In The Supreme Court of Bermuda

CIVIL JURISDICTION
2018 No: 211

BETWEEN:

THE MINISTER OF HEALTH

1st Applicant

And

THE BERMUDA HOSPITAL'S BOARD

2nd Applicant

And

Merrick Seaman
(Represented by his Protective Representative)

Respondent

JUDGMENT

Dates of Hearings:	Tuesday 26 June 2018
Date of Judgment:	Tuesday 31 July 2018
Counsel for the Applicants:	Mrs. Shakira Dill-Francois (Deputy Solicitor General)
Counsel for the Respondent's Protective Representative:	Mr. Ken Savoury (Savoury & Associates)

The Powers of the Court in exercise of its Inherent Jurisdiction
Application for Hospital Detention Order
Protection from Arbitrary Arrest or Detention (s. 5(1) of the Bermuda Constitution)

JUDGMENT of Shade Subair Williams J

Introduction:

1. The Respondent was convicted by jury in the Supreme Court on 17 March 2011 on four[1] counts of sexual exploitation of a young person, contrary to section 182A(1)(a) of the Criminal Code. On 30 August 2011, he was sentenced to concurrent terms of 8 years imprisonment without a provision for supervision upon his release. On 2 November 2015 the Crown successfully appealed the sentence and the Court of Appeal imposed a supervision order for a term of three years from the Respondent's release date from prison with a specification for him to comply with the lawful requirements of a probation officer.

2. While serving this sentence, the Respondent was further convicted in the Magistrates' Court on 21 September 2016 for the offence of wounding contrary to section 306(b) of the Criminal Code. He was sentenced to 9 months' imprisonment to be served consecutively to his 8 year terms.

3. The Respondent's earliest release date was fixed for 15 June 2018 when he was transferred from the Westgate Correctional Facility to the Co-Ed Facility.

4. The application before this Court has been made by an Originating Summons seeking an order in exercise of the Court's inherent jurisdiction to detain the Respondent under the Supervision Order in an overseas hospital for medical treatment in respect of his mental health diagnoses which include '(**DIAGNOSIS REDACTED**)'.

5. At the conclusion of the hearing before me, I reserved judgment and now deliver my decision and reasons below[2].

Preliminaries:

6. The Respondent, Mr. Seaman, was produced before the Court and the substantive application was fully heard in his presence.

7. Under Order 80 of the Rules of the Supreme Court ("RSC"), persons who are incapable of managing and administering their property and affairs by reason of a mental disorder must

[1] The Supreme Court Warrant of Commitment to Imprisonment dated 30 August 2011 was exhibited to the affidavit of Acting Commissioner Laura Walker. It refers to only two Counts of Sexual Exploitation upon which the Respondent was convicted. The Court of Appeal Supervision Order handed up to the Court during the hearing refers to four counts of sexual exploitation on which the Respondent appeared for the appeal. Deputy Director of Public Prosecutions, Cindy Clarke, states in her affidavit that the Respondent was convicted on four counts.

[2] This judgment, in redacted form, was delivered in open Court on Tuesday 7 August 2018

appear by a guardian ad litem or a next friend in Court proceedings. Under Rule 2(3) a next friend or guardian ad litem must act by an attorney.

8. The Court accordingly confirmed **(NAME REDACTED)** as the Respondent's guardian ad litem who I will hereinafter refer to as the "Protective Representative". RSC O.80/3 (2) states that it is not necessary for the Court to make an order appointing a next friend or guardian ad litem save in respect of exceptions which do not apply to this case. The Protective Representative was present and seated in close proximity to Mr. Seaman throughout the whole of the substantive hearing before me.

9. The Applicants also sought an order of this Court imposing reporting restrictions on the media to prevent the public disclosure of the Respondent's mental health diagnosis and the identity of his protective representative. I granted the order in these terms on 26 June 2018 and further ordered that the Court file was to be sealed from public access. Additionally, I acceded to the parties' mutual request for the hearing to be held *in camera*.

The Application

10. The Applicants invite this Court to invoke its inherent jurisdictional powers in sending the Respondent overseas to a hospital facility, namely St. Andrew's Health Care in Northampton, England.

11. There are no statutory provisions under which the Court may order a person to be detained and medically treated outside of Bermuda. This is the first occasion on which this Court has been requested to make such an order.

The Evidence in Support of the Application

12. On 13 June 2018 the Respondent was transferred under a warrant issued by the Minister directing him to be moved from the prison at Westgate Correctional Facility to the Co-Educational Facility at Ferry Reach, St George's ("Co-Ed"). Co-Ed is a designated hospital under the Mental Health (Designation of Hospital) Amendment Notice 2018 which was made on 13 June 2018 when the Respondent was so transferred.

13. The Court was referred to the affidavit evidence of the Acting Commissioner of Corrections, Ms. Laura Walker, who referred to a number of infractions made by the Respondent during his custodial period. She said that the Respondent used indecent language towards female officers and was found to be in wrongful possession of weapon-type items. On 8 July 2014, the Respondent was reported to have uttered; "*I intend to go on a killing spree when I get out of jail*." This remark led to a further review by a psychiatrist and pharmaceutical intervention.

14. Ms Walker stated that the Respondent was eligible for parole on 16 April 2013 but that a recommendation report in response to his application for release was to "*be deferred until such time that his offending behavior and the risk to the community have been reduced with the direction of mental health professionals*."

15. A Psychological Risk Assessment Report ("PRA Report") was submitted to the Department of Corrections by Dr. Emcee Chekwas on 27 March 2018. This report was exhibited to Ms. Walker's affidavit. While a thin slice of the report was referred to during the hearing, it is worth reciting the larger portion of Dr. Chekwas' findings:

16. At paragraph 9.2 of the PRA Report, Dr. Chekwas states:

"*Having considered information available to me from Mr. Seaman, assessing him and reviewing his prison medical and psychology files, I concluded that:*

He currently presents with a range of psychological and social adjustment difficulties as well as a (**DIAGNOSIS REDACTED**) *mental health condition that have contributed in the past, and highly likely to increase in the future, his potential for sexual and physical violence.*

There was no discernable evidence that Mr. Seaman has any sexual attraction and / or interest for sex with underage. The evidence discovered is that he is indiscreet about his choices of sexual partners and/or what he is prepared to do for sexual gratification. He also presents with poor impulse control which increases his future risk for sexual and physical violence recidivism.

On the balance of evidence I was able to gather I formed the view that Mr. Seaman presents a high risk for future sexual and physical violence against the public. In the event of him offending he is highly likely to cause significant physical and emotional harm to victims.

It is my view that all conventional interventions administered to Mr. Seaman so far have had minuscule impact in improving his presentation and/or reducing his likelihood of reoffending similarly to his sexual offence or violent tendencies. It is also my view that Mr. Seaman requires future mental health interventions markedly different from what he has received so far. In light of his slow response to interventions already completed, future timescales for his recovery is difficult to predict at this time.

