Neutral Citation Number: [2011] EWCA Civ 4

Case No: C1/2010/1658

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
Mr Justice Collins
C0/1221/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/01/2011

Before:
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE TOULSON
and
LORD JUSTICE JACKSON

Between:

TTM (By his litigation friend TM)	**Appellant**
- and -	
LONDON BOROUGH OF HACKNEY	**Respondents**
EAST LONDON NHS FOUNDATION TRUST	
SECRETARY OF STATE FOR HEALTH	

Mr Richard Gordon QC and Ms Amy Street (instructed by **Messrs Steel & Shamash**) for the **Appellant**
Mr Neil Garnham QC and Mr Sydney Chawatama (instructed by **Capsticks Solicitors LLP**) for the **East London NHS Foundation Trust**
Mr Alex Ruck Keene (instructed by **London Borough of Hackney Legal Department**) for the **London Borough of Hackney**
Mr Jason Coppel (instructed by **the Solicitor to the Department of Health**) for the **Secretary of State for Health**

Hearing dates: 14 - 15 December 2010

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Toulson :

Introduction

1. This appeal raises issues concerning the law of trespass to the person, the Mental Health Act 1983 and the European Convention on Human Rights.

2. The appellant, M, was detained at Homerton Hospital between 30 January and 11 February 2009. The hospital is managed by the second respondent ("the hospital trust"). M's detention followed the acceptance by the hospital trust of an application for his admission under s3 of the Act. The application was completed by an Approved Mental Health Professional ("AMHP"), for whose conduct the first respondent ("the local authority") accepts responsibility whether or not it is as a matter of strict law vicariously responsible.

3. M challenged the lawfulness of his detention by applying for a writ of habeas corpus against the hospital trust. The local authority was joined in the proceedings as an interested party. After a two day hearing, on 11 February 2009 Burton J gave judgment for M and ordered that:

> "3. The claimant's application for a writ of habeas corpus ad subjiciendum shall be granted, his detention being unlawful.
>
> 4. The defendant shall release the claimant from detention at the Homerton Hospital pursuant to the purported order under section 3 of the Mental Health Act 1983 (as amended) dated 30 January 2009 forthwith."

4. On the first day of the hearing M also issued a claim for judicial review against the local authority and the hospital trust, seeking damages for his detention or, if it were held that his claim for compensation was barred by the terms of the Act, a declaration of incompatibility with Article 5 of the Convention. In view of the contingent claim for a declaration of incompatibility, the third respondent ("the Health Secretary") was therefore joined as an interested party.

5. After an oral hearing, on 11 June 2010 Collins J dismissed M's claim for judicial review. He held that M's detention during the period up to Burton J's order was not unlawful as a matter of domestic law and that there was no incompatibility between domestic law and Article 5 of the European Convention. He gave leave to appeal on limited grounds.

Mental Health Act 1983

6. Section 3 provides:

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

> (2) An application for admission for treatment may be made in respect of a patient on the grounds that –
>
> (a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and
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> ...
>
> (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and
>
> (d) appropriate medical treatment is available for him.
>
> (3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with; and each such recommendation shall include-
>
> (a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraphs (a) and (d) of the that subsection; and
>
> (b) a statement of the reasons for that opinion so far as it relates to the conditions set out in paragraph (c) of that subsection, specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate.
>
> (4) In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case."

7. The Act contains detailed provisions about who may make an application under s3(2) and the procedures which are to be followed.

8. Under s11 an application for admission for treatment may be made by an AMHP, subject to certain exceptions. One of the exceptions, provided by s11(4)(a), is that an AMHP may not make such an application in respect of a patient if the nearest relative of the patient has notified the AMHP, or the local authority on whose behalf the

AMHP is acting, that he objects to the application being made. In such a case there is a different and more complex method for making an application for the patient's admission for treatment.

9. Section 6(3) is important in the present case, but I should set out the whole section because of an argument based on comparison of the language used in the different subsections. The section provides:

> "(1) An application for the admission of a patient to a hospital under this Part of this Act, duly completed in accordance with the provisions of this Part of the Act, shall be sufficient authority for the applicant, or any person authorised by the applicant, to take the patient and convey him to the hospital at any time within the following period, that is to say –
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> (a) in the case of an application other than an emergency application, the period of 14 days beginning with the date on which the patient was last examined by a registered medical practitioner before giving a medical recommendation for the purposes of the application;
>
> (b) in case of an emergency application, the period of 24 hours beginning at the time when the patient was examined by the practitioner giving the medical recommendation which is referred to in section 4(3) above, or at the time when the application is made, whichever is the earlier.
>
> (2) Where a patient is admitted within the said period to the hospital specified in such an application as is mentioned in subsection (1) above, or being within that hospital, is treated by virtue of section 5 above as if he had been admitted, the application shall be sufficient authority for the managers to detain the patient in the hospital in accordance with the provisions of this Act.
>
> (3) Any application for the admission of a patient under this Part of the Act which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it
>
> (4) Where a patient is admitted to a hospital in pursuance of an application for admission for treatment, any previous application under this Part of this Act by virtue of which he was liable to be detained in a hospital or subject to guardianship shall cease to have effect."

10. The "necessary medical recommendations" for admission under s3 are defined in s3(3). Section 12 contains further provisions about who may make them. Section 12(2) states that:

> "Of the medical recommendations given for the purposes of any such application, one should be given by a practitioner approved for the purposes of this section by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder; and unless that practitioner has previous acquaintance with the patient, the other such recommendation shall, if practical, be given by a registered medical practitioner who has such previous acquaintance…"

11. Section 139 is important. It provides:

> "(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act,…unless the act was done in bad faith or without reasonable care.
>
> (2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court…
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> …
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> (4) This section does not apply to proceedings against the Secretary of State or against a Strategic Health Authority, Local Health Board, Special Health Authority or Primary Care Trust or against a National Health Service Trust established under the National Health Service Act 2006 or the National Health Service (Wales) 2006 or NHS Foundation Trust or against the Department of Justice in Northern Ireland."

12. Article 5 of the European Convention provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (e) the lawful detention…of persons of unsound mind…
>
> …

> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Facts

13. M was born on 3 April 1983 and is a citizen of Lithuania. He came to the UK with his brother to seek work. In 2008 it became apparent that he was not well and in November 2008 he was admitted to Homerton Hospital under s 2 of the Act for assessment. On 9 December he was admitted under s3 for treatment. His brother, who was his nearest relative within the meaning of the Act, did not at that stage object because he recognised that M needed treatment. M's admission under s3 was based on the recommendations of two psychiatrists at the hospital, Dr Chatterjee and Dr Malik. There was some difference between them as to diagnosis but both agreed that M needed to be admitted for treatment for his own safety. Dr Malik considered that he also needed to be detained for the safety of others.

