Denning Law Journal 2007 Vol 19 pp 258-269
CASE COMMENTARY

VULNERABLE ADULTS: THE INHERENT JURISDICTION AND THE RIGHT TO MARRY

Re SA (Vulnerable Adult with Capacity: Marriage) ([2006] 1 FLR 867)

Mary Welstead[*]

THE FACTS

Ms SA was an eighteen year-old deaf and mute young woman. She had minimal sight in one eye, the intellectual capacity of an early teenager, and the reading age of a seven year-old. Her family (mother, father and three brothers) came from a Pakistani Muslim background; they spoke primarily Urdu and Punjabi. Ms SA was neither able to lip-read nor understand either of these languages; her only means of communication was through British Sign Language (BSL) which she had learned in a specialist educational unit for deaf children. None of her family had learned BSL; thus, communication between Ms SA and her family was very limited. Her family wished to arrange, or possibly even force her into, a marriage in Pakistan. She was happy to have an arranged marriage but wanted the right to veto any potential husband.

Prior to her 18th birthday, the local authority had applied to make Ms SA a ward of court because it feared that she might be forced into marriage against her will. The court under its inherent *parens patriae* and wardship jurisdictions had granted protective injunctions to prevent any possibility of a forced marriage. The local authority and the guardian remained concerned that Ms SA, as a vulnerable adult, would require continued protection when the wardship ended when she attained the age of majority. It therefore applied successfully to the court to invoke the inherent jurisdiction of the High Court and obtain a protective order to safeguard Ms SA's future welfare.

THE RELEVANCE OF THE DECISION IN *RE SA*

[*] BSc (Econ) (Lond), MA, PhD (Cantab), DipEd (London): Visiting Professor and Director of the University of Buckingham Foundation.

The decision in *Re SA* is important for a number of reasons. First, it confirms that the inherent jurisdiction is an extremely broad-based jurisdiction which has the capability of protecting vulnerable adults' interest in the same way as the wardship jurisdiction does for children. Munby J, in a lengthy and detailed judgment explained the extensive development of the inherent jurisdiction since the House of Lords rediscovered its potential in Re F (Mental Patient: Sterilisation) ([1990] 2 AC 1), and the current scope of the doctrine. In Re F, the House of Lords held that it was open to the court under the inherent jurisdiction to make a declaration that the proposed sterilisation operation was in a mentally incompetent female patient's best interests. She could not give consent to the surgery herself yet without the proposed operation, as a sexually active adult, she was at risk of an unwanted, and potentially very frightening, pregnancy. She would be totally incapable of caring for any child.

Second, the decision is of interest because it raises further important and overlapping questions including the nature and circumstances of the requisite mental capacity of a vulnerable adult who wishes to marry; the competing interests of the rights to self determination under Arts 8 (the right to respect for family and private life), 12 (the right to marry), and 14 (the right to enjoy the rights under the Convention without discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR 1950) versus the need to protect vulnerable adults from exploitation from prospective partners and family members, and, finally, the problematic issue of recognising the value of arranged marriages for vulnerable adults in cultures where such marriages are considered to be the norm, whilst ensuring that parties are protected from exploitation in the form of forced marriages by their families or by third parties.

According to Munby J, a vulnerable adult is not a term of art; it is descriptive not definitive; indicative not prescriptive. It includes anyone:

> "… who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be 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."

THE DECISION IN *RE SA*

Once Ms SA had attained the age of 18, Munby J was faced with the dilemma of how to protect her from an inappropriate marriage to which she did not freely consent. There were three possible solutions to this dilemma.

First, he could have found her to be mentally incapable of contracting a

valid marriage. This he was not anxious to do; his aim was to ensure, if at all possible, that she should lead a happy and fulfilled life as a woman, wife and mother and, thereby, safeguard her rights under the ECHR 1950. He explicitly stated that his 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, (see below in Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend) ([2005] 2 FLR 230)) I emphasise the importance these courts place on the right of the individual to exercise choice in this most intimate area of decision-making."

Second, he could find that Ms SA had the mental capacity to marry and in so doing the court would have no jurisdiction or role in protecting her from the risk of an inappropriate if not forced marriage. Although such a marriage would be voidable at her request (Matrimonial Causes Act 1973 s.12 (c)),if she were to make such a request , the courts have been reluctant to allow an event to happen which would later require rectification with all the attendant possibilities of destabilising the vulnerable person still further (see below *M v B, A and S (by the Official Solicitor*) ([2006] 1 FLR 117).

