IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

AND IN THE MATTER OF AC

ADVICE AS TO THE JURISDICTION OF THE COURT OF PROTECTION/HIGH COURT TO TAKE STEPS IN RELATION TO AC

Introduction

1. My Instructing Solicitors act on the instructions of the Official Solicitor, who has been asked by Peter Jackson J (sitting as a judge of the Court of Protection) to undertake a so-called *Harbin v Masterman* inquiry as to a number of matters connected – broadly – with the practical aspects of the determination of the capacity and best interests of a woman, Ann Clarke ('AC'), who is currently in Spain with an adult son, Michael Clarke/Michael Rake ('MC'), together with the ability to implement any decision to bring AC back to this jurisdiction should the court determine this is in her best interests.

2. When first contacted by my Instructing Solicitor I formed the view that there was an initial question that needed to be asked as to whether Peter Jackson J still had jurisdiction (either as a judge of the Court of Protection or of the High Court) to make declarations and orders in relation to AC's welfare[1] given that she appears to have been present in Spain for some considerable period of time, perhaps from as long ago as 2008, with apparently near permanent presence from 2012 (save for a period in Thailand). It seemed to me that if jurisdiction had been lost, then it would serve no purpose for AC's assets to be expended[2] upon the more detailed, and more expensive, investigations that would be required in order to take forward (for instance) an assessment of her capacity to decide as to residence and potential steps that might be taken before the Spanish courts to bring about recognition and enforcement of English court orders. It did not appear from the materials available to me that this question had been considered at any stage by the court.

3. My Instructing Solicitors and the Official Solicitor have therefore agreed that it is most proportionate that I prepare a discrete advice upon the jurisdiction of the Court of Protection and – if such would serve as an alternative route to relief – the jurisdiction that Peter Jackson

[1] There can be no doubt that he retains jurisdiction as a Court of Protection judge over her property for so long as it remains physically present in England and Wales: paragraph 7(1)(b) of Schedule 3 to the Mental Capacity Act 2005. I do not therefore address this further in this Advice.
[2] The Official Solicitor's costs in this matter are being met by way of a charge over a property owned by AC in Blackpool.

J may be able to exercise under the inherent jurisdiction of the High Court. Stock can then be taken as to the next steps required.

Factual background

4. For present purposes, I can summarise the relevant factual background shortly, although I am conscious that considerably more investigation is likely to be required in due course in the event that it is held that the court has jurisdiction to investigate AC's circumstances. I take this factual background from my Instructing Solicitors' instructions to me, which are, in turn, drawn from a combination of the documents provided to them by the court (in the form of judgments and orders), their own researches on the internet and communication with AW and KC for purposes of amplifying those documents. However, not least as I am very aware that there are issues in respect of which MC may well have his own 'take,' I have sought here to set out matters which either appear in the judgments provided to me or appear uncontroversial.

5. AC is 76 years old. She has 3 children, MC, AW, and KC. In 1995, AC suffered serious injuries following a road traffic accident, including a brain injury, apparently after she jumped in front of a lorry having presented to mental health services a few days previously. It appears that a negligence claim was brought against the Mental Health Trust in this regard and AC later received damages of £775,000, based on a life expectancy of 70. The court judgments provided to my Instructing Solicitors indicate that, until at least 2011, significant sums were being paid out to MC either directly, or on behalf of AC, in order to pay for AC's care and living costs. A receivership was granted in respect of AC in 2001 which became a property and affairs deputyship in 2010. Hugh Jones of Pannones Solicitors acted, throughout, as receiver and then deputy.

6. It appears that MC and AC began spending time in rented accommodation in Torremolinos in Spain in 2008. I understand that, during the first few years, AC and MC would spend time travelling back and forth between Blackpool and Spain but this happened less as lodgers began living in the house in Blackpool.

7. It is not clear at this stage from the (limited) documentation available to my Instructing Solicitor or I how the existing proceedings started but it appears that it may have been following an application by the Deputy seeking authorisation to sell AC's Blackpool home, so as to release further funds for her to live on. This did not in fact happen because of a

disagreement with MC over the sale price.

