

**RE SA (VULNERABLE ADULT WITH CAPACITY:
MARRIAGE)
[2005] EWHC 2942 (Fam)**

Family Division

Munby J

15 December 2005

Marriage – Capacity – Vulnerable adult – Mental capacity established – Court’s protective function – Whether exercising free choice or able to exercise genuine consent

Marriage – Vulnerable adult – Mental capacity established – Court’s protective function – Whether exercising free choice or able to express genuine consent

The 17-year-old daughter was profoundly deaf and unable to speak. She communicated by British sign language, with some limited ability to lipread English. Communication within the family was very limited, as neither of the parents could communicate using British sign language and the daughter had no ability to lipread Punjabi, the language spoken at home. The local authority appraisal of the daughter was that she functioned at the intellectual level of a 13 or 14-year-old, with a reading age of about 7 or 8. The local authority was concerned that the family might take the daughter to Pakistan to be married there to some unknown person contrary to her wishes, and applied to the court to invoke the inherent jurisdiction. As she was still under 18 years old the daughter could be made a ward of court, and injunctions were granted to prevent her being removed from the jurisdiction or married, however, the main issue in the proceedings was what would happen to her once she was an adult. Both the local authority and the guardian took the view that even as an adult the daughter would need some element of continuing protection by the court, in relation to the specific issue of a marriage being arranged. Expert evidence was that the daughter had capacity to marry, having a rudimentary but nevertheless clear and accurate understanding of the concept of marriage and of what a marriage contract would entail, including a sexual relationship. However, she did not understand immigration issues, and would have significant difficulty understanding the implications of a specific marriage contract to a specific individual, such as a change in her country of residence. The daughter’s evidence was that: (a) she wished to marry, but not yet; (b) she expected that her parents would choose a Muslim husband for her, probably from Pakistan, but that it would be for her to agree to the choice; (c) she would want a husband who would speak English, and would want to live in England, in the same city as her family; (d) she emphatically did not want to live in Pakistan.

Held – making an order requiring that the daughter be properly informed, in a manner she could understand, about any specific marriage prior to entering into it, with associated injunctions –

(1) The court’s inherent protective jurisdiction could be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, was, or was 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. The inherent jurisdiction was not confined to vulnerable adults, nor was a vulnerable adult amenable as such to the jurisdiction; it was simply that an adult who was vulnerable was more likely to fall into the category of the incapacitated in relation to whom the

inherent jurisdiction was exercisable than an adult who was not vulnerable (see paras [77], [78], [83]).

(2) The court had power to make orders and to give directions designed to ascertain whether or not a vulnerable adult had been able to exercise her free will in decisions concerning her civil status. The principle that the jurisdiction was exercisable on an interim basis while proper inquiries were made applied whether the suggested incapacity was based on mental disorder or on some other factor capable of engaging the jurisdiction (see para [80]).

(3) In the context of the inherent jurisdiction, a vulnerable adult could be described (rather than defined) as someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, was or might be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who was substantially handicapped by illness, injury or congenital deformity. The principle that the court should seek to prevent damage to children that it could not repair was equally applicable in relation to vulnerable adults (see para [82]).

(4) While it was no part of the court's function to decide whether it was in a person's best interests to marry, the court was not debarred from considering whether it was in the best interests of someone lacking capacity to be exposed to an ineffective betrothal or marriage (see para [100]).

(5) There was nothing to prevent a local authority from commencing wardship proceedings, or proceedings under the inherent jurisdiction in an appropriate case, as a body with a genuine and legitimate interest in the welfare of the individual in question. Guidance to the contrary in the document *Young People & Vulnerable Adults Facing Forced Marriage: Practice Guidance for Social Workers* (The Foreign & Commonwealth Office, 2004) was simply wrong. The court agreed with the note on this subject in the *Family Court Practice 2005* (Family Law), p 668 (see paras [105], [106], [109], [112]).

(6) The daughter was a vulnerable adult who might, by reason of her disabilities, and even in the absence of any undue influence or misinformation, be disabled from making a free choice and incapacitated or disabled from forming or expressing a real and genuine consent. There was a pressing need to intervene to protect the daughter from the serious emotional and psychological harm which she would suffer if she went through a ceremony of marriage with which she did not in fact agree, or if she were to find herself isolated and helpless in a foreign country (see paras [124], [127]).

Statutory provisions considered

Children Act 1989, ss, 91, 100

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 8, 12

Cases referred to in judgment

A (Male Sterilisation), Re [2000] 1 FLR 549, CA

A v A Health Authority and Others; Re J and Linked Applications [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, [2002] 3 WLR 24, [2002] 1 FLR 845, FD

Allcard v Skinner (1887) 36 ChD 145, [1888–1890] All ER Rep 90, CA

C (Mental Patient: Contact), Re [1993] 1 FLR 940, FD

Cambridgeshire County Council v R (An Adult) [1995] 1 FLR 50, FD

D (A Minor) (Wardship: Sterilisation), Re [1976] Fam 185, [1976] 2 WLR 279, [1976] 1 All ER 326, FD

D-R (Adult: Contact), Re [1999] 1 FLR 1161, CA

E (An Alleged Patient), Re; Sheffield City Council v E and S [2004] EWHC 2808 (Fam), [2005] Fam 326, [2005] 2 WLR 953, [2005] 1 FLR 965, FD

- 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, [2005] EMLR 709, FD
- F (Adult: Court's Jurisdiction), Re* [2001] Fam 38, [2000] 2 FLR 512, [2000] Lloyd's Rep Med 381, CA
- F (Mental Patient: Sterilisation), Re* [1990] 2 AC 1, [1989] 2 WLR 1025, [1989] 2 FLR 376, [1989] 2 All ER 545, HL
- G (Adult Patient: Publicity), Re* [1995] 2 FLR 528, FD
- G (An Adult) (Mental Capacity: Court's Jurisdiction), Re* [2004] EWHC 2222 (Fam), [2004] All ER (D) 33 (Oct), FD
- H and Others (Minors) (Sexual Abuse: Standard of Proof), Re* [1996] AC 563, [1996] 2 WLR 8, [1996] 1 FLR 80, [1996] 1 All ER 1, HL
- Harbin v Masterman* [1896] 1 Ch 351, [1896] 65 LJ Ch 195, [1896] 73 LT 591, [1896] 12 TLR 105, [1895–1899] All ER Rep 695, CA
- Heraopath, Re* (unreported) (2003) *The Guardian*, May 12, FD
- Jones v Cunningham* (1963) 371 US 236, US Sup Ct
- Local Authority (Inquiry: Restraint on Publication), Re* [2003] EWHC 2746 (Fam), [2004] Fam 96, [2004] 2 WLR 926, [2004] 1 FLR 541, [2004] 1 All ER 480, FD
- M v B, A and S (by the Official Solicitor)* [2005] EWHC 1681 (Fam), [2006] 1 FLR 117, FD
- R v Jackson* [1891] 1 QB 671, [1891–1894] All ER Rep 61, CA
- R v Secretary of State for Home Affairs ex parte O'Brien* [1923] 2 KB 361, [1923] 21 LGR 419, [1923] 87 JP 166, [1923] 129 LT 419, [1923] 39 TLR 487, CA
- S (Adult's Lack of Capacity: Carer and Residence), Re* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235, FD
- S (Adult Patient) (Inherent Jurisdiction: Family Life), Re* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, FD
- S (Adult Patient: Sterilisation), Re* [2001] Fam 15, [2000] 3 WLR 1288, [2000] 2 FLR 389, CA
- S (Hospital Patient: Court's Jurisdiction), Re* [1996] Fam 1, [1995] 3 WLR 78, [1995] 1 FLR 1075, [1995] 3 All ER 290, CA; affirming [1995] Fam 26, [1995] 2 WLR 38, [1995] 1 FLR 302, [1995] 1 All ER 449, FD
- SK (Proposed Plaintiff) (an Adult by way of her Litigation Friend), Re* [2004] EWHC 3202 (Fam), [2006] 1 WLR 81, [2005] 2 FLR 230, [2005] 3 All ER 421, FD
- T (Adult: Refusal of Treatment), Re* [1993] Fam 95, [1992] 3 WLR 782, [1992] 2 FLR 458, [1992] 4 All ER 649, CA
- Wellesley v Duke of Beaufort* (1827) 2 Russ 1, (1827) 38 ER 236, LC; affd (1828) 2 Bli NS 124, [1824–1834] All ER Rep 189, [1824–1834] 4 ER 1078, HL
- Wingrove v Wingrove* (1885) 11 PD 81, (1885) 50 JP 56, (1885) 55 LJP 7, (1885) 34 WR 260, PDA
- Z (Local Authority: Duty), Re* [2004] EWHC 2817 (Fam), [2005] 1 WLR 959, [2005] 1 FLR 740, [2005] 3 All ER 280, FD

Teertha Gupta for the petitioner local authority

The defendant father did not appear and was not represented

The defendant mother appeared in person

Anne-Marie Hutchinson for the third defendant SA

Cur adv vult

MUNBY J:

[1] This case raises novel questions about the court's inherent jurisdiction in relation to vulnerable adults. I have before me a vulnerable young woman who has just turned 18 years old and has therefore attained her majority. While she was still a child the court had exercised its inherent *parens patriae*

and wardship jurisdictions to protect her from the risk of an unsuitable arranged marriage. The question is whether I have jurisdiction to continue that protection now she is an adult.

[2] The question arises because expert evidence establishes that this young woman, although undoubtedly vulnerable, equally undoubtedly has the capacity to marry. In other words, the case raises the question of whether the inherent jurisdiction in relation to adults can be exercised for the protection of vulnerable adults who do not, as such, lack capacity. In my judgment, the jurisdiction can be so exercised. And I propose to exercise the jurisdiction in this particular case, so that a young woman who remains just as vulnerable now she is an adult as she did when she was still a child should not suddenly be deprived of the protection which the court has hitherto felt it necessary to afford her and which I believe is still very much required in her best interests.

