Case Law

# Inherent jurisdiction and vulnerable adults: Redcar and Cleveland BC v PR [2019] EWHC 2305 (Fam) and Wakefield MDC v DN [2019] EWHC 2306 (Fam)

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## Introduction

The inherent jurisdiction of the High Court, sometimes referred to as the "great safety net", exists to fill gaps left by the law. Historically, in relation to adults, the courts had developed this jurisdiction primarily to protect those lacking decision-making capacity. As a result of the Mental Capacity Act 2005 (MCA), much of the inherent jurisdiction has been displaced in relation to mental incapacity. Nevertheless, the inherent jurisdiction continues to be used in cases of adults who have capacity but who are vulnerable.

Cases involving the inherent jurisdiction often raise extremely challenging issues, and the outcomes invariably have significant and far-reaching implications for the person who is the

subject of the application. For a fuller analysis of the inherent jurisdiction, see Community Care Inform's guide to the inherent jurisdiction of the High Court and vulnerable adults.

The judgments in *Redcar and Cleveland BC v PR* and *Wakefield MDC v DN*, which were handed down on the same day by the same judge (Mr Justice Cobb), considered different aspects of the inherent jurisdiction. The first considered the circumstances in which orders can be made to regulate the conduct of the vulnerable adult. The second looked at the circumstances in which the inherent jurisdiction can be used to authorise a deprivation of liberty.

### Points for practice

- Before a local authority makes an application under the court's inherent jurisdiction to regulate the conduct of the vulnerable adult by way of injunction, it must consider (and support with evidence) whether the person:
  1. is likely to understand the purpose of the injunction;
  2. will receive knowledge of the injunction; and
  3. will appreciate the effect of breach of that injunction.
- The inherent jurisdiction is targeted at those whose ability to make decisions has been compromised by matters other than those covered by the MCA.
- The inherent jurisdiction cannot be deployed to deprive a capacitous adult of their liberty.
- A person can retain legal capacity to make decisions even when faced with stark choices (including a custodial sentence).
- Anticipatory declarations can be made under the MCA in order to deal with future incapacity and best interests determinations.

### Case summaries

## *Redcar and Cleveland Borough Council v PR*

**Case date: 2 July 2019**

PR, 32, had been living at home with her parents and a sibling. She suffered a significant deterioration in her mental health and was admitted as a voluntary patient to hospital. During this time, she disclosed aspects of her home life with her parents which gave professionals considerable concern about her future wellbeing should she return there (the precise details of the allegations were not included in the judgment).

A capacity assessment determined that she had capacity to make decisions about returning home and about her contact with others (including her parents). However, she was also extremely confused and vulnerable, and there was a suggestion that parental influence over her was preventing her from making true choices. The local authority concluded that urgent intervention was justified and sought "protective orders" from the High Court under its inherent jurisdiction.

PR had no knowledge that the application was being made; the authority felt she would be "increasingly anxious" if she knew of the application. Over a period of three weeks, Judge Hallam made three interim orders, and the case was remitted for a full hearing. The orders included restraining PR from living with her parents, and restraining her father from contacting PR.

PR was eventually told about the proceedings and while initially upset, was co-operative with plans to move her from the hospital to accommodation provided by the local authority. The move took place without any problems. PR's parents also agreed to have only limited contact with PR, and not to persuade her to return home. The parties all agreed that the orders made by Judge Hallam under the inherent jurisdiction should be discharged.

## *Wakefield Metropolitan District Council v DN*

**Case date: 8 August 2019**

DN, 25, had a severe form of autism and was in receipt of aftercare support under section 117 of the Mental Health Act 1983. Occasionally, DN experienced 'meltdowns', which tended to occur when he was particularly stressed, anxious and/or aroused. This had led to assaults on his family, friends, the police, and the general public, as well as sexualised behaviours.

Following conviction for a range of public order and related offences, he was given a community order with a two-year mental health treatment requirement under the Criminal Justice Act 2003. He resided at a supported living complex (Stamford House), where the community order gave staff powers to restrict, but not deprive him of liberty. He had his own flat and received 12 hours of direct care per day (1:1 or 2:1). However, it was clear that the regime went further than restricting DN of his liberty.

DN had capacity to make all relevant decisions in his life, such as about his residence and care, and was clear that he would like less restriction on his life, but wished the placement to continue. The local authority and clinical commissioning group felt that DN was unable to give consent to the care regime at Stamford House, due to his vulnerability and circumstances. They therefore applied to the High Court, seeking the court's approval under the inherent jurisdiction for the care plan and the deprivation of liberty.

