WHITHER THE INHERENT JURISDICTION?

How did we get here? Where are we now? Where are we going?

A Lecture by Sir James Munby

to the Court of Protection Bar Association

10 December 2020

In recent weeks the unpredictable chances of litigation have produced two cases raising interesting, and in truth profoundly important, questions about the ambit and reach of the inherent jurisdiction: I refer to my own decision on 30 September 2020 in *FS v RS and another* [2020] EWFC 63 and to the decision of the Court of Appeal on 27 October 2020 in *Mazhar v Birmingham Community Healthcare Foundation NHS Trust and others* [2020] EWCA Civ 1377. Consideration of these two cases inevitably invites consideration of a third: the slightly earlier decision of Hayden J in *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202. As it happens, it had already been suggested to me that my views on the inherent jurisdiction might be of interest. You will be the judge of that. But before coming to these cases there is some important and, dare I say it, quite interesting history to examine.

First, a word of clarification. Many years ago, Sir Jack Jacob wrote a justly famous article on the inherent jurisdiction in its widest sense: *The Inherent Jurisdiction of the Court*, Current Legal Problems 1970, 23. My focus is exclusively on that aspect of the inherent jurisdiction reflecting the Crown's obligation as *parens patriae* to protect those who, whether because of what the Chancery lawyers used to call non-age or because of mental incapacity, are unable to protect themselves. This, as I recently had occasion to point out (*In re X (A Child) (Jurisdiction: Secure Accommodation), In re Y (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam), [2017] Fam 80, para 37) is a branch of the Royal Prerogative, albeit the Royal Prerogative exercised by Her Majesty's Judges and not, as more usually, by her Ministers.

My only qualification for speaking on this important, and, I venture to say, intriguing, topic is that the happenstance of litigation has brought me more than my fair share of some of the most important cases both at the Bar from 1988 onwards and then, from 2000, on the Bench. Inevitably, then, what I have to say may seem indecorously autobiographical and probably immodest. But I would plead in mitigation that the views of someone who was privileged to be an insider during an interesting period in our recent legal history, given the opportunity to be, as it were, in on the ground floor as a participant when momentous developments were occurring, may be of some interest, and that false modesty is simply a barrier to historical truth.

<u>(Mis)understanding the inherent jurisdiction</u>

Weary experience suggests that there are three obstacles to a proper understanding of the inherent jurisdiction and how it works.

First, it has suffered from more than its fair share of myths and misunderstandings. If the myth that it was a contempt of court to publish anything about a ward of court was exploded as long ago as 1976 (*In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58), it took until 2000 (*Kelly v British Broadcasting Corpn* [2001] Fam 59) to explode the myth that it was a contempt of court for a journalist to interview a ward of court without prior judicial authorisation and until 2017 (*Re A Ward of Court* [2017] EWHC 1022 (Fam), [2017] 2 FLR 1515) to explode the myth that it was a contempt of court for a policeman or member of the security service to interview a ward of court without such authorisation. Nor was this mythology confined to children and wardship: consider *E (By Her Litigation Friend the Official Solicitor) v Channel Four; News International Ltd and St Helens Borough Council* [2005] EWHC 1144 (Fam), [2005] 2 FLR 913, paras 115-120:

> "I do not agree … that the media, whether the print media or the broadcast media, must first consult with the relevant local authority or with the Official Solicitor before seeking to interview or film a vulnerable adult, or even an adult who is in receipt of care and support under the community care legislation."

Secondly, and linked to the first, there is a reluctance to accept that a jurisdiction whose avowed object is the *best* interests of P (to adopt the useful statutory shorthand) is limited by two principles of profound constitutional importance, long ago recognised by the House of Lords:

- One, the *De Keyser* principle (*Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508]) is that the inherent jurisdiction is pro tanto ousted by any relevant statutory scheme. As I have sought to explain it (*In re X (A Child) (Jurisdiction: Secure Accommodation), In re Y (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam), [2017] Fam 80, para 45, a case relating to section 25 of the Children Act 1989):

  > "Section 25 does not, to use Lord Dunedin's phrase, [in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508] at p 526, cover "the whole ground", it is not, in contrast to the legislation being considered in *B v Forsey* 1988 SC (HL) 28, a comprehensive statutory scheme intended to be exhaustive. To have recourse to the inherent jurisdiction in a situation, as here, wholly outside the territorial ambit of the statute, does not, to use Lord Sumption JSC's phrase in *In re B (A Child) (Reunite International Child Abduction Centre intervening)* [2016] AC 606, para 85, "cut across" the statutory scheme, nor, to use Sir John Dyson JSC's phrase in *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15, para 34, would it be "incompatible with" the statutory scheme."
- The other, the *A v Liverpool* principle (*A v Liverpool City Council* [1982] AC 363) is that even a court exercising the inherent jurisdiction cannot interfere in an area of activity which Parliament has entrusted to an administrative body; a corollary of this is that a court exercising the inherent jurisdiction cannot require such a body to make available to P financial or other resources which the court thinks would be in P's best interests but which the other body is unwilling to provide. This principle predates even the

seminal decision in *A v Liverpool* itself: see the classic judgment of Russell LJ in the wardship / immigration case of *In re Mohamed Arif (An Infant)* [1968] Ch 643.

Two recent examples illustrate the seemingly boundless enthusiasm and eternal optimism of counsel. I appreciate that, appearing in the Supreme Court, one is, as was once said, facing the prophets, and it is always possible that the demi-gods will overturn decades or even centuries of seemingly secure authority. But given that the House of Lords and the Supreme Court had applied the *A v Liverpool* principle on at least three occasions in the intervening years (*In re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791, *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413, and *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591), the prospect of the appeal in *Re MN (Adult)* [2015] EWCA Civ 411, [2016] Fam 87, [2015] COPLR 505 succeeding must have been exiguous, it might have been thought. In the event, as you know, the appeal failed: *N v ACCG and others* [2017] UKSC 22, [2017] AC 549. Another example: in *Re A (A Child: Female Genital Mutilation: Asylum)* [2019] EWHC 2475 (Fam) the attempt was unsuccessfully made to persuade the President of the Family Division that a female genital mutilation protection order made pursuant to section 5A of the Female Genital Mutilation Act 2003 trumped the exercise of the Secretary of State for the Home Department's immigration powers. It might be thought, given the clear and settled jurisprudence ever since *In re Mohamed Arif (An Infant)* [1968] Ch 643 in 1968, that the attempt was, to put it no higher, exceedingly unlikely to succeed. An appeal, albeit on a very narrow point, was dismissed: *Secretary of State for the Home Department v Suffolk County Council and others* [2020] EWCA Civ 731, [2020] 3 WLR 742.

The third obstacle has to do with a lack of professional understanding; driven in part by a reduced exposure of many family lawyers to the inherent jurisdiction in relation to children (I will explain the reasons for this in a moment) and in part by the way the legal professions seem to be organised (many who deal with adult cases having little, if any, experience of the corresponding inherent jurisdiction in relation to children). This can lead to a failure or even a reluctance to 'read across'. I have always found this puzzling. I shall return to this later.

<u>What is the inherent jurisdiction?</u>

But what is the inherent jurisdiction? Understanding of this rather basic, if fundamental, issue has been bedevilled, and still is, by an ambiguity of language, for which, may I say at once, I bear a significant measure of responsibility – ambiguity which has generated uncertainty, confusion and in some instances, I am going to suggest, plain error.

Like ancient Gaul the inherent jurisdiction is divided into three parts; taking them in chronological order of their recognition:

- First, the inherent jurisdiction in relation to children, that is, people who have not reached their majority (currently fixed at 18). Now children are, no doubt, vulnerable, and the identification and evaluation of the particular child's vulnerabilities will, of course, be central to *how* the inherent jurisdiction is exercised in any specific case. But it is not vulnerability which founds the jurisdiction; what founds the jurisdiction is simply the fact that the child is a child.

- Second, the inherent jurisdiction in relation to those adults who, in a relevant respect, lack the capacity to decide for themselves. Now as with children, such adults are, no doubt, vulnerable, and the identification and evaluation of the particular adult's vulnerabilities will, of course, be central to *how* the inherent jurisdiction is exercised in any specific case. But it is not vulnerability which founds the jurisdiction; what founds the jurisdiction is simply the fact that the particular adult lacks decision-making capacity. For clarity of exposition I shall refer to such an adult as incapacitous.
- Third, the inherent jurisdiction in relation to those adults who, although *not* incapacitous, are in a relevant respect vulnerable. Here, in contrast to the two older branches of the inherent jurisdiction, it is the vulnerability which founds the jurisdiction; vulnerability, as we will see in due course, is, in contrast to the inherent jurisdiction in relation to incapacitous adults, a necessary though not a sufficient foundation for the exercise of this branch of the inherent jurisdiction. For clarity of exposition I shall refer to such an adult as vulnerable.

<u>The inherent jurisdiction in relation to children</u>

The inherent jurisdiction in relation to children was, at least since the days of Charles II, an established part of the practice of the old Court of Chancery, and its successor the Chancery Division of the High Court, until its transfer to the newly established Family Division (successor to the old Probate, Divorce and Admiralty Division) in 1971. Under the inherent jurisdiction the court had power to make the child a ward of court. This had the effect of placing the child in the custody of the court; significantly, no 'important' decision in relation to the child could be taken without the court's prior consent. Also significant, was the principle that, although a mere busybody could not do so, any person with a bone fide concern about a child's welfare could invoke the jurisdiction of the court: *In re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185.

In the period prior to the coming into force of the Children Act 1989 in October 1991, an important aspect of the wardship jurisdiction was in relation to what we would now call care proceedings. Section 7 of the Family Law Reform Act 1969 empowered the wardship judge to place a child in the care of the local authority. That power was removed by the 1989 Act: section 100 prohibited it and placed other restrictions on the ability of a local authority to have recourse to the inherent jurisdiction. Some, in consequence, thought we might see the gradual withering away of wardship and the inherent jurisdiction. On the contrary, it has since been rejuvenated.

The key decision here was that of Singer J in 1999 in *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542. KR was a teenage girl who, it was feared, had been lured to India to be forcibly married. Singer J made an order facilitating her tracking down, rescue and repatriation. Ever since *Re KR*, we have seen a resurgence of the wardship jurisdiction in two distinct if typically linked respects:

- First, in relation to such newly emergent or newly recognised problems as medical treatment issues, abduction, forced marriage, female genital mutilation, stranded spouses and, most recently, radicalisation and terrorism. These may arise entirely

unexpectedly, rapidly and in the most acute form. Few would have predicted in January 2015 the emergence of radicalisation and terrorism as a focus of *family* justice, or the demands which they would impose on the law and practice of wardship. Yet by the autumn of that year, such was the number of these cases which had arisen in previous months, I had had, as President of the Family Division, to issue on 8 October 2015 *Guidance on Radicalisation Cases in the Family Courts*.

