

# **International Family Law, Policy and Practice**

**Some Collected Papers from the Centre's  
July 2016 Conference**

**Culture, Dispute Resolution and the Modernised Family  
Part 3**



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# **International Family Law, Policy and Practice Volume 5, Number 1 • Spring 2017**

## **SOME COLLECTED PAPERS FROM THE CENTRE'S JULY 2016 CONFERENCE: CULTURE, DISPUTE RESOLUTION AND THE MODERNISED FAMILY PART 3**

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## Editor's Message

This issue is the third of the collected papers from the Centre's 2016 Conference on Culture, Dispute Resolution and the Modernised Family. In this collection we have five/six papers from Europe and the Middle East, highlighting topics of key international interest: one from the Hague Secretariat in the Netherlands whose Conventions are of such importance in international law; one from the Republic of Eire (a formerly conservative Family jurisdiction now potentially more radical in Family Law Reform than either Scotland or England and Wales); two /three from England and Wales on key topics in the ongoing modernisation of Family Justice in our home jurisdiction; and one from the Anglo/UAE expatriate practice in Dubai which addresses enforcement in the UAE of the foreign financial orders (including those from the UK) which so frequently concern the international families with connections to that jurisdiction.

The power points from these writers' 2016 conference sessions may be accessed through the Centre's new website, [www.icflpp.com](http://www.icflpp.com), but their more developed articles published here preserve the detail of their perspectives on topics which are of interest to the Centre's international readers, as indeed is the purpose of this journal.

First, Philippe Lortie and Caroline Armstrong Hall present a masterly round up of the available international protection which could be harnessed to address the epidemic of unaccompanied child migration which has occurred owing to upheavals in some over seas jurisdictions where children either set off by themselves to seek a new life in the West or become separated from their family groups as a result of one trauma or another. This is very much a topical perspective on a situation which, as Philippe Lortie rightly identifies, is a key current issue which affects all Europe as much as the wave of terrorist attacks, and with which all European jurisdictions which recognise the importance of child protection and positive promotion of the child's welfare must be concerned.

Next, Professor Peter de Cruz raises a concerning issue in our own national child protection, namely the interface between family autonomy and the protective role of the state in intervening to remove children from parents who are apparently not performing their preventative role as guardians of their children from harm and their nurturing function as providers of the safe and stable family background which should form the basis of the family autonomy which the state should not need to intervene to disturb. This is not the first time that it has been suggested that the threshold criteria for such state intervention should be amended to clarify for local authorities and the judges of the Family Court precisely what is required to identify what is sufficient for local authority intervention, particularly of new born babies – since while the higher courts have taken a more conservative view about the adequacy of existing legislation there have been disturbing cases – identified by practitioners and the President himself of both local authorities and judges at circuit bench level being satisfied with care orders being made on the basis of inadequate evidence. Combined with the sudden and significant rise in over a short period of the numbers of such orders being made this does suggest that perhaps it is time to look at s 31 of the Children Act 1989 again, although the last attempt – following the case of *Re J* (2013) UKSC 9 which provoked adverse academic comment – was unsuccessful.

Thirdly, Hannah Camplin looks at the potential role of Law Student Clinics to assist in addressing some of the unmet legal need created by LASPO 2012, an issue which affects the quality of family justice as much as any other lack of protection of the weak and impoverished by those who have a right to access to such family justice, but also identifies much else that needs to be done by government and other agencies to enable such clinics to help in a manner in which their willingness to do so could be sufficiently regulated as to enable them to form a valuable integral part of access to justice in unmet legal need rather than as a well meant but too informal emergency resource - since this is not the first time that the appropriateness of the inclusion of such volunteer resources has been queried and their potential contribution not harnessed.

Fourthly, --- Avril Cryan from Eire examines the Republic's approach to polygamy, another issue which needs close examination in English law which recognises such relationships for some purposes but not others, so that this author suggests that it may be possible for Eire to avoid the confusion of not using a more systematic approach than has been the case in England and Wales.

Fifthly, HH Michael Horowitz QC analyses the relationship between Family Arbitration under the IFLA Schemes (the relatively new alternative to litigation in the Family Court) and the Arbitration Act 1996 which inspired the creation of the Institute of Family Arbitrators' innovative new version of the Non-Court Dispute Resolution which has been encouraged by Sir James Munby, the President of the Family Division.

Finally, Alexandra Tribe and Hassan Elhais provide a useful note on enforcement of foreign orders in the UAE – such as those in English law when Anglo Arab families fall apart, and indeed some ideas as to how such enforcement might even be avoided, since such potentially bitter splits are well recognised to be an adverse experience for children.

The themes from this third collection of the conference papers certainly provides further excellent inspiration from the UK and European section of the international Family Law community which never disappoints when gathering so productively in London at a Centre conference every three years, so as to share these perspectives and insights from around the world.

## *Frances Burton*

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Editor, *International Family Law, Policy and Practice*

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# Tools in International Law for the Protection of Unaccompanied and Separated Children: Applying the 1996 Hague Child Protection Convention in Europe and Beyond

Philippe Lortie and Caroline Armstrong Hall\*

## Introduction

### Background

The numerous reports are unequivocal: the rights of unaccompanied migrant children are being violated, perhaps even ignored.<sup>1</sup> There are various reasons for the current state of affairs that, in aggregate, explain the on-going and widespread violation of the rights of unaccompanied children in Europe. The enormous number of unaccompanied children in itself presents an immense challenge.<sup>2</sup> Public authorities simply do not have the capacity, both financially and in terms of human resources, to provide protection to such a large number of children.<sup>3</sup> This helps to explain why such a significant number of unaccompanied children are not receiving accommodation complying with international and national requirements.<sup>4</sup> Some of them are left to fend for themselves, while others avoid the authorities despite that doing so increases the risk of exploitation and human trafficking. Another significant piece of the puzzle is the insufficient number of persons in the field who have been trained in child protection. This is the first time that a migration crisis affects so many unaccompanied children globally.<sup>5</sup> In the European Union alone, the number of asylum applications made by unaccompanied children increased tenfold between 2010 and 2015.<sup>6</sup>

Furthermore, the United Nations Convention of 28 July 1951 Relating to the Status of Refugees ('1951 Refugee Convention' or '1951 Convention'),<sup>7</sup> though modern for its time, does not guarantee any rights specific to unaccompanied children. It was adopted well before the development of the Declaration of the Rights of the Child of 1959 and of the United Nations Convention of 20 November 1989 on the Rights of the Child ('1989 Convention on the Rights of the Child' or '1989 Convention').<sup>8</sup> This is another factor that may explain the on-going violation and disregard of the rights of unaccompanied children. It may be that persons tasked with implementing the 1951 Refugee Convention have a limited knowledge of the rights enshrined in the 1989 Convention on the Rights of the Child or are enforcing them insufficiently, as these rights are not always implemented in domestic law in a clear manner. It is equally possible that the persons tasked with the implementation of the 1951 Refugee Convention do not properly apply domestic regimes of protection to foreigners. Finally, it is even less likely that these individuals are familiar with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the

\* Philippe Lortie is a First Secretary and Caroline Armstrong Hall is a Legal Assistant, both at the Permanent Bureau of the Hague Conference on Private International Law. Philippe Lortie is grateful to Caroline Armstrong Hall for her assistance in drafting this article in English, based on earlier work he authored in French (which has not yet been published). The statements expressed in this article are the authors' own, and do not necessarily reflect the views of the Hague Conference on Private International Law.

<sup>1</sup> See House of Lords European Union Committee, *Children in crisis: unaccompanied migrant children in the EU*, 2<sup>nd</sup> Report of Session 2016-2017, HL Paper 34, published 26 July 2016, available at

< [www.publications.parliament.uk/pa/ld201617/ldselect/ldsecom/34/34.pdf](http://www.publications.parliament.uk/pa/ld201617/ldselect/ldsecom/34/34.pdf) > ; see also UNICEF, *Ni sains, ni saufs: enquête sociologique sur les enfants non accompagnés dans la Nord de la France*, published 15 June 2016, available at < [https://www.unicef.org/french/media/files/ni-sains-ni-saufs\\_MNA\\_france\\_2016.pdf](https://www.unicef.org/french/media/files/ni-sains-ni-saufs_MNA_france_2016.pdf) >.

<sup>2</sup> There are an estimated 5.4 million child migrants in Europe: see 10<sup>th</sup> European Forum on the Rights of the Child of 29-30 November 2016 (convened by the European Commission) on 'the protection of children in migration', *General Background Paper*, 24 November 2016, p 13 (citing UNICEF statistics), available at < [http://ec.europa.eu/newsroom/document.cfm?doc\\_id=40208](http://ec.europa.eu/newsroom/document.cfm?doc_id=40208) > ('10<sup>th</sup> European Forum on the Rights of the Child, *General Background Paper*').

<sup>3</sup> Nigel Cantwell, *Challenges to Developing Appropriate Care for Children on the Move* in International Reference Center for the Rights of Children Deprived of their Family-ISS, Monthly Review No 211, April 2017, p 12, available at < [http://img.snd47.ch/clients/2016/3/1/119419/2017\\_211\\_MonthlyReview\\_ENG.pdf](http://img.snd47.ch/clients/2016/3/1/119419/2017_211_MonthlyReview_ENG.pdf) > ('Nigel Cantwell, *Challenges to Developing Appropriate Care for Children on the Move*').

<sup>4</sup> UNICEF, *Refugee and Migrant Crisis in Europe Advocacy Brief: A home away from home for refugee and migrant children*, August 2016, pp 3-4, available at < [https://www.unicef.org/ceecis/A\\_home\\_away\\_from\\_home\\_29\\_08\\_2016.pdf](https://www.unicef.org/ceecis/A_home_away_from_home_29_08_2016.pdf) > ('UNICEF, *Refugee and Migrant Crisis in Europe Advocacy Brief*').

<sup>5</sup> In 2015, UNHCR registered the highest number of unaccompanied or separated children in 78 countries in its recorded history: see UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, p 3, available at < <http://www.unhcr.org/576408cd7.pdf> >.

<sup>6</sup> In the EU, there were 10,610 unaccompanied child asylum applicants in 2010, and 96,465 in 2015: see 10<sup>th</sup> European Forum on the Rights of the Child, *General Background Paper*, p 14 (citing Eurostat statistics).

<sup>7</sup> The text of the Convention is available at: < <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> >.

<sup>8</sup> The text of the Convention is available at: < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> >.

Protection of Children ('Hague 1996 Convention' or '1996 Convention');<sup>9</sup> while it deals with private rather than public international law, this instrument has a humanitarian purview.<sup>10</sup> A number of hypotheses have been described which merit further analysis in this area, but unfortunately time is running out. In the absence of an in-depth assessment of all the underlying reasons for the shortcomings in the protection unaccompanied children, public authorities ought to employ the full range of legal mechanisms that enable this challenge to be effectively tackled.

### **Purpose**

The purpose of this article is to introduce the 1996 Hague Convention and to present examples of its application to unaccompanied or separated children. Before doing so, the terms 'child', 'unaccompanied children' and 'separated children' will be defined, and specific cases relating to them will be outlined. This will make it possible subsequently to identify the rights which apply to these children; the measures of protection from which they may benefit in accordance with the 1951 Refugee Convention, the 1989 Convention on the Rights of the Child and the UN Guidelines for the Alternative Care of Children ('Alternative Care Guidelines');<sup>11</sup> and the short-, medium- and long-term classical protective solutions which are available to public authorities.

Following a brief introduction of the 1996 Hague Convention, it will be shown that cases of unaccompanied or separated children are included in the *ratione personae* scope of the Convention. An analysis of the *ratione materiae* scope of the 1996 Convention follows. It will, first, identify the rights enshrined in the 1951 Refugee Convention and the 1989 Convention on the Rights of the Child that fall under the scope of the 1996 Convention.<sup>12</sup> Secondly, this analysis will describe the short-, medium- and long-term measures that are available to protect unaccompanied or separated children, which are supported by the 1996

Convention. Examples will finally be given to illustrate the application of the relevant provisions of the 1996 Hague Convention. In addition, information will be provided on the application of the 1996 Hague Convention with *Council Regulation (EC) No 2001/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* ("Brussels II bis Regulation").<sup>13</sup>

### **Definitions**

Within the meaning of Article 1 of the 1989 Convention on the Rights of Child, 'child' refers to 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. This implies that any instrument relating to children in the territory of a given State cannot employ a definition of the child which 'deviates from the norms determining the age of majority in that State'.<sup>14</sup> Article 2 of the 1996 Convention provides that 'the Convention applies to children from the moment of their birth until they reach the age of 18 years'. The definition of 'child' set out in the 1989 Convention forms the bases for further definitions provided in this section.

Unaccompanied children (also called unaccompanied minors) are children who 'are not cared for by another relative or an adult who by law or custom is responsible for doing so'.<sup>15</sup>

Separated children are those who 'are separated from a previous legal or customary primary caregiver, but who may nevertheless be accompanied by another relative'.<sup>16</sup>

Individual cases of unaccompanied children are abundant and diverse, depending on the child's state of health, origin and status. Unaccompanied children are usually undocumented, creating difficulties where there is a need to establish their State of habitual residence. Generally, they can be divided into two categories: (1) children who have involuntarily been separated from

<sup>9</sup> The text of the Convention is available at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> >.

<sup>10</sup> States are invited to build on networks created in accordance with the 1996 Convention, as stated in the Conclusions and Recommendations of the Rome Conference of 10 and 11 November 2014 on Fundamental Rights and Migration to the EU, organised by the European Union Agency for Fundamental Rights with the Italian Presidency of the Council of the EU, available at < [http://fra.europa.eu/sites/default/files/frc-2014-conclusions\\_en\\_0.pdf](http://fra.europa.eu/sites/default/files/frc-2014-conclusions_en_0.pdf) >.

<sup>11</sup> United Nations General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010, available at < [https://www.unicef.org/protection/alternative\\_care\\_Guidelines-English.pdf](https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf) > ("UNGA, *Alternative Care Guidelines*"). Para 139 of the Guidelines encourage States to ratify or accede to the 1996 Hague Child Protection Convention.

<sup>12</sup> Significantly, the Preamble to the 1996 Hague Convention states that the signatory States "[desire] to establish common provisions...taking into account the *United Nations Convention on the Rights of the Child of 20 November 1989*".

<sup>13</sup> The text of the Regulation is available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML> >.

<sup>14</sup> Committee on the Rights of the Child, Thirty-Ninth Session, 17 May – 3 June 2005, *General Comment No 6 (2005) Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2005/6, 1 September 2005, para 9, available at < <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> > ("UNCRC, *General Comment No 6 (2005)*").

<sup>15</sup> UNGA, *Alternative Care Guidelines*, above, para 29(1)(i).

their parents;<sup>17</sup> and, (2) children who have separated voluntarily from their parents.<sup>18</sup>

### **The Relevant Law and Available Measures of Protection** *The Convention of 28 July 1951 Relating to the Status of Refugees*

The Refugee Convention, drafted in 1951 and applicable to any person (*i.e.*, adult or child) who meets the definition of refugee set out in Article 1, guarantees very few rights which are uniquely specific to children. Indeed, among the rights included in the Convention, most apply to children and adults alike. The Convention states that Contracting States shall apply its provisions to refugees ‘without discrimination as to race, religion or country of origin’ (Art. 3). The Convention equally provides that ‘Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children’ (Art. 4). It is equally stipulated in the 1951 Convention that ‘a refugee shall have free access to the courts of law on the territory of all Contracting States’ (Art. 16(1)). In addition to these fundamental rights, the Convention also incorporates the *non-refoulement* principle, which currently forms an integral part of customary international law,<sup>19</sup> stating that ‘No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’ (Art. 33). The Convention states that ‘The personal status of a refugee shall be governed by

the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence’ (Art. 12). As concerns housing, ‘the Contracting States, in so far as the matter is regulated by the laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances’ (Art. 21). As for public education, ‘The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education’ (Art. 22).

Experts in the area of family law or the protection of children will note that many rights relating specifically to children, compared with those provided in the 1989 Convention on the Rights of the Child, are not covered by the Refugee Convention. The drafters of the Refugee Convention recognised that the 1951 Convention was perhaps incomplete by prescribing in Article 5 that ‘Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.’

### *The 1989 Convention on the Rights of the Child*<sup>20</sup>

Article 5 of the 1951 Refugee Convention is likely to have formed the basis for the inclusion of Article 22 in the 1989 Convention on the Rights of the Child. The latter provides that a child who is seeking refugee status or who is considered a refugee, whether alone or accompanied, is entitled to the protection afforded by the rights enshrined in the 1989 Convention. Where another family member cannot be traced, the child is to be accorded the same protection set out in the Convention ‘as any other child permanently or temporarily deprived of his or her family environment for any reason’.

<sup>16</sup> *Ibid.*, para 29(a)(ii).

<sup>17</sup> The following definitions are from E.M. Ressler, N. Boothby and D.J. Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (Oxford University Press, 1988) pp 218-219:

‘Orphan: a child whose parents are both dead.’

‘Lost: a child unintentionally separated from the parents.’

‘Abducted: a child involuntarily and illegally taken from its parents.’

‘Removed: a child removed from the parents as a result of legal suspension or loss of parental rights.’

‘Runaway: a child who intentionally left his parents without their consent. From the parents’ point of view this is an involuntary separation, but it is a voluntary one on the child’s part.’

<sup>18</sup> *Ibid.*, pp 219-220:

‘Entrusted: a child voluntarily placed in the care of another adult or institution by the parents who intend to reclaim the child....

Evacuation of children in wartime or other emergencies is an example of this parental right to control the child’s residence.’

‘Abandoned: a child whose parents have deserted him with no intention of reunion.’

‘Surrendered: a child whose parents have permanently given up their parental rights.’

‘Independent: a child voluntarily living apart from his parents with their consent.’

<sup>19</sup> Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, *Declaration of States Parties to the 1951 Convention and / or its 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/MMSP/2001/09, 16 January 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, paras 3-4, adopted 18 December 2001.

<sup>20</sup> Similar rights are also enshrined in the *United Nations International Convention of 18 December 1990 on the Protection of the Rights of All Migrant Workers and Members of their Families*, available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>>. The instrument is applicable to all migrant workers without distinction as to age (Art. 1), including unaccompanied and separated children.

Founded on this Article is the clear principle that children seeking refugee status or considered refugees should first and foremost be treated as children.<sup>21</sup> More specifically, unaccompanied and separated children who are outside of their country of origin and temporarily or permanently deprived of their family environment have a right to receive alternative care complying with the national laws of the State in which they are located, by virtue of Article 20 of the 1989 Convention on the Rights of the Child.<sup>22</sup> The same Article provides that due regard shall be had, when considering solutions, ‘to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background’. These provisions indicate the extensive nature of the rights that separated or unaccompanied children enjoy under the 1989 Convention on the Rights of the Child.

Some of these rights can be described as fundamental rights, such as, for example, the right to non-discrimination. The rights articulated in the 1989 Convention must be ensured to each child ‘without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status’ (Art. 2). In the cases with which this article is concerned, this obligation applies to every child who finds him or herself on the territory of a given State and every child falling within a given State’s jurisdiction. The principle of non-discrimination prohibits in particular ‘any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant’.<sup>23</sup> Moreover, taking

into account of the best interests of the child (Art. 3), another fundamental right, must serve as a primary consideration in all decisions taken in respect of children.<sup>24</sup> This applies to any such decision taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—including institutions responsible for migration-related issues.<sup>25</sup> Other fundamental rights of the child that come to mind are: the inherent right to life (Art. 6(1)); the right to survival and development (Art. 6(2));<sup>26</sup> the child’s right to preserve his or her identity, including nationality, name and family relations (Art. 8);<sup>27</sup> the right to maintain, except in exceptional circumstances, personal relations and direct contact with both parents on a regular basis (Arts 9(3) and 10(2));<sup>28</sup> and the right to freedom of thought, conscience and religion (Art. 14).<sup>29</sup>

The child is equally entitled to certain legal safeguards. Any child who is capable of forming his or her own views has the right to express these views freely in all matters affecting him or her, and such views should be given due weight in accordance with the age and maturity of the child (Art. 12(1)).<sup>30</sup> The child also has the right to be heard in the course of judicial and administrative proceedings which concern him or her, either directly or through a (legal) representative or an appropriate body, in a manner consistent with the procedural rules of national law (Art. 12(2)).<sup>31</sup> It is important to note that States are required to protect the confidentiality of information relating to unaccompanied or separated children, in accordance with the right to privacy (Art. 16).<sup>32</sup> States notably commit to protecting children against all forms of (sexual) exploitation

<sup>21</sup> See the comments of François Crépeau, Special Rapporteur on the Human Rights of Migrants, in Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The rights of all children in the context of international migration*, 28 September 2012, para 5, available at < [http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC\\_DGD-Childrens\\_Rights\\_InternationalMigration.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf) >. See also UNICEF, *Refugee and Migrant Crisis in Europe Advocacy Brief*, above, p 1: “UNICEF urges States to recall that a child is first and foremost a child...”.

<sup>22</sup> See UNGA, *Alternative Care Guidelines*, above, for alternative care standards that have been adopted by the UN General Assembly. See, in particular, para 141: “Unaccompanied or separated children already abroad should, in principle, enjoy the same level of protection and care as national children in the country concerned.”

<sup>23</sup> UNCRC, *General Comment No 6* (2005), above, para 18.

<sup>24</sup> See UNGA, *Alternative Care Guidelines*, above, para 6; United Nations High Commissioner for Refugees, *Guidelines on Determining the Best Interests of the Child*, May 2008, available at <[www.unhcr.org/4566b16b2.pdf](http://www.unhcr.org/4566b16b2.pdf)>; and UNHCR and UNICEF, *Safe and Sound: What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014, available at <<https://www.unicef.org/protection/files/5423da264.pdf>> (“UNHCR and UNICEF, *Safe and Sound*”).

<sup>25</sup> UNCRC, *General Comment No 6* (2005), above, paras 19-22. See para 19: ‘A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process.’ See also Nigel Cantwell, *Challenges to Developing Appropriate Care for Children on the Move*, above, p 11.

<sup>26</sup> *Ibid.*, paras 23-24; and UNGA, *Alternative Care Guidelines*, above, para 2(b).

<sup>27</sup> UNGA, *Alternative Care Guidelines*, above, para 16.

<sup>28</sup> *Ibid.*, para 151.

<sup>29</sup> *Ibid.*, para 16.

<sup>30</sup> UNCRC, *General Comment No 6* (2005), above, para 25, and UNGA, *Alternative Care Guidelines*, above, para 7.

<sup>31</sup> UNGA, *Alternative Care Guidelines*, above, para 57.

<sup>32</sup> UNCRC, *General Comment No 6* (2005), above, paras 29-30; and UNGA, *Alternative Care Guidelines*, above, para 110.

and abuse (Art. 34);<sup>33</sup> illicit transfer, abduction, sale or traffic (Arts 11 and 35); torture or other cruel, inhuman or degrading treatment or punishment (Art. 37(a)); and unlawful or arbitrary deprivation of liberty (Art. 37(b)).

The child has the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. The child additionally has a right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development (Art. 27). Equally, the child has a right to education (Art. 28), as is also provided in Article 22 of the 1951 Refugee Convention, and a right to rest and leisure (Art. 31).

### **Specific Measures of Protection for Unaccompanied and Separated Children<sup>34</sup>**

#### **Urgent Measures of Protection upon Arrival in the Territory of a New State**

As soon as the child has arrived in the territory of the State he or she has migrated to, the responsible authorities—judicial or administrative—will have to take responsibility for his or her care, and will need to register the child.<sup>35</sup> The following information will require inclusion in the registration process, in order to enable the authorities to develop an accurate and comprehensive understanding of the identity of the child: nationality; education; cultural, linguistic and ethnic background; specific vulnerabilities and special needs in terms of protection (Art. 8).<sup>36</sup> From the outset of any procedure, an *ad hoc* administrator, guardian or counsellor/advisor should be designated for the child,

as well as a legal representative (Art. 12(2)).<sup>37</sup> It may be necessary to grant him or her access to translation and interpretation services, where applicable. The authorities will have to take the child into their care, provide accommodation and full access to the education system, and ensure that the child enjoys an adequate standard of living and receives the care that he or she needs.<sup>38</sup> These measures are vital for the effective prevention of trafficking and sexual or other forms of exploitation of the child, abuse and violence. There is equally a need to prevent the enlistment of the child in the armed forces and deprivation of his or her liberty, as well as to ensure the lawful treatment of the child in cases of detention.

