Neutral Citation Number: [2018] EWCA Civ 100

Case No: B4/2016/2164

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(FAMILY DIVISION)
Mr Justice Peter Jackson
[2016] EWHC 851 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2018

Before:

LORD JUSTICE MCFARLANE
LADY JUSTICE KING
and
LORD JUSTICE SIMON

- -

Between:

Valerie Anderson (Personal Representative of William Brian Anderson Deceased)	**Appellant**
- and -	
David Spencer	**Respondent**

- -
- -

The Appellant did not appear and was not represented
James Kemp (instructed by **TM Solicitors**) for the **Respondent**

Hearing date: 10 October 2017

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Judgment Approved

Lady Justice King

1. This is an appeal against an order made under the inherent jurisdiction of the High Court on 9 May 2016 by Mr Justice Peter Jackson (as he then was). The order now challenged directed that DNA extracted from a sample provided by William Anderson (deceased) and now held by Central Manchester University Hospitals NHS Foundation Trust, should be tested against a bodily sample to be taken from the Respondent, David Spencer. The purpose of the order is to establish whether Mr Anderson was or was not the Respondent's biological father.

2. The application, made by the Respondent, was resisted by Valerie Anderson, the Appellant; the mother and, the then, personal representative of the deceased. The Appellant has informed the court that some months after the trial, a valid will providing for her to be the sole beneficiary of Mr Anderson was discovered and probate was, in due course, granted. Whilst the Appellant thereafter became the Executor under the will, none of the issues with which the court were concerned are affected by that change in status and I will continue to refer to the Appellant as the personal representative of Mr Anderson, that having being the position at the date of the trial.

3. The Appellant has not in the event pursued her appeal, her legal team have come off the record and a late application made by her to adjourn this hearing was refused for the reasons given by McFarlane LJ at the hearing. Prior to the position becoming apparent, a full skeleton argument had been prepared and submitted on the Appellant's behalf by Mr Michael Mylonas QC. Notwithstanding the Appellant's failure to attend, given that the order in question represented a novel use of the inherent jurisdiction, Mr Kemp, on behalf of the Respondent and at the Court's request, responded orally to the written arguments filed by Mr Mylonas and answered a number of supplementary questions put to him by the court with skill and economy.

4. In addition an order was made that a transcript of the appeal hearing was to be obtained and served on the Appellant with leave for her to make submissions in writing, with regard to any additional arguments that she would have raised in response to the Respondent's skeleton argument and oral representations in court. Those written submissions were received on 24 January 2018 in accordance with the order a little under a month from the date upon which the Appellant was served with the transcript.

5. The issue before the court is whether the judge fell into error in finding that he had the jurisdiction, or power, to make an order under the inherent jurisdiction and, if he had such jurisdiction, whether, on the facts, the judge had been wrong in exercising it in the way in which he did.

Background

6. The background is set out in the judge's judgment and can be found at [2016] EWHC 851(Fam), the key features can be summarised for the purposes of the appeal.

7. The Respondent's mother had a relationship with Mr Anderson, which came to an end prior to the birth of the Respondent. There was no contact between the Respondent and Mr Anderson during the latter's lifetime. Mr Anderson died (it was believed)

intestate following a heart attack on 23 July 2012; his mother, the Appellant, became his personal representative.

8. In 2006, when aged 38, Mr Anderson was diagnosed with bowel cancer. The type of cancer was a condition known as Lynch Syndrome which carried a 50% risk of inherited predisposition; indeed both Mr Anderson's father and grandfather had had the condition. Because of the concerning family history, a blood sample was taken from Mr Anderson and DNA extracted from it. The hospital retains a single DNA sample but no blood or tissues.

9. In June 2013, nearly a year after the death of Mr Anderson, there was contact between the Appellant and the Respondent. The Respondent's case was that he was contacted by the Appellant who warned him of the risk of his having inherited Lynch Syndrome and advised him to have a DNA test. The Appellant's case is that it was the Respondent who had initiated contact, 'badgering' her at the time of her bereavement.

10. Notwithstanding this conflict, it is not in dispute that, in February 2015, the Appellant wrote to the Respondent's GP setting out the history, informing the GP that the hospital held DNA samples from Mr Anderson and asking that the Respondent be referred to the hospital's genetic team in order to see if he was at "risk of bowel cancer and to clarify paternity".