He is likely to be best helped if placed in a medium secure forensic unit with specialist staff with ability to evaluate, diagnose and intervene appropriately to help him. His current incarceration in Westgate Correctional facility is merely keeping him in custody but not addressing the risks and needs he presents. The services likely to help him are currently unavailable in Bermuda and even where intervention abroad could be secured he will require long term care. My strong recommendation is that the overseas option highlighted in

the medium risk scenario at appendix 5[3] *below is pursued for the Public as well as Mr. Seaman's best interests, provided correct legal procedures are in place and followed*."

17. The Court was also referred to the affidavit and exhibits of the Deputy Director of Public Prosecutions, Ms. Cindy Clarke who outlined the underlying facts to the sexual exploitation convictions. Those facts need not be recited in this judgment.

18. In Ms. Clarke's affidavit, she stated that the Respondent's mental state was a live issue during the Supreme Court proceedings and that consideration had been given during the sentence hearing to the making of a hospital order under section 33 of the Mental Health Act 1968.

19. Ms Clarke in her evidence stated that prior to the passing of sentence, Chief Justice Ground (as he then was) ordered reports from two medical practitioners pursuant to section 33(1)(a). Reports from Dr. Grant Farquhar and Dr. Gregory Kerry were produced and reviewed by Ground CJ who in the end decided against proceeding under the provisions of the Mental Health Act.

The Medical Evidence

20. This Court also considered affidavit evidence from the Permanent Secretary of the Ministry of Health who exhibited an extensive psychiatric report on Mr. Seaman from Consultant Forensic Psychiatrist, Dr. Katina Anagnostakis of St. Andrew's Health Care in Northampton, England, dated 24 May 2018.

21. Dr. Anagnostakis reported in detailed narrative in a 44-page report her analysis and diagnosis of Mr. Seaman. Her report discloses that she interviewed him and reviewed his background information which was relevant to her diagnostic formulation. Most relevantly, Dr. Anagnostakis confirmed his various diagnoses as "(**DIAGNOSIS REDACTED**)".

22. At page 31 of her report, Dr. Anagnostakis concluded her opinion on Mr. Seaman's diagnosis as follows:

"*In summary, it is my opinion that he suffers with significant mental disorder and that his presentation is accounted for by a complex constellation of symptoms resultant from* (**DIAGNOSIS REDACTED**)."

[3] Appendix 5 was not included in Acting Commissioner Laura Walker's exhibit.

23. In addressing risk concerns, she reported at page 34:

"*Mr. Seaman has significant mental health needs associated with significant risk of harm towards others as described above. As such he requires treatment in a specialist hospital setting where therapy can be provided safely. Unless detained it is very unlikely that he would engage meaningfully with any treatment and the risks he presents would escalate, placing the public at significant risk.*

Given his profile, the most appropriate setting for him to receive treatment is a specialist forensic medium secure unit with robust physical, procedural and relational security systems in place…"

24. At pages 35-36 Dr. Anagnostakis continued:

"*…In conclusion it is evident that Mr. Seaman lacks capacity to make decisions about his care and treatment. If he were not detained, he would most likely leave prison, live a homeless lifestyle, disengaged from mental health and probation services, making himself very vulnerable to exploitation. It is unlikely that he would adhere to medication and very likely that his mental health would deteriorate; he would take drugs and behave in an aggressive and sexually inappropriate manner, placing members of the public and himself at risk. I can confirm that appropriate treatment as described above is available for Mr. Seaman at St. Andrew's Healthcare, Northampton, UK and that we are willing to admit him to the hospital in his best interests in order to receive treatment if the Bermudian and UK Courts deem it appropriate on this basis*."

25. Dr. Anagnostakis described Mr. Seaman's prognosis as follows:

"*The type of treatment Mr. Seaman requires typically takes 18 months to 3 years to achieve significant improvement in mental health, functional ability and risk reduction allowing step down into the community. It is difficult to predict this exactly, however based on my assessment of Mr. Seaman I believe that it is more likely than not that this timescale will be applicable to him. I believe that he will make rapid progress in a more therapeutic and less restricted setting in relation to stability of his mental state and functional rehabilitation. Progress in relation to developing his insight and engaging in offence related work aimed at risk reduction will be more challenging for him given his history and will depend on his motivation. A significant focus of the treatment programme will be to engage and motivate him in this regard and it will be helpful to have close liaison with Bermudian services in relation to their readiness for him to return to an appropriate care package. This is likely to involve supported accommodation of some kind alongside mental health and probation supervision*."

26. The Court also received medical affidavit evidence directly from Dr. Richard Henagulph who is employed as a Consultant Forensic Psychiatrist by the Bermuda Hospitals Board. He provides support to the Mid-Atlantic Wellness Institute (MAWI) which is a well-established mental health facility in Bermuda. Dr. Henagulph is also known to this Court in his professional expertise capacity.

27. At paragraph 5 of his affidavit he states that he has been involved in Mr. Seaman's treatment since September 2016 and has been regularly visiting him at 2-3 month intervals as the prison's visiting psychiatrist. At paragraph 12 Dr. Henagulph reported his agreement with Dr. Anagnostakis' diagnoses as reported by her 24 May 2018 report. At paragraph 12.b he added:

"*I further note that diagnostic clarification and associated responsivity to treatment will be part of the assessment and treatment provided while at St Andrew and this will better inform his future management on return to Bermuda*."

28. Dr. Henagulph concluded his report as follows:

"*In summary I am of view that:*

a. the nature of his mental disorders (**DIAGNOSIS REDACTED**) *warrant hospital treatment for his own safety and the safety of others;*

b. that this treatment is not currently available in Bermuda but appropriate treatment is available at St Andrew's Hospital;

c. and that his welfare would be at risk of serious harm by reason of his mental disorder if he were not transferred to St Andrew's Hospital for the purposes of such treatment.

Finally, should the order be granted and MS is transferred to St Andrews Hospital, I am willing and able to act as the clinical liaison and local responsible clinician for MS and agree to submission of clinical reports to the Supreme Court as required."

29. Dr. Henagulph also provided a report outlining the patient review plan which would be put in place upon Mr. Seaman's admission to St. Andrew's Health Care. The report also specifies the preservation of Mr. Seaman's right to initiate proceedings to challenge the basis of his detainment and to have regular reviews of his detention.

30. A copy of the proposed contract agreement to be entered between the Bermuda Hospitals Board and St Andrew's Healthcare was also included amongst Dr. Henagulph's exhibits. Amongst the various terms of agreement, the BHB would have a contractual entitlement to a summary of the clinical reports which would be filed with the Supreme Court for review purposes.

The Law

31. The Courts are statutorily empowered to order the admission and detention of a person for treatment in a hospital facility in Bermuda. Mrs. Dill-Francois referred to the Court's sections 33 and 38 of the Mental Health Act 1968 ("the 1968 Act" or "the MHA"). Section 33 empowers the Supreme Court to make a hospital detention order where a person has been convicted of criminal offence and the sentence for that offence has not been fixed by law. Section 38 permits the Court to restrict the discharge of a patient from a hospital order with or without a specified time limit.

