

The inherent jurisdiction: where are we now?

Introduction

1. That very significant vestiges of the High Court's inherent jurisdiction to grant relief in respect of certain categories of adults survived the implementation of the Mental Capacity Act 2005 ('MCA 2005') is now clear. However, what is rather less clear is precisely: (1) how far the inherent jurisdiction has survived; and (2) how the High Court can or should exercise its powers under the inherent jurisdiction in respect of those who can only be afforded protection by way of its exercise.
2. This paper seeks to draw together some of the threads from recent cases, as much to provoke discussion as to offer solutions. It does so by particular reference to the Scottish experience with the suite of powers granted to local authorities in the Adult Support and Protection (Scotland) Act 2007. The paper concludes with a brief discussion of the prospects for statutory reform in the area in the shape of the draft Care and Support Bill, a topic which will be discussed in much more detail in other sessions during the course of the conference.
3. I should note that this paper does not address remedies other than the inherent jurisdiction which may be open to public authorities or other interested persons in circumstances where they consider that an adult may be at risk. The creative use of the civil and criminal law may in some circumstances afford relief, and more solutions may be forthcoming even prior to the completion of the passage of the Crime and Security Bill.¹ However, it is beyond the scope of this paper to address the hotch-potch of remedies that may be available: the reader is directed instead to the comprehensive review of the topic produced by Michael Mandelstam available on the SCIE website.²
4. Any paper upon this topic delivered to Action on Elder Abuse is a paper which must be delivered with trepidation in light of the vital campaigning work done by the charity in the area of safeguarding of those adults who fall just below the cusp of threshold. I am thinking in this regard, in particular, of the consultation paper issued by the charity on the need for powers of

¹ Including, for instance, the use of Domestic Violence Protection Notices and Domestic Violence Protection Orders issued under ss.24-30 Crime and Security Act 2010. A pilot of these orders began on 30 June 2011 in three police force areas: West Mercia, Wiltshire and Greater Manchester. The pilot closed on 30 June 2012, but all three forces will continue the scheme for a further year whilst the Home Office evaluates the pilot to assess whether or not a change in the law is needed. The evaluation of the pilot is expected to report in late summer 2013. See www.parliament.uk/briefing-papers/SN06337.pdf.

² Safeguarding Adults at Risk of Harm: <http://www.scie.org.uk/publications/reports/report50.pdf>.

entry and intervention in Adult Safeguarding³ in light of the apparent absence of any intent by the Department of Health to consider the need for such powers in the Care and Support Bill; a consultation paper so effective that it provoked a reversal of course by the Department.

5. I should emphasise that, to the extent that this paper goes beyond description to prescription, the views expressed are my own, and do not necessarily reflect the views of others in the 39 Essex Street Court of Protection Team or those public bodies (including the Official Solicitor) on whose behalf I have appeared in cases relating to the exercise of the inherent jurisdiction. I also reserve the right to argue upon instruction the direct contrary of any or all of the propositions set down below, even if my advice behind the scenes may reflect such propositions.

On the eve of the MCA 2005

6. The position as at 30 September 2005 was – relatively – clear:
 - 6.1. through a series of decisions (many of them handed down by Munby J, as he then was), the High Court had created and exercised what was “*in substance and reality, a jurisdiction in relation to incompetent adults which [was] for all practical purposes indistinguishable from its well-established parens patriae or wardship in relation to children*” (*E v Channel Four News & Ors* [2005] 2 FLR 913, at paragraph 55, per Munby J); and
 - 6.2. that jurisdiction could be exercised not merely in respect of the ‘incompetent’ but also in respect of the ‘vulnerable,’ i.e. those who, even if not incapacitated by mental disorder or mental illness, were, or were reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent (*A Local Authority v (1) MA (2) NA and (3) SA* [2005] EWHC 2942 [2006] 1 FLR 867, at paragraph 77, per Munby J).

The position now: the outline

7. The decision of the Court of Appeal in *A Local Authority v DL & Ors* [2012] EWCA Civ 253 [2012] COPLR 504⁴ has put beyond doubt that the inherent jurisdiction has survived so to protect

³ <http://www.elderabuse.org.uk/Documents/AEA%20Adult%20Safeguarding%20legislation.pdf>.

from the baleful influence of others vulnerable persons who require such protection but do not fall within the categories of incapacitated persons covered by the MCA 2005.