8. In November 2011, MC issued an application in the Court of Protection to discharge the Deputyship. Following a hearing on 6 July 2012, judgment was given by Peter Jackson J on 31 July 2012 who declared that AC had capacity to make a will but lacked capacity to decide whether to sell the Blackpool property. The proceedings were then adjourned to allow for evidence to be filed in respect of AC's best interests and Peter Jackson J handed down judgment on 9 October 2012 when he concluded that it was not in AC's best interests to sell the property at that time and directed that it should not be sold or charged within AC's lifetime without an order of the Court. In that judgment, Peter Jackson J recorded that AC's time was divided between Spain and Blackpool; that AC identified the Blackpool property as her home; that all agreed that it was not in her best interests to live in a care home; and that Peter Jackson J felt that if the Blackpool property was sold, AC would lose her home. At that time, Peter Jackson J discharged the deputyship order as AC's funds had run out and her only income was derived from benefits.

9. On 15 January 2013, it appears that MC was sentenced to 3 months imprisonment for contempt of court.

10. It appears that some sort of court proceedings continued between January 2013 and September 2015 but it is unclear to on the face of the documentation currently available to the Official Solicitor and my Instructing Solicitors what the nature of those proceedings was, although a limited civil restraint order was made in March 2015 to prevent MC making any further applications in civil proceedings.

11. At the beginning of September 2015, MC applied to vary the order of 9 October 2012 so as to allow the sale of the Blackpool property.

12. Between September 2015 and February 2016, MC apparently took AC to Thailand; it is unclear whether this was for the entire period or for a number of visits. It appears that her health may have deteriorated in Thailand necessitating admission to hospital.

13. In February 2016, Peter Jackson J gave judgment in respect of the application made in September 2015 for sale of the Blackpool home and dismissed the application. He also dismissed a request by AW and KC to obtain access to the Blackpool property. In that

judgment, he records that it is impossible to assess what is best for AC but all that he can say is "*it is unlikely to be in her best interests to be kept out of native country*."

14. It was following this judgment that AW and KC made an application on 17 March 2016 requesting that AC be brought home to England to be cared for and that they both be given the keys to her house in Blackpool.

15. MC's website contains two recent orders which have not so far been disclosed to the Official Solicitor by the court. The first was made on 15 March 2016 and indicates that it was done on the court's own initiative. In it, Peter Jackson J directed that the committal order made in January 2013 is suspended for three months on the condition that MC brings AC back to England within one month; that upon arrival in England, he surrenders AC's passport; and that he complies with an order of Foskett J made in May 2012 (my Instructing Solicitor does not have the order, or know its content). It is apparent that MC did not comply with that order. A further order was then made on 11 April 2016 requiring AW and KC to serve their application on MC and giving him an opportunity to respond. It appears that statements were filed by all three individuals as these are referred to in the subsequent order of Peter Jackson J. Those statements have not yet been provided to my Instructing Solicitors.

16. On 9 May 2016, Peter Jackson J made an interim declaration that AC lacked capacity "*in relation to the matter*." It appears that this is reference to the matters set out in AW and KC's application. In this order, the court invited the Official Solicitor to conduct the *Harbin v Masterman* inquiry.

17. Finally, I understand that MC has very recently posted a post on his Facebook page to the effect that he intends to go with AC to Thailand from November of this year to April 2017; this therefore gives a degree of urgency to resolving matters of jurisdiction and to the taking of (at a minimum) steps to secure AC's continuing presence in Spain in light of the apparently deleterious effects upon her of the previous move to Thailand.

The welfare jurisdiction of the Court of Protection – principles

18. The Court of Protection has jurisdiction to make declarations and orders under ss.15-16 Mental Capacity Act 2005 ('MCA 2005') in respect of a person's welfare only so long as they are habitually resident in England and Wales: see paragraph 7(1)(a) MCA 2005 and,

most recently, *Re DB*[3] at paragraph 15. *Re DB* also contains a useful summary of the majority of the key principles related to the construction of "habitual residence" for these purposes. Importantly, Baker J emphasised (as had Moylan J in *An English Authority v SW and others*[4]) that the definition of "habitual residence" under the MCA 2005 is the same as the definition applied in family law statutes and instruments, in particular under Council Regulation (EC) 2201/2003 ("Brussels IIA") which is the pre-eminent instrument defining the jurisdictional rules for cases involving children. This has the consequence that the jurisprudence of both the CJEU and the Supreme Court relating to the meaning of "habitual residence" in these contexts is also applicable under Schedule 3 to the MCA. [5] What this jurisprudence requires can be summarised as the question:

