

# THE HINTERLAND OF THE INHERENT JURISDICTION



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# ITS ORIGINS



Statute de Prerogativa Regis of 1324 (17 Edw. 2, cc.1-16):

“The King is in legal contemplation the guardian of his people; and in that amiable capacity is entitled, (or rather it is his Majesty’s duty, in return for the allegiance paid him,) to take care of such of his subjects, as are legally unable, on account of mental incapacity, whether it proceed from (1) non-age, (2) idiocy, or (3) lunacy, to take proper care of themselves and their property.”

As Lord Hardwicke LC held in *Butler v Freeman* (1756) Amb 301, 302:

“[The court] has a general right delegated by the Crown as *pater patriae*, to interfere in particular cases, for the benefit of such who are incapable to protect themselves.”

Lord Eldon LC said in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, 20:

“[It] belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.”

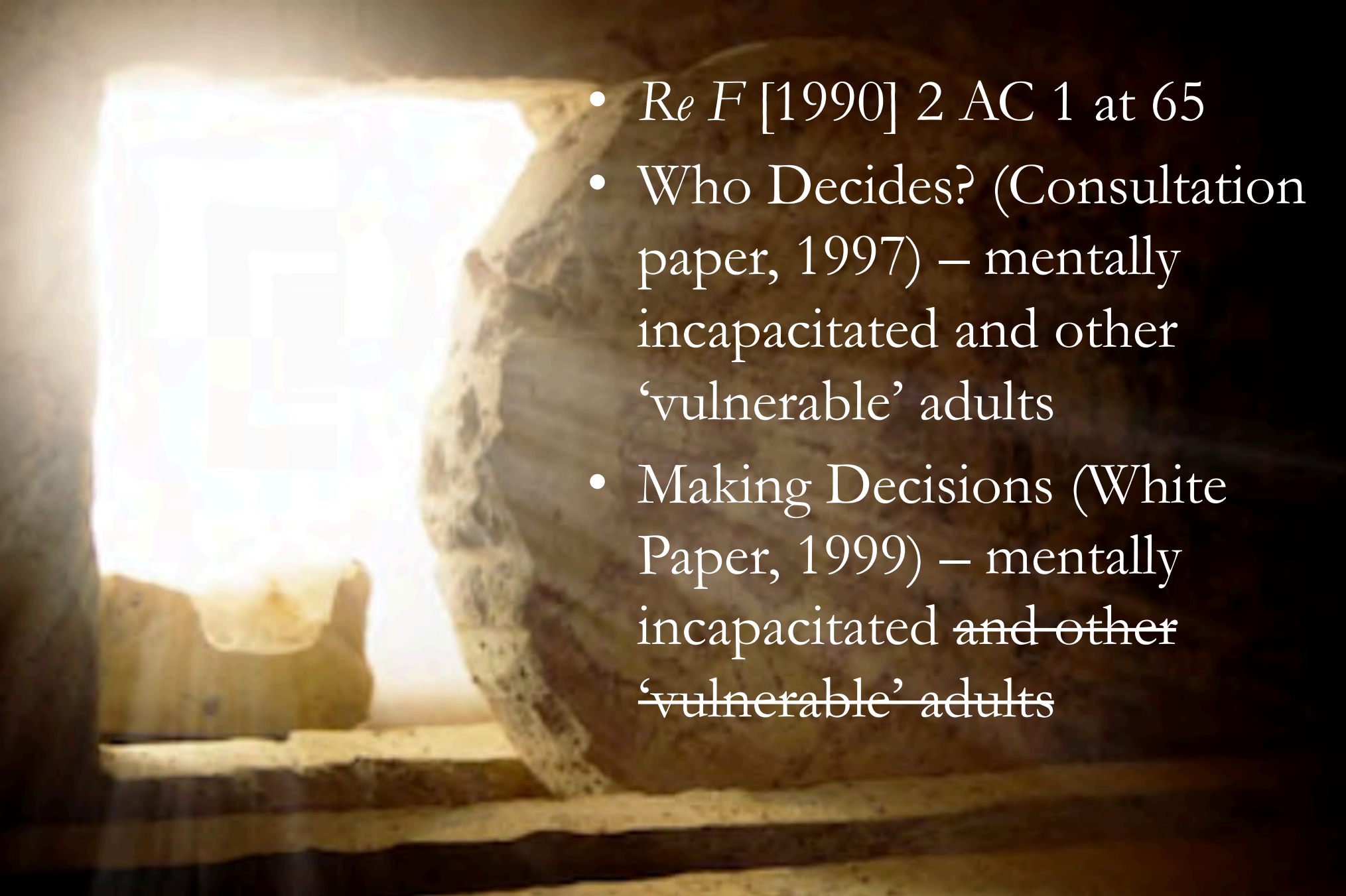
# ITS END



The jurisdiction ceased to exist (by mistake?) following two events on 1 November 1960:

