This judgment is being handed down in private on 26th July 2012. It consists of 28 pages and has been signed and dated by the Judge. The judge hereby gives leave for it to be reported.

This judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructed by them (and other persons identified by name in the judgment itself) may be identified by name or location and that the anonymity of all those other than individuals named in the judgment must be preserved.

Case No: 11747829

IN THE COURT OF PROTECTION
AND IN THE INHERENT JURISDICTION OF THE HIGH COURT
BIRMINGHAM DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2012

Before :

MRS JUSTICE PARKER

- - - - - - - - - - - - - - - - - - - -

Between :

	XCC	**Applicant**
	- and -	
	AA **-and-** **BB** **-and-** **CC** **-and-** **DD** **(By her Litigation Friend the Official Solicitor)**	**Respondents**

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Mr Jonathan Cowen of Counsel (instructed by Legal Services) for the **Applicant XCC**
Mr Jeremy Weston QC (instructed by Osborne and Company) for the **Respondent AA**
Ms Nandini Dutta of Counsel (instructed by Kauldhar and Company) for the **Respondents CC and BB**
Ms Nicola Greaney of Counsel (instructed by Anthony Collins Solicitors) **for DD** by her litigation friend the Official Solicitor
Mr Bilal Rawat as Advocate to the Court

Hearing dates: 27th and 28th October 2011

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Judgment

Mrs Justice Parker :

1. In October 2010 I heard substantive proceedings about DD in the Court of Protection.

2. DD has a very significant degree of learning disability, little language, very little comprehension of anything other than simple matters, and needs assistance with almost all aspects of her daily life. Her parents are originally from Bangladesh, but have lived in this country for many years and brought up their family here. All family members are British citizens.

3. In 2003 DD was married in Bangladesh by arrangement to AA, said to be her cousin (although DD's parents differ as to whether he is a cousin on the paternal or maternal side). After two failed attempts to gain entry in which he was "sponsored" by DD (the immigration judge noted that her capacity to do so was very much in doubt) he was finally successful in obtaining a spousal visa and entered in 2009. He moved in with DD and her parents to their home in a city in England, sharing a bedroom and a bed with DD. DD's brother, English speaking who is in effect the head of the family, lives in the same street with his family. He attended the court hearings and although not a party has given undertakings upon which he has had the opportunity to take legal advice.

4. The fact of DD's marriage eventually came to the attention of the learning disabilities team, which had only recently been created, of the local authority where DD lives (XCC), and very significant concerns arose as to DD's welfare as a result of which the Police obtained a Forced Marriage Protection order, which order continued pending an application by XCC to the Court of Protection. Within those proceedings the Official Solicitor was appointed as litigation friend for DD. Dr Milne, consultant psychiatrist in learning disabilities, was instructed to assess DD's capacity to marry and have a sexual relationship, and her capacity generally.

5. AA remained in the family home, although he was made aware by the Circuit Judge at the first substantive hearing in the Court of Protection in September 2009 that to have sexual relations with DD was likely to constitute a criminal offence due to her incapacity to consent. By court order, since 2010, he is no longer permitted to live at DD's family home and has been ordered, or has undertaken, not to have any form of contact with her.

6. It is unfortunate that the social services department of XCC had not been previously alerted to the fact that a woman with severe learning difficulties had been married abroad, and that she had needs with which she and her family required assistance. In a judgment given in December 2010, I explored the reason why the case had slipped through the safety net. XCC has accepted its failures. For their part, DD's parents did not perceive that there was any problem with DD being married and neither had the family's GP, whose

advice had been sought on at least three occasions about marriage and pregnancy for DD over the years.

7. After a hearing in 2010, in which I heard from a number of witnesses including Dr Milne and an independent social worker, Diane Sugden, as well as the XCC social worker, and DD's mother, and AA, I made declarations, in the face of very strong resistance from DD's parents and AA:

    i. DD lacks the capacity to marry.
    ii. DD lacked the capacity to marry in 2003 when the marriage ceremony took place in Bangladesh.
    iii. DD lacks the capacity to consent to sexual relations.
    iv. DD lacks capacity to make decisions as to where she should live.
    v. DD lacks capacity to make decisions regarding her care.
    vi. DD lacks capacity to make decisions regarding with whom she should or should not have contact.
    vii. It is unlawful for AA or any other person to engage in sexual activity with DD (including sexual touching).
    viii. It is at the present time in DD's interests to reside with her parents.
    ix. It is not in DD's interests to reside with AA.
    x. It is not in DD's interests that AA should provide her with care.
    xi. It is not in DD's interests to have contact with AA.
    xii. From 2003 it was unlawful for AA to engage in sexual activity (including sexual touching), and it continues to be unlawful for AA to engage in sexual activity (including sexual touching) with DD.

8. I made further findings that in 2009 whilst DD was a patient in a local hospital (DD has various health problems), and in spite of his denials, AA had been physically very rough and abusive to DD on two occasions, smacking her head, shaking her, and yanking her eyelid, even though I accepted that he acted in this way in a misguided attempt to assist medical staff. I accepted also that AA told hospital staff that this kind of behaviour was the usual practice at home to make sure that DD did as she was told.

9. DD lives in a very traditional family in a close-knit community not integrated, by and large, into the non-Bangladeshi local community. Her parents are very largely insulated from mainstream English society and are mistrustful of non-Bengalis. They do not communicate well in English: her mother understands and speaks almost none. They are devout Muslims. I found that DD is a loved and valued member of her family and that her parents are devoted to her. The family is bewildered and disconcerted that they are seen as having done anything wrong, and that what they have done may be seen as contrary to DD's best interests. In my December 2010 judgment I accepted that in DD's parents' culture it is considered a duty of parents to arrange for their children to be married and that disabled children are found spouses so that they can be provided for when the parents are unable to do so. Whether there was some other motive for the marriage such as family or other obligations in addition I was not able to determine.

10. I was not prepared to find, as invited, that AA who came to this country for the express purpose of working, genuinely wished to be married to DD as opposed to having the benefit of a spousal visa.

11. As part of the decision making process I was asked to consider what should be the next step in relation to the marriage. In accordance with court directions the Official Solicitor had commissioned reports from Professor Rehman, Professor of Law and head of the law school at Brunel University, and an expert in Islamic law, International Human Rights and Constitutional Law for that hearing.

12. In my judgment given in December 2010 I stated:

> "[122] This case demonstrates, as Wall LJ said in *KC v Anor v City of Westminster Social & Community Services Department & Anor* [2008] EWCA Civ 198, a case which raised similar issues,
>
> > '[45]…a profound difference in culture and thinking between domestic English notions of welfare and those embraced by Islam. This is a clash which this court cannot sidestep or ignore. To the Bangladeshi mind...the marriage of IC is perceived as a means of protecting him, and of ensuring that he is properly cared for within the family when his parents are no longer in a position to do so.
> >
> > [46] To the mind of the English lawyer, by contrast, such a marriage is perceived as exploitative and indeed abusive. Under English law, a person in the position of IC is precluded from marriage for the simple reason that he lacks capacity to marry. No English Registrar of marriages could or would have contemplated celebrating a marriage between IC and NK, for the simple reason (amongst others) that no such Registrar could have issued a certificate of satisfaction that there was no impediment to the marriage. Furthermore, as IC is incapable of giving his consent to any form of sexual activity, NK would commit a criminal offence in English law by attempting to have sexual intercourse, or indeed having any form of sexual contact with him."