Third, he could find that she could be regarded as a vulnerable adult with capacity to marry but requiring the protective power of the inherent jurisdiction to safeguard her best interests in the same way as they had been protected by the wardship jurisdiction during her minority. Munby J decided to take this third route. Appropriately drafted injunctions, he thought, could

> "… 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."

CAPACITY TO MARRY

The psychologist who evaluated Ms SA, assisted by a BSL interpreter, acknowledged the problems in determining the nature of her mental capacity. The nature of psychological testing uses both verbal and non-verbal communication; the former is inappropriate for a deaf person who is only capable of understanding non-verbal communication, and the validity of the results was therefore likely to be compromised.

Munby J found the psychologist's report to be so 'remarkable, sympathetic and illuminating' that he quoted in detail from it. Ms SA's non-verbal IQ was found to be in the borderline range of ability and her verbal ability, although incapable of assessment, was assumed to be in the learning disability range. The psychologist, in his discussion of her suggestibility, found that

> "…it is highly likely that the nuances of any conversation 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 her and in that sense she would be both suggestible and vulnerable."

Thus, Ms SA's ability to understand information, and express her own views, was severely limited. However, the psychologist concluded that Ms SA had

> "…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 be legally ended in divorce."

However, he drew attention to the fact that although Ms SA understood the concept of marriage in general, she did not appear to be able to grasp the ramifications of the specificities of her proposed marriage. She was clear in her own mind that she wanted to have an arranged marriage to an English speaking Muslim man, and that she would probably have to go to Pakistan to meet him. She was adamant that any potential husband would have to return with her to the UK as her fiancé and marry her in the UK. She expected to have the right of veto over whom she might marry and not be forced into marriage. However, according to her social worker and her guardian, Ms SA was very naive and immature; the psychologist also recognised this. He found that she was unable to comprehend the very real possibility that her parents might take her to Pakistan, organize her marriage, whilst she was there to a man who would not, or could not, because of immigration rules, return with her and live in the UK. If that were to happen, Ms SA would be unable to express her concerns to anyone in Pakistan or obtain help to return to the UK. She might then be compelled to remain in a country where she would be unable to communicate with anyone in BSL, including the man she might have been forced to marry.

Such a possibility would result in her leading an isolated existence and her mental health would suffer severely.

To the reader, the psychologist's conclusions, in the light of his and the social worker and guardian's views of Ms SA's general mental ability, may seem somewhat confusing. However, Munby J, purported to follow his own test of mental capacity to marry which he had expressed in *Re E (An Alleged Patient); Sheffield City Council v E and S* ([2005] Fam 326) and held that Ms SA fulfilled the requirements of that test and did have the capacity to marry.

MENTAL CAPACITY IN *RE E*

In Re E, Munby J stated the fundamental requirement that any person wishing to marry must have the mental capacity to do so. Without such capacity, any marriage would be voidable (Matrimonial Causes Act 1973 s.12(c)). In his view, the general rule of English law relating to capacity in any context is to 'understand the nature and quality of the act'. Thus, the test for establishing mental capacity relating to marriage, requires a person wishing to enter into a valid marriage to know that he or she is taking part in a marriage ceremony and understands the words of the ceremony; he or she must also be able to appreciate the responsibilities which stem from the contract of marriage agreed to in that ceremony. According to Munby J, the marriage contract confers on the man and woman the status of husband and wife. From this status flow consequences. The parties are expected, *inter alia*, to live together, love only each other as husband and wife, and be responsible for each other's care and comfort.

Given the nebulous nature of the State determined English marriage contract, it might be argued that Munby J's test is a very high hurdle for a mentally vulnerable adult to leap. After all, it is not always easy for a mentally competent adult to appreciate the full significance of the marriage contract, which is an unwritten one, and can only be compiled from a reading of case law and statute, (primarily, relating to marital breakdown). This is not the reading matter of most couples who are about to embark on marriage, and certainly not of a vulnerable adult on the borderline of learning ability with a reading age of a seven year-old.

However, Munby J did not share this view. He maintained, on the authority of *Park v Park* ([1954] P 112), that the contract of marriage is essentially a very simple one, and does not require a high degree of intelligence to comprehend it. He was, quite understandably, anxious to avoid discriminating against those of limited mental ability, whose lives could might benefit substantially from marriage, were the test of capacity to marry be set too high. However, he did not question the realism of her expressed views relating to whom, and how, she wished to marry nor did he acknowledge the dilemma in

finding that Ms SA had the mental capacity to marry whilst at the same time accepting the psychologist's finding that she had a mental age of thirteen. He simply stated that the question whether a person has capacity to marry is a generalized one; it does not relate to the implications of marriage to, or wisdom in marrying, a specific person. No court may rule on whether it is in a person's best interest to marry any particular partner, and no court may give consent to marriage on behalf of anyone who lacks capacity to give his or her own consent.