8. The decision of Parker J in *XCC v AA & Anor* [2012] EWHC 2183 (COP) [2012] COPLR 730⁵ has also confirmed that a High Court judge, exercising the inherent jurisdiction, has the power to afford protection to incapacitated adults where the remedy sought does not fall within the remedies provided for in the MCA 2005.
9. Finally, it would appear (although such has not been the subject of specific judicial confirmation) that the inherent jurisdiction may also have survived to afford protection to adults unable to take a decision for themselves but who do not suffer from an impairment of or disturbance in the functioning of the mind such as to satisfy the diagnostic criteria set down in s.2(1) MCA 2005.
10. Each of these three routes to relief are discussed in turn.

Vulnerable adults

11. The precise scope of the High Court's powers under the inherent jurisdiction in respect of those who are not considered to lack capacity within the meaning of the MCA 2005 but who require its protection against third parties has still to be finally tested. It is suggested, though, that the following points are uncontroversial:

- 11.1. the jurisdiction can only be exercised by High Court judges (most usually of the Family Division) sitting in their capacity as such, rather than as judges of the Court of Protection. The Court of Protection only has jurisdiction over those who lack capacity within the meaning of MCA 2005, and the powers exercised over the capacitous but vulnerable are therefore powers of the High Court;⁶

⁴ Attached as Appendix 1 to this paper; the COPLR series is published by Jordans, and is the only law reports series dedicated to cases decided under the MCA 2005.

⁵ Attached as Appendix 2 to this paper.

⁶ There is an argument that s.47(1) MCA 2005 (which provides that “[t]he court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court”) would cloak the Court of Protection with the powers as the High Court enjoys by way of the exercise of its inherent jurisdiction. However, whilst this is an attractive argument (not least as it would mean that District Judges and Circuit Judges holding Court of Protection ‘tickets’ could also exercise the inherent jurisdiction), the Courts have to date proceeded on the basis that the inherent jurisdiction identified/created by Munby J in *Re SA* can only be exercised by a High Court Judge. In this regard, the question which may fall for decision on an appropriate occasion is whether the words “in connection with [the Court of Protection’s] jurisdiction” serves as an indication that s.47 does not serve to extend the Court’s jurisdiction beyond that over the incapacitated. See, by analogy, *Dame Vivienne Westwood OBE v Anthony Edward Knight* [2012] EWPC 14, in which HHJ Birss QC

- 11.2. the test for engaging the inherent jurisdiction of the High Court is whether the proposed intervention is necessary and proportionate (*DL* at paragraphs 66 (per McFarlane LJ) and 76 (per Davis LJ));
- 11.3. the High Court will in the first instance seek to exercise the inherent jurisdiction so as to facilitate the process of unencumbered decision-making by the adult, rather than taking the decision for or on behalf of the adult: see in this regard, in particular, *LBL v RYJ and VJ* [2010] EWHC 2665 (COP), [2010] COPLR Con Vol 795 and the dicta of Macur J in that case as to the “*facilitative, rather than dictatorial, approach of the court*” to the exercise of the inherent jurisdiction in the case of vulnerable adults. Her dicta were expressly endorsed by the Court of Appeal in *A Local Authority v DL & Ors*, at paragraph 67, per McFarlane LJ;
- 11.4. the inherent jurisdiction of the High Court is, however, not limited solely to affording a vulnerable adult a temporary ‘safe space’ within which to make a decision free from any alleged source of undue influence (*DL* at paragraph 68 per McFarlane LJ).
12. More difficult to glean, however, is how far the High Court will go in the exercise of the ‘great safety net’⁷ of the inherent jurisdiction.
13. In light of the decision in *DL*, it would seem that that the High Court could impose long-term injunctive relief to protect the vulnerable adult (for instance, by making orders prohibiting third

had caused to consider whether, sitting as a County Court Judge, he had power to issue a bench warrant (i.e. a warrant to bring an alleged contemnor before the court). That power was part of the High Court’s inherent jurisdiction. It was not an order which the County Court had specific power to make under the County Courts Act 1984, but HHJ Birss QC analysed the provisions of s.38(1) of that Act. That provides in material part that, subject to specific restrictions, “*in any proceedings in a county court the court may make any order which could be made by the High Court if the proceedings were in the High Court,*” and HHJ Birss QC held thus:

“147 Section 38 does not confer on the county court a jurisdiction to hear a case it has no jurisdiction to hear. It is concerned with remedies and orders the court can make in proceedings properly before it. This committal application is properly before me, a circuit judge sitting in the county court. If this committal application was proceeding in the High Court then the High Court could make an order issuing a bench warrant to secure Mr Knight’s attendance at court. Accordingly, by section 38 of the 1984 Act, an order to issue a bench warrant can be made by a county court. I may make such an order here in a proper case.”