13. In *KC v Westminster* the Court of Appeal made a declaration that the marriage of an incapacitated adult, in that case a telephone marriage, but held to have been celebrated in Bangladesh and valid according to the law of that jurisdiction, was not recognised in England and Wales.

14. At the end of my judgment I said:

> “**Consequences of declaration of lack of capacity to consent to marriage or sexual relations: What steps, if any, should be taken in respect of the marriage**
>
> [172] DD’s parents and AA begged me not to make a declaration that DD did not have capacity. They said that there would be considerable stigma in Bangladesh for them if the marriage were annulled.
>
> [173] Section 12 (c) of the Matrimonial Causes Act 1973 provides that a marriage shall be voidable on the ground that “either party did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise”. Section 55 of the Family Law Act 1986 allows any person to apply for a declaration that a marriage was at its inception a valid marriage, but not a declaration that the marriage was at its inception an invalid marriage: see *KC v City of Westminster* [2008] EWCA Civ 198. The only available step would be a petition for nullity. The Court of Appeal confirmed that the High Court may, under its inherent jurisdiction, be entitled to refuse to recognise a marriage contracted where one party was unable to consent but that the Court of Protection has no such power pursuant to the Mental Capacity Act 2005.
>
> [174] Professor Rehman in his opinion told the court that Bangladeshi Islamic law allows for a valid marriage of minors and by extension, persons without the mental capacity to consent, providing that the guardian has the capacity to consent. Thus the marriage is valid under Islamic and Bengali law, and if it has been consummated can only be dissolved by talaq granted by the husband. This view was accepted by the CA in *KC*. It is unlikely that the marriage could be annulled or a divorce granted in Bangladesh unless the husband consents. There would be no automatic recognition of an English decree of nullity, divorce, or judicial separation.
>
> [175] Professor Rehman was also asked to advise what were the implications for DD and her standing in the Muslim community if this marriage were annulled on the ground that DD lacked consent, that she lacks capacity to consent to sexual relations, and that if absence of capacity continues, she will not be able to marry in the future. He said that a decision that she should be divorced or her marriage annulled would have a substantially negative impact on her. Marriage

breakdown and divorce has considerable stigma and negative connotations in the Muslim community. In this case it risks creating considerable tension within DD's family. He expressed concern as to how she will react if her marriage is annulled. He expressed concern that the community would ostracise her. He said that there would be considerable stigma.

[176] Prof Rehman states that annulment of the marriage or divorce is likely to bring shame on the family and on DD if the community believes that she has had sexual intercourse as an unmarried woman. DD's parents and AA urged me not to declare that DD lacks capacity for the same reason.

[177] I have to say that I am not at the moment convinced by Professor Rehman's analysis. Without in any way reaching a concluded view, I record that:

1. DD would not understand that her marriage has been brought to an end by a decree of nullity or divorce, either here or in Bangladesh. I reject [the] case that if that happened she would be "devastated".

2. Any effect on DD would be indirect, from the feelings of her family.

3. I have no reason, at the moment, to think that DD will be harmed, ostracised, or treated with anything other than loving care, whatever the court process;

4. DD's marriage will remain valid in Bangladesh;

5. The declaration which I have made will prevent her from contracting a valid marriage in English law, and divorce or annulment will not in any way add to that; also at the moment I do not understand why an inability to marry because of incapacity will cause her to be shamed or ostracised in this community;

6. I cannot at the moment understand why DD's position and the position of her parents, and AA, will be any worse if this marriage is brought to an end, than by the order which I have made, which prohibits AA from having any marital or other relationship with DD. If the community knows that state of affairs, and the reasons for them, then it will be known that in English domestic law (which may mean little in this community) DD cannot be married. There is at the moment no evidence that the family is in any way ostracised.

> [178] However I agree with the Official Solicitor that a period of reflection needs now to take place and the question of whether any formal steps should be taken in relation to the status of the marriage will need to be further considered. Thus there will inevitably need to be another hearing."

15. Resolution of this issue was delayed. XCC thought that DD's parents were not co-operating with them over the provision of services to DD, and there was a suspicion, based on what DD said, that AA was continuing to live at the family home. On 7 March 2011, I made directions as to further assessment as to support provision for DD, and laid down a revised timetable for the re-instruction of Professor Rehman, and reiterated the terms of my earlier order, and listed a two day hearing in October 2011 for the issue of marital status to be considered.

16. On 5 July 2011, the case came before me again for review; at that hearing all parties told me that it was proposed that the issue in respect of the validity of the marriage should be compromised by agreement on the basis of undertakings and assurances, and that it was not necessary that there should be any declarations in respect of recognition, or any steps to bring the marriage to an end. I articulated my concern that this simply ducked the issue of the status of the marriage and DD's status as AA's wife and AA's as her husband in this country, particularly in the light of the very strong observations as to public policy in the Court of Appeal in *KC v City of Westminster*.

17. XCC positively asserted that it would not be in DD's interest for any steps to be taken to bring the marriage to an end, and that it was unnecessary for any formal declaration to be made in respect of the marriage. The Official Solicitor took the same view; DD's parents and AA continued to assert that formal non-recognition would bring shame on them in their community.

18. I put the matter back to 27 July. No party's position changed. The terms of the undertakings/ assurances/ acknowledgments proposed, a little refined from the previous hearing, were that AA, DD's parents and her brother undertook that AA should not be allowed to come into any form of contact with DD, and they gave a series of assurances that AA would not seek to exercise in any way any function conferred on him in his status as DD's husband, however those functions may have been conferred or for whatever reason, and in particular not to put himself forward as DD's next of kin, and to acknowledge that he is not to be entitled to be treated as DD's next of kin nor consulted as a part of any decision relating to DD's health or welfare. DD's passport was to remain lodged and copies of the order sent to appropriate agencies. I remained convinced that issues arose which needed to be properly determined.

19. It was submitted to me by all counsel that I was engaged purely in a welfare determination in relation to DD and that DD's welfare required this particular solution because of her family's concern as to their position in the community. I expressed the tentative view that the fact that the family wish to continue to present DD as married may have welfare implications for her in the future, as well as other repercussions.

20. AA's spousal visa was due to expire on 5 August 2011 and he wished to make an application for leave to remain. AA continued to urge me not to take any steps further to undermine DD's marital status. The Official Solicitor did not intend to bring nullity proceedings on behalf of DD because he perceived that her family would also be distressed by this, and that this would have an impact on DD.

21. No party was prepared, in spite of my invitation, to argue the case for a 'Westminster' type declaration of non-recognition to be made to address any of these issues. I was particularly disappointed that neither XCC nor the Official Solicitor was prepared to assist the court in this regard.

22. I concluded that I needed to seek the assistance of the Attorney General. I contacted his office and spoke to a member of his staff, Mr Weerasinghe, for whose assistance I am most grateful.