32. Sections 33 and 38 of the 1968 Act provide as follows:

Powers of court to order hospital admission

33 (1) Where a person is convicted before the Supreme Court of an offence other than an offence the sentence for which is fixed by law, or is convicted by a court of summary jurisdiction of an offence punishable on summary conviction with imprisonment and the following conditions are satisfied—

(a) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with section 35)—

(i) that the offender is suffering from mental illness, severe personality disorder, mental impairment or severe mental impairment;

(ii) that the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment; and

(b) the court is of the opinion, having regard to all the circumstances, including the nature of the offence, and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section,

the court may by order authorise his admission to and detention in a hospital.

(2) Where a person is charged before a court of summary jurisdiction with any act or omission as an offence and the court would have power, on convicting him of that offence, to make an order under subsection (1) in his case as being a person suffering from mental illness or severe mental impairment, then, if the court is satisfied that the accused did the act or made the omission charged, the court may, if it thinks fit, make such an order without convicting him.

(3) A hospital order for the admission of an offender to a hospital shall not be made under this section unless the court is satisfied that arrangements have been made for the admission of the offender to the Hospital in the event of such an order being made by the court, and for his admission thereto within a period of twenty-eight days beginning with the date of making such an order.

(4) A hospital order shall specify the form or forms of mental disorder referred to in subsection (1)(a) from which, upon the evidence taken into account under that paragraph, the offender is found by the court to be suffering; and no such order shall be made unless the offender is described by each of the practitioners whose evidence is taken into account as aforesaid as suffering from the same one of those forms of mental disorder, whether or not he is also described by either of them as suffering from another of those forms.

(5)Where an order is made under this section, the court shall not pass sentence of imprisonment or impose a fine or make a probation order in respect of the offence, but may make any other order which the court has power to make apart from this section; and for the purposes of this subsection "sentence of imprisonment" includes any sentence or order for detention, including a sentence of corrective training.

Power of Supreme Court to restrict discharge from hospital

38 (1) Where a hospital order is made in respect of an offender by the Supreme Court and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in this section, either without limit of time or during such period as may be specified in the order.

(2) An order restricting discharge shall not be made in the case of any person unless at least one of the medical practitioners whose evidence is taken into account by the court under section 33(1)(a) has given evidence orally before the court.

(3) The special restrictions applicable to a patient in respect of whom an order restricting discharge is in force are as follows—

- *(a) none of the provisions of Part II relating to the duration, renewal and expiration of authority for the detention of patients shall apply, and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under Part II or absolutely discharged under section 39;*

- *(b) no application shall be made to the Review Tribunal in respect of the patient under section 36 or under any provision of Part II;*

- *(c) the following powers shall be exercisable only with the consent of the Minister—*

(i) power to grant leave of absence to the patient under section 20;
(ii) power to order the discharge of the patient under section 26;

and if leave of absence is granted under section 20 the power to recall the patient under that section shall be vested in the Minister as well as the responsible medical officer; and

(d) the power of the Minister to recall the patient under section 20, and the power to take the patient into custody and return him under section 21, may be exercised at any time;

and in relation to any such patient the provisions of Part II described in the first column of the Second Schedule shall have effect subject to the exceptions and modifications set out in the second column of that Schedule.

(4) A hospital order shall not cease to have effect under section 36(4) if an order restricting the discharge of the patient is in force at the material time.

(5) Where an order restricting the discharge of a patient ceases to have effect while the relevant hospital order continues in force, section 36 and the Second Schedule shall apply to the patient as if he had been admitted to a hospital in pursuance of a hospital order 38 (1) without an order restricting his discharge) made on the date on which the order restricting his discharge ceased to have effect.

33. There are also various provisions in the MHA which empower the relevant Minister (the Minister of Health) to make hospital orders in respect of a facility located in Bermuda and overseas.

34. Section 10 of the 1968 Act would permit the 1st Applicant, without the need for the Court's assistance and upon the satisfaction of various conditions, to order the admission of a person for treatment in a facility located in Bermuda.

35. Section 10 provides:

Admission for treatment
10 (1) A patient may be admitted to a hospital, and there detained for the period allowed for by the following provisions of this Act, in pursuance of an application made in accordance with the following provisions of this section.

(2) An application for admission for treatment may be made in respect of a patient on the grounds—

(a) that he is suffering from mental disorder, being—
(i) in the case of a patient of any age, mental illness or severe mental impairment;
(ii) in the case of a patient under the age of eighteen years, severe personality disorder or mental impairment,

and that the said disorder is of a nature or degree which warrants the detention of the patient in the hospital for treatment under this section; and

(b) that it is necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should be detained.

(3) An application for admission for treatment shall be founded on the written recommendations of two medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2)(a) and (b) are complied with; and each such recommendation shall include—

(a) all necessary particulars of the grounds for that opinion so far as it relates to the conditions set out in the said paragraph (a); and

(b) a statement of the reasons for that opinion so far as it relates to the conditions set out in the said paragraph (b) specifying whether other methods of dealing with the patient are available, and if so, why they are not appropriate.

(4) An application for admission for treatment, and any recommendation given for the purposes of such application, may describe the patient as suffering from more than one of the forms of mental disorder referred to in subsection (2); but the application shall be of no effect unless the patient is described in each of the recommendations as suffering from the same one of those forms of mental disorder, whether or not he is also described in either of those recommendations as suffering from another of those forms.

(5) An application for admission for treatment on the ground that the patient is suffering from severe personality disorder or mental impairment, and no other form of mental disorder referred to in subsection (2), shall state the age of the patient, or, if his exact age is not known to the applicant, shall state (if it be the fact) that the patient is believed to be under the age of eighteen years.

36. Section 44 of the MHA is the only statutory pillow on which the Applicants may lay their heads for the lawful transfer of the Respondent from a prison facility to hospital facility in Bermuda. The Minister is empowered to make this transfer direction by a warrant if satisfied by the reports of at least two medical practitioners that it is expedient so to do, having had regard to the public interest and all other relevant circumstances.

37. Section 44 provides:

Removal to hospital of person detained in prison, etc
44 (1) If, in case of a person detained in prison, the Minister is satisfied, by reports from at least two medical practitioners (complying with this section)—

(a) that the said person is suffering from mental illness, severe personality disorder, mental impairment or severe mental impairment.

(b) that the mental disorder is of a nature which warrants the detention of the patient in a hospital for medical treatment,

the Minister may, if he is of opinion having regard to the public interest and all the circumstances that it is expedient so to do, by warrant direct that that person be removed to and detained in a hospital.

(2) A transfer direction shall cease to have effect at the expiration of fourteen days beginning with the date on which it is given unless within that period the person with respect to whom it was given has been received into a hospital.

(3) A transfer direction with respect to any person shall have the like effect as a hospital order made in his case.

(4) Of the medical practitioners whose reports are taken into account under subsection (1), at least one shall be a practitioner approved for the purposes of section 12 by the Board as having special experience in the diagnosis or treatment of mental disorders.