14. At some stage M's brother became troubled about M's treatment. Acting on legal advice, and in accordance with a procedure provided by s23 of the Act, on 19 January 2009 M's brother gave notice as M's nearest relative of his intention to require M's release on 22 January 2009. M's brother and his solicitor duly attended at the hospital on that day, but it was agreed informally that M should remain there for the time being as a voluntary patient. However, there were problems about M refusing to take medication which Dr Malik considered that he needed, and so the question arose whether M should again be sectioned. Dr Malik considered that this was necessary, but at this stage Dr Chatterjee did not agree.

15. Faced with this disagreement among themselves, the clinical team at the hospital considered that it would be right to arrange for fresh assessments to be made by two psychiatrists who were independent of the hospital team. This was done, and the two independent psychiatrists, Dr Lyall and Dr Metcalf, both took the view that M's admission was necessary for his own health and safety and for the protection of others.

16. On 30 January 2009 the AMHP made a written application for M's admission for treatment under s3. The application was founded on the recommendations of Dr Lyall and Dr Metcalf.

17. In the application form, the AMHP stated that she had consulted M's brother, who to the best of her knowledge and belief was the patient's nearest relative within the meaning of the Act, and that "[t]hat person has not notified me or the local social services authority on whose behalf I am acting that he or she objects to this application being made".

18. The form also required the AMHP, in a case where the application was founded on recommendations from two medical practitioners neither of whom had previous acquaintance with the patient, to provide an explanation. The explanation given was that the clinical team wanted an independent assessment.

19. The hospital trust accepted the application and M was admitted for treatment.

Habeas corpus proceedings

20. In the habeas corpus proceedings the lawfulness of the application was challenged principally on the ground that M's brother had informed the AMHP that he objected to the application, contrary to what was stated in the application form signed by the AMHP, and that accordingly the application was in contravention of s11(4)(a).

21. Burton J heard oral evidence from the AMHP and M's brother. It was common ground that there had been a number of telephone conversations between them before the application was made, and that in one of the conversations M's brother expressed his objection to it. The question which Burton J had to decide was whether that objection was withdrawn in a later conversation. He described the AMHP as "a convincing and impressive witness" and said that her evidence was "very honest". He accepted that she signed the application form in good faith, believing that the effect of her final conversation with M's brother was that he no longer objected to the application. However, on an objective assessment of the effect of what M's brother said, Burton J found that it did not amount to a withdrawal of his objection. The application was therefore prohibited by s11(4)(a).

Judicial review proceedings

22. M argued that his admission for treatment under s3 and detention between 30 January and 11 February 2009 were unlawful on two grounds. The first was the ground on which Burton J granted habeas corpus relief, i.e. that M's brother had objected to the application. The second was that neither of the doctors who provided the medical assessment on which the application was founded had previous acquaintance with M. It was argued that the application therefore failed to conform with the requirements of s12(2). The second ground had been included in the written application for habeas corpus, but it was not the subject of oral argument in those proceedings and Burton J made no reference to it in his judgment.

23. M's detailed grounds for judicial review asserted a number of causes of action against the local authority and the hospital trust. In broad summary, there were claims for unlawful detention and/or trespass to the person, negligence, breach of statutory duty under the Mental Health Act and breach of duty under s6 of the Human Rights Act 1998 coupled with article 5. In addition, M applied for leave under s139(2) of the Mental Health Act to pursue his claims against the local authority (a procedural hurdle which did not apply in relation to the hospital trust, since s139(4) excluded the hospital trust from the provisions of that section). If, however, the provisions of the Act were held to bar M from recovering compensation for his detention, he applied for a declaration of incompatibility with article 5.

24. Collins J's reasons for dismissing the claim were in summary as follows:

> 1. M's detention was lawful because the hospital trust was authorised to detain him under s6(3), since the application for M's admission appeared to be duly made. The hospital trust was accordingly entitled to rely upon the matters stated in it (including that M's brother, as his nearest relative, did not object to the application).

2. By analogy with cases of unlawful bye-laws or unlawful court orders, M's detention was to be regarded as lawful under domestic law until such time as the court declared the decision making process to have been defective and ordered that the detention should cease.

3. In the circumstances of this case, the AMHP's decision to found the application on the medical assessments of two psychiatrists who had come fresh to it did not involve a breach of s12(2).

4. Leave to sue the local authority for negligence or breach of statutory duty should be refused, because there was no realistic prospect in the light of Burton J's judgment of M persuading a court that the AMHP had acted in bad faith or without reasonable care. Section 139 therefore precluded any liability on the part of the local authority.

5. Because M's detention was lawful as a matter of domestic law until the judgment and order of Burton J, there was no breach of article 5 and no incompatibility between domestic law and the convention.

25. The judge gave leave to appeal on the following questions:

"(1) Whether the detention was unlawful ab initio so that compensation is payable in accordance with Article 5(5) of the European Convention on Human Rights 1950; and

(2) whether in the circumstances there was a breach of s12(2) of the Mental Health Act 1983."

The rival contentions

26. M contends that the judge was wrong in the following respects:

1. The judge should have held that M's detention was unlawful. The purpose of s6(3) was to exonerate the hospital trust from liability for acting upon an unlawful application made by the AMHP, but it did not make M's resulting detention lawful. The parallel which the judge drew with invalid bye-laws or court orders was inapposite.

2. The judge misapplied s12(2). He ought to have found that it was "practicable" for the AMHP to have obtained an assessment from a practitioner who had previous acquaintance with M, and therefore that the AMHP acted in breach of s12(2). Further, the application did not show that it was impracticable to have obtained an assessment from a practitioner who had previous acquaintance with M, and therefore s6(3) did not entitle the hospital trust to act on it.

3. The judge was wrong to refuse M leave under s139(2) to sue the local authority.

4. The judge was wrong in his approach to article 5. Even if he was right to hold that M's detention was lawful under domestic law, he should have held that the provisions of the Act in s6(3) and s139(2) led to incompatibility with the requirements of article 5, unless read down so as to avoid such incompatibility. He should therefore have read down one or other or both of those provisions, so as to avoid M being left without any right to compensation, or, failing that, he should have made a declaration of incompatibility.