> "*has the residence of a particular person in a particular place acquired the necessary degree of stability* […] *to become habitual?*"[6]

19. The answer is fact-sensitive and whilst there must be a sufficient degree of integration in a social and family environment, this is not a free-standing determinative factor. Rather, as Moylan J observed in *Re SW*:

> "*I would suggest that the phrase "degree of integration"... is an overarching summary or question rather than the sole, or even necessarily the primary, factor in the determination of habitual residence. Otherwise, it would become a legal construct in place of the essential issue which is, of course, that of habitual residence. This is not to say that the degree of integration and a person's state of mind are not relevant; they are clearly factors to which appropriate weight must be given when the court is undertaking a broad assessment of all the circumstances of the case. The broad assessment which is required properly to determine whether the quality of residence is such that it has become habitual in that it has the necessary degree of stability in order to distinguish it from mere presence or temporary or intermittent residence. This means a sufficient, or some, degree of integration, not, I suggest, as a limited factual assessment, but as a question to be answered by reference to the factors, suitably applied, referred to by the CJEU and the Supreme Court*."[7]

20. Those factors include, in the case of a child:

> "*the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the*

[3] [2016] EWCOP 30.
[4] [2014] EWCOP 43, [2015] COPLR 29.
[5] The two leading CJEU cases being *Proceedings brought by A* (Case C – 523/07) [2010] Fam 42 and *Mercredi v Chafe* (Case C- 497/10PPU) [2012] Fam 22 and a series of cases heard by the Supreme Court, (in particular *A v A* [2013] UKSC 60 and *Re LC* [2014] UKSC 1).
[6] *Re LC* at para 59 per Lady Hale.
[7] Para 72.

family and social relationships of the child in that state"[8]

21. In the context of an adult who lacks the capacity to decide where to live, further matters of importance are that:

21.1. It is possible to lose one habitual residence without gaining another;[9]

21.2. The state of mind of the individual concerned can be relevant, even if they are not capable of expressing capacitous views, although it will not be determinative. See, by analogy, *Re LC* at para 37, the observations of Sir James Munby P in the context of Schedule 3 in *Re O*,[10] and the discussion in *Re SW* at paras 74-5;

21.3. Habitual residence can in principle be lost and another habitual residence acquired without the need for any court order or other formal process, such as the appointment of an attorney or deputy, where the decision taken to move the person has been taken by a relative or carer which is reasonable, arrived at in good faith and taken in the best interests of the assisted person;[11]

21.4. Whilst Sir James Munby P observed – obiter – in *Re O* that there will be no change in P's habitual residence where there is bad faith or where what is done is unreasonable or not in the best interests of the assisted person (including where removal is in breach of a court order),[12] Hedley J had previously observed – again obiter – that the passage of a sufficient length of time could, in and of itself, effect a change in habitual residence even were the original removal to have been wrongful;[13]

21.5. Determination of an incapacitated adult's habitual residence is to be assessed by reference to all the circumstances as they are at the time of assessment. In other words, and unlike in relation to the position of children under European law[14] the principle of *perpetuatio fori* has no application in this context, and it is possible for an adult's habitual residence to change during the currency of proceedings, thereby

[8] *Proceedings brought by A* at para 39.
[9] See paragraphs 49 and 50 of the Explanatory Report to the 2000 Hague Convention on the International Protection of Adults, cited in *Re O* at para 14.
[10] [2013] EWHC 3932 (COP), [2014] Fam 197 at para 27.
[11] *Re O* at para 18.
[12] *Re O* at para 20.
[13] *Re MN (Recognition and Enforcement of Foreign Protective Measures)* [2010] EWHC 1926 (Fam), [2010] COPLR Con Vol 893 at para 21.
[14] Article 8 of Brussels IIA.

