and D together when the successful implantation took place.

*R v Human Fertilisation and Embryology Authority ex parte Blood* [1999] Fam 151: Mrs Blood and her husband had been actively trying to start a family when he became seriously ill and fell into a coma. At Mrs Blood's instruction, sperm was extracted from her husband which she wished to use to conceive a child. The Court of Appeal applied the statutory regime under the Human Fertility and Embryology Act 1990 and held that in the absence of the specific informed written consent of the donor, the sperm had been unlawfully stored. Furthermore, since her husband was no longer alive, the use of that sperm for treatment was not for treatment of them both, could not fall within the provisions of the Act, and would be unlawful (although she was entitled to seek a direction for export of the sperm abroad).

*Warren v Care Fertility (Northampton) and The Human Fertilisation and Embryology Authority* [2014] EWHC 602 (Fam): Mrs Warren wished to continue to store sperm from her late husband, who had given express consent for her use of it after his death, with himself to be named as the father. However, the husband's written consents did not specify that his sperm should be stored beyond the statutory period, as required by the Regulations, even though his consent for their use after his death and that he be named as the father of any child were not time-limited. Hogg J held that the wording in the relevant regulations was capable of being read so as to permit storage for up to the statutory maximum period.



## JUDGMENT APPROVED FOR PUBLICATION

On behalf of Mrs Anderson, it is said that these cases demonstrate the overriding importance that the Court attaches to specific informed consent in cases involving the use of genetic material derived from a person's body. In *Warren*, there was no conflict of individual rights and the limited formal shortcomings in the process had arisen from default on the part of the clinic.

To these cases, I would add one recent decision not referred to in submissions:

*R (IM and MM) v Human Fertilisation and Embryology Authority* [2015] EWHC (Admin) 1706: The parents of a young woman who had died wished to carry out her wishes for her mother to bear a child using eggs that had been harvested during her lifetime. The Authority declined to approve this use of the eggs on the basis that the relevant statutory consents had not been provided. A challenge to this decision was rejected by Ouseley J, though I note that the matter is awaiting a hearing in the Court of Appeal.

- (10) The European Convention on Human Rights does not give domestic courts the power to create a remedy where none exists. If it is said that this court's powers do not satisfy the state's Convention obligations, it is open to the applicant to apply for a declaration of incompatibility, on notice to the Crown. However, if the present case came before the ECHR, it would be likely to conclude that the available statutory remedies fell within the margin of appreciation that the state enjoys in the area of paternity testing.
- (11) DNA testing could take place by agreement, but in the absence of agreement there is no power to direct it, and it cannot lawfully take place. Were it otherwise, the confidentiality of the deceased's sample would be infringed and the Art. 8 rights of Mrs Anderson and others (*cf S v UK* [2009] 48 EHRR 50) would be subject to an alarming and unanticipated interference. Those rights represent an absolute bar to a direction for testing.
68. In response, Mr Kemp submits that the decision in *Re O* rested on the fact that the statutory scheme covered the situation that had arisen in that case. Here, the application falls outside the FLRA, which does not apply to post-mortem DNA testing at all.
69. He further begs to doubt whether the Article 8 rights of Mrs Anderson are engaged in this application; if they are, it is no lack of respect for her family life to know the truth about whether or not she has a grandchild.
70. Lastly, he contends that the court should be cautious about the conclusions to be drawn from the very different field of assisted reproduction.

*Conclusion as to inherent jurisdiction*

71. In my view, the following features are relevant to the existence or non-existence of an inherent power:

(1) *Statutory interpretation*

Before the enactment of the FLRA, the preponderant judicial opinion was that there was power to direct the taking of blood to establish a child's paternity, and such orders were on occasion made: see *In re L (An Infant)* [1968] P 119 and *B (BR) v B (J)* [1968] P 466.