27. The local authority contends that Collins J was right for the reasons that he gave. If, however, he was wrong to hold that M's detention was lawful for the purposes of article 5, the local authority accepts and asserts that it would be legitimate to read down s139(2) and/or s6(3) so as to avoid incompatibility. It further submits that it would be "a very peculiar result" on Burton J's findings of fact if the local authority, which did not detain M, should be held responsible for the deprivation of his liberty but that the hospital trust, which did detain him, should escape liability.

28. The hospital trust contends that the judge was right to dismiss M's claim against itself, but wrong to dismiss his claim against the local authority, for the following reasons:

1. The successful habeas corpus application established that the application for M's admission to hospital was unlawful, because his nearest relative did not consent to it, and accordingly his detention pursuant to the application was unlawful.

2. The effect of s6(3) was to protect the hospital trust from the consequences of acting on an unlawful application. It did not make M's detention lawful.

3. Compliance with s12(2) was not a condition precedent to the application of s6(3) but, in any event, the judge was right in his interpretation of s12 and in his conclusion on the facts of the case.

4. M's detention was in breach of article 5 because it was not a lawful detention.

5. The party responsible for the breach of article 5 was the local authority and not the hospital trust. The hospital trust acted properly in accordance with a procedure prescribed by law; the local authority acted in breach of the law.

6. Section 139(1) can and should be read down so as not to apply where its effect would otherwise conflict with article 5.

29. The Health Secretary supports the decision and reasoning of the judge, except that he says that the judge went too far in holding that the detention of a patient which initially was saved from unlawfulness by reason of s6(3) would, willy nilly, continue to be lawful until such time as a court should determine otherwise. The Health Secretary submits that s6(3) would not serve to authorise continued detention of the patient after information came to the attention of the hospital trust establishing that the application for the patient's admission had been invalid.

30. Although the Health Secretary's formal position was that he supported the judge's dismissal of the entire claim, Mr Coppel on his behalf made it clear by his oral submissions that the Health Secretary's main concerns were to uphold the judge's dismissal of the claim against the hospital trust, to avoid any watering down of s6(3) and to avoid any declaration of incompatibility.

31. The Health Secretary accepts that as a matter of Convention jurisprudence a state may be responsible for a breach of article 5 where agents of the state contribute to causing that detention, and that in the present case the role of the AMHP in bringing about M's detention was sufficient to engage the local authority's responsibility for breach of article 5, if there was such a breach. He submits that if, contrary to the primary conclusion of the judge, M's detention from 30 January to 11 February 2009 contravened article 5, the court should read down s139(1) so as to enable M to recover compensation in respect of his detention from the local authority, rather than make a declaration of incompatibility. He further submits that it would be unnecessary and wrong to read down s6(3), which serves an important purpose.

Was M's detention unlawful by reason of the AMHP's breach of s11(4) of the Mental Health Act?

32. Chapter 29 of Magna Carta 1297 provides:

> "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land."

33. The right to freedom enshrined in Magna Carta is a fundamental constitutional right. From ancient times two writs were fashioned for its enforcement – the writ of *habeas corpus* for obtaining release and the writ of trespass to the person for obtaining compensation where the right has been infringed. Trespass to the person can take different forms, one being false imprisonment. This action will lie where there is intentional deprivation of a person's liberty without lawful justification. Particular features of the cause of action are that the interference with the claimant's liberty must be a direct consequence of the defendant's act and that, if so, it is actionable per se: Clerk and Lindsell on Torts (2010) 20th ed, para 15-01. (I refer to the defendant's act because we are not concerned in this case with any question of liability alleged to arise from a deliberate omission in breach of a duty to act, which was considered by this court in *Prison Officers Association v Iqbal* [2009] EWCA Civ 1312.)

34. Cases have from time to time arisen where a claimant has been detained by a third person in consequence of something said or done without justification by the

defendant, and the courts have had to decide whether the defendant was liable for false imprisonment. The case law was reviewed by the Court of Appeal in *Davidson v Chief Constable of North Wales* [1994] 2 All E R 597. In that case innocent claimants were arrested by the police on suspicion of shoplifting as a result of an allegation made by a store detective. The police officers were not liable because their conduct was lawful by reason of s24(6) of the Police and Criminal Evidence Act 1984 (as it then was), which gave power to a constable to arrest a person without a warrant if he had reasonable grounds for suspecting that an arrestable offence had been committed and that the person arrested was guilty of it. The issue was whether the store detective was liable. Sir Thomas Bingham MR, at page 604, stated the test as being whether the store detective's conduct

> "went beyond laying information before police officers for them to take such action as they thought fit and amounted to some direction, or procuring, or direct request, or direct encouragement that they should act by way of arresting these defendants."

35. The principle is therefore recognised at common law that there may be false imprisonment by A, although it was B who took the person into custody and B acted lawfully, provided that A directly caused B's act and that A's act was done without lawful justification.

36. In *Davidson* it was held on the facts that there was no liability on the part of the store detective, but suppose for the sake of argument that the facts had led to a decision on the other side of the line. There would have been no illogicality in holding that the claimants had suffered wrongful deprivation of liberty by reason of the store detective's conduct, albeit that the police had acted lawfully in arresting them. The explanation is straightforward. Lawfulness or unlawfulness is an attribute of the conduct of the defendant which caused the claimant's loss of liberty. In the hypothetical example, the fact that the police acted under a lawful power of arrest would not have cured the wrongful character of the store detective's conduct, nor would it have been an independent act breaking the chain of causation between the store detective's wrongful conduct and the claimant's loss of liberty.

37. In the present case the hospital trust acted lawfully in detaining M by virtue of s6(3), just as the police officers acted lawfully in *Davidson*. On this point there was some debate between the parties about whether s6(3) should be characterised as affording to hospital managers a power to detain or merely a defence to an action for false imprisonment. The hospital trust argued for the latter and drew attention to differences in language between s6(1), s6(2) and s6(3). It was not a profitable debate. It does not need close linguistic analysis to detect the purpose of s6(3). It is intended to enable hospital managers, possibly at short notice, to admit for treatment someone who they have reasonable cause to believe is in immediate need of such admission for the health and safety of himself or for the protection of the public, and, with this end in view, Parliament has considered it reasonable for the hospital managers to be able to rely on an application which appears to have been completed in accordance with the requirements of the Act. Since the section empowers hospital managers to admit a patient in respect of whom an application for his admission appears to have been duly made, it follows that they have a defence against any claim which might otherwise have been made against them for acting on an invalid application. The two are

opposite sides of the same coin. In that regard the situation is analogous to the position of the police officers in the example involving a store detective. Police officers have powers of arrest based on reasonable suspicion, from which it also follows they are not liable for false imprisonment if in the proper exercise of those powers they arrest someone who is innocent.