### **Durable Solutions – General Points<sup>39</sup>**

The path towards durable solutions will enable the authorities to respond to all of the child's protection needs. These should take into account the views of the child and should, if possible, put an end to the unaccompanied or separated circumstances. Efforts to reunify the child with his or her family in accordance with Article 9(3) of the 1989 Convention—the child's right to maintain contact with both parents—should be a priority; especially in cases of involuntary separation, unless this would be contrary to the best interests of the child or compromise the fundamental rights of the individuals to be reunified. If such steps appear to be impracticable, alternative care arrangements for the child should be explored.<sup>40</sup> This might include kinship care, foster care, other forms of family-based or family-like care placements, residential care, supervised independent living arrangements for children and adoption, whether in the country of refuge or a third country.<sup>41</sup>

<sup>33</sup> UNGA, *Alternative Care Guidelines*, above, para 13.

<sup>34</sup> The measures of protection identified in this section are drawn from: (1) UNHCR and UNICEF, *Statement of Good Practice—Separated Children in Europe Programme*, 4<sup>th</sup> Revised Edition, Save the Children, 2009, available at < <http://www.separated-children-europe-programme.org/p/1/69> >; (2) UNHCR and UNICEF, *Safe and Sound: What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014, available at < <https://www.unicef.org/protection/files/5423da264.pdf> >; and Committee on the Rights of the Child, *General Comment No 6* (2005), above.

<sup>35</sup> UNGA, *Alternative Care Guidelines*, above, para 162.

<sup>36</sup> “In order to assist in planning the future of an unaccompanied or separated child in a manner that best protects his / her rights, relevant State and social service authorities should make all reasonable efforts to procure documentation and information in order to conduct an assessment of the child's risk and social and family conditions in his / her country of habitual residence.”, *ibid.*, para 147.

<sup>37</sup> “As soon as an unaccompanied child is identified, States are strongly encouraged to appoint a guardian or, where necessary, representation by an organisation responsible for his / her care and well-being to accompany the child throughout the status determination and decision-making process.” Furthermore, “no child should be without the support and protection of a legal guardian or other recognised responsible adult or competent public body at any time”, *ibid.*, respectively paras 145 and 19.

<sup>38</sup> “States should ensure the right of any child who has been placed in temporary care to regular and thorough review – preferably at least every three months – of the appropriateness of his / her care and treatment, taking into account, notably, his / her personal development and any changing needs, developments in his / her family environment, and the adequacy and necessity of the current placement in these circumstances”, *ibid.*, para 67.

<sup>39</sup> UNCRC, *General Comment No 6* (2005), above, paras 79-80.

<sup>40</sup> UNGA, *Alternative Care Guidelines*, above, para 2(a).

<sup>41</sup> *Ibid.*, para 29(c)(i)-(v).

### Family Reunification (In the (Fled) State of Origin or the Host State)<sup>42</sup>

It would not be in the best interests of the child to reunite him or her with family in the State of origin if there is a 'reasonable risk' that such a return would lead to violation of the fundamental rights of the child.<sup>43</sup> This risk is indisputably established by the granting of refugee status or by a decision of non-return based on the *non-refoulement* principle. In cases where there appears to be a mitigation of this risk, it would be appropriate to examine family reunification in light of other considerations affecting the rights of the child, including the consequences of prolonged separation from one's family.

Where family reunification is impossible in the State of origin, the obligations set out in Articles 9(3) and 10(2) of the 1989 Convention on the Rights of the Child should prompt the host State to examine the possibility of family reunification in its own territory. In any case—even where the child is (temporarily) separated from his or her parents and thus does not have direct contact with them—both provisions impose an obligation to fulfil the child's right to maintain personal relations with both parents on a regular basis, where this is possible. For example, the child's enjoyment of this right is effectively facilitated where a public authority enables a child to see and speak with his or her parents via videoconference. This illustrates that innovative tools which have only become available after the adoption of the Convention can be employed to fulfil the rights contained therein, in particular where children have been physically separated from their parents.<sup>44</sup>

### Return to the State of Origin (Especially in Cases of Orphaned Children)<sup>45</sup>

In order to determine whether it is in the child's best interests to return to the State of origin, unless there is a reasonable risk that such a return would lead to violation of the fundamental rights of the child, it is important to take the following criteria into account: (1) the socioeconomic and security conditions awaiting the child upon his or her return (to be determined by means of a social survey); (2) the availability of care arrangements for the child; (3) the views of the child; (4) the extent to which the child has integrated in the host State; (5) the child's right to preserve his or her identity; (6) the desirability of ensuring continuity in the child's education, and to account for his or her ethnic, religious, cultural and linguistic background. Where it is impossible for members of the immediate or extended family to assume care of the child, the return of the child to his or her State of origin must not be carried out unless a clear and certain arrangement, including defined custody rights, is in place.

### Local Integration<sup>46</sup>

In cases where the child cannot be returned to the State of origin on legal or factual grounds, local integration in the host State is the primary option to be considered. Recourse to placement in institutional care should only be had as a last resort, after national adoption or foster family placement.<sup>47</sup> The unaccompanied or separated child should enjoy the same rights as other children in the host State, such as the right to education and development, including acquiring the language of the host State, as well as the right to health.

<sup>42</sup>UNCRC, *General Comment No 6* (2005), above, paras 81-83. Family reunification should be facilitated in accordance with the UNGA, *Alternative Care Guidelines*, above, para 49-52.

<sup>43</sup>UNGA, *Alternative Care Guidelines*, above, provide at para 148 that "Unaccompanied or separated children must not be returned to their country of habitual residence:

- (a) If, following the risk and security assessment, there are reasons to believe that the child's safety and security are in danger;
- (b) Unless, prior to the return, a suitable caregiver, such as a parent, other relative, other adult caretaker, a Government agency or an authorized agency or facility in the country of origin, has agreed and is able to take responsibility for the child and provide him or her with appropriate care and protection;
- (c) If, for other reasons, it is not in the best interests of the child, according to the assessment of the competent authorities."

<sup>44</sup> *Ibid.*, para 151.

<sup>45</sup>UNCRC, *General Comment No 6* (2005), above, paras 84-87. The UNGA, *Alternative Care Guidelines*, above, provide at para 11 that "[a]ll decisions concerning alternative care should take full account of the desirability in principle, of maintaining the child as close as possible to his / her habitual place of residence." Note that Article 12(4) of the *United Nations International Covenant of 16 December 1966 on Civil and Political Rights*, available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>, provides that 'No one shall be arbitrarily deprived of the right to enter his own country.' The UN Human Rights Committee interprets 'his own country' broadly: 'It is not limited to nationality in a formal sense [...] it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.' Crucially, the Committee remarks that 'The right to return is of utmost importance for refugees seeking voluntary repatriation', see *General Comment No 27*, 2 November 1999, paras 19-20, available at <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en)>.

<sup>46</sup>UNCRC, *General Comment No 6* (2005), above, paras 89-90.

<sup>47</sup>Note that 'placement with a view to adoption or *kafala* of Islamic law should not be considered a suitable initial option for an unaccompanied or separated child. States are encouraged to consider this option only after efforts to determine the location of his/her parents, extended family or habitual carers have been exhausted.' UNGA, *Alternative Care Guidelines*, above, para 152.

### Inter-country Adoption<sup>48</sup>

Regarding adoption, States are required to respect the rights and obligations provided in Article 21 of the 1989 Convention on the Rights of the Child, as well as other applicable national and international instruments, including the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption* ('the 1993 Hague Convention').<sup>49</sup>

### Resettlement in a Third Country<sup>50</sup>

Where the child cannot be returned to the State of origin or durable solutions cannot be put in place in the host State for factual or legal reasons, resettlement in a third State may offer a durable solution insofar as this serves the child's best interests. This resettlement in a third State is in the best interests of the child if it enables family reunification in the State of resettlement. It is equally in the child's best interests if it ensures continuity in the child's education, taking into consideration the child's ethnic, religious, cultural and linguistic background.

### The 1996 Hague Convention

It is a well-established legal principle that every State may exercise its jurisdiction in accordance with domestic law in respect of any child present on its territory, in order to take measures of protection in relation to that child. It is also a well-established principle that the law applicable to the child, including measures taken to protect him or her, is the law of the forum, namely the law of the State in which the child is present.<sup>51</sup> However, national law cannot in and of itself facilitate the degree of international judicial and administrative co-operation that is necessary for the implementation of protective solutions with cross-border elements, such as the reunification of a family in a State of origin, a host State or even a third State; the return of a child to a State of origin; or reintegration in a third State. It is only through the application of an international instrument such as the 1996 Hague Convention that these tools for co-operation become available.

### Introduction

The civil aspects of the protection of endangered children in cross-border settings has always been at the heart of the endeavours of the Hague Conference on Private International Law, now for over a century.<sup>52</sup> The

Hague Convention of 12 June 1902 Governing the Guardianship of Infants ('1902 Hague Convention') was the first of a series of Conventions in this area.<sup>53</sup> This Convention was replaced by the Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants ('1961 Hague Convention').

During the second half of the 20<sup>th</sup> Century, the opening of national borders, ease of mobility, breaking-down of cultural barriers and, more recently, the free flow of information via the Internet, notwithstanding their benefits, have considerably increased the risks associated with the cross-border movement of children. Cross-border trafficking of children, their exploitation, as well as migration triggered by (civil) war, socioeconomic hardships and natural disasters have become serious problems. There has been an increase in reliance on temporary arrangements to address these problems. The risks associated with the struggle to provide all children with protective measures, that certain States appear to have faced, are grave indeed.

The 1996 Hague Convention has a very wide scope dealing with large variety of measures of protection, ranging from decisions pertaining to parental responsibility and contact rights to public measures of protection or care, as well as matters of representation. The Convention establishes uniform rules determining which competent authorities have jurisdiction to take the necessary measures of protection. These rules prevent the occurrence of conflicting decisions. They confer primary responsibility on the authorities of the country of habitual residence of the child and allow every State in whose territory the child is present to take the necessary urgent or preventative measures of protection. The Convention designates the applicable law and provides for the recognition and enforcement of measures taken in one Contracting State in every other Contracting State bound by the Convention. Above all, the co-operative measures laid down by the Convention provide a conducive framework for the exchange of information and collaboration between the authorities of the various Contracting States that is necessary to achieve, for example, family reunification, the return of the child to the State of origin or the child's resettlement in a third country. The Convention proves particularly useful in ensuring the protection of unaccompanied children and the cross-border placement of children.

<sup>48</sup> UNCRC, para 91.

<sup>49</sup> Again, 'no action should be taken that may hinder eventual family reintegration, such as adoption, change of name or movement to places far from the family's likely location, until all tracing efforts have been exhausted.' UNGA, *Alternative Care Guidelines*, above, para 166. See also the Hague Recommendation on Refugee Children adopted on 21 October 1994, available at: < [https://assets.hcch.net/upload/recomm33refugee\\_en.pdf](https://assets.hcch.net/upload/recomm33refugee_en.pdf) >.

<sup>50</sup> UNCRC, *General Comment No 6* (2005), above, paras 92-94.

<sup>51</sup> Case concerning the application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands v Sweden*) ICJ Reports, 1958, p 55 ('the *Boll* case').

<sup>52</sup> P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of Children*, (The Hague, SDU, 1998) para 3 ('Explanatory Report on the 1996 Convention').

<sup>53</sup> The text of the Convention is available at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> >.

## Unaccompanied Children

The co-operation procedures provided by the 1996 Hague Convention may prove to be valuable in tackling the growing number of cases in which unaccompanied children cross borders and find themselves in vulnerable situations, subject to exploitation and other risks.<sup>54</sup> Whether the unaccompanied child is a refugee, an asylum seeker, a displaced person or a runaway adolescent, the Convention will assist by facilitating co-operation to locate the child and determining which country's authorities have jurisdiction to take the appropriate measures of protection. It also ensures that there is co-operation between the authorities of the country of origin and host State, exchange of all necessary information and the implementation of every necessary measure of protection.

## Cross-border Placement of Children

The 1996 Hague Convention additionally enables co-operation between States faced with the growing number of cases of children placed in another country as an alternative to long-term placement solutions other than adoption, such as institutional placement.

## An Integrated System

The 1996 Hague Convention is based on the notion that provisions dealing with measures for the protection of children should constitute an indivisible whole. This explains its wide scope, which covers measures of protection or care of both a public and private nature. The Convention overcomes the uncertainty that is likely to arise where distinct laws apply to different types of measures of protection taken in relation to the same case.

## An Inclusive System

The Convention takes account of the wide variety of legal institutions and systems of protection that exist around the world. It does not attempt to create a uniform international law of child protection; the basic elements of such a law are already to be found in the 1989 Convention on the Rights of the Child. The function of the 1996 Hague Convention is to avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems. In this respect, the Convention provides a remarkable opportunity for the building of bridges between legal systems with diverse cultural or religious backgrounds.

## Scope

### *Ratione Personae* Scope

Article 2 of the 1996 Hague Convention provides that the instrument 'applies to children from the moment of

their birth until they reach the age of 18 years'. There is no mention of the legal status of the child. Thus, the 1996 Convention implements the principle of non-discrimination prescribed by the 1989 Convention on the Rights of the Child. The 1996 Convention applies to unaccompanied children and children who have been voluntarily or involuntarily separated from their parents.<sup>55</sup> The inclusion of this group in the scope of the 1996 Convention is unequivocal; some of these children, such as those who are refugees, who are internationally displaced due to disturbances occurring in their home country and those whose habitual residence cannot be established, are specifically mentioned in Article 6 of the 1996 Convention.

### *Ratione Materiae* Scope

The *ratione materiae* scope of the 1996 Convention is very broad. It includes both measures of protection of a private and public nature (*i.e.* measures taken by competent authorities as well as parents in relation to children). The scope is regulated by the inclusion of an illustrative list of measures of protection covered by the Convention, provided in Article 3, as well as an exhaustive list of measures of protection not covered by the Convention, set out in Article 4. It follows that if a measure is not listed in Article 4, Article 3 must inevitably cover it.

The measures of protection to be taken upon the arrival of the child in the territory of the host State (explained above) that are not provided in the 1951 Refugee Convention, are all covered by Article 3. As such, it will be possible to designate a guardian (Art. 3 *e*); a person or body having charge of the child's person or property, representing or assisting the child (Art. 3 *d*); and a legal representative (Art. 3 *d*). It will equally be possible to set out the functions and responsibilities of such persons (Art. 3 *d*), including the care of the child, the provision of accommodation, access to education, to health care and to an adequate standard of living (Art. 3 *b*). The placement of the child in foster care or in an institution outside of the refugee camps, as is good practice, is equally possible in accordance with the 1996 Convention (Art. 3 *e*).

Durable solutions are equally all covered by Article 3. These include family reunification in the State of origin or the host State, return to the State of origin, local integration and resettlement in a third State, as well as measures which are incidental to the implementation of these measures of protection. However, adoption and measures preparatory to adoption are excluded from the scope of the 1996 Convention, as they are covered by the 1993 Hague Convention.

It is important to take note of the final paragraph of Article 4, which deals with the areas excluded from the scope of the 1996 Convention; this provision may well

<sup>54</sup> See Aude Fiorini, 'The Protection of the Best Interests of Migrant Children—Private International Law Perspectives', in G Biagini & F Ippolito (eds), *Migrant Children in the XXI Century: Selected Issues of Public and Private International Law*, "La ricerca del diretto" Series, Editoriale Scientifica, 2016.

<sup>55</sup> See the definitions in E.M. Ressler, N. Boothby and D.J. Steinbock, above, n17.

cause confusion. 'Decisions on the right of asylum and on immigration' are excluded from the scope (Art. 4 *jj*). According to the Explanatory Report of the 1996 Convention, this exclusion is founded on the principle that these decisions derive from the sovereign power of States.<sup>56</sup> It must be understood that only decisions on these matters are excluded—that is, the granting of asylum or of a residence permit.<sup>57</sup> Otherwise, all measures of protection and representation of children seeking asylum or residence permits, as explained below, do fall under the scope of the 1996 Convention.

### Geographic Scope

Unlike other Hague Conventions, certain mechanisms of the 1996 Convention may be applied to individuals or matters not connected *per se* to Contracting States. For example, certain rules about jurisdiction apply regardless of whether a child is habitually resident in a Contracting State or has no habitual residence at all. This feature demonstrates the humanitarian nature of the Convention. The rules on applicable law are of a universal character, as is the case for the majority of Hague Conventions. Under these rules, it is possible to apply the law of non-Contracting States. On the other hand, the rules on recognition and enforcement of measures of protection are limited to measures that have been taken in Contracting States, due to the Convention's rules on jurisdiction. The implementation of the co-operation mechanisms provided by the 1996 Convention is equally limited to Contracting States based on reciprocity. It is important to note that the measures of protection subject to the rules on recognition and enforcement and co-operation mechanisms concern children whose habitual residence is not in a Contracting State.

### Rules on Jurisdiction

#### Introduction<sup>58</sup>

The general basis of jurisdiction under the 1996 Convention is the habitual residence of the child (Art. 5). This solution responds to the difficulties created by the concurrent bases of jurisdiction in the 1961 Hague Convention, which could result in conflicting decisions (*i.e.* jurisdiction of habitual residence and nationality jurisdiction).

The Convention provides exceptions to jurisdiction based on habitual residence, for example in cases where the child is displaced due to disturbances in his or her State of habitual residence (Art. 6(1)) or in cases where there is an absence of habitual residence (Art. 6(2)). In both cases, the 1996 Convention reverts to the universal principle that every State has exclusive jurisdiction over persons located in their territory, especially for humanitarian purposes. The Convention thus provides for jurisdiction based on necessity.

It is also possible fully or partially to transfer jurisdiction based on the habitual residence of the child to the authorities of a Contracting State who are better placed to appreciate, on the facts of the particular case, the best interests of the child. This transfer must be requested or authorised by the authorities of the State of habitual residence of the child (Arts 8 and 9) or requested by the authorities of the State on whose territory the child is present (Art. 8).

In certain cases of urgency with extraterritorial effects (*i.e.* effects that occur beyond the territory of the State which has jurisdiction; see Art. 11) or where there is a need for provisional measures with limited territorial effect (Art. 12), territorial jurisdiction may be independently exercised. Its exercise is limited by measures taken or to be taken by the authorities that normally have jurisdiction.

It is important to note that measures taken under Articles 5 to 10 remain in force subject to their limitations, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded. This is only insofar as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures (Art. 14).

### Refugee or Displaced Children, or Children Whose Habitual Residence Cannot Be Established<sup>59</sup>

The jurisdiction that competent authorities have in relation to refugee or displaced children, or those whose habitual residence cannot be established, is governed by Article 6.<sup>60</sup> The category of children covered by this provision is limited to those who have left their country due to disturbances raging there. The Convention does not define the term 'disturbances'. Civil war, famine, environmental or socio economic disturbances are all

<sup>56</sup> Explanatory Report on the 1996 Convention, above, para 36.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, para 37.

<sup>59</sup> *Ibid.*, para 44.

<sup>60</sup> Article 6 provides that:

'For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.

The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.'

examples that come to mind.<sup>61</sup> Such children are often unaccompanied or separated and, in all cases, are deprived of their parents temporarily or permanently. Article 6 does not deal with abandoned or runaway children; other provisions of the Convention will offer a solution for such children (Art. 31 *c*).

Refugee or displaced children, or children whose habitual residence cannot be established, often require arrangements for their protection that are of a durable nature, except in cases of urgency. This is why these children have been provided with a forum of general jurisdiction, as opposed to one which is limited to urgent measures of protection. The jurisdiction normally attributed to the authorities of the State of habitual residence by the Convention is inoperative in such cases. Indeed, such children have severed every connection with their State of habitual residence, and the uncertain circumstances of their continued presence in the State in which they have found refuge precludes the conclusion that they have acquired a new habitual residence.

As soon as the child obtains a new habitual residence, the forum of necessity under Article 6 will cease to have effect. If this new place of habitual residence is in a Contracting State, the competent authorities will exercise their jurisdiction under Article 5, or alternatively the State in whose territory the child is present will have but a limited basis of jurisdiction, as set out in Articles 11 and 12.

It is interesting to note that Article 6 of the 1996 Convention finds its counterpart in Article 13 of the Brussels II *bis* Regulation.<sup>62</sup> A rule which co-ordinates the Brussels II *bis* Regulation and the 1996 Convention provides that the Regulation only applies to children who have their habitual residence on the territory of a Member State of the European Union to which the Regulation applies (*i.e.* every Member State except Denmark).<sup>63</sup> By implication, if it cannot be established that a child has his or her habitual residence in such a Member State, it logically follows that the 1996 Convention is applicable.

#### **Transfer of Jurisdiction to an Appropriate Forum<sup>64</sup>**

As an exception to the general rules on jurisdiction, Articles 8 and 9 of the 1996 Convention offer a procedure that allows, in the framework of measures for the protection of the person of the child, the transfer of jurisdiction from the authorities of the Contracting State normally having jurisdiction (*e.g.* the State of habitual residence of the child) to the authorities of another

Contracting State. This transfer of jurisdiction is only possible once certain conditions have been met, and only in favour of the authorities of another Contracting State that would be better placed in the particular case to assess the best interests of the child. It should be noted that jurisdiction can only be transferred between the authorities of the Contracting States. A request for transfer of jurisdiction can be executed in two different ways.

First, according to Article 8 of the 1996 Convention, an authority having jurisdiction under the Convention, under Articles 5 (habitual residence) or 6 (refugee or displaced children, or children whose habitual residence cannot be established), if it considers that another authority which lacks jurisdiction would be better placed in the particular case to assess the best interests of the child, may request that the other authority assumes jurisdiction. The Contracting States to whose authorities a transfer of jurisdiction may be made, listed in paragraph 2 of Article 8, are: (a) a State of which the child is a national, (b) a State in which property of the child is located, (c) a State whose authorities are seized of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, (d) a State with which the child has a substantial connection.

It is important to note that the best interests of the child must be assessed 'in the particular case', that is to say, 'at the moment when a certain need for protection is being felt'.<sup>65</sup> Thus, the possibility of this transfer may be particularly appropriate in cases of family reunification in the child's State of origin, return of the child to the State of origin or resettlement in a third country. However, according to the wording of paragraph 2 of Article 8, the addressed State would need to be a State of which the child is a national or with which the child has a substantial connection—such as one where (extended) family members are located or whose language, culture or religion the child shares. Where refugee children are returned to their State of origin, there must be no breach of the *non-refoulement* principle enshrined in the 1951 Refugee Convention.

Secondly, under Article 9 of the 1996 Convention, the authorities of a Contracting State listed in paragraph 2 of Article 8 that lacks jurisdiction but which consider that they are better placed in the particular case to assess the child's best interests, may request the competent authority of the Contracting State of the habitual residence of the child (Art. 5) that they be authorized to exercise jurisdiction.

<sup>61</sup> As concerns the inclusion of socioeconomic conditions in the determination of the best interests of the child, see Committee on the Rights of the Child, *General Comment No 6* (2005), above, paras 84-88.

<sup>62</sup> See Brussels II *bis* Regulation, above.

<sup>63</sup> *Ibid.*, Art. 61.

<sup>64</sup> Explanatory Report on the 1996 Convention, above, paras 53-60.

<sup>65</sup> *Ibid.*, para 56.

It is worth noting a very important difference between Articles 8 and 9, especially as it relates to children who are refugees, displaced or whose habitual residence cannot be established. While the transfer of jurisdiction to take measures in relation to them (Art. 6) is expressly provided in Article 8, it is not in Article 9. The Explanatory Report indicates that this is the results of an ‘oversight’, and that Article 9 should be aligned with Article 8.<sup>66</sup> The Explanatory Report states: ‘If the authorities of the State of the child’s nationality are entitled to ask those of the State of the habitual residence to authorise them to exercise protective jurisdiction, for even stronger reasons they ought to be able to ask the same of the authorities of the State to which, due to disturbances occurring in the country of the child’s habitual residence, the child has been provisionally removed.’ There may be another possibility, namely that a State with which the child has a substantial connection—for example, as stated above, one where (extended) family members are located or whose language, culture or religion the child shares<sup>67</sup>—requests a transfer of jurisdiction from the authorities of the State in which the child is present as a result of disturbances occurring in his or her State of habitual residence.

