



Neutral Citation Number: [2020] EWHC 2743 (Ch)

Claim No: PT-2020-000763

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 21 October 2020

Before:

ROBIN VOS
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

Between:

KHEIRA GANOUN

Applicant

- and -

(1) KHYATI JOSHI
(2) BARTS HEALTH NHS TRUST

Respondents

Nick Armstrong (instructed by **Nicholls & Nicholls**) appeared for the **Applicant**
John Bryant (instructed by **Joshi Advocates Ltd**) appeared for the **First Respondent**

Hearing date: 9 October 2020

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 21 October 2020 at 10.30 am.

DEPUTY JUDGE ROBIN VOS:**Introduction**

1. This is a sad case which relates to the disposal of the remains of a man who died on 15 September 2020 as a result of a road traffic accident on 10 September 2020. There is a disagreement as to the name by which he should be known and his date of birth. I will refer to this in more detail later on. For the time being, I will refer to him as the deceased but mean no disrespect in doing so.
2. The deceased was born in Algeria. However, he lived in England for the last 15 years of his life. His parents and his three siblings all still live in Algeria.
3. The applicant, Mrs Ganoun is the deceased's mother. The first respondent, Ms Joshi is the deceased's widow. The Barts NHS Trust is the second respondent as, following the deceased's death, they had physical possession of his body. Westminster Coroner is named as an interested party as a result of the concerns relating to the deceased's identity. Neither the second respondent nor Westminster Coroner have played any part in these proceedings and do not intend to do so.
4. Mrs Ganoun's wish and, she says, her son's wish is that he should be buried in Algeria next to his grandmother, to whom he was very close. Having become aware that Ms Joshi was planning to arrange a funeral in the UK, and in the absence of any agreement to delay matters, Mrs Ganoun made an urgent application to the court with notice to the respondents on 30 September 2020.
5. The application sought an order that Mrs Ganoun should be appointed as administrator of her son's estate (in order to give her the right to make the funeral arrangements) or, alternatively, requested the court exercise its inherent jurisdiction to make directions about the disposal of her son's body. Mrs Ganoun also sought an injunction preventing Ms Joshi from taking any steps to dispose of the deceased's body pending the outcome of the proceedings.
6. The application was however too late as Ms Joshi had arranged for her late husband to be buried in a Muslim cemetery at a private ceremony conducted by the Imam for Barts NHS Trust, Mr Faruq Siddiqi on the morning of 30 September 2020.
7. This fact was made known to Mr Justice Miles who heard Mrs Ganoun's application on 1 October 2020 with the result that he made directions for a full hearing of the application.
8. Mrs Ganoun intends to apply to the Secretary of State for permission to exhume her son's body in accordance with Section 25 Burial Act 1857. Her plan would then be to repatriate the body to Algeria and for her son to be buried there. She therefore now wishes to apply for the following relief:-
 - (i) Mrs Ganoun still applies to be appointed administrator of her son's estate in accordance with Section 116 Senior Courts Act 1981;
 - (ii) Mrs Ganoun seeks a declaration that her son has not been buried "decently";

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- (iii) A declaration is also sought by Mrs Ganoun as to her son's true identity;
9. The main purpose of the relief sought is to support the application which she intends to make to the Secretary of State for her son's body to be exhumed.