1. Coming into force of MHA 1959 s.1
2. The revocation of the last Royal Warrant.

The consequence was to sweep away the previous statutory and prerogative jurisdiction in lunacy, leaving the law relating to persons of unsound mind to be governed solely, so far as statutory enactments are concerned, by the MHA 1959.

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- *Re F* [1990] 2 AC 1 at 65
  - Who Decides? (Consultation paper, 1997) – mentally incapacitated and other ‘vulnerable’ adults
  - Making Decisions (White Paper, 1999) – mentally incapacitated ~~and other~~ ‘~~vulnerable~~’ adults



Detention

*Bournemouth*

[1999] 1 AC  
548

Contact:

*Re F*

[2000] EWCA  
Civ 192

Residence:

*Re S*

[2003] EWHC  
1909

Marriage:

*Re SK*

[2004] EWHC  
3203

Publication:

*LA v HA*

[2004] Fam 96



“There is no doubt that since its rediscovery by the House of Lords the inherent jurisdiction has evolved, that it continues to evolve and that it must indeed continue to evolve if the court is properly to comply with its obligations under, for example, Articles 5 and 8 of the Convention.”

*PS v Sunderland City Council* [2007] EWHC 623 (Fam), [14]



## Mental Capacity Act 2005

*Southend-on-Sea BC v Meyers* [2019] EWHC 399: “was entirely capable of and has the capacity ... for determining where he wishes to reside and with whom.”





*DL (Vulnerable Adults with Capacity: Court's Jurisdiction)* [2013] Fam 1

Mental Capacity Act 2005

Unable to decide because of a temporary/permanent impairment/disturbance in the functioning of the mind or brain



*Re SA* [2005] EWHC 2942, [77]-[78]:

Vulnerable adult =

- (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.

Endorsed in *DL* at [53].

*DL*: “targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the 2005 Act”





*Re MM* [2009] 1 FLR 443, [78]: “... it would be worse than unfortunate if a judge of the Family Division exercising the inherent jurisdiction had to adopt an approach significantly different from the approach to be adopted by the same judge when sitting in the Court of Protection exercising the statutory jurisdiction.”

“The facilitative, rather than dictatorial, approach of the court ... 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 ECHR Article 8 rights.” *Re DL* [2012] EWCA Civ 253

*Wakefield MDC v DN and MN* [2019] EWHC 2306: ‘aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity’.

*The Mayor and Burgesses of the London Borough of Croydon v KR and ST* [2019] EWHC 2498 (Fam) at [40]: “Paragraph 67 [of *DL*] suggests that the primary, although probably not the only, purpose of the inherent jurisdiction in this type of case is to allow the individual to be able to regain their autonomy of decision making.”



“In reality, KF exerts an influence over his father which is malign in its effect if not in its intention. The consequence is to disable Mr Meyers from making a truly informed decision which impacts directly on his health and survival.”

“I instinctively recoil from intervening in the decision making of a capacitous adult. However well motivated the State may be in seeking, paternalistically, to protect people from their own unwise decisions, it is a dangerous course which has the potential to threaten fundamental rights and freedoms. ... the inherent jurisdiction is not ubiquitous and should be utilised sparingly. Here Mr Meyers’ life requires to be protected and I consider that, ultimately, the State has an obligation to do so. Additionally, it is important to recognise that the treatment of Mr Meyers has not merely been neglectful but abusive and corrosive of his dignity. To the extent that the Court’s decision encroaches on Mr Meyers’ personal autonomy it is, I believe, a justified and proportionate intervention. The preservation of a human life will always weigh heavily when evaluating issues of this kind.”