depriving the authorities of the place of the original habitual residence of jurisdiction;[15] and

21.6. (It is suggested, by analogy with the position to children) the burden will lie upon the person asserting the change of habitual residence.[16]

22. Although determination of habitual residence is a fact-sensitive exercise, it is perhaps of some assistance to note the circumstances under which the courts have considered it in the relatively small body of relevant case-law:

22.1. In *Re HM*,[17] Munby LJ, sitting as a judge of the Family Division, had cause to consider the circumstances of a young woman, HM, who did not have capacity to decide as to her residence, and who was abducted by her father to Israel. The case was decided under the inherent jurisdiction, although it post-dated the coming into force of the MCA 2005, it appears because the original proceedings had begun before the Act came into force. Whilst the court does not appear expressly to have considered the question upon which it had jurisdiction to make orders in relation to HM when she was not physically present in England and Wales,[18] Munby LJ appeared to have no doubt that he had jurisdiction to make decisions in relation to HM in circumstances where she had been abducted in or around October 2009, there had been hearings on dates between November 2009 and February 2010, and the final judgment was given in April 2010. In *Re O*, Sir James Munby P subsequently noted *HM* as a case where a wrongful removal did not give rise to a change in habitual residence.[19] *HM*'s case is also of considerable relevance as regards the powers of the court to make orders in relation to third parties outside the jurisdiction so as secure the interests of the subject of the proceedings; it will therefore no doubt fall to be considered by the Official Solicitor (and in due course the court) as regards the nature of any orders that might be required to enforce the steps that the court might wish to take;

[15] *Re O* at para 21. This flows from the fact that habitual residence for purposes of Schedule 3 to the MCA 2005 has the same meaning as under the 2000 Hague Convention, for which purposes it is clear that the doctrine does not apply: see the Explanatory Report to the Convention at paragraph 51.
[16] *Re R (Wardship: Child Abduction)* [1992] 2 FLR 481 at 487.
[17] [2010] EWHC 870 (Fam), [2010] 2 FLR 1057.
[18] Detailed consideration was given to the basis upon which the court could and should invoke the inherent jurisdiction to protect HM and also the court's powers to make orders directed against third parties – in that case her father – to secure her well-being, even where that third party is located outside England and Wales.
[19] *Re O* para 20.

22.2. In *Re MN*, concerning an elderly woman who had previously been habitually resident in California but, having lost capacity to make decisions as to residence, MN had been moved to England by her niece, Hedley J expressed the view – obiter, and recording a concession – that if MN's niece had not had authority (under a Californian instrument) to move her to England, then she would have remained habitually resident in California, the move having taken place a little over a year prior to the court considering the issue. MN was, at the time of the hearing, well cared for by her niece at her home;

22.3. In *Re O*, an elderly woman lacking capacity to decide where to live was moved from England to Scotland by one of her adult children, with the agreement of two of his siblings but in the face of opposition from the third. She had been present in Scotland, initially at the home of the adult child but subsequently in a care home, for around 15 months prior to the time of the hearing of the final sibling's application for (inter alia) a determination that she remained habitually resident in England and Wales. Sir James Munby P found that she had not been kidnapped, as was asserted by the applicant, rather that the move was "something reasonably and sensibly undertaken by, or in agreement with, three of PO's four children in what they saw as her best interests," and that she was settled in her care home. He therefore found that she was habitually resident in Scotland. It should be noted that he did not consider that he was bound to find to the contrary that the Scottish courts had decided, relatively shortly after her arrival, that she was not habitually resident in Scotland, albeit that jurisdiction was accepted on the basis of her physical presence in Scotland and the urgency of dealing with matters relating to her welfare;

22.4. In *Re SW*, a Scottish woman who had sustained serious brain injuries had been transferred to and had been present in England for 5 years. She had initially been transferred under Scottish mental health legislation to a rehabilitation facility but had been living in her own supported living flat since December 2010. She was not held to have capacity to make decisions as to residence. She had expressed her dislike of the area in which she lived, and her wish to move somewhere else (but not back to Scotland). Moylan J considered that "[b]*y virtue of its duration, SW's residence has, in my view, acquired what might be termed effective 'stability', in the sense used by the Court of Justice. Many people would rather not be living where they are and*

might wish fervently to live somewhere else. However, at least after a person has been living in one place for a significant period of time it will be difficult not to come to the conclusion that they are sufficiently integrated into their environment, whatever its composition, for them to be habitually resident there. In the present case, any other conclusion would, in my view, be placing far too much weight on an assessment on SW's state of mind and the extent to which she feels settled. Accordingly, in my judgment SW is habitually resident in this jurisdiction for the purposes of the Mental Capacity Act 2005;"[20]