38. However, it does not follow from the fact that the hospital managers detained M in the lawful exercise of their power under s 6(3) that he was not wrongfully deprived of his liberty by the unlawful conduct of the AMHP. On the facts of *Davidson* there was no liability on the part of the store detective because she did not directly request or encourage the police to arrest the claimants. By contrast, it would be difficult to imagine a more direct case of one person wrongfully causing another to detain someone than the present case. The AMHP made an unlawful written application to the hospital trust for M's admission; and acting on the facts stated in the application, as s 6(3) authorised it to do, the hospital trust detained him.

39. It follows that, on ordinary principles of common law, M's detention was unlawful inasmuch that it was brought about directly by the conduct of the AMHP for which she had no lawful justification, notwithstanding that she acted in complete good faith. I will consider in due course the effect of the qualified defence to civil liability provided by s139(1). Before doing so, I turn to a pair of habeas corpus cases and a judicial review case which concerned patients detained under the Mental Health Act: *R v Managers of South Western Hospital ex p M* [1993] QB 683, *Re S - C (Mental Patient Habeas Corpus)* [1996] QB 599 and *R v Central London County Court ex p London* [1999] QB 1260.

40. In *S-C*, at page 603, Sir Thomas Bingham MR explained the needs and counter-balancing considerations which the provisions of the Mental Health Act about involuntary admission and treatment were designed to meet:

> "[Mental patients] present a special problem since they may be liable, as a result of mental illness, to cause injury either to themselves or to others. But the very illness which is the source of the danger may deprive the sufferer of the insight necessary to ensure access to proper medical care, whether the proper medical care consists of assessment or treatment, and if treatment, whether in-patient or out-patient treatment.
>
> Powers therefore exist to ensure that those who suffer from mental illness may, in appropriate circumstances, be involuntarily admitted to mental hospitals and detained. But, and it is a very important but, the circumstances in which the mentally ill may be detained are very carefully prescribed by statute. Action may only be taken if there is clear evidence that the medical condition of a patient justifies such action, and there are detailed rules prescribing the classes of person who may apply to a hospital to admit and detain a mentally disordered person. The legislation recognises that action may be necessary at short notice and also recognises that it will be impracticable for a hospital to investigate the background facts to ensure that all the requirements of the Act are satisfied if

> they appear to be so. Thus we find in the statute a panoply of powers combined with detailed safeguards for the protection of the patient. "

41. The question in all three cases was whether, on their particular facts, the powers provided by Parliament had been properly exercised and whether the court should order the patient's release. In *S-C* Sir Thomas Bingham (at page 603) reminded himself (and his words are a reminder to other courts) "that the liberty of the subject is at stake in a case of this kind, and that liberty may be violated only to the extent permitted by law and not otherwise".

42. In *R v Managers of South Western Hospital ex p M* the patient was detained on the application of an AMHP. In purported pursuance of s11(4) the AMHP had consulted the patient's mother as her nearest relative. However, the patient's mother was not ordinarily resident in the UK, and, according to the statutory definition of "nearest relative", the AMHP ought to have consulted the patient's uncle. He was in fact consulted, but not in the capacity of nearest relative. Neither the patient's mother nor the patient's uncle objected to her admission. Nonetheless, Laws J was constrained to find that the AMHP had unwittingly contravened s11(4). However, he held that the hospital had authority to admit the patient under s6(3) and he concluded that "Accordingly, the applicant's detention is not unlawful." He therefore dismissed her application for habeas corpus.

43. That decision was overruled by the Court of Appeal in *S-C*. The facts of *S-C* were that the patient's admission was objected to by her father, who was her nearest relative, and the AMHP knew of his objection. However, the AMHP said that she understood that the patient's father was willing to delegate his role to the patient's mother, who made no objection to the proposed admission. The AMHP therefore signed an application form in which she stated that she had consulted the mother, who, to the best of her knowledge and belief, was the patient's nearest relative within the meaning of the Act. This statement was false and an application for habeas corpus was made. Counsel for the hospital managers was concerned to establish that his clients' conduct was lawful by reason of s6(3) and to forestall any possible claim against them for false imprisonment. Counsel for the local authority acknowledged that the applicant's detention was unlawful, but he argued that habeas corpus was inappropriate and that the appropriate remedy should be judicial review. The leading judgment was given by Sir Thomas Bingham. Neill LJ gave a short concurring judgment and Hirst LJ agreed with both judgments.

44. In his judgment Sir Thomas Bingham noted (at page 606) that s15 provided a limited power to amend a defective application, but he could see nothing which would enable "a fundamentally defective application to be retrospectively validated". He accepted (at page 608) the argument for the hospital managers that their conduct had been lawful by reason of s6(3) and that they had been entitled to rely on an application which appeared to be in order. But, he continued, those facts did not "turn an unlawful detention into a lawful detention; they meant simply that the applicant could not complain of the unlawful detention against the hospital managers."

45. On the question of remedy, Sir Thomas Bingham said (at page 611) that the application for habeas corpus was appropriate, since the object was not to overturn an administrative decision but "to show that there was never jurisdiction to detain the

applicant in the first place, a fact which on agreed evidence appears to be plainly made out".

46. Referring to Laws J's judgment, Sir Thomas Bingham said that he agreed with the analysis except for the conclusion, which I have quoted. As to that, he said at page 612:

> "The judge goes straight from a finding that the hospital managers were entitled to act upon an apparently valid application to the conclusion that the applicant's detention was therefore not unlawful. That is, in my judgment, a non sequitur. It is perfectly possible that the hospital managers were entitled to act on an apparently valid application, but that the detention was in fact unlawful. If that were not so the implications would, in my judgment, be horrifying. It would mean that an application which appeared to be in order would render the detention of a citizen lawful even though it was shown or admitted that the approved social worker purporting to make the application was not an approved social worker, that the registered medical practitioners whose recommendations founded the application were not registered medical practitioners or had not signed the recommendations, and that the approved social worker had not consulted the patient's nearest relative or had consulted the patient's nearest relative and that relative had objected. In other words, it would mean that the detention was lawful even though every statutory safeguard built into the procedure was shown to have been ignored or violated."