The wording of the 1984 Act is rather different to s.47(1) MCA 2005 (and the County Court is for the majority of purposes a court of record rather than a superior court of record; the Court of Protection is stated to be a superior court of record: s.45(1)). However, essentially the same question arises, namely whether s.47(1) confers on the Court of Protection jurisdiction to hear a case it would otherwise have no jurisdiction to hear, or whether its jurisdiction is confined by virtue of the limitation within s.47(1).

⁷ *DL* at paragraph 61 per McFarlane LJ, citing Lord Donaldson of Lynton MR in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

parties from taking steps to remove the adult from the jurisdiction which are either of long duration or even unlimited in time⁸).

14. However, can the High Court in the exercise of its inherent jurisdiction grant relief which goes further than that aimed against third parties? For instance, could the High Court require that the adult be temporarily removed from the environment in which they are subject to coercion, either for purposes of ensuring their safety on a temporary basis or for purposes of allowing assessment of their medical, psychological and/or social circumstances?
15. In my experience, the Courts have sought vigorously to explore all steps short of this. In very significant part, it would seem that this is because, whilst it is conceptually easy to formulate effective relief against a third party or parties so as to protect the vulnerable adult, it is much less easy to formulate relief directed against the vulnerable adult in such a way that it does not become dictatorial rather than facilitative.
16. However, it seems to me that this is, perhaps, to be too cautious and we can properly seek to push the boundaries somewhat further.
17. In this regard, it seems to me that we may be able to glean some assistance from the Scottish experience, and a small detour is therefore required:
 - 17.1. as is (perhaps not sufficiently) well known, the Scottish framework for the protection of the interests of the incapacitated and the vulnerable is cast very differently to the regime in England and Wales. The differing philosophical approaches underpinning the differences in drafting between the Adults with Incapacity (Scotland) Act 2000 and the MCA 2005 are fascinating,⁹ but a topic for another day;
 - 17.2. for present purposes, I want to focus upon later legislation, the Adult Support and Protection Act ('ASP 2007'). This legislation was introduced as the ultimate consequence of a 1997 Scottish Law Commission Report on Vulnerable Adults,¹⁰ in which the Scottish Law Commission proposed (inter alia): (1) a definition of an adult at risk which bore a

⁸ *Re SA*, Munby J made an order under the inherent jurisdiction preventing the removal of the vulnerable adult from the jurisdiction and making provisions in relation to the circumstances under which arrangements could be made for her marriage. At the conclusion of his judgment he noted "[i]t will be recalled that SA's mother raised the question of how long the order should remain in force. It is not possible to define this with any precision, though in reality it will need to remain in force indefinitely, probably, in effect, until SA marries. SA should have liberty to apply. The power of arrest will last for 6 months, until 1 June 2006."

⁹ Including, for instance, that the phrase 'best interests' does not appear in the 2000 Act.

¹⁰ Available at <http://www.scotlawcom.gov.uk/publications/reports/1990-1999/>.

striking resemblance to that later given by Munby J in *Re SA*;¹¹ and (2) the introduction of powers to enable compulsory assessment and removal of a vulnerable adult and the exclusion of an suspected abuser;

17.3. the Law Commission for England and Wales had made not dissimilar proposals in its earlier 1995 Report on Mental Incapacity;¹² those proposals went beyond its original brief and were not adopted. By contrast, the legislature in Scotland ultimately gave effect to the Scottish Law Commission's proposals in Part 1 of the ASP 2007;

17.4. Part 1 of the ASP 2007 contains the following material provisions:

17.4.1. s.3, which provides that that "adults at risk" are adults who:

"(1)...

(a) are unable to safeguard their own well-being, property, rights or other interests,

(b) are at risk of harm, and

(c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

(2) An adult is at risk of harm for the purposes of subsection (1) if—

(a) another person's conduct is causing (or is likely to cause) the adult to be harmed, or

(b) the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm."

17.4.2. s.4, which places a duty upon a council to make inquiries if it knows or believe that a person is an adult at risk and that it may need to intervene to protect the person's well-being, property or financial affairs;

17.4.3. s.7, giving a power of entry to council officers for purposes of enabling or assisting a council conducting inquiries under s.4;

¹¹ Unsurprisingly, as it would appear that Munby J in *Re SA* was assisted by the definition of vulnerable adult which derived, ultimately, from that given by the (English) Law Commission: see paragraph 81.

¹² Part IX, pp. 157-180.