22.5. In *Re PA, PB and PC*,[21] Baker J considered the position of three young Irish individuals placed in England under cover of orders of the Irish High Court to receive psychiatric treatment in conditions of detention, all initially as minors. All had been present in England for between 3 and 4 years by the time that Baker J came to consider their circumstances, and he confirmed that he considered that the Irish High Court had been entitled to find (for purposes of making orders in relation to them as adults which were presented for recognition and enforcement by the Court of Protection) that they were all habitually resident in Ireland because "[i]*n each case, Ireland remains the place of integration in a social and family environment. PA, PB and PC are all in this country on a temporary basis for the purposes of treatment, each hoping to return to Ireland at the earliest opportunity, and their cases are subject to regular review by the Irish court to determine whether the adult concerned should return or remain for the time being in this country*;"[22]

22.6. Most recently, in *Re DB* and *Re EC*, Baker J held that two Scottish men with significant learning disabilities who had initially been placed in a specialist hospital in England under Scottish mental health legislation (and subsequently made subject to 'DOLS' authorisations under Schedule A1 to the MCA 2005) were now habitually resident in England, primarily upon the basis of the length of time that they had been present here, 7 ½ years in the case of DB and 6 years in the case of EC. This was in the context of a situation where "[i]n each case, the individual's life has been based in the environment of the hospital. In each case, he is unable to communicate views concerning his residence and care. In each case, the individual's aggressive and difficult behaviour has moderated during his stay at the hospital and a good

[20] Para 75.
[21] [2015] EWCOP 38, [2015] COPLR 447.
[22] Para 73.

relationship has been maintained with other residents and hospital staff. Neither DB nor EC has attempted to leave the hospital. EC has family in Scotland with whom he is not in contact. DB's father and his wife visit him regularly every 6 to 8 weeks and have telephone contact once a week. DB's father is very keen that he should return to Scotland."

The welfare jurisdiction of the Court of Protection – application in AC's case

23. I have no doubt that the concern that motivated Peter Jackson J to invite the Official Solicitor to undertake a *Harbin v Masterman* inquiry here will also mean that he will be loath to find that AC is no longer habitually resident in England and Wales. However, ultimately, this is a jurisdictional question, and it seems to me that Peter Jackson J would need to consider whether her residence in Spain has acquired the necessary degree of stability to become habitual before he takes further steps – as a Court of Protection judge – to investigate and seek to address her circumstances.

24. Prior to the decision in *Al-Jeffery v Al-Jeffery (Vulnerable Adult: British Citizen)*[23] discussed below, there was some degree both of urgency and of importance to the determination by Peter Jackson J of the issue of AC's habitual residence. However, in light of that decision and the approach to jurisdiction set out there, it may be that the need for determination of habitual residence does not assume quite such importance (at least for purposes of determining interim relief). I therefore turn to that decision and the inherent jurisdiction of the High Court.

Recourse to the inherent jurisdiction?

25. A potential alternative route to jurisdiction if AC is no longer habitually resident in England and Wales is via the inherent jurisdiction of the High Court. For these purposes, I note that I am not primarily referring to the inherent jurisdiction of the High Court as identified in *DL*[24] to address the position of vulnerable but capacitous individuals, but rather the inherent jurisdiction of the High Court to fill a statutory lacuna in relation to a person whom (at least for the purposes of s.48 MCA 2005) has been held to lack the material decision-making

[23] [2016] EWHC 2151 (Fam).
[24] *Re DL* [2012] EWCA Civ 253, [2013] Fam 1.

capacity, but where the MCA does not provide a remedy.[25] However, given that the true position in relation to AC may be that she is, in fact, a capacitous but vulnerable adult falling within the category of those identified in *DL*,[26] it may be that Peter Jackson J would also need to consider in due course whether to exercise this aspect of the inherent jurisdiction.