*Meyers*: “Properly analysed, the ambition here is not to confine Mr Meyers to the Care Home, but to protect him from the grave danger that living in the bungalow with his son has already been demonstrated to represent. To safeguard him, by invoking the inherent jurisdiction of the High Court, it is necessary to restrict the scope and ambit of his choices, not his liberty. It is important to highlight that there remain a range of options open to him. The impact of the Court’s intervention is to limit Mr Meyers’s accommodation options but it does not deprive of his physical liberty which is the essence of the right guaranteed by Article 5.”

*Croydon*: “45. However, the LA do not seek KR to be required to live at CP, they merely require him not to live with ST. Although in practice KR given his condition would have little or no choice certainly in the short run, but to live at CP if the order was made, the order itself would not be a removal of his liberty. As such I do not think that this is a case where article 5 is in truth the issue. This entirely accords with Cobb J’s judgment in *PR* [2019] EWHC 2305 (Fam).”

Order preventing a person going home can in principle constitute confinement:  
*Redcar & Cleveland Borough Council v PR & Ors* [2019] EWHC 2305 (Fam) at [40]



*Hertfordshire County Council v AB* [2018] EWHC 3103 (Fam):  
conditions included residence and 24-hour supervision  
meeting the acid test. AB had decisional capacity.

40. In those circumstances, where the [Supreme Court] has said that AB's consent to a deprivation of liberty is not lawful, the applicant invited me, both in AB's interests and in the interests of the general public as a whole, to authorise the extension of the inherent jurisdiction so as to regularise that care plan and to do so (a) by declaring that it involved a deprivation of liberty and (b) by providing for a regular court review of that plan.

41. It seems to me that, in these particular circumstances this is precisely the use to which the inherent jurisdiction should be put, exercised cautiously ... Having given the matter a great deal of careful thought, having decided that I am able to do so.



Had capacity to make decisions other than during ‘meltdowns’. On MHA s117 after-care and sentenced to a mental health treatment requirement (which can restrict not deprive liberty). Application to High Court to authorise DOL.

Held:

- DN not a vulnerable adult nor of unsound mind. Free to make own decisions.
- It cannot be used to deprive a capacitous person of liberty (disagrees with *Hertfordshire County Council v AB*).
- Hence intensity of care arrangements to be reduced to avoid DOL.
- Anticipatory declarations under MCA for meltdowns.



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## **Convention on the Rights of Persons with Disabilities**

### **Committee on the Rights of Persons with Disabilities**

### **Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland \***

31. The Committee recommends that the State party ... abolish all forms of substituted decision-making concerning all spheres and areas of life by reviewing and adopting new legislation in accordance with the Convention to initiate new policies in both mental capacity and mental health laws. It urges the State party to step up efforts to foster research, data and good practices in the area of, and speed up the development of, supported decision-making regimes...

## CRPD-COMPLIANCE?

Article 12(2): “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”

- MCA – “mental incapacity” but CRPD Committee says “perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity”.
- IJ – incapacity on an equal basis with others?
  - *Meyers*: dysfunctional nature of their relationship disabled him “from making a truly informed decision which impacts directly on his health and survival”. Can return home if son moves out.

Article 12(3): “provide access by persons with disabilities to the support they may require in exercising their legal capacity”.

- MCA: practicable steps to support P to decide; LPAs; ADRTs... *but more required to mitigate indirect discrimination*
- What supports are required for this person to exercise capacity?

## CRPD-COMPLIANCE?

Article 12(4): “respect for the rights, will and preferences of the person”

- CRPD Committee:
  - must replace ‘best interests’ paradigm with this ‘will and preference’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.
  - Allows for ‘best interpretation’ of that will and preference if unable to determine it.
- MCA: permits best interests decisions for/on behalf of P with no s.4 hierarchy.
  - *Aintree, Wye Valley* etc moving closer towards CRPD
  - MC(A)A 2019 not follow Law Commission’s recommendation
- IJ: to facilitate the process of unencumbered decision making; not dictatorial
  - *Meyers*: respected his fundamental rights (eg to life/dignity) at the temporary expense of his will and preference?



## CRPD-COMPLIANCE?

Article 14: ‘the existence of a disability shall in no case justify a deprivation of liberty’.