47. The effect of *S-C* was considered shortly by the Court of Appeal in *London.* In that case the AMHP proposed to apply for the patient's admission under s3, but the application was objected to by his mother, who was his nearest relative. The local authority then obtained an order in the County Court for the displacement of the mother under s29 of the Act and for her functions to be exercised by the AMHP. Under the power of that order, the AMHP made an application for the patient's admission and the hospital managers admitted him. The patient applied for judicial review to quash the court's decision to displace his mother. The application was dismissed and that decision was upheld on appeal. However, the court went on to consider, obiter, what the consequences would have been if it had decided that the County Court had no jurisdiction to order the displacement of the patient's mother. Stuart-Smith LJ, at pages 1276-7, described as ambiguous the phrase which had been used by Laws J in *R v Managers of South Western Hospital ex p M* and criticised by the Court of Appeal in *S-C*. He said that Laws J may have meant that the applicant's *continued* detention would not be unlawful; or he may have meant only that the *original* detention had not been unlawful. Stuart-Smith LJ continued:

> "It seems to me that the Court of Appeal in *Re S-C* [1996] QB 599 understood it in the first sense, and if that is correct then I respectfully agree. But it seems to me that if Laws J meant it in the second sense, what he was saying was consistent with authority, namely that the original admission and detention,

> based as it was on an apparently valid application, was itself valid and lawful until the underlying basis, namely the application, is held by the court to be invalid. This does not preclude the court from ordering the patient's release once this determination has been made, but it does not retrospectively render invalid the decision to admit which was valid at the time it was taken."

48. Stuart-Smith LJ referred to authorities concerning the validity of acts done pursuant to bye-laws or court orders subsequently held to be invalid. He also cited the following passage from an article by Professor Christopher Forsyth, which had been cited with approval by Lord Steyn in *Boddington v British Transport Police* [1999] 2 AC 143,172:

> "it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void."

49. Stuart-Smith LJ said that in *London* the hospital managers were second actors relying on the validity of the court orders and the application made by the AMHP; they were not only entitled but bound to admit the applicant. He concluded that, even if the County Court had no jurisdiction to order displacement of the patient's mother, the decision of the hospital managers to admit the patient – which was the only matter challenged in the application for judicial review – was valid and ought not to be quashed.

50. In the present case Collins J said that although the observations of the court in *London* were obiter, since they had been reached after full argument he should follow them unless persuaded that they were wrong. He was not so persuaded and, adopting the same reasoning, he concluded that there had been no unlawfulness in domestic law and no breach of article 5.

51. Mr Gordon argued that *S-C* was binding authority for the conclusion that the M's detention was unlawful from the outset, that the court in *London* misapprehended the effect of the decision in *S-C* and that in any event the present case was distinguishable from *London*. In *London* the discussion was about the validity of a court order and the lawfulness of acts done pursuant to the court order, if it were subsequently held to have been invalid. There was no true parallel between that scenario and the present case. Mr Ruck Keene disputed the proposition that *S-C* was binding authority on the question whether M's detention was unlawful from the outset. The sole issue before the court in *S-C* was a procedural question whether habeas corpus or judicial review provided the appropriate remedy in circumstances where the managers of the hospital had acted lawfully at the time of the patient's admission. He further submitted that the reasoning in *London* was correct and that the judge was right to follow it.

52. It seems to me, with respect, that Stuart-Smith LJ was wrong in suggesting that Laws J in *R v Managers of South Western Hospital ex p M* may have meant no more than that the patient's original detention was lawful. I say that because Laws J dismissed the application for habeas corpus. In other words, he found that it was not unlawful for the patient's detention to continue. His reasoning was disapproved by the Court of Appeal in *S-C*, which held on the contrary that the fact that the hospital managers had acted lawfully was no reason for refusing a grant of habeas corpus in circumstances where there had been a fundamental defect in the application for the patient's admission.

53. The misunderstanding by the court in *London* about what Laws J meant as a matter of fact is not in itself of particular significance, since it agreed that if Laws J meant (as I think that he clearly did) what the Court of Appeal in *S-C* had taken him to mean, it was incorrect. More important is what the court said in *London* about the correctness of Laws J's statement, if he had meant that detention based on an apparently lawful application was lawful until held by the court to be invalid. Stuart-Smith LJ described this view as "consistent with authority". I do not consider, with respect, that it can be squared with the reasoning of the court in *S-C*.

54. As I read his judgment in *S-C*, Sir Thomas Bingham reached three conclusions which are directly relevant in the present case. These were, first, that the hospital managers acted lawfully by reason of s6(3); but secondly, that this fact did not clothe the conduct of the AMHP with lawfulness; and thirdly, that *S-C's* detention was unlawful throughout.

55. The third point was strongly contested by Mr Ruck Keene. He argued that it would be inconsistent to hold a patient's detention to have been unlawful at a time when the hospital was validly authorised to detain him. Understandably he prayed in aid the observations of Stuart-Smith LJ in *London*. Accordingly, he submitted, the true meaning of Sir Thomas Bingham's judgment was that when the defective nature of the application became apparent, the basis of the hospital manager's authority to detain him ceased to exist, with the consequence that his detention thereafter would have been unlawful. This was all that it was necessary for the court to decide in *S-C*, because the only issue was whether to grant habeas corpus.

56. The argument was attractively presented but I do not accept it. The reasoning of Sir Thomas Bingham is, I think, clear and entirely consistent with the common law of false imprisonment. As I have said, lawfulness or unlawfulness is an attribute of the conduct which caused the loss of liberty. The tenor of Sir Thomas Bingham's judgment is that *S-C*'s detention was unlawful, notwithstanding that the hospital had lawful authority to detain him, in as much as it was the direct consequence of an unlawful application by the AMHP, and the fact that the hospital managers, for their part, acted lawfully did not cure that underlying unlawfulness. Thus, he spoke of s6(3) not turning an unlawful detention into a lawful detention, and he referred to it as plain on the agreed evidence that there was never jurisdiction to detain *S-C* in the first place.

57. I do not think that it is necessary to decide whether the reasoning in *S-C* is technically binding on us, because I have no doubt about its correctness.

58. I can see why Professor Forsyth's comments about "the legal powers of the second actor" were considered relevant in *London*, where the court was considering what would have been the validity of an application based on a court order if the court order had been held to have been made without jurisdiction. Difficult questions can arise about the validity of acts done under court orders or bye-laws which are later held to have been invalid, because by their nature they appear to have the force of law and to require the citizen's obedience. This is not such a case. There is no issue as to the lawfulness of the conduct of the "second actor" (the hospital trust) in admitting and detaining M. But it does not follow that this either cured the unlawfulness of the AMHP's conduct or meant that M's detention was not a direct consequence of that unlawfulness.