- 17.4.4. s.8, giving a power to a council officer to interview in private any adult found in a place visited under s.7;
- 17.4.5. s.9, giving a power to a health professional conducting or accompanying an officer's visit under s.7 to conduct a private medical examination upon an adult known or believed to be an adult at risk;
- 17.4.6. s.10, giving a power to a council officer to require any person holding health, financial or other records relating to the suspected adult at risk to produce records (or copies);
- 17.4.7. s.11, giving a power to a Sheriff to make an assessment order authorising a council officer to take an adult suspected of being at risk from a place visited under s.7 for purposes of assessment/medical examination to determine whether they are at risk and whether anything needs to be done to protect the person from harm. The order can only be granted where the council has reasonable cause to suspect that the person is being or is likely to be seriously harmed (s.12). Where where the person refuses to consent to the granting of the order or to carrying out any action for purpose of carrying out the order, that refusal can only be ignored where the Sheriff/officer reasonably believes that the affected adult at risk has been unduly pressurised to refuse consent and there are no steps which could reasonably taken with their consent which would protect them from the harm that the order or action is intended to prevent (s.35);
- 17.4.8. s.14, giving a power to a Sheriff to authorise the removal of an adult suspected of being at risk to move them to a specified place for a period of no more than 7 days and take reasonable steps for the purpose of protecting them from harm. The order can include provision as to contact arrangements (ss.15(2)-(3)) Essentially the same restrictions apply as to the grant of a removal order as to the grant of an assessment order (s.15(1) and 35);
- 17.4.9. s.19, giving a power to a Sheriff to ban a person whom the Sheriff is satisfied is or is likely seriously to harm an adult at risk from doing a number of things (including being in a specific place, in an area of a specified place, moving specified things from a specified place) if the Sheriff is satisfied that the adult's well-being or property would be better safeguarded by way of a banning order than by moving the adult from that place. A banning order can run for a

maximum of 6 months (s.19(5)(c)); it can be made on a temporary basis (s.21) and may have a power of arrest attached to it (s.25);

17.5. whilst there have been a substantial number of referrals to local authorities for consideration of the use of powers under Part 1 of the ASP, the actual number of orders granted has been very low, in large part because councils find other ways in which to resolve the issues that arise upon referral.¹³ In the first 15 months after the ASP came into force in October 2008, 9 assessment orders were granted, 5 removal orders and 133 banning orders; in 2010/11, 1 assessment order was granted, 2 removal orders and 40 banning orders. A significant – and surprising – proportion of referrals were made in respect of adults abusing alcohol and/or drugs, a category of person whom it is fair to say were not those in the forefront of the drafters of the ASP;

17.6. I understand that there have been no reported cases considering these provisions of the ASP, the majority of orders being granted in Chambers with the adult neither being present nor being represented. This means that there remain a number of issues which have not been tested as regards the powers granted to councils/Sheriffs under the provisions, including:

17.6.1. what, precisely, does an assessment or removal order empower a council to do? Does it, for instance, carry with it a power to restrain the adult for purposes of enforcing the order in the limited circumstances where it may be enforced against a non-consenting adult?¹⁴

¹³ Much of the information in this paragraph and the subsequent one is provided by Nicola Smith at Cairn Legal and Jan Todd, solicitor at South Lanarkshire Council and/or by those solicitors in Scottish local authorities who kindly provided responses to the questions posed by Ms Todd on my behalf. I am extremely grateful to both Ms Smith and Ms Todd (and to Adrian Ward of TC Young Turnbull & Ward) for their assistance in gathering statistics as to and impressionistic evidence of the use of the ASP.

¹⁴ The Code of Practice to the ASP 2007 issued by the Scottish Ministers under s.48 ASP 2007 provides that an assessment order does not carry with it the power to detain the adult in the place that they are taken to and that the adult may choose to leave at any time (paragraph 9.14). It is silent as regards the position in respect of removal orders, save for the answer given to the question “*what happens [... if] the adult wishes to leave?*” The Code provides (paragraphs 10.59-60) that: “[a]lthough the Act does not make explicit what happens after the order expires or the adult chooses to leave, the council continues to have a duty of care to return the adult safely to the place from which they were removed or to a place of their choice, within reason. To this end, the council may consider agreeing some form of support plan with the adult, or where appropriate, convene a multi-disciplinary meeting to discuss further care and protection issues.”

- 17.6.2. whether either an assessment or removal order carries with it an implicit power to deprive an adult of their liberty.¹⁵ Whilst there is (in England and Wales at least) a vigorous debate at the moment as to what, precisely, constitutes a deprivation of liberty beyond the paradigm case of detention in a prison cell, at least one reading of the Strasbourg case-law suggests that the question to be asked is whether the adult is free to leave the place at which they are placed.¹⁶ If there is such a power, then the making and enforcement of an order would presumably only be compliant with Article 5(1) ECHR if as a necessary (but not sufficient) condition, the adult in question suffered from an objectively established mental disorder so as to fall within Article 5(1)(e) ECHR: *Winterwerp v Netherlands* (1979) 2 EHRR 387;¹⁷
- 17.6.3. the circumstances under which the undoubted interference with the Article 8(1) ECHR rights of the adult at risk will be justified for purposes of Article 8(2).