The facts

[3] SA was born in December 1987. She comes from a Pakistani Muslim family and lives at home in a provincial city in this country with her father, MA, her mother, NA, her older brother and her two younger brothers.

[4] SA is profoundly deaf. She has no speech, no oral communication. She has profound bilateral sensory neural loss. She also has significant visual loss in one eye. She communicates by British sign language, which is based on English. Her ability to lipread is low. She has some capacity to lipread English but no ability to lipread the family's first language, which is Punjabi. She cannot understand, lipread or sign in either Punjabi or Urdu. Neither of her parents is able to communicate with SA using British sign language. It follows that communication between SA and her parents is necessarily very limited. Her children's guardian understandably expresses doubts that SA would be able to understand her parents' wishes and plans in relation to her future. Equally, it must be doubted that they would be able to understand SA's own wishes and plans.

[5] The workers most closely involved with SA say that she sees her identity as being primarily as a deaf person, secondly, as from the place where she lives and, thirdly, as a Muslim. Apparently she does not attend the mosque.

[6] SA was statemented and attended a specialist unit for hearing impaired children. The local authority's appraisal is that she functions at the intellectual level of a 13 or 14-year-old and has a reading age of about 7 or 8.

[7] SA has recently been assessed by Dr P, a chartered forensic psychologist, who interviewed her at length using a British sign language interpreter. His report is dated 24 October 2005. It requires to be read in full. Partial quotation cannot bring out the subtle and nuanced detail of a remarkable, sympathetic and illuminating report.

[8] Dr P stressed the difficulties of formally assessing someone who can communicate only by means of British sign language – the Wechsler Intelligence Scale for Children relies on both non-verbal and verbal tests and its validity is, therefore, likely to be severely compromised by the use of British sign language. But he was able to express the opinion, based on the Comprehensive Test of Non-verbal Intelligence, that SA has an overall non-verbal IQ of 75, a pictorial non-verbal IQ of 68 and a geometric non-verbal IQ of 85. Overall, he assessed SA's level of non-verbal intellectual functioning as likely to be in the borderline range of ability rather than the

learning disability range. He undertook no formal assessment of SA's verbal IQ but felt that it was likely to be in the learning disability range.

[9] Dr P added four important observations. The first related to SA's verbal IQ:

'It was clear that she had significant difficulties understanding the meaning of relatively simple words and it was also clear that at times she had significant difficulty understanding verbal instructions. When this was compared to her ability to follow non-verbal instructions, such as in the Comprehensive Test of Non-verbal Intelligence, this difference was marked.'

The second related to SA's possible suggestibility:

'It is my opinion that [SA] would be, to some extent, suggestible given that she has significant difficulty understanding information presented verbally and also because she appears to have significant difficulties understanding complex concepts presented in spoken English, which then must be presented to her in BSL [British sign language]. It is my opinion that it is highly likely that the nuances of any conversations that were occurring around her, even if translated to BSL, would not be understood by her. Therefore, I believe that, although she may not be particularly suggestible, it would be extremely easy to mislead [SA] and in that sense she would be both suggestible and vulnerable.'

The third related to SA's ability to understand what is being presented to her:

'[SA] is not able to understand any information given to her that is not translated into BSL. Her ability to understand BSL would, from the evidence of my clinical assessment, appear to be a good understanding. It was clear at times that the translator was conveying complex concepts to her using BSL and [SA] did appear to understand them. It was also clear by observing the translation, that such concepts were being presented in an extremely nonverbal way. That is, that they relied on her nonverbal intelligence. For example some complex tasks were broken down into their constituent parts and related to [SA] in stages. It is therefore my opinion that even if the information is presented to her in written English, it is likely that her understanding will be incomplete.'

[10] Dr P continued:

'To summarise, it is therefore my opinion that [SA] is only able to comprehend what is said to her if it is presented in British sign language.'

This last point is, in my judgment, of fundamental importance, as is Dr P's final observation, which related to SA's ability to convey her views:

'In my opinion [SA] is able to at times forcefully explain her views in BSL. During the clinical assessment, [SA] was clearly able to form an

opinion and then be able to argue why she held that opinion and, as discussed earlier, was not suggestible in the sense that it was not possible to persuade her from that opinion. [SA]'s ability to convey her opinion in any other medium than BSL, including written English, is in my view extremely limited and she would have extreme difficulty expressing herself in any other medium.'

[11] Dr P investigated SA's understanding of the concept of marriage and of the nature of a sexual relationship. It was clear, at the end of what he referred to as a prolonged discussion, that SA has what Dr P describes as a rudimentary but nevertheless clear and accurate understanding of the concept of marriage and of what a marriage contract would entail; that she has an accurate and realistic understanding of what a sexual relationship is, its effect and implications, and what would be expected within the relationship; and that she understands that a marriage can legally be ended only by divorce.

[12] Dr P is accordingly of the opinion that SA does have the capacity to understand the general concept of marriage in accordance with the test as laid down in *Re E (An Alleged Patient); Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), [2005] Fam 326, [2005] 1 FLR 965 (*Sheffield*).

[13] Dr P added a number of important riders. The first related to possible immigration problems:

'On a number of occasions [SA] made it extremely clear that although she wished to travel to Pakistan in order to obtain a husband through an arranged marriage in accordance with the customs of her Muslim background, she would not wish to live in Pakistan and would wish to return to [her home town] to live either in the family home or to set up home with her husband. She clearly stated that if it were not possible to return to [her home town] due to immigration laws or because her partner was not willing to return with her, she would not wish to marry that particular individual.

At this point I attempted to discuss with her what would happen if the immigration authorities did not permit her husband to enter the UK, but despite significant attempts to convey and explore this concept with her, it became clear that she did not understand this concept, she simply responded in an extremely concrete way saying that they would come back to [her home town]. At this point both the translator and I attempted to convey the concept that this may not be possible but [SA] did not appear to understand.'

Dr P concluded that SA 'has no understanding of the potential legal difficulties with regard to immigration'.

[14] Dr P's next observation related to SA's ability to understand the implications of, and make a fully informed choice about, a specific marriage:

'She has significant difficulty in understanding concepts presented in spoken English. She also does not have knowledge of any other spoken language. All information given to her must be translated into British sign language, and there is significant potential given her overall level of understanding that this will significantly reduce her capacity to understand the implication of a specific marriage.

Therefore my conclusions are that, although she understands the concepts and responsibilities of marriage generally, she will have significant difficulty understanding the implications of a specific marriage contract to a specific individual. I have significant concerns that should, for example, the implications of that marriage be that she was not able to return to [this country] due to either that her potential husband would not wish [to come] to [this country] with her or was legally prevented from doing so, that she would not understand the implications of this for the marriage and may not be making a fully informed choice in a specific instance.'

[15] Dr P's last point is extremely important:

'Should she enter into a Marriage Contract where her husband was not able to communicate with her or where she was placed outside of the UK and may be surrounded by people who were not able to communicate with her in her first language, BSL, then in my opinion it is highly likely that she will become extremely distressed and there is a significant risk that she may develop psychological difficulties as a result of this. If she was to find herself outside of [the UK] and in a situation where she was not able to communicate with those around her, including her husband, it is highly likely that she would feel extremely isolated. The psychological implication of being in such circumstances and being extremely isolated are significant and, in my view, would pose a significant risk to her future wellbeing and mental health.'

[16] In a supplementary report dated 24 November 2005, Dr P considered whether SA has capacity to conduct litigation. He said that she does not:

'due to her limited intellectual functioning which although I do not assess to be in a learning disability range of functioning, nevertheless, when combined with her reliance on British sign language for communication, will mean that she will have considerable difficulties understanding the proceedings in court and also in understanding and processing complex concepts in a legal framework.'

[17] There is, of course, no conflict between Dr P's opinion that SA *does* have capacity to marry and his opinion that she does *not* have capacity to conduct litigation. Capacity is always issue specific and, as I explained in *Sheffield*, at para [41]:

'the tests for what I will call "litigation capacity" and "subject matter capacity" are not identical, and ... an adult who lacks the capacity to litigate – lacks "litigation capacity" – may nonetheless have capacity with regard to the matters which are the subject of that litigation – "subject matter capacity".'

[18] SA has been known to the local authority since 1989 when she was registered as a deaf child. As a result of events between May and July 2005, the local authority became concerned that SA might be about to be taken by

her family to Pakistan to be married there to some unknown person contrary to her wishes. I need not go into the details. They are set out in the local authority's evidence. None of it has ever been answered by either of SA's parents.

[19] Understandably and appropriately in the circumstances, the local authority believed that it had to intervene to protect SA's welfare. The local authority's concern, shared by her children's guardian, was that SA was a vulnerable minor who would still need protection after her eighteenth birthday because she would no doubt be a vulnerable adult. SA, in the considered view of her current social worker, is a very vulnerable young woman. Both the local authority and her guardian see SA as being naïve and immature.

The litigation

[20] On 14 July 2005, the local authority applied ex parte to Baron J, sitting as the Family Division urgent applications judge. SA was at that stage still a minor. Baron J gave the local authority permission under s 100 of the Children Act 1989 to invoke the inherent jurisdiction. She made SA a ward of court. She made a tipstaff passport order. She granted various injunctions designed to prevent SA being removed from the jurisdiction or married. That relief was continued by further orders made by Wilson J (as he then was) on 25 July 2005, by Black J on 22 August 2005 and then by me on 22 November 2005. The final hearing took place before me on 1 December 2005, shortly before SA's eighteenth birthday.

The hearing

[21] SA's father, although served, has played no part at all in the proceedings. SA's mother has gone to solicitors and appeared before me in person at the final hearing. But neither has filed any evidence. The mother's position is set out in a letter from her solicitors dated 18 November 2005.