## Legal framework

As noted above, the courts have been increasingly prepared to deploy the inherent jurisdiction to protect vulnerable adults who do not lack the relevant decision-making capacity. One of the key cases in this respect was *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942, [2006] 1 FLR 867 – summarised in Inform Adults' guide to the inherent jurisdiction.

This decision confirmed 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".

Subsequent case law has established the ability of the court to use the inherent jurisdiction to "facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions" (*LBL v RYJ* [2010] EWCOP 2665 [2011] 1 FLR 1279). This case is also summarised in the guide to the inherent jurisdiction.

The court has power to make a wide range of declaratory, injunctive, and other orders. Frequently, the inherent jurisdiction will be used on an interim "holding" basis where, for example, there is initial evidence of vulnerability, an immediate 'necessity' for intervention, but perhaps insufficiently robust or authoritative evidence of capacity or vulnerability. In some cases, judges have been prepared to make orders against the vulnerable adults themselves in proceedings under the inherent jurisdiction (for example, to stop them from having contact with a third party due to safeguarding reasons).

In some cases the inherent jurisdiction has been used to authorise deprivation of liberty within the meaning of Article 5 of the European Convention on Human Rights (see the guide to the inherent jurisdiction for a summary of the relevant case law). In *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam) it was clarified that for the inherent jurisdiction to be used to justify deprivation of liberty, the following minimum requirements must be satisfied in order to comply with Article 5:

- The deprivation of liberty must be authorised by the court on application made by the local authority and before the detention commences.
- Except in cases of urgency or emergency, the evidence must establish 'unsoundness of mind' of a kind or degree warranting compulsory confinement. In other words, "there must be evidence establishing at least a prima facie case that the individual lacks capacity and that confinement of the nature proposed is appropriate".

In addition to the inherent jurisdiction, the law does in certain cases provide alternative ways of protecting vulnerable adults. For example, the following may be relevant where there is harmful behaviour within family relationships:

- section 42 of the Family Law Act 1996 (non-molestation orders);
- section 76 of the Serious Crime Act 2015 (which creates a criminal offence of controlling or coercive behaviour where A and B live together and "are members of the same family");
- the Protection from Harassment Act 1997.

However, the significant difficulty with such powers is that, generally, they depend on the willingness of the person to initiate, or support, the proceedings. In practice, the person may well be reluctant to do so.

Under section 207 of the Criminal Justice Act 2003 the criminal courts can issue a community order with a mental health treatment requirement if (among other matters) the defendant has "expressed his willingness to comply with such a requirement". If the person fails to comply with the order without reasonable excuse, schedule 8 establishes a process whereby ultimately the matter can be laid before a court which has the power to, in essence, impose more onerous requirements, impose a fine, or re- sentence for the original offence(s).

Section 2 of the MCA provides that a person lacks capacity if "at the material time" they are unable to make a decision for themselves. As to when is the "material time", paragraph 4.4 of the code of practice provides that "an assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general" (see also paragraphs 4.26-4.27 of the code of practice). Section 2(2) emphasises that it does not matter whether the impairment or disturbance is temporary or permanent.

In some cases the court is able to make anticipatory declarations of capacity and best interests under section 15 and 16 of the MCA. The decision in *United Lincolnshire Hospital NHS Trust v CD* [2019] EWCOP 24 sets out the form and circumstances in which an anticipatory declaration may be appropriate. This case is summarised in Inform Adults' quick guide to fluctuating capacity and the law.

## Decision of the court

### *Redcar and Cleveland Borough Council v PR*

Given that the parties had reached agreement as to the way forward, there was no need for the court to determine any of the allegations made. The main issues were whether the

inherent jurisdiction should have been exercised in relation to PR at all, and if so, whether orders should have been against PR herself to prevent her from having contact with her parents.

Mr Justice Cobb confirmed in his judgment that it had been legitimate for Judge Hallam to have exercised the inherent jurisdiction to protect PR when the application was first made, while the situation was being assessed. In particular, the alternative statutory remedies would not have offered PR the level of protection she needed, since her co-operation with the relevant statutory processes was unlikely.

Mr Justice Cobb also accepted that PR had appeared to be a vulnerable person because of her range of mental health difficulties, and she was believed to be susceptible to coercive or controlling influence at home. He therefore observed: "When judges are presented, as Judge Hallam was, with situations of this urgency and apparent need, there is a strong imperative to oblige the applicant with an order" (paragraph 39).

Mr Justice Cobb also considered – and rejected – the argument that PR had been deprived of her liberty as a result of the order. The evidence revealed that she was "perfectly acquiescent" in the move, had not objected, and seemed to settle reasonably easily. Significantly, Mr Justice Cobb added that "had there been a deprivation of liberty, I would have been loath to endorse that state using my discretionary powers under the inherent jurisdiction" (the reasons for this were explained in his judgment in *Wakefield CC v DN* – see below).