The psychologist in *Re SA* had also found that Ms SA did not have the capacity to conduct litigation. However, Munby J held that capacity is issue specific and that a person could lack mental capacity with respect to certain matters but have capacity in other areas of her life. In particular, he accepted that Ms SA could have the mental capacity to marry but lack the mental capacity to litigate in relation to that marriage.

THE INHERENT JURISDICTION

It was evident that Ms SA would require help if she were to be allowed to marry on her own terms. Munby J proceeded to consider the nature of the inherent jurisdiction and its capacity to protect vulnerable adults. In his view, the jurisdiction is, in both substance and reality, the same for vulnerable adults as the wardship jurisdiction is for children. He described it as a protective jurisdiction which is based on the common law doctrine of necessity. Although its use in the past was primarily in relation to the medically incompetent and medical treatment, it's application was, he thought, theoretically, limitless. He maintained that since Re F, the potential of the inherent jurisdiction had been developed and was likely to continue to be extended in accordance with the courts' responsibilities to safeguard human rights under the ECHR 1950.

Munby J began his analysis of the non-medical decisions, in which the inherent jurisdiction had been invoked, with the case of *Re C (Mental Patient: Contact)* ([1993] 1 FLR 940). Eastham J, in *Re C*, had no difficulty in giving an affirmative answer to the preliminary question of whether the inherent jurisdiction could be used to grant a mother staying contact with her mentally ill adult daughter, and an order that the father, with whom the daughter was living, must not obstruct such contact. The daughter would otherwise be, in effect, a prisoner of her father. Eastham J explained

> "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 [of an order under the inherent jurisdiction]"

In *Re T (Adult: refusal of Treatment)* ([1993 Fam 95]), the Appeal Court accepted that it could invoke the inherent jurisdiction to determine whether a normally mentally competent patient could be deemed to be 'vulnerable' because his or her consent, or lack of consent, to treatment might have been compromised or vitiated by shock, fatigue, pain, drugs, or the undue influence of another.

In *Re G (An Adult) (Mental Capacity: Court's Jurisdiction)* ([2004] All ER (D) 33) an adult woman had a history of mental illness. By the time of the full hearing for a continuation of the protective framework which had been put in place by interlocutory orders, the woman's mental capacity had improved significantly. Those orders had had the effect of protecting her from her parents' overbearing influence and demands, and, as a result, her mental health had improved. Although Ms G no longer needed the orders, were they to be removed, she was likely to revert to her previously disturbed state. Bennett J explained persuasively and sensibly that

> "…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 … 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."

In *M v B, A and S (by the Official Solicitor*) ([2006] 1 FLR 117), Sumner J used the inherent jurisdiction to declare that Ms S lacked capacity to marry. He made orders to prevent the risk of her parents taking her to Pakistan for an arranged or a forced marriage. These would prevent the risk of Ms S suffering serious emotional and psychological damage. Although any such marriage would clearly be voidable at the request of either party, the court regarded it as preferable that it was better to prevent damage in the first instance than to attempt to repair the harm incurred after the event.

Munby J, finally, considered the decision in *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* ([2005] 2 FLR 230). This illustrates the use of the inherent jurisdiction, in perhaps the most innovative of all ways, to protect a potentially vulnerable young adult woman. She was not mentally incapacitated in the accepted sense of the term but was regarded as vulnerable because of her cultural background which led to pressures being put upon her to marry in conformity with her parents' wishes.

The Foreign and Commonwealth Office had learned that the woman, who lived in England and was of Bangladeshi origin, was somewhere in Bangladesh, probably against her will, because her family, consisting of her parents and brothers, wanted to force her to marry there. The Foreign and Commonwealth Office requested that a solicitor take action on her behalf; the woman knew absolutely nothing of the court proceedings.

Singer J explained his view 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."

He held that the jurisdiction could be exercised even in the absence of the vulnerable person, and without their knowledge, and proceeded to make orders and issue directions to discover whether the woman was being forced to marry and/or remain in Bangladesh against her will. Her family was ordered to allow her to be interviewed at the High Commission in Bangladesh to find out what she really wanted to do. The order included injunctions restraining the family from arranging any marriage or threatening or using violence against the woman. Such an order, Singer J believed, would encourage others outside the family to cooperate with the High Commission. Other orders required the woman's relatives, who were living in England, to appear before the High Court. The orders had the desired effect. The relatives communicated with the woman and her family in Bangladesh. The woman was interviewed in Bangladesh by a British Consular officer. She returned to England and explained that she did not need the court's help and the proceedings came to an end.