11. Three months later, in April 2015, the Appellant contacted the hospital, now asking that the DNA sample be destroyed. Notwithstanding this volte face, the Respondent saw the genetic counsellor at the hospital and was advised of the risks to him of having inherited the syndrome. The Respondent was told that in the event that it was determined that Mr Anderson had been his father, then he, should have screening by way of colonoscopy every two years. There was however now a stalemate which could not be resolved, the hospital feeling unable to carry out the paternity testing absent the consent of the Appellant.

12. In her written submissions the Appellant takes issue with the facts. She reiterates her version of the events as told to the judge which had led up to the making of the application by the Respondent. The judge did not find it necessary to resolve that dispute. For my part, whilst understanding that this is a highly emotive issue for both parties, I entirely agree with the approach of the judge and it is not for this court to go behind his view that it was unnecessary to make findings in this regard or in relation to the letter which had undoubtedly been written by the Appellant to the Respondent's GP in February 2015.

13. The Appellant further seeks to undermine the basis of the application itself; she suggests that the evidence given by the Central Manchester University Hospital to the court at first instance in relation to the desirability of there being genetic testing is inaccurate. In her written document she sets out her understanding of the relevant Guidance and links it to her account of the family history. She concludes by submitting: "therefore the Appellant does not consider the Respondent to be a vulnerable adult (medical) or deemed to be at risk".

14. Strictly speaking such assertions should have been the subject of an application to adduce additional evidence. In my judgment any such application would have been refused on *Ladd v Marshall* [1954] 1 WLR 1489, principles. The judge, having had

evidence on this critical issue from the hospital, and his conclusions not having been the subject of appeal, it seems to me that only the most compelling expert evidence (not available at the date of the trial) would now be considered admissible by this court. I accordingly proceed on the basis of the medical evidence at the trial, namely that genetic testing is desirable for the reasons given.

15. On 18 September 2015 the Respondent applied under s.55A Family Law Act 1986 for a declaration of paternity. It was within these proceedings that the Respondent sought a direction which would enable him to have access to the DNA sample retained by the hospital, in order scientifically to prove whether Mr Anderson was or was not his biological father.

16. The hospital holding the DNA sample has taken a neutral stance in the proceedings. At the request of the judge, the hospital clarified the basis upon which it holds the DNA sample. In a letter dated August 2015 written to Mr Anderson's sister by the hospital, they said they would release the DNA sample only with the consent of both the Appellant and the Respondent, or on receipt of a court order.

17. The judge recorded [34], that the hospital intends to retain the sample for at least 30 years in accordance with guidance given in: *The retention and storage of pathological records and specimens:* Royal College of Pathologists and the Institute of Biomedical Science, 5th Ed, April 2015 (para 139). This guidance recommends that DNA samples are retained for at least 30 years if '*needed for family studies in those with genetic disorders'*. The judge referred also to advice to the same effect found in further guidance: *Consent and confidentiality in clinical genetic practice: Guidance on genetic testing and sharing genetic information:* Joint Committee on Medical Genetics, 2nd ed, 2011 (at para 5.4). The trust, the judge recorded, had also explained that there is no obligation to retain the sample after 30 years.

Grounds of Appeal

18. The grounds of appeal can be summarised as follows:

    i) Ground 1 states that the judge erred in law in concluding that the High Court had the jurisdiction or power to make the order under its inherent jurisdiction.

    ii) Grounds 2 and 3 state that the judge failed to address the Appellant's Human Rights arguments in his judgment and, in any event, the judge had acted unlawfully in making an order which was incompatible with the Appellant's Article 8(1) ECHR rights. Interference with those Article 8(1) rights could not be justified as the purported use of the inherent jurisdiction was "novel and unpredictable" rather than "clear and accessible" and thus not '*in accordance with the law'*.

    iii) Ground 4 argues that, if the High Court had jurisdiction or power to make the order under its inherent jurisdiction, the judge had been wrong to exercise it in the present case.

Jurisdiction: Statutory powers

19. It is common ground that the Respondent is entitled to bring an application for a declaration of parentage pursuant to s.55A Family Law Act 1986 which provides:

> "(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 the person so named."