One of the orders made by Judge Hallam had restrained PR from living with and having contact with her father. While Mr Justice Cobb accepted there was precedent in the case law of judges making orders against the vulnerable person themselves, he preferred the argument that it was illogical for the court to conclude that PR needed the protection of the court, yet required her, by order, to refrain from doing something which she wanted to do, backed with the punitive force of an injunction.

In such cases, the ability to understand the order becomes crucial. If the person understands the purpose of an injunction, no problem arises, and an interim order might be made while waiting for evidence. But in this case "there was sufficient evidence that PR was confused in her thinking about her immediate future and/or was possibly being coerced, and thus unable to make a decision of her own free will; she was also suffering from a possible mental disorder". Accordingly, it would have been "difficult for the court to conclude that any attempt to return to live with her parents in breach of the injunction would be a decision that could be classified as deliberate".

Mr Justice Cobb approved the following comment that: "Injunctive relief…may only be granted to those amenable to its jurisdiction and it must be capable of being put into effect…the injunction must serve a useful purpose and have a real possibility of being enforced in personam" (paragraph 43). He also advised that before a local authority makes an application under the court's inherent jurisdiction to regulate the conduct of the person

by way of injunction, it should be able to demonstrate (and support with evidence) that it has appropriately considered whether the person:

- is likely to understand the purpose of the injunction;
- will receive knowledge of the injunction;
- will appreciate the effect of breach of that injunction.

If the answer to any of these questions is in the negative, the injunction is likely to be ineffectual, and should not be applied for or granted as no consequences can truly flow from the breach.
No further substantive order was made and the proceedings were ended.

## *Wakefield Metropolitan District Council v DN*

On the facts, Mr Justice Cobb concluded that DN was not a "vulnerable adult" for the purposes of the inherent jurisdiction. He did not find that DN's decision making in relation to his residence at Stamford House had been "vitiated" or so overborne by his circumstance that he should be regarded as requiring the intervention of the High Court exercising its inherent jurisdiction. It was recognised that DN faced a stark choice in the court when presented with the prospect of a custodial sentence if he had not accepted a community order, but this did not disable him from making a free choice.

In reaching this conclusion, Mr Justice Cobb also noted that it would "undermine the ethos of the sentencing regime if I were to find…that the combination of mental ill-health and the stark alternative of custody were to create an atmosphere or context of coercion, constraint or other disabling condition as to vitiate the apparent 'willingness' of the offender 'to comply with [the Mental Health Treatment Requirement]'."

Mr Justice Cobb also concluded that the inherent jurisdiction should not be used to deprive DN of his liberty. He was satisfied that DN was not a person of 'unsound mind' for the purposes of Article 5. He also pointed to (among other matters) strong judicial dicta to the effect that the inherent jurisdiction should be used for "facilitative rather than dictatorial" reasons and that *Re PS* provided no support for the use of the inherent jurisdiction to deprive a capacitous adult of their liberty (on both points see above).

Finally, Mr Justice Cobb agreed to make anticipatory declarations as to DN's capacity to make decisions about residence and/or care (and if appropriate his best interests) under sections 15 and 16 of the MCA. This would cover occasions when he has 'meltdowns' and is unable to make capacitous decisions. The judge observed: "It seems to me that the outcome of an anticipatory declaration would provide a proper legal framework for the care team, ensuring that any temporary periods of deprivation of liberty are duly authorised and thereby protecting them from civil liability."

Since DN was currently being deprived of his liberty, it was recognised that the local authority and clinical commissioning group would need, urgently, to discuss and implement

changes to his care regime at Stamford House. In particular, those aspects which deprived him of his liberty (and to which he did not agree) would need to be relaxed. It was also recognised that if agreement could not be reached about some aspects of the regime, the local authority and clinical commissioing group may in the circumstances terminate the placement, which could have implications in the criminal process under schedule 8 to the Criminal Justice Act 2003 (see above).

Mr Justice Cobb emphasised that it was important that DN recognised the implications of a refusal. He suggested it would be much better for DN to build on the progress he has made at Stamford House.

## Court Reference

[2019] EWHC 2305 (Fam) and [2019] EWHC 2306 (Fam), High Court, Mr Justice Cobb

## Barristers

Redcar and Cleveland Borough Council v PR: Simon Burrows and Fay Collinson (for the local authority); Nageena Khalique QC and Alexander Ruck Keene (for PR); Ella Anderson (for the father of PR); and Jacqueline Thomas (for the mother of PR). Wakefield Metropolitan District Council v DN: Brett Davies (for the local authority and CCG), Neil Allen (for DN); and John McKendrick QC (for DN's mother).