26. I had initially considered that there were respectable grounds to consider that Peter Jackson J, could have recourse to the inherent jurisdiction (whether in relation to AC as an incapacitated adult or as a vulnerable one) even if she is no longer habitually resident in England and Wales, on the basis of her British nationality, a nationality that I am at present assuming but which would need to be established.

27. I had considered, however, that this would potentially be a difficult (or at least novel) path for the court to take as no previous decision had held clearly that such a nationality-based jurisdiction existed in relation to those over 18.[27] In this regard, therefore, the very recent decision of Holman J in *Al-Jeffery v Al-Jeffery (Vulnerable Adult: British Citizen)*[28] is both significant and extremely helpful for the light that it sheds on this area. It therefore merits detailed consideration:

    27.1. The case, which was the subject of considerable media attention whilst it was ongoing, concerned a 21 year old dual British-Saudi woman who was born and lived in Wales until just before she turned 17, at which point she travelled (in 2012) to Saudi Arabia at the insistence of her Saudi father. She had remained there thereafter

[25] See, by analogy, *NHS Trust v Dr A* [2013] EWHC 2442 (COP), [2013] COPLR 605: recourse to inherent jurisdiction where court unable to authorise force feeding and ancillary deprivation of liberty of mental health patient because of the operation of the eligibility criteria in Schedule 1A to the MCA 2005; also *XCC v AA* [2012] EWHC 2183 (COP), [2012] COPLR 730 (declaration of 'non-recognition' of foreign marriage not available under s.15 MCA).
[26] *Re DL* [2012] EWCA Civ 253, [2013] Fam 1.
[27] As opposed to those under 18: see *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1 at paras 60-65 per Lady Hale and *Re B (A child)(Habitual residence: inherent jurisdiction)* [2016] UKSC 4, [2016] AC 606. The reported case which had come closest to assisting was that of *O v P* [2015] EWHC 935 (Fam), in which Baker J extended injunctive orders made against the father whilst the daughter was the subject of wardship proceedings to last indefinitely beyond her majority (the application for such orders being made on an anticipatory basis prior to her turning 18). The daughter was now in Australia, and it would appear to have been habitually resident there. Baker extended the orders so under the wardship jurisdiction, alternatively under its inherent jurisdiction to protect vulnerable adults, extending the protection provided hitherto beyond S's 18th birthday. However, whilst he noted (almost in passing, at para 27(4)) that the court might have jurisdiction on the grounds that the daughter was a British national, he did not explain the basis upon which that jurisdiction might continue after her 18th birthday, and focused the majority of his reasoning upon the fact that she had been a ward of court, something which AC has not been.
[28] [2016] EWHC 2151 (Fam).

and alleged in proceedings brought under the inherent jurisdiction that she was being seriously ill-treated by him, including by being kept in caged conditions in his flat, and that she was prevented from leaving Saudi Arabia and returning to Wales or England. She also sought a forced marriage protection order, although this application was ultimately abandoned during the course of a hearing listed before Holman J to consider what, if any, jurisdiction he had to make orders in relation to Ms Al-Jeffery (in respect of whom it is important to note that there was no suggestion that she was of anything other than unimpaired mental capacity). The father's refusal to comply with earlier orders (made without formal determination of jurisdiction) to return his daughter to England and Wales or to allow her to speak privately to her instructing solicitor without fetter or fear of fetter had meant that it was not possible to proceed with a fact-finding hearing, such that Holman J proceeded in his consideration of whether he had jurisdiction on the basis of *prima facie*, rather than judicially determined facts.

27.2. It was agreed before the court by counsel for both daughter and father that the inherent jurisdiction existed and would apply if the facts alleged by the daughter were true and she were physically present in England and Wales. Holman J, relying (in particular) on *DL* endorsed this proposition, noting that he had no doubt at all that "*if all the facts were the same but occurring here in Wales or England, the inherent jurisdiction for the protection of vulnerable adults is engaged and I have a very wide range of powers*" (para 42). Importantly, Holman J also noted (relying on *Re SA*[29]) that the trigger for this jurisdiction being engaged was that there was a reasonable belief that the person was for some reason in need of the protection of the court, such that it would be "*intolerable*" (para 41) were a failure by one party (here the father) to enable a fact-finding hearing to proceed so as to enable the court to proceed on the basis of established, rather than *prima facie* facts.