[22] SA's children's guardian has filed reports dated 18 August 2005 and 28 November 2005. Her particular concerns about SA are summarised in her first report:

'Were [SA] to visit Pakistan at this time, the Guardian feels that any possible benefits such as the cultural experience and the opportunity to see family would be outweighed by the risk of her being involved in an unwanted marriage. The Guardian feels that [SA] would be very vulnerable in Pakistan. Her lack of hearing and speech means that she could be unaware of what was going on around her and of any plans being made in relation to her. She would be unable to seek assistance if she did become aware of any concerns. Furthermore [SA]'s naivety and immaturity could mean that she may not even recognise any risk or danger that may arise.'

Those concerns, articulated before Dr P had reported, have not of course been allayed by his report.

[23] In her second report the guardian emphasises that:

'it is therefore of great importance that any arrangements for [SA] to be married are made through the medium of sign language, so as to ensure [SA's] continued well being.'

The guardian's view is that:

'[SA], even on reaching her majority, needs some element of continuing protection by the court, in relation to the specific issue of a marriage being arranged.'

The guardian requests the court to give consideration to:

'what protective measures it can put in place in respect of [SA] when she reaches her majority, to ensure that she is able to give a valid consent to any marriage being arranged.'

[24] SA's wishes, as conveyed by her both to Dr P and to her guardian, are quite clear. They have been confirmed to me in court by her solicitor, Ms Anne-Marie Hutchinson who, as is well known, is highly experienced in cases of this kind. SA wishes to marry, but not yet. She will marry a Muslim man, probably from Pakistan, who she expects will be chosen for her by her parents. But it will be for her to agree to her parents' choice of bridegroom. Her husband will have to speak English and be prepared to come and live in this country, for she wants to go on living in the same city as her family. She does not want to live in Pakistan. It is anticipated that if she meets her husband in Pakistan, he will enter this country as her fiancé and that they will marry here.

[25] The local authority believes, as I have said, that SA needs the continuing protection of the court, notwithstanding that she has now attained her majority. Mr Teertha Gupta, who like Ms Hutchinson is very experienced in cases of this type, submits that what is required is an order which not merely provides SA with continuing protection by means of injunctions but is also expressed in flexible terms that will, as he puts it, enable this young woman to exercise her right to self determination, and specifically her right to marry as enshrined in Art 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

[26] Mr Gupta rightly draws attention to the fact that SA has the advantage of coming from a community and family that can assist in finding and arranging a consensual marriage for her. Such marriages are not, of course, in any way to be condemned. On the contrary, as Singer J said in *Re SK (Proposed Plaintiff) (an Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2006] 1 WLR 81, [2005] 2 FLR 230 at para [7], such arranged marriages are to be respected and supported as a conventional concept in many societies. Mr Gupta says that if a bridegroom can be found who meets SA's exacting criteria, SA can lead a happy and fulfilled life as a woman, wife and mother. It is with the aim of facilitating and achieving this worthy ambition, he says, that the local authority seeks to invoke the court's inherent jurisdiction.

[27] To this end Mr Gupta, with assistance from Ms Hutchinson, has drafted a form of order which, as I have slightly amended it, appears at the end of this judgment. As Mr Gupta points out, SA is unlikely to marry without her parents' involvement and consent. An order in this form will, he says, effectively ensure that SA is properly informed, and in a manner she can understand, about any specific marriage prior to entering into it. The order is designed to provide a practical solution to the concerns raised by the local

authority and other professionals and, very importantly, to reflect what SA herself wants and expects from her husband.

[28] As Mr Gupta helpfully puts it, the practical issue raised by the facts of this particular case requires the court to put in place measures, or steps, that enable SA to understand, and give her consent to, the terms of the specific marriage contract into which she is entering.

[29] Ms Hutchinson, on SA's behalf, puts the case in a very similar way. SA has capacity to marry. She has very clear views as to the marriage she wishes to enter into and as to how and where her married life should take place. She wants and expects to be able to choose her spouse, albeit from a group identified by her parents, but her difficulty is in making her choice known to her family and future husband, indeed in making clear whether or not she is in fact consenting. Because of her physical disabilities and special needs, SA can only give consent to a particular marriage if she is provided with a full understanding of what is proposed.

[30] SA must also, says Ms Hutchinson, be afforded the opportunity fully to assess the information provided to her. SA could not give informed consent unless all her special needs are taken into account and she fully comprehends what is being proposed to her. It is of concern that, because of communication difficulties, those who are likely to be making any such proposals – her parents or a future spouse – will not have the ability to know or ascertain what her response is. Nor will they be in a position to answer any questions that SA may raise.

[31] Ms Hutchinson says that SA's vulnerability will not dissipate on her achieving her majority, so she needs the continuing protection of the court. Ms Hutchinson goes further. She asserts 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.

[32] SA's father, as I have said, has played no part in the proceedings. Her mother attended the final hearing in person. Her solicitors indicated in their letter of 18 November 2005 that the mother has no objection, as they put it, to SA remaining a ward of court beyond her eighteenth birthday, though she would wish to know how long this period would last. The draft order prepared by Mr Gupta was carefully translated for the mother. She told me, through an interpreter, that she 'had no problem with it'.

[33] As Mr Gupta says, the factual basis upon which the local authority seeks this relief is not seriously disputed by anyone. The real question is whether the court has jurisdiction to protect SA who, although she is very vulnerable, *does* nonetheless have capacity to marry.

[34] At the end of the hearing I held that I did have jurisdiction to grant the relief sought.

[35] I made two orders. The first, to cover the period until SA's eighteenth birthday in December 2005, continued the previous wardship orders. The second order, to come into effect in December 2005, was in the terms attached to this judgment.

[36] I now (15 December 2005) hand down judgment explaining the basis upon which I have exercised jurisdiction.

The nature of the jurisdiction

[37] It is now clear, in my judgment, 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.

[38] The simple fact is that the jurisdiction has developed very significantly since its rediscovery by the House of Lords in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376. I need not go through the history in detail.

[39] In *Re G (Adult Patient: Publicity)* [1995] 2 FLR 528, at 530, Sir Stephen Brown P described the jurisdiction as 'not strictly '*parens patriae*' but similar in all practical respects to it'. In *Re S (Adult Patient: Sterilisation)* [2001] Fam 15, [2000] 2 FLR 389, at 29–30 and 403 respectively, Thorpe LJ described this as 'a distinction without a difference', going on to say that the two jurisdictions are 'to be exercised upon the same basis, namely that relief would be granted if the welfare of the patient required it and equally refused if the welfare of the patient did not'.

[40] In *A v A Health Authority and Others; Re J and Linked Applications* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, [2002] 1 FLR 845, I noted at para [38] that:

'In the 12 years and more that have passed since the House of Lords gave judgment in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376 the jurisdiction has developed in many important respects ... I have little doubt that this wholesome and entirely beneficial jurisdiction will continue to develop at least until such time as the legislature sees fit to intervene.'

I added at para [45]:

'For most practical purposes the declaratory jurisdiction in relation to incompetent adults is the same as that of a court exercising the *parens patriae* jurisdiction ...'

In *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, I elaborated on this at para [52]:

'The inherent declaratory jurisdiction has developed considerably since the House of Lords gave judgment in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376 and in ways which few might have foreseen in 1989. It will, I do not doubt, continue to develop. It is right that it should. It probably must if the court is to meet its obligations under the Convention.'

[41] Dame Elizabeth Butler-Sloss P made similar points in *Re Local Authority (Inquiry: Restraint on Publication)* [2003] EWHC 2746 (Fam), [2004] Fam 96, [2004] 1 FLR 541. She reviewed a number of authorities, including *Re F (Mental Patient: Sterilisation)*, *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, [1995] 1 FLR 1075, *Re S (Adult Patient:*

Sterilisation) and *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38, [2000] 2 FLR 512 before continuing at paras [96]–[97]:

[96] From the above decisions I draw the propositions that the circumstances within which a court will exercise the inherent jurisdiction through the common law doctrine of necessity are not restricted to granting declarations in medical issues. It is a flexible remedy and adaptable to ensure the protection of a person who is under a disability. It has been extended to questions of residence and contact. Until there is legislation passed which will protect and oversee the welfare of those under a permanent disability the courts have a duty to continue, as Lord Donaldson of Lynton MR said in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376 at 13 and 385 respectively to use the common law as the great safety net to fill gaps where it is clearly necessary to do so. Further, as Sedley LJ pointed out in *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38, [2000] 2 FLR 512 the European Convention adds an additional dimension to the exercise of the principles enunciated in the cases decided before the European Convention applied. One consequence of the European Convention is the obligation upon the court as a public authority to take positive steps, as described in *Marckx's* case.

[97] I am satisfied, therefore, despite the absence of any previously decided cases, that I can properly exercise the inherent jurisdiction of the High Court in order to consider whether I should restrain publication of ... the report. In the previous cases about adults under a disability, the issues have been the lawfulness of the proposed course of action and considerations as to their best interests. That cannot be the correct approach in the present case. The application of the inherent jurisdiction would seem more appropriately to be treated as the exercise of a “protective jurisdiction” rather than a “custodial jurisdiction”. In considering whether the publication of the report would be contrary to the welfare of the vulnerable adults, I propose to approach the issue by balancing their rights under Art 8 against the rights given under Art 10 and the emphasis given by s 12 of the Human Rights Act 1998. In my judgment I have to balance those competing rights in the same way as I did with regard to the children.’

[42] In *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, having set out this passage from the President’s judgment, I continued at para [55]:

‘I respectfully agree with the President’s analysis. The simple fact is that we have come a long way since the decision in *In Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1. The courts have created and now exercise 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 jurisdiction in relation to children. Indeed, the President’s reference in the passage I have just quoted to the “protective” and “custodial” jurisdictions is a straight borrowing from wardship: see *S v McC, W v W* [1972] AC 24,

(1970) FLR Rep 619 and *Re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1, [1996] 1 FLR 191.’