59. I come back therefore to the fact that M was deprived of his liberty as a direct consequence of the AMHP's unlawful act in applying for his admission in breach of s11(4). The only matter which protects the local authority from liability for false imprisonment is the statutory defence provided by s139(1). That subsection does not stop the AMHP's conduct from being unlawful. The application was an undoubted breach of the Act. What s 139(1) does is to limit the civil liability of the AMHP (and the local authority) for the AMHP's unlawful act to cases where the act was done in bad faith or without reasonable care. That restriction, however, is subject to the provisions of the Human Rights Act.

Human Rights Act 1998 and Article 5 of the European Convention

60. M's case is attractively simple. It is as follows:

> 1. Section 6(1) of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> 2. The AMHP acted in a way which was incompatible with his right under article 5 (set out in paragraph 12 above) not to be deprived of his liberty except in accordance with a procedure prescribed by law. In applying for M's involuntary admission to hospital the AMHP did not act in a manner prescribed by law; on the contrary, she acted in violation of the prohibition contained in s11(4) of the Mental Health Act.
>
> 3. M's deprivation of his liberty was the direct consequence of the AMHP's failure to comply with the procedure prescribed by law and intended for his protection.
>
> 4. Article 5(5) entitles him to compensation.
>
> 5. Section 8 of the Human Rights Act provides that the court may grant such relief or remedy within its powers as it considers just and appropriate for an act of a public authority which the court finds to be unlawful. In determining whether to award damages, or the amount of an award, s8(4) requires the court to take into account the principles applied by the

> European Court of Human Rights in relation to awarding compensation for a violation of the Convention.
>
> 6. Section 139(1) of the Mental Health Act must, if possible, be read down by reason of s3 of the Human Rights Act so as to give effect to his Convention right to compensation.
>
> 7. If that is not possible, a declaration of incompatibility must be made under s4 of the Human Rights Act.

61. Mr Ruck Keene disputed the second proposition, and his argument was supported, rather lukewarmly, by Mr Coppel on behalf of the Health Secretary. They both accepted that if the second proposition is correct, none of the other steps can be challenged, except that Mr Ruck Keene proposed an alternative solution to reading down s139(1). Their argument about the second proposition may be summarised as follows:

> 1. The AMHP was not to be regarded as having acted in a way which was incompatible with a Convention right unless there was a breach of article 5 for which the AMHP was responsible.
>
> 2. There was no breach of article 5 because M's detention was in accordance with a procedure prescribed by law with adequate clarity and was not arbitrary.
>
> 3. Accordingly, M did not have an enforceable right to compensation under article 5(5), since he was not a "victim of arrest or detention in contravention of the provisions of this Article".

62. The argument that because the hospital trust was entitled to act as if the AMHP's application was lawful, it follows that a) M's detention did not contravene his Convention right and b) the AMHP did not act in a way which was incompatible with that right, notwithstanding that the AMHP's act was unlawful and was the fundamental cause of his detention, is a back to front argument, reminiscent of the world of Alice Through The Looking-glass, where things are seen back to front. The correct starting point is to examine the nature of the conduct and whether it conformed with the safeguards for the patient's liberty prescribed by Parliament, which it did not. The next question is whether that conduct was the direct cause of the claimant's loss of liberty, which it was.

63. The argument of the local authority and the Health Secretary on this point involves a re-run in the context of the Convention of the same argument which I have considered and rejected in the context of domestic law, i.e. that he was not unlawfully deprived of his liberty by the conduct of the AMHP since the conduct of the hospital trust was lawful. The implications of the argument are no less objectionable when considered in the context of the Convention than Sir Thomas Bingham considered them to be in the context of domestic law.

64. Standing back from the minutiae of the arguments, this is a case of detention by the state under a statutory scheme involving two agents of the state, between whom the

scheme provides for an internal division of responsibility. The first agent has responsibility for ensuring that any application which it makes for a patient's detention is lawfully made. The second agent has responsibility for carrying out the detention on the application of the first agent, provided that the application appears to be in order. Things went wrong in the present case when the first agent made an application for M's detention which was prohibited by law. It cannot be right, because of the division of responsibility, to regard the resulting state detention as consistent with article 5, when the fundamental cause of the detention was an application made in contravention of the Act.

65. Contrary to the view of Collins J, I would hold that M's rights under article 5 have been infringed and that he is entitled to compensation.

66. The next question is how that result should be achieved. Neither counsel for the local authority nor counsel for the Health Secretary disputed M's argument that s139(1) can be read down by virtue of s3 of the Human Rights Act so as to permit a claim by M for compensation from the local authority, and the Health Secretary strongly supported that solution. In those circumstances, I am happy to proceed on the basis that it is open to the court to read s139(1) in that way without further consideration of the matter.

67. It is necessary, however, to consider Mr Ruck Keene's submission that the court could alternatively enable M to recover compensation for his wrongful detention by reading down s6(3), and that, in circumstances where everyone acted in good faith, it would be more appropriate for compensation to be paid by the party which detained M. I am not persuaded that this would be the right course.

68. Although the AMHP acted in good faith, the unfortunate fact remains that she acted in contravention of s11(4), whereas the hospital trust acted lawfully. Further, for reasons which I have already given, s6(3) serves a positive purpose. I accept the arguments made by the hospital authority and the Health Secretary that it would be undesirable to weaken s6(3). It is in the public interest that a hospital trust should act promptly on receipt of an application for admission which appears to be in proper form, and that it should not think it necessary for its own legal protection to incur time and expense in checking the accuracy of the various matters which s6(3) entitles it to accept as correct.

69. On the main issue raised by this appeal, I would therefore conclude that the judge was wrong to dismiss M's application for judicial review. He ought to have held that M was unlawfully detained, both as a matter of domestic law and within article 5, by reason of the AMHP's contravention of s11(4), and he should have given M leave under s139(2) to pursue a claim for compensation against the local authority.

Section 12(2) of the Mental Health Act

70. The second question on which Collins J gave leave to appeal was whether M's detention was unlawful on the ground that there was a breach of s12(2) of the Mental Health Act.

71. M's case is that the application for his admission was defective, aside from the AMHP's lack of jurisdiction to make it (the s11(4) point), because it failed to comply

with requirements of s12(2). Under s3(3) an application for admission for treatment must be "founded on the written recommendations in the prescribed form of two registered medical practitioners". Section 12(2) provides that one of the recommendations shall be given by a practitioner approved for the purposes of the section by the Health Secretary as having appropriate special experience and that

> "unless that practitioner has previous acquaintance with the patient, the other such recommendation shall, if practicable, be given by a registered medical practitioner who has such previous experience."