20. Where there are proceedings in existence in which the issue of parentage arises, the court may order scientific tests to determine whether the person is the parent of the child. Family Law Reform Act 1969, section 20, provides:

> "20 Power of court to require use of blood tests
>
> (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.

21. As was recognised by the judge, a court could, absent scientific evidence nevertheless, conduct a finding of fact hearing and having done so reach a conclusion as to the paternity of the Respondent to the civil standard of proof upon the balance of probabilities. Such was the route used by the courts for determining paternity in so called 'affiliation proceedings' in the days prior to scientific testing; a humiliating process whereby the parties were obliged to give oral evidence in open court of the most personal and intimate kind. The DNA testing sought by the Respondent would, however, resolve the question of parentage with near certainty and, if it excluded Mr Anderson as being the father of the Respondent, would rule out the possibility of his having inherited Lynch Syndrome, thereby putting his mind at rest without the necessity of further investigations.

22. The judge reminded himself of the importance of the best available evidence being available to a court and referred to *Re H and A (Paternity: Blood Tests)* [2002] EWCA Civ 383 where Thorpe LJ said

> "…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"

23. Prior to the introduction of Part III of the Family Law Reform Act 1969 (FLRA 1969) which, as set out above, provides the vehicle whereby the court can direct the use of scientific tests for the purpose of determining parentage, the court had on occasion used its inherent powers to order blood tests which, whilst not providing the near certainty of DNA tests, gave the courts evidence with which to corroborate oral evidence: see *In re L (An Infant)* [1968]P 119.

The Family Law Reform Act 1969

24. Section 20 FLRA as first drafted permitted a direction for 'blood tests' to be made. In due course FLRA 1969 was updated by the Family Law Act 1987 so as to allow an order to be made for 'scientific testing'; taking into account the development of DNA testing.

25. Key to FLRA 1969 is that whilst the court has the power to direct the taking of bodily samples for the purposes of ascertaining whether a party to the proceedings is (or is not) the parent of a person, the sample in question may only physically be taken from any person by consent (s.21(1) FLRA 1969). Whilst a person cannot be compelled to subject themselves to testing, a failure to comply with the court's direction allows the court to draw such inferences as "appear proper in the circumstances" (s.23(1) FLRA 1969)

26. Importantly for the purposes of the present case, the FLRA 1969 (as amended) makes no provision for the posthumous testing of samples taken in life. The question therefore arose as to whether the Act provides a complete statutory code in respect of DNA testing, or whether, as argued by Mr Kemp and found by the judge, the FLRA 1969 applies only to lifetime testing and, absent statutory power elsewhere, there is a lacuna in relation to post mortem DNA testing which can only be filled by a direction made by the High Court under its inherent jurisdiction.

Human Tissue Act 2004

27. In English law, there is no right to dictate the treatment of one's body after death. This is so regardless of testamentary capacity or religion. The wishes of the deceased are relevant, but are not determinative and cannot bind third parties: *Williams v Williams* [1882] LR 20 ChD 659. Following the revelation that several English hospitals had retained patients' body parts without the consent of their families, it became apparent that the existing law made no provision to proscribe such behaviour, which was (unsurprisingly) regarded as unethical. The Human Tissue Act 2004 (HTA) was passed in order to regulate the continued storage of human tissue. The legal requirements of the HTA with regard to consent, storage and the use of human tissue does not apply to nucleic acids already extracted, or cell lines derived, from the

cellular material governed by the HTA. The extracted DNA at the heart of this dispute falls into this category of material.

28. Unlike the FLRA, there is specific provision in HTA s.3(6) for consent to be given by a range of qualifying family members, including a parent (HTA s. 54(9)), in respect of the use of the bodily samples of a person who has died.

29. The judge rightly concluded that the HTA does not apply to the use to which the DNA in the present case can be put; the sample in question is 'extracted DNA' and is not 'bodily material' as defined by s.45 HTA 2004. Therefore, as is recorded in the *Consent and confidentiality in clinical genetic practice: Guidance on genetic testing and sharing genetic information* para A1.2.2 :

> "…since the extracted DNA stored in NHS diagnostic laboratories is therefore not governed by the HTA. Common law and professional guidance determine the consent requirements for analysis of such samples."