The court's power to make declarations

10. Mr Armstrong, on behalf of Mrs Ganoun submitted that the court has power to make the declarations which she seeks as part of its inherent jurisdiction in relation to the administration of estates. There is no doubt that the court does have an inherent jurisdiction in relation to estates. That much was confirmed by the Chancellor, Sir Geoffrey Vos in *Oldham Metropolitan Borough Council v Makin* [2017] EWHC 2543 (Ch) [at 80], one of the authorities to which Mr Armstrong referred in relation to the disposal of bodies.
11. Mr Bryant, representing Ms Joshi however argues that any such jurisdiction is forward-looking. Whilst it might be exercised for example to decide to whom a body should be released or to give directions as to the way in which a body should be disposed of, it should not be exercised in this situation to express a view on the way in which a body has been disposed of where this has already happened.
12. It is of course clear from CPR Rule 40.20 that the court has power to make a declaration, whether or not any other remedy is claimed, although the underlying basis for making a declaration is derived from Section 19 Senior Courts Act 1981. Whether or not the court should make a declaration is an exercise of the court's discretion.
13. Although no submissions were made on the point, the principles which the court should apply are not controversial. The court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration (see for example the decision of Neuberger J (as he then was) in *Financial Services Authority v Rourke (t/a JE Rourke and Co)* [2001] EWHC 704 (Ch)).
14. Care needs to be taken in making declarations where there has not been a full trial given the possibility of adverse repercussions for third parties. However, a declaration may be made, even in such circumstances, (see *Hayim v Couch* [2009] EWHC 1040 (Ch) [at 17]).
15. Bearing these principles in mind, I am not satisfied that it would be right for the court to make a declaration in relation to the question as to whether the deceased's burial was "decent". There are many ways of looking at what might or might not be decent. It is not part of any established legal test; instead, it is simply a factor which the court might take into account in determining who should have the right to dispose of a body (see *Oldham MBC v Makin* [at 74-75]).
16. In addition, the only purpose of the declaration would be to strengthen any application which Mrs Ganoun might wish to make to the Secretary of State for her son's body to be exhumed. As Mr Armstrong explained, the Secretary of State will be required to take into account all the relevant circumstances in coming to a decision. This may

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well include the circumstances surrounding the burial. It would be wrong for the court to pre-empt or influence the Secretary of State's decision by making a declaration as to whether, in the court's view, the circumstances were such that the burial was or was not "decent". This is something which should be left to the Secretary of State to determine, should it be relevant.

17. The position in relation to the deceased's identity is however different. Mrs Ganoun objects to her son being buried under what she considers to be the wrong name. Mr Armstrong submits that it is improper for this to happen. However he also referred to a more practical issue which is that it is likely to be difficult for Mrs Ganoun and other members of her family in Algeria to obtain a visa to visit the UK and see her son's grave if the name under which he is buried does not correspond with the name of the person who was her son. Having a court declaration confirming that the deceased was known by more than one name would no doubt assist in obtaining such a visa.
18. There is therefore a purpose in making such a declaration subject to the court being satisfied of the relevant facts, that justice requires a declaration to be made and that there is no material risk of adversely affecting third parties.

The deceased's identity

19. Mrs Ganoun says that the deceased was born Lamine Ouabri on 27 October 1983. She has produced various official documents from Algeria which verify this, including an ID card, a birth certificate and an official family record issued by the Algerian authorities a few days before the hearing.
20. Mrs Ganoun's evidence is that her son left Algeria in 2003 to travel to France. She believes that he arrived in the UK in 2004 although Ms Joshi's evidence is that he arrived in the UK in 2005.
21. It is clear from the evidence provided by Ms Joshi that, on arrival in the UK, the deceased gave his name to the authorities as Omar Djabali and his date of birth as 27 October 1989. There is speculation that this was for immigration reasons as it might be more likely that he would be allowed to stay in the UK if, on his arrival, he was a minor.
22. Whatever the reason, it is apparent from the evidence provided by Ms Joshi as well as the evidence of the police officer who contacted Ms Joshi on the night of the accident that, as far as the UK is concerned, he has always been known as Omar Djabali with the date of birth of 27 October 1989.
23. Ms Joshi is not clear in her evidence whether she accepts that Mrs Ganoun is the deceased's mother. She does however accept that Mrs Ganoun, her husband and her other children are members of her deceased husband's family. She also accepts that the family in Algeria called her husband by a name other than Omar although she says that they called him "Amin" rather than "Lamine". She does not however accept that her husband was born in 1983 rather than 1989 and suggests that the official documents from Algeria may have been tampered with.