- Secondly, in relation to the repatriation of children from abroad.

The first requires no elaboration here. The second, perhaps, does.

A particular utility of the inherent wardship jurisdiction, in a system of family justice where jurisdiction is usually founded on the child's habitual residence, is the fact that it is exercisable, irrespective of the child's habitual residence, and irrespective of where the child may be, in relation to any child who is a British national or travelling on a British passport.

As both Roger Casement and William Joyce ultimately discovered to their cost, a British subject (*The King v Casement* [1917] 1 KB 98) and someone travelling on a British passport (*Joyce v Director of Public Prosecutions* [1946] AC 347) has a duty of allegiance to the Crown wherever he may be, whether in this country or abroad. The correlative of this is that the Crown has a protective responsibility for its subjects wherever they may be. The significance of this for the wardship jurisdiction is that the Crown's protective duty, as *parens patriae*, in relation to children extends, in the case of a child who is a British subject or, who although not a British national is travelling on a British passport (*In re P(GE) (An Infant)* [1965] Ch 568), to protect the child, whether in this country or abroad. Thus, the court may make a child who is a British subject a ward of court even if the child, at the time the order is made, is outside the jurisdiction. *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542 is, of course, the classic example.

The purpose of such an order is to protect the child, not least by facilitating the child's hopefully speedy return to the jurisdiction. In the days of Lord Palmerston, the Briton imperilled abroad had merely, in echo of the Roman of old, to assert *civis britannicus sum* to find rescue at hand, if need be in the form of the Royal Navy. The days of gunboat diplomacy are, at least in this context, long gone. Modern 'soft power' is exemplified by the sonorous words which appear in every British passport:

> 'Her Britannic Majesty's Secretary of State Requests and requires in the Name of Her Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford the bearer such assistance and protection as may be necessary.'

The English court, of course, has no authority at all in a foreign state, and must always be astute to ensure that no order it makes could possibly be construed as an interference with the sovereign rights of another State. These are matters to be dealt with in accordance with the well-established principles of international comity between friendly States. Unless, conceivably, in the case of failed states where there is no effective functioning Government at all, we cannot, as it were, send in the Royal Marines, the SAS or the SBS to rescue a child. We have to engage the willing assistance of the foreign state. That is why judicial comity

properly bridles at the use of a word such as 'require' in an English order directed to a foreign court. A wardship order relating to a British child abroad which seeks the assistance of the foreign authorities, whether judicial or other, is couched in language designed to minimise all risk of offence. Typically, it contains explanatory recitals designed to engage the concern of the foreign authorities and to elicit their willing assistance; and it then 'respectfully requests' that assistance. This form of order was first crafted by Singer J (see the order set out in *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542, 546, and, for a later example, the orders set out in *Re M (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433 (Fam), [2016] 1 FLR 1055, paras 9, 17, the latter 'respectfully requesting' the assistance of the 'judicial, police, security, immigration and other authorities in Moldova'). It has now passed into more general usage: see the Schedule to the President's Guidance of April 2016, *Liaison between Courts in England and Wales and British Embassies and High Commissions Abroad*.

I mention these developments because, although, I fear, little recognised, there has here been a straight 'read across' from the child jurisdiction to the inherent jurisdiction in relation to incapacitous adults: *Re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057.

What all this demonstrates is the continuing need for a remedy which, despite its venerable age, has shown, is showing and must continue to be allowed to show its remarkable ability to change with the times and adapt to meet the ever-evolving needs of an ever-changing world and our ever-changing society.

Singer J, granting relief in what he acknowledged was a "novel" case (*Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, para 8), said that:

> "the inherent jurisdiction of the High Court … now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values."

More recently, Hayden J (*London Borough of Tower Hamlets v M and Others* [2015] EWHC 869 (Fam), [2015] 2 FLR 1431, paras 57-58), has said that:

> "The family court system, particularly the Family Division, is, and always has been … in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children than that which the courts have had to deal with in the past … What, however, is clear is that the conventional safeguarding principles will still afford the best protection."

I agree with all of that. So, as I said in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, para 45:

> "New problems will generate new demands and produce new remedies."

Sometimes, as with forced marriage and radicalisation, the novelty and the need are obvious. Sometimes, the changes driving the advance are more subtle. Thus, as I have commented (*Re K (Arranged Marriage)* [2005] EWHC 2956 (Fam), [2007] 1 FLR 399, paras 77, 84):

> "As late as the early 1960s the wardship jurisdiction was being invoked by parents seeking to prevent their daughters entering into marriages with unsuitable suitors. Over the last thirty years or so the picture has changed dramatically … In recent years … these jurisdictions have seen a remarkable revival, though in a very different context. Traditionally, wardship was a remedy invoked by parents seeking the court's assistance in reinforcing the parental right to object to an unsuitable marriage of which the parents disapproved. Today, the inherent and wardship jurisdictions are more likely to be invoked by a local authority, or even the child, seeking the court's assistance in overriding parental pressures to enter into a marriage which the parents desire but which the local authority or child wants to prevent. Traditionally the court's powers were invoked in support of parents and parental rights. Now they tend to be invoked in opposition to parents and in order to prevent the abuse of parental power. The paradigm case, and the situation where the appropriate exercise of the court's powers is most urgently and imperatively required, is, of course, the forced marriage. In this context the court continues to play an absolutely vital role."

On the other hand, as I said in *FS v RS and another* [2020] EWFC 63, paras 103-104:

> "… novelty alone does not demand a remedy. Any development of the inherent jurisdiction must be principled and determined by more than the length of the Chancellor's foot (John Selden, Table Talk, 1689; Selden Society, 1927)."

Moreover, human nature being what it is, many seemingly new problems are far from new. Wardship judges have been familiar down the ages with the impressionable youngster embarking upon some unsuitable relationship or dangerous cause. 'Hot pursuit' in the days of Lord Eldon LC conjures up the image of the coach and four labouring up Shap Fell taking the young heiress and her unsuitable paramour to the Scottish border and the blacksmith's forge at Gretna Green. Today it more probably conjures up the image of the potential teenage jihadist travelling by aeroplane to the Turkish border en route to join so-called ISIS in war-torn Syria. But we have to remember that the romantic or idealistic call to participate in foreign wars is nothing new: one has only to think of John Cornford who went as a young man, but in law still a minor (technically, in the language of the era, an infant), to fight in the British Battalion of the International Brigades in the Spanish Civil War, where he was killed in action the day after his 21st birthday.

On the other hand, one has to distinguish the novel problem from the novel case: the kind of case, such as *FS v RS and another* [2020] EWFC 63, where the problem is as old as the hills but where – probably for good reason – it has not previously occurred to anyone to take the point. The applicant in *FS*, a vulnerable adult aged 41, sought to invoke the inherent jurisdiction to compel his wealthy parents to provide for his maintenance. As I observed (para 104):

> "financial disputes between parents and their financially dependent adult children have been with us for ever. Recall that familiar figure in Victorian and Edwardian

culture, the remittance man. Yet it is a striking fact that, notwithstanding the prevalence of these disputes, there is no trace of them ever having been litigated. The law – that is, the common law and equity – never entertained a cause of action or claim between a financially dependent adult child and his parents, and this whether the child was illegitimate or legitimate, nor was there any process by which a legitimate adult child could have made such a claim."

Finally, before moving on to the inherent jurisdiction in relation to adults, there are two other aspects of the inherent jurisdiction in relation to children which I need to mention (see *Re L (A Child); Re Oddin* [2016] EWCA Civ 173, [2017] 1 FLR 1135, paras 3-9):

- First, the jurisdiction of the Family Division to make a variety of Tipstaff orders, typically though not limited to what are called location and collection orders in relation to missing or abducted children; but also orders for the handing over of passports and orders authorising the Tipstaff to enter private residential property, if need be using force to open doors, with a view to searching for, removing and taking into custody anything which there is reason to believe may contain information throwing light on the missing child's whereabouts.
- Second, an inherent jurisdiction to make orders directed to third parties (including public authorities and commercial entities, as well as relatives, friends and associates of the abducting parent) who there is reason to believe may be able to provide information leading to the location of a missing child. In appropriate cases, the court can require the attendance at court to give oral evidence of anyone who there is reason to believe may be able to provide relevant information.

Again, there has here been a straight 'read across' from the child jurisdiction to the inherent jurisdiction in relation to incapacitous adults: *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, para 91, *Re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057.

<u>The inherent jurisdiction in relation to incapacitous adults</u>

Let me move on. If 1999 marked the re-invigoration of the inherent jurisdiction in relation to children, the years from 2000 to 2006 witnessed nothing less than the invention by the judges of a corresponding jurisdiction in relation to incapacitous adults.

In 1988 any lawyer would have advised confidently and correctly in the light of seemingly clear authority that there was no adult welfare jurisdiction, no inherent *parens patriae* jurisdiction in relation to incapacitous adults. Indeed, the House of Lords said as much, first in 1989 (*In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376) and again in 1992 (*Airedale NHS Trust v Bland* [1993] AC 789, [1993] 1 FLR 1026). Yet within ten years the jurisdiction had been revived and was thriving. How did this remarkable change come about?

I need to start not with adult welfare law but with medical law. The seminal decision was the judgment of the House of Lords in 1989 in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376. In relation to adult welfare law the very first reported decision was in 1992: *Re C (Mental Patient: Contact)* [1993] 1 FLR 940. In these related areas, astonishing as it now

seems, the legal principles have been rationalised, in truth, invented, over a very recent period of our history.

I am not here to speak about medical law, but a little background is essential.

For the child patient there was no particular difficulty: a parent can give consent on behalf of their child and a judge exercising the *parens patriae* wardship jurisdiction of the High Court can likewise consent on behalf of the child. But in the case of an adult there was a major problem. No-one had authority to give consent. And the conventional wisdom was that there was no *parens patriae* jurisdiction for adults corresponding to wardship for children.

In *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376, the House of Lords came up with a solution. The House reiterated the same analysis four years later in *Airedale NHS Trust v Bland* [1993] AC 789.

Four great legal principles seemingly lay at the heart of both decisions:

(1) First, the acceptance that there was no inherent *parens patriae* jurisdiction in relation to incapacitous adults.

(2) Secondly, the anchoring of the court's role in its jurisdiction to give declaratory relief in relation to the lawfulness or unlawfulness of future proposed action or inaction.

(3) Thirdly, the identification of the common law doctrine of necessity as the touchstone of what was lawful or unlawful. As explained by Lord Goff of Chieveley, to fall within the principle of necessity:

> "not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person."