(5) A transfer direction shall specify the form or forms of mental disorder referred to in subsection (1)(a) from which, upon the reports taken into account under subsection (1), the patient is found by the Minister to be suffering; and no such direction shall be given unless the patient is described in each of those reports as suffering from the same one of those forms whether or not he is also described in either of them as suffering from another of those forms.

(6) References in this Part to a person detained in prison include references—

(a) to a person detained in pursuance of any sentence or order for detention made by a court in criminal proceedings, including a sentence of corrective training;

(b) to a person committed by a court to prison in default of payment of any fine adjudged to be paid on his conviction;

(c) to a person committed in custody for trial in the Supreme Court;

(d) to a person remanded in custody by a court of summary jurisdiction.

(7) ...

38. Mrs Dill-Francois pointed out that section 45 empowers the Minister in a way which is similar to how section 38 empowers the Court in that it allows the Minister to restrict the discharge of a patient from the transfer hospital detention order. This is the section which would make it lawful for the Minister to order the continued hospital detention of the Respondent in a facility located in Bermuda.

39. Sections 45 provides:

Restriction on discharge of prisoners removed to hospital
45 (1) Where a transfer direction is given in respect of any person, the Minister, if he thinks fit, may by warrant further direct that that person shall be subject to the special restrictions set out in section 38; and where the Minister gives a transfer direction in respect of any such person as is described in section 44(6)(c) or (d), he shall also give a direction under this section applying the said restrictions to him.

(2) A direction restricting discharge shall have the like effect as an order restricting the discharge of the patient made under section 38.

40. All of the above provisions of the MHA are applicable to hospital facilities in Bermuda. The only provision in the Act which empowers any authority to make a hospital detention order in respect of a facility outside of Bermuda is to be found at section 16A which was introduced under the Mental Health Amendment Act 2018:25.

41. Section 16A:

"*Treatment at hospital outside Bermuda*
16A (1) This section applies in the case of a patient—
(a) who is over the age of eighteen years; and
(b) who is liable to be detained in a hospital for treatment under this Act,

where no effective treatment for his disorder can be given at a hospital in Bermuda and it is necessary, for the health or safety of the patient or for the protection of other persons, that he should continue to be liable to be detained in a hospital outside Bermuda for treatment.

(2)Where the circumstances referred to in subsection (1) exist and the Minister is satisfied that—

(a) the management and administration of the patient's property and affairs in Bermuda have been dealt with, either under Part IV or otherwise; and
(b) arrangements have been made for the admission, detention and treatment of the patient at a hospital outside Bermuda,

then the Minister may by warrant discharge the patient from the hospital, and give such directions as he thinks fit for the conveyance of the patient to the hospital outside Bermuda, and for the patient's detention pending his conveyance.".

42. Section 16A confers the conveyance power to a Minister and makes no mention of the Court being so empowered. Notwithstanding the Minister's statutory powers under section 16A, the Applicants have requested a Court Order and reasoned judgment which has the capability of

being registered and recognized by the relevant facilities and judicial authorities in the United Kingdom.

43. Mrs. Dill-Francois took the Court through a line of UK authorities in exploration of the existence and scope of the Court's inherent jurisdictional powers to intervene and make such an order. However, I was not addressed by Counsel on the Bermuda law position outlining the Supreme Court's inherent jurisdiction. I will summarize the Bermuda law position before moving on to consider the persuasive UK law on these fundamental judicial powers.

44. In *Re Celestial Nutrifoods [2017] Bda LR 11* the then Hon. Chief Justice, Mr. Ian Kawaley, observed that this Court's inherent jurisdiction is preserved by sections 12 and 18 of the Supreme Court Act 1905 ("the 1905 Act").

45. Section 12 states:

Jurisdiction of Supreme Court
12 (1) The Supreme Court shall be a Superior Court of Record, and, in addition to any other jurisdictions conferred by this or any other Act or Act of the Parliament of the United Kingdom, shall, subject as in this Act mentioned, possess and exercise the jurisdiction which, at the commencement of this Act [6 June 1905], was vested in, or capable of being exercised by, the Governor as Ordinary relative to the grant of probate of wills and letters of administration of the personal estate of persons deceased and by all or any of the following courts, that is to say—

(a) the Court of General Assize;
(b) the Court of Chancery;
(c) the Court of Exchequer;
(d) the Court of Probate;
(e) the Court of Ordinary;
(f) the Court of Bankruptcy.

(2) The jurisdiction transferred to the Supreme Court by virtue of this Act shall include the jurisdiction which, at the commencement of this Act [6 June 1905], was vested in, or capable of being exercised by, all or any one or more of the Judges of the aforementioned courts, respectively, sitting in court or chambers, when acting as Judges or a Judge in pursuance of any Act, law or custom, and all powers given to any such court, or to any such Judges or Judge, by any Act or Act of the Parliament of the United Kingdom, and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdictions so transferred.

46. Section 18 states:

Concurrent administration of law and equity

18 In every civil cause or matter which is pending in the Supreme Court law and equity shall be administered concurrently; and the Court, in the exercise of the jurisdiction vested in it by virtue of this Act, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as seems just, all such remedies or relief whatsoever, whether interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which appears in such cause or matter, so that as far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail.

[Section 18 amended by 2009:28 s.3 effective 7 July 2009]

47. Section 14 of the 1905 Act refers specifically to the Mental Health Act 1968. It provides:

Jurisdiction in respect of persons suffering from mental disorder

The Chief Justice, and in his absence a Puisne Judge, shall, in respect of persons suffering from mental disorder, have all the jurisdiction, powers and authorities as are conferred upon him under the provisions of Part IV of the Mental Health Act 1968 [title 11 item 36].

48. I am reminded of this Court's judgment delivered by Kawaley CJ (as he then was) in *Latisha Lightbourne v Shawn Thomas [2016] SC 36 App*. *Lightbourne v Thomas* was an appeal against my decision as a then Acting Magistrate in respect of a mother's application for the Family Court to extend its statutory custody, care and control jurisdiction over a vulnerable person of adult age. Under the relevant provisions of the Children Act 1989, the Family Court has the power to make such orders in respect of persons who had not yet attained the age of 18 years or for persons of adult age enrolled in full-time education.

49. At first instance in summary jurisdiction, I ruled in favour of the father's position and held that the jurisdiction of the Magistrates' Court was a purely statutory one limited by the boundaries of the applicable legislation which did not extend the Family Court's jurisdiction to apply to an adult vulnerable person who was not enrolled in a full-time education program.

50. On appeal, the Kawaley CJ stated:

"Inherent jurisdiction of the Family Court

13. The Appellant's counsel cited no authority which supported the incredible proposition that the Family Court, a Special Court established by the Magistrates' Act 1948, had inherent jurisdiction corresponding to the Supreme Court of Bermuda and the High Court of Justice of England and Wales.