The Practical Handbook on the Operation of the 1996 Child Protection Convention stipulates that ‘at the current time the language of the Convention is clear and it seems that a request under Art. 9 may only be made to the Contracting State of the child’s habitual residence.’<sup>68</sup> On the other hand, the doctrinal position is that ‘the purposive approach to interpreting the Convention would permit the wider application of Art. 9’, in light of further clarifications contained in the Explanatory Report.<sup>69</sup> In fact, there is nothing to prevent the authorities of Contracting States to act on an agreement to this effect once it has been reached. Ultimately, an interpretative declaration of the States Parties to the Convention or even an amendment to the Convention would enable the resolution of this apparent oversight.<sup>70</sup>

The transfer of jurisdiction may occur in respect of a

case in its entirety, or a part of it.<sup>71</sup> Once the transfer has been accepted by the authorities of both States, the authority which waives its jurisdiction may no longer exercise it in the particular matter, and must wait until the decision rendered by the authority of the other State becomes final and enforceable.<sup>72</sup> Nevertheless, the transfer is not of a permanent nature. ‘Nothing, indeed, allows it to be affirmed in advance that under future circumstances the authority which has jurisdiction under Article 5 or 6 might not be better placed to decide in the best interests of the child.’<sup>73</sup> Yet, in the specific cases outlined above of return to the State of origin or resettlement in a third State, these movements may result in the establishment of a new habitual residence, which can bring about a change in the forum having jurisdiction.

There are two possible processes for transferring jurisdiction. First, the authorities themselves may submit the request to the authorities of the other State having jurisdiction, whether directly or with the assistance of the relevant Central Authority (Arts 8(1), first paragraph, 9(1), first paragraph and 31 *a*). Secondly, the parties to the proceedings may be invited to introduce the request before the authorities of the other Contracting State (Arts 8(1), second paragraph, 9(1), second paragraph and 31 *a*)).

### **Concurrent Jurisdiction of the Authorities of the State of the Child’s Presence—Jurisdiction in Cases of Urgency (Art. 11) and Provisional Measures of Territorial Effect (Art. 12)<sup>74</sup>**

Article 11 grants jurisdiction to the authorities of every State on whose territory the child is located to take any necessary measures of protection in cases of urgency. The 1996 Convention does not define urgency. ‘It might be said that a situation of urgency within the meaning of Article 11 is present where the situation, if remedial action were only sought through the normal channels of Articles 5 to 10, might bring about irreparable harm for the child. The situation of urgency therefore justifies a derogation from the normal rule and ought for this reason to be construed rather strictly.’<sup>75</sup> The jurisdiction covered in Article 11 is

<sup>66</sup> *Ibid.*, para 58.

<sup>67</sup> In the case of the migration crisis which is currently raging in Europe one might imagine that the French or Belgian authorities would want to take in, from Greece, French-speaking African children of Franco-African culture and Catholic faith. Such authorities would be able to do so under Article 9, if it provided for the forum of jurisdiction set out in Art. 6.

<sup>68</sup> Hague Conference on Private International Law, *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention* (The Hague, 2014) footnote no 156 (‘Practical Handbook on the Operation of the 1996 Convention’).

<sup>69</sup> N. Lowe and M. Nicholls, *The 1996 Convention on the Protection of Children* (Family Law, Jordan Publishing, Bristol, 2012) para 3.44.

<sup>70</sup> It is noteworthy that this problem does not present itself in Art. 8 of the Hague Convention of 13 January 2000 on the International Protection of Adults, which refers to both Arts 5 (habitual residence) and 6 (refugees). The structure of the 2000 Convention is modelled on that of the 1996 Convention.

<sup>71</sup> Practical Handbook on the Operation of the 1996 Convention, above, para 5.5.

<sup>72</sup> *Ibid.*, para 5.6.

<sup>73</sup> Explanatory Report on the 1996 Convention, above, para 56.

<sup>74</sup> *Ibid.*, paras 67-77.

<sup>75</sup> *Ibid.*, para 68.

concurrent with jurisdiction based on the habitual residence of the child, thus constituting an exception to the principle of primary jurisdiction that underpins the Convention. 'As concerns the authority of the State where the child is present, this extends by hypothesis to children other than refugee or displaced children within the meaning of Article 6, paragraph 1, or children without a habitual residence within the meaning of Article 6, paragraph 2. For these children, indeed, in the absence of a State of habitual residence which is established or accessible, the authorities where the child is present have general jurisdiction' enabling them to take all available measures, whether urgent or not.<sup>76</sup> Thus, in the case of unaccompanied or separated children, Article 11 would be appropriate in the case of runaway or displaced children for whom it is impossible to establish a place of habitual residence and who may otherwise be subject to, for example, trafficking.

Alternatively, in cases which are not urgent, Article 12 grants the authorities of every Contracting State on whose territory the child is present jurisdiction 'to take measures of a provisional character for the protection of the person [...] of the child which have a territorial effect limited to the State in question'.

#### ***Rules on Applicable Law***<sup>77</sup>

The 1996 Convention incorporates the principle handed down by the International Court of Justice in the *Boll* case, according to which the authorities of Contracting States, in exercising their jurisdiction under the Convention to take measures for the protection of children, apply their own law (Art. 15(1)).<sup>78</sup> In so doing, they will apply the law they are most familiar with, which in most cases coincides with the law of the State on whose territory the child is present under the rules on jurisdiction. Furthermore, measures are generally executed on the territory of the State that has taken them. In this way, implementing these measures is more straightforward where they conform to the law of that State.

However, insofar as it is necessary for the protection of the person of the child, the authorities of the Contracting States may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection (Art. 15(2)). It is important to note the universal character of the rules on applicable law, meaning that they apply even if the law designated by them is the law of a non-Contracting State (Art. 20). For example, in the specific cases of family reunification in the State of origin or the return of the child to the State of origin, 'it might [...] be indicated to apply to the protection of

foreign children their national law, if it appeared that these children would be returning in a short time to their country of origin', even where that State is not a Contracting State.<sup>79</sup> Similarly, it may be appropriate to apply the law of a third State if the child is to be resettled there in the short term. In any case, as provided in paragraph 2 of Article 15, the authorities in one State may take into consideration the law of another State in order to avoid taking a measure of protection that would not be capable of being enforced in the latter State.

Additional provisions complement the Chapter on Applicable Law, dealing with: attribution or extinction of parental responsibility (Art. 16); exercise of parental responsibility (Art. 17); termination or modification of parental responsibility (Art. 18); protection of third parties (Art. 19); exclusion of *renvoi* and conflicts between choice of law systems (Art. 21); and public policy, by which 'the law designated by the provisions [of the 1996 Convention] can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child' (Art. 22).

#### ***Rules on Recognition and Enforcement***<sup>80</sup>

The 1996 Convention sets forth the principle that measures taken in one Contracting State shall be recognised by operation of law in all other Contracting States (Art. 23). 'Recognition by operation of law means that it will not be necessary to resort to any proceeding in order to obtain such recognition, so long as the person who is relying on the measure does not take any step towards enforcement. It is the party against whom the measure is invoked, for example in the course of a legal proceeding, who must allege a ground for non-recognition set out in paragraph 2 [of Article 23].'<sup>81</sup> The grounds for non-recognition set out in the Convention are the classic grounds found in the various Hague Conventions on private international law.

The 1996 Convention provides for preventive action for recognition or non-recognition of a measure of protection (Art. 24). This provision may be of interest in the specific cases of returning the child to his or her State of origin, family reunification in that State, or of resettlement in a third State. Certainty may be required in these cases as to the recognition or enforcement of a measure of protection before the movement of the child. Thus, 'Without prejudice to Article 23, [...] any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State' (Art. 24). Such a procedure is governed by the law of the requested State.

<sup>76</sup> *Ibid.*, para 69.

<sup>77</sup> *Ibid.*, paras 85-117.

<sup>78</sup> The *Boll* case, above.

<sup>79</sup> Explanatory Report on the 1996 Convention, above, para 89.

<sup>80</sup> *Ibid.*, paras 118-135.

<sup>81</sup> *Ibid.*, para 119.

As is customary in Hague Conventions, ‘The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction’ (Art. 25). In addition, ‘there shall be no review of the merits of the measure taken’ (Art. 27). ‘If the measure [of protection] requires enforcement, for example a measure of constraint to obtain the handing over of the child, [...] the measure will have to be the subject in the second State of a declaration of enforceability or, according to the procedure applicable in certain States, of registration for the purpose of enforcement’ (Art. 26(1)).<sup>82</sup> This procedure will be triggered in the requested State by the request of an interested party for a declaration of enforceability or registration for enforcement, according to the procedure provided in the law of that State (Art. 26(1)). Contracting States are required to apply a simple and rapid procedure to the declaration of enforceability or registration for enforcement (Art. 26(2)). Finally, the 1996 Convention provides that ‘Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child’ (Art. 28).

### ***Co-operation Mechanisms***

The 1996 Convention puts in place a system of Central Authorities tasked with discharging the duties which are imposed by the Convention (Art. 29). Every Contracting State will designate a Central Authority for this purpose. ‘Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention’ (Art. 30(1)). Each Central Authority is, as it were, a fixed point of contact for the Central Authorities of other Contracting States for obtaining responses to requests. Central Authorities can co-operate in relation to unaccompanied or separated children in different ways.

Under Article 31 *c*), the Central Authority of another Contracting State may be asked to locate a child who appears to be present on the territory of the requested State and in need of protection. It is to be hoped that with time it will become possible, pursuant to the development of good practice in this area, to rely on an opposite direction of co-operation between Central Authorities, in order to

trace the parents or family of an unaccompanied or separated child.

Article 33 of the 1996 Convention imposes a mandatory procedure of consultation and approval between Central Authorities for the placement of the child in a foster family or institutional care, or the provision of care by *kafala*. Such placement can only occur in another Contracting State. This consultation is initiated when an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child abroad. For the types of cases with which this paper is concerned, such placement may be contemplated for an unaccompanied or separated child who may be returned to his or her State of origin or resettled in a third State, without the occurrence of family reunification in either case. ‘This consultation gives a power to review the decision to the authority of the receiving State, and allows the authorities to determine in advance the conditions under which the child will stay in the receiving State, in particular in respect of immigration laws in force in that State, or even in the sharing of the costs involved in carrying out the placement measure. The text sets it out that the consultation will be with the Central Authority or other competent authority of the receiving State, and that it will be demonstrated by the furnishing to that authority of a report on the child’s situation and by the reasons for the proposed placement or provision of care.’<sup>83</sup>

Central Authorities can co-operate under Articles 30 and 32 with a view to ensuring the return of an unaccompanied or separated child to the State of origin or the resettlement of the child in a third State, accompanied by appropriate measures of protection which are to be in place upon the child’s arrival. Indeed, Article 32 ‘envisages the case in which an authority, whether or not the Central Authority, of a State with which the child has a substantial connection is concerned about the fate of this child, who has his or her habitual residence or who is present in another Contracting State, and addresses to the Central Authority of that other State a request with supporting reasons that it be furnished a report on the child’s situation, or that measures be taken for the protection of the person or property of the child.’<sup>84</sup> The first paragraph of Article 35 also provides for ‘mutual assistance between the competent authorities of the Contracting States for the implementation of measures of protection. Such assistance will often be necessary, in particular in case of removal of the child or of his or her placement in an appropriate establishment, situated in a State other than that which has taken the measure of placement.’<sup>85</sup>

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<sup>82</sup> *Ibid.*, para 132.

<sup>83</sup> *Ibid.*, para 143.

<sup>84</sup> *Ibid.*, para 142.

<sup>85</sup> *Ibid.*, para 146.

As part of these rules on co-operation, the first paragraph of Article 34 enables the competent authority of a Contracting State to request any authority of another Contracting State which has information relevant to the protection of the child to communicate that information. It is also important to note that, according to Article 36, ‘in any case where the child is exposed to serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child’s residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.’ This may be the case, for example, where a runaway child has been the victim of an act of exploitation discovered in another State.

Within this framework of information sharing, Article 37 of the Convention merits particular attention and emphasis. It provides that ‘an authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child’s person [...] in danger, or constitute a serious threat to the liberty or life of a member of the child’s family.’ This obligation takes on particular importance in cases of refugee children, especially for those who have been victims of trafficking and exploitation.

## Conclusion

During its twenty-fifth meeting of 18-20 September 2015 in Luxemburg, the European Group for Private International Law adopted the *Declaration on the Legal Status of Applicants for International Protection from Third Countries to the European Union*.<sup>86</sup> In its Declaration, the European Group for Private International Law recalls in particular the 1996 Convention, identifying it as a solution in this area, and calls on the institutions of the European Union and its Member States to take initiatives with a view to ‘promoting

the universal ratification of instruments of private international law aimed at ensuring legal certainty and mutual recognition of personal status, including the Hague Convention on the Protection of Children (1996)’. Moreover, in General Comment No. 6 (2005), the Committee on the Rights of the Child also identifies the 1996 Convention as an instrument that addresses the protection of unaccompanied and separated children, and encourages its ratification.<sup>87</sup> The UN Alternative Care Guidelines equally invite States to ratify or accede to the instrument.<sup>88</sup> Despite these invitations to ratify the 1996 Convention, its implementation is rather slow. Efforts will be made to address the universal implementation of the 1996 Convention during the next meeting of the Special Commission tasked with examining the practical operation of the 1996 Convention, which will be held in The Hague from 10 to 17 October 2017.

Along with the promotion of the 1996 Convention among States, the authorities responsible for immigration and asylum matters should be made aware of the practical application of the 1996 Convention in these areas as set out in this article. Constructive dialogue should be facilitated between these authorities and the authorities responsible for international co-operation in civil matters, in order to better assist unaccompanied and separated children.

Thorough and precise knowledge of the applicable legal frameworks is required to secure sustainable solutions in the fields of asylum, immigration and the protection of children. Positive results in the area of the protection of unaccompanied or separated children can only be obtained as a result of close collaboration between persons with expertise in these fields.<sup>89</sup> It is to be hoped that the information provided in this article will inspire the intensification of a collaborative approach in Europe and beyond,<sup>90</sup> and that with time the promotion of the 1996 Convention—and its application to provide protection and certainty for unaccompanied children—will proliferate.

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<sup>86</sup> The text of the Declaration is available at < <http://www.gedip-egpil.eu/documents/gedip-documents-25bis.htm> >.

<sup>87</sup> Committee on the Rights of the Child, *General Comment No 6* (2005), above, para 15.

<sup>88</sup> UNGA, *Alternative Care Guidelines*, above, para 139.

<sup>89</sup> Nigel Cantwell, *Challenges to Developing Appropriate Care for Children on the Move*, above, p 11.

<sup>90</sup> States are invited to build on networks created in accordance with the 1996 Convention, as stated in the Conclusions and Recommendations of the Rome Conference of 10 and 11 November 2014 on Fundamental Rights and Migration to the EU, organised by the European Union Agency for Fundamental Rights with the Italian Presidency of the Council of the EU, available at < [http://fra.europa.eu/sites/default/files/frc-2014-conclusions\\_en\\_0.pdf](http://fra.europa.eu/sites/default/files/frc-2014-conclusions_en_0.pdf) >.

# Parental Behaviour, Child Protection and the Removal of Children From Their Families: Evaluating the Threshold for State Intervention in 21st Century Britain<sup>1</sup>

Peter de Cruz\*

How should the State best protect children from suffering significant harm perpetrated within their own families? Is the State justified in removing babies from their mothers at birth, in accordance with a set of statutory rules? Should the State have this far-reaching power where judges are empowered to remove babies at birth according to statutory criteria which are not fully defined and open to different interpretations? Are such court-ordered removals in the best interests of the welfare of the child? Do they in turn do irreparable harm to the mother? These are deep and searching questions which demand deep and searching investigation, carefully targeted research, and critical and well-informed analysis.

However, this article focuses on just one aspect of this practice, namely the relatively recent spate of cases where the number of such compulsory removals by lower courts appears to have reached a new high which raises questions about their justification and moral acceptability. The case of *Nottingham City Council v LW and others*<sup>2</sup> is examined as it purports to give judicial guidance on how long a Local Authority is permitted to wait before issuing care proceedings for the removal of a new born baby, where the evidence indicates that the statutory threshold for such removal appears to have been crossed. Having surveyed seminal case-law, suggestions for reform are made as to what can be done to address the manifold problems which beset this area of law and social work practice.

## Striking a balance

A crucial difficulty with this area of social work and the law is the perceived need by the State to strike a balance between respecting the rights of parents and protecting children from significant harm. This constant goal has evolved because of the history of the investigation of child abuse in this country. Reported and well-documented cases dating back to the early 1970s have seen an abundance of instances where the State (through their child protection agencies) has repeatedly failed to intervene in time to save a child from serious physical abuse and eventual death, going back to Maria Colwell in 1973, stretching across the decades to Victoria Climbié in 2000 and Baby P (Peter Connelly) in 2009. There have been at least 40 child abuse

Inquiries where the basic facts have been the same –local authorities and other welfare services failing to notice a child showing signs of being physically abused until the child eventually died from that persistent abuse. The solitary high-profile exception was the series of incidents involving alleged sexual abuse of a child in 1986-7 in Cleveland, where it is surmised that between 121 and 165 children were removed from their homes in a council estate, over a period of several months and taken to Middlesbrough General Hospital where their parents were denied access to them until their cases were heard in court.

## The Threshold for Intervention

This is contained in s.31(2) of the Children Act 1989, which stipulates that a care or supervision order may be made by a Court if it is satisfied that the child concerned is suffering or is likely to suffer significant harm *and* the harm or likelihood of harm is attributable to the care given to the child not being what is reasonable to expect a parent to give that child or the child is beyond parental control.

## The Elements of the Threshold requirements

The two key elements of the threshold requirements are the existence of significant harm (present or future) and, by virtue of s.31(10) of the Children Act 1989, the treatment of a ‘similar child’.<sup>3</sup> We shall examine each of these elements in turn.

## What is ‘significant harm’?

What does ‘significant harm’ mean in English Child Law in the context of child protection? This is a matter for the interpretation of the Courts since the Children Act 1989 offers no statutory definition of the concept of ‘significant harm’ as such. However, there is a statutory definition of ‘harm’ under the Children Act 1989, which, under s.31(9) thereof, is described as ‘ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another.’

The traditional starting point has been the definition of ‘significant’ by Booth, J, who, citing the Oxford English Dictionary, described it as ‘considerable, noteworthy, important’.<sup>4</sup> The advice of Hedley, J is also worth noting,

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<sup>1</sup> This article is an expanded and updated version of the paper delivered at the Conference ‘Culture, Dispute Resolution and the Modernised Family’ at the conference of the International Centre for Family Law, Policy and Practice held at Kings College, London in July 2016.

<sup>2</sup> [2016] EWHC 11 (Fam).

<sup>3</sup> Section 31(10) Children Act 1989 declares: Where the question of whether harm suffered by a child is significant turns on the child’s health or development, his health and development shall be compared with that which could reasonably be expected of a similar child’.

<sup>4</sup> See Booth, J in *Humberside CC v B* [1994] 1 FLR 297

when he observes that in this context, ‘to be significant, the harm must be something unusual; at least something more than commonplace human failure or inadequacy.’<sup>5</sup> However, he goes on to say that it would be ‘unwise to a degree to attempt an all-embracing definition of significant harm’ and that the term is ‘fact specific’ and must retain the breadth of meaning that human fallibility may require of it.<sup>6</sup>

Lord Wilson echoes this view in the Supreme Court case of *Re B* by saying that ‘In my view this court should avoid attempting to explain the word ‘significant’; it would be a gloss; attention might then turn to the meaning of the gloss and albeit with the best of intentions, the court might find in due course that they had travelled far from the word itself.’<sup>7</sup>

#### *Interpreting ‘similar child’*

Whilst there is no statutory definition of ‘similar child’, the Department of Health Guidance to the Children Act 1989, Vol. 1, has suggested that the ‘meaning of similar child will require judicial interpretation but may need to take account of environmental, cultural and social characteristics of the child...the standard should only be that which it is reasonable to expect for the particular child rather than the best that could possibly be achieved.’

### **The two-stage test in Care proceedings**

In order for a care (or supervision) order to be made, a Court has to consider the application for a care order in two stages: First, *the threshold stage* where there has to be sufficient reason to suggest that the threshold as stipulated under s.31(2) has been crossed, i.e. that there are sufficient facts to suggest that significant harm has been caused to the child or the circumstances suggest that significant harm will be suffered by the child in the future; or circumstances show the child is beyond parental control.

At the second stage, known as *the welfare stage*, even if the threshold has been crossed, the Court must consider whether it would be in the child’s best interests to make an order. If it is not, then no order should be made.

### **The relevance of Human Rights**

Both Art. 8 and Art 6 of the European Convention of Human Rights are relevant to this area of the law in that Article 8 deals with ‘interference’ with the right to respect for family life and Article 6 deals with the right to a fair trial/hearing. Case-law suggests that a decision about the threshold does not engage Art 8 since a consequence that the threshold is crossed merely opens the gateway to the making of order.<sup>8</sup> Once the court decides to make statutory

orders, Article 8 is engaged and comes into play. If the parents are not given adequate time to know the nature of the allegations against them and therefore cannot prepare their defence adequately, then Article 6 might be engaged.<sup>9</sup>

### **Meeting the threshold: Guidelines in *Re B***

In the leading 2013 case of *Re B*<sup>10</sup> the Supreme Court confirmed that a decision as to whether the threshold conditions have been satisfied depends on an evaluation of the facts of the case as found by the judge. It is not an exercise of discretion.

The oft-quoted words of Lady Hale in *Re B*<sup>11</sup> cast some light on meeting the threshold:

‘I agree entirely that it is the statute and the statute alone that the courts have to apply, and that judicial explanation or expansion is at best an imperfect guide. I agree also that parents, children and families are so infinitely various that that the law must be flexible enough to cater for frailties as yet unimagined even by the most experienced family judge. Nevertheless, where the threshold is in dispute, courts might find it helpful to bear the following in mind:

The court’s task is not to improve on nature or even to secure that every child has a happy and fulfilled life, but to be satisfied that the statutory threshold has been crossed.

When deciding whether the threshold is crossed the court should identify, as precisely as possible, the nature of the harm which the child is suffering or is likely to suffer. This is particularly important where the child has not yet suffered any, or any significant harm and where the harm which is feared is the impairment of intellectual, emotional, social or behavioural development.

Significant harm is harm which is “considerable, noteworthy or important”. The court should identify why and in what respects the harm is significant. Again, this may be particularly important where the harm in question is the impairment of intellectual, emotional, social or behavioural development which has not yet happened.

The harm has to be attributable to a lack, or likely lack, of reasonable parental care, not simply to the characters and personalities of both the child and her parents. So, once again, the court should identify the respects in which parental care is falling (or likely to fall) short of what it would be reasonable to expect.

Finally, where harm has not yet been suffered,

<sup>5</sup> See Hedley, J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 para. 51

<sup>6</sup> *ibid.*

<sup>7</sup> See *Re B (A Child)* [2013] UKSC 33 para. 26.

<sup>8</sup> See *Re B (A Child)* [2013] UKSC at paras. 29, 62, 129 and 186.

<sup>9</sup> As could be argued in *Re LW* [2016] EWHC 11.

<sup>10</sup> *Re B (A Child)* [2013] UKSC 33.

<sup>11</sup> See *Re B*, *ibid* at para 193.

<sup>12</sup> See *Re MA (Care Threshold)* [2009] EWCA 253; [2010] 1 FLR 431.

the court must consider the degree of likelihood that it will be suffered in the future. This will entail considering the degree of likelihood that the parents' future behaviour will amount to a lack of reasonable parental care. It will also entail considering the relationship between the significance of the harm feared and the likelihood that it will occur. Simply to state that there is a "risk" is not enough. The court has to be satisfied, by relevant and sufficient evidence, that the harm is likely: see *in re J* [2013] 2 WLR 649.