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24. In support of this, Mr Bryant drew attention to the fact that, when he arrived in the UK, the deceased had been cared for by social services who had completed an information form showing his date of birth as 1989 and who could be expected to have assessed his age. He also referred to a photograph said to be taken in 2005/2006 from which he invited the court to infer that the deceased was, at that stage, 16 or 17 rather than 22 or 23.
25. Based on the evidence which has been provided, there is no doubt in my mind that Lamine Ouabri and Omar Djabali were one and the same person, namely the deceased. Although Ms Joshi does not explicitly accept this, she does not deny it.
26. I am also satisfied that his true date of birth was 27 October 1983 and not 1989. The UK documents date only from the time the deceased arrived in the UK and are based on what he told the authorities at that time. There is no evidence of any age assessment carried out by social services nor, if there was, what the outcome may have been. It is impossible to draw any conclusions from the photograph provided.
27. On the other hand, the documents from Algeria include the deceased's birth certificate. They clearly state the deceased's date of birth. There is no evidence that those documents have been tampered with. They therefore provide much more compelling evidence of the deceased's true age than the UK documents.
28. The fact that it is not unusual for individuals coming to the UK who are claiming asylum to claim they are minors provides an obvious explanation for the discrepancy. In addition, as Mr Armstrong observed, it is difficult to conceive of any reason why Mrs Ganoun would wish to say that her son was born 6 years earlier than he actually was.

Section 116 Senior Courts Act 1981

29. Section 116 reads as follows:-

"116 Power of court to pass over prior claims to grant

- (1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
 - (2) Any grant of administration under this section may be limited in any way the court thinks fit."
30. The court may make an order under Section 116 at any time until a full grant of probate or letters of administration has been made (*Jakimaviciut v HM Coroner for Westminster* unreported (31 October 2019) [at 34]). In this case, Ms Joshi has confirmed that no grant has been made.
 31. The normal rule is that the deceased's executors or administrators have both a right and a duty to make arrangements for the proper disposal of the deceased's body (*Buchanan v Milton* [1999] 2 FLR 844 [at 845-846]).

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32. There is no doubt that, in accordance with Rule 22 of the Non-Contentious Probate Rules, Ms Joshi as the deceased's widow is the person who has the right to be appointed as administrator of the deceased's estate.
33. However, as will be apparent, Section 116 gives the court a discretion to appoint some other person if, by reason of any special circumstances, it is necessary or expedient to do so. The court must therefore decide whether, as a result of the existence of any special circumstances, it is necessary or expedient to appoint Mrs Ganoun as administrator rather than Ms Joshi.
34. Previous decisions have broken down the test in section 116 into two stages. The first is to decide whether there are any special circumstances. If so, the second stage is to decide whether it is necessary or expedient to appoint some person as administrator other than the person who would normally be entitled (see for example *Oldham MBC v Makin* [at 71]).
35. In my view this two stage approach is hard to justify. What the court must determine is whether it is necessary or expedient to appoint an administrator as a result of the existence of special circumstances. The special circumstances are therefore only relevant to the question as to whether it is necessary or expedient to appoint a particular person as administrator. They are not some separate pre-condition to the ability of the court to exercise its discretion in the first place.
36. The identification of the special circumstances and the decision whether it is necessary or expedient to depart from the usual order of priority is therefore a single process. The factors which the court should consider in deciding whether it is necessary or expedient to appoint a different administrator are the special circumstances which have been identified and not any other factors which might exist.
37. I should mention that Mr Armstrong, in his skeleton argument, drew attention to the fact that the court also has an inherent jurisdiction, as part of its jurisdiction in relation to the administration of estates, which enables it to give directions both as to who should dispose of a body and as to the manner of the disposal (*Oldham MBC v Makin* [at 79-80]). However, he made no submissions in relation to this. In my view, he was right not to do so. The court's inherent jurisdiction has little relevance in the present case given that the deceased has already been buried. The real issue is whether Mrs Ganoun should be appointed as administrator in order to bolster her application to the Secretary of State for permission for her son's body to be exhumed.
38. Mr Armstrong's primary submission is that the fact that the deceased was buried using the "wrong" name is a special circumstance which justifies the exercise of the court's discretion under section 116 Senior Courts' Act 1981. He argues that this affects Mrs Ganoun's ability to mourn properly for her son as well as the more practical issue of getting immigration permission to enter the UK in order to visit the grave.
39. In addition, Mr Armstrong relies on Ms Joshi's conduct between the date of her husband's death and the date of the funeral. In this context, it is helpful to record some of what happened during that period. There is no real disagreement as to the facts although the parties differ in the conclusions they draw from those facts.