72. The two written recommendations in the prescribed form which accompanied the application were both from practitioners approved for the purposes of s12, but, as appeared on the face of their recommendations, neither had previous acquaintance with M.

73. The point made is that it would have been "practicable" to have obtained a written recommendation in the prescribed form from Dr Malik, who had previous acquaintance with M and who was of the opinion that his admission was necessary, but that he was not one of the practitioners on whose opinion the application was founded.

74. The point is academic in relation to the local authority in view of my conclusion on the main issue, but it remains a live issue in relation to the hospital trust. The case against the hospital trust is that the application was neither duly completed nor appeared on its face to be "founded on the necessary medical recommendations" within the meaning of s6(3). Accordingly, the hospital managers had no lawful authority to admit him.

75. Collins J said that the word "practicable" must be interpreted in its context and should not be equated with possible. He referred to a decision of Bennett J in *R(E) v Bristol City Council* [2005] EWHC 74 (Admin) and said:

> "In Bennett J's view, with which I entirely agree, practicality should be approached on the basis that the patient's interests are to be considered. A judgment has to be made, but it must always be borne in mind that one of the doctors who is concerned with recommending compulsory admission should have had previous acquaintance with the patient. Thus only if it is considered on reasonable grounds to be appropriate in given circumstances for doctors who have not had previous acquaintance to decide whether to recommend admission should such a course be adopted."

76. Applying that approach, his conclusion was as follows:

> "In the circumstances of this case, it was known that there was a division of opinion among the doctors who had acquaintance with the claimant. The weakness of [counsel for M's] argument can be shown by her recognition that she could not have complained of a breach of s12(2) if one of the doctors

> chosen had been Dr Malik. Equally it might not have been in the interests of the claimant if one who held a contrary view was chosen since he might in reality need treatment which he would not receive as a voluntary patient. Thus I think that the decision to use two professionals who came afresh and who, of course, had access to all the hospital notes and could question nurses and other doctors was reasonable and a proper exercise of judgment of what was in the claimant's best interests. Thus there was no breach of s12(2).

77. Mr Gordon submitted that the test which the judge applied was not the test which Parliament has provided. Parliament has required that at least one of the recommendations should be given by a practitioner who has previous acquaintance with the patient, unless that is impracticable, but the judge has applied a different test, namely whether there were reasonable grounds for neither recommendation being given by a practitioner who had such acquaintance.

78. In addition to the question about the meaning of the word "practicable" in the present context, there is also a question as to the effect on the validity of the application if the judge was wrong and there was not strict compliance with s12(2). This point was not debated before the judge, nor was it considered in the parties' skeleton arguments, but it was raised by the court in the course of the argument.

79. The situation in which the AMHP found herself was not easy. In a written report made by her on the day of the application, she referred to Dr Malik as M's responsible clinician. Dr Malik was of the opinion that M needed to be sectioned for the safety of himself and others; but his colleague, Dr Chatterjee, did not consider that at that stage M required to be sectioned. It would have been invidious to expect the AMHP, who was not a member of the clinical team but a social worker, to make a judgment between them. However, she would have had good reason to be concerned that if no application were made for M's admission, and if the opinion of Dr Malik was right, the results might be serious for M himself and for others. There would have been nothing unlawful in these circumstances if she had taken steps to see whether another practitioner agreed with Dr Malik and, if so, to have made an application for M's admission founded on their two recommendations. Under the Act, it would then have been for a mental health review tribunal to decide whether M should continue to be detained or should be discharged. The way ahead suggested by the clinical team, that in the circumstances there should be a fresh assessment by psychiatrists independent of the hospital team, was obviously a responsible professional approach. It paid proper regard to the interests both of M and of the public.

80. The Concise Oxford Dictionary defines "practicable" as meaning "that can be done or used; possible in practice", but to give the word that definition in the context of s12(2) could produce surprising results. In the present case it would not have been possible to obtain a written recommendation from Dr Chatterjee satisfying the requirements of s3(3), because it was not his opinion that M needed to be sectioned. If Dr Malik had been of the same view as Dr Chatterjee, paradoxically the result would seem to be that the application would then have complied with s12(2) (because it would not have been possible to obtain a recommendation satisfying s3(3) from either of the practitioners who had previous acquaintance with M); but because Dr Malik *did* think that M needed to be sectioned (a view with which the two independent consultants

both agreed), on M's argument the application based on the recommendations of the consultants brought in to make a fresh assessment was invalid.

81. I do not think that it would be wise for the court to attempt to give a comprehensive definition of the word "practicable" in the present context. However, Parliament must have foreseen that decisions about making applications for admission under s3 may have to be made in circumstances of urgency. And it must have intended that the professionals involved in the process would discharge their responsibilities in a professional way with proper regard for the interests of the patient and of society. The word "practicable" must have sufficient elasticity to accommodate these considerations, consistently with the intention of Parliament. On the facts of this case, where the clinical team including Dr Malik considered that it was better in the interests of the public and M for there to be fresh assessments than to prefer the view of Dr Malik and try to find another practitioner to support it, I do not regard it as unduly stretching the language of s12(2) to conclude that it was not practicable for the application to be founded on a written recommendation of Dr Malik. He and the others had suggested a different course and the social worker could not reasonably have been expected to dictate otherwise.

82. If, however, I am wrong in that view, there is a further question as to whether the application was therefore invalid.

83. The effect of non-compliance with a procedural requirement for the exercise of a legal authority is the subject of a considerable amount of case law and academic writing.

84. There is an important distinction between a) breaches of procedural requirements which go to jurisdiction and b) breaches of procedural requirements in the exercise of a jurisdiction. In this case the AMHP had no jurisdiction to make an application in view of the objection made by M's brother, by reason of s11(4). The provisions of s12(2) are of a different kind. They go to the form of the evidence required to support an application.

85. In a case where breach of a procedural requirement goes to jurisdiction, the courts will not treat a person purporting to exercise the jurisdiction as having such jurisdiction if it was non-existent. The law relating to breaches of procedural requirements in the exercise of a jurisdiction is less cut and dried.

86. The courts used to categorise procedural requirements in the exercise of a statutory jurisdiction as either mandatory or directory. A breach of the former would make the act invalid, but a breach of the latter would not. Over the course of time the distinction was found in practice not to be entirely satisfactory. In *London and Clydeside Estates Limited v Aberdeen District Council* (1980) 1 WLR 182, 189-190 Lord Hailsham of St Marylebone LC said that in many cases

> "although language like "mandatory," "directory," "void," "voidable," "nullity," and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories

> or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition."