(4) Fourthly, the adoption of the *Bolam* test of professional negligence (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582) as the determinant of what, in accordance with the doctrine of necessity, was lawful or (as the case might be) unlawful.

Now what is remarkable, indeed astonishing, is that within less than ten years of the decision in *Bland* all of this had been shown to be wrong. The House of Lords had unlocked the door but led us down a blind alley. How did this happen?

This takes me to the development of what we would now think of as adult personal welfare law.

In 1992, very shortly indeed after the decision in *Bland*, it was recognised for the first time, in *Re C (Mental Patient: Contact)* [1993] 1 FLR 940, that the declaratory jurisdiction might have a utility extending beyond purely medical cases. It might provide a mechanism for dealing with an emerging problem – the seeming absence of any appropriate jurisdiction in relation to disputes as to where an incapacitous adult should live, who he should or should not have contact with and, more generally, as to the non-medical care of those in the community unable to look after themselves. But three difficulties began fairly rapidly to emerge.

In the first place, the limitations of the common law doctrine of necessity became apparent in the decision of Hale J (as she then was) in 1994 in *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50, holding that, in the circumstances, there was no power to grant declaratory relief. The result was most unfortunate. It meant in practical terms that in the growing number of cases coming before the court it would be able to assist only if the facts, correctly analysed, disclosed the threatened or potential carrying out of some action which, absent consent on the part of the incapacitous adult, would be a tort. The consequence seemed to be that the court was in many situations incapable of protecting such an adult from a potentially abusive relationship.

Linked with this was the problem that a declaration changes nothing. Something does not become lawful because a declaration is made; all that the declaration does is to declare that something is or (as the case may be) is not lawful. That, of course, is the great difference between a declaratory and a *parens patriae* jurisdiction, because a judge exercising a *parens patriae* jurisdiction can make an order the effect of which is that something which, absent the order, would not be lawful is, because of and by virtue of the order, nonetheless to be lawful. So, because a declaration changes nothing, the declaratory jurisdiction was not apt to deal with cases where what was required was, for example, judicial sanction for some change in the patient's living arrangements.

A third problem had already emerged in the medical context. Since the jurisdiction was concerned fundamentally with declaring what was lawful, and since the benchmark of legality appeared, despite rhetorical references to the patient's best interests, to be whether what was proposed met the *Bolam* test of professional negligence, the possibility remained that two diametrically opposed courses of conduct could both be lawful – with the consequence that a jurisdiction whose very purpose was to determine what should or should not be done, on occasions left the underlying question undetermined.

It was not long before the unfortunate consequences of this were illustrated in the most remarkable fashion. In *Re NK* (1990) 4 April (unreported) the question arose as to whether a incapacitous adult woman should be sterilised. Faithfully applying the law as laid down by the House of Lords, and in circumstances where medical opinion was divided, respectable medical opinion both supporting and opposing the proposed sterilisation, the judge declared both that it would be lawful 'as being in her best interests' for the woman to be sterilised and also that it would be lawful, again 'as being in her best interests', for her not to be sterilised. The legal analysis may have been impeccable, but it reduced the jurisdiction of the court to virtual futility, the judge's order being quite useless to answer the question for the resolution of which the proceedings had been brought, namely whether or not NK should be sterilised.

So the House of Lords had actually driven us into a cul-de-sac.

Even as Hale J was speaking, the first cracks were beginning to show in the edifice created by the House of Lords: see, for example, the approach adopted in *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, where the Court of Appeal had to consider the case of an incapacitous adult whose care was being disputed between his wife and his mistress. The issue was, on the face of it, remarkably technical, even arid, namely whether the mistress had

standing to commence the proceedings. But the Court of Appeal's explanation as to why she had standing was pregnant with future possibilities. Sir Thomas Bingham MR said that "in cases of controversy . . . the courts have treated as justiciable any genuine question as to what the best interests of a patient require or justify." And the Court of Appeal recognised that the court was not confined to granting declaratory relief; it could grant injunctions. What is perhaps most remarkable about the decision is that the Court of Appeal should have held that the mistress had a remedy without identifying too precisely the nature of the rights engaged.

Thus, by the end of the century there were signs of change. The decisive breakthrough occurred in the early months of 2000, shortly before the Human Rights Act 1998 came into force in October 2000, when powerful Courts of Appeal, each including Dame Elizabeth Butler-Sloss P and Thorpe LJ, the pre-eminent family judges of their generation, decided two cases in quick succession which rescued the law from this dead end.

One, *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38, [2000] 2 FLR 512, framed the jurisdiction in terms which included reference to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The other, *In re S (Adult Patient: Sterilisation)* [2001] Fam 15 discarded the *Bolam* test in this context; asserted that the jurisdiction was indeed founded on an appraisal of the patient's best interests; that best means best, so in any given set of circumstances there could only be one solution which was best; and that the declaratory jurisdiction was akin to a welfare *parens patriae* jurisdiction.

These two decisions of the Court of Appeal finally enabled the judges of the Family Division to throw off what, it had become increasingly apparent, were the shackles imposed by the House of Lords and to develop a completely new jurisdiction.

The timing of these two decisions was fortunate, for it enabled the Family Division to explore the nature and extent of the jurisdiction, as it now had to, at a time when it had to hand the newly available tools of the Human Rights Act 1998 and the Convention. It was thus possible for the necessary analysis to be founded on the Convention rather than the common law. There were three drivers for this process.

The first was the increasing volume of cases coming before the Family Division which involved non-medical issues to which the doctrine of necessity did not apply. On the ground, as it were, these doctrinal developments were matched by the rapid emergence and expansion of what, for want of a better phrase, one can usefully call an adult care jurisdiction. Following the Court of Appeal's decisions in *In re S (Adult Patient: Sterilisation)* [2001] Fam 15 and *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38, [2000] 2 FLR 512, the jurisdiction really took off. The legal basis of the jurisdiction was being rapidly expanded and developed; and applications that were once a rarity were now increasingly common.

The second driver of change was the delay in implementing the Law Commission's proposals. Dating from the mid-1990s, they were not introduced until 2007, when the Mental Capacity Act 2005 was brought into force. Something had to be done, and the judges could not wait for Parliament to provide a solution.

The third driver of change was the obligation of the court as a public authority to comply with the Convention. This required the court to develop its jurisdiction in such a way as to enable proper effect to be given to the Convention rights of all those involved. Unless the court moved beyond the limited jurisdiction assumed by the House of Lords we would be in breach of our obligations under the Convention. Without the impetus of the Human Rights Act I doubt whether the jurisdiction could have developed so quickly or been extended so far.

This process occurred with almost dizzying rapidity. Thus, in 2005 I could say with confidence and without any sensible fear of contradiction (*Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, para [37]) that:

> "It is now clear … that the court exercises what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established parens patriae or wardship jurisdictions in relation to children. The court exercises a "protective" jurisdiction in relation to vulnerable adults just as it does in relation to wards of court."

I apologise for the imprecision of my language.

The ongoing development of the inherent jurisdiction, and the increasing numbers of welfare cases where the doctrine of necessity played no role, brought into question the appropriate form of order. In particular, there seemed no reason why the form of declaration used in cases where the doctrine of necessity was engaged – declaring, for example, that 'it is lawful, being in P's best interests, for … [etc]' – should also be used in cases where it was not. On the contrary, I suggested that what I called a bare declaration of 'best interests' would be more appropriate in such a case: *St Helens Borough Council v PE* [2006] EWHC 3460 (Fam), [2007] 2 FLR 1115. So, orders were no longer framed in terms of declarations as to what was lawful; they simply announced that something was, or was not, in the person's best interests or that the arrangements in relation to them were to be as specified in the order. That, of course, anticipated the dichotomy underlying sections 15 and 16 of the Mental Capacity Act 2005: see *Re MN (Adult)* [2015] EWCA Civ 411, [2016] Fam 87, [2015] COPLR 505, paras 87-91 (approved by the Supreme Court in *N v ACCG and others* [2017] UKSC 22, [2017] AC 549, para 26).

So much for the theoretical underpinnings of this novel jurisdiction. These technical developments were matched by an equally rapid expansion of the kinds of issues being brought before the courts. Applications which in the early days tended to be made by private individuals in the context of intra-family disputes – the analogue of what family lawyers would recognise as private law residence or contact disputes in relation to children – were now more frequently being made by local authorities seeking to remove incapacitous adults from a family setting damaging to their interests – the analogue of what family lawyers would recognise as public law care proceedings in respect of a child. But the emerging adult *parens patriae* jurisdiction was not confined to such cases. Thus, it became utilised as the mechanism for dealing with the so-called *Bournewood* gap, the problem exposed in *HL v United Kingdom* (2004) 40 EHRR 761: see *DE v JE and Surrey County Council* [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150, and *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2

FLR 1083, dealing not with patients informally detained in mental hospitals and similar institutions – the original problem – but with incapacitous adults living in a local authority care home.

Thus was the *Bournewood* gap plugged. The irony is that there was nothing very new in any of this, for, in a case involving a 16-year old anorexic, the Family Division had identified and addressed the problem as long ago as 1997, in fact before the travails of L, the victim in *Bournewood*, had even begun: see *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180. The Family Division in the context of the inherent jurisdiction – albeit in this instance the wardship jurisdiction in relation to children – had, as it were, recognised the need to avoid the *Bournewood* gap even before it had been identified!

Thus, the jurisdiction had become exercisable in relation to a wide range of questions, including, crucially, it should be noticed, questions where the doctrine of necessity was simply not engaged at all: see *St Helens Borough Council v PE* [2006] EWHC 3460 (Fam), [2007] 2 FLR 1115, para 14.

The outcome was the re-discovery – in plain language, for let us speak plainly and not resort to pious fiction, the invention – by the family judges of a full-blown welfare-based *parens patriae* jurisdiction in relation to incapacitous adults which, except in one respect (there is no power to make an adult a ward of court), is indistinguishable from the long established *parens patriae* jurisdiction in relation to children. A jurisdiction, moreover, which, truth be told, bears no relation to the declaratory jurisdiction as reinvigorated by the House of Lords in 1989.

The result of the process I have been describing is that, well before the Mental Capacity Act 2005 came into force in 2007, the inherent jurisdiction was already being exercised in a manner largely indistinguishable from the way in which the new Court of Protection now exercises its statutory 'personal welfare' jurisdiction under that Act. By then we had come a very long way indeed in those few short years since Hale J's decision in *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50.

So the wheel had come full circle. The very problem which in 1988 was taken as a given had simply evaporated. We discovered, through some 15 years of trial and error, that the *parens patriae* jurisdiction which we all believed had gone in 1960 was there all the time. So by the time the Mental Capacity Act 2005 came into force in 2007 the judges had in effect got there already. Since 2007 the work of the Court of Protection has expanded mightily, in some respects into areas unforeseen in 2007. But the principles, though now anchored in the statutory language of the Mental Capacity Act 2005, remain in very large part as they were developed by the judges in those fifteen short heady years between 1992 and 2007, in fact in large measure in the seven brief years between 2000 and 2007.