14. In addition to relying upon Re C in the Court below, Ms Dismont referred the Learned Acting Magistrate to the following provisions of the Magistrates' Act 1948:

"77. A Special Court shall exercise such jurisdiction as may be conferred upon a Special Court by or under any Act…"

15. Ms Vieira relied at first instance and on appeal on a dictum of Thorpe LJ in Re F (Adult: Court's Jurisdiction) [2001] Fam 38 at page 53, which was approved by Baker J in O-v-P [2016] 1 All ER 1021 ; [2015] EWHC 935 (Fam) (at paragraph [10]):

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

16. All the English cases cited which have deployed the inherent jurisdiction of the court to fill statutory voids in relation to vulnerable persons have involved the High Court. As I observed in the course of the hearing, the Supreme Court of Bermuda is a court of unlimited jurisdiction similar to the High Court of England and Wales. It may be helpful to refer to the statutory basis for this assertion.

…

18. Section 12 of the Supreme Court Act preserves not just the statutory powers of those ancient courts, but also their common law and customary powers. The Supreme Court's jurisdiction under Bermudian law consciously mirrored the jurisdiction conferred on the English High Court by section 16 of the Judicature Act of 1873, which vested in the High Court the original civil jurisdiction previously dispersed amongst multiple separate courts, courts upon which our own pre-1905 courts were in turn largely based[44] (The Bermudian pre-1905 courts did not exactly correspond to the English pre-1873 courts and some existed only in name. For instance, in England there was no Court of Ordinary by 1873 (this was probably replaced by the Probate Court); Bermuda notionally had both a Court of Ordinary and a Probate Court. Bermuda had no Court for Divorce and Matrimonial Causes, while England did. The English High Court's criminal jurisdiction was dealt with by a separate section of the 1873 Act, section 29, while section 12 of the 1905 Act dealt with both criminal and civil jurisdiction.) However, as regards inherent jurisdiction, it is noteworthy that section 12(2) of the 1905 Bermuda Act is substantially the same as the second paragraph of section 16 of the English Judicature Act 1873. From inception therefore, the Bermuda Supreme Court's inherent civil jurisdiction has corresponded to that of the English High Court.

19. The Learned Acting Magistrate was accordingly clearly right to reject the proposition that the Family Court (which is essentially a court of summary jurisdiction) possessed the same inherent jurisdiction enjoyed by the English High Court and/or the Bermudian Supreme Court.

The inherent jurisdiction of the Supreme Court to supervise the care of vulnerable adults

20. The English courts have, pending legislative intervention to fill the gap in the law, cautiously used declaratory relief appreciating the fact that the line demarcating the courts' inherent common law powers and the constitutional role of Parliament is not always an easy one to draw. In identifying the legal basis for a common law power, the English courts have identified the common law doctrine of necessity. This doctrine not only needs to be conservatively exercised with a view to avoiding trespassing on the proper domain of the Legislature. It must also be deployed with an awareness of the patient's own fundamental human rights. As Sedley LJ observed in Re F (Adult: Court's Jurisdiction) [2000] 3 W.L.R. 1740[5] (at 1756 F-1757H; 1758E-G):

"*The legal power to bring this about by declaration was confirmed by the decision of the House of Lords in In re F (mental patient: sterilisation) [1990] 2 AC 1 that the common law of necessity would in appropriate cases permit otherwise tortious interferences with the personal integrity of the mentally incapacitated. In the Court of Appeal Lord Donaldson MR had said :*

'...the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges.'

I do not accept Mr Gordon's submission that necessity is limited to medical and similar emergencies. Lord Goff in R v Bournewood Mental Health Trust, ex parte L [1999] AC 458 , 490, having cited early cases on the permissibility of detention of those who were a danger to themselves or to others, said:

'*The concept of necessity has its role to play in all branches of our law of obligations — in contract ..., in tort ... in restitution ... and in our criminal law. It is therefore a concept of great importance*.'

Lord Nolan said of the applicant (at 491):

'*It would have been wholly irresponsible for those monitoring him to let him leave the hospital until he had been judged fit to do so*.'

I would accordingly not think it right to set prior limits to the applicability of the doctrine.

But it is equally a part of Mr Gordon's case that Parliament has made its own safety net provisions for the mentally disordered or incapacitated. He points to s. 47 of the National Assistance Act 1948 which permits local authorities to remove to suitable premises people who — in broad terms — are sick or are infirm and living in squalor, and who are in want of care and attention; and to s. 135 of the Mental Health Act 1983 which permits the removal of mentally disordered persons pending, among other things, the making of arrangements for their care — but only if they are being ill-treated or neglected or are living alone and unable to care for themselves, and then only for 72 hours. Both are cast in terms which exclude T.

<u>If this case had come before the courts in the mid-1980s, Mr Gordon's case, however troubling in terms of outcome, might well have been unanswerable. The court would have</u>

had to confront the fact that it was being asked to sanction state intervention in a situation which Parliament had recently removed from the state's sphere of influence (The receivership regime for adult patients under the Mental Health Act 1968 appears to derive from the original 1968 enactment and to be accordingly nearly 50 years old). But, as the Scottish jurist Stair wrote more than three centuries ago:

'*[T]he nations are more happy whose laws have been entered by long custom, wrung out from their debates on particular cases, until it came to the consistence of fixed and known custom. For thereby the conveniences and inconveniences thereof through a long tract of time are experimentally seen…. But in statutes the lawgiver must at once balance the conveniences and inconveniences; wherein he may and often doth fall short …' (Stair, Institutes, I.1.15, quo. Bennion, Statutory Interpretation (3rd ed.) s. 319)*

Since the conflict and settlement of the seventeenth century the courts have recognised the ultimate legislative authority of Parliament, and Parliament in its turn has respected the authority of the courts within their self-delineated sphere as the authors of the common law and the source of equity. The relationship between the two is a working relationship between two constitutional sovereignties (see R v Parliamentary Commissioner for Standards, ex parte Fayed [1998] 1 WLR 669 *, 670H, per Lord Woolf MR). Thus Parliament, on the one hand, has more than once had to legislate to rescue the courts from difficulties of their own making, while the courts for their part, from the refusal of Holt CJ* (*Smith v Gould* (1706) 2 Salk. 666)*to recognise slavery in England to the recent decision by the House of Lords on withdrawal of life support (Airedale NHS Trust v Bland* [1993] AC 789) *, have from time to time had to speak where Parliament, although the more appropriate forum, was silent. Both can find themselves left behind by time and tide, and that is what has happened here…*

It does not of course follow that the courts are free to devise new forms of social control unsanctioned by Parliament. Apart from the constitutional inhibitions on any such development (Mr Gordon reminds us of R v Home Secretary, ex parte Fire Brigades Union [1995] 2 AC 513*and A-G v De Keyser's Royal Hotel* [1920] AC 508 *, both of which, however, concern the supplanting of statutory by prerogative powers), Article 5 of the European Convention on Human Rights will in the very near future form a legal constraint on what a court, as a public authority, may do. It is worth observing that the Article's guarantee of security of person, even taking it to be concerned only with arbitrary detention, is potentially engaged in the present case by both parties' proposals , the mother's and the local authority's, inexorably making the resolution of the problem in part a Convention issue*[7]*…*" *[Emphasis added]*