Conclusion as to statutory powers

30. It is now common ground that the court has no statutory power to make a direction for the testing of Mr Anderson's stored DNA. The judge, in determining whether he nevertheless had the power to make the direction sought, properly had in mind a number of matters consequent upon his consideration of the philosophy and objectives of the HTA, which he set out in his judgment at [35]. This included that:

    i) Although not directly applicable, the HTA shows how Parliament has chosen to reconcile the various interests: "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".

    ii) "Other than in the case of excepted use, the fundamental dividing line between lawful and unlawful use is the existence of consent".

Inherent Jurisdiction

31. Absent statutory power, the question arose as to whether the High Court has an inherent power to order the DNA testing in circumstances where the Appellant (qua mother and qua personal representative) was now objecting to use being made of Mr Anderson's extracted DNA for the purposes of establishing (or otherwise) the paternity of the Respondent.

32. The judge briefly referred to the fact that the inherent jurisdiction is a jurisdiction of long standing which has been used in a wide variety of ways to supplement statutory powers. He referred to the recent cases which have seen the jurisdiction develop to provide remedies for the protection of vulnerable, but not legally incapable, adults: (*Re Sa* [2005] EWHC 2942 (Fam)) and also to the confirmation by the Court of Appeal that the use of the inherent jurisdiction has survived the enactment of the Mental Capacity Act 2005 see: *Re DL v A Local Authority* [2012] EWCA 253.

33. The judge also referred to *Bremer Vulkan v South India Shipping* [1981] 1 AC 909 by way of an example of the use of the inherent jurisdiction by the court in relation to its power to control its own procedures.

34. Before turning to the submissions of each of the parties, the judge said:

> "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 of the law."

35. For the purposes of the appeal in relation to the court's jurisdiction to make an order under its inherent jurisdiction, Mr Mylonas refined his argument to four key submissions:

    i) That the inherent jurisdiction is not a "lawless void". In support of this he relies on the judgment of Hayden J in *Redbridge LBC v A* [2015] Fam 335, a case in which Hayden J rejected an application by a local authority to invoke the inherent jurisdiction to protect vulnerable young people from a man whom they perceived to present a sexual risk. He said:

    > "36. 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…. "

    ii) That the court's powers are limited by s.19(2) of the Senior Courts Act 1981. s.19(2) provides (SCA 1981):

    > "(2) 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)."

    The effect of this provision, argues Mr Mylonas, is that the Respondent must, but cannot, show that there was jurisdiction

to make an order of this kind prior to the coming into force of SCA 1981.

iii) The power to make a direction for scientific testing to establish paternity under the inherent jurisdiction was ousted by FLRA 1969 and there is therefore no place for the inherent jurisdiction. Mr Mylonas relies in this regard upon *Re O (a Minor) (Blood Tests: Constraint)* [2000] Fam 139. This was a case where the mother of the children, the subject of the order, refused to consent to the testing as ordered by the court. Wall J said in the passage relied on by the Appellant:

> "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"

[In the event, Parliament did provide 'it' by way of an amendment to s.21(3) of the Act in April 2001, allowing a sample to be taken from a child absent the consent of the appropriate adult where it would be in the child's best interests].

(iv) The order made by the judge was an unprincipled extension of inherent jurisdiction. Mr Mylonas submits that although the judge cited Lord Donaldson in *Re F (Sterilisation: Mental Patient)* [1990] 2 AC 1 with approval, he failed thereafter to adhere to the following passage:

> "… 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 initiative 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."

Mr Mylonas submits that on a proper analysis of the judge's judgment, the judge's overall conclusion relied only, or very substantially, on the interests of justice. This, he submits, does not represent a 'principled extension' as the interests of justice cannot found a remedy where none previously existed. Further, he says the proposed direction does not fit into any well-established category (that is to say; children, vulnerable adults or the court's power to control its own procedure such as striking out) and the direction sought is not sufficiently proximate to found a principled extension. Finally he says that the proposed extension was a matter for Parliament and there are sound policy reasons to support the current position, namely that if it became known that the court will permit DNA testing without consent after death, it will, or may, discourage patients from providing DNA during their lifetime.