18. I accept that it is perhaps dangerous to place too much weight upon silence from north of the border, especially given the small number of assessment and removal orders which have been granted since the Act came into force. However, it does seem to me that those advancing arguments to the High Court as to the exercise of its inherent jurisdiction can properly note: (1) the existence of the powers addressed set out above; (2) the express consideration given by the Scottish Law Commission to the question of the definition of mental disorder for purposes of Article 5(1)(e) ECHR in this context; and (3) the absence of any reported challenge to the use of such powers in the 4 ½ years since they were introduced. It further seems to me that the High

¹⁵The instinctive reaction of the Scottish solicitors who responded to my survey was that neither an assessment nor a removal order carried with it such a power. See the footnote above as well.

¹⁶For more on this, see my forthcoming article in [2013] *Elder Law Journal*, and also – at much greater length – the paper at http://www.39essex.com/resources/article_listing.php?id=748.

¹⁷The Scottish Law Commission was alive to this. In its 1997 Report, it noted thus (footnotes removed):

“2.23 [...] *Unsoundness of mind has to be determined by objective medical criteria and where detention is concerned the degree of unsoundness must be such as to justify such measures. We think that in the context of emergency protective measures to include vulnerable people who have insufficient strength of mind to resist pressure from others and who are thus unable to make a free decision is not unduly stretching the meaning of "unsound mind". We would again draw attention to the Council of Europe's Recommendation of 1991 on Emergency Measures in Family Matters* [(1) that Courts and other competent authorities dealing with family matters should have sufficient emergency powers and resources to protect children and other persons in need of special protection and assistance and whose interests are in serious danger; (2) courts and competent authorities should be ready to act at any time in extremely urgent cases; and (3) simple and expeditious procedures should be available to ensure that decisions are reached quickly].”

This would rather suggest that Scottish Law Commission considered that a person suffering from undue influence could, for purposes of a potential deprivation of liberty, be considered to fall within Article 5(1)(e).

Court, if considering the exercise of its inherent jurisdiction in the context of measures going beyond the grant of injunctive relief against a third party, could properly be directed to the procedures set down in the ASP as representing an appropriate ‘checklist’ of factors to consider. It could not blindly follow the ASP,¹⁸ but it is clear that a Court order can provide the necessary lawfulness for an interference with either Article 5 or 8 ECHR,¹⁹ such that the focus of any inquiry as to the compliance of the proposed action with the ECHR will be directed – appropriately – to the necessity and proportionality of the steps under consideration.

19. The three caveats that I would make in respect of the propositions set out above are:

19.1. it seems to me that the High Court could not authorise any steps which amounted to the deprivation of liberty of the adult unless it could properly be satisfied (on the basis – except in dire emergency – of objective medical evidence obtained in advance²⁰) that the adult was suffering from a mental disorder;²¹

¹⁸ It would for instance, have to be satisfied that any power that it sought to exercise was a power it properly had under the inherent jurisdiction rather than a power which was for the first time granted by virtue of the ASP to the relevant judicial authorities in Scotland (the most obvious example, perhaps, being the provisions relating to arrest and detention of those in breach of banning orders).

¹⁹ See in this regard, *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam) [2007] 2 FLR 1083 at paragraphs 18-23 per Munby LJ (Article 5); and *J Council v GU & Ors* [2012] EWHC 3531 (COP) [2013] COPLR forthcoming at paragraph 20 per Mostyn J (Article 8 in the context of the authorisation of a long-term restrictive regime accompanied by invasive monitoring).

²⁰ In the event of a true emergency, the normal requirements as regards the obtaining of medical evidence objectively establishing a mental disorder can be dispensed with: see *Winterwerp v The Netherlands* (1979) 2 EHRR 387 at para 39 and *X v United Kingdom* (Application No 7215/75, decision of 5.11.81) at paras 41 and 45).