[43] This process continues and will, I am sure, continue. A recent and very striking example is *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, where Singer J granted relief in what he acknowledged was a ‘novel’ case. As he said at para [8]:

‘the inherent jurisdiction of the High Court can, in an appropriate case, be relied upon and utilised to provide a remedy ... the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values.’

I respectfully agree.

Circumstances in which the jurisdiction is exercised

[44] As is well known the jurisdiction was first exercised in relation to issues of surgical, medical and nursing treatment, but it is now clear that it is exercisable not merely in relation to matters of that nature but also in relation to a wide range of other questions:

- (i) It was soon recognised that the jurisdiction is exercisable in relation to the question of where an incompetent adult should live, who he should see, and the circumstances of such contact: see *Re C (Mental Patient: Contact)* [1993] 1 FLR 940, *Re S (Hospital Patient: Court’s Jurisdiction)*, *Re D-R (Adult: Contact)* [1999] 1 FLR 1161, *Re F (Adult: Court’s Jurisdiction)*, *A v A Health Authority*, *In Re J (A Child)*, *R (S) v Secretary of State for the Home Department*, *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)*, *Re S (Adult’s Lack of Capacity: Carer and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235, and *Re G (An Adult) (Mental Capacity: Court’s Jurisdiction)* [2004] EWHC 2222 (Fam), [2004] All ER (D) 33 (Oct).
- (ii) It has also been exercised to restrain the publication of matter damaging to a vulnerable adult: see *Re Local Authority (Inquiry: Restraint on Publication)*, and *E (By her Litigation Friend the Official Solicitor) v Channel Four, News International Ltd and St Helens Borough Council*.
- (iii) More recently it has been exercised in cases involving marriage, including forced marriages: see *Sheffield*, *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)*, and *M v B, A and S (by the Official Solicitor)* [2005] EWHC 1681 (Fam), [2006] 1 FLR 117.

[45] This is far from being an exhaustive description of the potential reach of the jurisdiction. New problems will generate new demands and produce new remedies. As Singer J put it, the jurisdiction must evolve in accordance with social needs and social values. I agree. Indeed, there is probably no theoretical limit to the jurisdiction. As has been said, the court can regulate everything that conduces to the incompetent adult’s welfare and happiness,

including companionship and his domestic and social environment: see *A v A Health Authority and Others; Re J and Linked Applications*, at paras [39]–[40].

The ambit of the jurisdiction

[46] It has always been recognised that the jurisdiction is exercisable in relation to any adult who is for the time being, and whether permanently or merely temporarily, either disabled by mental incapacity from making his own decision about the matter in hand or, although not mentally incapacitated, unable to communicate his decision: see in particular Lord Goff of Chieveley in *Re F (Mental Patient: Sterilisation)* at 75–76 and 438–439 respectively.

[47] It has also been recognised that the jurisdiction is exercisable on an interim basis ‘while proper inquiries are made’ and while the court ascertains whether or not an adult is in fact in such a condition as to justify the court’s intervention: see *Re S (Hospital Patient: Court’s Jurisdiction)* [1995] Fam 26, [1995] 1 FLR 302 per Hale J (as she then was) esp at 33, 36 and 309, 311 respectively.

[48] The question is whether the jurisdiction extends further. In my judgment it does. I must now explain why.

[49] So far as I am aware the first occasion on which the court had to consider the ambit of the inherent jurisdiction and, in particular, the question whether it extended beyond medical matters, for example, to disputed questions of contact to a handicapped adult, was *Re C (Mental Patient: Contact)* [1993] 1 FLR 940. In that case there was a dispute between the parents as to their adult daughter’s living arrangements. The parents had separated and their daughter remained in her father’s care. The mother complained that the father had prevented her from seeing her daughter. The mother applied for staying contact and for an order that she could lawfully enter the father’s home to take her daughter for contact. She also sought a declaration that the father could not lawfully obstruct or prevent contact. The preliminary question of whether there was jurisdiction to grant such relief came before Eastham J. He agreed that the court did indeed have jurisdiction.

[50] I do not for present purposes need to examine all the various reasons why Eastham J came to that conclusion. What are of immediate importance are certain views he expressed about habeas corpus and its possible relevance to the inherent jurisdiction.

[51] Eastham J recorded in *Re C* at 944 a submission of counsel that:

‘although in the normal habeas corpus case the applicant for relief is totally incarcerated, the cases reveal that it is not limited to such cases and if it prevents someone being at liberty freely to go at all times to all places whither he will or amounts to a significant curtailment of the freedom to do those things which in this country free men are entitled to do then the writ will run.’

That formulation, I should add (though this does not appear from the report), was in fact derived from certain passages in R Sharpe, *The Law of Habeas Corpus* (OUP, 2nd edn, 1989), at pp 165 and 175, and from what the Supreme Court of the United States of America had said in *Jones v Cunningham* (1963) 371 US 236, at 243.

[52] Having recorded that submission, Eastham J continued at 944:

‘It is submitted on this principle that interference by a custodial parent with the other parent’s access to a child is capable of being remedied by habeas corpus. That is a view with which I agree, and ... if this is a case in which either contrary to the will of C if she is able to express her will, or, if contrary to her best interests as found by the court she is not being allowed to see her mother and not being allowed to have access and is otherwise being restrained, then habeas corpus would definitely be available.’

He added at 945:

‘I have come to the conclusion that if the plaintiff had wished there was material, if her contentions are right, to found an application for habeas corpus, and I am inclined to agree with the submission that if the grounds apply for relief in that drastic form it does support very much the contention that there should be relief available by way of the lesser declaration.’

[53] I should add that Eastham J’s approach to the potential reach of habeas corpus has the weighty support of Atkin LJ’s observation in *R v Secretary of State for Home Affairs ex parte O’Brien* [1923] 2 KB 361, at 398 that:

‘Actual physical custody is obviously not essential. “Custody” or “control” are the phrases used passim in the opinions of the Lords in *Barnardo v Ford* [1892] AC 326, and in my opinion are a correct measure of liability to the writ ... In testing the validity of the order the question is as to the legal right to control; in testing the liability of the respondent to the writ the question is as to de facto control.’

[54] I should also add that, although one tends to think of habeas corpus as a remedy against state action, the unlawful detention need not be at the hands of the state or public authority. Even a domestic house may for this purpose be a prison: see *R v Jackson* [1891] 1 QB 671, especially per Lord Esher MR, at 682. That was the celebrated case where a wife who had been detained by her husband in his house, being given the full run of the house short of leaving it, was freed on a habeas corpus. The Court of Appeal denied that a husband has in law any right either to imprison or to confine his wife. Nor do parents have any right to imprison or confine their adult children or subject them to their control, using that word in the sense in which it was used by Atkin LJ. So, an adult child can have recourse to habeas corpus if kept confined, controlled or under restraint, even if the restraint is only of the kind referred to by Eastham J. And if recourse can be had to habeas corpus then, for the reasons given by Eastham J, recourse can equally be had to the inherent jurisdiction.

[55] A few months before *Re C (Mental Patient: Contact)*, the Court of Appeal had made it clear in *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, [1992] 2 FLR 458 that the court has jurisdiction to determine whether an apparent consent or refusal of consent is vitiated, for example, by the effects of shock, fatigue, pain or drugs, or because the will has been overborne by the undue influence of another, or by deception or misinformation of a significant kind. As Butler-Sloss LJ said in *Re T* at 117 and 474 respectively:

‘Although the issues of capacity and genuine consent or rejection are separate, in reality they may well overlap, so that a patient in a weakened condition may be unduly influenced in circumstances in which if he had been fit, he would have resisted the influence sought to be exercised over him.’

Stoughton LJ made a similar point at 122 and 479 when he said:

‘at the time of apparent consent or refusal the patient may not, for the time being, be a competent adult. Her understanding and reasoning powers may be seriously reduced by drugs or other circumstances, although she is not actually unconscious.’

[56] Lord Donaldson of Lymington MR made some general comments at 113 and 471 respectively, which are important in the present context:

‘When considering the effect of outside influences, two aspects can be of crucial importance. First, the strength of the will of the patient. One who is very tired, in pain or depressed will be much less able to resist having his will overborne than one who is rested, free from pain and cheerful. Second, the relationship of the “persuader” to the patient may be of crucial importance. The influence of parents on their children or of one spouse on the other can be, but is by no means necessarily, much stronger than would be the case in other relationships. Persuasion based upon religious belief can also be much more compelling and the fact that arguments based upon religious beliefs are being deployed by someone in a very close relationship with the patient will give them added force and should alert the doctors to the possibility – no more – that the patient’s capacity or will to decide has been overborne. In other words the patient may not mean what he says.’

[57] Butler-Sloss LJ made much the same point at 120 and 477:

‘it has long been recognised that an influence may be subtle, insidious, pervasive and where religious beliefs are involved especially powerful. It may also be powerful between close relatives where one may be in a dominant position vis-à-vis the other. In this case Miss T had been during her childhood subjected to the religious beliefs of her mother and in her weakened medical condition, in pain, and under the influence of the drugs administered to assist her, the pressure from her mother was likely to have a considerably enhanced effect. I find it difficult to reconcile the facts found by the judge with his conclusion that the influence of the mother did not sap her will or destroy her volition. The degree of pressure to turn persuasion or appeals to affection into undue influence may as Sir James Hannen P said in *Wingrove v Wingrove* (1885) 11 PD 81, 82–83, be very little.’

[58] These observations reflect Lindley LJ’s well-known comment in *Allcard v Skinner* (1887) 36 ChD 145, at 183 that ‘the influence of one mind

over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful’.