87. The problem was similar to one which once bedevilled the law of contract. Clauses which imposed obligations on a party used to be categorised as either conditions, the slightest breach of which would entitle the other party to treat the contract as discharged, or warranties, breach of which did not affect the continuing validity of the contract. This meant that the scope of relief in the event of a breach was determined by an analysis of the clause in the abstract, without regard to the gravity or triviality of the breach or its consequences. The results were not always satisfactory. The courts broke out of this self-imposed straightjacket by developing the idea of innominate clauses (pioneered by Lord Diplock, then Diplock LJ, in *Hongkong Fir Shipping* [1962] QB 26, 70), which enabled the court to look at the gravity of the breach and its consequences in determining its legal effect.

88. There has been a similar change in public law in the way that the courts approach the consequences of non-compliance with a procedural requirement in the exercise of a statutory power. They have adopted a more flexible approach, which, because of its flexibility, is difficult to reduce to a clear formula. Twenty-five years on from *London and Clydesdale*, Lord Steyn reviewed the development of this branch of the law in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340. He also examined the way in which the law had developed in New Zealand, Australia and Canada.

89. From New Zealand, he cited with approval (at para 20) the statement of Cooke J (subsequently Lord Cooke of Thorndon) in *New Zealand Institute of Agricultural Science Inc v Elsmere County* [1976] 1 NZLR 630, 636:

> "Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the act or regulations and the degree and seriousness of the non-compliance."

90. From Australia, he cited with approval (at para 21) the judgment of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, which criticised the use of "the elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not as classifications which had outlived their usefulness.

91. From Canada, he cited with approval (at 22) the statement of Evans JA in *Society Promoting Environmental Conservation v Canada (Attorney General)* (2003) 228 DLR (4^{th}) 693, 710, that

> "...the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity."

92. Lord Steyn concluded (at para 23) by expressing his agreement with the view that the rigid mandatory and directory distinction, and its many artificial refinements, had outlived their usefulness. Instead, he said that the emphasis ought to be on the consequences of non-compliance and on the question whether Parliament could fairly be taken to have intended total invalidity.

93. In *Director of Public Prosecutions of the Virgin Islands v Penn* [2008] UKPC 29, a case about statutory provisions for the empanelling of jurors to try a criminal case, Lord Mance said at para 18:

> "The modern tendency is no longer to seek to identify or distinguish between mandatory and directory acts, but the Board's judgment in the *Montreal Street Railway* case [1917] AC 170 underlines the need for careful examination of the relevant legislation, to ascertain the purpose of statutory procedures for the empanelling of an array and whether an intention should be attributed to the legislature that non-compliance with such procedures should render a jury trial a nullity, irrespective whether it may have occasioned potential unfairness or prejudice."

94. As these citations show, there is a tendency for the courts to express their conclusions by reference to the imputed intention of the legislature. This is valuable insofar as it concentrates the mind of the court on the purpose of the particular statutory provision in the wider statutory scheme, although beyond that it can be an oratorical device for clothing the judge's view of the seriousness of the non-compliance on the particular facts with the mantle of the hypothetical view of the legislature.

95. I would not wish to give a firm decision, since we did not hear detailed argument on the point and it is unnecessary to do so, but I should be surprised if the application had been invalid merely because it was not supported by a written recommendation in prescribed form by a clinician who had previous acquaintance with M, when his responsible clinician (who had such acquaintance) had expressed his opinion that M's admission was necessary. In these circumstances there was no breach of the underlying purpose behind s12(2), even if there was a failure to comply with the letter of the law. In referring to the underlying purpose, I find it hard to think that Parliament would have intended in such circumstances to have discouraged the AMHP from obtaining fresh medical assessments, when the responsible clinicians believed this to be in the interests of the patient and the public.

96. My conclusion that, on the facts of the present case, the judge was right to reject the argument that the AMHP acted in breach of s12(2) disposes of any claim against the hospital trust, since in that respect the application made to the hospital trust was not invalid.

Alleged negligence of the AMHP

97. Mr Gordon argued that even if he failed in his main argument, it was at least arguable on the facts found by Burton J that the AMHP acted "without reasonable care" in concluding, as she genuinely believed, that M's brother was not objecting to the application. He submitted that Collins J ought therefore to have given M leave under

s139(2) to proceed against the local authority on that ground. Mr Gordon rightly accepted that the question whether the conduct of the AMHP fell below the standard of care which was reasonably to be expected of a social worker in her circumstances would fall to be determined by applying the well-known test in *Bolam* [1957] 1 WLR 582. That is not the same as the "hypothetical reasonable person" test used when considering how words would reasonably be understood for the purpose of deciding questions about the formation or construction of an oral contract. In the latter type of case the parties may each have reasonable cause to hold different views, but the judge has to decide between them. Mr Gordon argued that Burton J's judgment should be read as a finding not merely that, on an objective analysis, M's brother had not withdrawn his objection, but that the AMHP could not have thought otherwise if she had used reasonable care, and there are some phrases in the judgment which are capable of supporting that construction. Mr Ruck Keene argued that this is a misreading of his judgment, when taken as a whole, and that on a full reading of the judgment there is no arguable case for considering that the AMHP's conduct fell below proper professional standards. On the contrary, he points out that Burton J found expressly that the AMHP acted properly. I do not think that it is necessary to examine these arguments in any further detail, because Mr Gordon acknowledged that the matter would be of no practical importance to M if he succeeded against the local authority on his first ground of appeal.

98. There was also argument about whether the judge applied the correct threshold in deciding whether to grant leave under s139(2), but for similar reasons that question is also academic.

Compensation

99. In the course of the hearing the President expressed the strong hope, which I would echo, that if M succeeded in his appeal the parties would be able to agree on damages without incurring the time and costs of further proceedings.

Conclusion

100. I have considerable sympathy with the local authority's position. The AMHP was clearly conscientious, and it may be that if she had not been mistaken in supposing that M's brother no longer objected to the application, the ultimate result would have been the same, but by a different route. However, while that may affect the amount of any compensation, it cannot affect the legality of what occurred. Our system of law is rightly scrupulous to ensure that in matters affecting individual liberty the law is strictly applied. It is a hallmark of a constitutional democracy. I would allow M's appeal against the local authority and invite the parties' submissions about the precise terms of the order which should be made.

Lord Justice Jackson:

101. I agree.

The President of the Queen's Bench Division:

102. I agree that this appeal should be allowed for the reasons given by Toulson LJ and to the extent that he sets out in paragraph 100.