<u>The inherent jurisdiction in relation to capacitous but vulnerable adults</u>

The development of the third strand of the inherent jurisdiction, that in relation to capacitous but vulnerable adults, occurred over an even shorter period: to be precise, the bare year which separated the judgment on 10 December 2004 of Singer J in *Re SK (Proposed Plaintiff) (an Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, and my

judgment on 15 December 2005 in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867.

The problem which confronted Singer J in *Re SK* was the same as that which he had dealt with in *Re KR*, with the crucial difference that SK was an adult, but – and this was the vital point – an adult who was seemingly capacitous. Did the court have jurisdiction? Answering that question in the affirmative, Singer J said (paras 8-9):

> "8 This young woman, therefore, if a child, would be protected by the court, which would make orders of the sort I am making but adapted to the fact that a child can be made a ward of court. An adult cannot be made a ward of court, but the inherent jurisdiction of the High Court can, in an appropriate case, be relied upon and utilised to provide a remedy. I believe that the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values. If an adult is deprived of the capacity to make relevant decisions, then if there is disagreement about what should be done in his or her best interests or if there is a serious issue as to the propriety of what is proposed, recourse can be had to the court for declaratory relief …
>
> 9 Decisions can be made for such unfortunate persons in the light of, and guided by, what is in their best interests as objectively viewed by an independent court with an oversight of relevant information. By analogy, and appropriately it seems to me, it is within this court's power, notwithstanding that this English resident is currently abroad, to make orders and to give directions designed *to ascertain whether or not she has been able to exercise her free will in decisions concerning her civil status and her country of residence*. It may, of course, turn out to be the case that all is well and that she is content with whatever arrangements are currently in place. But as I say, the causes for anxiety are such and sufficiently cogent in my view to justify this court's interference in the first instance at least to the extent and for the purpose of evaluating her circumstances."

In a postscript to his judgment, he added (para 17):

> "proceedings such as these are in appropriate situations available, and that the courts are accessible to investigate the circumstances of adults as well as children. I should add that the same is true in the courts of, for instance, the Islamic Republic of Pakistan and in Azad Kashmir where the ancient writ of habeas corpus has been turned to contemporary use. In a case of suspected restraint with a view to or subsequent to forced marriage, habeas corpus is effective there to secure the attendance of children and young adults at court, *so that the judge may ascertain their true wishes and, if coercion is established, ensure their release* and (if they wish) their return to this country (emphases added)."

It will be seen that the key insight in Singer J's reasoning was the availability of the inherent jurisdiction, in cases where an adult was suspected of being the victim of *coercion*, to ascertain their *true wishes* and establish whether they were acting of their *free will*.

This insight was the springboard for my decision in in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, in which I also prayed in aid *In re T (Adult: Refusal of Treatment)* [1993] Fam 95, [1992] 2 FLR 458, a case in 1992, in which I had appeared as counsel. There the Court of Appeal had had to consider, among other issues, the question of whether a capacitous adult's refusal of medical treatment had been vitiated by a combination of illness and inappropriate family pressure. The court decided that it had. It accordingly upheld the declaration granted by Ward J – the refusal being out of the way and the patient being by then sedated and on a ventilator and therefore incapable of giving or refusing consent – that it was not unlawful to administer a blood transfusion despite the absence of consent. The order in *In re T* does not seem to have included any declaration in relation to the validity or otherwise of the patient's refusal. In the later case of *HE v A Hospital Trust* [2003] EWHC 1017 (Fam), [2003] 2 FLR 408, para 52, the order I made included recitals as to the validity of the advance directives. There is, however, no reason why the court cannot make a declaration that such a refusal or advance directive is, or, as the case may be, is not, valid: see the declarations in *Re AK (Medical Treatment: Consent)* [2001] 1 FLR 129.

So when in 2005 the question arose again in *Re SA* as to whether the court's revived inherent jurisdiction in relation to incapacitous adults could be extended to adults who, though capacitous, were nonetheless vulnerable, I held that the court had such jurisdiction. Indeed, I said, this is what, in reality, the court had been doing in *In re T*, a proposition that might, I suspect, have surprised those involved in the earlier case – it certainly surprised me! *In re T* had, of course, been decided before the rediscovery – the invention – of either the inherent jurisdiction in relation to incapacitous adults or the inherent jurisdiction in relation to capacitous but vulnerable adults. Thus, it was decided in the context of the common law framework as set out in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376, and *Airedale NHS Trust v Bland* [1993] AC 789. But I saw, and see, no reason why it cannot be re-conceptualised to fit in with the analysis in *Re SA*.

Thus, by the time the Mental Capacity Act 2005 came into force the judge-made law had already gone even further.

The core of my decision in *Re SA* was (paras 76-77):

> "76 … the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to communicate his decision. The jurisdiction, in my judgment, extends to a wider class of vulnerable adults.
>
> 77 … the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is 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."

Having elaborated what I meant by "coercion" and "undue influence," an analysis heavily influenced by *In re T*, I turned to explain what I had in mind when referring to what I referred to as "other disabling circumstances" (para 78(iii)):

> "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."

I went on (para 82):

> "In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive."

So far as I am aware, none of this has ever seriously been challenged judicially; indeed, it was all approved by the Court of Appeal in *In re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2)* [2012] EWCA Civ 253, [2013] Fam 1, sc sv *DL v A Local Authority* [2012] EWCA Civ 253, [2013] 2 FLR 511. I choose my words carefully, being very conscious that in a paper he presented to you in October 2019 David Lock QC mounted a root and branch attack on all this; it has just been published as *Decision making, mental capacity and undue influence: do hard cases make bad – or least fuzzy-edged law?* [2020] Fam Law 1624. I have great respect for David, and his arguments deserve to be taken seriously, but you may not be surprised to hear that I am ultimately unpersuaded. It takes a lot to persuade a proud father to reject his own progeny. But there is, on any basis, a very important point lurking in his paper which I must address in due course.

I return, at last, to where I began, the recent decisions in *FS v RS and another* [2020] EWFC 63 and *Mazhar v Birmingham Community Healthcare Foundation NHS Trust and others* [2020] EWCA Civ 1377.

<u>*FS v RS and another* [2020] EWFC 63</u>

In *FS*, the question was whether an adult who it was assumed for the sake of argument was 'vulnerable' in the *Re SA* sense, could use the inherent jurisdiction in relation to vulnerable adults to compel his parents to maintain him financially. I held that he could not, for three separate reasons:

(i) First (para 113), because his claim lay far outside the accepted parameters of the inherent jurisdiction in relation to vulnerable adults.

(ii) Secondly (para 123) because it fell foul of the fundamental principle that the inherent jurisdiction cannot be used to compel an unwilling third party to

provide money or services. You will be familiar with this from *N v A Clinical Commissioning Group and others* [2017] UKSC 22, [2017] AC 549.

(iii) Thirdly (para 132) because it fell foul of the *De Keyser* principle (*Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508) that the inherent jurisdiction is pro tanto ousted by any relevant statutory scheme, here the schemes under the Matrimonial Causes Act 1973 and the Children Act 1989.

I need say no more about the second and third reasons. The first, however, which is at the heart of what I want to say today, requires more extensive treatment (see *FS*, paras 114-122).

I start with the obvious but fundamentally important point that, precisely because they do not lack capacity, those subject to this branch of the inherent jurisdiction are fully autonomous adults; accordingly, the jurisdiction exists to protect and to facilitate their exercise of that autonomy. What then did I think I was doing in *Re SA*? I can best answer that with three quotations (from paras 126, 131 and 133):

> "I have power to make whatever orders and direct whatever inquiries are needed to ascertain, when a marriage is proposed or arranged, what SA's true wishes are and to ascertain whether or not she has been able to exercise her free will or is confined, controlled, coerced or under restraint – in short to ascertain the true state of affairs. Likewise I have power to make such protective or other orders as are best designed to ensure that any marriage really is what SA wants."

> "In the final analysis, my concern must be to enable this vulnerable young woman to exercise her right to self determination, specifically her right to marry as enshrined in Art 12 of the Convention … I emphasise the importance these courts place on the right of the individual to exercise choice in this most intimate area of decision-making. And I agree … that the court has a positive duty to assist SA to enter into what will for her be the 'right' marriage, with someone who will confirm to her, in a way she can understand, that he understands and agrees with what she wants."

> "By taking this course, far from depriving SA of her right to make decisions, I am ensuring, as best I can, that she has the best possible chance of future happiness. I am taking these steps to protect, support and enhance SA's capacity to control her own life and destiny in the way she would wish."

Consistently with this approach, the order I made (para 136) contained injunctions directed exclusively at SA's parents and not at SA herself. This was as one might expect: after all one would expect injunctive relief to be granted against the abuser and not against the abuser's victim.

The same concept was picked up by Macur J in an important passage in *LBL v RYJ and VJ* [2010] EWHC 2665 (COP), [2011] 1 FLR 1279, para 62:

> "I do not doubt the availability of the inherent jurisdiction to supplement the protection afforded by the Mental Capacity Act 2005 for those who, whilst "capacitous" for the purposes of the Act, are "incapacitated" by external forces – whatever they may be – outside their control from reaching a decision ... However, I

> reject … the … contention … that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance ... the relevant case-law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions."

Likewise, Theis J at first instance in *A Local Authority v DL & Ors* [2011] EWHC 1022 (Fam), (2011) 14 CCLR 441, para 53(7), said of the jurisdiction:

> "its primary purpose is to create a situation where the person concerned can receive outside help free of coercion, to enable him or her to weigh things up and decide freely what he or she wishes to do. That is precisely what Munby J ordered in SA."

The Court of Appeal specifically approved all this: *In re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2)* [2012] EWCA Civ 253, [2013] Fam 1, sc sv *DL v A Local Authority* [2012] EWCA Civ 253, [2013] 2 FLR 511. McFarlane LJ, with whose judgment Davis and Maurice Kay LJJ agreed, said this of the jurisdiction (para 53):

> "It is … targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the MCA 2005."

He went on (para 54):

> "The jurisdiction … is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity."

He added (para 67):

> "I would expressly commend the approach described by Macur J … The facilitative, rather than dictatorial, approach of the court that is described there would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their European Convention Art 8 rights."

Here, again, the injunctions granted (see [2012] EWCA Civ 253, paras 6, 9) were directed at the abuser not the victims.

