



Neutral Citation Number: [2023] EWHC 551 (Admin)

Case No: CO/4517/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

14th March 2023

Before:

MR JUSTICE FORDHAM

Between :

ADAM HARRIS

(by his Litigation Friend ADNAAN MIRZA)

- and -

GENERAL PHARMACEUTICAL COUNCIL

Appellant

Respondent

Nasir Aziz (acting in a personal capacity) for the **Appellant**
Helen Fleck (GPC) for the **Respondent**

Hearing date: 14.3.23

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. These proceedings are an appeal against the six month suspension order imposed on 28 October 2022. By a subsequent decision on 3 March 2023 the Appellant has now been removed from the register. Mr Adnaan Mirza, on 24 November 2022, filed a “Certificate of Suitability of Litigation Friend” containing the relevant undertakings: as to ability to conduct these proceedings on the Appellant’s behalf competently and fairly; as to lack of any adverse interest; and an undertaking to pay any costs ordered against the Appellant (CPR 21.4(3)).

What Happened at this Hearing

2. By email Mr Mirza made a request for this hearing to involve a remote access facility. There are a number of relevant emails, all of which I have read. In circumstances where I only saw the request very belatedly yesterday (13.3.23) although it had been made last Wednesday (8.3.23), I decided that it was appropriate and in the interests of justice to set up a hybrid hearing which could be accessed remotely. Mr Mirza is the Litigation Friend in this case. In his emails, he made reference to his solicitor brother Nasir Aziz, who has also been assisting. But it was very clear from the emails that I was being asked to set up a facility so that the Litigation Friend could access this hearing. Mr Mirza even said in one email yesterday (13.3.23 13:40) that his brother Mr Aziz “if available will be able to undertake the hearing by Zoom, whereas I can only do it by telephone”. Specific arrangements were made and communicated, specifically to allow Mr Mirza access “by telephone”. I was extremely surprised, this morning, to find that Mr Mirza had not telephoned into this hearing. Mr Aziz – the solicitor brother who did do so – has told me that, at my request, he has sent an urgent text to Mr Mirza. But there has nevertheless been no telephone call into this hearing by the brother Mr Mirza who stands as Litigation Friend. I make no findings, but I register my concern.
3. Mr Aziz then told me that he wanted to address the Court in a personal capacity. He confirmed that he is a solicitor. He has not attended the court-room in person. He has used the dial-in details that was supplied to Mr Mirza. Mr Aziz has plainly been involved in drafting documents which were supplied by Mr Mirza by email in the early hours of this morning (14.3.23 00:43). They included a witness statement which Mr Aziz had made on 28 February 2023. That witness statement is said to have related to a hearing on 1 March 2023 before Fraser J. An observation attributed to Fraser J is quoted in the written materials which were drafted by Mr Aziz and provided early this morning. All of that was news to Ms Fleck who appears on behalf of the Respondent and says that the Respondent had no notice or awareness of that hearing before Fraser J and has never seen any order. I am told by Mr Aziz that the hearing before Fraser J was the latest in a line of hearings and court orders refusing applications for interim injunctions. It is a matter of concern if there was no notice and that no order has been sought produced or supplied. Again, I make no finding, but I record the circumstances.
4. Mr Aziz confirmed that he had nothing he would wish to add orally to the documents which had been provided in the early hours by email, which I had read. I did give him the opportunity to respond orally to what was said at this hearing by Ms Fleck. I was

very anxious that the Appellant's position should not be prejudiced by any point that Mr Aziz would have wanted to suggest being made on the Appellant's behalf.

5. I make clear that I do not expect such an experience to be repeated for any future hearing. There needs to be crystal clarity as to what the arrangements are, and who it is who is asking to be heard, acting in the interests or on behalf of the Appellant.