27.3. The complicating factor was that Ms Al-Jeffery had not resided or been present anywhere in the UK since 2012, and her counsel conceded that she could no longer be considered habitually resident in England and Wales (although he did not concede that she was now to be considered habitually resident in Saudi Arabia). Holman J expressed the view that she was, in fact, habitually resident there and had been so

[29] *Re SA (Vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam); [2006] 1 FLR 867 at para 37.

since April 2013, but that in any event he would proceed on that assumption;

27.4. The only basis for exercising jurisdiction, Holman J held, was therefore that she had British citizenship or nationality. He noted that "[i]*n the recent cases of Re A (Jurisdiction: return of child) [2013] UKSC 60 and Re B (A child)(Habitual residence: inherent jurisdiction) [2016] UKSC 4 the Supreme Court has twice reaffirmed that the British nationality alone of a child is a sufficient basis for exercising the inherent or parens patriae jurisdiction in relation to children*" (para 44), that "*the jurisdiction based on nationality alone should only be exercised with extreme circumspection or great caution and where the circumstances clearly warrant it*" (para 46), that "*the jurisdiction should only be exercised with great caution and circumspection, and particular care must be taken not to cut across any relevant statutory scheme, but that does not limit it to cases "at the extreme end of the spectrum*" (para 48), concluding that:

> *It seems to me that at para.60 of Re B Lady Hale and Lord Toulson do helpfully indicate a test when they said "the real question is whether the circumstances are such that this British child requires that protection". That has an echo in the words of Lord Sumption at para.87 where he referred to "... a peril from which the courts should 'rescue' the child ...*

27.5. Holman J then turned to the question of whether that jurisdiction could be exercised in relation to an adult, and had little hesitation in concluding that it could:

> *49. The courts having clearly held that the vulnerable adult jurisdiction is indistinguishable from the parens patriae jurisdiction in relation to children, it seems to me that exactly the same approach as that analysed and discussed by the Supreme Court in Re A and Re B should inform my approach to the present case. The jurisdiction based on nationality must apply no less to an adult than to a child. As Bennett J asked rhetorically in Re G (an adult) (mental capacity: court's jurisdiction) [2004] EWHC 2222 (Fam) at para.111 (quoted with obvious approbation by Munby J in Re SA at para.65):*
>
> *"Why then should G, now an adult, be worse off than she would have been had the matters arisen if she was a child?"*
>
> *50. If it is appropriate to extend the protection of this court to a British citizen abroad when that person is 17, it cannot be less appropriate to do so just because he attains 18 or 21 or, indeed, any other age. The focus must be upon whether the citizen requires that protection and upon the peril from which he may need to be rescued; not upon whether he happens to be above or below the age of 18. Further, although there is a statutory framework (including the provisions of EU Council*

> *Regulations) which regulates the exercise of jurisdiction in relation to children, there is none in relation to adults. I do not suggest that for that reason the court should be any less cautious or circumspect in relation to its exercise of the jurisdiction to protect adults rather than children, but there is no obvious reason why it should be even more so. Mr. Scott-Manderson suggested in his final written schedule of balancing factors that the required caution is even greater in the case of an adult than of a child. When I asked why, he said because the use of the inherent jurisdiction based on nationality in the case of adults is very rare. It is; but just because it is very rare does not seem to me to require that even greater caution is required. "Great caution" or "extreme circumspection" means what it says, whether the person concerned is a child or an adult. To exhort even greater or more extreme caution or circumspection is, frankly, to succumb to hyperbole.*

27.6. Holman J therefore concluded that "*there is an inherent jurisdiction to protect vulnerable adults who are habitually resident abroad, but are British citizens; and that on the facts alleged by Amina, which include constraint and ill-treatment, that jurisdiction is engaged by this case*" (para 51).