23. I decided that I must continue with my plans to hold a hearing in October 2011 to decide "*on the issues of the marriage of AA and DD (if applicable) and the future welfare of DD*". Accordingly, the order of 27 July 2011 recorded that in accordance with CPR 39.8 I had requested the Attorney General to appoint an Advocate to the Court who was to attend the hearing to give oral submissions, subject to any further direction of the Court. Immediately after the hearing I wrote to the Attorney General setting out the background and the matters upon which I required assistance, which were repeated in the order of 27 July;

> *"In circumstances where all parties seek to resolve these proceedings in the terms of the declarations made and the undertakings and assurances given, without the Court making any declaration that the marriage celebrated between AA and DD in Bangladesh should not be recognised in this jurisdiction due to DD's lack of capacity at the date of that marriage, which lack of capacity continues:*
>
> 1) *Whether the court is only engaged in a welfare determination of DD's immediate and /or long term interests or whether public policy issues arise from the existence of a marriage valid in Bangladesh with particular reference to the immigration position of AA, which the Court should consider;*
>
> 2) *The immigration position of AA;*
>
> 3) *The potential consequences for DD in the future if no declaration is made that the marriage in Bangladesh is not recognised as valid in this jurisdiction;*
>
> 4) *(a) how effective are the raft of measures contained in the proposed injunctions/undertakings given by AA, BB and CC, to address the issues of DD's welfare throughout her life with particular regard to issues of status; and (b) whether the undertakings/assurances given have legal effect;"*

24. The Attorney General appointed Mr Bilal Rawat as Advocate to the Court. In his skeleton argument and oral submissions he supported my making a declaration of non-recognition. This remained strenuously opposed by all the parties.

25. Professor Rehman is not a specialist in cases concerning incapacitous individuals. He had not met any of the parties in this case. He had however read the papers and my judgment of December 2010 in order to write his second report, in which he also expressed concern as to the shame and stigma which might affect DD's family if members of that community thought that she had lived with a man while not married to him. He gave evidence. As his evidence was developed through cross-examination he accepted however that this case requires closure, and that there is in fact no benefit to any of the parties from a cultural perspective in allowing the fiction to be perpetuated that this marriage was or could be regarded as valid in this jurisdiction, or in permitting any ambiguity to remain about the relationship between AA and DD. Only after having heard Professor Rehman's evidence did DD's parents accept that I should make such a declaration of non-recognition, and the Official Solicitor on DD's behalf and XCC then followed suit. AA was not able to agree but left the matter to me. The Official Solicitor sought my ruling as to the basis upon which the declaration should be pronounced.

26. The realities of the respective positions of DD and AA are that DD does not have even the most basic understanding of marriage. I rejected accounts by the family that DD had initiated discussion about marriage or that she had truly consented. I watched the wedding video, and observed from that that although DD was clearly a loved and cherished member of her family, she was able to play very little part in the first, celebratory stage of the wedding ceremonies, and that when the religious ceremony took place she was slumped in a chair almost comatose and only just able with considerable prompting to repeat the words of consent to marriage, which I found she did not understand. I found that AA and DD's mother had given me false and misleading accounts as to the circumstances in which the marriage came about, and had made false statements about what DD had said to them in an attempt to present her as having understanding. After my rulings in December 2010 DD's mother was still representing DD as wanting to be married: stating that DD missed AA and "wanted him back" an assertion which cannot be true in the light of DD's lack of communication and understanding.

27. DD cannot be considered to have capacity to consent to sexual relations on any basis. She does not understand the concept of sexual relations at all, or indeed the difference between men and women. Any sexual relations between DD and AA would lack consent at the most basic level. For reasons set out in my main judgment I was not sure that the marriage had been consummated as AA asserted. AA's account, which I rejected, that DD herself initiated sexual relations with him was unconvincing in the extreme. I am still of the view that sexual relations, if they took place, are likely to have been bewildering and frightening and probably painful for DD.

28. I also heard from Dr Milne that pregnancy (if it could be achieved, and carried to term, which is a problem with persons with DD's condition) holds a very

high risk for DD during pregnancy, delivery, and after delivery, and is likely to cause considerable physical and mental suffering to DD. She has no concept of pregnancy and would not understand what was happening to her. She would not be able to co-operate with medical intervention and would find the whole process terrifying. She would not be able to care for a child, a fact which DD's mother recognised in her evidence, even though she and the whole family had knowingly exposed DD to the risk of pregnancy and had sought medical advice as to why DD was not pregnant when a negative pregnancy test result was obtained, this being after AA had been told by the Circuit Judge that he must not have sexual relations with DD.

29. AA's case is that he wants to remain married to DD for life in spite of the prohibition on him of having any contact with DD and the undertakings and assurances given in 2011. In my earlier judgment I remarked that this is wholly unrealistic. AA's position is that he does not intend either to divorce DD, or to present a petition for nullity, although a letter was received from his solicitors dated July 2011 which states that AA "has not ruled out the possibility of seeking to dissolve the marriage presumably by seeking leave to petition for nullity should his circumstances change in the future". I was informed by Counsel for AA on 27 July that this letter was badly expressed and does not in fact reflect his present instructions. I have not heard evidence about this issue, but it is quite clear to me that this reflects the reality which is that whether he is permitted to remain in this country or not AA will inevitably want to be married to a woman with whom he can have a full marital life and a family.

30. In my view a marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage Act 2007. In my earlier judgment I said:

> "[185] In this case the family does not perceive DD to have been "forced" because there was no threat or physical or emotional coercion. In this context it must be made clear that "Forced Marriage" is defined by the Forced Marriage (Civil Protection) Act 2007 as occurring
>
> "if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent"; and by section 1 (6) "force" includes "coercion by threats or other psychological means"."
>
> "[186] "Force" in the context of a person who lacks capacity must include inducing or arranging for a person who lacks capacity to undergo a ceremony of marriage, even if no compulsion or coercion is required as it would be with a person with capacity."

31. In *KC v Westminster* Roderic Wood J at first instance had made a declaration *that the "marriage" of IC and NK ... is not valid under English Law*. It had

not been drawn to his attention that he had no power to make such a declaration, because of the provisions of Section 58 (5) Family Law Act 1986 that "No declaration may be made by any court, whether under this Part or otherwise - (a) that a marriage was at its inception void…". Section 55 (6) provides that "Nothing in this section shall affect the powers of any court to grant a decree of nullity of marriage". Thus, the Court of Appeal ruled, an application for a declaration is proscribed, and the only route to a judicial determination that a marriage is void at its inception is by a petition for nullity. As the Matrimonial Causes Act 1973 (MCA 1973), by section 12 (c) provides that where "either party to a marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise", the marriage is voidable rather than as, prior to the enactment of the Nullity Act 1971, void. The Court of Appeal held that the marriage was to be regarded as valid in Bangladesh, and must be regarded in English Law as valid until set aside.

32. The Court accepted that there were a number of reasons not to recognise the marriage as valid:

(i) The "dual domicile rule" is the overriding principle (proposition 67 of Dicey and Morris that capacity is governed by the law of each party's domicile: and that "A marriage is (normally) invalid when either party lacks, according to the law of his or her ante nuptial domicile, the capacity to marry the other"). Wall LJ (as he then was) said that the "dual domicile rule" "is well established in English law, has been frequently applied, and produced no injustice in the present case". He referred to *Brook v Brook* (1961) 9 HLC 193, (per headnote) "The form of entering into the contract of marriage was regulated by the lex loci celebrationis, the essentials of the contract depend on the lex domicillii. If the latter are contrary to English law of the domicile, the marriage (although duly solemnised elsewhere) is void." However, where the dual domicile rule does not apply, there are other grounds: namely

(ii) the matrimonial home test: capacity to marry is determinable according to the law of the jurisdiction of the matrimonial home or intended matrimonial home, and

(iii) the law of the country with which the marriage has the most "real and substantial connection", in that case England and Wales, since it was the intention of the parties to live in England, and

(iv) public policy considerations.