36. The Respondent responds by submitting that:

    i) The inherent jurisdiction is a residual power which the court may draw on where necessary and *Redbridge LBC v A* merely serves to highlight the need for care in its exercise.

    ii) Section 19(2)(b) SCA 1981 was intended to confer statutory authority on the exercise of the jurisdiction prior to the coming into force of the SCA 1981 and does not limit the variety of circumstances in which it can be applied, as evidenced by its approved use in the case of vulnerable adults who retain capacity: *DL v A Local Authority*. The Respondent additionally relies upon the editors' note in the White Book which refers to s.19 (2)(b) as a provision which 'subsumes and incorporates' the inherent jurisdiction of the court which 'was exercisable by the superior courts from the earliest days of the common law'.

    iii) The remedy sought has not been ousted by the FLRA 1969 statutory scheme. The judge was, Mr Kemp submits, right to conclude that the testing of DNA post-mortem falls outside the scheme in contrast with *Re O* which fell squarely within it – the FLRA 1969 specifically providing for the testing of a child, which was the very issue in *Re O*. Even though the FLRA 1969 has been amended to incorporate modern testing methods including DNA, no consideration has ever (in contrast to the HTA) been given by Parliament to post-mortem testing.

    iv) In response to the submission that the making of the order amounts to an unprincipled extension of the inherent jurisdiction, Mr Kemp says that in order to be a principled extension it is not necessary to compartmentalise the inherent jurisdiction into specific areas. The judge's role, as highlighted by Lord Donaldson in *Re F,* is one of '*filling gaps left by that law, if and so far as those gaps have to be filled in the interests of society as a whole'* and that process must be undertaken in accordance with principle. That, he submits, is precisely what the judge has done in the present case.

Discussion

37. The judge rejected each of the four key submissions made by Mr Mylonas in support of his appeal. The judge set out with care the competing arguments for and against the existence, or otherwise, of an inherent power [71] – [74]. The judge considered not only statutory interpretation, but issues of consent, the public interest in certainty in the law and the importance of knowledge of our biological identity, together with the interests of third parties and of the interests of justice being served by the establishment of the truth.

38. The judge was clearly troubled by the prospect of a court trying to establish the truth on the balance of probabilities when 'the truth is there for the asking': [71(6)]. As the judge said [71(4)] "A declaration made without testing is a finding, while the result of a test is a fact".

39. More specifically the judge held that the testing of DNA post-mortem falls 'distinctly outside the scope of the legislation', saying:

> "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."

40. I agree. In my judgment *Re O* does not assist the Appellant in this regard. The Act is, of course, comprehensive in relation to cases falling within its ambit and, as was observed by the judge [71(1)], the issue in *Re O* 'lay squarely within the scheme of the Act'. In my judgment Re *O* was entirely different, dealing as it did with the enforcement of an order made under the terms of the Act, whereas post-mortem testing is, as the judge put it 'distinctly outside the scope of the legislation'.

41. The FLRA 1969 makes provision for the giving of directions for scientific testing only in relation to the living and not in relation to samples retained after death. In *DL v A Local Authority,* Davis LJ referred to the 'ordinary rule of statutory interpretation', citing Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at p.725:

> "In my opinion where the courts have established a general principle of law or equity, and the legislature steps in with legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law."

42. In my judgment Lord Wilberforce's statement applies as much to post-mortem scientific testing as it did in *DL v A Local Authority* to vulnerable adults who do not fall within the specific provisions of the Mental Capacity Act 2005.

43. In relation to s.9(2) SCA 1981, the judge rejected the argument that the powers of the High Court had effectively been frozen at the date of the legislation. I unhesitatingly agree. Had that been the case, the inherent jurisdiction would, from that time on, have been limited to those categories already identified prior to the SCA 1981 coming into force and the inherent jurisdiction could not (for example) have been called upon to fill the gap left following the Mental Capacity Act 2005 in relation to vulnerable adults who had retained capacity.

44. Mr Mylonas' 'lawless void' and 'unprincipled extension' arguments can be conveniently dealt with together. In my judgment the judge was acutely conscious of the dangers of an indiscriminate use of the inherent jurisdiction as a means primarily to achieving what a court may view as a 'fair' outcome. The judge directed himself by saying that, whilst the inherent jurisdiction is a valuable asset, caution is required and:

> "60 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 of the law"

45. Such an approach is, in my judgment, entirely at one with the observation of Hayden J in *Redbridge.*

46. I accept the submission of Mr Kemp that in order for an extension of the jurisdiction to be principled, it is unnecessary for it to slot into a previously recognised category. To do so would constrain the legitimate use of Lord Donaldson's '*great safety net.'* That does not, however, give a judge open season to expand the use of the inherent jurisdiction and this judge was sensible of the need to avoid any unprincipled extension of the jurisdiction saying:

> "71(1):…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. That gives rise to the possibility of an indefinite period during which individuals would be left without a remedy."