### Proving Significant Harm: Some problem Cases

In recent case law, while lower courts have been willing to have children taken into care upon proof of sufficient evidence of significant harm having been or about to be committed, the Court of Appeal in *Re MA* has shown a reluctance to make care orders for a child where it has been argued that the possible past abuse of the sibling of the child in question can found the basis of placing that child into care.<sup>12</sup> Similarly, the gist of the Supreme Court's approach in *Re J* is that the threshold criteria can only be established on the basis of facts proved to be true on the balance of probabilities not on the basis of suspicions.<sup>13</sup>

These cases have been criticised by academics, calling the decision of *Re MA*, in particular a 'staggering' decision, in the words of the dissenting judge, Wilson LJ (as he then was).<sup>14</sup>

### The Impact of high-profile child abuse scandals on social work practice

It would appear that the impact of high-profile child abuse scandals has been a series of child abuse Inquiries, some producing not simply reports, identifying a catalogue of failures by the local authorities and child protection services, but also containing long lists of recommendations<sup>15</sup>. Some of these, for example from the Victoria Climbié Report, have actually resulted in new legislation, namely the Children Act 2004, which, *inter alia*, has strengthened the statutory basis on which the various child protection agencies are required to co-operate with each other. In the past few years, the increased frequency of reported cases where local authorities have failed to protect vulnerable children has resulted in a surge of care applications. This could well explain the willingness of the local authorities to apply to place so many babies in care, as a reaction to the many reported cases where such measures

were not taken. It should perhaps be borne in mind that in the Baby P case, legal advice was given that there were insufficient grounds to issue care proceedings which with hindsight has proved to be at best misplaced and at worst, incorrect advice. This could have been as a result of confusion between the grounds for care proceedings and the grounds for interim care orders.<sup>16</sup> However, regardless of the reason for the advice given, both local authorities and the lower courts now seem to be more willing to be more proactive and not run the risk of having failed to act in time to protect the child.

### Statistics on Children taken into care at birth: 2008-2014

Family court records were studied by researchers at Lancaster University, Brunel University, London University and the Tavistock and Portman NHS Trust. They found that in 2008, a total of 802 babies were taken into local authority care, rising in 2013 to 2,018 babies at birth or soon afterwards. Between 2007 and 2014, a total of 13,248 babies were removed by Local Authorities. The number of new born babies taken away with the approval of the family courts has soared by 150% in five years, with a third removed from women in their teens. One mother had 16 babies removed from her one after another, and is still of child-bearing age. The number of new born babies taken away by family courts has increased 2.5 times in five years. It has also been reported<sup>17</sup> that only 1 in 10 of those babies was ever returned to its mother.

It has been argued by Broadhurst and Mason that their research indicates that the State reinforces parents' exclusion, where the full range of challenges these parents face is poorly understood. They emphasise that the continued high volume of children entering state care is also taking place in international jurisdictions such as the USA and Australia, and that recent empirical evidence from England suggests that a sizeable proportion of birth parents who appear as respondents in the family court are repeat clients.<sup>18</sup> The impact of such removal in terms of emotional loss and social stigma where it is not a clear-cut case of needing to protect highly vulnerable children is perhaps yet to be fully understood and remains controversial.

### Cases on Removal of babies at birth: *Re LW*

In the 2016 case of *Nottingham City Council v LW & Ors*<sup>19</sup> the judge posed the question: how long can a Local Authority wait before issuing care proceedings for

<sup>13</sup> See *Re J* (2013) UKSC 9.

<sup>14</sup> See eg Hayes, J, Hayes, M & Williams, J 'Shocking abuse followed by a 'staggering' ruling: *Re MA (Care Threshold)* [2010] Family Law 166.

<sup>15</sup> See *The Victoria Climbié Inquiry. Report of an Inquiry by Lord Laming* (2003) HMSO contained 108 recommendations while the subsequent Report by Lord Laming nearly 6 years later, largely precipitated by the death of Baby P (Peter Connelly), contained 58 recommendations: see *The Protection of Children in England: A Report* (2009).

<sup>16</sup> A suggestion made by Jacqui Gilliat in 'The Interim Removal of Children from their parents Updated: Emergency Protection Orders, Interim Care Orders and the Baby P Effect' (2009) *Family Law Week* at www.familylawweek.co.uk .

<sup>17</sup> See *The Guardian, the Mail* online, 14 December 2015.

<sup>18</sup> See Broadhurst, K and Mason, C 'Birth Parents and the Collateral Consequences of Court-ordered Child Removal: Towards a Comprehensive Framework' (2017) *31 International Journal of Law, Policy and the Family* 41.

<sup>19</sup> [2016] EWHC 11 (Fam).

removing a new born baby?

The case was focused on a baby girl who was the subject of care proceedings issued by Nottingham City Council, which argued that the baby was at risk of suffering significant harm if she remained in the care of either of her parents on her discharge from hospital. This was because there was concern over the parents' reported drug taking and domestic violence in their relationship which consequently posed a threat of harm the child would be at risk of suffering. Children services had been involved with the family for two years and care proceedings had been issued for a half sibling who had subsequently been placed with his grandparents with his mother's consent.

The first hearing of the present case came before Keehan J, when the child was 12 days old, and the learned judge had to determine whether the baby should be removed from her parents and placed in foster care under an Interim Care Order (ICO). The parents contested the application.

Given the allegations against the parents and in view of the removal of the baby's sibling, Keehan J was satisfied that the interim threshold was met.<sup>20</sup> He made the Interim Care Order with a plan for removal and directed supervised contact to take place each weekday. He was compelled to take this course in the 'best welfare interests of the baby'. The baby was born on 16 January and the hospital notified the social workers of her birth on 18 January. However, it took the social workers until 21 January to place the necessary papers before the local authority's solicitors for consideration of the issue of care proceedings. It then took a local authority solicitor until 28 January to issue care proceedings and to apply for an 'urgent' interim care order.

These facts led the learned judge to make several comments, highlighting the Local Authority's failings and poor practice, lamenting the fact that 'fundamental and egregious errors' were made in what he considered was 'a run of the mill case', and that such errors were not isolated examples.

The judge in this case was extremely critical of the length of time taken by the local authority to issue proceedings and described these 'egregious errors' in some detail. First, there was the question of the late issue of proceedings. The hospital had notified the social workers of the birth but they then took three days to notify their legal department and it took them another seven days before they issued proceedings. However, it was explained that the reason for the delay was largely due to the local authority awaiting medical information pertaining to allegations that the baby was suffering withdrawal symptoms from methadone taken by the mother during pregnancy and therefore needed monitoring, and that the father had taken a drugs overdose which necessitated him being admitted to hospital. The delay was compounded by

the fact that once the medical report had been provided, it was not picked up by the social worker who was on sick leave but although the report had been sent to the local authority lawyer, it was again not picked up as she was absent from the office.

Second, another criticism levelled by the learned judge was that the local authority did not provide the parent's solicitors with their application and supporting evidence until two and a half hours before the hearing, resulting in the parents having insufficient time to consider their position and prepare their case. Another consequence of the late issue of the application meant that the child's guardian could undertake only 'rudimentary enquiries' having only being appointed shortly before the hearing. Indeed, the parents sought to challenge the case but were hampered in doing so by the late service of evidence.

In the light of these errors, the Court took the unusual step of ordering Nottingham County Council to pay the costs of the publicly funded parties.

Keehan J chose to emphasise the following points:

The period of time for which a hospital is prepared to keep a new born baby may be a material consideration for a local authority in relation to the timing of an Interim Care Order (ICO) application –but one must not place too great a reliance on these indications, particularly as:

a hospital may not detain a baby in hospital against the wishes of parents with Parental Responsibility;

the capability of a maternity unit or hospital to accommodate a new born baby may change within hours;

police protection orders and emergency protection orders are emergency remedies but they do not afford the parents nor the child the same degree of participation, representation and protection as an on-notice ICO application;

the indication of a maternity unit as to date of discharge should not normally set or lead the time for an ICO application.

Where there is a pre-birth plan in place that provides for removal of a new born baby, it is 'essential and best practice'<sup>21</sup> for the ICO application to be made on the day of the child's birth.

The availability of additional evidence from the maternity unit or elsewhere must not cause delay in the issue of care proceedings –rather the 'provision of additional evidence may be envisaged in the application and/or provided subsequently.'<sup>22</sup>

He set out five basic points of good practice:

The birth plan should be rigorously adhered to

<sup>20</sup> i.e. that 'At an interim stage, the removal of children from their parents is not to be sanctioned unless the child's safety requires interim protection.' This comes from the Court of Appeal in *Re L-A* [2009] EWCA Civ 822.

<sup>21</sup> See *Nottingham CC v LW and ors* [2016] EWHC 2011 at para.31.

<sup>22</sup> *ibid* at para 32.

by social workers, managers and local authority legal departments; in the actual case, there was a pre-birth plan but ‘this was not worth the paper it was written on’ because it was ‘ignored by everyone connected with the local authority’.<sup>23</sup>

A risk assessment of the mother and the father should be commenced immediately upon the social workers being made aware of the mother’s pregnancy, and the assessment completed at least 4 weeks before the mother’s expected date of delivery. The assessment should then be updated to take account of relevant events immediately pre- and post-delivery, which could potentially affect the initial conclusions on risk and care planning for the unborn child;

The assessment should be disclosed forthwith upon initial completion, to the parents and, if instructed, to their solicitors to give them an opportunity, if necessary, to challenge the assessment of risk and the proposed care plan;

The social work team should provide all relevant documentation necessary, for the legal department to issue care proceedings and the application for an interim care order, no less than seven days before the expected date of delivery. The legal department must issue the application on the day of birth and, in any event, no later than 24 hours after birth (or, as the case may be, the date on which the local authority is notified of the birth);

Immediately upon issue, if not before, the local authority’s solicitors should have served the applications and supporting documents on the parents and, if instructed, upon their respective solicitors;

Immediately upon issue, the local authority should seek an initial hearing date, at the best time estimate that can at that time be provided.

Hence, he emphasised that ‘the message must go out loud and clear that, save in the most exceptional and unusual of circumstances, local authorities must make applications for public law proceedings in respect of new born babies timeously and, especially where the circumstances arguably require the removal of the child from its parent(s), within at most five days of the child’s birth’<sup>24</sup> with failures “to act fairly and/or timeously...condemned in an order for costs”.<sup>25</sup>

*Other historic case law on new born babies taken into care at birth or*

<sup>23</sup> *Ibid* at para.10.

<sup>24</sup> *Nottingham CC* (above) [2016] EWHC at para. 41.

<sup>25</sup> *Ibid* at para. 42.

<sup>26</sup> See *Re D (A Minor)* [1987] 1 AER 20 ; 1 FLR 422 (also known as The Berkshire Case).

<sup>27</sup> i.e. under the Children and Young Persons Act 1969 (now repealed).

<sup>28</sup> See *The Telegraph*, 16 February 2017.

<sup>29</sup> See *AZ, BZ, CZ v Kirklees Council* [2017] EWFC 11; [2017]1 WLR 2467 .

*soon after*

Case law on the *Re LW* scenario can be traced back to at least 1987 and the infamous ‘drug baby’ case of *Re D*<sup>26</sup>, where a baby whose mother who had been addicted to drugs for ten years and was a registered drug addict gave birth prematurely to a baby boy suffering from convulsions and drug withdrawal symptoms. The baby’s father was also a drug addict. The Local Authority obtained a care order (under pre-Children Act 1989 legislation) to remove the child soon after its birth and the baby was placed in intensive care. After six weeks the child was placed with foster parents by the Local Authority . The Local Authority then applied for a care order under the legislation of the time.<sup>27</sup>

The parents challenged the care order which was eventually affirmed by the House of Lords. Since this was in the pre-Children Act era, the Law Lords interpreted the legislation of the time (under the Children and Young Persons Act 1969) which required that meaning that the children could be removed if the child’s proper development ‘is being’ avoidably prevented, to refer to as part of a continuum or continuing state of circumstances and therefore the Courts could look at events surrounding the welfare of the child not just in the present but also in the past and in the future. Under the Children Act 1989, of course, the words of s.31 (2) thereof would cover the *Re D* scenario as it is worded widely enough to protect past, present and the likelihood of future harm.

#### **Removal for different reasons: *The Kirklees Case of CZ***

In a totally different scenario, it was reported on 16 February 2017<sup>28</sup> that social workers had removed a week-old baby into care because the father had expressed ‘unorthodox’ views about the need to sterilise feeding bottles. A family court judge awarded the couple and their son , who is now 15 months old, a total of £11,250, after ruling that Kirklees Council had breached the couple’s human rights and misled a judge in a bid to remove the child from their care.

The case of *CZ* <sup>29</sup> involved a couple in their mid-twenties, who cannot be identified. They both suffer from mild learning difficulties and have received assistance from adult social care workers for about a decade. Mr Justice Cobb said that the couple had *not* been referred to social services ahead of the baby’s birth, in November 2015, despite the fact that the mother suffers from minor mental health problems and the father ‘had displayed aggressive behaviour’. The child (*CZ*) was born by emergency caesarean section and was briefly placed in a Special Care

Unit after his birth because he was losing weight and was slow to feed. According to the hospital's health visitor, the baby's loss of weight was due to the circumstances of his birth and was not the parents' fault. Nevertheless, four days after the child was born, hospital staff called the council to raise concerns about 'the long-term parenting capacity of this mother and father.'

Cobb, J said: 'It was suggested that the mother had no family support, and that the father was expressing unorthodox views about the need for sterilisation of bottles, and was heard praising the benefits of formula milk.' Social workers then sought an emergency hearing to place the child under the care of its paternal grandmother but did not inform the parents that the hearing was taking place, and wrongly told the judge that the couple had been informed. They also 'forgot to notify' CAFCASS. The council removed the baby into care when the child was seven days old.

The learned judge declared: 'The failure of the local authority to notify the Claimants that the hearing was taking place on the afternoon of 13 November was particularly egregious; misleading the district judge no fewer than three times that the parents knew of the hearing aggravates the culpability yet further.'

He continued, 'There is no doubt in my mind, indeed it is admitted, that Kirklees Council breached the human rights of a baby boy and his parents. I am satisfied that the breaches were serious...the separation of a baby from his parents represents a very serious interference with family life.'

He stated that it was 'questionable that there was a proper case for asserting that CZ's immediate safety demanded separation from his parents at all.'<sup>30</sup>

The family accumulated legal aid bills of nearly £80,000 while Kirklees Council had costs of around £40,000. This was criticised by the learned judge as 'unwarranted expenditure' of the law firms involved in the case. The judge awarded the mother, father and baby £3,750 each but said that as they did not 'conscientiously attempt to settle their claim, they were unlikely to receive those sums because the funds were likely to be recouped by the Legal Aid Agency'.

### Comments on the Threshold Criteria

The criticisms of the threshold criteria are well-known, namely, that interpreting s.31(2) of the Children Act 1989 has become legalistic and requires a degree of subjective assessment by the courts; constant interpretation of its component parts is required and the threshold is arguably set too high to protect as many children as possible. It is strongly recommended that the previously detailed Guidance on the threshold criteria from previous versions of this publication be reinstated to a prominent position in

*Working Together* 2015 rather than in supplementary documents, while the emphasis in *Working Together* 2015 of the concept of 'serious harm'. The debate will no doubt continue on whether the threshold for interim care orders is too high or too low.<sup>31</sup>

### Concluding comments

The Nottingham case (*Re LJW*) appears to be a clear-cut scenario for court approval of removal of a new born baby by virtue of its risk of suffering significant harm from its parents. In the light of the facts of the case, the judge's approach in this instance appears to be totally justified. However, the judicial approach to applications for such removal may not be so straightforward in other cases. It is arguable that in the light of cases like *Re MA* and *Re J*, the courts at the highest level appear to be far more cautious about removal of children from their families purely on the basis of a history of sibling removal or if there does not appear to be cogent evidence of past significant harm. Even a real possibility that a parent had harmed another child in the past would not be sufficient to establish the likelihood that the child who was the subject of the present proceedings would necessarily be harmed in the future. Mere suspicion cannot be relied upon to establish the threshold criteria, only proof that the significant harm *had* actually taken place. Nevertheless, the lower courts do not seem to have any qualms about removing babies from their mothers at birth where the evidence looks reasonably convincing at the interim care order stage, as *Re LJW* demonstrates.

We therefore appear to have reached a polarised state in law and social work where, when it comes to the removal of babies at birth, the lower courts seem to be far more willing to do so, sometimes for somewhat dubious reasons, as in *CZ*, whereas in the light of their cautionary approach in relation to applications to place children in care on the basis of possible past abuse of siblings in the same family, the higher appellate courts do not appear to be easily convinced that the threshold has been crossed. The question therefore remains as to whether section 31(2) should be amended to 'lack of reasonable care' or a similar broader standard of care. However, this would immediately open the door to criticisms of further debates over what the new phrase means in any given case. It could be argued that the most concerning aspect of the spate of court ordered removals, child removals at birth is the age of the mothers concerned (predominantly teenagers) and the implication that this has now become a cultural phenomenon rather than a purely episodic occurrence. This does not augur well for any future amendments to the law and perhaps these cases reflect a deeper set of social problems encountered by these young mothers in particular which no amount of legislation can resolve on its own.

<sup>30</sup> See *AZ, BZ, CZ* [2017] EWFC 11 (above) at para.41.

<sup>31</sup> See Howe, D, 'Removal of Children at Interim Hearings: Is the test now set too high?' [2009] Fam Law 321, contrasted with Bainham, A 'Interim Care Orders: Is the Bar set too Low?' [2011] Fam Law 374.

# Changing landscapes: The relationship between Student Law Clinics, Litigants in Person and family law dispute resolution in England and Wales

Hannah Camplin\*

In November 2014 the Ministry of Justice published detailed research on the experiences of litigants in person (LIPs) in the family courts in England and Wales.<sup>1</sup> The study had been commissioned in anticipation of, and conducted prior to, the cuts to legal aid availability for most private family law cases brought about by the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012.<sup>2</sup> The research led to some key findings and recommendations for improving the experiences of LIPs in the family courts and, with the majority of private family law cases in England and Wales now involving one or both litigants self-representing<sup>3</sup>, and concerns that attendance at mediation is seemingly in decline<sup>4</sup>, it seems the findings from the report are more relevant than ever.

At the same time as the *Litigants in person in private family law cases*<sup>5</sup> was published, the University of Westminster Student Law Clinic, aware like many other University law clinics that there was a growing need<sup>6</sup>, started to provide free family law legal advice and assistance services.<sup>7</sup> Clinic staff and students have witnessed first hand the impact not being able to instruct a solicitor can have on those using our services, and it is in this context, and for this reason, a continued focus on LIPs and what is being done to try and assist them is necessary.

This article seeks to provide an evaluation of the efforts

in recent years to respond to growing numbers of LIPs in the English and Welsh family courts. Firstly the recommendations put forward by *Litigants in person in private family law cases*<sup>8</sup> and other key reports published in 2013-2015 will be considered. Secondly there will be a brief review of some of what has, and has not, been achieved since 2015 in response to the key recommendations. Thirdly the recommendations and subsequent policy developments will be considered in the light of the experiences of three LIPs who received family law advice and assistance from the University of Westminster Student Law Clinic since 2015. The experiences of three LIPs can provide no more than anecdotal evidence, but nevertheless this article concludes by making some observations about what more could be done to support LIPs in the family courts, especially those who are vulnerable, and where and how free family law advice and assistance fits in with this.

## Definition of a litigant in person

This article uses the term 'Litigant in Person' (LIP) to reflect the terminology used by many of the reports in England and Wales when discussing 'individuals without legal representation'.<sup>9</sup> A more internationally recognised term for LIPs would be self-represented litigants.<sup>10</sup> There is perhaps a debate to be had about the most appropriate

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<sup>1</sup> Trinder L, Hunter R, Hitchings E, Miles J, Moorhead R, Smith L, Sefton M, Hinchly V, Bader K and Pearce J, *Litigants in person in private family law cases* (2014) Ministry of Justice Analytical Series. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf) accessed on 26 June 2017.

<sup>2</sup> Legal aid is government (and therefore taxpayers') money paid to solicitors to represent those who could not otherwise afford legal advice and representation. Civil legal aid availability for private family law cases was removed by LASPO 2012, subject to exceptions for domestic violence and child abuse. For a good overview of the history of legal aid see Webley L 'When is a Family Lawyer a Lawyer?' in Maclean M, Eekelaar J and Bastard B (eds) *Delivering Family Justice in the 21<sup>st</sup> Century*, Hart Publishing, 2015, p 305.

<sup>3</sup> *Family Court Statistics Quarterly, England and Wales, January to March 2017*, Ministry of Justice, 29 June 2017. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/622932/family-court-statistics-quarterly-jan-march-2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/622932/family-court-statistics-quarterly-jan-march-2017.pdf) accessed on 10 July 2017.

<sup>4</sup> Blacklaws C 'The Impact of the LASPO Changes to Date in Private Family Law and Mediation' (2014), 44(5) *Fam Law*, pp 626-628.  
<sup>5</sup> See n1.

<sup>6</sup> See McKeown P and Morse S 'Litigants in person: is there a role for higher education?' (2015) 49(1) *The Law Teacher*, pp 122-129.

<sup>7</sup> For more information on the University of Westminster Student Law Clinic see <https://www.westminster.ac.uk/about-us/faculties/law/about-westminster-law-school/facilities/student-law-clinic>

<sup>8</sup> See n1.

<sup>9</sup> Williams K, *Litigants in Person: a literature review* (2011) Ministry of Justice, p1. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217374/litigants-in-person-literature-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217374/litigants-in-person-literature-review.pdf) accessed on 26 June 2017.

<sup>10</sup> For example see, from the U.S., Shepard R 'The Self-Represented Litigant: Implications for the Bench and Bar', (2010) 48(4) *Family Court Review*, pp 607-618.

terminology<sup>11</sup> particularly, as Trinder et al discuss, ‘LIP’ encompasses those who have received no legal advice and those who may have received some legal advice, assistance and even representation during the legal process but who appear as self-representing at a particular court hearing.<sup>12</sup> For now, though, ‘LIP’ appears to be the term widely in use in England and Wales.

### **Recommendations to improve LIPs access to the family justice system in England and Wales**

Trinder et al<sup>13</sup> considered areas of the family legal process where LIPs struggled without help from a solicitor or barrister. They concluded that, pre-hearing, LIPs tended not to be able to identify what the legal merits of their case might be,<sup>14</sup> found it difficult to identify and complete the correct forms<sup>15</sup> and misunderstood disclosure and other evidential requirements.<sup>16</sup> Immediately prior to hearings, LIPs were likely not to know about the court emphasis on negotiation and agreement, and therefore were less likely to engage in settlement discussions.<sup>17</sup> It was found that, during the hearing, ‘preparation of bundles and cross-examination were beyond the capacity of most LIPs without considerable help’.<sup>18</sup> It was also concluded that hearings with LIPs worked better where the issues were relatively straightforward, the hearing was for directions rather than a substantive hearing, the LIP was ‘calm and competent’<sup>19</sup> and there was a supportive professional present, either a helpful Cafcass Officer<sup>20</sup> or representative

for the other party, or a judge taking a more interventionist role. These findings have been echoed by other reports both pre- and post-2014.<sup>21</sup>

The experiences of LIPs going to family courts, and the associated experiences of courts in managing a process where one party has significant issues with court procedures, led to recommendations for change. Trinder et al, drawing on other reports such as that of the Judicial Working Group on Litigants in Person,<sup>22</sup> organise their detailed recommendations under three key headings. ‘Information needs’ includes redesigning court forms and guidance to make them simpler to read and complete,<sup>23</sup> clear guidance in leaflets and letters provided to LIPs before and after key hearings,<sup>24</sup> online information<sup>25</sup> and face to face explanation and support, potentially provided by court staff.<sup>26</sup>

Under ‘Emotional support’ Trinder et al suggest expansion of the Personal Support Unit (PSU) where volunteers provide emotional and practical support (but not legal advice) to LIPs.<sup>27</sup> The recommendations also include a presumption to admit McKenzie Friends<sup>28</sup> into the family courts if they are providing emotional and practical support to a LIP, and consideration of a regulatory framework for those who offer quasi-legal services.<sup>29</sup> Finally, in a detailed group of recommendations under the heading ‘Practical support and legal advice’ Trinder et al evaluate different options such as self-help schemes, taking inspiration from the Californian model of court help centres and extensive

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<sup>11</sup> The distinguishing of ‘vexatious litigants’ for example, see Genn H ‘Do-it-yourself law: access to justice and the challenge of self-representation’ (2013) 32(4) *Civil Justice Quarterly* pp 411-444.

<sup>12</sup> See n1, at p 12.

<sup>13</sup> See n1.

<sup>14</sup> *ibid*, p 36.

<sup>15</sup> *ibid*, p 39.

<sup>16</sup> *ibid*, p 42.

<sup>17</sup> *ibid*, p 48.

<sup>18</sup> *ibid*, p 52.

<sup>19</sup> *ibid*, p 52.