The Context

6. The documents filed on behalf of the Appellant tell me that it is intended that a Notice of Appeal will be filed against the subsequent decision of 3 March 2023. Everybody agrees that, if that happens, it will be sensible for the two appeals to be linked so that they can, as appropriate, be dealt with together. That can happen once a second appeal has been filed. Ms Fleck points out that if and when an appeal is filed, in relation to the more recent decision of 3 March 2023, that appeal will or may the suspensive in its effect. That may then mean that there is in parallel an ongoing suspension order with ongoing reviews. One controversial question between the parties is whether the present appeal should be stayed. I am quite satisfied that there is no basis today for ordering a stay.
7. At the heart of the case are complaints of unfairness including refusals of adjournments and decisions to proceed, taken together with other matters such as abuse of process and bad faith. Disclosure has been sought in this appeal and the Respondent has confirmed, in the context of the existing appeal, that the disclosure process is underway, and that documentation will be provided. A number of applications were separately been made to this Court for injunctions to restrain various hearings within the Respondent's processes. The most recent appears to be the mysterious hearing before, and the decision of Fraser J. All of these applications have been refused.
8. What precipitated today's 30-minute directions hearing are the following.
 - i) First, in the Notice of Appeal the box headed "other applications" said that the Appellant wished to apply for an order "that the Respondent obtain an expert psychiatric report on his mental capacity to conduct litigation prior to considering any retrial"; and an order "that no further hearing be listed against the Appellant until permission of the High Court has been obtained". These appear to me to be linked to "retrial", and hearings, in the Respondent's committee proceedings. In the event, in the Position Statement and Draft Order provided in the early hours of this morning, those applications are not now maintained on behalf of the Appellant.
 - ii) Secondly, in the Respondent's Notice (15 December 2022), in the light of those "applications", the Respondent had invited an early directions hearing "in order to ensure the timely resolution of the issues raised by the Appellant in relation to his capacity to conduct litigation". That appeared to envisage a decision by this Court relating to capacity in this appeal, or at least a crystallised decision as to what course was appropriate in the light of that capacity question having been raised.
 - iii) Thirdly, by an order on 16 February 2023, Jay J recorded that:

There is evidence that the Appellant had sustained a traumatic head injury and cannot conduct litigation in his own right. For that reason a litigation friend has been appointed.

I interpose that the head injury took place on the papers in September 2019. Jay J directed that there be a directions hearing as soon as possible with a 30 minute time estimate and said this:

The court at the directions hearing will need to decide the best way forward. It would not be right to require the Respondent to obtain potentially expensive medical evidence without the issues being properly ventilated. The Court will also need to be satisfied that this appeal is capable of being prosecuted by the Appellant, even with a litigation friend, in the present circumstances.

Capacity

9. It is important to distinguish between two different issues:
 - i) The first issue is a set of questions about the Appellant's ability to participate in the Respondent's proceedings. That links to decisions that have been made, as to adjournments, and as to hearings in those proceedings taking place and decisions made. It links to the substance of the appeal and any linked appeal. So far as that is concerned, there are questions about what evidence was available to the relevant committees who made the relevant decisions. That is one set of questions. This Court will, in due course, need to grapple with those questions.
 - ii) The second issue is distinct. It concerns capacity to conduct these appeal proceedings (and the proposed linked appeal). The Certificate of Suitability contains the reasons why the Litigation Friend believes the Appellant to be a protected party, lacking capacity.
10. Two recent assessments have been produced on behalf of the Appellant.
 - i) The first is a clinical psychologist Adriana Pavelescu's report dated 20 February 2023 which expresses an opinion that the Appellant "does not presently have the requisite mental capacity to conduct litigation or provide instructions".
 - ii) The second is a letter from consultant psychiatrist (retired) Dr Lars Davidsson dated 23 February 2023 which expresses the opinion that the Appellant "does lack capacity to take a meaningful part in the hearing".

Those assessments were deployed in the unsuccessful attempts to obtain injunctions from this Court and to obtain adjournments in the Respondent's most recent committee proceedings.

11. As Ms Fleck points out, the commentary in the White Book 2022 (page 722 §21.0.3) is very clear about the nature of evidence on capacity which this Court would need, when dealing with the question of capacity for the High Court proceedings. The commentary explains:

That evidence must be current and must deal first with the “diagnostic test” of impairment or disturbance of the functioning of the mind or brain, then secondly the “functional test” of whether the impairment renders the person unable to make the relevant decisions in litigation. It must deal with all the factors in s.3 of the Mental Capacity Act including whether there are any practical steps which could be taken to assist the claimant in making decisions in relation to the litigation. See Fox v Wiggins [2019] EWHC 2713 (QB) and King v Wright Roofing Co Ltd [2020] EWHC 2129 (QB).