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40. Ms Joshi was in contact with her husband's younger brother, Reda (who speaks English – his mother does not), from the night of the accident through WhatsApp. Following his brother's death, Reda sent Ms Joshi a number of messages pleading with her to allow her husband to be buried in Algeria with his grandmother. Ms Joshi was resolute that the funeral would take place in London although agreed with Reda that, to the extent practicable, she would involve her husband's family in the arrangements.
41. Around 25 September, Mrs Ganoun and her family organised a crowdfunding campaign to raise funds to help them take steps to ensure that the deceased was buried in Algeria. This resulted in a demonstration on 28 September when around 50 people confronted Ms Joshi outside her office.
42. During the course of 28 September, Ms Joshi had started making arrangements for the funeral with the help of the Imam, Mr Siddiqi, the coroner having released the body.
43. On the evening of 28 September, Mrs Ganoun's lawyers sent a pre-action notice to Ms Joshi warning her of the proposed application for an interim injunction. Ms Joshi responded to that letter the following afternoon (29 September), amongst other things, noting her commitment to ensure that her deceased husband's family would be involved in the funeral arrangements if practicable. She also mentioned the protest at her office the previous day. However, during that afternoon she arranged with the Imam that the funeral would take place at 10am the following day (30 September) attended only by herself and the Imam. She says that this was due to security concerns following the demonstration the previous day.
44. Also on 29 September, the Imam contacted Reda to ask if the family wished to view the body. Reda refused and instead asked the Imam to say again to Ms Joshi that the family's wish was for the burial to take place in Algeria. It does not appear that the Imam mentioned to Reda that the funeral was due to take place the following day.
45. On 30 September, the funeral took place as planned. Meanwhile, Mrs Ganoun's lawyers made the application to the court.
46. The family only found out about the funeral on 1 October when the Imam called Reda to let him know and a letter from the cemetery was provided to the court.
47. Against this background, Mr Armstrong submits that Ms Joshi's conduct in the face of the known objections from the family in Algeria, her commitment to involve the family which she reneged on and her knowledge of the proposed proceedings also constitutes a special circumstance which means that it is either necessary or expedient for the court to exercise its discretion under section 116.
48. Mr Armstrong notes that there is some overlap between the circumstances which he has identified and those which were found to be special in *Buchanan v Milton*. In that case, the special circumstances included the deceased's Aboriginal heritage, the importance attached in Aboriginal culture to correct burial procedures, the wishes of the family and the deceased's wishes. This, he says, supports his submission that the circumstances in this case should lead to the court to conclude that it is necessary or expedient to exercise its discretion under section 116.