33. Thorpe LJ stated at [29] that the alternatives to the dual domicile rule "have emerged as an expression of the general policy to recognise rather than to reject a marriage valid in some other sovereign state".

34. Wall LJ agreed with Roderic Wood J at first instance that Cotton LJ's statement in *Sotomayor otherwise de Barros v De Barros (1877) 3 PD 1*, that

"no country is bound to recognise the laws of a foreign state where they work injustice to its own subjects" reflected a persuasive position on public policy although (as Roderic Wood J had said) "of course requiring a rigorous analysis of the facts and law relevant to the individual case". Wall LJ also approved Munby J, as he then was, in *X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968 that "capacity to marry, in contrast with formal validity, is not governed by the lex celebrationis. So it is neither here nor there that a marriage celebrated in Pakistan might be recognised as valid in that country. The short point is that [B's] capacity to marry in the eyes of English law means that no marriage entered into by him, either in this country or abroad, will be recognised in English law. And, if it is not recognised in English law it will not be recognised by English public authorities." Wall LJ agreed with Munby J that the court had a protective jurisdiction to prevent an adult under a disability from being taken out of the country to be married, and also that any purported marriage whether celebrated in England or abroad would not be recognised in English law.

35. Roderic Wood J had said that "The clear intention of Parliament over many generations of legislation has been to protect vulnerable members of society including minor children and those suffering from unsoundness of mind. I would be failing in my responsibility to IC if I did not afford him the same right as is accorded to others suffering a disability, even respecting as I do the right of other religions and cultures to address matters differently."

36. Wall LJ referred to the test laid down by Sir Jocelyn Simon P in *Cheni (orse Rodriguez) v Cheni* (*Cheni*) [1965] P 85, namely "whether the marriage is so offensive to the conscience of the English Court that it should refuse to recognise and give effect to the proper foreign law. In exercising that judgment the court will seek to exercise common sense, good manners and a reasonable tolerance. In my view it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilisation. On the contrary, I must have regard to this particular marriage, which, valid by the religious law of the parties' common faith and by the municipal law of their common domicile, has stood unquestioned for 35 years. I must bear in mind that I am asked to declare unmarried the parents of a child who is unquestionably legitimate in the eyes of the law."

37. Wall LJ:

(i) Held that the most real and substantial connection was with England and Wales since the purpose and the intention was that parties to the Bangladeshi marriage would live together in the UK: and the matrimonial home was to be in England.

(ii) concluded that departures from the dual domicile rule designed to uphold the principle of marriage may be appropriate when the marriage question is one which the courts, on grounds of public policy, will think it right to uphold. But to qualify for such an approach, a marriage must conform to English concepts of marriage. The absence of capacity is wholly inconsistent

with English concepts of marriage, and the inability of IC to consent either to marriage or sexual intercourse "strikes at its root".

(iii) held that the marriage in *KC* was sufficiently offensive to the conscience of the English Court that the court should refuse to recognise it; in so doing the court would be exercising "common sense, good manners and a reasonable tolerance" (per *Cheni*).

38. Thorpe LJ said at [31] "I would be equally supportive of the judge's introduction of the public policy considerations. In English jurisprudence not every marriage valid according to the law of some friendly foreign state is entitled to recognition in this jurisdiction". At [32] he said "In the present case it is common ground that IC lacks the capacity to marry in English law. Even having regard to the relaxations that have permitted marriage to be celebrated in a variety of places and by a variety of celebrants, it is simply inconceivable that IC could be lawfully married in this jurisdiction." Wall LJ agreed with this observation. Thorpe LJ continued "There is much expert evidence to suggest that the marriage which his parents have arranged for him is potentially highly injurious". Thorpe LJ set out a number of considerations relevant to IC and referred also to the illegality of sexual relations: since sexual relations, including sexual touching with a person who cannot consent, constitutes a sexual offence under the Sexual Offences Act 2003. He continued "It is the duty of the court to protect IC against that potential abuse. The refusal of recognition of the marriage is an essential foundation of that protection." Wall LJ held "this marriage cannot be afforded recognition either on its own or in the context of the development of English private international law in relation to marriage. There are also strong public policy grounds for refusing recognition." The marriage was offensive simply on the basis of IC's inability to consent either to marriage or sexual relations. Thorpe LJ focused on the harm which was likely to be caused to IC by the marriage.

39. The Court of Appeal substituted a declaration that "the marriage between IC and NK, valid according to the law of Bangladesh, is not recognised as a valid marriage in this jurisdiction".

40. In *B v I* [2010] 1 FLR 1721 Baron J made a declaration of non-recognition in respect of the marriage of a young woman who had full capacity but whom she was satisfied had been forced into marriage abroad. Nullity was statute barred due to lapse of time. Baron J referred to the inherent jurisdiction as a "flexible tool which enables the court to assist parties where statute fails" and said that the Court should deal with cases in a "practical and sensible manner".

41. The characterisation of the jurisdiction as being "flexible and able to respond to social needs" was accepted by the Court of Appeal in *DL v A Local Authority* (2012) EWCA Civ 253 (*DL*): concerning two vulnerable adults who lacked capacity. This decision post-dates the argument before me, but upholds the decision of Theis J at first instance, decided on the same grounds, to which I was referred.

42. In *DL* the Court of Appeal held that the inherent jurisdiction to make declarations to protect vulnerable adults survives implementation of the Mental Capacity Act 2005 (MCA 2005) and allows the court, if necessary, to put protective measures in place in relation to vulnerable adults who do not fall within the MCA 2005. However the Court's reasoning is relevant also to incapacitated adults.

43. The Court held that the inherent jurisdiction was, in part, aimed at enhancing or liberating the autonomy of vulnerable adults whose autonomy had been compromised by a reason other than mental incapacity because they were: (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, and commented that there are strong public reasons to retain such a jurisdiction which is also aimed at enhancing ECHR rights. The Court specifically relied on and upheld the decision of Munby J, as he then was, in *Re SA (Vulnerable Adult with Capacity)* [2005] EWHC 2942 (Fam); [2006] 2 FLR 867 (SA).

What is the jurisdiction to make a declaration of non- recognition?

44. Pursuant to Section 1 (5) MCA 2005:

> An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

45. Section 15 (under the section headed "*General powers of the court and appointment of deputies"* and entitled "Power to make declarations") provides that the court may make declarations as to –

> (a) whether a person has or lacks capacity to make a decision specified in the declaration;
> (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
> (c) the lawfulness or otherwise of any act done[1], or yet to be done, in relation to that person.

46. Section 16, entitled "Powers to make decisions and appoint deputies: general", provides that

> (1) This section applies if a person ('P') lacks capacity in relation to a matter or matters concerning –
> a) P's personal welfare or
> b) P's property and affairs
>
> (2) The court may –

[1] Act' includes an omission and a course of conduct

i. by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

ii appoint a person (a 'deputy') to make decisions on P's behalf in relation to the matter or matters.