47. In considering the interests of justice the judge said:

> The interests of justice
>
> "71(6) 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."

The judge went on to say:

> "71(7)…the existence of a power cannot depend upon the circumstances of the particular case… jurisdiction cannot depend upon merits."

He concluded:

> "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 the 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."

48. Mr Mylonas protests that the emphasis on the 'interests of justice' by the judge does not justify an unprincipled extension to the jurisdiction. In my judgment, that submission fails properly to take into account the focus of the judge's finding in relation to the interests of justice. The judge's emphasis was on the prospect of a court trying to make a finding on a matter as important as parentage (and therefore the identity of the Respondent) on incomplete oral and written evidence. The nature of the evidence upon which the court would be compelled to rely (absent scientific testing) would be the recollection of the surviving protagonists, of events which took place several decades ago, in circumstances where, the undoubted truth could be easily and cheaply made available through DNA testing. The judge in reaching this conclusion had well in mind, and said in terms, that the existence of a power cannot depend upon the circumstances of the case and that the jurisdiction cannot depend upon merits [71(7)].

49. The judge carefully considered all the legal and ethical factors which related to the issue as to whether what he intended to do amounted to a principled extension of the use of inherent jurisdiction. Having weighed up those matters the judge decided, not that the best interests of justice on the facts of this case required a finding that there was jurisdiction, but that the interests of the living in knowing their biological identity together with the interests of justice including the desirability of knowing the truth, when set against the other identified considerations, led to the conclusion that the High Court possessed the jurisdiction to make the order sought.

50. In my judgment the judge was entirely correct in both his approach and in his conclusion that there is a residual power under the inherent jurisdiction for a court to make a direction that the extracted DNA of Mr Anderson should be utilised in order for the paternity of the Respondent to be determined.

51. In so concluding, it goes without saying that I wholly endorse Hayden J's stricture that the inherent jurisdiction is not a 'lawless void', and I would adopt the words of Jackson J in his judgment in the present case that:

> "60… 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 of the law."

52. I would therefore dismiss Ground 1 of the appeal.

Human Rights: Grounds 2 & 3

53. Art.8 of the Convention provides:

> "Right to respect for private and family life
>
> 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."

54. Mr Mylonas argues that if (which he does not accept) a relevant inherent jurisdiction exists in principle, it cannot be used to interfere with the Appellant's rights under Article 8 because such interference would not be '*in accordance with the law'* as required by Article 8(2) and the judge was, accordingly, prohibited from making the order sought.

55. Before considering whether interference with a person's Convention rights can be justified, and therefore lawful, it is necessary first to be satisfied not only that there has been an interference with those rights, but also that they were engaged in the first place. In the present case what is required is that the rights of the Appellant, the mother of the Mr Anderson, are engaged in relation to the proposed use of the DNA of her deceased son.

56. It seems to me that there are two bases upon which it could be argued that the Appellant's rights are engaged:

i) In her capacity as personal representative of the deceased, effectively standing in his shoes. The Article 8 rights, if engaged, are therefore those of the deceased. *Jaggi v Switzerland* (2008) 47 E.H.R.R.30 would seem to dispose of that argument as it was reiterated in that case that:

> "42…. The private life of a deceased person from whom a DNA sample was taken could not be adversely affected by a request to that effect made after his death."

ii) By virtue of her being Mr Anderson's mother and, possibly, as a putative grandmother. The Appellant's case seems to be that the Appellant's rights are engaged qua mother/putative grandmother (although that is not wholly clear). The argument goes that her right to private life being so engaged, it would thereafter be an infringement of those rights if the order was made for the testing of Mr Anderson's DNA sample. The infringement, it is said, is the result of DNA testing having the capacity to identify genetic relationships

between the Appellant and other people (namely her grandson) and is therefore an interference in Mrs Anderson's Article 8 rights.

57. In my judgment it is doubtful whether the Article 8 rights of the Appellant are engaged on the basis predicated by Mr Mylonas, although the matter was not fully argued on paper or orally before this Court. In any event it would be to take Article 8 too far to base a relevant 'interference' on a right not to know whether or not the Appellant has an additional grandchild.