The FLRA is the only statute concerned with testing for evidence of biological relationships. It is comprehensive in relation to cases falling within its scope: *Re O*. In that case, the issue that had arisen lay squarely within the scheme of the Act. It fell under what Wall J referred to at 150 as the "*rug*" of the legislation, or what Hale LJ referred to as the "*footprint*" in the Court of Appeal in *Re R* (see paragraph 39 of the House of Lords' opinions). In contrast, the testing of DNA post-mortem falls distinctly outside the scope of the legislation. The FLRA cannot be read purposively or convention-compliantly so as to cover cases of the present kind. I therefore do not accept that a power to give directions for post-mortem DNA testing has been ousted by the Act.

Nor do I accept that the court's powers are limited by s.19(2) Senior Courts Act 1981. This formal, descriptive subsection cannot be taken to have defined or circumscribed the powers of the High Court, or to have frozen them as at the date of the legislation. Were it otherwise, the vulnerable adult jurisdiction could not have existed.

There is a legislative void, both in relation to post-mortem paternity testing and in relation to paternity testing using extracted DNA. I accept that in an area of this kind, policy considerations arise which would be better regulated by Parliament than by individual decisions of the court. In one sense, this speaks for judicial reticence. However, there is no indication that Parliament has turned its attention to the situation that arises in the present case, or that it is likely to do so at any early date. This gives rise to the possibility of an indefinite period during which individuals would be left without a remedy.

(2) *Consent*

Both the FLRA and the HTA (and the HFEA 1990 and 2008, insofar as they may be analogous) regard consent as the central component of lawfulness.

It is necessary, when considering the availability of a remedy after death, to consider the situation that would have arisen in life. The person concerned would have had the right to decide whether or not to participate in paternity testing and to allow his human tissue to be used for that purpose.

## JUDGMENT APPROVED FOR PUBLICATION

Although neither the FLRA nor the HTA apply to extracted DNA as opposed to human tissue, the use of human tissue is a necessary forerunner to the extraction of DNA and similar considerations and sensitivities must apply when DNA testing is being considered.

If the issue related to the post-mortem testing of human tissue (as opposed to DNA), the terms of the HTA would apply. For testing to be lawful, there would have to have been consent from the individual in life or by a relative after death. Or there would have to be a court order.

### (3) *The public interest*

An intervention of the kind suggested in this case might give rise to uncertainty and concern within the medical world and beyond at the possibility that such orders might be made in other cases, or that in effect the door was being opened to post-mortem paternity testing on demand. Although it does not arise in the present case, the prospect of applications for exhumation cannot be regarded as fanciful when one recalls the circumstances in *Mortensen* and *Jaggi*, or indeed those of Richard III.

Against this, there is no sign that the present application has caused alarm to the major hospital involved in the present case (indeed it appears to welcome the court's assistance), or that applications of this kind are likely to be at all numerous, particularly if they could only be heard in the High Court, and thereby be subject to very close scrutiny. The prospect of this limited development in the law affecting the behaviour of the patient population as a whole is likely to be more imaginary than real.

### (4) *Identity*

Knowledge of our biological identity is a central component of our existence. The issue can have consequences of the most far-reaching kind, perhaps above all for those who do not know or are not sure of their parentage. Within our lifetimes, DNA testing has made the truth available. At the same time, it has made all other kinds of evidence almost irrelevant. While it remains possible to reach a conclusion about paternity without scientific tests, the practical and psychological consequences are different. A declaration made without testing is a finding, while the result of a test is a fact.

The contrast can be found in the opinion of Lord Wilberforce in *The Amphyll Peerage Case* [1977] 1 AC 547 at 569:

*“Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book.”*

While at 573 he said:

## JUDGMENT APPROVED FOR PUBLICATION

*“One need not perhaps, on this occasion, face the question whether, when technology or science makes an advance, so as to enable to be known with certainty that which previously was doubtful, such evidence ought to be admitted in order to destroy the binding force of a judgment or of a declaration with statutory force. It may be that within the limits within which a new trial may be ordered and, on the precedents, those limits are comparatively short, such evidence could be admitted for that purpose.”*

The European Convention, as interpreted in *Jaggi*, underscores the importance of the opportunity to discover one’s parentage. Although the Convention cannot on its own create a remedy, it is desirable that our law is consistent with the approach taken in other jurisdictions if that is possible.