[59] In *Re G (An Adult) (Mental Capacity: Court’s Jurisdiction)* [2004] EWHC 2222 (Fam), [2004] All ER (D) 33 (Oct) the facts so far as material for present purposes were simple. G was a woman of 29 with a history of mental illness. Proceedings under the inherent jurisdiction were commenced on 10 March 2004 at a time when, as it was subsequently established, G lacked capacity. What Bennett J described as a ‘protective framework’ for G, regulating her parents’ contact with her, was put and maintained in place by interlocutory orders made on 11 March 2004, renewed on 17 March 2004 and extended on 19 May 2004. By the time of the final hearing on 26 July 2004, G no longer lacked capacity. The reason for this was explained in the medical evidence, which (see paras 70–76) was to the effect that G’s capacity had been severely compromised by her will being overborne by her father’s powerful character; that prior to the protective framework being put in place the father’s ability to overbear G’s decision-making processes was very significant; that by contrast the protective regime, which limited the father’s access to G, had reduced the impact of his power over her decision-making processes; but that if the protective framework was removed, so that G had unrestricted contact with her parents, this would probably lead to disturbance and a significant deterioration in G’s mental state, adversely affecting her capacity.

[60] Bennett J’s conclusion in *Re G* at para 86 was that:

‘If the restrictions were lifted ... it is probable that the situation would revert to what it was prior to March 2004. G’s mental health would deteriorate to such an extent that she would again become incapacitated to take decisions about the matters referred to. Such a reversion would be disastrous for G.’

[61] In these circumstances it was argued that, because G currently had capacity, the court had no jurisdiction to grant any relief. Bennett J rejected the argument and made orders the effect of which was to retain the protective framework in place.

[62] Bennett J began his analysis of the law in *Re G* with these powerful observations at paras 90–91:

‘90 [Counsel’s] submissions seem to me to have serious practical flaws and very undesirable consequences. Both experts acknowledged that but for the court’s protective framework G probably would revert to her mental state prior to 10 March, with the consequences I have already referred to. If then I have to dismiss the local authority’s application for lack of jurisdiction, that is to say because the local authority has failed to establish G’s mental incapacity as of today, the court’s protective framework must therefore fall away. Thus, contact between G and her parents would be unrestricted; there would be no control over the father and his conduct vis-à-vis G’s mental health, her health care needs and team. It is probable that G’s mental health would deteriorate and she would become incapacitated. The local authority in such circumstances might feel obliged to institute proceedings all over again, the court would put into effect another protective framework, G

might well recover her capacity leading to the same result in those fresh proceedings. Thus the purpose of the court's inherent jurisdiction in cases such as these would be completely defeated. Further, the logic of [counsel's] submission is, as he acknowledged, that had the court's protected framework not had the impact that, in fact, it did have, and G had remained lacking in mental capacity, the court would have had jurisdiction.

91 Thus, in my judgment, the court's jurisdiction would be entirely dependent on the shifting sands of whether or not G did, or did not, have the requisite mental capacity at the time of the final hearing. I do not find that to be an attractive submission.'

[63] Having referred to various authorities, and in particular to the judgment of Thorpe LJ in *Re F (Adult: Court's Jurisdiction)*, Bennett J concluded at paras 103–105 of *Re G* as follows:

'103 ... To adopt the sentiment expressed by Thorpe LJ ..., it would be a sad failure were the law to determine that I had no jurisdiction to investigate and if necessary make declarations as to G's best interests to ensure that the continuing protection of the court put in place with effect from 11 March 2004 is not summarily withdrawn simply because she has now regained her mental capacity in respect of the matters referred to, given the likely consequences to G if the court withdrew its protection.

104 If the declarations sought are in G's best interests, the court, by intervening, far from depriving G of her right to make decisions as submitted by [counsel], will be ensuring that G's now stable and improving mental health is sustained, that G has the best possible chance of continuing to be mentally capable, and of ensuring a quality of life that prior to 11 March 2004 she was unable to enjoy.

105 In my judgment the court does have jurisdiction in this matter. Up to at least the seeking of the court's protective framework on 10 March 2004 the agreed medical evidence is that G was mentally incapacitated in the respects which I have set out. But for the court's intervention and orders the strong likelihood is that that incapacity would have continued. What was instrumental in reversing that situation was and is the court's protective framework, in particular in relation to the father. If the protective framework goes the probability is that G's mental health will regress and she will again become incapacitated.'

[64] Bennett J continued at para 106:

'It is, in my judgment, pertinent to ask oneself what would have been the situation of G if she had been a child at all material times instead of an adult? If the local authority had applied to the court under Section 31 of the Children Act 1989, and the court had then put in place an interim care order and made contact orders similar to those made in the present proceedings with the effect that her mental health recovered and that she was mentally capable once more, any submission that the court had no jurisdiction as at the date of this final

hearing because she was no longer suffering harm as at the date of the final hearing, would, since the decision of *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 FLR 577, have been dismissed out of hand. The House of Lords, I accept, in that case had to construe a statutory provision, but in my judgment the speeches of their Lordships are, with respect, instructive and very persuasive in the instant case.’

[65] Having cited from the speeches in that case, Bennett J concluded at paras 111–112:

‘111 Why then should G, now an adult, be worse off than she would have been had the matters arisen if she was a child? Why should the court be powerless where there is, as in the instant case, a justiciable issue? I repeat the words of Lord Donaldson MR in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, at 13:

“It is because 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 insofar as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill the gaps is one of the most important duties of the judges.”

112 In my judgment, the common law demands that in the instant case the court acts, that is to say by investigating, and if it is in G’s best interests, making the declarations sought. In my judgment the “focal point” of the enquiry into G’s mental capacity must be “the situation which resulted in the temporary measures being taken, and which has led to the application for” declaratory relief under the inherent jurisdiction, to borrow the words of Lord Nolan in *Re M*. A “focal point” of the final hearing would not be just, or in my judgment in accordance with the law.’

[66] Bennett J’s language and approach echoes (as I would echo) Thorpe LJ’s words in *Re F (Adult: Court’s Jurisdiction)* [2001] Fam 38, [2000] 2 FLR 512. That was a case in which the wardship jurisdiction had been invoked very shortly before a vulnerable young woman’s eighteenth birthday. On her attaining her majority the question arose as to whether the inherent jurisdiction in relation to adults could be invoked, the wardship jurisdiction, as here, having come to an end. In the course of explaining why it could, Thorpe LJ commented at 53 and 527 respectively:

‘It would in my opinion be a sad failure were the law to determine that [the court] has no jurisdiction to investigate and, if necessary, to make declarations as to T’s best interests to ensure that the protection that she has received belatedly in her minority is not summarily withdrawn simply because she has attained the age of 18.’

[67] Picking up the chronological thread, I refer next to what Hedley J said in *Re Z (Local Authority: Duty)* [2004] EWHC 2817 (Fam), [2005] 1 WLR 959, [2005] 1 FLR 740, at para [13]:

‘There is a legal presumption in favour of capacity but that could have been rebutted by evidence of inability to assimilate the issues, or fully appreciate the consequences, or being unduly influenced by the views of others or by undue concern for the burden that her condition imposed on others.’

[68] Finally, I go to Singer J’s important decision in *Re SK (Proposed Plaintiff) (an Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230. In that case Singer J had to consider a novel issue where ‘gravely disquieting’ information about a young adult suggested that she was being kept under constraint as part of an attempt to marry her forcibly. There was no suggestion of mental incapacity.

[69] The question was what, if any, powers this court had, analogous to the powers which, if the case had involved a child, would undoubtedly have been exercisable in wardship. Singer J held that the inherent jurisdiction of the High Court provided a remedy. He said at para [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. Clear resemblances are to be discerned, in my judgment, with cases such as that of the Norwegian deprived of the capacity for autonomy by the after-effects of a stroke (see *Re S (Hospital Patient: Court’s Jurisdiction)* [1996] Fam 1, [1995] 1 FLR 1075).’

I entirely agree. The sentiment underlying those observations corresponds exactly with what I and other judges have said on previous occasions.

[70] Singer J described the circumstances in which he decided to exercise the jurisdiction at paras [3]–[4]:

‘[3] ... Consular officers in Bangladesh and London have, from a variety of sources, received information concerning the young woman who is the proposed plaintiff which, if true, is gravely disquieting. It is quite unnecessary, I think, for present purposes to go into the detail of the reasons for that anxiety or how they have been communicated. Suffice to say that if they prove to be substantially well-founded they would certainly satisfy me that there would be serious cause for concern about her capacity to control her own life and destiny at the moment. This, notwithstanding that she is an adult and is emancipated, at least in terms of English law, and should not be the subject of duress or force or be deprived of the ability to make her own decisions.’

[4] There is, as I say, information which if true (and that of course is as yet untested) would lead me to believe that she may be being kept by relatives or friends of relatives and family in Bangladesh contrary to her will, and that her anticipated return to this country (the expected date for which has been seriously delayed) may be being frustrated as part of an attempt to marry her forcibly. It may transpire indeed that she may be or is a young woman in relation to whom that has already happened. In either event the activities involved to those ends would be or would have been a gross interference with her human rights and might have involved the commission of criminal offences against her. If, in truth, she were forced to marry or if, in truth, that is the outcome which she may contemplate and fear, then steps taken in furtherance of those ends would be a series of acts to which she did not consent. Indeed her very capacity to consent would have been overborne by fear, duress or threat.'

[71] He added in para [9]:

'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.'

[72] Accordingly, Singer J made an order whose purpose, as he explained at para [20], was:

'to do what can be done properly to order defendants where binding orders are indeed appropriate, and to invite and encourage other persons and authorities where they are not subject to this court's orders, to arrange for the plaintiff to be seen by an appropriate official at the High Commission in Dhaka for the purpose of establishing what SK's true wishes are in an environment where, it is to be hoped, she will feel able to express them.'