²¹ Note in this regard that it would appear that the inherent jurisdiction of the High Court seem still to extend to authorising the deprivation of a liberty of an adult falling outside the scope of the MCA 2005: see both *Re PS* (footnote 15 above) at paragraph 16 and *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam) [2010] COPLR Con Vol 10 per Munby LJ:

“74 ... *There is no longer any room for doubt that a judge exercising the inherent jurisdiction of the High Court (whether the inherent jurisdiction of the court with respect to children or the inherent jurisdiction with respect to incapacitated or vulnerable adults) has power to direct that the child or adult in question shall be placed at and remain in a specified institution such as, for example, a hospital, residential unit, care home or secure unit. And the High Court’s powers extend to authorising that person’s detention in such a place and the use of reasonable force (if necessary) to detain him and ensure that he remains there: see Re PS (Incapacitated or Vulnerable Adult) [2007] EWHC 623 (Fam), [2007] 2 FLR 1083 at para [16]. But if a local authority is to resort to such measures it must, unless it can bring itself within the new ‘deprivation of liberty’ amendments to the Mental Capacity Act 2005 effected by the Mental Health Act 2007 (the new ss 4A, 4B and 16A and the new Sch A1 and 1A), first enlist the assistance of the court and do so before it embarks upon such measures: see Re PS (Incapacitated or Vulnerable Adult, at para [23], and A Primary Care Trust and P v AH and A Local Authority [2008] EWHC 1403 (Fam), [2008] COPLR Con Vol 179, [2008] 2 FLR 1196 at paras [29], [41].” (emphasis added).*

- 19.2. for my part, I would anticipate that the High Court would in making any form of order under the inherent jurisdiction equating to one of the orders made under the ASP wish to seek to spell out in considerably more detail than appears in the ASP precisely what powers the individuals charged with enforcing the order would have for those purposes. In other words, I would anticipate that it would wish to make clear what steps could and could not be taken to enforce the equivalent (for instance) of an assessment order;
- 19.3. the High Court could not make any order where its inherent jurisdiction has been ousted by the passage of legislation. The most obvious area in which this would apply is in respect of consideration of the making of an equivalent of a banning order in circumstances where an occupation order under s.33 Family Law Act 1996 could be made, as the statutory route would have to be utilised.²²

Incapacitated adults

20. The decision of Parker J in *XCC* has emphasised a point which (although made by the Court of Appeal early in the life of the MCA 2005) has sometimes been overlooked, namely that there remains the possibility that the High Court can grant relief under the inherent jurisdiction in respect of a person who is incapacitated within the meaning of the MCA 2005, but where such relief does not lie within the gift of the Court of Protection under the powers granted it by the MCA 2005.
21. The decision of Parker J is also of some importance – and potentially no little difficulty – as regards how the High Court will exercise the inherent jurisdiction in such circumstances.
22. In *XCC*, Parker J was concerned with the question of whether she had power under the MCA 2005 to make a declaration that a marriage entered into in and recognised as valid in Bangladesh was to be recognised under the law of England and Wales in circumstances where P had lacked the capacity to marry. She held that the repertoire of declarations available to the Court of Protection in s.15 MCA 2005 expressly circumscribed and limited the power of the Court under

I note that neither in *PS* nor in *Re A and Re C* (or indeed in *Re SA*) did Munby LJ explore the question of when an adult who is not incapacitated but vulnerable would be considered to suffer a mental disorder falling within Article 5(1)(e).

²² See, by way of analogy, *Re O (A Minor) (Blood Tests: Constraint)*, *Re J (A Minor)* [2000] Fam 139, [2000] 1 FLR 418: the inherent jurisdiction of the High Court to direct the taking of blood from children for the purposes of establishing paternity was held to have been abrogated by the relevant provisions of ss.20-21 of the Family Law Reform Act 1969.

that Act and did not extend to the making of such a ‘non-recognition declaration.’ She did not therefore have the power, as a Court of Protection judge, to make such a declaration. Importantly, however, she went on to hold that:

“The protection or intervention of the inherent jurisdiction of the High Court is available to those lacking capacity within the meaning of the MCA 2005 as it is to capacitous but vulnerable adults who have had their will overborne, and on the same basis, where the remedy sought does not fall within the repertoire of remedies provided for in the MCA 2005. It would be unjustifiable and discriminatory not to grant the same relief to incapacitated adults who cannot consent as to capacitous adults whose will has been overborne” (paragraph 54).

23. There being a statutory lacuna, in the form of the absence of a power under the MCA 2005 to make a non-recognition declaration, Parker J held that she had the jurisdiction – as a High Court judge – to make such a declaration under the inherent jurisdiction.
24. In reaching this conclusion, Parker J noted that she considered the Court of Appeal decision in *City of Westminster v IC and KC and NN* [2008] EWCA Civ 198 [2008] 2 FLR 267 to be binding authority for the proposition that she had jurisdiction to make such a declaration under the inherent jurisdiction. I have to confess that I harbour some doubts as to this, because the question of why the Court of Appeal felt it had to proceed under the inherent jurisdiction when making such a declaration had not been considered by that Court.²³ In any event, however, the decision in *XCC* would seem to put beyond doubt the question of whether it is necessary to use the inherent jurisdiction in such circumstances.
25. Importantly, in *XCC*, Parker J proceeded on the basis that, in considering whether to grant a non-recognition declaration, the Court was not confined to making a decision dictated only by considerations as to best interests, whether those set out in s.4 MCA 2005 or more general welfare considerations (see paragraph 56 of her judgment). She therefore found that she was entitled to take into account public policy considerations and – specifically – that the marriage had been arranged for the purpose of engineering the entry of P’s spouse into this country so as to allow him to work here. This approach to the question of the exercise of the inherent jurisdiction is