21. An alternative basis for the inherent jurisdiction to make orders to regulate the care, control and custody of a vulnerable adult has been expressed by way of continuing existing custody orders beyond the age of 18 years. That was the approach adopted through the grant of an injunction in O-v-P [2016] 1 All ER 1021 , upon which Ms Vieira relied. O-v-P entailed extending a non-molestation order beyond a child's 18th birthday based in this respect on a decision made by current Court of Appeal for Bermuda President Scott Baker J (as he then was). Baker J (at paragraph [8]) of his judgment O-v-P stated:

"*8. It is Mr Lyon's primary submission that the orders made during the currency of the wardship proceedings made before the ward's 18th birthday can be extended beyond that date. He submits that such a step can be taken "in order to preserve the integrity of the proceedings." He cites in support of that proposition the earlier decisions of Sir John Arnold P in Re P (Minors) (Wardship: Surrogacy)* [1987] 2 FLR 421*and of Scott Baker J in Re E (A Minor) (Child Abuse: Evidence)* [1991] 1 FLR 420. *In Re P, the issue concerned the preservation of the identity of twins born to a surrogate mother who then refused to give them up. The twins were warded and orders made preserving confidentiality, and the President continued those orders notwithstanding the termination of the wardship. In Re E, orders were made in wardship preserving the anonymity of a number of those involved during a fact-finding into allegations of sexual abuse of very young children. Those orders were continued following the discharge of the wardship. It was submitted before Scott Baker J that it would be a surprising void in the law were the court to have no power to grant an injunction whose effect continued after the discharge of the wardship proceedings and that such a void would be inconsistent with the court's established inherent jurisdiction to protect minors. Scott Baker J concluded at page 455 F to G*:

'*In the absence of any provision to the contrary, any injunction would ordinarily terminate on the discharge of wardship proceedings. It is, however, open to the court, if it deems necessary to direct that an injunction made during the currency of wardship proceedings do continue after their discharge.*"' [Emphasis added]

22. Ms Dismont also referred the Court, by way of illustrating that the Supreme Court was the proper forum to invoke inherent powers, to the decision of Hellman J in Re C (a minor); A-v-B [2012] Bda LR 84 . In that case Hellman J primarily held that this Court had no inherent jurisdiction to supplement the statutory scheme for periodical payments in relation to children. However, in affirming that a residual jurisdiction to deal with matters not covered by the statutory scheme did exist, Hellman J lucidly summarised the parameters of this Court's inherent jurisdiction thus:

"*The Court exercises a closely analogous inherent jurisdiction with respect to incompetent adults. See, eg, the judgment of Munby J (as he then was) in Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867 , *HC, at paragraph 37. In Westminster City Council v C and others* [2009] 2 WLR 185 *the Court of Appeal considered the relationship between that inherent jurisdiction and the Mental Capacity Act 2005. Ward LJ, with whom Hallett LJ agreed, approved at paragraph 55 the following formulation of Roderic Wood J at first instance*:

'*Consistent with long-standing principle, the terms of the statute must be looked to 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 regulatory framework.*'"

51. Mrs. Dill-Francois directed this Court to the English Court of Appeal decision in *DL v A Local Authority [2012] EWCA Civ 253* where the local authority was concerned with a man in his fifties ("DL") who exerted physically and mentally abusive behavior towards his elderly parents with whom he lived.

52. A preliminary issue arose as to whether the parents had sufficient capacity to litigate under the Mental Capacity Act 2005 (MCA). The local authority, having considered and decided against making various available statutory applications including an application to the Court of Protection under the MCA, commenced court proceedings for interim injunctive relief. President Wall LJ, on an ex parte basis, granted the application and ordered that DL be restrained from committing various abusive acts.

53. In the final judgment of the Court at first instance, Theis J considered the scope of the Court's inherent jurisdiction as follows:

"*The central issue in this case is whether, and to what extent, the court's inherent jurisdiction is available to make declarations and, if necessary, put protective measures in place in relation to vulnerable adults who do not fall within the MCA but who are, or reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent by reason of such things as constraint, coercion, undue influence or other vitiating factor*."

54. Theis J (and subsequently McFarlane LJ on appeal) cited with approval the first-instance decision of Munby J (as he then was) in *Re SA (Vulnerable Adult with Capacity: Marriage) [2005] EWHC 2942 (Fam), [2006] 1 FLR 867*. (*Re SA* was relied on by this Court in *Re C (a minor) and A-v-B [2012] Bda LR 84.)* McFarlane LJ summarized the facts in *Re SA* as follows:

"*Re SA (Vulnerable Adult with Capacity: Marriage) focused upon an 18-year-old woman, who was profoundly deaf, lacking in any means of oral communication, had a profound bilateral sensory neural loss and who had a significant visual loss in one eye. Her only means of communication was via British Sign Language, which is based on English. Her parents, whose language was Punjabi, could not use sign language and their ability to communicate with their daughter was very limited. The issue before the court related to the prospect the SA may, in due time, be involved in a marriage. It was common ground that she had sufficient understanding of the general concept of marriage and did not lack the capacity to marry. The question raised in the case was whether the court had jurisdiction to continue protection provided previously during her minority to protect her from the risk of an unsuitable arranged marriage."*

55. Munby J in *Re SA* concluded:

"*It is now clear, in my judgment, that the court exercises what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes*

indistinguishable from its well-established parens patriae or wardship jurisdictions in relation to children. The court exercises a "protective jurisdiction" in relation to vulnerable adults just as it does in relation to wards of court."

56. I am persuaded by McFarlane LJ's view that the term "*incompetent adults*" employed by Munby J has a general applicability to '*vulnerable*' adults. Having regard to the judgment of Munby J in *Re SA,* McFarlane LJ at paras 18 and 19 of his judgment:

"*The baseline is established in paras [46] and [47] where Munby J recorded the fact that it had always been recognized that the jurisdiction is exercisable in relation to any adult who is, for the time being, and whether permanently or merely temporarily, either disabled by mental incapacity from making his own decisions or, although not mentally incapacitated, is unable to communicate his decision. In addition the jurisdiction extended to the taking of interim measures while proper inquiries are made.*

From para [48] onwards Munby J identified the key question of whether the jurisdiction extends beyond those established boundaries and, after proffering the answer that it does, he set out the reasons that support that conclusion."

57. In defending DL's position, Miss Nathalie Lieven QC argued that Munby J's decision in Re SA was an impermissible and erroneous extension of the inherent jurisdiction which amounted to a major infringement of common law autonomy and a major subversion of parliament's legislated boundaries in the MCA. She submitted that Parliament had created a statutory scheme which was intended to be exhaustive and that the common law should not go behind that scheme. She cited the rule from Bennion on Statutory Interpretation where it provides; '*where an enactment codifies a rule of common law…it is presumed to displace that rule altogether*'.