THE COMMON THREAD

Munby J concluded that all the decisions relating to the inherent jurisdiction had a common thread running through them. He explained that

> "The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of their capacity to make the relevant

> decision, 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."

WHO MAY APPLY?

According to Munby J, applications for orders under the inherent jurisdiction may be made by anyone, including a local authority, who is not merely a stranger or an officious busybody, with a genuine and legitimate interest in the vulnerable adult's welfare. It is not restricted to friends or relatives; the latter may well be the persons from whom the vulnerable adult most needs protection.

THE ORDER

Munby J's ambition was to ensure that Ms SA had the best possible chance of future happiness by being allowed to marry and have children, and on her own terms. To that end, he made an order which would last until Ms SA married or applied herself for it to be discharged. The terms of the order were detailed and extensive:

The parents were prohibited from

(a) physically harming, threatening, intimidating or harassing their daughter by themselves or through third parties;

(b) preventing their daughter from communicating, via a BSL interpreter, with her solicitor;

(c) applying for travel documents for their daughter, either by themselves or through third parties;

(d) removing their daughter from the jurisdiction of England and Wales without the express written consent, translated into BSL and notarized by their daughter's solicitor;

(e) making arrangements for their daughter's marriage either by themselves or through third parties unless:

i. the daughter gives her voluntary express written consent, translated and explained in BSL to her and notarized by her solicitor;

ii. the future bridegroom gives his voluntary written notarized consent to allow Ms SA to return to her home town within 4 months of the marriage ceremony regardless of whether he has been given immigration clearance for himself, and, if he is given immigration clearance, to live in her home town with her; allow a visit by a worker from the British High Commission in Pakistan to visit within 4 months of any marriage ceremony to interview Ms SA with a BSL interpreter to ascertain whether she wished to return to England.

Ms SA's passport was ordered to be deposited with her solicitor and not to be released to her unless she has given her express written consent, translated and explained in BSL and notarised by the solicitor

CONCLUSIONS

The decision in *Re SA* demonstrates a sensitive attempt by Munby J to deal with the cultural issue of arranged and, potentially, forced marriages, in the particularly difficult context of a mentally vulnerable adult. The decision shows a respect and support for arranged marriages where they are an important part of cultural expectations, whilst at the same time taking a strong stance against forced marriages. Adult offspring of first generation immigrants often live divided lives across two cultures. Outside home, they have adapted to a different set of cultural values from those which prevail within the home. It may prove difficult for them to protest against their parents' wishes, relating to marriage, which conflict with their own. They may require help to cope with the problem. The inherent jurisdiction is clearly, at least theoretically, a useful, yet perhaps underused tool, within the panoply of solutions which have been proposed to help eliminate forced marriages (see http://www.fco.gov.uk).

Munby J's judgment is not, however, entirely without problems. Although his aim was to protect Ms SA's rights under the EHCR 1950, the order may actually limit her ability to safeguard those rights. First, it is evident that she will require her parents' help in order to marry yet the terms imposed on them under the order may, in effect, impede them from arranging a marriage in Pakistan. Potential husbands with different cultural expectations about marriage may have difficulty in understanding the requirement that they must sign, and have notarized, legal documents relating to their future life with Ms SA. Second, the nature of the order inevitably imposes significant limits on Ms SA's right to privacy. Although the court held that she could apply for the order to be discharged, it is questionable whether any court would do so if it believed her to be still at risk.

Finally, the decision draws attention to the problematic nature of mental

capacity to marry. Munby J glossed over the dilemma of how an adult with the mental capacity of a thirteen year-old can be said to understand the complexities of the contract of marriage. He simply held that she had capacity. Had he been prepared to extend the inherent jurisdiction still further to encompass decision making with respect to whether a specific marriage was in a vulnerable person's best interests or for the court to consent to marriage on a vulnerable person's behalf, he could have avoided stretching the test of capacity to marry to its limits. Such a development would have improved the lives of the many mentally incapacitated adults who could benefit from both the emotional and practical advantages which marriage can offer. They are currently denied the benefits of marriage because of the limits placed on the ambit of the inherent jurisdiction. The inherent jurisdiction already gives the court the power to prevent an incapacitated person from entering into marriage and probably the power to help mentally incapacitated persons, who have entered into voidable marriages, to escape from them. If a voidable marriage can be shown to be damaging to the best interests of the mentally incapacitated spouse, it would be unacceptable to leave him or her trapped in that marriage. Without the aid of the court, such persons would find it impossible to apply for a decree of nullity against their spouse's will.

It remains for another court to be courageous enough to develop the inherent jurisdiction still further.