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests). An order of the court may be varied or discharged by a subsequent order.

47. Section 17, under the same heading, provides that:

(1) The powers under section 16 as respects P's personal welfare extend in particular to-

(a) deciding where P is to live;
(b) deciding what contact, if any, P is to have with any specified persons;
(c) making an order prohibiting a named person from having contact with P;
(d) giving or refusing consent to the carrying or continuation of a treatment by a person providing health care for P;
(e) Giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.

48. On analysis of the MCA 2005 itself, I note that the repertoire of available declarations is clearly set out in section 15; and that the ambit of personal welfare decisions is described in section 16. There is no suggestion within section 15 that there is power to make declarations other than so specified, such as "in particular" or "including", found elsewhere in the Act, for instance s 17, and s 18, referred to below. I accept that s 15 expressly circumscribes and limits the powers of the court under the MCA 2005. I could, I think, make a declaration pursuant to the MCA 2005 that it is unlawful for DD to be married in this jurisdiction. I do not think that I could make a declaration that it was or is unlawful for her to be married in Bangladesh. But even if I am wrong about this, there is no jurisdiction within the MCA 2005 to make a non-recognition declaration in respect of the marriage: and it is not a personal welfare decision.

49. The Court of Appeal in *KC v Westminster* proceeded on the basis that it was required to exercise the inherent jurisdiction of the High Court rather than to make a declaration pursuant to the MCA 2005, which had been in force for almost six months when the appeal was heard. Had the Court of Appeal thought that it had jurisdiction to make a declaration of non-recognition under the MCA 2005 it could have exercised that jurisdiction itself or sent it back to the trial judge for him to do so. The question of whether there was jurisdiction under the MCA 2005 was not specifically addressed. The Court of Appeal may have thought that it was obvious that there was no such jurisdiction. I do not think, as was suggested as a possibility on behalf of the Official Solicitor, that the Court of Protection can develop its "own inherent jurisdiction" which permits it to go outside its own statutory powers.

50. I am satisfied that I have jurisdiction to make a non-recognition declaration under the inherent jurisdiction of the High Court: the decision in *KC v Westminster* is binding authority for that proposition.

51. The application itself in *KC v Westminster*, brought pursuant to the inherent jurisdiction of the High Court, was issued prior to the coming into force of the MCA 2005: the hearing at first instance however took place after its implementation. In the Court of Appeal it was argued that there was no jurisdiction to prohibit the removal of IC to Bangladesh to marry because the inherent jurisdiction of the High Court had been subsumed into the provisions of the MCA 2005, and no longer existed. The Court rejected that submission, Wall LJ saying at [54] "I am in no doubt that the inherent jurisdiction to protect the welfare of vulnerable adults, confirmed in this court in *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38, survives, albeit that it is now reinforced by the provisions of the Mental Capacity Act 2005. I am also in no doubt that a combination of the inherent jurisdiction and the provisions of the 2005 Act are apt to confer jurisdiction on the High Court to make orders about where IC should live, including the decision as to whether it is in his interests to go and live in Bangladesh." He approved Roderic Wood J's rejection of the argument at first instance where he said "… where it is necessary, is lawful and proportionate I consider that this court can exercise its inherent jurisdiction alongside, as appropriate, the Mental Capacity Act 2005. Consistent with long-standing principle, the terms of the Statute must be looked at first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction should not be deployed so as to undermine the will of Parliament as expressed in the statute or any supplementary framework." That analysis was specifically approved by the Court of Appeal in the recent decision in *DL.*

52. I accept that the inherent jurisdiction of the High Court exists to fill a gap. But I reject Mr Cowen's somewhat circular argument on behalf of XCC that

    i) The MCA 2005 provides a complete statutory code, and must be given "priority";

    ii) Therefore there is no gap to be filled.

53. This was the argument rejected in *KC v Westminster* and now in *DL.* The gap is the lack of the power to grant a declaration of non-recognition.

54. Such a declaration in this case is not unlawful, as Mr Cowen submits. The protection or intervention of the inherent jurisdiction of the High Court is available to those lacking capacity within the meaning of the MCA 2005 as it is to capacitous but vulnerable adults who have had their will overborne, and on the same basis, where the remedy sought does not fall within the repertoire of remedies provided for in the MCA 2005. It would be unjustifiable and discriminatory not to grant the same relief to incapacitated adults who cannot consent as to capacitous adults whose will has been overborne.

Under the inherent jurisdiction of the High Court, are declarations confined to those relating to best interests and/or dictated by best interests' considerations?

55. The Official Solicitor accepts that that it would be lawful for me to make a declaration pursuant to the inherent jurisdiction, but submits that that jurisdiction is available only on welfare grounds and that public policy is irrelevant.

56. In my view since I am exercising inherent jurisdiction powers and not making an order under the MCA 2005, then the provisions of Part 1 of the Act (entitled "Persons who lack capacity") which are specifically expressed to apply "for the purposes of this Act" are not imported into the inherent jurisdiction evaluation. However since it has been submitted that a number of these considerations are relevant in this case and should form part of my evaluation, and since it may be argued that the principles codified in the MCA 2005 are principles of general applicability in cases falling outside the MCA 2005 which concern incapacitated adults, I will deal with these criteria when dealing specifically with welfare.

57. I do not consider that under the inherent jurisdiction I am confined to making a decision which is dictated by only considerations as to best interests, whether applying specific section 4 MCA 2005 or more general welfare considerations. The Court of Appeal in *DL* stressed that in contrast to incapacitated adults, the decisions of adults with capacity cannot be overridden on the best interests test or welfare grounds. But that is not to say that intervention on behalf of incapacitated adults is confined to best interests decisions: indeed as the Court of Appeal observed in *DL*, Munby J had said in *SA*, in relation to the exercise of the inherent jurisdiction, that:

   a. The jurisdiction can be invoked <u>whether or not</u> the vulnerable adult is suffering from any kind of incapacity (emphasis added)
   b. The common thread is the lack of capacity to make a relevant decision: including coercion, restraint, undue influence or other factor.

58. In *DL* the Court of Appeal stressed that there was not necessarily a clear division between capacity and incapacity, and cases before the court often concern persons with borderline or fluctuating capacity.

59. Notwithstanding that DD lacks capacity she does not in my view lack the right to autonomy (the Shorter OED definition of which includes "freedom from external control or influence").

60. Although the Court of Appeal in *KC v Westminster* did not express its decision in quite the same terms as Munby J in *SA* and the Court of Appeal in *DL* with reference to "autonomy", part of its reasoning was that IC had not given consent to the marriage and that this was a grave breach of his personal rights.

61. I consider that I am entitled to grant a non-recognition declaration in this case on the specific ground that DD's consent has not been given, as did Baron J in *B v I*; irrespective of capacity. That is not a welfare or best interests decision.

Is welfare relevant to the decision whether or not to recognise? And what is "welfare"?