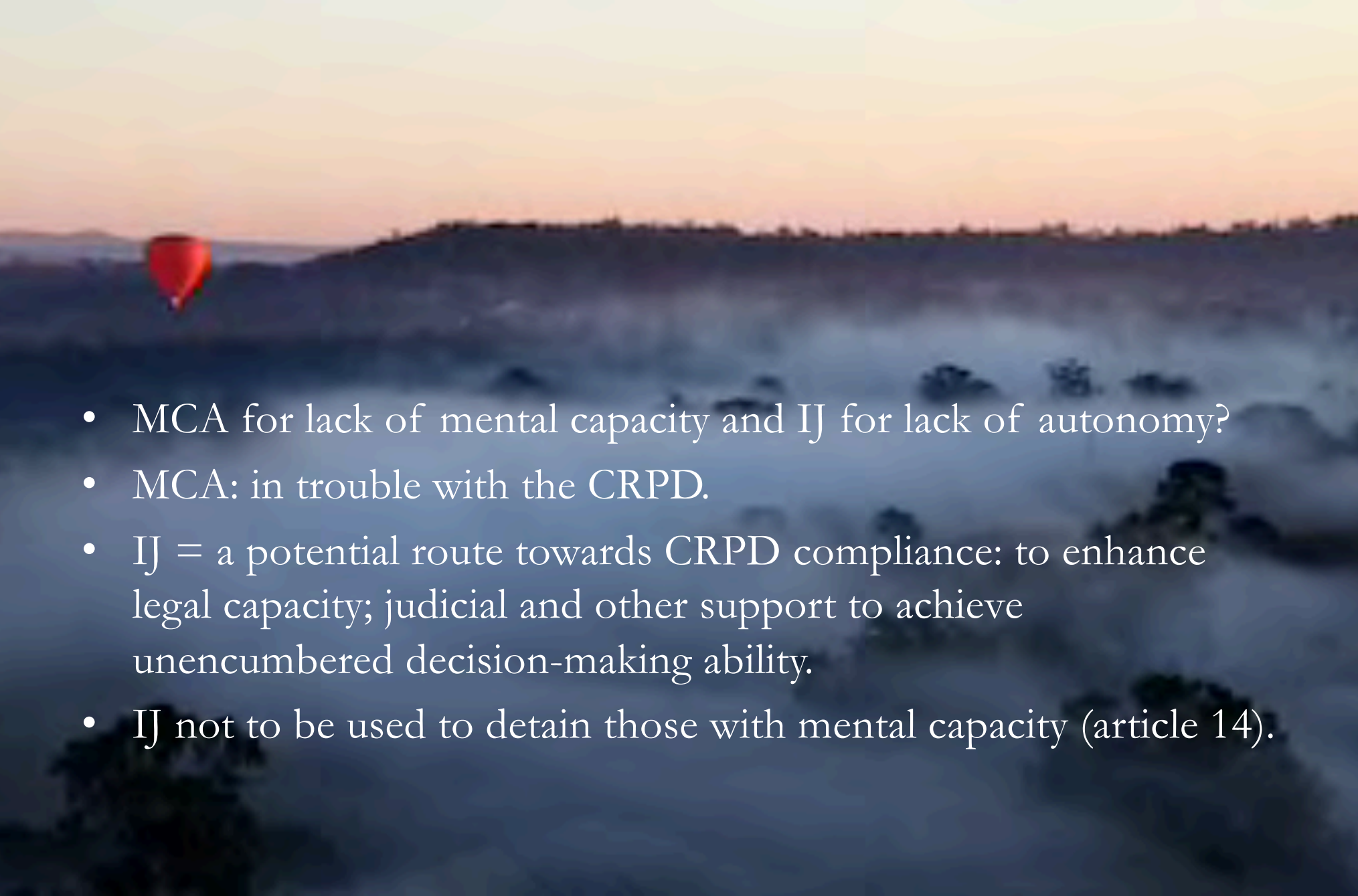
- CRPD Guidelines on article 14 (Sept 2015):

“6... article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment... It is discriminatory in nature and amounts to arbitrary deprivation of liberty...

13... The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.”

- MCA: detention on the basis of mental disorder and mental incapacity.
  - ECHR Article 5(1)(e) permits ‘unsound mind’ as basis
- IJ: *Wakefield* confirms cannot detain those with capacity and recognises the CRPD approach; *Hertfordshire* in doubt.

# CONCLUSION

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- MCA for lack of mental capacity and IJ for lack of autonomy?
  - MCA: in trouble with the CRPD.
  - IJ = a potential route towards CRPD compliance: to enhance legal capacity; judicial and other support to achieve unencumbered decision-making ability.
  - IJ not to be used to detain those with mental capacity (article 14).