²³ The earlier case is also somewhat curious in that Wall LJ appeared (at paragraphs 54-5) to entertain the possibility that there was no power under MCA 2005 to take steps to prevent an incapacitated adult being removed from the jurisdiction. Thorpe LJ proceeded on the basis that there was such a power, contained in MCA 2005, s 17(1)(a) (paragraph 13). Hallett LJ agreed with both judgments without explaining which analysis she preferred. I would respectfully suggest that the approach of Thorpe LJ is to be preferred, and indeed have been in (unreported) cases in which the Court of Protection has made ‘non-removal’ orders in support of declarations that it is in P’s best interests to remain at an identified location in England and Wales.

undoubtedly novel, and it will be interesting to see whether it is followed outside the very specific context of the case before Parker J.

Adults lacking capacity for a reason outside the MCA 2005

26. We should always remember that there are those who lack capacity to take decisions but for a reason which does not satisfy the diagnostic threshold set down in s.2(1) MCA 2005. They are likely to be relatively few in number, but a possible example of such a person (drawn from an unreported case in my experience) might be someone born deaf and deprived of access to signing throughout their childhood. Such a combination can lead to language deprivation, resulting in concrete thinking, limited theory of mind and poor problem solving. Whilst fundamentally impacting upon a person's ability to make choices, it is not necessarily the case that such a combination of difficulties (flowing from the consequences of physical disability combined with the deleterious circumstances of the individual's childhood) would satisfy the diagnostic criteria contained in s.2(1) MCA 2005.

27. This category of person was not discussed by the Court of Appeal in *DL*. However, the definition given by Munby J in *Re SA* of the 'vulnerable' included those "*for some other reason... incapacitated or disabled from giving or expressing a real and genuine consent.*" Elaborating upon this, he noted in respect of "*other disabling circumstances*" that: "[w]hat I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others." It is noteworthy that not all of these circumstances are temporary.

28. The definition given by Munby J of the 'vulnerable' in *Re SA* was expressly endorsed by the Court of Appeal in *DL* (at paragraph 53, per McFarlane LJ). I would further suggest that it is wide enough to capture the category under discussion and, indeed, logic would dictate that if they do not fall to be considered by reference to the MCA 2005, they either fall to be protected by reference to the inherent jurisdiction or fall not to be protected at all. The tenor of both *DL* and *XCC* is very firmly that the Courts can be flexible and creative in deploying 'the great safety net' of the inherent jurisdiction, so long as its deployment is not inconsistent with the MCA 2005.

29. Taking the approach outlined above would not, I suggest, be incompatible with the MCA 2005, and I would therefore contend that such persons would fall – in an appropriate case – to benefit

from the protection of the High Court by the exercise of the inherent jurisdiction even if their inability to make a choice does not arise because they are subject at the material time to the baleful influence of a third party.

30. In such a case, a very real question would arise as to whether the High Court should exercise its inherent jurisdiction *as if* it were exercising its powers under ss.15-6 MCA 2005. I would suggest that there is no logical objection in principle to such an approach. Indeed, in such a case, limiting the grant of relief to injunctive relief against third parties would not necessarily serve any purpose, not least as (1) there may well be no third party involved; and (2) the person requires protection because they are unable to take a decision themselves (but do not satisfy the diagnostic criteria in s.2(1)).

31. I would anticipate, though, that in the event that the High Court is considering the exercise of its inherent jurisdiction in such circumstances:

31.1. the Court will take very considerable care to reassure itself that the person is not, in fact, materially incapacitated within the meaning of ss.2-3 MCA 2005. In the case involving the deaf individual discussed above, for instance, a further report produced by an expert in a different discipline identified a material impairment which satisfied the diagnostic criteria under s.2(1) MCA 2005;