58. That is not quite the end of the matter as, even if I am wrong both as to the issue of the Appellant's rights being engaged and as to whether the order sought is an interference with those rights, the court , (as was recognised by the judge) still has to consider the competing rights of the parties concerned. In *Jaggi* the court said:

> "25…..the right to know one's ascendants falls within the scope of the concept of "private life", which encompasses important aspects of one's personal identity, such as the identity of one's parents. There, appears, furthermore, to be no reason in principle why the notion of "private life" should be taken to exclude the determination of a legal or biological relationship between a child born out of wedlock and his natural father."

And at para.37:

> "37…. The Court considers that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases particularly rigorous scrutiny is called for when weighing up the competing interests"

59. Finally at para 43:

> "The Court notes that the preservation of legal certainty cannot suffice in itself as a ground for depriving the applicant of the right to ascertain his parentage…"

60. It follows that 'particularly rigorous scrutiny' is called for when weighing up the competing interests of the Respondent and Appellant. In my judgment the balance falls firmly on the side of the Article 8 rights of the Respondent. This view is bolstered by that is the fact that, not only has the Respondent the right to an identity, but also that the right to medical treatment is an adjunct to both Art. 2 (Right to Life) and Art.3 (Prohibition of Torture) of the Convention.

61. It follows that the appeal in respect of Ground 2 must be dismissed.

62. By his Ground 3 Mr Mylonas criticises what he characterises as the judge's 'failure' specifically to address the very full arguments made by him on behalf of the Appellant at trial.

63. In my judgment it was absolutely clear from the judge's judgment that he was alive both as to the content of the submissions on Article 8 and his task in relation to those rights, namely a balancing exercise. The judge's conclusion reveals that he did not

consider the case for the engagement of the Appellant's rights as convincing and/or, that if the Appellant's rights were engaged, they were outweighed by the unequivocal rights of the Respondent.

64. The judge said:

> "77(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 that the question of whether it is palatable."

The judge therefore, albeit succinctly, set out his conclusion in relation to the balancing act, even if the Appellant's rights were in fact engaged.

Should the Order for DNA testing have been made?

65. Mr Mylonas argues that as testing could not have taken place in Mr Anderson's lifetime without his consent, it would be wrong to circumvent the obtaining of that consent by waiting until after his death to make the application. The delay in making the application, he submits, deprived Mr Anderson of the opportunity to make his own decisions about his private life.

66. The Appellant, as personal representative, stands in the shoes of the deceased. On one view it could be argued that Mrs Anderson's refusal to consent should (perhaps by analogy to the HTA) be determinative of the application, even under the inherent jurisdiction. In my judgment such an argument does not hold water for two reasons; one legal and one relating to the facts of the case:

i) The FLRA allows the court to make a direction for scientific testing. Whilst the taking of the bodily sample requires consent (s.21(1) FLRA 1969) the making of a direction for scientific testing does not. It is only if a party refuses to provide a specimen once the order for testing has been made, that adverse inferences may be drawn (s.23(1) FLRA 1969). It follows that, in appropriate circumstances, where, as here, the DNA sample is already available and the consent of a party is not required in order to <u>obtain</u> a sample, the court can make an effective direction for DNA testing to be carried out on that sample notwithstanding the refusal of the party whose DNA it is to consent to its use. In those unusual circumstances, it follows that a court could in the same way order the DNA testing of an existing sample notwithstanding the refusal of a personal representative (as Executor) to consent to its use.

ii) Further, as the judge focused on the facts, as recently as February 2015 the Appellant had regarded it as 'essential' for medical reasons that the Respondent's paternity should be established. As the judge observed: "It does not now lie easily in her mouth to say the opposite."

67. In my judgment there is no basis for interfering with the judge's decision that on the facts of the case the order for DNA testing should be made. This was a case of a claimant wanting to know his paternity for a sound medical reason and in my view, once the issues in relation to jurisdiction and the human rights obligations have been

cleared away, the wording of the order made by the judge allowing the DNA testing to take place, was not only inevitable but right.

68. I accordingly dismiss this appeal.

Lord Justice Simon

69. I agree.

Lord Justice McFarlane

70. I also agree.