<sup>20</sup> Cafcass supports children law proceedings, providing risk assessments and reports for the courts.

<sup>21</sup> For a more general civil, rather than family law, focus see *Access to justice for Litigants in Person report* Civil Justice Council (2011), available at <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf> accessed 28 June 2017. For a focus on welfare benefits see *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare in England and Wales* The Low Commission (2014), available at <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf> accessed 28 June 2017.

<sup>22</sup> *Judicial Working Group on Litigants in Person: Report* Judiciary of England and Wales (2013) p 12. Available at [https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lip\\_2013.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf) accessed 26 June 2017.

<sup>23</sup> See n1, p 106.

<sup>24</sup> *ibid*, p 106.

<sup>25</sup> *ibid*, p 107.

<sup>26</sup> *ibid*, p 109.

<sup>27</sup> *ibid*, p 112.

<sup>28</sup> A term used for a lay person accompanying an LIP into court. The term originates from the case of *McKenzie v McKenzie* [1970] 3 WLR 472. McKenzie Friends usually provide emotional and practical support but the term also covers a lay person who offers legal or quasi-legal services for payment. McKenzie Friends may be permitted by the judge to address the court on behalf of the LIP.

<sup>29</sup> See n1, p 112.

LIP support,<sup>30</sup> free advice services and unbundling practices.<sup>31</sup> The recommendations also suggest that ‘the traditional arbiter role of the judge is not sustainable’ and that consequently the judiciary develop a more inquisitorial style.<sup>32</sup> The recommendations end with a suggestion that vulnerable LIPs or those with very complex financial cases be extended legal aid through the exceptional funding provision under s.10 LASPO 2012.<sup>33</sup>

Subsequent reports have refined these recommendations, but ultimately come to a similar set of conclusions. The Justice Select Committee considered the LIP experience when reporting on the impact of LASPO 2012.<sup>34</sup> Whilst the conclusions were more cautious regarding unbundling practices and the judiciary adopting an inquisitorial approach, the Committee recommended that additional funding be available for demands made on court staff, that information and free advice services be further developed, that McKenzie Friend regulation be addressed and remaining legal aid availability should be used flexibly where necessary. Additionally, the report highlighted that measures were needed to protect witnesses from cross-examination by their abusers, now more likely to be representing themselves.

Reports from free legal advice providers in 2015 suggest, in line with Trinder et al<sup>35</sup>, that to increase LIPs’ access to justice there be easily accessible legal information, simplified paperwork and processes including evidence submission<sup>36</sup>, and expansion of legal aid provision to the most vulnerable.<sup>37</sup>

Academic and practitioner suggestions for LIPs accessing justice also support and refine the Trinder et al recommendations. Bevan suggests redesigned court forms and training for lawyers.<sup>38</sup> Genn, whose work significantly

influenced the Judicial Working Group report on the subject, suggests very similar changes to Trinder et al including access to early advice on the merits of the case, procedural modifications, access to information, courts admitting McKenzie Friends and an investigation into inquisitorial procedures. She also, crucially, recommends training for the judiciary on how to approach LIPs.<sup>39</sup>

Owing to the breadth and depth of the recommendations, many different potential areas of reform could be investigated and evaluated. However, for the purposes of the following section, the recommendations can be broadly summarised into five general areas:

- More information to be available
- Simplified court forms and court procedures
- Developments for the judiciary including specific judicial training and flexibility in adopting a more inquisitorial approach
- Greater availability of free/low cost legal advice and provision of emotional and practical support, including routine admission into court for volunteer McKenzie Friends
- Expand what legal aid and representation provision there is for the most vulnerable

The next section of this article aims to provide some evaluation of the steps taken to respond to these key recommendations.

### Recent Developments for LIPs

Since 2012, when Trinder et al were conducting their research<sup>40</sup>, the family justice system in England and Wales has undergone huge changes. The system of family courts, and the geographical location of many, has been changed following a modernisation process,<sup>41</sup> which is still

<sup>30</sup> See Zorza R ‘An Overview of Self-Represented Litigation Innovation, Its Impact and Approach for the Future: An Invitation to Dialogue’ (2009) 43(3) *Fam.L.Q.*, pp 519-543.

<sup>31</sup> A significant area of research and development in itself, see Maclean M ‘The Changing Professional Landscape’ (2014) 44(2) *Fam. Law*, pp 177-182.

<sup>32</sup> See n1, p 119.

<sup>33</sup> Limited in scope to exceptional cases, this provision allows legal aid for a solicitor to be granted even if the other requirements are not met.

<sup>34</sup> *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Eighth Report of Session 2014-15* House of Commons (2015). Available at <https://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf> accessed June 2016.

<sup>35</sup> See n 1.

<sup>36</sup> *Standing Alone, Going to the family court without a lawyer*, Citizens Advice Bureau (2015). Available at <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Crime%20and%20Justice%20consultation%20responses/StandingAloneGoingtothefamilycourtwithoutalawyerfinalversion.pdf> accessed June 2016.

<sup>37</sup> Lin X, *Sleepless nights: accessing justice without legal aid*, Middlesex University and Toynbee Hall (2015). Available at [http://www.toynbeehall.org.uk/data/files/Reports/Sleepless\\_Nights\\_digital\\_version.pdf](http://www.toynbeehall.org.uk/data/files/Reports/Sleepless_Nights_digital_version.pdf) accessed 26 June 2017.

<sup>38</sup> Bevan C ‘Self-represented litigants: the overlooked and unintended consequences of legal aid reform’ (2013) 35(1) *Journal of Social Welfare and Family Law* pp 43-54.

<sup>39</sup> Genn H ‘Do-it-yourself law: access to justice and the challenge of self-representation’ (2013) 32(4) *Civil Justice Quarterly*, pp 411-444. Genn’s suggestions cover a wider remit of civil law in general, but this includes family law.

<sup>40</sup> See n 1.

<sup>41</sup> See, for example, *The Family Justice Modernisation Programme: Sixth update from Mr Justice Ryder* Judiciary of England and Wales (2012). Available at [https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/family\\_newsletter6.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/family_newsletter6.pdf) accessed 9 July 2017.

continuing.<sup>42</sup> Changes to terminology and compulsory Mediation Information and Assessment Meetings have been introduced as a result of the Children and Families Act 2014.<sup>43</sup> There has been an increase in providers offering discrete, ‘unbundled’, low cost family law services, and these often make use of new technologies.<sup>44</sup> Although these changes may have been motivated by LASPO 2012, they are also the result of a variety of factors, such as the Legal Services Act 2007, which changed the regulatory system for legal services.<sup>45</sup> Due to this and the rapidity of change, there is not scope to consider the types of discrete family law services offered or the developments in mediation. Therefore this section will focus on developments specifically implemented to support LIPs before and during the court process in the family courts.

### Information for LIPs

Clear efforts have been made in the last two or three years to develop online information and resources for LIPs. The response to Trinder at al’s recommendation for a ‘single, authoritative, ‘official’ website<sup>46</sup> has arguably been met with ‘Advicenow’,<sup>47</sup> which provides advice guides and helpful videos on key topics and is funded, at least in part, by the Ministry of Justice. Although the website does not easily link to relevant court forms (with the exception of the court fee remission form), it does provide clear information and signposting to other legal advice provision. However, to read more detailed guides, the information must be purchased. The price is not extortionate,<sup>48</sup> but this potentially does limit the availability of some of the information. The government website also offers, fairly brief, information on family proceedings and does link to

relevant forms, and a government supported legal information app has been developed.<sup>49</sup> Significant legal information is also provided by other charities, and this has been the case for some time.<sup>50</sup>

Reliable and ‘official’ online information must be publicised as such. As Citizens Advice point out, there is a wealth of information on the internet but LIPs struggle to know what information is reliable and what is not.<sup>51</sup> When using a search engine to find information on divorce, the Advicenow website does not appear on the first page of Google entries, though the government pages do. The entries appear to have changed little since a study of legal services in family justice was conducted in 2013-14, for example the website ‘Quickie Divorce’ offering ‘a low cost document handling service for cases without issues to be resolved’ still appears first on the list.<sup>52</sup> It is suggested that more could therefore be done to support Advicenow as the ‘official’ and reliable website for LIPs, including better publicity and further direct links to court forms.

### Simplified court forms and court procedures

Since recommendations were made for radical simplification of forms and procedures post LASPO 2012,<sup>53</sup> there has been relatively little change to the Family Procedure Rules 2010 and key family court forms for divorce, financial and private children matters. Family court forms were revised following the Children and Families Act 2014, and are regularly updated, but no significant simplification measures have yet been taken in terms of language or phrasing.

However, there has been noticeable change to one form. Tkacukova highlights a scheme by Birmingham Personal

<sup>42</sup> See Sir Oliver Heald MP comments on digital court processes (though not specific to family law courts) at the Fifth National Forum on Access to Justice for those without means, from *Fifth National Forum on Access to Justice for those without means: A summary*, Civil Justice Council (2016). Available at <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-fifth-national-forum-note.pdf> accessed on 5 July 2017.

<sup>43</sup> In response to the Family Justice Review recommendations, *Family Justice Review Final Report* Department of Education and Ministry of Justice (2011). Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217343/family-justice-review-final-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf) accessed 13 July 2017.

<sup>44</sup> Maclean M ‘The Changing Professional Landscape’ (2014) 44(2) *Fam. Law*, pp 177-182.

<sup>45</sup> See Webley L ‘When is a Family Lawyer a Lawyer?’ in Maclean M, Eekelaar J and Bastard B (eds) *Delivering Family Justice in the 21<sup>st</sup> Century*, Hart Publishing, 2015, at p 305.

<sup>46</sup> See n1, p 107.

<sup>47</sup> See <http://www.advicenow.org.uk>, website developed by charity Law for Life with funding from the Ministry of Justice. ‘Sorting out Separation’ is also a useful ‘official’ website <https://www.sortingoutseparation.org.uk/legal-mediation/divorce-legal-separation/>.

<sup>48</sup> At last check, between £10-20.

<sup>49</sup> Called ‘Sorting out Separation’, although when searched for many other apps of a similar nature appear, making a confusing choice.

<sup>50</sup> For example, Citizens Advice, see <https://www.citizensadvice.org.uk> and Rights of Women, see <https://www.rightsofwomen.org.uk>.

<sup>51</sup> *Standing Alone, Going to the family court without a lawyer*, Citizens Advice Bureau (2015). Available at <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Crime%20and%20Justice%20consultation%20responses/StandingAloneGoingtothefamilycourtwithoutalawyerfinalversion.pdf> accessed June 2016.

<sup>52</sup> Maclean M ‘New Ways to Seek Legal Information and Advice on Family Matters in England and Wales: From Professional Legal Services to Google and Private Ordering’ in Maclean M, Eekelaar J and Bastard B (eds) *Delivering Family Justice in the 21<sup>st</sup> Century*, Hart Publishing, 2015, at p 323, p 328.

<sup>53</sup> For example, see Bevan C ‘Self-represented litigants: the overlooked and unintended consequences of legal aid reform’ (2013) 35(1) *Journal of Social Welfare and Family Law*, pp 43-54.

Support Unit that piloted a simplified version of the application for the exemption from fees (fee remission) form.<sup>54</sup> The form used bigger font, shorter sections and plain language. A version of this simplified form has now been adopted nationally.<sup>55</sup> Tkacukova concludes that 'Closer interdisciplinary cooperation with linguists and communication experts would bring more clarity to [court] forms and court procedures and processes'.<sup>56</sup> Although efforts have been made to revise forms, much further work could still be done, especially with divorce and financial application forms.<sup>57</sup>

### Developments for the judiciary

Whether or not, and when and how, family judges should adopt an inquisitorial approach to cases is much contested<sup>58</sup> and the discussion is largely beyond the scope of this article. However, what is clear from the findings detailed in the preceding section, is that LIPs have more successful hearings if a more interactive judicial approach is taken. Following a recommendation by the Judicial Working Group on Litigants in Person, new rule 3.1A was introduced into the Civil Procedure Rules 1998 in 2015. Whilst not implementing a new regime of inquisitorial approach, rule 3.1A 'emphasises the court's duty to adopt such procedure as it considers appropriate..when one or more LIPs is involved in a case'.<sup>59</sup> It also appears that there have been significant developments in judicial training on LIPs.<sup>60</sup> Two key issues however remain, the extent to which these developments allow the judiciary to intervene as necessary, and the issue of consistency of approach amongst judges (and magistrates and legal advisors). The significance of judicial approach is further discussed in relation to Student Law Clinic client experiences in the section below.

### Expansion of current legal aid provision

Following the implementation of LASPO 2012 the Lord Chancellor emphasised that the exceptional funding provision at LASPO 2012 s.10 was to be interpreted strictly and only to be used in the 'highest priority cases'.<sup>61</sup> Legal Aid Agency decisions in relation to exceptionality were (and are) challenged by judicial review in respect to individual cases, though there are cases that have remained unfunded despite judicial and other concern.<sup>62</sup>

There have, however, been two substantial developments in relation to vulnerable parties receiving representation in the family courts. The first was Rights of Women's successful challenge to some of the evidential restrictions LASPO 2012 placed on victims of domestic violence trying to obtain legal aid in their family cases.<sup>63</sup> The second is the recent announcement that new legislation will prevent alleged perpetrators of abuse from cross-examining their victims personally in court and allow a publicly funded lawyer to cross-examine the witness for them (although other options must seemingly be explored before the court appoints a centrally funded solicitor).<sup>64</sup> This provision is to be welcomed, yet, from a cynical perspective, it is also a means by which the Ministry of Justice can react to judicial and other pressure to publicly fund vulnerable parties without relaxing the exceptional funding provisions.

### Provision of emotional and practical support

The government has clearly encouraged the provision of emotional support and free advice in relation to family law since LASPO 2012. In 2016 there were 20 Personal Support Units<sup>65</sup> in 16 cities across England and Wales and 14 more LawWorks<sup>66</sup> advice clinics set up, both organisations funded at least in part by the Ministry of Justice.<sup>67</sup>

<sup>54</sup> Tkacukova T 'Communication in family court: financial remedy proceedings from the perspective of litigants in person' (2016) 38(4) *Journal of Social Welfare and Family Law*, pp 430-449.

<sup>55</sup> See 'Apply for help with fees' <https://formfinder.hmctsformfinder.justice.gov.uk/ex160-eng.pdf> .

<sup>56</sup> Tkacukova T 'Communication in family court: financial remedy proceedings from the perspective of litigants in person' (2016) 38(4) *Journal of Social Welfare and Family Law*, pp 430-449, p 442.

<sup>57</sup> For example, the divorce application form D8 still uses archaic wording such as 'Prayer'.

<sup>58</sup> See Zuckerman A 'No justice without lawyers – The myth of an inquisitorial solution' *Oxford Legal Studies Research Paper* (2014) 66 pp 355-374.

<sup>59</sup> Asplin S 'The need to coordinate LIP initiatives' (2016) *Tribunals*, (Autumn) pp 17-19, p 18.

<sup>60</sup> *ibid*.

<sup>61</sup> *Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)* Legal Aid Agency (2014), p 2. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/477317/legal-aid-chancellor-non-inquests.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477317/legal-aid-chancellor-non-inquests.pdf) accessed 9 July 2017.

<sup>62</sup> For example, *Q v Q* [2014] EWFC 31.

<sup>63</sup> *The Queen (On the Application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91.

<sup>64</sup> See Roscoe M 'Reforms to cross-examination by alleged abusers in the Prison and Courts Bill' *Family Law Week* (March 2017). Available at <http://www.familylawweek.co.uk/site.aspx?i=ed176325> accessed 10 July 2017.

<sup>65</sup> Provides volunteer emotional and practical (though not legal) support for those appearing in court unrepresented, see <https://www.thepsu.org>.

<sup>66</sup> An umbrella and signposting organisation for pro bono advice schemes, see <https://www.lawworks.org.uk>.

<sup>67</sup> See Sir Oliver Heald MP comments at the Fifth National Forum on Access to Justice for those without means, from *Fifth National Forum on Access to Justice for those without means: A summary*, Civil Justice Council (2016). Available at <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-fifth-national-forum-note.pdf> accessed on 5 July 2017.

Free family law advice, of differing quality, tends to be provided by solicitors acting pro bono, Law Centres, charities and University law clinics. Whilst these services do undoubtedly provide tailored legal advice that would otherwise be unavailable, and reserve a valuable place within services for LIPs because of this, it is important to note that all free advice schemes have service limitations. Services may be only for those within a specific catchment area, offer limited one-off advice sessions or have services subject to time restrictions.<sup>68</sup> Usually free services are heavily oversubscribed. With the exception of solicitor-staffed Law Centres and some solicitor pro bono advice, many organisations offering free family law advice will not conduct litigation on behalf of clients or attend court,<sup>69</sup> though they may refer to limited organisations offering free representation, such as the heavily in demand Bar Pro Bono Unit.<sup>70</sup>

There is also research from the U.S., both in relation to discrete advice schemes<sup>71</sup> and advice provided by a University law clinic,<sup>72</sup> which suggests that although clients leave advice sessions feeling satisfied with the service (and perhaps better informed), the advice alone has very little impact on the outcome of the case. This is contrasted with Sandefur's study revealing the very clear impact of the presence of a lawyer (or knowledgeable representative) on case outcomes, although it is the procedural rather than substantive knowledge that was interestingly found to affect the impact.<sup>73</sup>

Though some experienced lay representatives, as well as lawyers, may meet the above requirement of extensive procedural knowledge, the presence of unregulated, unchecked McKenzie Friends has raised concerns and, in 2016, the judiciary launched a consultation on the regulation of lay representatives in court.<sup>74</sup> What has importantly not been explicitly considered, though may yet be, is a careful distinction between fee charging and voluntary McKenzie Friends and an official response to Trinder et al's<sup>75</sup> recommendation that there be a presumption of admitting voluntary McKenzie Friends into

the family courts.

There have undoubtedly been many changes since 2014 in response to the rise of LIPs in the family courts. Some funding has been made available for the provision of legal information, free advice and emotional support in court. However, developments purporting to respond to LIPs' needs have seemingly not addressed crucial issues such as the radical simplification of all court forms and procedures, the adoption of the inquisitorial approach by the judiciary and the limitations of free family law advice. The Ministry of Justice appears to remain reluctant to permit provision of exceptional funding where cases involve the most vulnerable people. The question also remains as to whether LIPs feel the benefits of these developments. To consider these issues further, the final section of this article considers some experiences of LIPs recently involved in proceedings in the Family Court.

#### **LIP experiences in a changing family justice system**

This section will set out the experiences of three LIPs who were advised and assisted by the Student Law Clinic at University of Westminster in relation to their private children proceedings in the Family Court during 2015-17. It is not suggested that these experiences are anything more than anecdotal, and the experiences of three people in the London Family Courts involved in private children proceedings cannot be indicative of LIP experiences more widely. However, the experiences do provide a suggestion as to how changes are working and what more it is that could be done to assist LIPs in family proceedings.

Fred<sup>76</sup> is a man in his early 50s. He and his partner separated in December 2014 and their three children (10, 7 and 3 years old) remained living with their mother. Once separated from his partner, Fred had no contact with the children. After receiving some advice from the Student Law Clinic, Fred was able to contact a mediator and, when his ex-partner did not attend mediation, make an application to court. When the case progressed to court, however, things became much more difficult for Fred. The

<sup>68</sup> For example, many University law clinics will offer a reduced service outside of term time.

<sup>69</sup> Indeed there are potential regulatory issues with University law clinics conducting litigation, see Thomas L 'Law clinics in England and Wales: a regulatory black hole' (2017) 51(5) *The Law Teacher*, pp 1-17.

<sup>70</sup> An organisation that co-ordinates litigants in person with volunteer barristers, see <https://www.barprobono.org.uk>.

<sup>71</sup> Steinberg J 'In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services' (2011) 18(3) *Georgetown Journal on Poverty Law and Policy*, pp 453-506.

<sup>72</sup> Smith L and Stratford B 'DIY in Family Law: A Case Study of a Brief Advice Clinic For Pro Se Litigants' (2012) 14(2) *Journal of Law and Family Studies*, pp 167-221.

<sup>73</sup> Sandefur R 'Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact' (2015) 80(5) *American Sociological Review*, pp 909-933.

<sup>74</sup> *Reforming the courts' approach to McKenzie Friends: A consultation* Lord Chief Justice (2016). Available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016-1.pdf> accessed 9 July 2017.

<sup>75</sup> See n1.

<sup>76</sup> Names and some details have been changed to protect identity.

application took several months for the court to process and Fred needed detailed advice on what to do to contact the court and question the time taken. Throughout the lengthy proceedings (including a fact-finding and final hearing) Fred felt that he was at a disadvantage because his ex-partner was represented, but yet the court still refused the admission of a voluntary McKenzie Friend offering practical support to Fred. The proceedings were also beset with communication problems. Several court orders were sent to Fred containing directions different to what he thought had been agreed in court, and these needed time consuming clarification with the court. Court staff tended to correspond with his ex-partner's solicitor and only with Fred when prompted. Staff also appeared to be confused about the status of a direct access barrister<sup>77</sup> that Fred managed to pay to attend the fact-finding court hearing, sending correspondence to her as if she were his solicitor rather than direct to Fred. This lack of communication led to one occasion where Fred was not informed of a new court date. As a result of these issues, Fred found the court experience very frustrating.

Fatima is a woman in her late 20s from the Indian subcontinent. She has one daughter who, at the time of proceedings, was 5 years old. Fatima's ex-husband showed very little interest in his daughter and had not seen her for some time. When Fatima approached the Student Law Clinic she had very little financial means, low confidence and difficulties understanding formal English. It became clear that Fatima needed to apply for an order to resolve a specific issue about her daughter, but because of language difficulties and low confidence Fatima needed significant help with the application and preparation of evidence. In court a barrister was able to assist pro bono, but an interesting issue emerged in relation to the differing approach of the judges. At one hearing the judge asked for significant input from the barrister and ultimately adjourned the case. At the second hearing (without any change in evidence or situation) the judge took a more interventionist approach, identified the issues, questioned the parties and made a decision. Afterwards it was felt that Fatima probably could have represented herself before the second judge but, as she did not know which 'type of' judge she was going to get beforehand, she said she would always be worried in future about going to court without representation.

Grace is a woman in her 40s originally from Ghana. She has two teenage sons with her ex-husband. Unlike Fred and

Fatima, Grace was the Respondent in proceedings and her ex-husband made several applications to see his sons. Grace was intimidated by her ex-husband and not inclined to attend court. The two boys live with their mother and were adamant about not seeing their father. Grace finds it very difficult to understand court processes and procedure, is not computer literate, is of limited means and struggles to understand formal English. She was desperate for assistance. In response, the Clinic provided her with advice and managed to arrange for a barrister to represent her pro bono at court, though it became obvious that the Clinic had both practical and emotional limitations for her.

### Discussion

The experiences of the three LIPs supports the findings of Trinder et al<sup>78</sup> in relation to the need for court staff support and the benefits of judges taking a more inquisitorial approach. What is interesting from the perspective both of maximising the effectiveness of Clinic advice services and evaluating the changes set out in the preceding section, is to consider what factors would have allowed all three clients to navigate the family courts successfully as a LIP, with the assistance of one off (but recurring if necessary) free family law advice from the Student Law Clinic.

Fred had a significant advantage over Fatima and Grace because he could access a computer and was reasonably literate. With an initial free or low cost session of family law advice and an Advicenow guide he probably could have found the mediation procedure and then the necessary form to apply to court to see his children. If there had been some free or low cost online or face-to-face assistance to help him, or the form had been simplified in language and style, Fred could have completed his form and initiated proceedings himself. At court the greater assistance of court staff would have made a significant difference to Fred. If Fred had been handed a draft order immediately after the hearing, or information on what to do if he needed to clarify anything in the order, this would have assisted. If court staff had communicated with him as they did his ex-partner's solicitor and been clear about what information he could expect to receive from court staff, this would have greatly assisted him. This suggests the need for further thought as to how court processes and procedures can be adapted for LIPs, or simply better explained. Fred would also have benefitted from the

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<sup>77</sup> A growing trend, barristers are providing services without being instructed by a solicitor. Usually they can be paid to attend a specific court hearing.

<sup>78</sup> See n1.

presumption of admission of a McKenzie Friend providing emotional and practical support.