[73] Singer J made various further orders, backed by a penal notice, including an order 'pending further order' that SK's parents 'shall not cause or permit SK to undergo any ceremony or purported ceremony of betrothal or marriage whatsoever'. He also made orders, again backed by a penal notice, prohibiting SK's parents from 'threatening intimidating or harassing' her or 'using violence towards or upon' her.

[74] Singer J went on to emphasise at para [16] 'the importance these courts place on the right of the individual to exercise choice in this most intimate area of decision-making'. He added at para [17]:

'proceedings such as these are in appropriate situations available, and ... 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.'

[75] I have no doubt that habeas corpus would lie in this country in similar circumstances. Habeas corpus ad subjiciendum (the form of the writ with which we are here concerned) is a means not merely of testing the legal right to detain or control; inasmuch as it requires the 'gaoler' to bring the 'body' before the court, it is also a means of ascertaining whether someone is in fact being kept confined, controlled, coerced or under restraint. And if, by means of a habeas corpus, the court can, as Singer J put it, secure the attendance of a young adult at court, so that the judge may ascertain her true wishes and, if coercion is established, ensure her release, then, for the reasons given by Eastham J in *Re C (Mental Patient: Contact)* [1993] 1 FLR 940, the same result can equally be achieved by recourse to the inherent jurisdiction.

[76] In the light of these authorities it can be seen that 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] It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that 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.

[78] I should elaborate this a little:

- (i) *Constraint*: It does not matter for this purpose whether the constraint amounts to actual incarceration. The jurisdiction is exercisable whenever a vulnerable adult is confined, controlled or under restraint, even if the restraint is only of the kind referred to by Eastham J in *Re C (Mental Patient: Contact)*. It is enough that there is some significant curtailment of the freedom to do those things which in this country free men and women are entitled to do.
- (ii) *Coercion or undue influence*: What I have in mind here are the kind of vitiating circumstances referred to by the Court of Appeal in *Re T (Adult: Refusal of Treatment)*, where a vulnerable adult's capacity or will to decide has been sapped and overborne by the

improper influence of another. In this connection I would only add, with reference to the observations of Sir James Hannen P in *Wingrove v Wingrove* (1885) 11 PD 81, of the Court of Appeal in *Re T (Adult: Refusal of Treatment)*, and of Hedley J in *Re Z (Local Authority: Duty)*, that where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it, be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.

- (iii) *Other disabling circumstances*: What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others.

[79] I am not suggesting that these are separate categories of case. They are not. Nor am I suggesting that the jurisdiction can only be invoked if the facts can be forced into one or other of these headings. Quite the contrary. Often, indeed, the facts of a particular case will exhibit a number of these features. There is, however, in my judgment, a common thread to all this. The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some 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. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he or she is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors.

[80] It will be noticed that I have referred to the inherent jurisdiction as being exercisable not merely where a vulnerable adult is, but also where he or she is reasonably believed to be, incapacitated. As I have already pointed out, it has long been recognised that the jurisdiction is exercisable on an interim basis 'while proper inquiries are made' and while the court ascertains whether or not an adult is in fact in such a condition as to justify the court's intervention. That principle must apply whether the suggested incapacity is based on mental disorder or some other factor capable of engaging the jurisdiction. As Singer J put it in *Re SK* at para [9], and I agree, the court has power to make orders and to give directions designed to ascertain whether or not a vulnerable adult has been able to exercise his or her free will in decisions concerning his or her civil status.

[81] Before parting from this topic I should explain what I have in mind when I refer to a vulnerable adult. This is not a term of art, though as Mr Gupta has helpfully pointed out, the authors of *Young People & Vulnerable Adults Facing Forced Marriage: Practice Guidance for Social*

Workers (The Foreign & Commonwealth Office, 2004) (in conjunction with the Association of Directors of Social Services, the Home Office, the Department for Education and Skills and the Department of Health) borrow at p 38 the Law Commission's broad definition of a vulnerable adult as a person over the age of 18:

'who is or may be in need of community care services by reason of mental or other disability, age or illness and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation.'

On the same page it is said that:

'a young person is considered disabled if they are deaf or blind (both of which require medical evidence), suffer from a mental disorder of any kind, or are substantially and permanently handicapped by illness, injury or congenital deformity or other ... disability.'

[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.

[83] The inherent jurisdiction is not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction. The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable, than an adult who is not vulnerable. So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable. That is all.

The powers of the court

[84] As I have said, 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 jurisdiction in relation to children. There is little, if any, practical difference between the types of orders that can be made in exercise of the two jurisdictions. The main difference is that the court cannot make an adult a ward of court. So the particular status which wardship automatically confers on a child who is a ward of court – for example, the fact that a ward of court cannot marry or leave the jurisdiction without the consent of the court – has no parallel in the case of the adult jurisdiction. In the absence of express orders, the attributes or incidents of wardship do not attach to an adult. But this apart, the court's powers to make orders under the inherent jurisdiction in relation to adults would seem to be as wide as its powers when exercising its inherent *parens patriae* jurisdiction in relation to children. Just as there are, in theory, no limits to the court's powers

when exercising the wardship jurisdiction I suspect that there are, in theory, few if any limits to the court's powers when exercising the inherent jurisdiction in relation to adults.

[85] Be that as it may, there is no doubt, as I said in *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), [2003] 1 FLR 292, at para [50], that:

'The court has jurisdiction to grant whatever relief in declaratory form is necessary to safeguard and promote the incapable adult's welfare and interests.'

That view was endorsed by Sumner J in *M v B, A and S (by the Official Solicitor)* [2005] EWHC 1681 (Fam), [2006] 1 FLR 117, at para [133].

[86] There is also no doubt that the court has a wide and largely unfettered jurisdiction to grant appropriate injunctive relief. In *Re E (An Alleged Patient), Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), [2005] Fam 326, [2005] 1 FLR 965 (*Sheffield*), at para [108], I said:

'There is no doubt that, generally speaking, this branch of the court's inherent jurisdiction extends not merely to declaratory relief but also to the grant of injunctive relief: see *A v A Health Authority, In Re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, [2002] 1 FLR 845 at para [44]. And notwithstanding the qualification which I there expressed it is now, in my judgment, clearly established that the jurisdiction in such cases is not limited to the grant of interlocutory injunctions but extends to the grant of final injunctions. I have myself granted such injunctions in previous unreported cases involving incompetent adults.'

[87] In *Sheffield*, I left open the question whether the court can, and if it can whether it should, grant an injunction to restrain the marriage of someone who lacks capacity to marry. That was not because I had any doubt as to the proper answer but because I was conscious that the question, which had not been argued before me, was likely to arise later for decision both in that case and in the case involving W which I had referred to at para [93]. In the event, as I understand it, neither of those cases resolved the issue. It arose again in *M v B, A and S (By the Official Solicitor)*. Sumner J at para [98] was clear:

'In appropriate circumstances there is jurisdiction to make an order to restrain those responsible for an adult lacking capacity from entering into a contract of marriage whether formal or informal if it is required to protect that adult's best interests.'

I respectfully agree.

[88] A few months earlier, as we have seen, in *Re SK*, Singer J had granted an injunction, pending further order, providing that SK's parents 'shall not cause or permit SK to undergo any ceremony or purported ceremony of betrothal or marriage whatsoever'. He was, if I may be permitted to say so, plainly entitled to do so.

[89] The court can also grant whatever interlocutory injunctive relief is required ‘to preserve or regulate the status quo’: see *A v A Health Authority, In Re J (A Child), R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, at para [44].

[90] This question had first been considered by Hale J (as she then was) in *Re S (Hospital Patient: Court’s Jurisdiction)* [1995] Fam 26, [1995] 1 FLR 302, at 36 and 311 respectively:

‘what is sought in this case is the preservation of the status quo while proper inquiries are made. The appropriate way to achieve this is obviously by way of an interlocutory injunction ... if the position is not yet known, then as long as there is a serious question to be tried (in accordance with the principles laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396), it may well be just and convenient to preserve the status quo while it is determined. Of course, in this case the status quo can be preserved by an injunction in negative terms. A more difficult problem arises in a case such as the *Riverside Mental Health NHS Trust v Fox* [1994] 1 FLR 614, where drastic, positive, coercive steps may be needed to achieve this.

I hold, therefore, that there is power to grant an interlocutory injunction to prevent the patient’s removal and thus to preserve the present position pending the hearing of the plaintiff’s originating summons.’

The Court of Appeal agreed: *Re S (Hospital Patient: Court’s Jurisdiction)* [1996] Fam 1, [1995] 1 FLR 1075, at 10 and 1079 respectively.

[91] In an appropriate case the court can also make tipstaff orders – location orders, collection orders and passport orders – in relation to an adult just as it does in relation to children. I have myself in an unreported case (the case of Edna Herapath; *Re Herapath* (unreported) (2003) *The Guardian*, May 12) made a collection order in relation to a vulnerable adult who had been removed from her usual place of residence by her daughter and grand-daughter. In *M v B, A and S (By the Official Solicitor)*, Kirkwood J made an interlocutory order for the seizure of passports (see at paras [2], [4] and [84]). In another such case that was recently before me, a tipstaff passport order had been granted together with an all ports alert order.

[92] There are other forms of order that the court can make in an appropriate case, including orders enabling third parties to take protective steps in relation to an incapacitated adult. In *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)*, at paras [50]–[51] I said that:

‘[50] ... The court has jurisdiction to grant whatever relief in declaratory form is necessary to safeguard and promote the incapable adult’s welfare and interests. If the court thinks that his interests will best be served by a judicial identification of some third party as the most appropriate person to be responsible not merely for his care but also for taking the kind of decisions to which I have already referred ... then, in my judgment, there can be no objection whatever to the court so declaring. Indeed, were the court not to do so in an appropriate case, it would, as it seems to me, be failing in its duties under both the common law and the Convention. After all, to declare

that some specified person who is, in the eyes of the court, the most appropriate person to assume responsibility for this aspect of a patient's care is also to be clothed with practical decision-making on behalf of the patient, is merely to state explicitly that he has those powers and responsibilities which would in any event be reposed in him by the doctrine of necessity. Moreover, some such mechanism is essential if those caring for the incapable are to be allowed to get on with their task without the need for endless reference to the court – something which (cases in the “special” category apart) would serve neither the public interest nor the interests of the mentally incapacitated.