### (5) *The interests of others*

It is a peculiar feature of genetic testing that it inescapably has the potential to affect not only the individual being tested but also those to whom he is closely related. Depending on the facts, the rights of surviving relatives may be engaged, but it is difficult to envisage a situation in which the establishment of the truth about biological relationships could amount to an unlawful interference with those rights; at the very least any interference may be necessary and proportionate. The rights of third parties certainly cannot represent an absolute bar to the existence of an inherent power.

### (6) *The interests of justice*

When all is said and done, the court is faced with a civil dispute that must be resolved. In cases where a power exists, it has long been emphasised that the establishment of the truth is both a goal in itself and a process that serves the interests of justice. As noted above, where a court makes findings of fact based upon witness and documentary testimony, there is always the possibility of error. Evidence will be incomplete because (by definition in a case of the present kind) people will have died and memories may have faded. When dealing with matters as important as parentage, the need to reach the right conclusion is obvious. The prospect of a court trying to ascertain the truth to the best of its ability when the truth is in effect there for the asking is a troubling one. Account must also be taken of the needless waste of resources that would accompany a trial involving narrative evidence.

### (7) *The range of circumstances*

The existence of a power cannot depend upon the circumstances of the particular case. What is relevant is the range of cases that might arise. It is possible to envisage opportunistic and unmeritorious applications, but there might equally be applications, perhaps concerning young children, where the need to know the truth about parentage is compelling. The answer cannot be that the court can

## JUDGMENT APPROVED FOR PUBLICATION

consider an application in the second case but not in the first: jurisdiction cannot depend on merits.

72. Reflecting the complexity of the legal and ethical issues, the above features pull in a number of different directions. If the only considerations related to the interests of the deceased and the public interest, the arguments against the existence of an inherent power would surely prevail. However, the interests of the living and the interests of justice must also be brought into consideration.
73. Taking all these matters into account, my conclusion is that the High Court does possess an inherent jurisdiction that it can properly deploy to direct scientific testing to provide evidence of parentage in circumstances falling outside the scope of the FLRA. If the court was unable to obtain evidence of this kind, severe and avoidable injustice might result. Awareness of the implications of ordering testing without consent and of the wider public interest does not lead to the conclusion that the jurisdiction does not exist, but rather to the realisation that it should be exercised sparingly in cases where the absence of a remedy would lead to injustice.
74. In the circumstances, it is not necessary to consider whether the existing legislation is not compliant with Convention rights.

### **F THIRD ISSUE: SHOULD TESTING BE DIRECTED IN THIS CASE?**

75. The following factors are relied upon in support of testing:
  - (1) Mr Spencer's natural desire/right to know his parentage.
  - (2) Combined with this, the value that knowledge of paternity will have in clarifying his medical status and the need (or not) for intrusive investigations.
  - (3) The interests of justice and the need for the best available evidence: *cf Re H and A*.
76. In response, it is said on behalf of Mrs Anderson that:
  - (1) An order for testing would be an unjustified interference with her own Art. 8 rights by compounding a distressing situation and creating a risk that a genetic relationship would be identified between herself and a person who has caused her stress and anxiety.
  - (2) Human DNA is intensely personal and very strong justification is therefore required if it is to be used for any purpose without that person's consent. The sample was provided by Mr Anderson for his own benefit during the course of medical treatment. He was entitled to a high expectation of confidentiality.