27.7. Having held that there was a jurisdiction, Holman J had then to consider the second question – namely whether he should exercise his discretion to do so. His discussion balancing the factors for and against (the fact of her dual nationality being a particularly weighty one against) is lengthy, but he proceeded in particular by reference to the three main reasons identified by Lady Hale and Lord Toulson in *Re B* for caution: namely (1) the risk of conflict with the jurisdictional scheme between the applicable countries (there being no such scheme in place here); (2) the potential for conflicting decisions between the two countries (there being no such risk here); and (3) the risk that the orders made might be unenforceable (a real risk in the instant case, but where Holman J considered that the court had considerable moral and practical "hold" over the father). Whilst noting that there were dicta in both *Re A* and *Re B* to the effect that an assessment "in country" should take place before the jurisdiction were exercised, Holman J noted that these were in a different context, and the instant case concerned an adult aged 21 who was subject to the constraints allegedly placed on her by father, could and indeed sought to speak for herself.

27.8. Holman J had then to consider what order he should actually make. On the facts of the case before him, he concluded that the appropriate order to make was one directed against the father himself personally "*that he must permit and facilitate the return of Amina, if she so wishes, to Wales or England and pay the air fare* [and that] [h]*e must at once make freely available to her both her British and her Saudi Arabian*

passports." He specified that Ms Al-Jaffery had to be enabled to return to England and Wales by 11 September 2016, and at the time of drafting this advice it is not known whether or not the father will comply. Holman J further provided for a hearing before him shortly thereafter, emphasising at paragraph 66 that he wished to make:

> *crystal clear that, apart from requiring her attendance before me at that hearing, if she has indeed voluntarily returned to Wales and England, I do not make any order whatsoever against Amina herself. The purpose is not to order her to do anything at all. Rather, it is to create conditions in which she, as an adult of full capacity, can exercise and implement her own independent free will and freedom of choice. To that end, I will give further consideration with counsel after this judgment to what mechanism can now be established to enable her freely to state, if that be her own free decision and choice, that she does not now wish to avail herself of the opportunity provided by my decision and this order to return to Wales or England."*

28. Whilst *Al-Jeffery*'s case did not concern a person lacking capacity within the meaning of the MCA 2005, it seems to me that it would be equally appropriate to deploy the nationality-based inherent jurisdiction identified by Holman J in respect of a person who lacks capacity for purposes of the MCA 2005 but who is, because they are no longer habitually resident in England and Wales, outside the Court of Protection's statutory jurisdiction as circumscribed by paragraph 7 of Schedule 3 to the MCA 2005. It would therefore – as noted at paragraph 32 – be a use of the inherent jurisdiction to complement rather than to cut across the statutory jurisdiction of the Court of Protection.

29. I should note that there is a distinction between the question of whether the jurisdiction exists and whether the jurisdiction should be used in the instant case. This would require consideration of whether the need for "great caution" or "extreme circumspection" is met. It would also require – as would consideration of whether to exercise the jurisdiction of the Court of Protection (if such exists) – consideration of whether it is likely that it would serve any purpose. However, this gives rise to questions (for instance as to the likely response of any Spanish court to requests for recognition and enforcement of orders made by Peter Jackson J) which go into what I would consider to be the substance of the report that the court has asked of from the Official Solicitor. I do not therefore advise upon them at this point.

30. Nonetheless, in light of the decision in *Al-Jeffery*, it seems to me that Peter Jackson J should be invited to consider whether he wishes to invoke the inherent jurisdiction either as a

subsidiary ‘belt and braces’ approach alongside Schedule 3 to the MCA 2005 or even perhaps as the primary basis for the grant of interim relief.

Conclusion

31. For the reasons set out above, it seems to me that Peter Jackson J should be invited to consider and determine – even if only on a provisional basis – whether he is satisfied that he has jurisdiction to make declarations and orders in relation to AC (and the basis for that jurisdiction), as a necessary preliminary to the Official Solicitor then incurring further costs in the name of AC identifying, as a part of the *Harbin v Masterman* inquiry, what steps the court might take.

32. My Instructing Solicitors should not hesitate to contact me in Chambers should they wish to discuss any part of this Advice.

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13 September 2016