[51] So, subject always to being satisfied that this really is in the best interests of the mentally incapacitated person, the court has, and in my judgment always has had, power to declare that some specified person is to be, in relation to specified matters, what is, in effect, a surrogate decision-maker for the incapable adult.'

[93] In *Re SK* as we have seen, Singer J made an order providing for SK to be interviewed, alone, by an officer of the British High Commission in Dhaka for the purpose, as he put it at para [20], of:

'establishing what SK's true wishes are in an environment where, it is to be hoped, she will feel able to express them.'

No doubt in an appropriate case where similar inquiries needed to be carried out within the jurisdiction the court could direct the Official Solicitor, subject to his agreement, to carry out a '*Harbin and Masterman* investigation': see *Harbin v Masterman* [1896] 1 Ch 351.

[94] More generally, as it seems to me, *Re SK* shows that the court has the power to make whatever orders and to give whatever directions are needed to ascertain the true wishes of a vulnerable adult or to ascertain whether a vulnerable adult is able to exercise her free will or is confined, controlled, coerced or under restraint.

[95] Additionally, as I have already pointed out, the jurisdiction is exercisable on an interim basis while the court ascertains whether or not an adult is in fact in such a condition as to justify the court's intervention. For that purpose the court has power to direct whatever inquiries are needed to ascertain the true state of affairs.

Exercise of the court's powers

[96] It is elementary that the court exercises its powers by reference to the incompetent adult's best interests. As Sumner J pointed out in *M v B, A and S (By the Official Solicitor)* at paras [99]–[100], the key to where a person's best interests lie is to be found in an application of the 'balance sheet' the use of which was suggested by Thorpe LJ in *Re A (Male Sterilisation)* [2000] 1 FLR 549, at 560.

[97] The particular form of order will, naturally, depend upon the particular circumstances of the case. Here, I am concerned, as Sumner J was in *M v B, A and S (By the Official Solicitor)*, with the need to put in place protective measures to prevent a vulnerable adult being taken abroad to be married. In

Re SK, as we have seen, Singer J was concerned with trying to protect a vulnerable adult who had already been taken abroad for that purpose.

[98] In *M v B, A and S (By the Official Solicitor)*, Sumner J found (see paras [11], [35], [101], [102]) that S lacked the capacity to marry but that there was, nonetheless, a real possibility (in the sense in which the words were used in *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, [1996] 1 FLR 80) that her parents would take her to Pakistan and organise an arranged marriage for her which would, as he put it, 'be a potential disaster for S and plainly against her best interests.' Accordingly, it was in S's best interests to be protected from that risk by the grant of appropriate injunctive relief. Sumner J summarised his conclusions at paras [106]–[107]:

[106] ... The parents may well believe that marriage is in S's best interests. There is a powerful cultural motivation for this and a history of resistance to views other than their own. I cannot rely on their protestations to the contrary. S requires protection from family pressures drawn by cultural priorities when the parents' protection regrettably cannot be trusted. A protection against a risk that is neither understood nor accepted by those responsible for safeguarding S is no protection when faced with strong motivation to ignore the risk.

[107] In my judgment, the parents' lack of understanding and insight, their hostility to any interference as shown by the father, their lack of realism and logic, and their inadvertent admissions that they have marriage in mind persuade me that there is a real risk that they would carry this out. The evidence in its totality makes it, in my judgment, likely to a high degree. The consequences for S would be a real disaster.'

An injunction was needed, as Sumner J put it at para [109]: 'For S's safety and to prevent serious emotional and psychological harm to her'.

[99] Accordingly (see paras [3], [101]), Sumner J granted declarations that S lacked capacity to make a decision about whether or not she should marry and that it was not in the existing circumstances in her best interests that she should leave the jurisdiction of the court in view of the risk that her parents might arrange for her to be married in Pakistan. He also granted injunctions forbidding S's parents taking any steps in respect of any marriage of S or removing or taking any steps to remove S from the jurisdiction of the court, in each case without the leave of the court.

[100] Lest it be thought that there is some conflict between Sumner J's approach and certain views I expressed in *Sheffield* at paras [91]–[102], I ought to make clear that there is not. I remain of the view which I expressed in the *Sheffield* case, and for the reasons I there set out, that it is no part of the court's function in a case such as this to decide whether it is in a person's best interests to marry. But that does not, of course, mean that the court, if satisfied that someone lacks the capacity to marry, is debarred from considering whether it is their best interests to be exposed to an ineffective betrothal or marriage. Nor does it prevent the court concluding that such events would *not* be in their best interests and therefore should be prevented. The point was well made by Singer J in *Re SK* at para [4]:

‘If, therefore, she has been through or faces the prospect of going through a ceremony of marriage with which she is, in fact, not in agreement it would be a voidable marriage, but nevertheless one which might engender irreparable and severe physical and emotional consequences for its victim.’

I agree with that, just as I agree with Sumner J’s approach in *M v B, A and S (By the Official Solicitor)*.

[101] Two further points emerge from Sumner J’s judgment in *M v B, A and S (By the Official Solicitor)* [2005] EWHC 1681 (Fam), [2006] 1 FLR 117.

[102] First, he referred at para [109] to S’s rights under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and made it clear at para [112] that he was granting an injunction:

‘to protect S’s private life. I do so to ensure it is not jeopardised by her parents’ actions in seeking to arrange a marriage for her.’

I respectfully agree with that approach.

[103] The other point is one of wide general significance. Sumner J recognised (see para [108]) that this is a context in which the well known words of Lord Eldon LC in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 18 are as apposite today as they were almost 180 years ago:

‘it has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done.’

Lord Eldon LC continued, at 20, with the observation that the jurisdiction:

‘is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown around them.’

In common with Sumner J, I think that these principles are as equally applicable where the court is exercising its inherent jurisdiction in relation to vulnerable adults as when it is exercising its inherent or wardship jurisdictions in relation to a child.

The position of local authorities

[104] There is one final matter I must deal with before returning to the facts of the present case.

[105] Mr Gupta drew my attention to passages on pp 19 and 22 of *Young People & Vulnerable Adults Facing Forced Marriage: Practice Guidance for Social Workers* which assert that social services themselves cannot have a child warded. As it is put on p 22:

‘An application for wardship ... may be made by a relative, a friend close to the young person, or by ... CAFCASS ... Social services are not able to make a child a ward of court.’

Mr Gupta submits that this is simply wrong. I agree.

[106] A mere stranger or officious busybody cannot set the court in motion. But it is quite clear that in the case of the wardship jurisdiction, as in the case of the inherent jurisdiction in relation to adults (as also, indeed, in the case of an application for habeas corpus: see R Sharpe, *The Law of Habeas Corpus* at p222), anyone with a genuine and legitimate interest in the welfare of the individual in question has locus standi to bring proceedings. The reason is obvious. If the law were otherwise it might be powerless to give practical help to the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives.

[107] In the case of the inherent jurisdiction in relation to adults the law was laid down in *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, [1995] 1 FLR 1075, affirming [1995] Fam 26, [1995] 1 FLR 302. Since *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50 there have been many such cases brought by local authorities. The present is such a case.

[108] In the case of the wardship jurisdiction the principle is long established. A classic example is provided by *In Re D (A Minor) (Wardship: Sterilisation)*, where wardship proceedings were commenced by an educational psychologist, attached to the local authority educational department, in order to prevent the ward's mother having her sterilised.

[109] There is in principle, in my judgment, nothing to prevent a local authority commencing wardship proceedings or proceedings under the inherent *parens patriae* jurisdiction in an appropriate case, just as the local authority did here.

[110] What the learned authors may have in mind are the provisions of ss 91 and 100 of the Children Act 1989, but if this is indeed what they are thinking of they are, with all respect, mistaken. Section 91(4) provides that:

'The making of a care order with respect to a child who is a ward of court brings that wardship to an end.'

Section 100(2)(c) provides that:

'No court shall exercise the High Court's inherent jurisdiction with respect to children ... so as to make a child who is the subject of a care order a ward of court.'

Neither of these provisions has the effect of preventing a local authority applying to have a child made a ward of court, unless the child is already the subject of a care order; and in any event, they do not prevent a local authority invoking the inherent *parens patriae* jurisdiction (as opposed to the wardship jurisdiction) in relation to a child in care.

[111] It may be that what they have in mind is s 100(3), which provides that:

'No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.'

True it is that this requires the local authority first to obtain the permission of the court to invoke the inherent jurisdiction (which for this purpose includes

the wardship jurisdiction) but I find it hard to imagine that such permission would be refused in a case of suspected forced marriage. Quite the contrary. In my experience such permission is readily granted, typically at the initial ex parte hearing and at the same time as injunctions and tipstaff orders are made. Indeed, the present case is a good example. That, after all, is precisely what Baron J did on 14 July 2005.

[112] Mr Gupta has helpfully drawn my attention to the following note which appears at p 668 of *The Family Court Practice 2005* under the heading 'Inherent jurisdiction and forced marriages':

'It is submitted that, applying the above principles to the issue of forced marriages and having regard to the need in such cases for urgent, immediate and effective relief, the inherent jurisdiction is the only route available to safeguard and protect a "child" and to prevent the child from suffering significant harm, particularly by removal from the jurisdiction of the court. In such cases, there is often no effective interested party who is able to make the application other than the local authority. Therefore, the local authority should confidently apply for leave to invoke the inherent jurisdiction and the court's approach to such an application should be sympathetic and robust as in *Re A (Wardship: Jurisdiction)* [1995] 1 FLR 767; and *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542. Where the victim of the forced marriage and abduction is an adult the inherent jurisdiction should also be invoked on similar principles as those which apply in cases where the subject of the proceedings is unable to make the application personally due to some incapacity.'