58. At paragraph 66, MacFarlane LJ described the High Court's inherent jurisdiction:

"*In terms of the European Convention, this use of the inherent jurisdiction in this context is compatible with Art 8 in just the same manner as the MCA 2005 is compatible. Any interference with the right to respect for an individual's private or family life is justified to protect his health and/or to protect his right to enjoy his Art 8 rights as he may choose without the undue influence (or other adverse intervention) of a third party. Any orders made by the court in a particular case must be only those which are necessary and proportionate to the facts of that case, again in like manner to the approach under the MCA 2005. In this respect it is irrelevant that the judges of the High Court Family Division to whom the exercise of this aspect of the inherent jurisdiction is assigned, are all also judges of the Court of Protection and well used to the approach under the statutory scheme*."

59. Of course, the Court must consider not only when the Court may appropriately exercise its inherent jurisdiction but also the manner in which it should do so. In addressing the approved manner of use, at paragraph 33 Mc Farlane LJ referred to Macur J in *LBL v RYJ and VJ [2010] EWHC 2665 (COP)* where at para [62] Macur J held:

"*I do not doubt the availability of the inherent jurisdiction to supplement the protection afforded by the Mental Capacity Act 2005 for those who , whilst "capacitous" for the purposes of the Act, are "incapacitated " by external forces- whatever they may be- outside their control from reaching a decision (citing Re SA). However, I reject what appears to have been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him / her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case–law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those they have determined have capacity free of external pressure or physical restraint in making those decisions.*"

60. MacFarlane LJ, with whom Kay and Davis LJJ agreed, stated at paragraph 67 of the judgment of the English Court of Appeal:

"*Furthermore, in terms of the manner in which the jurisdiction should be exercised, I would expressly commend the approach described by Macur J in LBL v RYJ and VJ, para [62], which I have set out at para [33] above. The facilitative, rather than dictatorial, approach of the court that is described there would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their European Convention Art 8 rights*."

61. Article 8 of the European Convention provides as follows:

Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

62. The test outlined by the English Court of Appeal on whether the Court should invoke its inherent jurisdiction is grounded on necessity and proportionality. The baseline of

McFarlane's caution on the manner of exercise of the Court's inherent jurisdiction is that it must be balanced carefully so not to unlawfully meddle with the constitutional rights of the relevant person(s) with whom the Court is concerned.

63. Article 8 broadly correlates with section 7 of the Bermuda Constitution which safeguards the right to privacy of home and other property. The express exceptions to this constitutional right allows for a judicial body, acting lawfully, to authorize a search of person or property in order to enforce a judgment or order in civil proceedings. Notwithstanding, the privacy of home and property constitutional rights do not apply to this case as it factually did in *Re SA* and *LBL v RYJ and VJ*. In the case before me, the relevant constitutional right arises under section 5 which provides:

> ***Protection from arbitrary arrest or detention***
> *5 (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:*
>
> *(a) in execution of the sentence or order of a court, whether established for Bermuda or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge;*
>
> *(b) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal;*
>
> *(c) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law;*
>
> *(d) for the purpose of bringing him before a court in execution of the order of a court;*
>
> *(e) upon reasonable suspicion that he has committed, is committing, or is about to commit, a criminal offence;*
>
> *(f) in the case of a person who has not attained the age of twenty-one years, under the order of a court or with the consent of his parent or guardian, for the purpose of his education or welfare;*
>
> *(g) for the purpose of preventing the spread of an infectious or contagious disease or in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;*
>
> *(h) for the purpose of preventing the unlawful entry of that person into Bermuda or for the purpose of effecting the expulsion, extradition or other lawful removal from Bermuda of that person or the taking of proceedings relating thereto.*

(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) Any person who is arrested or detained in such a case as is mentioned in subsection (1)(d) or (e) of this section and who is not released shall be brought without undue delay before a court; and if any person arrested or detained in such a case as is mentioned in the said paragraph (e) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person.

(5) Any person who is arrested shall be entitled to be informed, as soon as he is brought to a police station or other place of custody, of his rights as defined by a law enacted by the Legislature to remain silent, to seek legal advice, and to have one person informed by telephone of his arrest and of his whereabouts.

64. Counsel for the Respondent, while generally unopposed to the application, has urged the Court to jealously guard the Respondent's constitutional rights against arbitrary detention. The Applicants, however, would lay emphasis on the exception under 5(1)(g) which makes a detention lawful when it is for the purpose of providing care or treatment or for protecting the community in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant.

65. Mrs. Dill-Francois referred the Court to the judgment of Parker J sitting in the English Court of Protection in *XCC v AA and others [2012] EWHC 2183 (COP); [2013] 2 ALL ER 988* which, like *Re SA*, involved an arranged marriage of a vulnerable person and an application for a non-recognition declaration in respect of the marriage.

66. Parker J applied the reasoning of the Court of Appeal in *DL v A Local Authority* and emphasized that the Court's inherent jurisdiction can be invoked whether or not the vulnerable adult is suffering from any kind of incapacity. She agreed with the Court of Appeal, having been bound to do so, that the issue of lack of capacity applies to an individual who lacks capacity to make a relevant decision whether by a particular diagnosis or by coercion, restraint, undue influence or any other such factors.

67. In the case of *XCC v AA and others* the MCA did not provide a statutory basis for the application before the Court of Protection. At paragraphs 56-57 Parker J stated:

"*In my view since I am exercising inherent jurisdiction powers and not making an order under the 2005 Act, then the provisions of Pt 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 2005 Act are principles of general applicability in cases falling outside the 2005 Act which concern incapacitated adults, I will deal with these criteria when dealing specifically with welfare.*

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 interest, whether applying s 4 of the 2005 Act or more general welfare considerations. The Court of Appeal in A local authority v 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 A local authority v DL, Munby J had said in Re SA [2007] 2 FCR 563, in relation to the exercise of the inherent jurisdiction, that: (a) the jurisdiction can be invoked whether or not the vulnerable adult is suffering from any kind of incapacity; (b) the common thread is the lack of capacity to make a relevant decision: including coercion, restraint, undue influence or other factor."

68. This Court was also referred to the earlier 1979 judgment of the European Court of Human Rights ("the ECHR") in *Winterwerp v The Netherlands Application no. 6301 / 73*. *Winterwerp* came to be listed in the ECHR on the referral of the European Commission of Human Rights and the Government of the Kingdom of the Netherlands with reference to Article 5 of the European Convention which states:

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c)…

(d)…

(e) the lawful detention of persons for the prevention of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) …

2…

3. …

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

69. On the facts, Mr. Winterwerp was committed to a psychiatric hospital under the order of the District Court. On the application of his wife and subsequently by a public prosecutor, the Regional Court renewed the order from year to year. Both Orders were made under the Netherlands Mentally Ill Persons Act 1884 which governed the detention of persons of unsound mind and which laid down the procedure and grounds for committing "mentally ill persons" to hospital. The ECHR observed from the evidence submitted before it that the general practice was that the Netherland Courts would only authorize hospital confinement where it has been proven that the would-be patient concerned has a mental disorder of such a kind or of such gravity so as to make him an actual danger to himself or to others.