It might be asked at this point, is this the same as, or in some way related, to the jurisdiction of the Chancery Division to grant a *quia timet* injunction to restrain some threatened exercise of undue influence? I think not, at least formally, although there is perhaps some analogy: (i) the Chancery jurisdiction was not part of the inherent jurisdiction, and was never seen as such – bear in mind that the Chancery jurisdiction goes back a very long way while the inherent jurisdiction in relation to vulnerable adults is a very recent invention of the Family Division; (ii) the Chancery jurisdiction relates to property, the inherent jurisdiction extends to matters of personal welfare and status; and (iii) the inherent jurisdiction, unlike the Chancery jurisdiction can be invoked by any person with a bone fide concern for the vulnerable adult

(as in the case of a child: cf, *In re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185) and not just by the vulnerable adult.

That said, I can see no reason in principle why this branch of the inherent jurisdiction cannot be invoked in an appropriate case to grant relief – whether by way of quia timet injunction as to the future or declaration as to the past – in relation to the vulnerable adult's property.

In *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083, paras 31-34, I made orders, in exercise of the inherent jurisdiction, for the protection of an adult's property. I granted an injunction restraining PS's daughter, CA, operating PS's bank or building society accounts. Now in that case PS was incapacitous, but there is no reason in principle why a similar approach should not be adopted, if appropriate, in the case of a vulnerable adult. Because PS was incapacitous I also, exercising the court's powers under section 37 of the Supreme Court [now Senior Courts] Act 1981, appointed a named officer of the local authority to be PS's receiver, "limited to the collection and application of her income and the management of her bank and building society accounts." Whether such an order could ever be appropriate in the case of a vulnerable but capacitous adult may be open to doubt. Would it not, in contrast to the purely protective injunction, encroach impermissibly on her autonomy? I return to this below.

This all seems clear enough.

Mazhar v Birmingham Community Healthcare Foundation NHS Trust and others [2020] EWCA Civ 1377

Let me against this background turn now to *Mazhar v Birmingham Community Healthcare Foundation NHS Trust and others* [2020] EWCA Civ 1377. This is important for a variety of reasons. Here I focus only on one aspect of the case.

It was common ground (para 3) that the appellant had capacity, so the case was *not* concerned with the inherent jurisdiction in relation to incapacitous adults; it was a case about the inherent jurisdiction in relation to vulnerable adults.

The order under challenge (para 16) had declared that:

> "It is lawful for the police and any medical professionals, as are required, to enter [address] (the property) and use reasonable and proportionate force to do so, … to remove [the appellant] from the property and to convey him to an ambulance; It is lawful for the ambulance service, together with any other medical professionals and police as are required, to convey [him] to [a specified hospital]; It is lawful until further order for [him] to be deprived of his liberty at [that] for the purposes of receiving care and treatment."

The argument of his counsel, plainly correct in my opinion, was (para 41) "that, insofar as the order … authorised his detention, it was wrong because the appellant was not a person of "unsound mind" and, on a proper analysis, there was no substantive evidence of any form of duress." Furthermore (para 43):

> "the inherent jurisdiction of the High Court, developed in the line of cases starting with *Re SA* which exists for those who have mental capacity but are subject to duress and so incapable of exercising choice for that reason, can never be used to deprive someone of their liberty. The use of the jurisdiction in that way could not be article 5 compliant because such a person is not of "unsound mind" in the way that has been construed in Strasbourg."

In the event the Court of Appeal declined to rule on this question because (paras 52-53) it was both unnecessary and, given the absence of full argument, inappropriate to do so.

But I should like to explore what the Court of Appeal nonetheless said on this crucial topic.

The only judgment was given by Baker LJ. I start with the opening (para 30) of his analysis of the law, where he said:

> "It is now clearly established that the inherent jurisdiction of the High Court for the protection of vulnerable and incapacitated adults remains available notwithstanding the implementation of the Mental Capacity Act 2005."

With the greatest of respect, it might be thought that the inclusion here of the words "and incapacitated" was unfortunate, and for two quite separate reasons: the case before him did not concern an incapacitous adult; and, more to the point, nor did either of the two previous cases to which Baker LJ then referred: *DL v A Local Authority* [2012] EWCA Civ 253, [2013] 2 FLR 511, and *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867. In venturing to express this criticism, and at the risk of being justly castigated as the pot calling the kettle black, I again acknowledge responsibility for my own previous terminological ambiguity, including, as we will see, for having popularised the misleading conflation of two quite distinct things when referring, for example, to the "inherent jurisdiction with respect to incapacitated or vulnerable adults."

Later (para 57), Baker LJ referred to and quoted from my judgment in *Re MM; Local Authority X v MM (By the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, which he described as "another case concerning the exercise of the inherent jurisdiction relating to vulnerable adults." Again, acknowledging my unfortunately ambiguous use of the word vulnerable throughout the lengthy passage cited by Baker LJ, and recognising that I had begun my judgment (para 1) with the statement that "This is a case under the inherent jurisdiction in relation to vulnerable adults," I point out that the adult in that case in fact lacked capacity in the relevant respect (deciding where and with whom to live), so the jurisdiction I was exercising was *not* that in relation to vulnerable adults. The crux of the case turned on the fact (para 98) that although MM lacked capacity to decide where and with whom she should live, she *did* have capacity to consent to sexual relations with her long-time partner KM. In relation to this aspect of the case I said (para 160) "There is … no demonstrated justification for preventing MM continuing her sexual relationship with KM and no proper basis for putting obstacles in the way." I said that, in the circumstances, the local authority had a choice (para 163):

> "If the local authority seeks to impose on MM a regime which in fact involves a breach of her Article 8 rights – and that … is the consequence of imposing on MM a regime which in practical terms prevents her continuing her sexual relationship with KM – then the local authority in principle has a choice. It must modify the arrangements so that there is no breach of Article 8. And in the circumstances of the present case it can do this either by abandoning its attempt to prescribe where and with whom MM lives or, if it wishes to exercise that control, by taking appropriate positive steps to enable MM to continue her sexual relationship with KM. If it seeks to do the one without shouldering the burden of doing the other, then its intervention in MM's life is … disproportionate. And in my judgment it involves a breach of her rights under Article 8."

In the event, the local authority caved in: *Re MM (An Adult)* [2007] EWHC 2689 (Fam), [2009] 1 FLR 487. With all respect to Baker LJ, none of this, I suggest, has anything to do with the inherent jurisdiction in relation to vulnerable adults.

For present purposes, what is crucial is what Baker LJ went on to say (para 33):

> "Can an order can be made under the inherent jurisdiction depriving a vulnerable adult of their liberty? This question has never arisen for consideration before this Court. There are a number of decisions at first instance in which it has been held that the jurisdiction can be exercised to deprive a vulnerable adult of their liberty, provided the exercise of the jurisdiction is compatible with Article 5 of ECHR: *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083, (Munby J), *An NHS Trust v Dr A* [2013] EWHC 2442 (COP), [2014] Fam 161, (Baker J), *Guys and St Thomas's NHS Foundation Trust and another v R* [2020] EWCOP 4, [2020] 4 WLR 96, (Hayden J), and see also my summary of the law when refusing permission to appeal in *A Local Authority v BF* [2018] EWCA Civ 2962, [2019] COPLR 150. On the other hand, Cobb J in *Wakefield MDC v DN* [2019] EWHC 2306 (Fam), [2019] COPLR 525, reached a contrary conclusion, relying in part on the observation of McFarlane LJ in *DL* (at paragraph 67) that the inherent jurisdiction should be used for "facilitative rather than dictatorial" reasons."

Later (para 52) he said:

> "The preponderance of authority at first instance supports the existence of this jurisdiction [scil, to make an order that has the effect of depriving a vulnerable adult of liberty], but there is some authority to the contrary."

To test the validity of this proposition, it is necessary to examine with some care the authorities to which he refers.

I start with *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083. I imagine the passage which Baker LJ particularly had in mind was where I said this (para 16):

> "It is in my judgment quite clear that a judge exercising the inherent jurisdiction of the 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. It is equally clear that the 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 *Norfolk and Norwich Healthcare (NHS) Trust v W* [1996] 2 FLR 613 (adult), *A Metropolitan Borough Council v DB* [1997] 1 FLR 767 (child), *Re MB (Medical Treatment)* [1997] 2 FLR 426 at page 439 (adult) and *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180 (child)."

Now in relation to this, two things need to be said: (1) *Re PS* involved (para 1) an incapacitous adult, so anything said about vulnerable adults was obiter. (2) So too, both in the *Norfolk case* and in *Re MB* (each, as will be noted, decided long before the invention in 2005 of the inherent jurisdiction in relation to vulnerable adults) the adult was incapacitous, so neither is any authority for the power of the court where the adult is capacitous, albeit vulnerable. The simple fact is that I should not have included the words "or vulnerable" in the passage quoted, just as it is most unfortunate, to use no stronger expression, that I should have been so promiscuous and ambiguous in my use of language throughout the preceding part (paras 11-15) of the judgment.

Re PS is clear authority that, in relation to a child or an incapacitous adult, a judge exercising the inherent jurisdiction can make an order providing for the restraint of the child or incapacitous adult and/or authorising a deprivation of their liberty. Indeed, in that respect, so far as I am aware, *Re PS* never been questioned. But, properly understood, *Re PS* has nothing to say about the exercise of the inherent jurisdiction in relation to vulnerable adults and is no authority for any assertion that in the exercise of that branch of the inherent jurisdiction a judge has any such power. In relation to adults it applies only to those who are incapacitous. This, I might add, is not merely my view; it was the considered view of Cobb J, having heard argument on the point, in *Wakefield Metropolitan District Council and Wakefield Metropolitan Clinical Commissioning Group v DN and MN* [2019] EWHC 2306 (Fam), [2019] COPLR 525, para 27.

With all respect to Baker LJ I am also puzzled by his reliance in this context upon his own decision in *A NHS Trust v A* [2013] EWHC 2442 (COP), [2014] Fam 161, [2013] COPLR 605. The patient in that case was incapacitous (paras 47-48). Baker J (para 94) cited *Re PS* as authority for the proposition that "Under its inherent jurisdiction, the High Court can make an order authorising a deprivation of liberty but such an order must comply with the provisions of Article 5." The question in that case was whether, since the coming into force of the Mental Capacity Act 2005, it was permissible for the court to have recourse to the inherent jurisdiction in the case of an adult who, lacking capacity, was amenable to the jurisdiction of the Court of Protection but where the Court of Protection could not make the desired order; Baker J (para 96) answered that question in the affirmative. Accordingly, the case does not seem to me to throw any light upon the exercise of the inherent jurisdiction in relation to vulnerable but capacitous adults.