At the time Fatima went to court<sup>79</sup> she would not have been able to access legal information or complete a form even if simplified, so she would have needed fairly detailed, free, family law advice and support to initiate proceedings. In court what made a real difference to Fatima was the approach of the judge. Therefore it is possible that, with the provision of fairly significant free family law advice, help with the form and writing a statement, and the promise of a consistent 'robust' approach from a judge, Fatima may have been able to feel that court proceedings were something she could manage herself. Fatima's case therefore suggests that a consistent, inquisitorial-type approach to LIPs by family court judges and magistrates would be of significant assistance.

Finally, even with the provision of free family law advice and information, Grace would not have been able to respond to her ex-husband's application herself. She cannot access information online and would have difficulties completing even simplified court forms. In terms of communication, she really only responds to text messages. She probably would avoid court if she had to attend on her own, even with an inquisitorial-style judge and supportive court staff. What Grace really needed was a solicitor.

These limited client experiences demonstrate that, with some significant discussions and changes, as well as the provision of free or low cost family advice at the beginning of proceedings, two of these LIPs might potentially have felt that their family court experience was a fair and accessible procedure.<sup>80</sup> However, one LIP needed substantial on-going advice and representation, irrespective of any changes made. It is therefore suggested that, as a priority, the basis of exceptional funding for legal aid is re-examined for those like Grace.

## Conclusions

Litigants in person remain a significant consideration for the family courts in England and Wales. Several detailed reports made similar recommendations as to how family courts, judges, lawyers and the Ministry of Justice could respond to increased numbers of LIPs. Whilst important changes have been, and continue to be, made in response, it is argued that these are predominantly developments that can be implemented with relative ease and comparatively little expense, for example provision of judicial training, online information and free limited advice schemes. The more difficult issues raised by the recommendations, and echoed by the experiences of LIPs assisted by the Student Law Clinic, have, on the whole, not been considered in detail by the government. These include the drastic simplification of court forms and procedures, a consistent and inquisitorial approach by the judiciary, changes to the role of court staff and expansion of legal aid provision for the most vulnerable. Exceptions to this would be the recent introduction of expert cross-examination where there are issues of abuse and consideration of the regulation of McKenzie Friends, though both of these developments are as a result of action from the judiciary and other interested groups.

The developments to the family justice system in England and Wales since LASPO 2012 have aptly been described as 'a bagel with a hole in the middle'.<sup>81</sup> The issue of LIP access to justice has not, and will not, go away with the provision of online information and free advice services, welcome as these may be. The evaluation of recent policy developments and experiences of LIPs set out in this article demonstrates that there is a greater need than ever for bold and difficult decision making in relation to the family justice system.

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<sup>79</sup> She has now greatly increased in confidence and her ability to understand English.

<sup>80</sup> I am not at any point suggesting that they would not prefer to instruct a solicitor.

<sup>81</sup> Maclean M 'New Ways to Seek Legal Information and Advice on Family Matters in England and Wales: From Professional Legal Services to Google and Private Ordering' in Maclean M, Eekelaar J and Bastard B (eds) 'Delivering Family Justice in the 21<sup>st</sup> Century' (Hart Publishing, 2015), at p 323, p 324.

# Polygamous Marriages and the Allocation of Matrimonial Rights: Can Ireland Avoid Repeating the UK's Confusion?

Avril Cryan\*

## Introduction

The changing demographic of Irish society has resulted in an increase in cases involving polygamy in the context of the recognition of foreign marriages for the purposes of family reunification.<sup>1</sup> The most prolific form of polygamy, polygyny, is associated with gender inequality, child marriage and the vulnerability of women and children in male-dominated societies.<sup>2</sup> Consequently, the practice may be deemed to conflict with progress made in relation to the rights of women and children. Hence, the refusal to recognise polygamy because of the associated harms may initially appear to be the correct approach to the issue. However, the conflict between polygamy and women's rights is more perplexing than monogamous jurisdictions may wish to acknowledge. A State's refusal to recognise polygamy does not alleviate the harms associated with the practice. In fact, it denies women who are party to polygamous unions their matrimonial rights and thereby further entrenches the harms.

In the absence of a concrete position on the issue, Irish case law indicates that the jurisdiction is in the process of embarking along the road previously travelled by the UK. This has led the UK to a position whereby polygamy is recognised for some purposes and denied recognition in other instances. The resulting division of matrimonial rights causes uncertainty and places the affected women in a weaker legal position than those who are party to monogamous marriages. Coupled with this, both jurisdictions appear to entertain the falsehood that it is possible for monogamous jurisdictions to ring fence against polygamy. In reality, persons domiciled in monogamous jurisdictions may form polygamous unions via cultural or

religious ceremonies. Polygamous households may also be established if an additional wife is entitled to immigrate to the jurisdiction as an individual and then joins her polygamous family upon arrival. Considering that the harm associated with polygamy is the primary reason for its non-recognition in monogamous societies, it is questionable whether individuals are best served by the State's refusal to provide affected women with full access to matrimonial rights. The contradiction created by allowing parties to benefit from the recognition of their marital status in limited circumstances undermines the idea that polygamy cannot be allowed full recognition in order to protect women from harm.

## The Irish Response to Polygamy

The existing legal framework in Ireland allows for the recognition of monogamous marriages.<sup>3</sup> Originally, the influence of Christianity filled the void created by the lack of a legislative or constitutional definition of marriage.<sup>4</sup> The introduction of same-sex marriage as a result of the 2015 referendum marked a clear departure from the concept of traditional Christian marriage.<sup>5</sup> However, the insertion of Art.41.4 into the Irish Constitution reinforces a public policy preference for monogamous marriage.<sup>6</sup> Ireland currently lacks any specific legislation which addresses polygamous marriages that are contracted when neither party is domiciled in the State. The application of the concept of domicile to convert a potentially polygamous marriage to a monogamous one was demonstrated in *Hamza v Minister for Justice and Law Reform*.<sup>7</sup> Cooke J. referred to authorities in other common law jurisdictions which suggest that:

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<sup>1</sup> A Cryan, 'Changing Demographics: Legal Responses to Polygamy and the Challenges Ahead for Ireland' [2016] 19(4) *Irish Journal of Family Law* 82.

<sup>2</sup> L Fishbayn Joffe, 'What's the Harm in Polygamy? Multicultural Toleration and Women's Experience of Plural Marriage' [2016] 31(3) *Journal of Law and Religion* 336 at p 342.

<sup>3</sup> Civil Registration Act 2004 s.2(2)(b). Also see *People (Attorney General) v Ballins* [1964] Ir. Jur. Rep. 14 (IRCC). Sixteen arrests were made in the state in respect of bigamy between November 2009 and March 2012.

Enright notes that this marks a departure from the crime generally not being prosecuted from 1990 onwards. See M. Enright, 'Preferring the Stranger? Towards an Irish Approach to Muslim Divorce Practice' [2013] 49 *Irish Jurist* 65, at p 82.

<sup>4</sup> *Hyde v Hyde and Woodmanson* (1866) L.R. 1 P. & D. 130 at 133; approved by Haugh J. in *Griffith v Griffith* [1944] I.R. 35 at 40; B. v R. [1995] 1 I.L.R.M.491 at 495. Note this judgment was delivered before divorce was legalised in Ireland.

<sup>5</sup> Marriage Act 2015.

<sup>6</sup> Bunreacht na hÉireann, Art. 41.4: 'Marriage may be contracted in accordance with law by two persons without distinction as to their sex'.

<sup>7</sup> *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427; Fennelly J. did not address potentially polygamous marriage in the appeal; *Hamza v Minister for Justice, Equality and Law Reform* [2013] IEHC 9.

a marriage which was polygamous when contracted may be transformed into a monogamous one, particularly in circumstances where the parties to a marriage which is in fact monogamous, acquire a new domicile of choice in a country where polygamous marriage is not possible.<sup>8</sup>

The issue of actually polygamous marriage presented in *H.A.H. v S.A.* which concerned an application by a Lebanese refugee for reunification with his first wife and their children. The applicant's second wife had previously been granted permission to reside with him in Ireland. The applicant applied for a declaration that his marriage to his first wife was valid pursuant to s.29 of the Family Law Act 1995.<sup>9</sup> Dunne J. referenced r.73 of the Conflicts of Law as stated by Dicey and Morris which dictates that polygamous marriages will be recognised unless there is 'some strong reason to the contrary'.<sup>10</sup> Such a reason may be a conflict with public policy. Dunne J. stated that 'in the context of the institution of marriage, the public policy of the State is informed by the Constitution, by legislation and to an important extent by our culture and tradition'.<sup>11</sup> As all legislation in the jurisdiction must be compatible with the Constitution, s.29 of the 1995 Act could not facilitate practices which are contrary to the public policy dictated in the Constitution in relation to marriage.<sup>12</sup> However, as Enright notes '[i]t is apparently enough that polygamy departs from that concept: it is not necessary to show that recognition of a polygamous marriage actively threatens the constitutional institution of marriage'.<sup>13</sup> Ultimately, the obscure concept of public policy was relied upon to prevent the reunification of the family.

The judgement in *Mabuzwe v Fakazi* indicates that the Ireland is likely to follow the UK in its division of access to matrimonial rights for polygamous spouses.<sup>14</sup> The applicant in *Mabuzwe* had been granted refugee status in Ireland. Pursuant to s. 18 of the Refugee Act 1996 (as amended) the applicant sought permission for the respondent (his wife) and children to enter and reside in the State. Nolan J had ruled in the Circuit Family Court that the applicant's marriage was valid pursuant to s. 29(1) of the Family Law Act 1995. In appealing to the High Court, the Attorney General argued that a traditional marriage that allows for polygamy cannot be recognised as a valid marriage under

Irish law. However, in the High Court, Clark J stated that the 1995 Act:

is not... relevant to determining for the purposes of s. 18 of the Refugee Act 1996 the validity of a marriage celebrated according to the legal requirements and rites in a refugee's country of origin. Family reunification should mean just that; the refugee is entitled to be reunited with his closest family, being the children and parent of those children, and should be facilitated in achieving that entitlement. Establishing that a person is a refugee's spouse for the purposes of a family reunification application is not the equivalent of establishing lawful marital status for the purposes of the Family Law Act 1995.<sup>15</sup>

Clark J outlined what the Court deemed to be the appropriate approach to future cases, stating that the Minister had failed 'to recognise the distinction between the recognition of a marriage for family reunification reasons and the recognition of a marriage for the purpose of determining matrimonial reliefs and other related remedies'.<sup>16</sup> Considering that the fact that the Attorney General had appealed the case to the High Court on the grounds that the marriage could not be recognised in this jurisdiction due to its potentially polygamous nature, Clark J. stated:

This court... refrains from either considering or engaging with the undoubted prohibition in Irish law of a polygamous marriage or the problematic issue of potentially polygamous marriage. It simply does not need to consider what is settled law on polygamy or law which has no relevance to the only issue in this appeal which is the recognition of the Applicant's marriage which was, according to the uncontroverted evidence adduced, a valid marriage in the country of his domicile.<sup>17</sup>

This statement evidences Clark J's reluctance to examine polygamous marriage within the context of the Irish jurisdiction. In an effort to avoid a thorough exploration, the approach taken by Clark J was one of converting the potentially polygamous marriage to a *de facto* monogamous marital union. Hence, Clark J found the *de facto* marriage at

<sup>8</sup> *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 at 42; Cooke J. cited Rule 71 as stated by Dicey and Morris, *The Conflicts of Laws*, (Sweet & Maxwell, 13th edn, 1999) and the cases cited at fn.87, p.697.

<sup>9</sup> Family Law Act 1995 s.29.

<sup>10</sup> *H.A.H. v S.A.* [2010] IEHC 497 citing Dicey and Morris, *The Conflicts of Laws*, (Sweet & Maxwell, 13th edn, 1999).

<sup>11</sup> *H.A.H. v S.A.* [2010] IEHC 497 at 32.

<sup>12</sup> *H.A.H. v S.A.* [2010] IEHC 497 at 32.

<sup>13</sup> M. Enright 'H v A: Polygamous Marriage and Irish Law' available at <http://www.humanrights.ie/index.php/2011/07/12/h-v-a-foreign-polygamous-marriage-and-irish-law/> [Last accessed 15 August 2016].

<sup>14</sup> *Mabuzwe v Fakazi* [2011] IEHC 415

<sup>15</sup> *Mabuzwe v Fakazi* [2011] IEHC 415 at 35 and 36.

<sup>16</sup> *Mabuzwe v Fakazi* [2011] IEHC 415 at 39.

<sup>17</sup> *Mabuzwe v Fakazi* [2011] IEHC 415 at 24.

issue in this case to be valid despite its potentially polygamous nature.<sup>18</sup> The judgment failed to acknowledge that if polygamous unions are to be recognised only for the purposes of family reunification, upon being reunited in the jurisdiction, the family is placed in a weaker legal position than other residents of the State. It indicates the formation of two-tier system of matrimonial rights in the jurisdiction with the State offering little or no protection to members of polygamous unions.

### The Initial Response to Polygamy in the UK

The provision of quasi recognition of polygamous marriages is all too familiar in the UK. The UK initially attempted to evade the recognition of polygamy. However, the circumstances of both the State and those who are party to polygamous unions have led to the limited recognition of the marital practice. The UK's experience of polygamy is unusual as it has a history of attempting to eradicate polygamy not only within its own borders, but also within its colonies.<sup>19</sup> Policy arguments favouring the eradication of polygamy have evolved considerably, moving from an original focus on the incompatibility of the practice with Christian morality, to an emphasis on preventing the perceived harms caused by polygamy. Lord Penzance's declaration in *Hyde v Hyde* that 'marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of others' strikes an antiquated tone to the modern reader.<sup>20</sup> The current focus on the prevention of harms to women is a concept which is much more of this time. However, the desire to protect women from the harms associated with polygamy has not progressed their position to an adequate level in the UK. In fact, echoes of the ruling in *Hyde v Hyde* still exist in the jurisdiction, as those who are party to a polygamous union which is formed in the State via a religious or cultural ceremony are not entitled to the legal recognition of their marriage or the granting of matrimonial relief.<sup>21</sup> This raises the question as to whether the reason for non-recognition has truly evolved or whether the incompatibility of polygamy with a morality which remains heavily influenced by the Christian faith lies at the heart of the denial of matrimonial rights to these women.

The UK's approach to polygamy appeared to be

sufficient at the time of the decision in *Hyde v Hyde*.<sup>22</sup> The compromise provided by weak legal pluralism dealt with the issue in the colonies. The policy in the UK itself of a negative and restrictive approach to polygamous marriages entered in to outside of the UK addressed the issue in the context of immigrants to the UK. The combination of these approaches was largely adequate in an era when the issue of polygamous marriage of UK residents was, as Simons notes, 'an exotic phenomenon, a kind of legal oddity.'<sup>23</sup> It was not regarded as an issue for UK residents as the Offences Against the Person Act 1857 provided for the offence of bigamy.<sup>24</sup> In addition, polygamous marriage was simply contrary to the Christian based concept of marriage and was regarded as immoral in comparison to the *status quo* of the jurisdiction. As a result, the legal position of the practice of polygamy affected few. However the post-war influx of African and Asian residents from the British colonies brought the issue of polygamy closer to home. The traditional legal approach was inadequate in providing for migrants experiencing issues with the recognition of polygamous or potentially polygamous marriages for the purposes of immigration or for seeking marital relief. Shah states that the initial reaction of the post Second World War courts was to attempt to harmonise the 'historic disdain for the practice of polygamy' with the needs of the migrants.<sup>25</sup> This was a necessary result of the practical and social concerns created by the mass non-recognition of the marriages of migrants.

A contradiction developed in the fact that although polygamous marriages were not recognised for the provision of matrimonial relief, the courts recognised polygamous marriages for the purposes of other legislation. This was applicable if the marriage was valid in the place of celebration and under the parties' personal law.<sup>26</sup> The issue of whether a man who was party to a polygamous marriage could be liable to provide familial maintenance was considered in *Amin Din v National Assistance Board*.<sup>27</sup> The man was party to two marriages when he was domiciled in Pakistan. After the death of his first wife, the man and his second wife moved to England. The man subsequently abandoned his wife and four children. This resulted in his wife being required to apply for national assistance. Her application was successful. However, the National Assistance Act provided that 'a man shall be liable to

<sup>18</sup> *Mabuzwe v Fakazji* [2011] IEHC 415 at 39.

<sup>19</sup> L. Sheleff, 'Human Rights, Western Values and Tribal Traditions: Between Recognition and Repugnancy, Between Monogamy and Polygamy' [1994] 12 *Tel Aviv University Studies in Law* 237, at p 251.

<sup>20</sup> *Hyde v Hyde and Woodmansee* (1886) LR 1, P&D, 130; Penzance, L.J., at p 133.

<sup>21</sup> *Hyde v Hyde and Woodmansee* (1886) LR 1, P&D, 130.

<sup>22</sup> *Hyde v Hyde and Woodmansee* (1886) LR 1, P&D, 130.

<sup>23</sup> HJ Simons, *African Women: Their Legal Status in South Africa* (Northwestern University Press, 1968), at p 250.

<sup>24</sup> The Offences Against the Person Act 1857, previously the OAPA 1828. The offence of bigamy is currently provided by the OAPA 1861, s.57.

<sup>25</sup> PA Shah, 'Attitudes to Polygamy in English Law' [2003] I.C.L.Q. 369, at p 369.

<sup>26</sup> R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 319.

<sup>27</sup> *Amin Din v National Assistance Board* [1967] 2 QB 213.

maintain his wife and children'.<sup>28</sup> As a result, the board pursued the husband under section 43 of the Act which entitled the State to recover the cost of assistance from the person who was liable to provide maintenance.<sup>29</sup> It was held that the word 'wife' included a polygamous wife. This ruling resulted in a situation where a polygamous husband could be pursued for by the National Assistance Board for the recuperation of familial maintenance under the 1948 Act. The position shielded the State from incurring financial obligations towards polygamous families. However, a polygamous wife could not apply to the family courts for direct support from her husband. In addition, social security legislation did not recognise polygamous spouses for the purposes of a wife's application for benefits on the basis of her husband's social security contributions.<sup>30</sup>

A further form of quasi recognition was provided in *Baindail v Baindail*.<sup>31</sup> It was held that if a marriage was lawful in the place of celebration and according to the personal laws of the parties, the marriage was recognised for the offence of bigamy in the UK. As a result, the parties were prevented from entering into any additional marriages. This recognition served as a means of preventing polygamous marriages in the UK. As Gaffney-Rhys states, '[p]olygamous marriages were... in an anomalous position as they were recognised in some contexts but not others'.<sup>32</sup>

A further form of recognition was necessary for providing a means for obtaining matrimonial relief, such as divorce, under UK law. The existing situation needed to be addressed as it was being used as a means for parties to actually or potentially polygamous marriages to evade their legal responsibilities as a spouse on the basis that their marriage was not recognised under UK law. Thus, attempts were made to provide a solution within the existing legal framework. To this end, the approach adopted by the courts was to convert potentially polygamous marriages to monogamous ones before the necessary relief could be provided. Where the country of origin had adopted legislation to forbid polygamy, the UK courts looked to rely upon the relevant statute as in the case in *Prakasho v Singh*.<sup>33</sup> The Indian Hindu Marriage Act 1955 allows second marriages to be declared void. It was held that despite the couple having married before the enactment of the legislation, their marriage had been converted from a potentially polygamous marriage to a monogamous marriage as a result of the Indian legislation. Hence, the Indian legislation was relied upon to legitimise the British

approach to polygamy.

In *Mubammad v Suna*, Lord Walker proposed that the acquisition of a domicile in England converted such marriages in to monogamous unions;

It is perhaps not altogether satisfactory that a man who enters into a polygamous union while domiciled abroad should, on acquiring a domicile in this country, be unable to sue in the court of his domicile for divorce and yet be regarded by the court of his domicile as not free to marry.<sup>34</sup>

The legal response went a step further in *Ali v Ali*.<sup>35</sup> As a result of this case, a potentially polygamous marriage could be converted into a monogamous marriage provided that the man transferred his domicile to the UK and only had one wife. However, the concept of domicile could prove complex. Difficulties could arise in establishing whether a person had changed their domicile if they had been in the UK for a short period of time.<sup>36</sup> Shah contends that 'this was an early portent of things that were to follow in that the reaction to increased migration was not to recognise "alien" customs according to their own terms but rather to make them undergo a process of conversion first'.<sup>37</sup>

The approach of conversion was honourable in its aim as it attempted to prevent the erosion of the gains made in family and feminist areas of the law. However, it failed to address the circumstances of any additional wives. Converting the polygamous marriage to one of a monogamous nature allowed the marriage to be valid for the purposes of UK law. However, this validity only applied to the newly created monogamous aspect of the marriage. As a result, rights were created for the wife involved in the case, but were erased for any additional wives as their marriage was not recognised by UK law. Hence, the impact on this approach was the deconstruction and eradication of polygamy rather than the recognition of it. However, to put this patchwork legal approach within context, at the time, the immigrants' retention of their practices of resolving disputes (including those of a marital nature) within their own minority communities was actively encouraged by the UK government through the provision of funds for local ethnic associations.<sup>38</sup> This allowed for a mild form of pluralism to operate within these communities. The logic behind this was that the majority of immigrants from these regions were residing in the UK to work for a period of time, after which they would return

<sup>28</sup> National Assistance Act 1948, s.42(a).

<sup>29</sup> National Assistance Act 1948, s.43.

<sup>30</sup> R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 320.

<sup>31</sup> *Baindail v Baindail* [1946] P&D 122.

<sup>32</sup> R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 320.

<sup>33</sup> *Prakasho v Singh* [1966] P 233, [1967] 1 All ER 737.

<sup>34</sup> *Mubammad v Suna* [1956] S.C 366, at p 370.

<sup>35</sup> *Ali v Ali* [1968] P 564.

<sup>36</sup> R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 319.

<sup>37</sup> PA Shah, 'Attitudes to Polygamy in English Law' [2003] I.C.L.Q. 369, at p 375.

<sup>38</sup> W Kennett, 'Women Living Under Shariah Law – Part One – Distinct Legal Worlds?' [2011] 2 *Women in Society* 14, at p 16.

to their countries of origin.<sup>39</sup> This approach echoed that of colonisation as the immigrants were not judged as being part of the greater British culture and therefore their practices, when operating within their own community, did not affect the traditional British demographic. Hence it was deemed that polygamy was a temporary issue that did not affect the long-term members of the British community. However, a change in immigration policy in the 1970s resulted in many immigrants qualifying for permanent residence and British citizenship. This exposed the need for a more considered approach to the issue.

### The Development of Legislative Approaches to Polygamy in the UK

The Law Commission's 1971 Family Law Report on Polygamous Marriages expressed concern about the social impact of denying relief to the parties to a polygamous marriage.<sup>40</sup> The Commission stated that 'to close all doors to all matrimonial courts in England to either party to a polygamous marriage gives rise to hardship and to the risk of a social problem which, in our view, the law should not ignore'.<sup>41</sup> The Commission described 'the position regarding financial provision [as] particularly disturbing'.<sup>42</sup> However, a contributing factor to this assertion can be deduced from its concern with the interests of the taxpayer in this context. The report stated that 'a man who has several wives and who cannot afford to maintain them should not be allowed to leave them as a charge to the benefits system'.<sup>43</sup> The Commission was of the opinion that 'denial of relief not only permits parties to escape from their obligations, lawfully entered into under another legal system, but tends to perpetuate the polygamous situation because the marriage cannot be ended'.<sup>44</sup> However, it also recommended that ultimately English norms should prevail and that polygamy should be eradicated through a strong legal stance.<sup>45</sup> In line with this, the Law Commission concluded that there was 'no justification, nor indeed reason, for changing the present law by making the law of the place of celebration the sole test of validity; regard must still be had to the law of the country where each party is domiciled'.<sup>46</sup> As a result, statutory reform was introduced in

a bid to force immigrants to conform to the British *status quo* regarding marital practices.

The Matrimonial Proceedings (Polygamous Marriages) Act 1972, which was later incorporated the Matrimonial Causes Act 1973, allowed for matrimonial relief for the parties to potentially or actually polygamous marriages.<sup>47</sup> In addition, polygamous marriage was addressed in what was later to become section 11 of the 1973 Act which provides that a marriage celebrated after 31<sup>st</sup> July 1971 is deemed to be void on the grounds, *inter alia*:

- (b) that at the time of the marriage either party was already lawfully married.
- (d) in the case of polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.

As a result, a polygamous marriage is void if is formed in the UK. However, if the parties were not domiciled in the UK at the time of forming a polygamous marriage in another jurisdiction, either party can apply for ancillary financial relief.<sup>48</sup> Section 11(d) prevents persons domiciled in the UK from entering a polygamous marriage. This remains true in the case of actually polygamous marriages. However, section 11(d) had the potential to create difficulties for immigrants who married outside of England and were party to potentially polygamous marriages. Hence, the legislation led to the potential de-recognition of South Asian marital unions.<sup>49</sup> Despite the mitigation of the hazardous effects of the legislation by the judiciary Shah states that 'the situation remained unsatisfactory, as the ability of South Asian men to enter into plural marriage could still be limited, or so it seemed, by the manipulation of the concept of domicile'.<sup>50</sup>

An attempt to address this issue was made in *Hussain v Hussain* which concerned a potentially polygamous marriage which took place in Pakistan.<sup>51</sup> The husband was domiciled in England at the time. It was held that the fact that the marriage had taken place under a law which permitted polygamy did not necessarily render it void because section 11(d) of the 1973 Act had to be read in

<sup>39</sup> W Kennett, 'Women Living Under Shariah Law – Part One – Distinct Legal Worlds?' [2011] 2 *Women in Society* 14, at p 16, citing J Bowen, 'Private Arrangements: 'Recognizing Shariah' in England' [2009] *Boston Review*.

<sup>40</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971).

<sup>41</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971), at para. 25.

<sup>42</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971), at para. 4.

<sup>43</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971), at para. 35(d).

<sup>44</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971), at para. 38.

<sup>45</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971), at para. 38.

<sup>46</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971), at para. 19.

<sup>47</sup> The Matrimonial Proceedings (Polygamous Marriages) Act 1972 (later incorporated in the Matrimonial Causes Act 1973).

<sup>48</sup> R Gaffney-Rhys, 'Polygamy and the Rights of Women' [2011] 1 *Women in Society* 2, at p 5; R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 320; if a foreign law is the appropriate law to apply it will be adhered to. The marriage may be deemed to be valid if, for example, one of the parties was domiciled in the UK at the time of the ceremony, but the couple intend to live in an alternative jurisdiction.

<sup>49</sup> The Matrimonial Proceedings (Polygamous Marriages) Act 1972 (later incorporated in the Matrimonial Causes Act 1973).

<sup>50</sup> PA Shah, 'Attitudes to Polygamy in English Law' [2003] I.C.L.Q. 369, at p 370.

<sup>51</sup> *Hussain v Hussain* [1982] 3 All ER 369.

conjunction with section 47(1) of that Act. This provided that the court was not precluded from granting matrimonial relief by reason only that the marriage was entered into under such a law. As a result, when considering whether a marriage was monogamous or polygamous, the court no longer had to consider the nature of the ceremony according to the *lex loci celebrationis*, but rather the capacity of the parties to marry under the laws of their respective domiciles. If one of the parties had the capacity to marry a second spouse during the subsistence of the marriage, the nature of the marriage was potentially polygamous. The facts of the case led to the marriage in question being deemed monogamous as the husband did not have the capacity to enter into a polygamous marriage as he was domiciled in England at the time of the ceremony and was accordingly subject to the law of the jurisdiction and the wife did not have the capacity to marry a second husband as the Muslim religion only permits men to take multiple wives. In his ruling, Ormrod L.J. confirmed that such an interpretation of the legislation was the correct course of action as the alternative would have meant that if the law of the country in which a marriage took place permitted polygamy all such marriages would be deemed to be void in England. He noted that ‘the repercussions on the Muslim community alone in this country would be profound’.<sup>52</sup> The Private International Law (Miscellaneous Provisions) Act 1995 sought to clarify the position. Section 5 provides that *de facto* monogamous marriages are valid, even if they are formed by parties who are domiciled in England and Wales in jurisdictions which allow polygamy.<sup>53</sup>

The 1995 Act also resulted in the recognition of polygamous marriages for the purpose of immigration to the UK. This is providing that the marriage is contracted by persons domiciled in polygamous jurisdictions. However, the 1995 Act did not create a right for such wives to immigrate to the UK.<sup>54</sup> The issue of family reunification is dealt with in the Immigration Act 1988, which attempts to ban the admission of second wives to the country.<sup>55</sup> The legislation was a reaction to the considerable case law that had developed from the late 1970s onwards.<sup>56</sup> Government policy of preventing the formation of polygamous

households is clearly served by the Act.<sup>57</sup> However, section 2 allows a husband to choose which wife he wishes to accompany him to reside in the UK. This approach is contrary to the concept of monogamy.<sup>58</sup> It would be more in keeping with the idea of monogamy if only the first wife was allowed to immigrate with her husband. The abandonment of any additional wives and the potential financial and social hardships that result from this approach are overlooked.<sup>59</sup>

### Further Forms of Recognition

Additional instances of recognition continue to emerge in the UK. The Court of Appeal recently held that actually polygamous marriages which are formed by foreign domiciliaries are valid for the purpose of the statutory exception to the offence of conspiracy.<sup>60</sup> Such marriages are also recognisable for the entitlement to some State financial welfare benefits.<sup>61</sup> Further development in the recognition of polygamy is evidenced in the area of succession. The recent case of *Official Solicitor to the Senior Courts v Yemoh and Others*, concerned a man who died intestate whilst being party to a polygamous marriage.<sup>62</sup> The deceased was domiciled in Ghana, but owned some personal property and two houses in the UK. Due to the deceased’s multiple spouses and children, the Official Solicitor, as Judicial Trustee, sought guidance on how the estate should be distributed. The High Court held that ‘a spouse lawfully married in accordance with the law of his domicile to someone dying intestate is entitled to be recognised in this country in relation to property... of the intestate being administered here as a surviving spouse for the purpose of section 46 of the [Administration of Estates] Act 1925’.<sup>63</sup> It was acknowledged that the application of the legislation to polygamous marriages would perhaps not have been foreseen by the draftsman of the 1925 Act. However, the court pointed to the rather tenuous argument that the draftsman would have been aware that section 1(i) of the Interpretation Act 1889 provided that ‘words in the singular shall include the plural’.<sup>64</sup>

The court cited the reasoning of the Privy Council in

<sup>52</sup> *Hussain v Hussain* [1982] 3 All ER 369, Ormrod L.J. at 373.

<sup>53</sup> Private International Law (Miscellaneous Provisions) Act 1995, s.5.

<sup>54</sup> R Gaffney-Rhys, ‘The Legal Response to Polygamous Marriages in England and Wales’ [2011] I.F.L. 319, at p 320.

<sup>55</sup> Immigration Act 1988.

<sup>56</sup> PA Shah, ‘Attitudes to Polygamy in English Law’ [2003] I.C.L.Q. 369, at p 380.

<sup>57</sup> Fairbairn, C., ‘Polygamous and potentially polygamous marriages’ *Immigration Directorates’ Instructions*, Chapter 8, Annex C, Section1 (November 2009).

<sup>58</sup> Fairbairn, C., ‘Polygamous and potentially polygamous marriages’ *Immigration Directorates’ Instructions*, Chapter 8, Annex C, Section2 (November 2009).

<sup>59</sup> PA Shah, ‘Attitudes to Polygamy in English Law’ [2003] I.C.L.Q. 369, at p 389.

<sup>60</sup> *R v Bala (Yikyes Finok)* [2016] EWCA Crim 560; [2017] Q.B. 430.

<sup>61</sup> The House of Commons Standard Note on Polygamy 2014; see R Gaffney-Rhys, ‘Polygamy’ (Westlaw UK Insight, last updated 11 April 2017), at p 8.

<sup>62</sup> *Official Solicitor to the Senior Courts v Yemoh and Others* [2010] EWHC 3727 (Ch), [2011] 1 WLR 1450, [2011] 2 FLR 371.

<sup>63</sup> *Official Solicitor to the Senior Courts v Yemoh and Others* [2011] 1 WLR 1450, at para. 20; Administration of Estates Act 1925, s.46(1).

<sup>64</sup> *Official Solicitor to the Senior Courts v Yemoh and Others* [2011] 1 WLR 1450, at para. 20; Administration of Estates Act 1925, s.46(1); this rule of interpretation is now contained in the Interpretation Act, 1978, s.6(c).

*Coleman v Shang*.<sup>65</sup> *Coleman* concerned whether a polygamous wife was entitled to a grant of letters of administration upon the death of her husband. The marriage was celebrated in Ghana, where the parties were domiciled. The Privy Council decided the case in the affirmative on the basis that the Interpretation Ordinance ordinarily required words expressed in the singular to also be interpreted in the plural form. However, the High Court in *Yeomb* did point out that the outcome of *Coleman* did not have any public policy implications as the case concerned the grant of letters of administration in Ghana.<sup>66</sup> The court also cited *Sebota (Deceased)* which concerned inheritance in polygamous marriages.<sup>67</sup> The husband in this case had died having made a will leaving his estate to one of his wives. It was held that plaintiff was also 'a wife of the deceased' for the purposes of section 1 of the Inheritance (Provision for Family and Dependents) Act, 1975.<sup>68</sup> As Gaffney-Rhys states, the decision 'was not surprising given that the [1972 Act] had granted a polygamous spouse the right to apply for matrimonial relief on breakdown'.<sup>69</sup>

The judge in *Yeomb* was concerned with the practicalities of the division of the property between the seven or eight wives (one marriage was disputed). As a result, he ruled that one statutory legacy was to be shared between the wives rather than each to have her own. This was the effect of the judge deeming 'the surviving spouse' in section 46 of the 1925 Act, to be comprised of all of the deceased man's wives.<sup>70</sup> The judge was of the opinion that by the deceased's wives sharing the estate it would not be exhausted by being divided between seven or eight wives. This was a practical approach as it would be unlikely that if the estate was divided the proceeds would be large enough to provide for any of the wives to establish their own home. This issue had been highlighted by the Law Commission which noted that 'the amount considered appropriate for one widow might not be enough if there were two widows'.<sup>71</sup> The judge also specified that the wives hold their life interest until the last remaining spouses dies as the wives had been treated as one entity for the purposes of the statutory legacy. However, the solution of a form of joint-tenancy offered by the court also weakened the protection of the wives as they were now not in a position to obtain their inheritance and live independently of their polygamous family. However, the decision that the wives should share

a single statutory legacy is consistent with the recommendation made by the Law Commission that a special inheritance rule should not be introduced for polygamous marriages.<sup>72</sup> Gaffney-Rhys states that '[t]he decision regarding the statutory legacy demonstrates that the court was not willing to interpret the legislation for the benefit of polygamous spouses.<sup>73</sup> However, as Gaffney-Rhys states, '[t]he case did not... raise major public policy issues, nor could the decision be regarded as encouraging polygamy as the court shared the single statutory legacy between all the wives'.<sup>74</sup>

## Conclusion

The UK's route to quasi recognition of polygamous unions has evolved over time. Gaffney-Rhys describes the development as 'logical... as the parties' marriages were lawful in the place of celebration and according to the law of domicile.<sup>75</sup> The forms of recognition granted to polygamy may be said to have been created in an effort to alleviate some of the harmful effects of non-recognition. However, these forms of recognition make the continued refusal to offer complete recognition appear increasingly contradictory. The reality that the formation of polygamous unions in monogamous jurisdictions cannot be prevented adds to the contradiction. The forms of recognition which have been created for actually polygamous marriages apply to only those involving individuals who were not domiciled in the UK at the time of marrying. This recognition is granted to these unions to prevent the infliction of harm on the individuals involved through the deprivation of their matrimonial rights. Yet, the State fails to offer such protection to persons who are party to polygamous spouses which are formed within the jurisdiction. As Shah states;

while clearly attempting to solve the problem of the potential non-recognition of a huge number of marriages contracted abroad, [the Private International Law (Miscellaneous Provisions) Act 1995] ... preserves the fiction that English domiciled men and women cannot but enter into monogamous marriages... [g]iven... that the concept of domicile has been seen as the dominant determinant of capacity and that this concept itself is unwieldy and uncertain, this leaves room for all sorts of assimilationist

<sup>65</sup> *Coleman v Shang* [1961] AC 481.

<sup>66</sup> *Official Solicitor to the Senior Courts v Yeomb and Others* [2011] 1 WLR 1450, at para. 17; R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 321.

<sup>67</sup> *Sebota (Deceased)*, Re [1978] 3 All ER 385; see also *Coleman v Shang* [1961] AC 481.

<sup>68</sup> Inheritance (Provision for Family and Dependents) Act, 1975.

<sup>69</sup> R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 320.

<sup>70</sup> Administration of Estates Act 1925, s.46.

<sup>71</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971), at para. 120.

<sup>72</sup> The Law Commission: Family Law Report on Polygamous Marriages, Law Com. No. 42 (1971), at para. 120.

<sup>73</sup> R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 322.

<sup>74</sup> R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 322.

<sup>75</sup> R Gaffney-Rhys, 'The Legal Response to Polygamous Marriages in England and Wales' [2011] I.F.L. 319, at p 322.

assumptions or exclusionary agendas to be played out by discretionary manoeuvres in actual cases.<sup>76</sup>

A two-tier system of matrimonial rights has been created by the UK's response to polygamy. The State holds the belief that the practice will be eradicated through the deprivation of rights. However, as Shah argues, this approach has failed to succeed in its aim of eliminating polygamy as 'ethnic minorities continue to navigate among various legal levels to circumvent official laws'.<sup>77</sup> Shah states that despite calls for a 'more sensitive approach to non-English marital practices the position taken at official level has been maintained and strengthened at the expense of women and... children'.<sup>78</sup> Indeed, Shah states that his case study of the English approach to polygamy highlights the fact that 'a dominant legal system is ill-advised to attempt to impose a mono-cultural and ethnocentric regime upon a highly pluralist social basis'.<sup>79</sup> However, part of the concern generated by the current legal position is it that results in polygamous Muslim women having no option available to them other than Sharia Counsels if they are seeking any form of matrimonial rights.

The reality is that adult women, for better or for worse, are opting to enter in to polygamous unions in monogamous societies. This creates a situation where monogamous societies are so concerned about the welfare of polygamous wives that they are choosing to deprive them of access to matrimonial legal rights. As Bailey and Kaufman state '[t]he paradox of polygamy... [is that]... [h]owever harmful and unequal the practice, it is a source of legal rights for the women and children involved. Expressing disapprobation by refusing recognition strips these women and children of their meagre legal protections'.<sup>80</sup> The argument can be made that these individuals are choosing to be party to relationships which have no legal bearing and therefore they deserve to be refused recognition. However, the current climate in family law in both Ireland and the UK evidences that society is activity seeking to provide rights to persons who are party to relationships which traditionally would not have been recognised such as same-sex couples and cohabiters.

The establishment of rights for cohabiters may have some relevance to polygamy. The Irish legislation limits cohabitants to two people.<sup>81</sup> However, women who are

party to polygamous marriages which are not recognised by the law are, for all sense and purposes, cohabiting with their partner, and thus may fall within the theoretical bracket for such rights. In the event of a polygamous union spreading over different households, a case could be made for a polygamous wife to seek relief from her former partner, as the Act does not limit cohabitation to one partner at a time. As Enright states, a "... cohabitant is not necessarily barred from recovering under the regime simply because her former partner remains legally married to another person, and the Act makes no reference to subsisting religious marriages".<sup>82</sup> If a polygamous union spreads over a number of households and if the primary spouse is legally married to a member of the union, it would have to be proven that the spouses lived apart from each other for a period of at least four of the previous five years for cohabitation rights to be established. However, an argument could be made if the primary spouse officially resided with a polygamous partner rather than their legal spouse.<sup>83</sup>

As discussed, the forms of recognition granted to polygamy continue to evolve in the UK. Ireland appears set to embark upon the same process of allowing for various forms of quasi recognition of polygamy. An outright solution to the issue remains elusive as both the recognition and non-recognition of the practice are sources of potential harm. However, the approach is contradictory. The State is recognising polygamy in various instances to prevent women from being subjected to harm, whilst simultaneously causing harm to women by refusing to recognise polygamy in other circumstances. This approach dilutes the protection offered to parties to polygamous marriages and ignores the fact that polygamy exists within monogamous societies. Rather than providing equality and protection the current position, in both jurisdictions, offers uncertainty by allocating matrimonial rights according to their applicability to polygamous marriages. Hence, a legitimate examination of the issue is required to create a uniformed and theorised approach. This involves facing the reality that the non-recognition of these unions entrenches the harms associated with polygamy. It also requires the acknowledgement that the cultural practices of the residents of both jurisdictions are evolving. The law must correspond with these changes if we truly care about the potential vulnerability of these women.

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<sup>76</sup> PA Shah, 'Attitudes to Polygamy in English Law' [2003] I.C.L.Q. 369, at p 379.

<sup>77</sup> PA Shah, 'Attitudes to Polygamy in English Law' [2003] I.C.L.Q. 369, at p 370.

<sup>78</sup> PA Shah, 'Attitudes to Polygamy in English Law' [2003] I.C.L.Q. 369, at p 370.

<sup>79</sup> PA Shah, 'Attitudes to Polygamy in English Law' [2003] I.C.L.Q. 369, at p 370.

<sup>80</sup> M Bailey and A Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Laws and Policy* (Praeger, 2010), at p 137.

<sup>81</sup> Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s.172(1).

<sup>82</sup> M Enright, 'Preferring the Stranger? Towards an Irish Approach to Muslim Divorce Practice' [2013] 49(1) *Irish Jurist* 65, at p 10.

<sup>83</sup> Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s.172(6).

# Arbitration under the Institute of Family Law Arbitration schemes: A new player in the English Family Justice System

His Honour Michael Horowitz QC\*

Arbitration, defined as a rules based system for the resolution of private disputes outside the official judicial systems of the state, can be traced back at least as far as the customary law merchant of medieval international traders and the traditions of the medieval Guilds. English statute law has recognised and lightly regulated arbitration since 1698 through successive Acts leading up to the Arbitration Act 1996.

Sharia based systems apart, both the creation and dissolution of a marriage are acts declaring or modifying status and so almost universally reserved to the exclusive jurisdiction of the state's judicial authority<sup>1</sup>.

Arbitration provides resolution by an expert chosen, or at least accepted, by both parties as experienced in the subject matter of their dispute, confidentiality and a fixed hearing free from the law's delays not least because the parties are not jostling for their day in court in the same list with other litigants.

It might be thought that the option of recourse by consent to a system of arbitration to resolve financial and other issues following pronouncement of a dissolution would have received judicial welcome and state recognition in lock step with the exponential growth in marital breakdown over the last 50 years.

The contrary is the case. Historically, English family law jealously protected its monopoly of adjudication over all aspects of family breakdown.

But since 1980 an apparent judicial refusal to recognise and enforce out-of-court settlement has mutated to approval of agreements achieved in fair and open negotiation. The next step was for the outcome of an agreement to arbitrate to be treated with equal respect. Since 2012, parties to financial disputes arising out of the dissolution of the marriage and have the effective option of professional arbitration. A children scheme has been available since 2016. This paper traces the development in law and in practice of both systems.

The Children and Families Act 2014 s 10 requires parties to family proceedings concerning their finances or children to attend a mediation information and assessment meeting. The 2010 revision of the Family Proceedings Rules which govern the exercise of jurisdiction of the family courts empower judges to encourage and even direct

the parties to consider alternative dispute resolution (not otherwise defined).

Arbitration has not been the subject of specific statutory or procedural direction. The new family arbitration system has been created by the initiative of family law academics and practitioners astute to seize the opportunity provided by a change of judicial direction towards agreements in family law litigation.

Although the result is a new system of family dispute resolution, it is grafted onto and preserves the judicial doctrine that the jurisdiction of the court cannot be ousted. Family law arbitration is a hybrid distinct in many aspects from mainstream civil arbitration. Those differences reflect its twin parentage born of an increasing judicial endorsement and encouragement of the role of agreement in family litigation and the autonomous construction and development of the scheme including its rules and training by family lawyers.

## Ousting the Jurisdiction of the Court: Re-visiting a Mantra

Taken as a whole, the provisions of the 1996 Arbitration Act and its predecessors reflect the values and needs of a mercantile community whose goals are: summary decision, enforcement of trade customs and discreet resolution. Absent misconduct by the arbitrator, the only escape route for the loser is an appeal on a point of law – unless, as the Act allows, the parties agree to exclude any appeal.

Moreover, an agreement to arbitrate is a contract. Civil Arbitration, in essence, is an exercise in autonomous resolution of disputes implementing a binding agreement between the parties to submit themselves to the decision of the arbitrator. The parties elect the system of law to be applied and may agree excluding appeal even on a point of law.

All these essential elements of civil arbitration have long been held inconsistent with the jurisdiction of the family court, a proposition tested and confirmed in the leading case of *Hyman*<sup>2</sup> in 1929. In that case the wife, who had covenanted with her husband to receive a fixed and relatively modest sum of maintenance following the breakdown of the marriage on his adultery, applied in the matrimonial jurisdiction for a court order. The husband argued that the covenant shut her out from relief, a

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<sup>1</sup> With the anomalous exception of Israel. But nearly all States recognising Sharia law now require some form of registration of a talaq with the state or by a state recognised authority.

<sup>2</sup> *Hyman v Hyman* [1929] AC 601.

submission forcefully rejected by the House of Lords.

*The parties to a marriage cannot lawfully make an agreement either not to invoke the jurisdiction or to control the powers of the court where jurisdiction is invoked. Such an agreement is contrary to public policy: per Lord Hailsham in Hyman.*

Why not? Because divorce, like marriage, is not in the European and English tradition a private contractual act as it was in Roman law and essentially remains in the Jewish and Islamic legal traditions. The language of divorce is the language of the church: petitioner, prayer for relief. The state intervenes to protect a weaker party, the property lacking wife (who could not own property in her own right prior to 1882), or the unsupported child from refusal to support or an unfair bargain. Further, the State had an interest in compelling a husband to provide further support for a destitute wife who might otherwise seek release at the expense of the taxpayer.

The Maintenance Agreements Act 1957 s 1 (see now ss 49 – 51 of the Matrimonial Causes Act 1973) removed the public interest sting from financial arrangements made on the breakdown of marriage by providing that only a provision restricting application to the court would void the substantive content being recognised as binding upon the parties.

But *Hyman* continued to exercise its long and intimidating reach. Eight decades later, the decision was relied upon by Mr. Justice Jonathan Baker in acceding to a joint application to adjourn the proceedings before him to enable the parties to refer the entirety of their matrimonial disputes to the resolution of the New York Beth Din on the modified terms inserted by the Court that its decision would be non-binding between them and subject to his review. *AI v MT*, 2013<sup>3</sup>.

When the parties reported back the comprehensive decision of the rabbinical court relating to both children and finances, Baker J approved a consent order in like terms and noted in a careful explanatory judgment that while they had been away the climate of judicial and professional opinion had shifted. Arbitration was consistent with the overriding modern objective in all civil proceedings to decide with dispatch and economy, the vesting of primary responsibility for decisions regarding children in their parents exemplified by the No Order principle and awareness of initial stages of preparation of the IFLA financial arbitration scheme.

*AI v MT* stands as a case on the cusp of change. Several strands can be identified in the development of the function of a properly achieved agreement outcome in family litigation. High rates of family and relationship breakdown confront an increasingly underfunded judicial system and government unwilling to provide resources to the court direct order the parties by way of legal aid. But there are wider judicial and social trends in play which include:

Recognition of the need to distinguish between agreements fairly arrived at between parties possessing (to adapt a phrase from the ECHR terminology) *equality of arms* and those tainted by unfairness or abuse of a dominant bargaining position by emotional or other coercion, inequality of bargaining power or inadequate disclosure;

Social and cultural change subverting any automatic assumption of imbalance of financial or other power between husband and wife which correlated with acknowledgement of and increasing insistence within society on the right to autonomy in the making of their own decisions in all aspects of their personal life;

Less overtly spelled-out, but of critical importance, development of an analytical framework that could accommodate these strands within the overriding jurisdiction of the Court, albeit kept in reserve.

*Edgar v Edgar*, 1980,<sup>4</sup> established that an agreement to settle financial claims on the breakdown of a marriage with a negotiated agreement made at the kitchen table or between lawyers (preferably via the latter) and obtained without coercion or undue influence would be likely to be upheld on summary application to dismiss the dissatisfied party's later application to prosecute ancillary relief proceedings. Alternatively, in the exercise of its Matrimonial Cause Act 1973 s25 discretion, the Court might factor in the agreement in discount of the award it might otherwise have made.