12. The White Book commentary gives examples where the High Court has dealt with the question of capacity as a preliminary issue. One is V v R [2011] EWHC 822 (QB). Another is King, to which I have just referred. It describes (at p.723) the practice whereby “the Court should at the first convenient opportunity investigate the question of capacity whenever there is any reason to suspect that it may be absent (eg. a significant head injury)”, which means that, even where the issue does not seem to be contentious, a master or judge responsible for case management “will almost certainly require the assistance of a medical report before being able to be satisfied that incapacity exists”.
13. I have not seen any case or commentary addressing whether the Court can proceed to deal with the litigation, avoiding medical reports and a ‘preliminary issue’, on this basis: whether or not a claimant or appellant is or is not a protected party, there is a litigation friend in place who has followed the procedure in CPR 21.5; no application has been made by anyone; suitable protection is in place; and so the Court does not need to make a ruling on capacity. Ms Fleck told me, candidly, that she has yet to find a definitive answer to that. She made clear that, as Counsel for the Respondent, she was able and willing to ensure that the Court had the assistance that it needs. Her provisional position was that the Court could properly deal with question-marks and concerns about capacity by focusing on the question of whether adequate assistance for the Appellant is in place. If so, that could obviate the need for a ‘preliminary issue’ determination. I am in no position to reach any conclusion today about this, including a conclusion about what the appropriate next steps in this regard would be.
14. The Position Statement filed by the Respondent (10.3.23) said this:

the Respondent ... recognise[s] that formal evidence of the capacity assessment may be required by the Court in order to ascertain whether the present appeal can properly be pursued by the Appellant, with the assistance of his present litigation friend or otherwise. The Respondent’s position is that any direction should be accompanied by a strict timetable. The Respondent will assist and comply with any such direction made by the Court.

The Way Forward

15. The Order I am making today is to direct that the Respondent provide written submissions and materials by 4pm this Friday, giving the Litigation Friend 7 days thereafter to file and serve any response. That should mean that this Court is placed in a fully informed position – by reference to any materials, cases or commentary – as to whether it is necessary to make a ‘preliminary issue’ ruling on capacity; and in any event as to what process and approach the court should now adopt in light of the question that has been raised and the current materials.

Orders sought on behalf of the Appellant

16. In the draft Order filed on behalf of the Appellant this morning, with the Position Statement drafted by Mr Aziz, a number of orders are sought. I am asked to give a blanket, prospective permission for medical and other evidence to be adduced. I am asked to make an order for disclosure by the Respondent of “all documents” and “any” documents requested on behalf of the Appellant. I am asked to give permission now for the existing Notice of Appeal to be amended after disclosure. I am also asked to give permission to join the proposed second appeal. In my judgment, none of these orders are appropriate. It is important to be able to give consideration to what evidence can properly be adduced, in relation to what specific issues arise on these appeals including any capacity issue which the Court may be addressing. Applications to adduce evidence, for any further required disclosure, or to amend the grounds of appeal, or to join cases should all be made at the appropriate time when the position has crystallised. Blanket or prospective orders are not appropriate. As to adducing evidence, the material currently before the Court can be considered in order to see what relevance it has to any issue which the Court is considering.
17. I am also asked to order (i) a stay of this appeal with liberty to the Appellant to restore and (ii) an order “that there be no order as to costs”. The first of those is explained as being intended to allow time for the Appellant to be able to recover, then advise and then get representation. That – alongside what is said about his current incapacity – envisages a very long period (18 months or so) where this appeal would be on hold. The second, the order in relation to costs, appears to be intended to operate prospectively as a ‘protective costs order’, in light of the Appellant and his Litigation Friend’s limited means. I am quite satisfied that it is not appropriate today to be making either of those orders. The stay is premised on incapacity, and the Court is made no ruling on incapacity. Moreover the appeal is being progressed currently by the Litigation Friend Mr Mirza, assisted by the solicitor brother Mr Aziz. It relates to past decisions and their legal legitimacy. So far as costs are concerned, one of the conditions of the Certificate of Suitability of the Litigation Friend is the undertaking to pay costs if ordered by this court. There is no proper application before the Court for a prospective and protective costs order; still less evidence or justification for such an order.
18. I am not foreclosing today on what applications may subsequently be made or how they may come to be dealt with by the Court. But I am quite satisfied that none of the Orders sought today on behalf of the Appellant are appropriate to be made today and I will therefore refuse the application made today for those Orders.

Other Matters

19. I started this Judgment with some concerns about the way this hearing has been approached, and the fact that this has been an in-person hearing which the Litigation Friend has not attended, for which I have been given no good reason but am making no findings. I record that I am concerned at the suggestion, made in emails, that there can be no “in-person” hearing of this appeal at which anybody would appear “in-person” to make representations on behalf the Appellant. I have put down a clear marker.
20. My Order will give the parties liberty to apply on notice for a further directions hearing or case management hearing. I am ordering that costs be reserved. That leaves

the question of costs, and all points that could be made about costs in any direction, open to be dealt with as appropriate on a future occasion.

14.3.23