In *Guys and St Thomas's NHS Foundation Trust and another v R* [2020] EWCOP 4, [2020] 4 WLR 96, Hayden J was concerned with an adult pregnant woman who (paras 2-3) was capacitous, although "there was a substantial risk of a deterioration in [her] mental health, such that she would likely lose capacity during labour," in other words "a capacitous woman who is likely to become incapacitous, during the course of labour." The question was whether an anticipatory declaration could be made, either under the Mental Capacity Act 2005 or under the inherent jurisdiction. Following the earlier decisions of Francis J in *United Lincolnshire Hospitals NHS Trust v CD* [2019] EWCOP 24 and of Cobb J in *Wakefield Metropolitan District Council and Wakefield Metropolitan Clinical Commissioning Group v DN and MN* [2019] EWHC 2306 (Fam), [2019] COPLR 525, Hayden J held that it could (see paras 7-10). I need not, for present purposes follow him into his very detailed analysis of whether the appropriate jurisdiction was that under the Act or under the inherent jurisdiction (in the event he went for the latter: para 47). The important fact for present purposes is that Hayden J was not there exercising the jurisdiction in relation to vulnerable adults; he was, albeit prospectively, exercising jurisdiction in relation to an incapacitous adult.

So, I need to suggest, with all respect to Baker LJ, that, far from the preponderance of first instance decisions to which he referred supporting the proposition that the inherent jurisdiction can be used to deprive a vulnerable but capacitous adult of liberty, *none* of them, correctly understood, provides any support at all for it.

The final authority to which Baker LJ referred in this context is to his own summary of the law when refusing permission to appeal in *A Local Authority v BF* [2018] EWCA Civ 2962, [2019] COPLR 150, para 22, an important case to which I must return. This summary runs to ten numbered sub-paragraphs. Sub-paragraphs (1) to (4) summarise the learning to be found in or deriving from my judgment in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, and in the judgment of the Court of Appeal in *In re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2)* [2012] EWCA Civ 253, [2013] Fam 1, sc sv *DL v A Local Authority* [2012] EWCA Civ 253, [2013] 2 FLR 511; sub-paragraphs (5) to (8) summarise the learning to be found in or deriving from my judgment in *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083, and in relation to Article 5. None of this is objectionable as it stands; indeed, these summaries are, if I may say so, very helpful. However, there is a problem. In the course of his analysis, Baker LJ did not overtly draw any distinction between the inherent jurisdiction as it applies to incapacitous adults and the inherent jurisdiction as it applies to adults who although vulnerable are capacitous; consequently, an unwary reader may assume that sub-paragraphs (5) to (8) apply as much to the latter as to the former. But, as I have already said, the learning in *Re PS* applies only to incapacitous adults.

In truth, so far as I am aware, there are *only two* decisions at first instance supporting the broader view of the inherent jurisdiction in relation to adults who are capacitous but vulnerable: Gwynneth Knowles J's decision in *Hertfordshire County Council v AB* [2018] EWHC 3103 (Fam), [2019] Fam 291, and Hayden J's decision in *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202. Curiously, neither was referred to by Baker LJ in *Mazhar*.

Hertfordshire County Council v AB [2018] EWHC 3103 (Fam), [2019] Fam 291

The first of these is problematic for the reasons given by Cobb J in *Wakefield Metropolitan District Council and Wakefield Metropolitan Clinical Commissioning Group v DN and MN* [2019] EWHC 2306 (Fam), [2019] COPLR 525, para 49. Indeed, he declined to follow it. He had, earlier in his judgment (paras 27, 37, 48) explained why, in his judgment, the inherent jurisdiction *cannot* be used to deprive a vulnerable but capacitous adult of his liberty. Cobb J's reasoning is, if I may say so, plainly correct. He was right not to follow Gwynneth Knowles J, whose judgment, with great respect, is in my view simply unsustainable as a matter of principle.

Southend-On-Sea Borough Council v Meyers [2019] EWHC 399 (Fam), [2019] COPLR 202

For present purposes the crucial decision is that of Hayden J in *Meyers*. The question there arose in the most acute form, because on 10 December 2018 Hayden J had made interim orders preventing Mr Meyers living in what had been his home for 40 years and requiring him to live in a care home. Mr Meyers, then rising 98, was living, with his son KF, in conditions of considerable squalor and in circumstances where there was great concern about how KF was treating him. But the local authority suggested that he was capacitous. Following a further hearing on 4 February 1919, Hayden J held that he was indeed capacitous. Yet he did not immediately allow him to return home. The case accordingly requires the most careful consideration. In my respectful opinion it is simply wrong. Unhappily, as I shall have to point out, full understanding of what exactly happened in *Meyers* is hindered by the absence from the public domain of some key documents.

The history of the proceedings down to the hearing before Hayden J on 10 December 2018 is set out in considerable detail both by Baker LJ (*A Local Authority v BF* [2018] EWCA Civ 2962, [2019] COPLR 150, paras 5-15) and by Hayden J (*Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202, paras 6-18). For present purposes it suffices to note that the proceedings were begun by the local authority in March 2017 and that there were hearings before Moor J on 30 March 2017 (at which injunctions were granted against KF), 30 April 2017 and 5 June 2018. Following a crisis Mr Meyers was persuaded to move into respite care at B house on 27 September 2018. The same day, Francis J made an out-of-hours order, restraining BF from returning to his home or living with KF and requiring him to live at B House pending further order. As Hayden J was later to observe (*Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202, para 16), "There seems to have been little doubt, at this point, that Mr Meyers lacked the capacity to take decisions regarding his general welfare in consequence of the temporary disabling effects of the dehydration and urinary tract infection." That order was continued at a hearing on 3 October 2018, pending a further hearing fixed for 5 November 2018. As recorded by Baker LJ, Mr Meyer's stance at the hearing on 3 October 2018 was that he understood he could not return to his home until works had been done to the property, that he did not want KF to continue to reside at his home, that he would not return to live at his home until the next hearing and that he intended to comply with the assessment of capacity instigated by the local authority. Hayden J records My Meyers as having "stated in unambiguous terms that he did not want KF to continue to

live with him." Mr Meyers then prepared, and on 8 October 2018 the local authority served, a notice on KF terminating his licence to reside at Mr Meyer's property.

The hearing on 5 November 2018 had to be adjourned because the capacity assessment was not available. As Hayden J subsequently noted, the plan as at 3 October 2018 was to facilitate KF's move out of Mr Meyer's home. By the next hearing on 10 December 2018 that plan had not been accomplished. KF continued to live in his father's bungalow, so no repairs had been undertaken. Indeed, on 6 November 2018 Mr Meyers had expressed the wish (from which he had not resiled) to return to his home to resume living with KF.

Although we have accounts both from Baker LJ (*A Local Authority v BF* [2018] EWCA Civ 2962, [2019] COPLR 150, paras 16-18) and from Hayden J (*Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202, paras 18-20) of what happened at the hearing on 10 December 2018, and although Baker LJ quotes some paragraphs from the judgment, a full understanding of Hayden J's reasoning at that stage is hindered by the fact that his judgment has not been published.

The local authority's stance at the hearing (*Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202, para 18) was that Mr Meyers had capacity to make decisions about his living arrangements. Yet Hayden J's order required him until further order (a) not to live or reside at the bungalow; (b) not to reside with KF at any other address; and (c) to reside at B House or such other address, excluding his home, as might be agreed between him and the local authority, the latter's agreement not to be unreasonably withheld.

As quoted by Baker LJ, Hayden J had said this:

> "23 … It was submitted that once an individual had capacity the inherent jurisdiction had no reach. The Court of Appeal roundly and unequivocally rejected that and did not attempt to circumscribe the scope/ambit of the inherent jurisdiction. Whether it extends to the kind of protection that [Mr Meyers] needs is moot … It strikes me as an important application of the law to the facts of this case. It requires an analysis of the scope of the law to impose welfare decisions on vulnerable adults who otherwise have capacity.
>
> 24 I am driven to adjourn this application so I can receive full argument on this point. All parties, not just [Mr Meyers] and the local authority, are entitled to nothing less. In the meantime, and on an interim basis, [he] should remain where he is. I know he is eager to go home and I do not discount the possibility that that he might be able to as a result of my final decision. At the moment and in the present circumstances, I am satisfied that the inherent jurisdiction reaches that far."

Subsequently (*Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202, paras 19-20), Hayden J said of his decision:

> "19 I heard evidence from Mr Meyers … I found him engaging, entirely lucid and, I noted, respectful and courteous to the advocates. He spoke plainly … When he was asked about the circumstances in which he was found he did not seek to distort the facts or evade the reality of his situation. He emphasised that the decision to go home

was his. He told me this was about freedom of choice and that this is what he had fought in the Second World War to preserve. I was impressed by the force of his argument and the sincerity of his convictions.

20 The issues in contemplation at the December hearing … could not have been more serious. Mr Meyers asserts his own right to freedom of choice as a capacitious adult. The countervailing reality is that a return home would seriously compromise his welfare and, as the local authority identified, potentially risk his life. I was not prepared to take a final decision in December in a busy urgent applications list and I made interim orders preventing Mr Meyers residing at the bungalow or with his son. I also ordered that he should reside at the care home or any such other address as might be agreed."

Seeking permission to appeal, counsel for Mr Meyers, presaging the arguments that would, as we have seen, later be made in *Mazhar*, submitted (*A Local Authority v BF* [2018] EWCA Civ 2962, [2019] COPLR 150, paras 28-29) that the orders Hayden J had made infringed his client's Article 5 rights; that there was no objective medical evidence that Mr Meyers was of unsound mind; that the case accordingly fell outside the proper ambit of the inherent jurisdiction; and that Mr Meyers was being unlawfully detained at a place against his capacitous wishes.

Refusing permission to appeal, Baker LJ, while accepting (para 27) that Hayden J had proceeded on the basis that Mr Meyers was capacitous, observed (para 33) that "there is certainly *prima facie* evidence that he is of unsound mind by reason of his infirmity and/or all the extraneous circumstances identified above … It is at this stage unclear whether he is of unsound mind, but there are certainly *prima facie* grounds for thinking that he may be." In these circumstances, he went on (para 34), "it is plain from the *Winterwerp* decision [*Winterwerp v Netherlands* (1979) 2 EHRR 387] and consequential jurisprudence that, in an emergency situation, someone may be deprived of their liberty in the absence of evidence of mental disorder without infringing Article 5." This is not a topic I have time to explore today, but, granted the premise on which he, in contrast to Hayden J, was proceeding, Baker LJ's analysis seems unexceptionable. It accords with a substantial body of domestic authority on the subject of interim relief in such cases (helpfully gathered together by Cobb J in *Redcar and Cleveland Borough Council v PR and Others* [2019] EWHC 2305, [2020] 1 FLR 827, para 16), and it is, as Cobb J there recognised, the analysis which explains and justifies Hayden J's earlier decision in *London Borough of Wandsworth v M and Others* [2017] EWHC 2435 (Fam), [2018] 1 FLR 919. It is to be noted that Baker LJ went on to emphasise (para 35) "In circumstances where someone is found not to be of unsound mind, they cannot, of course, be detained in circumstances which amount to a deprivation of a liberty," adding "but a move home in these circumstances is something which requires very careful planning and support."