31.2. the High Court will also be likely to wish to limit itself in the first place to the grant of relief designed – if possible – to improve the adult’s decision-making ability. In other words, the High Court will (and should) be slow to use the inherent jurisdiction as a simple fall-back in the event that the applicant is unable to make good an application founded upon the MCA 2005. I note that Macur J strongly deprecated reliance on the inherent jurisdiction as a fall-back in *LBL v RYJ* (a decision expressly approved by the Court of Appeal in *DL*). However, that case can be distinguished because RYJ satisfied the diagnostic criteria in s.2(1) MCA 2005 but the applicant failed to establish that she satisfied the functional tests for incapacity in s.3; we are concerned with those who would not satisfy the s.2(1) criteria. I would therefore suggest that whilst the decision is clear authority for caution in the exercise of the inherent jurisdiction, it does not stand as a bar to its exercise in the cases under discussion;

31.3. the Court could only make an order which had the effect of depriving the person of their liberty if satisfied that they were suffering from a mental disorder for purposes of Article 5(1)(e) ECHR;

31.4. I would further suggest that in such a case, the High Court should proceed as if it were bound by the principles contained in (in particular) s.4 MCA 2005. In other words, it should not adopt the approach taken by Parker J in *XCC* above; that approach could in any event be distinguished because Parker J there was not exercising the inherent jurisdiction to take a decision on behalf of the adult before her; rather, she was using it to grant a declaration which lay outside the suite of remedies that were provided for in MCA 2005.

Statutory reform

32. Finally, and as is being discussed elsewhere during the course of this conference, I note that the draft Care and Support Bill includes a proposed duty on local authorities to make enquiries where there is a safeguarding concern. It states (clause 34) that local authorities “*must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken.*”

33. Relevantly for purposes of this note, part of the consultation upon the draft Bill,²⁴ the Department of Health has also consulted upon whether or not there should be a new power to support this duty.²⁵ The Department of Health suggested that this could take the form of a power of entry, enabling the local authority to speak to someone with mental capacity who they think could be at risk of abuse and neglect, in order to ascertain that they are making their decisions freely. The Department of Health did not consult upon any equivalent to the other suite of orders within the

²⁴ And it would appear consequent upon the consultation document issued by Action on Elder Abuse discussed at footnote 3 above.

²⁵ <http://www.dh.gov.uk/health/2012/07/safeguardingadults/>. This follows the consultation upon the No Secrets Guidance in 2008-9. A number of questions were posed as to whether compulsory powers should be introduced to be deployed where it was suspected that a vulnerable adult is being abused. As Action on Elder Abuse point out in their consultation document, the responses to these questions bear subtle reading, as they are not as bald as the DoH suggested in its response to the consultation (http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_102981.pdf), upon the basis of which the DoH is currently proposing only the limited power of entry discussed here. The Law Commission, in its report upon Adult Social Care published in 2011, essentially ducked the issue, suggesting that it was an issue outside the scope of its consideration (albeit that this was not something which had stopped its predecessor in 1995!), but recommending that any new bill should not include any new compulsory or emergency powers, unless the Government identified the need for such powers. It did, however, recommend repealing s.47 National Assistance Act 1948, essentially on the ground that it was incompatible with the ECHR. This recommendation was adopted by the DoH and abolition of s.47 is provided for in Clause 37 of the draft Bill.

ASP and made clear that it was not proposing to introduce any new power of removal or detention.

34. The precise scope of the proposed power of entry was left undefined in the consultation, although the Department of Health suggested a possible procedural route to ensure adequate safeguards were in place, namely applying for a warrant from a Circuit Judge (e.g. a nominated judge of the COP) upon evidence of need for the warrant, and ensuring that there was a “*process by which the occupiers of the premises understand that they can complain about the way in which a power has been used. The local authority would have to verbally inform the affected persons how they might access that process*” (p.5 of the consultation document).
35. It will be interesting to see whether the version of the Care and Support Bill put to Parliament in due course includes such a power, and (if so) whether the procedural safeguards are fleshed out and/or the power amplified, as the provisions are at present distinctly undercooked.
36. It might perhaps be worth concluding by noting that the views of those charged with operating the ASP in Scotland²⁶ are to – broadly – to the effect that, whilst there are a number of problems with the way in which the provisions of Part 1 were drafted, it has brought an increase in (and obligation in respect of) multi-agency working and that the creative use of ‘soft’ social work skills alongside the suite of remedies offered by the Act has stood the vulnerable in good stead.

Conclusion

37. Those at the margins of the MCA 2005 pose some of the most difficult problems for practitioners, giving rise to some extremely acute tensions between the principles of autonomy and protection. It is clear from the cases summarised in this note that the High Court will not be afraid to flex its muscles in suitable cases: real questions remain, though, as to precisely what those suitable cases may be and how powerfully those muscles will be flexed.

ALEXANDER RUCK KEENE
39 Essex Street
London
WC2R 3AT

March 2013

²⁶ As given in response to the informal survey noted above.