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49. There are two factors mentioned in *Buchanan v Milton* which Mr Armstrong did not however rely on in his submissions. Those are the importance in Algerian culture of both the place and the way in which a deceased is buried and the wishes of the deceased.
50. On the first point, no evidence was given of any particular concerns in relation to cultural issues other than the fact that the family would normally visit the grave every Friday. Clearly this will not be possible for the deceased's family in Algeria if he remains buried in the UK. However, it would of course be just as difficult for Ms Joshi to visit the deceased's grave were he to be buried in Algeria. I do not therefore consider this to be a significant factor in deciding whether the court should exercise its discretion in this case.
51. Given the conflicting evidence as to whether the deceased had any burial wishes and, if so, what they were, I believe Mr Armstrong was also right not to place any weight on this issue. I should however say a little more about the evidence on this point given that it has been seen as a relevant factor in other cases.
52. Mrs Ganoun says that the deceased had for many years said that he wanted to be buried alongside his grandmother in Algeria as they were very close and he was not able to attend her funeral after she died in 2014. Her evidence is that her son repeated this to her several times since the start of the Covid-19 pandemic.
53. The deceased's father, siblings and uncle in Algeria all support this view, and in their witness statements confirm that this was his wish. I do however note that none of them mentions any occasion on which the deceased communicated this wish to them. They simply assert that it was his wish.
54. Ms Joshi on the other hand says that her husband did not have any strong views as to his burial. Indeed, she says that he was unwilling to discuss his possible death. It does however appear that Ms Joshi was aware that being buried with his grandmother was a possibility as, in a conversation with the deceased's brother immediately following the accident, she asked him where the grandmother was buried.
55. In my view, the evidence in relation to the deceased's wishes is inconclusive. It is difficult to accept Mrs Ganoun's evidence at face value as it seems surprising that a healthy man in his thirties would repeatedly discuss his burial wishes particularly in circumstances where Ms Joshi's evidence is that he did not like talking about such matters.
56. I accept that the deceased may at some point have mentioned the possibility of being buried with his grandmother. However, on the basis of the evidence I have, I cannot say that this was a specific wish, let alone a strongly held wish.
57. Mr Bryant approached the exercise of the court's discretion from a rather different angle. He observed that Ms Joshi is the deceased's widow, having known him since 2006 and having been married to him since 2012. She is the person who, in law, is entitled to be appointed as administrator, recognising the special tie between spouses and putting this ahead of other family ties.

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58. On this basis, Mr Bryant submits that Ms Joshi was perfectly entitled to decide how her husband should be buried and, whilst listening to the wishes of his wider family, was free to act contrary to those wishes if she felt it was right to do so.
59. Mr Bryant makes the point that Ms Joshi was not acting furtively given that she contacted her husband's family immediately after the accident and remained in contact with them. She followed the advice of the Imam by making sure that her husband was buried as soon as possible and in accordance with Muslim traditions.
60. In support of this, Mr Bryant referred to the comment of Sonia Proudman QC in *Hartshorne v Gardner* [2008] EWHC 3675 (Ch) [at 9] that:-
- “the most important consideration is that the body be disposed of with all proper respect and decency and, if possible, without further delay”.
61. Mr Bryant makes the point that the requirement for a deceased to be buried without delay is especially important in the Muslim tradition. Ms Joshi was simply acting in accordance with the advice of the Imam.
62. Turning to the deceased's identity, Mr Bryant submits that this is not really relevant. He refers to the opening words of Mrs Justice Hale (as she then was) in *Buchanan v Milton* in which she states [at 844] that:-
- “In English law, a person's name is that by which he himself chooses to be known”.
63. There is, he says, nothing untoward or improper in the deceased being buried in the name which he chose. This cannot therefore, he submits, be a special circumstance which makes it necessary or expedient for the court to exercise its discretion under section 116.
64. I accept Mr Bryant's submission that there was nothing improper in allowing the deceased to be buried under the name which he had always used since he had lived in the UK. Although it was not the name which he had been born with, it was the name by which he had always been known to the UK authorities. Similarly, although his date of birth will have been recorded incorrectly on the paperwork relating to his death and the burial, this is the date of birth which the deceased chose to give to the UK authorities and which has always been contained in any UK records relating to him.
65. Any uncertainty over the deceased's identity does not therefore, in my view, represent a special circumstance which would make it necessary or expedient for the court to exercise its discretion to appoint the deceased's mother as administrator of his estate in priority to his widow for the purposes of determining where he should be buried.
66. I also do not consider that Ms Joshi's actions between the date of her husband's death and the date of the burial constitute special circumstances which would make it right for the court to appoint Mrs Ganoun as administrator. As Mr Bryant has pointed out, the law has specifically recognised that a spouse should have priority over any other family member when it comes to the appointment as administrator. As he says, this is

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no doubt a recognition of the close relationship between spouses. That is not to say that a son will not have a close relationship with his parents or his siblings. It is simply that the law deems the relationship between spouses to be more significant in this particular context.