The case came back before Hayden J on 4 February 2019. Crucially, he found (*Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202, para 36) that Mr Meyers was capacitous: "Mr Meyers … is entirely capable of and has the capacity … for determining where he wishes to reside and with whom." Moreover, he said, referring to Article 5 (para 44), "it is manifest that Mr Meyers does not satisfy the criteria of 'unsound

mind' or 'suffering from a mental disorder …" Nonetheless, Hayden J did not permit Mr Meyers to return immediately to his home, seemingly making that conditional upon KF first being excluded.

Unhappily we do not know the precise terms of the order Hayden J made, for it has never been published.

Hayden J summarised his findings as follows (para 41):

> "KF is needy, irrational, frequently out of control as well as manifestly emotionally dependent on a father who, despite the alarming history of this case, he obviously loves. KF's influence on his father is insidious and pervasive. It triggers Mr Meyers's sense of duty, guilt, love and responsibility. These, in my assessment, are pronounced facets of Mr Meyers's character, reflected in a different way in his sense of duty, love for his country and pride in his medals. In this particular context however, these admirable features of his personality have become confused and distorted in a relationship in which the two men have become so enmeshed that the autonomy of each has been compromised. In reality, KF exerts an influence over his father which is malign in its effect if not in its intention. The consequence is to disable Mr Meyers from making a truly informed decision which impacts directly on his health and survival."

The core of Hayden J's reasoning is to be found in paras 42, 45:

> "42 I am profoundly sympathetic not only to Mr Meyers's challenging circumstances but to his eloquent assertion of his right to take his own decisions, even though objectively they may be regarded as foolhardy … I instinctively recoil from intervening in the decision making of a capacitious adult. However well motivated the State may be in seeking, paternalistically, to protect people from their own unwise decisions, it is a dangerous course which has the potential to threaten fundamental rights and freedoms … the inherent jurisdiction is not ubiquitous and should be utilised sparingly. Here Mr Meyers's life requires to be protected and I consider that, ultimately, the State has an obligation to do so. Additionally, it is important to recognise that the treatment of Mr Meyers has not merely been neglectful but abusive and corrosive of his dignity. To the extent that the court's decision encroaches on Mr Meyers's personal autonomy it is, I believe, a justified and proportionate intervention. The preservation of a human life will always weigh heavily when evaluating issues of this kind.
>
> 45 The objective here, which the court's order should reflect, is that Mr Meyers be prevented from living with his son, either in the bungalow or in alternative accommodation. I do not compel him to reside in any other place or otherwise limit with whom he should live. For the avoidance of any doubt, Mr Meyers may live in his own bungalow, with an appropriate package of supportive care, conditional upon his son's exclusion from the property. This, to my mind, is the desirable outcome to this case. In this way I restrict Mr Meyers's autonomy only to the degree that is necessary to protect him, a measure which I have concluded is a proportionate interference with

> his Art 8 rights. As I have analysed above, it is the dysfunctional relationship between Mr Meyers and his son that serves to occlude his decision-making processes, concerning where and with whom he should live."

He went on (paras 58-59):

> "… The local authority must now investigate, whether KF can be removed from the bungalow, by court order, so that Mr Meyers may return with a suitable package of care … The ideal solution here, it seems to me, would be for Mr Meyers to return to his bungalow with a suitable package of support, his son having been excluded from the property. I should hope that the local authority will endeavour, within the framework of appropriate injunctive relief, to make provision for contact between Mr Meyers and his son."

Hayden J held that such an order did not breach Article 5 (para 56):

> "Properly analysed, the ambition here is not to confine Mr Meyers to the care home, but to protect him from the grave danger that living in the bungalow with his son has already been demonstrated to represent. To safeguard him, by invoking the inherent jurisdiction of the High Court, it is necessary to restrict the scope and ambit of his choices, not his liberty. It is important to highlight that there remain a range of options open to him. The impact of the Court's intervention is to limit Mr Meyers's accommodation options but it does not deprive him of his physical liberty which is the essence of the right guaranteed by Art 5."

What little we know of subsequent events, including at least two further hearings, has to be gleaned from a few reports in the media. An article in the Basildon Canvey and Southend Echo of 1 March 2019 reported:

> "Last week, Mr Justice Hayden concluded the "ideal solution" would be for Mr Meyers to return home with a "suitable package of support" but stopped short of giving a definitive ruling and left the matter with the council to decide.
>
> Southend Council has now confirmed they will assist Mr Meyers with his wishes."

A councillor was quoted as saying:

> "We have fully supported his request to go home and have gone above and beyond to work with him and the courts to reach the right outcome.
>
> We are pleased for Mr Meyers that this long court process has finally concluded and his wish to return home has been granted.
>
> "We will continue to work closely with Mr Meyers to offer a range of support to cover all his social care and healthcare needs once he has returned to his home."

BBC news reported on 14 March 2019 that "at a follow-up hearing" Hayden J had been told that Mr Meyers was now back at home. A further BBC news report on 20 March 2019 of a hearing where Hayden J spoke to Mr Meyers by telephone link after Mr Meyers had returned

home “last week” reported him telling the judge that he was enjoying being back and “have had eight days of living again.” These reports do not reveal what had become of KF.

Comment in the 39 Essex Chambers Mental Capacity Law Newsletter was critical: “Normally, this set of conclusions would suggest that no court could intervene, and that any choices that Mr Meyers made, no matter how apparently unwise, would have to be respected.” It went on sardonically, “Although intended to be facilitative, rather than dictatorial, in its approach, the great safety net of the inherent jurisdiction is capable of “facilitating” a vulnerable adult to move in one direction, by removing all other available choices.”

I note that scepticism was also expressed about Hayden J’s Article 5 analysis. Indeed, referring back to “the long ago days of 2006” and to my own judgment in *JE v DE (By His Litigation Friend The Official Solicitor), Surrey County Council and EW* [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150, the anonymous commentators speculate that I “might have taken a somewhat different view as to whether Mr Meyers would be deprived of his liberty by virtue of the order to be made by Hayden J.” My apologies, but I do not propose to take the bait or rise to the challenge.

I think it is fair to observe that the subsequent judicial response to *Meyers* has been unenthusiastic and in large part sceptical: see *Redcar and Cleveland Borough Council v PR and Others* [2019] EWHC 2305, [2020] 1 FLR 827, *Wakefield Metropolitan District Council and Wakefield Metropolitan Clinical Commissioning Group v DN and MN* [2019] EWHC 2306 (Fam), [2019] COPLR 525, *London Borough of Croydon v KR & Anor* [2019] EWHC 2498 (Fam), *JK v A Local Health Board* [2019] EWHC 67 (Fam), (2019) 171 BMLR 184, and *FS v RS and another* [2020] EWFC 63.

Thus, Cobb J was very clear in *Redcar and Cleveland Borough Council v PR and Others* [2019] EWHC 2305, [2020] 1 FLR 827, para 43:

> “it was illogical for the court to conclude that PR needed the protection of the court, yet required her, by order, to refrain from doing something which she wanted to do, backed with the punitive force of an injunction.”

So far as I am aware, the only support for Hayden J’s approach in *Meyers*, and it is pretty tepid, is from Lieven J in *London Borough of Croydon v KR & Anor* [2019] EWHC 2498 (Fam), where she said (para 63):

> “I do not reject the possibility that in extremely exceptional cases the inherent jurisdiction might be used for long term or permanent orders forcing the vulnerable adult not to live with the person(s) he wants to, as was the case in *Meyers*. However, that must be a truly exceptional case. As was contemplated by Macur J in *LBL*, and apparently supported by McFarlane LJ in *DL* at [67], the normal use of the inherent jurisdiction is to secure for the individual, who is subject to the alleged coercion or undue influence, a space in which their true decision making can be re-established. If the inherent jurisdiction is used beyond this then the level of interference in the individual’s article 8 rights will become increasingly difficult to justify.”

In *FS v RS and another* [2020] EWFC 63, para 122, I confessed to "some doubt" about all this. That, I fear, was taking judicial politeness and comity rather too far.

Some conclusions

Pulling all this together, there are, I suggest, two fundamental difficulties with *Meyers*.

The first is this: It is quite clear, I suggest, that the court *cannot* in exercise of the inherent jurisdiction in relation to vulnerable adults either (a) grant an injunction preventing the vulnerable adult from doing anything which would otherwise be lawful or (b) make an order depriving him of his liberty. If the jurisdiction is to be exercised with recourse to injunctions, those injunctions must be directed against the abuser, not his vulnerable victim. My reasons are simple:

(i) To make such orders against the vulnerable victim would be to go far outside the proper ambit of the jurisdiction as described in the authorities. The jurisdiction, to repeat, is "facilitative rather than dictatorial."

(ii) To do so would be to ignore the fact that an adult who is vulnerable but capacitous is autonomous and, worse, to trample on that autonomy.

(iii) To do so would be to "protect" the victim by controlling or restraining him rather than by controlling and restraining his abuser. What kind of justice is that?

(iv) It follows that Article 5 prohibits the making of an order depriving the vulnerable adult of his liberty: see the analysis of Cobb J in *Wakefield Metropolitan District Council and Wakefield Metropolitan Clinical Commissioning Group v DN and MN* [2019] EWHC 2306 (Fam), [2019] COPLR 525, para 48.

There is, however, an even more fundamental objection to the approach in *Meyers*. In seeking to control the life choices of the vulnerable person one is necessarily limiting and controlling rather than facilitating the exercise of his autonomy *and, moreover, in a manner breaching his rights under Article 8*. Let me explain why.

I start with what Davis LJ said in *In re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2)* [2012] EWCA Civ 253, [2013] Fam 1, sc sv *DL v A Local Authority* [2012] EWCA Civ 253, [2013] 2 FLR 511, para 76:

> "It is, of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are. But the decided authorities show that there can be no power of public intervention simply because an adult proposes to make a decision, or to tolerate a state of affairs, which most would consider neither wise nor sensible. There has to be much more than simply that for any intervention to be justified."

I agree. It is fundamental that a capacitous adult has the right to decide what is to happen to him, whether his reasons are good or bad or, indeed, for no reason at all. There is no scope for judicial paternalism, no scope for a judge to prevent an autonomous adult doing (or not doing) what he wants. The only scope for this branch of the inherent jurisdiction is to protect

someone who is vulnerable from improper or other vitiating influences with a view to establishing that his apparent wishes are indeed his true wishes.

Article 8 protects and obligates the State to "respect" both "family life" and "private life". As I have previously explained (*Re MM; Local Authority X v MM (By the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, paras 103-106, *FS v RS and another* [2020] EWFC 63, paras 73-74) in *Niemietz v Germany* (1993) 16 EHRR 97, para 29, the Strasbourg Court indicated that "private life" includes at least two elements: first, the notion of an "inner circle" in which the individual may live his own personal life as he chooses; second, the right to establish and develop relationships with other human beings. The Strasbourg jurisprudence thus recognises that the ability to lead one's own personal life as one chooses, the ability to develop one's personality, indeed one's very psychological and moral integrity, are dependent upon being able to interact and develop relationships with other human beings. *Niemietz v Germany* shows that private life includes the right of a person to define the "inner circle" in which he chooses to live his life, including in particular the right to choose those with whom he does and those with whom he does not want to establish, develop or continue a relationship – in short, the right to decide who is to be included in or excluded from his "inner circle".

How, compatibly with Article 8, can the State, whether a local authority or a judge, tell a capacitous adult who he shall or shall not live with? The answer, surely, is clear: it cannot.

Hayden J has given us a remarkable portrait of Mr Meyers, infused, if I may say so, with deep human understanding, empathy and respect, tinged with admiration for a remarkable man, one of the dwindling number of survivors from a generation slowly slipping away into history – a man justifiable proud to have been able to serve his country in her hours of darkest need and to show the judge the medals he won. As Hayden J said (*Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202, paras 2, 19):

> "2 … He served throughout World War II in the Royal Navy. He did so with considerable distinction and is decorated. He is rightly proud of his own contribution and has a strong belief in the fundamental principles that were being fought for. Chief amongst those objectives, he reminds me, was the right to freedom. It is his own freedom that he considers he is now fighting for.
>
> 19 … He emphasised that the decision to go home was his. He told me this was about freedom of choice and that this is what he had fought in the Second World War to preserve."

We need to understand the thoughts of such a man, told in the evening of a long life that he cannot live in what has been his home for 40 years or with the son who he had promised his wife he would look after when she died. I make no apology for quoting what has become an unintentionally famous aphorism: "What good is it making someone safer if it merely makes them miserable?" (*Re MM; Local Authority X v MM (By the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, para 120). But the last word must go to Mr Meyers. We do well to ponder his parting words to Hayden J – so powerful and compelling – that, having been able to return home, he had had "eight days of living again."

I have said it before, but it bears constant repetition. It is a very strong thing to remove someone unwillingly from the house in which they have lived for a long time and which for them is "home." Some residential placement may be 'safer', but if being removed from everything he has known and still wants has the effect that he simply loses the will to live, what 'good' is being achieved? What good is safety and better quality care if someone simply dies of a broken heart – and we know that this can and does happen? Happily, Mr Meyers was formed of tougher metal, but many are not.

I returned to this theme at my address to the annual conference of the Directors of Adult Social Services in May 2017 (see the *Guardian*, 10 May 2017). I said, "We … know that people die of a broken heart … How long do people last if they are uprooted? A very short time." I suggested that social workers should resist the desire to "rescue" the elderly from "squalid" dwellings that they nevertheless regarded as their home. I went on:

> "Merely demonstrating that if you let that person go on living in that house there is a foreseeable and appreciable risk that one day a neighbour or carer will come in and find them with a broken neck at the bottom of the stairs – is that sufficient justification for making them leave, if it is going to make them thoroughly miserable? It is no good just saying most people would prefer to live longer in nice new accommodation without breaking their neck – some people would not."

Of course, Hayden J was very conscious of all this and, if I appear to be critical, I am the first to acknowledge the enormous care and compassion with which he handled a hauntingly difficult case. But, as St Bernard of Clairvaux is reported to have said, 'L'enfer est plein de bonnes volontes ou desirs' (Hell is full of good wishes or desires)" (see *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363, para 56).

I return to David Lock's important paper. If, as I have suggested, injunctive relief should be directed against the abuser rather than the victim, we must realise, as he points out, that this does not give us carte blanche to order whatever relief against the abuser might seem desirable in the best interests of the vulnerable adult. Whatever relief is granted, it must, I suggest, satisfy two criteria:

- First, the relief must properly reflect the fundamentals of the jurisdiction, so it must, in principle, be confined to what is necessary to protect the vulnerable adult from the improper pressure the actual or potential existence of which grounds the jurisdiction – this was what underlay my decision in *FS v RS and another* [2020] EWFC 63.
- Second, it must not be such as to breach the vulnerable adult's own rights, in particular those protected by Article 8. Let me spell it out. *Niemietz v Germany* surely means that if Mr Meyers's capacitous wish was that KF no longer live with him (as it was in October 2018), then it would have been permissible, if appropriate, to grant an injunction against KF requiring him to leave; but if Mr Meyer's capacitous wish (as it was in February 2019) was that KF live with him, then it was no longer permissible to grant such an injunction.

<u>Final questions</u>

I end by posing three questions.

First, what were the driving forces behind all this judicial innovation. From time to time the judges themselves have provided hints. The earliest, much quoted and most influential statement was that of Lord Donaldson of Lymington MR, ironically in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376, itself, as long ago as 1989. He said ([1990] 2 AC 1, 13):

> "the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges."

In *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, 19, Lord Donaldson's successor, Sir Thomas Bingham MR said that the jurisdiction must have sufficient flexibility to be able to respond to social needs as they are manifested, case by case. Those observations were echoed by Singer J's comments in *Re SK (Proposed Plaintiff) (an Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, para 8, that "if there is a serious issue as to the propriety of what is proposed, recourse can be had to the court for declaratory relief" and that the jurisdiction is "sufficiently flexible … to evolve in accordance with social needs and social values."

The fact is that new problems will generate new demands and produce new remedies. And the law must always be astute to protect the weak and helpless, not least in circumstances where, as sadly so often happens in these cases, the very people they need to be protected from are those who ought to be their natural protectors – their parents, partners, children, other close relatives or friends. And if the legislature will not provide the remedy in such cases then, pace Lord Sumption, it is, I believe, a proper – indeed, a necessary – function of the judges. What is a judge to do faced with the appalling prospects which confronted first Singer J in *Re SK* and then me in *Re SA*? Wring our hands in anguish, abandon these vulnerable women to what once upon a time was often referred to as a fate worse than death, and express a pious hope for some future statutory amelioration? I think not. After all, what good is statutory reform, however prompt – and will it be prompt? – in protecting SK or SA in the here and now?

What then of the future? Where will the inherent jurisdiction take us? The tension between the reality that human beings remain largely as they always have been and the other reality, that the world and thus the human condition are in constant flux, will in the future, as in the past, be the occasion for what I do not doubt will be the continuing development of the inherent jurisdiction in each of its branches. We are now removed by some two centuries from the days of Lord Eldon LC. I have no doubt that, whatever the future may bring, the inherent jurisdiction, or something akin to it, will be as vital and vibrant two centuries from now as it is today.

I do not have a crystal ball, but can I venture some small predictions:

- First, I see no reason in principle why the inherent jurisdiction in each of its branches cannot be used as a legitimate vehicle in appropriate cases for obtaining damages or compensation which would otherwise be recoverable, whether at common law, or in equity (under section 2 of Lord Cairns' Act, the Chancery Amendment Act 1858; see now section 50 of the Senior Courts Act 1981) or by statute. If, in the context of proceedings under the inherent jurisdiction, the relevant parties are before the court, then why should the victim not be able to recover from his abuser what the law gives? Why should he be driven to commence separate proceedings in another court? Would such a formalistic approach, indeed, not offend the salutary principle in section 49(2) of the Senior Courts Act 1981, reproducing a fundamental piece of the architecture underlying the reforms introduced by the Judicature Acts some 150 years ago?
- A second, and similar, point is prompted by an unexplained feature of Hayden J's approach in *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [2019] COPLR 202. As we have seen, his view (para 45) was that Mr Meyers's return to his house should be conditional upon his son's exclusion from it. But (para 52) he left it to the local authority to investigate whether KF could be removed by court order. Now, as you will appreciate, it was in my view no longer appropriate to be contemplating KF's removal from the property, given his father's wishes. But, leaving that on one side, and assuming for the purpose of this argument that KF's removal was appropriate, why did Hayden J not himself proceed to make the order – either an injunction or, indeed, given that KF was only a licensee, a possession order? As I have pointed out, the court, in exercise of the inherent jurisdiction in relation to capacitous but vulnerable adults, can in principle grant relief – whether by way of quia timet injunction as to the future or declaration as to the past – in connection with a vulnerable adult's property.
- This leads on to a third and wider point. May we not come to see greater recognition of the role that the inherent jurisdiction in relation to capacitous but vulnerable adults can play in connection with property? If a capacitous but vulnerable adult is being inappropriately influenced by relatives in relation to both his personal welfare and his property, why should not *all* the aspects of the problem be dealt with by one court, the Family Division? Why should it be assumed that the Family Division can, or should, deal only with the former and that the latter must be dealt with by the Chancery Division? I can think of no good reason – and does not section 49(2) in truth point in the other direction?

Can I make a final observation? It relates to an important question of perennial interest but one little explored, at least on this side of the Atlantic: what is it about a case that makes it a leading case?

It has always seemed to me that it all depends on the unpredictable chances of litigation, and on the conjunction of three things in particular: first, that the 'right' case comes along, is recognised for what it is by a solicitor who is far-sighted enough to see the possibilities and then happens to be put in front of X J; second, that the case is argued in a particular way by the advocates; and, third, that X J happens to be the kind of judge who is persuaded (or persuades himself) that this is the occasion for saying something new or different.

It will be apparent from what I have been saying that, of all the cases I have referred to, the two most important were, in 1999, *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542, the springboard for the revived vigour of the inherent jurisdiction in relation to children, and, in 2004, *Re SK (Proposed Plaintiff) (an Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, the springboard for the creation of the inherent jurisdiction in relation to vulnerable adults. Now it is a striking fact that both involved – and I believe this to be crucial – two of the greatest family lawyers of their generation, neither, alas, still with us. In each case the solicitor was the redoubtable Anne-Marie Hutchinson, who died very recently, taken away from us before her time; in each case the judge was Singer J. Anne-Marie's Obituary (Times, 17 October 2020) rightly pays glowing tribute to her innovative approach in *Re KR* but, while it refers to her counsel in the case, it unhappily makes no reference to the judge. The simple reality is that it was this happy combination of solicitor and judge – the *right* solicitor and the *right* judge – which drove the law forward, so imaginatively and so importantly for the future and to the advantage of the countless number who have benefited, and will continue to benefit, from their visionary work. Both, no doubt, stood on the shoulders of giants, but each was blessed with a vision which enabled them to see further and more clearly than their colleagues.