I agree with that note. It accords with my experience of the current practice which is indeed, as it should be, sympathetic and robust.

Discussion

[113] This is a case in which it is plainly right, if have the power, that I should exercise a protective jurisdiction over SA.

[114] SA functions at the intellectual level of a 13 or 14-year-old. She has a reading age of about 7 or 8 and a verbal IQ that it is likely to be in the learning disability range. She is naïve and immature. She is able to comprehend what is said to her only if it is presented in British sign language. Her ability to convey her opinion in any medium other than British sign language, even in written English, is extremely limited. She can do so only with extreme difficulty.

[115] Communication between SA and her parents is necessarily very limited. I doubt that she would be able to understand her parents' wishes and plans in relation to her future or that they would be able to understand her own wishes and plans. Because of these communication difficulties, those who are likely to be making any proposals for SA's marriage – whether her parents or a future spouse – will not have the ability to know or ascertain what her response is. Nor will they be in a position to answer any questions she may raise.

[116] There is a further highly significant factor. As Dr P says, it is highly likely that SA would not understand the nuances of any conversations that were occurring around her, even if translated into British sign language. For

that reason, as Dr P points out, although SA may not be particularly suggestible, it would be extremely easy to mislead her. In that sense she is both suggestible and vulnerable.

[117] Moreover, given her overall level of understanding it is likely that SA may have significant difficulty understanding the possible implications of a specific marriage to a specific individual. For example, as Dr P discovered, SA has no understanding of the potential legal difficulties with regard to immigration if her intended husband was to be prevented from entering this country. If she could not understand the implications of this for the marriage, then she might not, in that particular instance, be making a fully informed choice.

[118] There is also the further problem which, understandably, greatly concerns both Dr P and the guardian. As Dr P put it, if SA was to find herself outside this country and in a situation where she was not able to communicate with those around her it is highly likely she would feel extremely isolated. The psychological implication of being in such circumstances and being extremely isolated would pose a significant risk to her future wellbeing and, I emphasise, to her mental health. As the guardian points out, SA would be very vulnerable in Pakistan. Because of her lack of hearing and speech she could be unaware of what was going on around her and of any plans being made in relation to her. She would be unable to seek assistance if she became concerned about what was going on. Moreover, her naivety and immaturity mean she might not even recognise any risk or danger that arose.

[119] It is against this background that the local authority became concerned earlier this year – in my judgment understandably and appropriately concerned – that SA might be about to be taken by her family to Pakistan to be married there to some unknown person, contrary to her wishes.

[120] In my judgment, SA is plainly a vulnerable adult. She is substantially handicapped by her disabilities. And, particularly because she is deaf and dumb, she may well be unable to take care of herself and protect herself against significant harm or exploitation if placed in unfamiliar surroundings or deprived of access to those able to communicate with and for her in British sign language.

[121] In these circumstances, given SA's physical disabilities and special needs, and particularly her difficulty in making her choices known to her family – indeed in making clear whether or not she is in fact consenting – and given also what has happened, I am satisfied that, even though SA has now reached her majority, she needs some element of continuing protection by the court in relation to the particular matter of marriage.

[122] SA will be able to give consent to a particular marriage only if she is provided with a full understanding of what is proposed. Specifically, I am satisfied that if her continued well being is to be assured:

- (i) any arrangements for SA to be married must be made through the medium of British sign language; and
- (ii) protective measures need to be put in place to ensure that SA is able to understand, and give her consent to, the terms of the specific marriage she is entering into, to ensure, in short, that she is giving a valid consent to any marriage which is being arranged.

[123] If such arrangements are not put in place then there is every reason to fear that steps taken in furtherance of those ends would be a series of acts to which she did not consent.

[124] In short, SA is a vulnerable adult who there is every reason to believe may, by reason of her disabilities, and even in the absence of any undue influence or misinformation, be disabled from making a free choice and incapacitated or disabled from forming or expressing a real and genuine consent.

[125] It follows that I have jurisdiction.

[126] Accordingly 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.

[127] I am satisfied that there is a pressing need to intervene to protect SA from the serious emotional and psychological harm which she would suffer if she went through a ceremony of marriage with which she did not, in fact, agree, or if she was to find herself isolated and helpless in Pakistan in the kind of circumstances understandably feared by Dr P and the guardian.

[128] I am therefore going to make an order essentially in the terms proposed by Mr Gupta. I agree with Mr Gupta that an order in this form will ensure that SA is properly informed, and in a manner she can understand, about any specific marriage prior to entering into it.

[129] I emphasise that I make this order with two different objects in mind.

[130] In the first place, as Mr Gupta correctly submits, there is here, for the reasons I have already given, a pressing need to afford SA continuing protection by means of appropriately crafted injunctions. That protection, as Sumner J pointed out, is needed, quite apart from anything else, to protect SA's private life, in particular to ensure that her private life is not jeopardised by her parents' actions in seeking to arrange a marriage for her. In striving to meet this objective I am, in other words, giving effect to the court's duties under Art 8 of the Convention.

[131] But that object, important though it undoubtedly is, stands merely as a means to an ultimately more important end. 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. Like Singer J, 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 with Ms Hutchinson 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.

[132] My ambition is that SA should lead a happy and fulfilled life as a woman, wife and mother, and it is with the aim of facilitating and achieving this ambition that I exercise my powers under the court's inherent jurisdiction.

[133] 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.

[134] I confess to some satisfaction that the law enables me to act in this way, for I agree with Thorpe LJ and Bennett J that it would be a sad failure were the law to determine that I have no jurisdiction to investigate and act in SA's best interests – no jurisdiction to ensure that the protection which she received in her minority is not summarily withdrawn – simply because she has attained the age of 18. SA as a young adult remains as vulnerable as she was when still a child. Why then should SA, as a vulnerable adult, be worse off than she would have been had she remained an equally vulnerable child?

Conclusion

[135] I conclude that I have jurisdiction, that I should exercise jurisdiction and that I should make an order essentially in the terms proposed by Mr Gupta and supported by Ms Hutchinson.

Order

[136] I accordingly made an order in the following terms:

'IT IS ORDERED THAT with effect from midnight on 9 December 2005 and thereafter until further order—

(1) The first and second defendants are prohibited (whether by themselves or by instructing or encouraging any other person) from—

- (a) threatening, intimidating or harassing [SA];
- (b) using violence on [SA];
- (c) preventing [SA] from communicating alone (with a British sign language interpreter) with her solicitor.

(2) The first and second defendants are further prohibited (whether by themselves or by instructing or encouraging any other person) from—

- (a) applying for any travel documents for [SA];
- (b) removing or attempting to remove [SA] from the jurisdiction of England and Wales;

unless they have first obtained her express written consent, translated and explained in British sign language and notarised before either her solicitor Ms Hutchinson of Dawson Cornwell or (if necessary) Ms Hutchinson's duly-appointed agent.

(3) The first and second defendants are further prohibited (whether by themselves or by instructing or encouraging any other person) from causing, making arrangements for, or permitting [SA] to be married unless the following preconditions have first been satisfied—

- (1) Her express written consent, translated and explained in British sign language and notarised before either her solicitor Ms Hutchinson of Dawson Cornwell or (if necessary) Ms Hutchinson's duly-appointed agent.
- (2) The receipt by Ms Hutchinson of Dawson Cornwell of the signed notarised consent of the bridegroom that he consents to—

- (a) allowing [SA] to return to [her home town] in any event within four months of the marriage ceremony whether or not he is granted immigration clearance to enter the UK;
- (b) residing in [her home town] with [SA] after the marriage ceremony;
- (c) allowing a visit by a worker from the British High Commission in Islamabad within 4 months after the marriage ceremony to interview [SA] alone (with a British sign language interpreter to be arranged through her solicitor Ms Hutchinson of Dawson Cornwell) in order to ascertain whether she wishes to return to England and Wales.

(4) A Power of Arrest is attached to paragraph 1(b) above until 1 June 2006.

AND IT IS HEREBY DIRECTED for the avoidance of doubt that the notarising process referred to in paragraphs 2 and 3 above requires that the relevant notary, having first confirmed the deponent's identity, ensures that the deponent (whether [SA] or her bridegroom) fully understands and voluntarily consents to the document which she or he is signing.

AND IT IS FURTHER ORDERED that—

- (5) The Tipstaff do forthwith release the first and second Defendant's passports to their respective bearers (either directly or by releasing the same to the local authority its servants or agents or to Dawson Cornwell for immediate transmission by them to the first or second defendant as the case may be).
- (6) The Tipstaff do forthwith release [SA]'s passport to her solicitor Ms Hutchinson of Dawson Cornwell (the passport not to be released by Ms Hutchinson to her client unless she has first obtained her express written consent, translated and explained in British sign language and notarised before either Ms Hutchinson or (if necessary) Ms Hutchinson's duly-appointed agent).
- (7) There be no order as to costs save detailed assessment of all publicly assisted parties' costs.
- (8) The third defendant is to be at liberty to apply to vary or discharge this order.'

[137] It will be recalled that SA's mother raised the question of how long the order should remain in force. It is not possible to define this with any precision, though in reality it will need to remain in force indefinitely, probably, in effect, until SA marries. SA should have liberty to apply. The power of arrest will last for 6 months, until 1 June 2006.

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Munby J

Re SA

(FD)

[2006] 1 FLR

Solicitors: *Local authority solicitor* for the petitioner local authority
Dawson Cornwell for the third defendant SA

PHILIPPA JOHNSON
Law Reporter