62. I accept that welfare may be relevant to the decision not to grant a declaration of non-recognition. The Advocate to the Court submits that the real test is not: is it in DD's best interests for a declaration of non-recognition to be granted: but rather: is it in her best interests for it not be granted, and for her to remain married. He suggests that where an adult has "borderline" capacity, and has the capacity to consent to sexual relations (which requires a different and arguably less sophisticated understanding than marriage) and to understand and to welcome pregnancy, and for whom the marriage is benign and supportive, and where there are children being cared for in the family environment, then the picture might be very different from this case, and welfare might argue against non-recognition. Furthermore, in my view, if a marriage has been celebrated when one party lacks capacity but later regains it, and does not wish to repudiate the marriage (a consideration relevant to the characterisation of a non-consensual marriage as void rather than voidable in the 1971 legislation) then the lack of consent and even non-consensual sexual relations before capacity was regained might well not justify non-recognition. In the latter case proceedings would probably not come before the court.

63. But in this case there is a raft of best interests declarations based on best interests terminating all marital relations between the parties. As the Advocate to the Court observed, a declaration of non-recognition reflects those declarations in law.

64. The resistance to the proposed declaration by DD's parents and AA led me to considerable concern as to why in the face of my earlier order they were so desperate to keep this marriage alive in English law. Also I found it a remarkable feature of this case that the presentation of DD's welfare interests by those who have a duty to protect her welfare has focused on the impact on DD of the wishes and feelings of her family.

The position of DD's family and their attitudes and beliefs.

65. Mr Cowen submits that I have to apply section 4 (7) (b) of the MCA 2005 and take account of the views of "anyone engaged in caring for the person or interested in his welfare ....". I have already said that I do not accept that I have to apply the provisions of the MCA 2005 to this inherent jurisdiction decision. However Sir Jocelyn Simon in *Cheni* referred to the beliefs and standards of the celebrants and its validity in their culture (but not of other persons: which is in my view an important distinction); Roderic Wood J in *KC and Westminster* stated that he had to give appropriate regard and respect to the cultural beliefs of IC's family.

66. I accept that cultural considerations arise in this case and I have done my best to be sensitive to these. However, I cannot accept Mr Cowen's submission that cultural norms and beliefs and the fact that DD's family does not perceive her marriage to be "illegal", as he puts it, nor contrary to her interests, can be allowed to dictate or even affect my decision. If Mr Cowen's argument is to be followed, then the beliefs and views of DD's family would extend to the court condoning sexual relations, and the risk of pregnancy; and create implicit recognition of a marriage which has been forced on her within the definition of the Forced Marriage (Civil Protection) Act 2007. Also I cannot

disregard that a non-consensual marriage is of a very different nature from the marriage in *Cheni*, and that since DD has no concept of marriage, she can have no culturally determined attitude to marriage.

67. I accept also, as is submitted by the Advocate to the Court, that since the issue of capacity to consent has already been determined the wishes of the parties cannot be relevant, by analogy with *Re MN* [2010] EWHC 1926 (Fam.). In that case Hedley J held that the decision to recognise or enforce an order of a competent court in California requiring the return of MN (an incapacitated adult) to that state cannot be described "as a decision 'for and on behalf of' MN. She is clearly affected by that decision but it is a decision in respect of an order and not a person." [31].

The family's case as to shame and stigma.

68. In their written evidence submitted for this hearing DD's mother and father said that there had been a number of comments made to them by members of their community about why the police had been to their house (at the inception of the Forced Marriage Proceedings) and why AA was not still living with them, and that their belief is that marriage is for life: their case was that "a divorce or nullity petition would lead to embarrassment and criticism and quite possibly lower {DD's} standing and quite possibly ours in the community", particularly since the community would assume that as man and wife AA and DD had had sexual relations. They were opposed to divorce because this would be a "sad outcome" for her and again would carry stigma for her. Even taking the presentation of the family's concerns at its highest, this did not seem to me truly to raise welfare considerations for DD. Dr Rehman's views reinforced my preliminary conclusions of December 2010 (Paragraph 14 above).

69. Also I simply do not understand that a declaration that the marriage is not to be recognised in this jurisdiction undermines, in the view of DD's community, the fact that she underwent a marriage in Bangladesh. Having reflected on his views in the witness box, Professor Rehman said that this could be explained to and understood by the Bangladeshi community both here and in Bangladesh, if necessary; and that if the community were assured that any sexual relationship took place within the provisions of Sharia law, then the refusal to recognise the marriage in this jurisdiction would be understood. In any event in my view these considerations must be subject to the recognition of the rights and protection of DD, and to public policy considerations.

DD's hypothetical beliefs and values.

70. I do not accept, as Mr Cowen submits, that I need to take into account "beliefs and values that would be likely to influence [DD's] decision if she had capacity" whether under section 4 (6) MCA 2005 or otherwise, or that if capacitous, DD would agree with her parents (i) that she should have married notwithstanding her incapacity and (ii) that the marriage must be now kept alive in name.

Are public policy considerations relevant?

71. I do not accept that *KC* does not lay down a general principle that public policy comes into play when considering whether a marriage of a party who does not have capacity to consent should be recognised. It is not a case on its own facts. But the Official Solicitor and XCC and AA submit that immigration considerations are irrelevant. The Advocate to the Court disagrees. He points out that it is as relevant to take into account immigration considerations as it is criminality of sexual relations. I am not sure that the analogy is entirely sound: the criminality attaches to an activity with the incapacitated person. Immigration issues affect society generally.

72. The Court of Appeal in *KC v Westminster* held that "the refusal of recognition of marriage is an essential foundation of the duty to protect the incapacitated adult". The specific public policy considered by the Court of Appeal was that such a marriage is so offensive to the conscience of the court that it should not be recognised. I have said that to force a marriage on an incapacitous person is a gross interference with his or her autonomy. Its concomitants, sexual relations and, as a foreseeable consequence, pregnancy, constitute not only a breach of autonomy but also bodily integrity, perhaps one of the most severe that can be imagined, and the consequences may be lifelong. Marriage creates status from which many consequences flow which affect third parties and the public at large including the admission of persons who would not otherwise be entitled to admission. Thus questions of public policy generally as well as those that affect the individual concerned are relevant. There is also a public policy interest in the Court stating openly that such marriages should not be recognised.

73. The parties suggest that AA's immigration status is no longer relevant: by the time of the hearing in October 2011 a letter had been received from the Home Office, which had seen my earlier judgment. AA's leave to remain has expired. AA has not applied for further leave to remain or indefinite leave to remain as DD's spouse: but for leave to remain outside the immigration rules. His status was likely to be reviewed regardless of the present proceedings. If he remains legally married to DD this is unlikely to benefit his immigration position given my earlier findings. The UKBA would not regard the marriage as subsisting, and it would be unlikely that he could rely on Article 8 of the ECHR: their letter made it clear that AA would not be able to rely on the marriage in support of his immigration application. The Advocate to the Court submits that even if a declaration as to the status of the marriage would have no future effect upon the immigration position of AA, public policy issues also arise from the fact that AA was able to enter to live and work in the UK by reason of DD being subjected to a marriage to which she could not consent. I accept that AA entered lawfully on a spousal visa: but it was a visa based on a false premise that this was a marriage capable of being recognised.

74. Although AA's visa has expired he remains DD's husband in English law. It is far from clear to me that he will not be entitled to rely on this status in some way, notwithstanding his "assurances". It was apparent during the hearing before me that AA still regarded the technical subsistence of his marriage as vitally important in assisting him to secure his immigration status.