70. Mr. Winterwerp objected before the ECHR to the hospital orders made by the District and Regional Courts on the basis that the applications were determined in his absence and without notice to him, leaving him without any opportunity to challenge the medical reports which had been produced before the various Courts. He further complained that his requests to discharge the orders had been refused.

71. The ECHR in determining the conformity of the Mentally Ill Persons Act 1884 with the European Convention considered the lawfulness of detaining persons of unsound mind and held at page 14:

"*…the law in force does not appear to be in any way compatible with the meaning that the expression "persons of unsound mind" is to be given in the context of the Convention. The Court therefore considers that an individual who is detained under the Netherlands Mentally Ill Persons Act in principle falls within the ambit of Article 5 para 1(e) (art.5-1-e).*"

72. At page 15 the ECHR further held:

"*The Commission likewise stresses that there must be no element of arbitrariness; the conclusion it draws is that no one may be confined as "a person of unsound mind" in the absence of medical evidence establishing that his mental state is such as to justify his*

compulsory hospitalisation… The applicant and the Government both express similar opinions.

The Court fully agrees with this line of reasoning. In the Court's opinion except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". The very nature of what has to be established before the competent national authority- that is, a true mental disorder- calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder…"

73. Bronagh O'Hanlon J in reading para 117 of the decision of the English High Court in *Health Service Executive of Ireland v PA and Others [2015] EWCOP 38* opined that it would be irresponsible for the Court to impose a time limit on the period during which the subject patient was to undergo further therapy merely for the sake of defending the patient's rights.

Analysis and Decision

74. It is clear that there is no statutory basis for the Court to make the substantive order sought by the Applicants. The Applicants have sensibly pursued an order founded on this Court's inherent powers which are statutorily defined and illustrated by carefully scripted Bermuda common law.

75. As a starting point, this Court is duty-bound to look to the provisions in the Mental Health Act 1968 which come closest or which are most relevant to the orders pursued. This is an important step in ensuring that the exercise of this Court's inherent jurisdiction is not deployed so as to undermine the will of Parliament.

76. The Applicants' Counsel first pointed me to sections 10, 33 and 38 of the Mental Health Act 1968.

77. Parliament clearly intended, by section 33 of the Mental Health Act 1968, to empower the Courts with a continuing jurisdiction over an offender, having been convicted of a criminal offence and awaiting sentence. Where the Court has been satisfied on the evidence of two medical practitioners that the offender is suffering from mental illness; a severe personality disorder; mental impairment or severe mental impairment which is of a nature or degree which warrants the detention of the offender in a hospital for medical treatment, the Court has the statutory power to make a hospital admission and detention order. This is subject to

the express requirement that the Court satisfy itself on a set of criteria that such an order is the most suitable method of disposing of the case.

78. However, in this case, the then Hon. Chief Justice, Mr. Richard Ground, determined that section 33 of the 1968 Act was not an appropriate order for the Court to make. It is, therefore, not open to me to go behind a decision of concurrent jurisdiction as Parliament clearly did not intend for the Court to impose a sentence outside of the s. 33 regime only to go back and to invoke a s.33 order after an offender has served a significant portion of his sentence. I, therefore, discard section 33 from the statutory pool of provisions in which I may properly invoke this Court's inherent powers.

79. Section 38, which allows to Court to restrict the discharge of a patient subject to a section 33 order, is equally irrelevant.

80. The relevant provision for the judicial magnifying glass is section 16A of the 1968 Act which was also raised by Mrs. Dill-Francois. Section 16A applies to a patient of adult age who is liable for hospital detainment outside of Bermuda where there is no effective treatment for that patient's disorder in a Bermuda hospital. Under section 16A it is necessary for the Minister to satisfy him or herself that the order is necessary for the health or safety of the patient or for the protection of other persons.

81. The Minister must also be satisfied that the management and administration of the patient's property have been dealt with. In this case, the Respondent has been a prisoner for the past several years and no concerns or issues have been raised in respect of property belonging to him or his affairs. In fact, Dr. Anagnostakis opined that without a hospital order, the Respondent would very likely take to a homeless lifestyle.

82. Additionally, under section 16A(2)(b), the Minister must be further satisfied that arrangements have been made for the admission, detention and treatment of the patient at a hospital outside Bermuda. On the evidence placed before this Court, the Minister so satisfied herself.

83. The question is whether the Court can assume the Minister's powers conferred by section 16A by invoking its inherent jurisdiction. Section 12(2) of the Supreme Court Act 1905 gives the judges of the Supreme Court '*…all ministerial powers, duties and authorities, incident to any and every part of the jurisdictions so transferred'.*

84. The Court's inherent powers should be used to fill the unintended gaps in the legislation concerned. The Court ought not to do so if its interference is clearly contrary to what

Parliament intended. More so, the Court must never use its inherent powers where in doing so it causes an unlawful interference with an individual's constitutional rights.

85. The Court's inherent jurisdiction in this case clearly applies to the powers outlined in section 16A of the MHA. Section 16A applies to persons liable to be detained in any other provision of the 1968 Act. I am satisfied that the Mr. Seaman's case qualifies under section 10 as read with section 38 in relation to his continued hospital detention.

86. I have carefully considered all of the relevant law and the evidence in this case. I have also had regard to Counsel's respective submissions, which were thoroughly and eloquently presented. I am satisfied that Mr. Seaman has been properly diagnosed with serious mental illnesses and disorders and that a hospital detention order to the St. Andrew's Health Care in Northampton, England is necessary not only for the protection of the general public but also for the health and safety of the Respondent himself.

87. In my judgment, Mr. Seaman's s. 5 constitutional rights against arbitrary arrest or detention have not been breached. Section 5(1)(g) of the Bermuda Constitution is the relevant exception to the constitutional right against arbitrary detention. Mr. Seaman may, therefore, be lawfully detained on the strength of the expert evidence detailing his mental health diagnoses and for the purpose of providing him with care and treatment. The wider purpose is to protect the community from the further harm which Mr. Seaman would likely cause if not further detained and treated.

88. It would indeed be irresponsible for this Court to impose an artificial time limit on the period of Mr. Seaman's hospital detainment overseas merely for the sake of defining his term of detention. However, this Court will review and monitor his progress by receipt of progress reports from the Applicants at 6 month intervals. A Court hearing review on Mr. Seaman's mental health prognosis shall also be held in one year from now.

Conclusion

89. The Respondent shall be conveyed as soon as is reasonably practicable to St. Andrew's Health Care in Northampton, England for hospital detention and treatment of his mental illnesses as outlined herein.

90. The Respondent shall remain in hospital detention in Bermuda for the interim period leading up to his conveyance to St Andrew's Health Care.

91. The Applicants shall file reports at 6 month intervals commencing within 6 months of the Respondent's detention at St Andrew's Health Care.

92. The parties shall reappear before this Court no later than within one year from the date of this Judgment to report on the progress and prognosis of the Respondent's care.

93. I shall hear the parties in respect of the Order to be drawn up from this Judgment.

Dated this 31 day of July 2018

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JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT