

**Neutral Citation Number: [2010] EWHC 2770 (Fam)**  
**IN THE COURT OF PROTECTION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

2 September 2010

BEFORE:

**THE HONOURABLE MR JUSTICE CHARLES**

BETWEEN:

<b>YA(F)</b>	Claimant
<b>and</b>	
<b>A LOCAL AUTHORITY</b>	First Defendant
<b>YA(M)</b>	Second Defendant
<b>A NHS TRUST</b>	Third Defendant
<b>A PRIMARY CARE TRUST</b>	Fourth Defendant

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Miss S Machin (Instructed By The Local Authority) Appeared On Behalf Of The Local Authority

Miss L Cavanagh (Instructed By Linder Myers Llp) Appeared On Behalf Of The Claimant Mother

Mr J O'brien (Instructed By Irwin Mitchell For The Official Solicitor As The Litigation Friend Of Ya(M)) Appeared On Behalf Of The Son Ya(M)

Ms N Wolferstan (Sol) Appeared On Behalf Of The Nhs Trust

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**Approved Judgment**  
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(Official Shorthand Writers to the Court)

MR JUSTICE CHARLES:

1. In this case, the parties are the Claimant ("the mother"), a local authority ("the Local Authority"), the second Defendant ("the son") who appears through his litigation friend the Official Solicitor, a NHS Trust and a Primary Care Trust.
2. The Primary Care Trust is not represented. The reason for the non-attendance at this stage of the Primary Care Trust is that they are not directly concerned with the relief sought by both the mother and the son based on the Human Rights Act 1998 and, thus, Convention rights against the first and third Defendants (the Local Authority and the NHS Trust).
3. Those arguments and claims are founded on events which took place in late 2007/early 2008. In brief and broad terms, they are that (i) the son was taken to hospital, as I understand it by his mother, and (ii) he was not, however, returned home from the hospital but was moved from that hospital to a placement, the identity of which was kept from the mother. There is much more to the events around that time, but that is the nub of what happened.
4. The son is now in his mid 20s. He has a complex set of needs and has been the subject of a high degree of assistance throughout his life concerning his mobility and personal care. It is common ground that he lacks capacity to determine his own best interests in respect of issues relating to where he should live, his general care, his health care, community provision and matters of contact with his family.
5. From his birth the son lived with his family. Up to 2003, as I understand it, his brother was a member of the household. His brother suffered from autism. After the brother left the household the son remained in the day-to-day care of his mother. He also, I understand, has a sister.
6. The son's claim relies on Convention rights. It is advanced by his litigation friend, the Official Solicitor, based on the events I have referred to primarily and unsurprisingly by reference to Articles 5 and 8. The mother's claims rely primarily on Article 8, but also there are aspects of it, relating to consultation, which rely on Article 6. The same sequence of events is relied on by both the son and the mother in the points of claim that have been directed and served. Central to the relevant sequence of events, as I have mentioned, is the removal of the son from hospital and his placement away from home in February 2008.
7. Both the mother and the son identify their claims as being ones that they bring in the Court of Protection in reliance on section 7(1)(b) of the Human Rights Act. As I have already indicated, the fourth defendant, the Primary Care Trust, has taken no part before me today. The other three Defendants have and they assert that, as a matter of jurisdiction, the Court of Protection cannot hear and deal with (a) all of the mother's Convention rights claim; and (b) the son's claim for damages under the Human Rights Act, leaving his claim for declaratory relief in the Court of Protection. So the position is that those three

defendants join together in advancing the jurisdictional argument. As a result of that position the Official Solicitor, on behalf of the son, accepts and asserts that on further reflection and consideration the claim for damages presently advanced on behalf of the son is not within the jurisdiction of the Court of Protection and therefore he invites me to transfer it to the Queen's Bench Division.

8. The issues are essentially ones of statutory construction and application. I turn first to the Human Rights Act. Provisions that are of central importance are –

3 Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

- (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4 Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

6 Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

7 Proceedings.

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4).....

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) “legal proceedings” includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(9) In this section “rules” means—

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

(b).....

(c).....

(i).....

(ii).....

## 8 Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(6) In this section—

“court” includes a tribunal;

“damages” means damages for an unlawful act of a public authority; and

“unlawful” means unlawful under section 6(1).

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

9. Turning to the Mental Capacity Act 2005. The most relevant provisions are:

45 The Court of Protection

(1) There is to be a superior court of record known as the Court of Protection.

47 General powers and effect of orders etc.

(1) The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.

50 Applications to the Court of Protection

(1) No permission is required for an application to the court for the exercise of any of its powers under this Act—

- (a) by a person who lacks, or is alleged to lack, capacity,
- (b) if such a person has not reached 18, by anyone with parental responsibility for him,
- (c) by the donor or a donee of a lasting power of attorney to which the application relates,
- (d) by a deputy appointed by the court for a person to whom the application relates, or
- (e) by a person named in an existing order of the court, if the application relates to the order.

(2) But, subject to Court of Protection Rules and to paragraph 20(2) of Schedule 3 (declarations relating to private international law), permission is required for any other application to the court.

(3) In deciding whether to grant permission the court must, in particular, have regard to—

- (a) the applicant's connection with the person to whom the application relates,
- (b) the reasons for the application,
- (c) the benefit to the person to whom the application relates of a proposed order or directions, and
- (d) whether the benefit can be achieved in any other way.

15 The power to make declarations

(1) The court may make declarations as to—

- (a) whether a person has or lacks capacity to make a decision specified in the declaration;
- (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
- (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2) "Act" includes an omission and a course of conduct

Paragraph 43 of Schedule 6

In section 4(5) of the Human Rights Act 1998 (c. 42) (courts which may make declarations of incompatibility), after paragraph (e) insert—

“(f)the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.

10. Rule 83 of the Court of Protection rules was relied on, but it seems to me it is not necessary for that rule to be set out in the body of this judgment.
11. The most relevant provisions of the Mental Capacity Act have to be read and construed in their context and having regard to the underlying purposes of the Mental Capacity Act. Thus, for example, and importantly, they need to be read in the light of the provisions contained in sections 1 to 6 of that Act, those contained in section 16 to 19 thereof, section 21(a) thereof, section 27 thereof, section 46 thereof, section 48 thereof and sections 51 and 52 thereof.
12. Before moving to an analysis of the arguments of statutory construction and interpretation and thus of jurisdiction in this case, I pause to consider the impact of the Defendants being successful in their jurisdictional arguments. First, looking at the position so far as the son's claim is concerned, what is sought is a transfer of the damages claim to the Queen's Bench Division. So far as the mother's claims are concerned, the Local Authority -- and in this the Local Authority is joined by the NHS Trust and the Official Solicitor because this is their jurisdictional argument -- what is sought is an order that the whole of the mother's claim should be struck out.
13. Counsel for the Local Authority (and the NHS Trust adopted the position of the Local Authority in all aspects of its presentation), accepted that in this case it would be inappropriate to take a limitation point under the Human Rights Act. It seems to me that that is plainly the right position for the Local Authority to take given the history of the case generally, the timing of the claims and the stay within the Court of Protection proceedings. As was accepted on behalf of the Local Authority in response to my enquiry, the practical consequence of success in their application to strike out would be that the mother would issue proceedings in the Queen's Bench Division, seeking a declaration and damages under the Human Rights Act relying on events which would remain the subject of the proceedings within the Court of Protection (a) in the context of the son's claim for declaratory relief under the Human Rights Act (which it is accepted the court has jurisdiction to deal with), and (b) subject to further directions and case management decisions of the court, as being relevant to the best interests decisions to be made by the court relating to the son's future care.
14. Exchanges between the court and counsel during this hearing demonstrate that a total isolation of the best interests issues would, inevitably, involve a consideration of the relationship between the mother and the Local Authority and other public bodies, and of the care given by the mother over relevant periods of time to her son and, to put it at its very lowest, there is a high risk of overlap between the events which are relevant to the claims based on Convention rights and the facts and matters which the court must consider to make a properly informed decision on best interests. Indeed, in this context counsel for both the mother and the Local Authority indicated to me that they

both maintain that those matters would need to be ventilated before the court in the context of the best interests decision.

15. So, on one level, the dispute before me is academic because it seems to me that on the hypothesis that the arguments of the Defendants are correct, the management of what would then be three sets of proceedings would have to ensure that the public purse and the parties were not put to the expense of litigating the same issues of fact in three different sets of proceedings. That could be done by hearing the proceedings together. But, in any event and only looking at the position by reference to the son's claim, it would be, to my mind, a very strange result if the fact finding exercise in both the Court of Protection proceedings and the Queen's Bench proceedings did not run concurrently. If that is so there would, it seems, be no sense in the mother's claim being heard separately.
16. However I acknowledge that there may be potential to determine the relevant facts only in one set of proceedings to which all the relevant persons are parties rendering them binding in all the other proceedings. But, in any event, the need to manage and deal with what is relevant to the best interests decision, and whether or not aspects of the Convention rights claimed can be excluded is something which it seems to me the relevant courts would have to grapple with and give appropriate directions in respect of. So, as I indicated earlier on, it seems to me that the points raised on this application are essentially academic subject to court management, save for the point (which I immediately acknowledge) that jurisdictional points can never be so described. If the court does not, or, arguably does not, have jurisdiction, the court itself would have to take the point. And it is therefore appropriate for the three Defendants (being two public bodies, and the other represented by the Official Solicitor) to draw attention to the jurisdictional points argued before me.
17. I now turn to my analysis and conclusions. I start with the common ground that the Court of Protection has jurisdiction to deal with the son's claim based on Convention rights, and that, in reliance on his Convention rights, the son can seek relief by way of a declaration in these proceedings. The route to that conclusion is found in sections 7(1)(b) and 8(1) of the Human Rights Act and section 15(1)(c) of the Mental Capacity Act. These sections identify what has become a well trodden path that is, for example, identified and explained by Munby J (as he then was) in Re L (Care Proceedings) Human Rights Claims [2003] 2 FLR 160. That path also reflects a number of commentaries and comments relating to the impact of the Human Rights Act, to the effect that individuals and others will be able to rely on, and seek relief in respect of, Convention rights in proceedings which are not confined to a claim to enforce or deal with Convention rights.
18. I agree with that common ground. Should it be necessary to do so, the point that the Court of Protection has jurisdiction to deal with arguments and claims based on Convention rights is to my mind confirmed by paragraph 43 of Schedule 6 to the Mental Capacity Act because it makes express provision relating to declarations of incompatibility and reflects section 4 of the Human Rights Act.

19. It follows that the Court of Protection has jurisdiction (a) to deal with arguments raised on behalf of the son (and so, in general Court of Protection terms, P), which rely on breaches of Convention rights of which he (P) is a victim, and (b) to grant declaratory relief in respect of them.
20. But it is argued that that jurisdiction does not apply to the mother's claims because it is said that the jurisdiction and powers of the Court of Protection (a) do not enable it to grant her any remedy under section 8(1) of the Human Rights Act, and (b) do not enable the court to deal with, or the mother to rely on, her Convention rights as the victim of any breach thereof.
21. The core of this argument is that the purposes of the Mental Capacity Act are confined to, and directed to, considering only the best interests of somebody who is found to lack capacity, (i.e. P, in this case the son), and to make decisions, orders and declarations applying statutory tests in respect of either matters relating to P's welfare, (i.e. where he should live, medical treatment etcetera) or, and an important or, in respect of his property or affairs. So it is said that as the mother's claims do not relate to such matters they should be struck out. And I pause to confirm that no incompatibility argument is properly before me in these proceedings.  
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22. The focus of this argument is on s. 15(1)(c) of the Mental Capacity Act which is set out above and provides that:

The court may make declarations as to the lawfulness or otherwise of any act done, or yet to be done, in relation to that person (i.e. the person who lacks capacity, P and thus here the son).

It is argued that the declaratory relief sought by the mother (in contrast to that sought by the son), is not a declaration as to the lawfulness or otherwise of any act done or yet to be done in relation to "*that person*" namely the son (P). Rather, it is said that she complains of an act done to her or advances her claims as the victim of breaches of Convention rights.
23. The argument goes that s. 15(1)(c), in the context of the Act, should be interpreted as confining the act or acts done effectively, as I understand it, to ones of which P is the victim and therefore the court is only concerned with (and can only be concerned with) P as a victim. As a matter of ordinary English, it does not seem to me that the language needs to be or is so confined. I ask myself whether in this case the mother is seeking a declaration as to the lawfulness or otherwise of any act done in relation to her son. The answer to my mind is plainly yes, she is. The relevant acts were directed to the son. He was the person who was in hospital. He was the person who was placed elsewhere in circumstances that are complained of. I do not dispute the point made on behalf of the Defendants by reference to the relevant primary purpose, namely the creation of a new statutory court which is given jurisdiction to consider and deal with issues concerning the best interests of P. But, in taking both a literal and a purposive approach to legislation, secondary purposes can also be taken into account.
24. Standing back from the Mental Capacity Act, it seems to me that Parliament must have been well aware that people without capacity for whom decisions

have to be made by the Court of Protection, if they cannot be made elsewhere, do not live in isolation. They often have families who are directly involved in decision making concerning, them and in their day to day care. There is no doubt that the mother is a necessary party to the best interests decisions that are made in respect of, and on behalf of, her son. Article 8 rights relate to and introduce a consideration of the impact of events on and between the members of a family and their relationships (see for example in the context of immigration Beuko Betts v SSHD [2008] UKHL 39, and cases in the Family courts often raise points in the context of Article 8 that relate to the interplay between the relevant rights and interests of the members of a family). Can it therefore be said that Parliament was intending that if a set of events occurs that impact the Article 8 rights of the members of the family of a person who lacks capacity, and those events are properly described as being an act or acts done in relation to the person who lacks capacity (P), the Court of Protection should not have jurisdiction to make declarations as to the lawfulness of such acts by reference to the Convention rights of, and on the application of, those members of the family? To my mind the answer to that question “No”, and that consideration of this question indicates that an ability (and thus a jurisdiction) to deal with such issues is within a secondary purpose of the legislation.

25. I have reached that conclusion within the four walls of the Mental Capacity Act. But, in my view, it is fortified by section 3 of the Human Rights Act and by (a) the underlying purposes and impact of the Human Rights Act, as expressed in Re L (Care Proceedings) Human Rights Claims [2003] 2 FLR 160, in textbooks, and in statements by those who introduced the legislation, and (b) the point that I have already made that it seems to me that the intention of Parliament, in enacting section 7(1)(b) of the Human Rights Act, was to enable any proper party to proceedings before a court to raise for consideration by that court claims based on Convention rights. A similar approach can be found in the ability of parties to raise public law points in private law proceedings.
26. Other points were raised in the course of argument which it seems to me on analysis take the matter little further. First, a point was raised concerning Rule 83 of the Court of Protection Rules and the fact that it recognises that Convention rights claims can be brought in the court. Here, it is common ground, correctly between counsel, that Rules cannot confer jurisdiction if it is not there and undoubtedly there is jurisdiction upon which Rule 83 can bite. So I think that it takes the matter no further.
27. Other arguments were raised relating to section 50 and the need for permission. Again, it seems to me that on analysis these arguments are essentially circular because if the court has no jurisdiction issues concerning permission are to my mind otiose. And, if the court does have jurisdiction, then a requirement for permission acts as a proper filter to prevent the court being inappropriately engaged in issues which should be dealt with elsewhere.
28. A point which I am not going to decide because it is to my mind not necessary for me to do so, relates to the interplay between section 50 (the need

for permission) and the bringing, in reliance on section 7(1)(b) of the Human Rights Act Convention rights points before the Court of Protection. The point has no relevance in the context of the son because he is “P” and does not need permission to make any application. The point arises in this way: does the mother, if the court has jurisdiction, need permission to make her application? But it has only been touched on (and so not fully argued) before me and in my view it takes the essential argument before me no further. This is because, if there is no need for that permission, it seems to me, (and this was accepted to my mind correctly on behalf of the mother), that the court has more than ample armoury to ensure that its process is not incorrectly or inappropriately used for the determination of a freestanding claim under the Human Rights Act, either by P or by, in this case the mother of P, or any outsider. Within that armoury is the ability to stay, the ability to transfer and importantly the ability to case manage applying the provisions of the Rules and the overriding objective.

29. I should also at this point record that the potential for bringing proceedings under section 7(1)(a) in the Court of Protection was not part of the argument before me and any such arguments will have to be for another day.
30. That analysis and reasoning leads me to the conclusion that, as a matter of construction and application of the Mental Capacity Act, the Court of Protection has jurisdiction (a) to hear argument on behalf of the mother that acts done “*in relation to that person (i.e. the son)*” constitute breaches of her Convention rights, and (b) to make declarations as to the lawfulness of those acts on her application and in respect of breaches of her Convention rights as a result of such acts (i.e. acts done in relation to the son).
31. I now have to turn to and consider whether or not the Court of Protection has jurisdiction to award damages under the Human Rights Act and I will do so at 2 o’clock.
32. My analysis has now reached the stage that the Court of Protection has jurisdiction to deal with the claims of both the mother and the son in the sense of considering points they advance under section 7(1)(b) of the Human Rights Act and granting a remedy by way of a declaration. Can this court also grant damages under the Human Rights Act? The crucial sections here are sections 8(1) and (2) of the Human Rights Act. Section 8(1) limits the remedies and relief that can be granted to those *within the powers of the relevant court*. Section 8(2) also focuses on the relevant court and provides that damages may be awarded only by a court which itself (I stress itself) has power to award damages, or to order the payment of compensation in civil proceedings.
33. As is explained in Re S; Re W [2002] 1FLR 815, for example at paragraph 41 and then at paragraphs 45 and following, sections 7 and 8 of the Human Rights Act do not of themselves create powers in the relevant courts and the focus is on the powers of the court and thus in Re S; Re W, the Family Courts. In re S (re W), it was held by the House of Lords that the Family court did not have the power to make orders for “starred care plans” because of the line Parliament had drawn between the functions of the court and those of the

Local Authority. Also, in this context, because the primary purpose of the Court of Protection is, as I have accepted and acknowledged, to exercise a welfare jurisdiction, there is perhaps a presumption or starting point in the minds of some that the concept of an award on damages does not sit easily with that primary purpose or jurisdiction. That point is made and addressed in Re C (Breach of Human Rights Damages) [2007] 1FLR 1957 in the lead judgment and also succinctly in any judgment of Wilson LJ, paragraph 61.2 to which I was referred, and in which Wilson LJ says:

“I do not think”, said Hedley J, “that the concept of damages sits easily with the welfare jurisdiction of family law”. The instincts of most family lawyers will be likewise, but by his thorough and energetic submission, Mr Tolson has persuaded me that, as a result of the advent of the Human Rights Act, such instincts are misplaced.”

34. So argument that because this court’s jurisdiction is primarily a welfare jurisdiction it was intention of Parliament to rule out any prospect of it awarding damages would seem to me to be equally misplaced. That, however, does not mean that the jurisdictional exercise with which I am involved results in the Court of Protection having jurisdiction to award damages under the Human Rights Act. And, I repeat that it is the powers of the Court of Protection that have to be looked at in applying section 8 of the Human Rights Act.
35. The nature of damages awarded under the Human Rights Act is analysed in a case which for obvious reasons the parties have referred to as the Southwark case (and I, too, have difficulty in pronouncing the name of the claimant), namely Anufrijeva v The London Borough of Southwark [2003] EWCA Civ 1406. What that case shows, (and indeed this flows from an examination of section 8 of the Human Rights Act itself), is that damages under the Human Rights Act are not recoverable as of right as, for example, are damages in tort or for breach of contract, but are to give just satisfaction if, applying an equitable approach, the court considers that to be the right result. The judgment of the court between paragraphs 52 and 78 provides general guidance and discussion and then again in paragraphs 79 to 81 it draws matters together by reference to procedure. I think it is fair to say that if the members of that Court of Appeal had been faced with the arguments relating to the claims for damages in this case they would have been upset. They may have been driven to the conclusion that is urged upon me, but the whole force of that court’s reasoning is that the damages are generally quite small and proportionality issues are ones which drove their conclusions on the procedural approach.
36. Having made that comment I recognise and proceed on the basis that arguments related to convenience, and/or what would seem to be more practical, do not themselves (and cannot themselves) confer jurisdiction. That was a point urged on me in particular on behalf of the Official Solicitor, but also by others. It is, correctly, accepted by the mother.
37. So one has to turn to the provisions relating to the relief that the Court of Protection can grant to determine whether or not it has the power to award damages and, so, whether or not the provisions of section 8(2) of the Human

Rights Act are satisfied. The Court of Protection is a court created by statute and therefore its powers are limited by the statute. A feature, it seems to me, of section 8(2) of the Human Rights Act is that it is looking at the general powers of the relevant English court and, in the context of the Human Rights Act, it would be circular to argue that as a court has power under the Human Rights Act to award damages section 8(2) is satisfied.

38. Section 8(2) directs one to consider, for example, whether the High Court or a County Court, has a power to award damages. The powers of those courts flow from provisions of now the Senior Courts Act, the County Courts Act and, in the case of the High Court, the assimilation of earlier jurisdiction and indeed an inherent jurisdiction. In broad terms, it seems to me, that the jurisdiction and power to award damages in those courts derives from the subject matter of cases that the court has jurisdiction to deal with. Examples are contract, tort, trespass and there are many others, all of which are civil claims. So, in my view, when applying section 8(2) one is looking at the general ability of the court to award damages excluding the power to so conferred by the Human Rights Act itself.
39. I turn to the crucial section in the Mental Capacity Act; it is section 47(1). I have mentioned it earlier, it provides that:

The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.

It is argued on behalf of the Defendants, and this was at the forefront of the argument put before me on behalf of the Official Solicitor on behalf of the son (P), that section 47(1) is an ancillary provision and/or a provision that facilitates the exercise of the jurisdiction of the Court of Protection.

40. It was then said that a power to award damages is not ancillary to the making of a declaration or facilitative of the making of a declaration. I would not quarrel with that, but first it seems to me that “the making of a declaration” is not an accurate description of the jurisdiction of the Court of Protection. The Court of Protection's relevant jurisdiction in this case is jurisdiction under the Human Rights Act. It seems do me that the natural reading of section 47(1) in that context is that in exercising its jurisdiction (under the Human Rights Act or indeed the Mental Capacity Act) the Court of Protection has the same powers, rights, privileges and authority as the High Court would have when it is exercising its jurisdiction (under the Human Rights Act and generally) and, therefore, the Court of Protection has an ability to award damages under the Human Rights Act because the High Court can do so under s. 8(2) thereof because of its jurisdiction to award damages in civil claims.
41. In my view, that argument does not have the circularity of an argument that section 8(2) is satisfied because a court has jurisdiction under the Human Rights Act and thus the power under that Act to award damages. This is because the argument looks outside the Human Rights Act and asks the “what if” question set by s. 47 of the Mental Capacity Act namely what could the High Court do if it was exercising the jurisdiction conferred on the Court of Protection by the Mental Capacity Act and the Human Rights Act.

42. But if that argument is wrong, in my view, an alternative route to the same answer is to consider whether the Court of Protection, by section 47, is given a power to award damages in respect of something other than a breach of a Convention right. In my view it does. For example, to my mind, in reliance upon section 47, the Court of Protection could award damages pursuant to an undertaking in damages given to it when an injunction was granted. Also, by reason of section 50 of the Senior Courts Act, it would have a power which, probably, would never be exercised in the welfare jurisdiction, and which might only be exercised rarely in the property jurisdiction, to award damages in lieu of an injunction. That is one of the specific powers of the High Court that listed in the relevant provisions in the Senior Courts Act.
43. So this alternative analysis and reasoning for the result that section 8(2) of the Human Rights Act is satisfied looks to, and relies on, powers of the Court of Protection (in connection with its jurisdiction and by reference to the powers of the High Court) to award damages other than under the Human Rights Act.
44. Arguments were put that it would be most unfortunate if the Court of Protection had that jurisdiction because it would take the eyes of the court or the parties off the “welfare ball” or might encourage family members of a person who lacks capacity to seek to use the vehicle of the Court of Protection as a stick to beat public authorities with. To my mind, for reasons I have already explained in the context of permission to bring such a claim, the Court of Protection and the other parties have ample abilities to protect themselves from such approaches being taken by family members, just as the Court of Protection and the other parties have ample powers and ability to protect themselves from any members of the family seeking to use Court of Protection proceedings as a means of getting around judicial review, for example, in the context of the points that the Court of Protection makes choices between care plans / packages that are offered by, or are enforceable against, the relevant public authorities and a best interests declaration does not compel a public authority to act in accordance with it.
45. It therefore seems to me, and I conclude, that both linguistically and purposively, albeit possibly against the instinct of a number of lawyers dealing with a welfare jurisdiction, the Court of Protection does have jurisdiction and thus power to award damages under the Human Rights Act.
46. I confess that I reach that conclusion with some relief because the alternative is proceedings in different jurisdictions which will escalate costs, and, so far as I can see, do little, if anything, to concentrate the attention of parties who are at odds on issues relating to best interests. Experience in this court, and in the Family court, shows me that when a parent and a Local Authority have fallen out issues relating to the parting of the ways are difficult to exclude from the best interests arguments and, to my mind, there is certainly a risk that if family members of a person (P) who is the subject of proceedings in the Court of Protection are not entitled to air their points under the Convention within the best interests process, that will escalate the problems on the ground and cause those family members to fail to face up to the realities of the situation that

choices have to be made for their loved ones between the various options that are available, usually at public expense.

47. So, I dismiss the application made by the Local Authority and supported by the other two Defendants. There is no need for me to order a transfer of the son's damages claim to the Queen Bench Division. I will, however, direct that when the matter comes before me in December I shall treat as being before me proceedings in the Queen's Bench Division, in respect of both the mother's entire Human Rights Act claim and the son's claim for damages, I dispense with the service of any document in the context of that direction and direct that the evidence and pleadings (in the sense of the Points of Claim and Defence) shall stand as pleadings and evidence in the Queen's Bench proceedings. My reason for doing that is not to indicate any concern or worry as to my conclusion on jurisdiction, but to ensure that if this decision on jurisdiction is successfully appealed, or in the future in another case my conclusion on jurisdiction is found to be wrong, any award made in these proceedings will have a jurisdictional base.

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## Costs Judgment

MR JUSTICE CHARLES:

48. I now have to deal with the issue of costs. I will deal with the Official Solicitor first. The relevant application that was before me was an application by the Local Authority to strike out the mother's Human Rights Act claim. The NHS Trust were not joint applicants, but the relief sought was to remove the claim of the mother against both of them so that if the relief sought was granted both the Local Authority and the NHS Trust would not be facing a Human Rights Act claim brought by the mother within these proceedings.
49. The Official Solicitor's position acting on behalf of the son is that the son was not concerned directly in that application. His concern was the legal points which arose in the context of that application; namely whether or not there was jurisdiction for the court to deal with the son's Convention rights claim for damages, which I have dealt with in the main judgment. It seems to me that the appropriate order so far as the Official Solicitor is concerned is that the son's costs of and in respect of the strike out application should be reserved.
50. Another aspect of the son's position is that his costs of attendance on the strike out application should like all of his costs of his Human Rights Act claims be reserved and so should be treated no differently from the costs incurred in respect of the management of the case on this application.
51. I turn to the question whether or not the mother's costs in successfully defeating the application to strike out should be paid by one or both of the Local Authority and the NHS Trust. I deal with that first as a matter of principle. It seems to me that there are competing arguments. One is that the issues raised were jurisdictional and therefore had to be raised in proceedings funded by the taxpayer through different budgetary processes. The other is that the Local Authority and the NHS Trust took a stance that this claim should be struck out on a preliminary basis without, so far as I can see and I have not been referred to, any consideration whatsoever of what would then happen and how the relevant issues would be case managed if the applications succeeded. These are points flagged up in the skeleton argument on behalf of the Claimant and are points which I have already made.
52. That is an indication that these two public authorities took the view, for whatever reason, that they wanted the claim, as they sought, to be struck out, but gave little or no thought to what would then happen and took that tactical litigation decision on that basis. That approach seems to be the foundation of the Local Authority's decision to issue and pursue the application, and the NHS Trust's decision to support the application, albeit very sensibly not adding to the costs of the process by themselves putting in a skeleton argument or advancing oral argument.
53. We are not dealing with the costs of the two Defendants; we are dealing with the costs of the Claimant. It seems to me that the way through those competing factors is that the court should recognise what on the face of it seems to be a failure by the Local Authority and the NHS Trust to stand back

and look at how this case would eventually turn out if the application to strike out was successful, whilst at the same time recognising that the arguments were founded on jurisdictional points.

54. What I propose to do is to order that the Local Authority and the NHS Trust are to pay one half of the costs of the Claimant incurred and occasioned by the application to strike out the mother's Human Rights Act claim. The other half should be reserved; this recognises that the arguments raised jurisdictional issues.

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