75. The Official Solicitor and XCC referred to *Re A and Another (Children) (Care Proceedings: Asylum Seekers)* [2003] EWHC 1086 (Fam), [2003] 2 FLR 921, FD, and I have also considered *S v S* [2008] EWHC 2288 (Fam); [2009] 1 FLR 241. In both cases Munby J was considering what he described in *S v S* as the "well –known principle that a judge exercising the wardship jurisdiction cannot interfere with the exercise by the Secretary of State for the Home Department of his or her powers in relation to matters of immigration and asylum". It is specifically not suggested that for me to consider or refer immigration issues in deciding whether to make a declaration of non-recognition would be to attempt to put pressure on, influence or bind the Home Office in its immigration decisions, or to undermine or circumvent its actions. I quite accept that it would be impermissible for me to seek to do so. But I do not accept that a declaration of non-recognition would have that effect. Neither of the decisions (or many other decisions in which precisely the same principle is set out) is relevant to the question of whether I can take into account that AA's entry was gained in reliance on a non-consensual marriage. I am exercising an independent jurisdiction as to whether to grant a declaration, and the fact that AA's has gained entry relying on this marriage is relevant to whether I find its recognition offensive, which I do.

76. The most important aspect of the immigration aspect of this case is that this non-consensual, forced marriage has been created in order to further the interests of others and not DD. That is a clear public policy consideration that affects DD. DD would not have been married to AA had he not wanted to come to England to live and work.

Do the assurances and undertakings make it unnecessary for the declaration of non-recognition to be granted?

77. In exercising the inherent jurisdiction I do not accept that I have strictly to apply section 1 (6) MCA 2005 and to give regard to whether the purpose for which the act or decisions is made "can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action". In any event DD has no rights and no freedom of action in respect of her marital status. But I can see that on general principles I should consider whether it is necessary and proportionate to grant a non –recognition declaration.

78. I do not accept that the undertakings provide absolute protection for DD although I accept that they provide some protection. First of all, breach of an undertaking may go undetected. There have been suspicions in this case that AA has been allowed into the family home of DD since my initial ruling: this is incapable of either proof or disproof. There are a number of features which cause me doubt as to the reliability of AA and DD's family.

    i) Exposure of DD to the risk of pregnancy;

    ii) Resistance to the finding, overwhelming on Dr Milne's and other evidence, that DD lacked capacity to marry;

(iii) A number of untruths told to the court about the circumstances of the marriage, what DD had said, and DD's level of functioning in that context;

(iv) Physical abuse of DD by AA: and untruths about it;

(v) Failure to co-operate with the plans for support for DD after the hearing, partly because they had fallen out with a support worker with whose evidence in these proceedings they had disagreed;

(vi) Resistance to the declaration of non-recognition and the belief that DD's marriage is not only lawful but perfectly acceptable and in her interests.

79. There may be any number of circumstances in which AA's status as DD's husband may affect not only her but others: and I have strong doubts as to whether AA can indeed "contract out" of that status, by agreeing "not to rely" on the marriage for certain purposes: for instance, as suggested by the Advocate to the Court, welfare and other benefits: and this is particularly so because, as the Official Solicitor submits, there is no legal status of "next of kin" Other examples were discussed in submissions. The Official Solicitor submits that if DD for instance inherited money or benefited from a damages claim that her family would bring matters to the attention of the Court of Protection, which could also determine testamentary disposition. I am not so confident: there has been throughout this case a conspicuous resentment of interference in family affairs by the local authority and the court.

80. These considerations are not only relevant to public policy, but serve to emphasise that the concessions are likely to have limitations and be difficult to police. Assurances have no legal effect whatsoever: the court has to decide whether the person giving the assurance is reliable *A Local Authority v A (by her litigation friend the Official Solicito*r) *& A* [2010] EWHC 1549 (Fam). In any event, assurances cannot interfere with the operation of law and would probably not bind third parties, or might not be effective in relation to DD's estate. In the light of the history I am not confident that assurances will be adhered to in all circumstances, that they will be regarded as binding, that the necessity for them will be understood or accepted, and that in any event there may be circumstances not yet contemplated where they will be ineffective.

81. The undertakings and assurances do not address the issue of status, which has both public and private ramifications.

Can the court make an order of its own motion?

82. Rule 27(1) of the Court of Protection Rules 2007 provides that: "Except where these Rules or some other enactment make different provision, the court may exercise its powers on its own initiative" but if, as I consider, I am exercising inherent jurisdiction rather than Court of Protection powers this does not help.

83. In *KC v Westminster* it appears that the orders were made of the Court's own motion both at first instance and in the Court of Appeal: and in *A Local*

Authority v A the court considered an application for an injunction even though no party sought it.

84. The Advocate to the Court submits, and no party challenges, that academic opinion supports the conclusion that the inherent jurisdiction may be exercised 'in respect of matters which are not raised as issues in the litigation between the parties'. ('The Inherent Jurisdiction of the Court' ***I.H Jacob, Current Legal Problems 1970, page 23 at page 25).***

85. In fact no party sought to persuade me that I could not make a declaration of non-recognition of my own motion pursuant to the inherent jurisdiction of the High Court in the course of a hearing in the Court of Protection in which capacity to consent to marriage is in issue. As Baron J said in *B v I* the inherent jurisdiction is a flexible remedy and must be approached practically. In *KC v Westminster* the Court referred to the inherent jurisdiction of The High Court being deployed in combination with the 2005 Act. I am satisfied that once a matter is before the Court of Protection, the High Court may make orders of its own motion, particularly if such orders are ancillary to, or in support of, orders made on application. Since the inherent jurisdiction of the High Court in relation to adults is an aspect of the parens patriae jurisdiction, the court has particularly wide powers to act on its own motion.

Formal steps to end the marriage

86. The family is more receptive to the notion that AA could end the marriage by way of talaq rather than that there should be nullity proceedings, notwithstanding that that might be thought to bring more shame and stigma on the family than non-recognition. It remains unclear whether AA would be prepared to end the religious status of the marriage here through talaq (which would not be recognised), and end the marriage in Bangladesh through divorce proceedings there. To be recognised a Bangladeshi divorce would have to be a "proceedings" divorce, notice would have to be given, and such a divorce might not be recognised for public policy reasons (see Part II Family Law Act 1986).

87. In *Re P (Forced Marriag*e) [2010] EWHC 3467 (Fam), where a capacitous woman had been forced into marriage abroad, Baron J adopted counsel's submissions, based on the decision of Coleridge J in *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661, that the court should, where appropriate, grant a decree of nullity. Coleridge J's decision preceded *KC v Westminster* and the Court of Appeal's innovative grant of a declaration of non-recognition.

88. I do not consider that the availability of nullity proceedings should deter me from making a declaration of non-recognition, which performs a wider function than a nullity decree since it extends to the whole duration of the marriage. I agree with the Official Solicitor that nullity is adjunctive rather than an alternative to a declaration of non-recognition. If a decree is granted this would add further clarity to DD's marital status.

89. Section 13 (4) MCA 1973 requires the court to grant leave for the institution of nullity proceedings if this is after three years of the celebration of the marriage. It is possible that DD might not be given leave to institute nullity proceedings as three years have elapsed from the date of the marriage, but one of the grounds on which leave may be given is that the petitioner has at some time during that three year period suffered from a mental disorder, which includes arrested or incomplete development of the mind, within the meaning of the Mental Health Act 1983; and the judge must consider that in the circumstances to grant leave would be just. AA might defend the proceedings, and although I doubt that this would prevent the decree from being granted in this case, it would delay the resolution of the proceedings.