67. Mr Bryant is therefore right when he says that, where there is a difference of opinion between a widow and other family members as to the way in which a person should be buried, it is the widow who, in the absence of other factors, would normally have the final say and who is entitled to override the wishes of other family members.
68. This does not mean there are no circumstances in which the court should intervene to override the plans of an executor or administrator. That is clear from the decision in *Oldham MBC v Makin* where the court appointed an administrator to deal with the disposal of the deceased's body, despite the existence of a will and the appointment of an executor. However, that was in circumstances where the deceased was an "infamous murderer", the executor had not made arrangements for the disposal of the body five months after the death and there was a concern that whatever arrangements might be made could cause public unrest. It is therefore very much the exception than the rule.
69. I accept that Ms Joshi initially committed to her deceased husband's family that she would involve them in the funeral and that the knowledge of the proposed injunction application may have led her to act more quickly than might otherwise have been the case. I also accept that she deliberately withheld information about the funeral from her deceased husband's family. However, in the light of the demonstration which had resulted from the family's pleas for help to the Algerian community in London, I do not find it surprising that Ms Joshi decided to go ahead with the funeral as quickly as possible and in private.
70. Mr Armstrong submits that, if Ms Joshi was really concerned as a result of the demonstration, the natural thing to do would be to defer any burial rather than to go ahead in secret. It is not, however, apparent to me why this would have been any better response, particularly in circumstances where the advice from the Imam was that the burial should take place as soon as possible given that it was now more than two weeks since the deceased had passed away.
71. In addition to the factors already mentioned, Mr Armstrong argues that it is necessary to appoint Mrs Ganoun as administrator in order to break the deadlock between the parties. This is the reason given by the Chancellor in *Oldham MBC v Makin* [at 75] as to why it was necessary for the court to intervene in that case. However, in this case, there is no deadlock given that Ms Joshi has arranged her husband's burial, albeit against Mrs Ganoun's wishes. Instead, the purpose of inviting the court to appoint Mrs Ganoun is to assist her in her application for permission to exhume her son's body.
72. Mr Armstrong accepts that it is not necessary for Mrs Ganoun to be appointed as administrator in order to be able to apply for permission to exhume her son's body. He submits however that it would be expedient. This is because any person making the application who is not the next of kin must provide a separate letter explaining why they are making the application. This, he says, adds an extra step. If Mrs Ganoun were the administrator, the process would be simpler and more efficient.

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73. However, the section in the guidance notes to the application form which needs to be completed when seeking permission to exhume a body which I was referred to by Mr Armstrong mentions only the next of kin. The notes say nothing about executors or administrators. On this basis, it appears that, even if Mrs Ganoun were appointed as administrator, she would still need to explain why she was making the application given that she is not the deceased's next of kin (which is defined first of all as any spouse or civil partner). There is therefore no reason to suppose that the application for exhumation will be any easier for Mrs Ganoun even if she were appointed as administrator for this purpose.
74. In the light of this, I am not satisfied that this is a factor which would make it either necessary or expedient to appoint Mrs Ganoun as administrator of her son's estate for the purposes of pursuing the exhumation application.

Conclusion

75. This is no doubt a difficult time for all members of the deceased's family. It is easy to understand why those family members in Algeria feel so strongly that the deceased should be buried there. However, the law in England gives that decision to a surviving spouse in priority to any other family member.
76. Although the court can appoint another person to act as administrator if, by reason of special circumstances it is necessary or expedient to do so, for the reasons I have set out, I am not satisfied in this case that any such reasons exist.
77. I consider that it is necessary in order to do justice to Mrs Ganoun to make a declaration in relation to her son's identity and date of birth following the conclusions I have reached at paragraphs [25/26] above. It will assist Mrs Ganoun and her family in obtaining a visa to travel to the UK to visit her son's grave. There is no suggestion that making such a declaration would have a material adverse impact on any third party. Mr Bryant did not suggest that it would cause any injustice to Ms Joshi.
78. I would ask Counsel to agree the form of a draft order for approval and to make submissions in relation to costs.