## JUDGMENT APPROVED FOR PUBLICATION

- (3) Testing could not have taken place in Mr Anderson's lifetime without his consent. This statutory bar has been given greater weight than any other rights, including those of a supposed child. Mr Anderson's option to consent or withhold consent during his lifetime (and to explain his decision) was circumvented by Mr Spencer's choice not to raise the issue until after his death. It would be unjust if his extensive delay allowed Mr Spencer to achieve testing without consent.
  - (4) To allow testing in this case would be against the public interest by undermining patient confidence in the confidentiality of providing samples for medical treatment.
  - (5) Mr Spencer's delay deprived Mr Anderson of the opportunity to make decisions about his private life and his property.
  - (6) Mr Spencer's interest weighs less heavily in the balance than that of Mr Anderson, Mrs Anderson and the public interest because:
    - (i) His lack of interest in testing until after Mr Anderson's death shows that he had no interest in testing for paternity in order to satisfy himself of that relationship for its own sake. The court is not obliged to take positive steps to uphold his rights in these circumstances.
    - (ii) If the request is now motivated by inheritance reasons, his delay denied the deceased the opportunity to manage his estate in the light of relevant knowledge.
    - (iii) If the request is now motivated by medical reasons, on Mr Spencer's own case, a test would merely serve to confirm what he already believes to be the case; if no testing is carried out he will continue to benefit from low-risk screening which will reduce his chance of cancer.
  - (7) Making no order for testing in this case would not exclude the possibility of an order for testing of a DNA sample being made on different facts, for example, where national security or the life of a child was at stake.
77. Weighing these matters up with appropriate caution, and seeking to strike a fair balance between the competing private and public interests, I have reached the conclusion that scientific testing should take place to seek to establish the paternity of Mr Spencer by using the stored DNA sample of the late Mr Anderson. These are my reasons:
- (1) If the application for a declaration of parentage had appeared to be speculative or opportunistic, the request for scientific testing would probably not have succeeded. However, the overall evidence here raises the real possibility that Mr Anderson was Mr Spencer's father, he having undeniably been in a relationship with Mr Spencer's mother at the time of conception.

JUDGMENT APPROVED FOR PUBLICATION

- (2) It is common ground between the parties that there is a significant medical issue that turns on the possibility of a biological relationship between Mr Anderson and Mr Spencer. It is of course possible for Mr Spencer to be tested periodically by colonoscopy, but that is only a partial solution because he is surely entitled to know the reason why he should undergo those procedures, or to be relieved of the need to do so. As recently as February 2015, Mrs Anderson regarded it as “essential” that Mr Spencer’s paternity should be established. It does not now lie easily in her mouth to say the opposite.
  - (3) Although it is possible that the late Mr Anderson (like the alleged father in *Jaggi*) might have refused to consent to testing during his lifetime, there is no particular reason to regard that as likely. Whether or not he would have welcomed the possibility that he was a father, it may not do justice to his memory to assume that he would have withheld his support from a young man who might have inherited a serious medical condition from him.
  - (4) The information, in the form of the DNA sample, is readily available and does not require physically intrusive investigations. In particular, it does not require exhumation, as to which particular considerations would undoubtedly arise.
  - (5) There is no objection on behalf of the hospital, which might be seen as being a nominal representative of the public interest in this case.
  - (6) The interests of third parties, and in particular those of Mrs Anderson to the extent that they may be engaged, are, with all respect, of lesser significance. There is no indication of any real risk of harm and the establishment of the truth carries greater weight than the question of whether it is palatable.
78. I accordingly find that Mr Spencer’s interest in knowing his biological parentage, the questions raised by the medical history, and the marked advantages of scientific testing as a means of resolving both issues, collectively carry more weight in the particular circumstances of this case than the counter-indicators to testing that undoubtedly exist. It is in the interests of justice that testing should take place, and it is a proper exercise of the court’s inherent jurisdiction to secure this outcome.
79. For completeness I would add that, had testing not been directed, the court would have heard the evidence in the normal way. Statutory inferences could not be drawn in a case where the statute did not apply, but this would not have prevented the court from drawing whatever inferences seemed proper from the evidence before it.
80. I pay tribute to the considerable help that I have received from counsel and invite them to submit a draft order that reflects this decision and replicates so far as possible the protections that would accompany a direction for testing under the FLRA.
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