90. The institution of nullity proceedings is within the powers of the Court of Protection. Section 16 MCA 2005 permits the court to make a decision in relation to an incapacitated person's personal affairs. Section 18 (1) (k) MCA 2005 provides that these powers extend in particular (i.e. not exclusively) to the conduct of legal proceedings in P's name or on P's behalf.

91. Section 27 MCA 2005 sets out a range of decisions which cannot be made on behalf of the incapacitated person: including consent to sexual relations and consent to a marriage or civil partnership and consenting to a divorce/ civil partnership dissolution being granted on the basis of two years' separation. It does not include the defence of divorce proceedings on any ground, and whether to institute nullity proceedings. Professor Rebecca Probert, senior lecturer at the University of Warwick, in her article "Hanging on the Telephone: *City of Westminster v IC*", Child and Family Law Quarterly, Vol 20, No 3, 2008 395 to which the Advocate to the Court drew my attention, states that the Law Commission, in recommending that lack of consent should render a marriage voidable rather than void, noted that the possibility of the incapable party's next friend instituting nullity proceedings "provided a safeguard in the event of being in the best interests of the insane (sic) person being able to obtain a decree of nullity". Professor Probert goes on to say that the Court of Protection now has power to facilitate the institution of nullity proceedings. The parties agree.

92. I can make a decision that it is in DD's best interests for nullity proceedings to be instituted. The court cannot institute such proceedings in nullity itself. I can authorise the Official Solicitor to act as DD's litigation friend for the purpose of commencing such proceedings. The Official Solicitor has confirmed that he is willing to do so subject to the availability of public funding. I do not see why, as the Official Solicitor hesitantly suggests, the Court of Protection's decision about capacity should not bind a court dealing with nullity proceedings. In any event lack of capacity cannot truly be in dispute.

Conclusion

93. I agree with the Advocate to the Court that it is not in DD's interest for this marriage to continue in form let alone in substance. Its creation and existence is in breach of her personal rights. There is no positive feature of the marriage at all for DD. Indeed it is disadvantageous to her in a number of respects. It has exposed her to great risk. Hopes in respect of the marriage have given rise

to great tensions, fuelled family conflict with XCC as providers of essential services and support for DD, led the family to dismiss the significance of the earlier declarations, and have led DD's mother to continue to use DD's purported wishes and feelings to support the continuance of the marital relationship. It is obvious to me that DD's family want to support AA's endeavour to remain in this country and that they have perceived the marriage, and perhaps even potential children resulting from it, as supporting that aspiration. I had and have a number of anxieties as to the reliance that might be placed on the marriage in a number of contexts. I agree that this family needs closure. DD is plainly aware of tensions in this family and conflict with XCC has affected her adversely. There should not be any ambiguity as to her status.

94. I have no doubt that the principles in *KC* are of general application: and that I am entitled to make an order that DD's marriage is not recognised in this jurisdiction. In respect of status alone, DD is undoubtedly domiciled in the jurisdiction, and England, as the proposed place of residence, and entry to which was one of the prime purposes if not the sole purpose of, the marriage, was and is the country with the most real and substantial connection with the marriage. There are overwhelmingly strong public policy grounds and welfare grounds not to recognise the marriage. I shall declare that the marriage of DD and AA, celebrated in and valid according to the law of Bangladesh, is not recognised as a valid marriage in this jurisdiction.

95. Subject to further argument as to the precise form of the order I declare that it is in DD's best interests for a nullity application to be issued; I direct that it shall be issued, and I appoint the Official Solicitor as DD's litigation friend for that purpose.

Postscript: Duties of professionals in cases of non-capacitous marriage.

96. I have referred above to the fact that DD was taken to the family GP for advice as to whether she could bear a child, why she was not pregnant, and whether she had capacity. No step was taken by any doctor to notify any authority, notwithstanding that her degree of incapacity was well known and obvious. I repeat the postscript to my previous judgment:

> "[179] I agree wholeheartedly with Professor Rehman in his conclusion that
>
> a. Care should have been taken to medically certify DD's physical and mental capacity prior to her marriage
> b. DD should have been prevented from leaving the UK with a view to getting married in Bangladesh.
>
> [180]At the date of DD's marriage, although the issue of forced marriage in the case of minors and adults with capacity was certainly in the judicial arena, and orders were made pursuant to the inherent jurisdiction, the Forced Marriage Act 2007 was not implemented until that year.

[181]Notwithstanding my criticism of XCC, effective Social Services intervention in 2003 and before by provision of support may well not have prevented the marriage since the family may not have discussed their plans for marriage. I doubt whether an effective support scheme would have led to any different approach by the family to the need to provide support for DD from a spouse. However XCC may have been in a position to bring the case before the High Court to seek an order pursuant to the inherent jurisdiction, although the jurisprudence was then still in its infancy. However they ought to have intervened, and quickly, when they became aware of DD's marriage in 2008. Had they done so it is likely that an order would have been made preventing her from cohabiting with AA. I understand the family's bewilderment and distress and indeed sense of anger that intervention took place at a late stage when there was no previous expression of concern from any quarter.

[182] It does seem to me also that there was effective lack of communication between medical and Social Services over a number of years. There have been a number of occasions when the GP service has been alerted to the question of marriage and potential pregnancy. I think in particular of:

1 The letter to Dr C in 2000 stating the family was thinking of getting DD married and asking for his advice as to the risk of bearing a baby with Down's syndrome
2 The letter from Dr J asking for a report in connection with AA's visa application in May 2004

[183] Social Services were not even alerted when visits were made to the general practice in June, September and October 2009 for pregnancy testing and it was asserted that DD "wanted a baby". In my judgment it does not take a psychiatrist of Dr Milne's standing to be aware that marriage and pregnancy are likely to create very real problems for DD.

[184] I have not heard from any of the medical professionals, but in my view it is the duty of a doctor or other health or social work professional who becomes aware that an incapacitated person may undergo a marriage abroad, to notify the learning disabilities team of Social Services and/or the Forced Marriage Unit if information comes to light that there are plans for an overseas marriage of a patient who has or may lack capacity. The communities where this is likely to happen also need to be told, loud and clear, that if a person, whether male or female, enters into a marriage when they do not have the capacity to understand what marriage is, its nature and duties, or its consequences, or to understand sexual relations, that that marriage may not be recognised, that sexual relations will constitute a criminal offence, and that the courts have the power to intervene.

[187]My view as to the duty of professionals to report cases of suspected forced marriage, including of persons who lack capacity, is reinforced by the fact that the Forced Marriage Unit has recently (3 December 2010) published guidance for multidisciplinary teams: **Forced Marriage and**

Learning Disabilities: Multi-Agency Practice Guidelines. These stress the "one chance rule" i.e. that there may be only one chance to speak to a potential victim. The guidelines state: "This means that all practitioners working within statutory agencies need to be aware of their responsibilities and obligations when they come across forced marriage cases".

[188] When it comes to light that a marriage is being arranged for a person without capacity to consent, the advice is to contact the police if the victim is at risk of harm and discuss the case with a child or adult protection specialist with expertise in forced marriage.

[190] These guidelines should be widely disseminated."

Mrs Justice Parker

26 July 2012