It is a curious fact that the second option had been suggested only to remain half hidden and scarcely recognised by the profession in *Hyman* itself - overshadowed perhaps by attention paid to the primary proposition that the jurisdiction of the court could not be ousted. Lord Hailsham was explicit that the fact and terms of the covenant or other agreement might be a highly relevant consideration in subsequent determination by the Court.

*Edgar* became the source of a steady stream of litigation exploring and developing the flexible parameters to be applied in considering the impact of an agreement in the breakdown of the marriage, whether as a complete shield or diminishing factor.

But what was the effect of the device widely accepted in other jurisdictions to anticipate possible breakdown by negotiating an agreement in anticipation of the marriage itself?

Initial attempts to rely on an ante nuptial contract, even where executed in accordance with the forms and safeguards of a jurisdiction relevant to the parties met with initial caution. In *Macleod v Macleod*, 2008<sup>5</sup>, (concerning a post nuptial deed executed in the Isle of Man varying an

<sup>3</sup> [2013] EWHC 100 (Fam).

<sup>4</sup> [1980] 1 WLR 1410, CA.

<sup>5</sup> [2008] UKPC 64.

ante-nuptial agreement on the breakdown of the parties' marriage) the Privy Council upheld the rule that ante-nuptial agreements remained contrary to public policy and non-binding, any change being a matter for Parliament. But the statutory acceptance of separation agreements rendered the prohibition on post-nuptial settlements anomalous.

The issue was revisited by the Supreme Court in *Radmacher v Granatino*, 2010<sup>6</sup>. The wife, heiress to a £100 million German family fortune, suggested and her future husband agreed to enter into an ante-nuptial agreement drafted in Düsseldorf four months before the marriage. The agreement waived any entitlement to support by either party against the other in respect of the marriage to be celebrated in London where they intended to set up their family home.

Baron J nonetheless awarded the husband £5.560 million to pay off debts and including £2.5m to enable him to purchase property of a suitable standard to enjoy contact with the children of the family. The wife appealed her partial win in the Court of Appeal, restricting the housing fund to the attainment of the children's majority.

By a majority (Lady Hale, the only member of the Court with experience as a family judge, dissenting), the Supreme Court struck out the provisions in favour of the husband (and father) holding him to his bargain.

The importance of the decision, going beyond the narrow issue, is the emphasis placed by majority of the Court on two matters: first, that the question whether to enforce the agreement was a matter of fairness for the court to decide uncluttered by the doctrine of ousting the jurisdiction of the court and, secondly, the emphasis on respect for the autonomy of parties making their own agreement.

Clear recognition of these two principles, I suggest, is the foundation of the modern approach to arbitration. Once an agreement, including an agreement to arbitrate, is detached from the chains of the doctrine of ousting the jurisdiction of the court, it became possible to construct a rational and modern approach.

As Mostyn J observed in *DB v DLJ* (below), in ordinary civil arbitration under the Act of 1996 the award operates as a form of *res judicata*. In family litigation by contrast, the arbitration and its outcome is the performance of an agreement capable of being respected if it is fair and just. The fact of agreement becomes the dominant or magnetic factor that entitles the Court to exercise its jurisdiction by refusing to ignore the parties' performance of their previous bargain.

Since an English Court can only reasonably be expected to grapple with its own law consistently or fairly, a family arbitration will necessarily be conducted under English law, whether that is the provisions and interpretation of sections 22 – 25 of the Matrimonial Causes 1973, the Children Act 1989 or other relevant statute. Since the jurisdiction of the

Court is being anticipated and not superseded, the right to appeal on a point of law must remain. Provisions to this effect are set out in the Rules of both the Financial and Children Schemes and drawn to the parties' attention in the prescribed originating applications.

Family law arbitration has been implemented with direct statutory or judicial approval in a number of jurisdictions sharing the English legal tradition in response to similar trends discussed above.

Australia led the way in 2001 by amending Family Law Regulations allowing for registration and thus enforcement of arbitration. As His Honour Judge Cryan reports in his recent Lecture, *Arbitration – The First Five Years and its Future*, given at City University on 30 March 2017<sup>7</sup>, take up and professional acceptance has been slow.

The Ontario Family Statute Law Amendment Act 2006 amended that Canadian Province's Arbitration Act 1991 with effect from 2007. The Act and Regulations set up a framework of arbitration integrated with the judicial system by requiring prescribed training for arbitrators and facilitates safeguarding checks through the Court welfare reporting system. As will be seen, the English solution is not so systematically integrated with the family justice system

### **Building the IFLA Scheme**

In 2004, Dr Frances Burton, then a lecturer in Family Law at the University of the West of England, proposed that the Centre for Child and Family Law Reform, associated with City University, should co-ordinate the development of arbitration by an alliance of academics and practitioners rather than wait on Government reform.

A working group was constituted under the aegis of the Chartered Institute of Arbitrators with membership drawn from the Family Law Bar Association, Resolution (the main association of solicitors practising family law) to draft a financial arbitration scheme. The working group is now established as IFLA – the Institute of Family Law Arbitrators, a not for profit organisation, the founders now integrated as stakeholders.

The initial framework received considerable input from two recently retired Judges of the Family Division of the Court, Sir Hugh Bennett and Sir Peter Singer, both of whom have extensive experience of financial cases. Training courses were provided by experienced family practitioners in association with the Chartered Institute of Arbitration.

It is a distinct feature of the IFLA schemes, both in respect of money and children that they were developed with no direct government input. The arbitration scheme was constructed within the profession in an astute and confident expectation that in the light of the development of the law and the approach of the judiciary it would receive approval. That enabled preparation of the training

<sup>6</sup> [2010] UKSC 427.

<sup>7</sup> Available on the City Law School London website, <https://www.city.ac.uk/events/2017/march/judge-cryan-family-arbitration-lecture>.

and other provisions free of the constraint of waiting for Parliamentary time or regulatory approval. It further enables freedom to modify, extend and develop the provisions and scope of both schemes without bureaucratic delay.

### The scope of the IFLA Arbitration Schemes

The Financial Scheme was launched in February 2012. The children scheme was launched in July 2016.

The financial scheme is governed by rules currently in their 5<sup>th</sup> Edition. The parallel set of rules for the Children Scheme is currently in its 1st edition, issued in final form in November 2016.

Training and certification is carried out exclusively by IFLA and is open to experienced practitioners in family law and retired members of the judiciary.

Arbitrations are commenced by prescribed forms signed by the parties. The combined effect of the Rules and relevant Form is to stipulate, *inter-alia*, that determination is in accordance with the law of England and Wales. By signing the Arb1 application form the parties declare their acknowledgement that they are entering into a binding agreement within the meaning of section 6 of the Arbitration Act 1996 upon which the other may rely seek a stay of court proceedings commenced Both Schemes' Application Forms conclude with a declaration thus:

**Arbitration is a process whose outcome is generally final. There are very limited bases for raising a challenge or appeal, and it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the award.**

The Financial Scheme is available to resolve financial or property disputes arising on the breakdown of a marriage, claims for financial relief following an overseas divorce under the Matrimonial and Family Proceedings Act 1984 s 12, as well as cohabitation property claims under the Trust of Land and Appointment of Trustees Act 1996, ('TOLATA'), financial provision under the Civil Partnership Act 2004, cases against an estate for the provision of dependants under the Inheritance (Provision for Family and Dependants) Act 1975, provision for children of cohabitants under Schedule 1 of the Children 1989. It is not available to deal with issues of bankruptcy or insolvency.

Considerable discussion took place to delimit the scope of the Children Scheme with the aim of launching a system that did not encroach on areas the judiciary might consider over ambitious or which might encroach on judicial liaison with foreign jurisdictions. Thus the Scheme provides for resolution of disputes between parents or other holders of parental responsibility relating to the exercise of parental responsibility, present or future welfare of the child concerned but excluding:

(i) Applications for the return of the child placed overseas whether under the inherent jurisdiction of the

High Court or within the 1980 Hague Convention

(ii) Applications for permanent or temporary removal of the child from the jurisdiction (to include disputes relating to the principle or details of an overseas holiday with one parent)

(iii) Issues relating to the authorisation of non-routine medical treatment which may be life changing or life threatening

(iv) Any case where a party lacks capacity under the Mental Capacity Act 2005.

### Safeguarding

Safeguarding was the focus of considerable concern in fine tuning the Children Scheme. Two aspects of safeguarding present themselves: first, safety (physical and emotional) for a vulnerable party within the process, either at the hearing or in its immediate aftermath; secondly, a keen apprehension of the risk of making an order, such as allowing unrestricted contact between one parent and child, which may turn out to have underestimated the danger he or she in fact presents, with potentially catastrophic consequences.

There is no satisfactory answer to the second problem in particular in any process of making a decision regarding a child. In the Court process, the tribunal has the assistance, of varying quality, of safety procedures in the hands of court staff and assessment by professionals such as CAF/CASS, the national child welfare reporting system.

In some jurisdictions, such as Ontario, the court makes available its own assessment procedures before releasing the case under court approval to arbitration. In the current financial climate there is no realistic prospect of obtaining such assistance. Further, as outlined, the IFLA Schemes are independent of the Court.

The agreed solution, reached after anxious consultation with lawyers representing children in particular, is recorded in the rules of the children scheme and form of application which combine to provide: –

A boxed and bold heading to the Rules recording that the safety and welfare of children is of the utmost importance;

Article 17 which comprehensively imposes a duty on each party to provide accurate information regarding safeguarding and protection. Applicants are required to annex their personal Basic Disclosure document readily obtainable from Disclosure Scotland which provides data similar to the English Disclosure and Barring dataset but omitting spent convictions.

Spelling out the duty on the arbitrator to keep safeguarding issues in mind, including a duty to report privately if necessary any concerns which arise during the course of the arbitration process;

### The IFLA Schemes and the Court

Although the Arbitration is freestanding and recorded

as binding between the parties, the law and procedure of ancillary relief makes it almost inevitable that the parties will involve the court to the limited extent, at least obtaining a Court consent order. A dismissal by the court, exercising however cursorily its powers under section 25, is the only secure mechanism to ensure finality from the threat, however speculative, of a future claim. Further, only the court has power to direct implementation by Pension Trustees of a variation of pension entitlement. The Rules accordingly provide that the parties are agreed to follow through a direction to apply to the court for such implementation as the arbitrator deems necessary.

There is no such necessary linkage in the case of a 'determination', the preferred usage to 'Award' in the Children Scheme. Indeed, the no order principle embodied in section 1 of the Children Act 1989 direct parties to consider resolving their disputes privately.

### Arbitration and the Court

The Financial Scheme has received judicial approval in two cases to date. I have referred above to *AI v MT*<sup>8</sup>, the curtain raiser case in which Baker's J's initially cautious approach was modified by an acceptance of the terms proposed and an express welcome to then incomplete work on the money arbitration scheme.

In *S v S*<sup>9</sup>, the President of the Family Division, Sir James Munby, approved a Consent Order jointly submitted to give effect to an Arbitrator's award under the IFLA financial remedy scheme. Munby P surveyed the modern authorities, albeit briefly in each case, to extract a unifying principle that a reasoned award would be likely to attract judicial approval *save in the rarest of cases* – see paragraph 21 of the judgment. No other definition is offered of what will detract from the inclination to make an Order in the terms of, or similar to, the Award.

Sir James further suggested that where one party sought to resile from the award, the (more) satisfied party should issue a summons to show cause why an Order should not be made and be entitled to a summary hearing as in *Xhydias*<sup>10</sup>, 1999.

These proposals are now embodied in a 2 Practice Directions, *S v S (Arbitral Award: Approval) (Practice Note) 2014* and *Practice Guidance (Family Court: Interface with Arbitration) 2016*<sup>11</sup>.

In *DB v DJ*, 2016<sup>12</sup> Mr Justice Mostyn was confronted with the more difficult task of an opposed application following a concluded arbitration (also conducted by Gavin Smith), the wife complaining that the validity of the Award was vitiated by a mistake as to the value of a property allocated to her).

Mostyn J carefully considered and contrasted the

differences between a pure arbitration under the 1996 Act and within family proceedings. Mostyn J expressly approved the decision of the President in *S v S* (above) and observed that the Court appears to be indicating that it would be more difficult for a party to resile from an arbitral Award than from negotiated agreement. Mostyn J opined that if that appeared to suggest a challenge on the ground of a vitiating mistake or supervening event was thus excluded, that might go too far. I respectfully suggest that Mostyn J's doubts are theoretical and unlikely to have been in the contemplation of the court in *S v S*.

Both decisions affirm the principle of judicial as well as party autonomy. In both cases, no mention is made of the purist right to appeal on a point of law.

To date, there has been no consideration of the effect on a Children Scheme arbitration brought to the subsequent attention of the Court. Analysis suggests that within the principle of respect for autonomy and the arbitration process itself, it is nevertheless likely that the court, conscious of its duty under section 1 of the Act, may be by a margin more inclined to substitute its own judgement for that of the Arbitrator where welfare strongly so demands.

The take up of the IFLA arbitration scheme is a little disappointing to date. 160 or so qualified financial Arbitrators have dealt with about 170 cases. I understand that to date only a single Children Scheme case has been determined. But increasing delays and cuts to the fabric of the Court system suggest likely growth.

The two schemes overlap. Many Arbitrators are trained and certified for both schemes. I believe that the facility to combine in one application taking a holistic view of children and money issues, instead of the arbitrary division imposed by judicial specialism and court listing, presents an opportunity not yet developed for arbitration under the IFLA schemes.

It is unlikely that arbitration will displace the Court process in the majority of cases. But it is equally likely, in my opinion, that take-up will accelerate so that the advantages of speed, fixed costs confidentiality and client control of the issues will prove increasingly attractive to professionals and their clients.

Lastly, while I have focused on the IFLA scheme, the rationale for arbitration and the observations of both the President, Sir James Munby, and Mr Justice Mostyn suggest that an arbitration conducted outside the strict confines of IFLA is equally entitled to be accorded judicial acceptance if put to the test, provided always the essential ingredients of procedural fairness and application of English law are identified throughout the process. If that is right, the door of the Court is also open for recognition a properly conducted resolution via Sharia Courts or the Beth Din or by a third party chosen by the parties outside IFLA certification.

<sup>8</sup> n3 above.

<sup>9</sup> [2014] EWHC Fam 7.

<sup>10</sup> A decision whose true ratio is not easy to grasp. The decision was doubted in some aspects by Ward LJ in *Soulsbury* [2007] EWCA Civ 969.

<sup>11</sup> [2014] 1 WLR 2299 and [2016] 1 WLR 59.

<sup>12</sup> [2016] EWHC 324 (Fam).

# Enforcement of financial orders in the UAE

Alexandra Tribe\* and Hassan Elhais\*\*

There can be difficulties with enforcing foreign orders in the UAE because to enforce foreign orders, certain criteria must be met<sup>1</sup>. The enforcement of a foreign order initially requires the commencement of an ‘attestation case’, this is loosely an application for a mirror order. This article discusses four aspects of enforcement in the UAE.

1. Enforcement in the UAE: the law
2. Enforcement of interim court orders
3. Using the DIFC courts to enforce foreign court orders
4. Alternatives to the court process

## 1. Enforcement in the UAE: the law

In general, foreign judgements are executed through the UAE courts in accordance with Article 235 of UAE Federal Law number 11 of 1992 (Civil Procedure Law). Foreign Judgments can be executed in UAE courts if the special conditions set out in Article 235 are fulfilled.

The Article 235 criteria are as follows:

- The Dubai courts did not have jurisdiction to deal with the original litigation
- Both parties were given notice of the hearing and attended or were represented
- That the foreign court had the jurisdiction to make the orders that it did
- The order does not conflict with orders previously made by the Dubai courts, and the orders do not breach public order or morals

## 2. Enforcement of interim court orders in the UAE

In 2005, the Dubai Court of Cassation made an exceptional judgment in the case no. 175/2005.

Within this judgment, the UAE Court determined that

they may accept an application for the enforcement of a temporary foreign court order or an interim judgment.

For such enforcement of a temporary or interim order, the party seeking enforcement should provide evidence that such order has not been changed by a higher court and that circumstances in which the order was made remained unchanged.

## How UAE court enforcement process works

When a party applies to a UAE courts for enforcement of a foreign judgement, the other party must be notified and given time to appoint legal representation and respond to the application.

The response to be submitted by the other party, shall initially just include submissions as to whether the requirements of Article 235 of UAE Civil Procedure Law have been met. It is not possible to include submissions about the subject or nature of the enforcement, unless in relation to the final criterion of Article 235 (that the subject or nature of the enforcement must not be against UAE public policy or morals).

The UAE courts have discretionary powers to accept or reject an application for enforcement of a foreign judgement depending whether the conditions set out in Article 235 are met.

The lowest court in the UAE court system is the court of First Instance. Once a decision is made by the court of First instance, both parties shall have the right to appeal the judgment to the Court of Appeal within a period of 1 month from the date on which the Court of First instance made the initial ruling.

Either party may appeal the judgment issued by the Court of Appeal, through an application to the Court of Cassation within a period of 2 months from the date on

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<sup>1</sup> For the criteria, see below at 1. Enforcement in the UAE: the Law.

which the ruling was issued by the Court of Appeal.

### **3. Exception to these rules: Using the DIFC Courts to Enforce Foreign Court Orders**

An important feature of the legal system in Dubai is that it operates from two courts; the Dubai Courts established pursuant to Dubai Law No. 3 of 1992, and the courts of the Dubai International Financial Centre ('the DIFC Courts') established through the amended Dubai Law No. 12 of 2004. The DIFC Courts are an independent English language common law judiciary, based in the Dubai International Financial Centre (DIFC) with jurisdiction governing civil and commercial disputes nationally, regionally and worldwide. The DIFC Courts began operations in 2006.

The laws of Dubai and the DIFC permit the enforcement of foreign judgments through the DIFC Courts in accordance with the Rules of the DIFC Courts, provided certain conditions are met.

Pursuant to Article 7(6) of Dubai Law No. 12 of 2004 and Article 24(l)(a) of the DIFC Court Law (DIFC Law No. 10 of 2004,) the DIFC Courts may have jurisdiction to ratify a judgment of a recognized foreign court for the purposes of any subsequent application for enforcement in the courts of Dubai.

A foreign order enforced through the DIFC Court, then effectively becomes a DIFC Court judgment, and DIFC Court judgments are automatically enforceable in the onshore courts of Dubai through the mutual enforcement mechanism which exists between the two court systems.

In a recent decision, the DIFC Court of Appeal handed down a judgment in the case of *DNB Bank ASA v Gulf Eyadah Corporation and Gulf Navigation Holdings PJSC* stating that parties may enforce foreign judgments in the DIFC Courts (even in circumstances where the judgment debtor has no presence or assets in, or connection with, the DIFC), and may then take the resulting DIFC Court judgment to the Dubai Courts for enforcement.

This recent ruling issued by DIFC Court of Appeal potentially opens the gateway to apply to the DIFC Courts for enforcement of the foreign orders even where the parties involved have no relationship with DIFC.

However these 'open doors' caused concern and on 9th June 2016, the "Judicial Tribunal for the Dubai Courts and DIFC Courts" was established. The specific purpose of this Tribunal is stated as being to resolve any conflict of jurisdiction that might arise between the DIFC courts and the Dubai courts. Further developments and precedents are eagerly awaited by practitioners in the UAE.

### **Execution once a mirror order is granted**

Once the attestation case has been carried out, the resulting mirror order should be enforced through an

'execution case'. The UAE courts have very wide powers of enforcement for example:

1. Attachment of earnings: the judge may make an order that the employer disclose details of the husband's salary and bonuses, then make an order that the maintenance owed is paid from the salary.
2. Enquiry of banks, or traffic and land departments: the judge can order an enquiry to determine whether, for example, a respondent has funds in their bank account to pay a lump sum, or a car or property that could be sold to meet an outstanding debt.
3. Freezing bank accounts: an order may be made to freeze a bank account if the judge believes that the respondent is likely to dissipate assets to avoid meeting their obligations under the original order.
4. Seizing goods: to ensure the repayment of a debt, a judge may order the seizure of property or other goods. The executive judge may transfer the matter to the executive judge of another court, in whose jurisdiction the property lies (for example in another Emirate).
5. Imprisonment: this is likely if the respondent shows a wilful refusal to pay despite being able to afford to.
6. Travel ban: the judge may make an order preventing the respondent from leaving the country.

### **4. Alternatives: Preventative steps to ensure enforcement in the UAE**

If both parties to a foreign court order (or prospective court order) are committed to ensuring its future enforceability in the UAE, they can cooperate together to enter in an agreement in the UAE in similar terms. The agreement must be succinct and in plain language, as it will be translated in to enforcement.

The parties would then sign the agreement before a competent authority such as Notary Public in the UAE, or a Judge of the family court.

The advantages of entering in to such an agreement are as follows:

- a. The agreement is capable of enforcement through the UAE courts without the need to address the Article 235 criteria.
- b. It can be kept for years for future enforcement as required.
- c. It saves time and cost.
- d. There is no need for the foreign court order to be translated into Arabic and legalised in the country of origin.

# **International Family Law, Policy and Practice**

## **Submission of articles for publication in the journal *International Family Law , Policy and Practice***

The Editor and Editorial Board welcome the submission of articles from academics and practitioners for consideration for publication. All submissions are peer reviewed and should be original contributions, not already published or under consideration for publication elsewhere: authors should confirm this on submission (although material prepared for the Centre's own conferences and seminars may be accepted in suitably edited versions). Any guidance required may be obtained by contacting the Editor, (Frances Burton, at [frb@frburton.com](mailto:frb@frburton.com)) before submission.

Each issue of *International Family Law, Policy and Practice* will be published on line and will be accessible through a link on the Centre's website. There will normally be three issues per annum, roughly coinciding with the standard legal and academic vacations (Spring: March-May depending on the date of Easter; Summer: August-September; and Winter: December-January). Copy deadlines will normally be three months prior to each issue. Certain issues may also be published in hard copy, for example, occasionally hard copy issues may be produced for commemorative purposes, such as to provide a collection of articles based on key conference papers in bound hard copy, but normally the policy is that provision of the online version only will enable the contents to be disseminated as widely as possible at least cost.

## **Copyright**

The author is responsible for all copyright clearance and this should be confirmed on submission.

## **Submission format**

Material should be supplied electronically, but in some cases where an article is more complex than usual a print out may be requested which should be mailed to the Editor, Frances Burton, at the production address to be supplied in each case NOT to the Centre as this may cause delay. If such a print out is required it should match the electronic version submitted EXACTLY, i.e. it should be printed off only when the electronic version is ready to be sent. Electronic submission should be by email attachment, which should be labelled clearly, giving the author's name and the article title. This should be repeated identically in the subject line of the email to which the article is attached. The document should be saved in PC compatible (".doc") format. Macintosh material should be submitted already converted for PC compatibility.

## **Author's details within the article**

The journal follows the widely used academic format whereby the author's name should appear in the heading after the article title with an asterisk. The author's position and affiliation should then appear next to the asterisk at the first footnote at the bottom of the first page of the text. Email address(es) for receipt of proofs should be given separately in the body of the email to which the submitted article is an attachment. Please do not send this information separately.

## **Peer review, proofs and offprints**

Where there are multiple authors peer reviews and proofs will be sent to the first named author only unless an alternative designated author's name is supplied in the email submitting the article. Any proofs will be supplied by email only, but the editor normally assumes that the final version submitted after any amendments suggested by the peer review has already been proof read by the author(s) and is in final form. It will be the first named or designated author's responsibility to liaise with any co-author(s) with regard to all corrections, amendments and additions to the final version of the article which is submitted for typesetting; ALL such corrections must be made once only at that

stage and submitted by the requested deadline. Multiple proof corrections and late additional material MUCH increase the cost of production and will only (rarely and for good reason) be accepted at the discretion of the Editor. Upon any publication in hard copy each author will be sent a copy of that issue. Any offprints will be made available by arrangement. Where publication is on line only, authors will be expected to download copies of the journal or of individual articles required (including their own) directly from the journal portal. Payment will not at present be made for articles submitted, but this will be reviewed at a later date.

## House style guide

The house style adopted for *International Family Law, Policy and Practice* substantially follows that with which academic and many practitioner authors writing for a core range of journals will be familiar. For this reason *International Family Law, Policy and Practice* has adopted the most widely used conventions.

## Tables/diagrams and similar

These are discouraged but if used should be provided electronically in a separate file from the text of the article submitted and it should be clearly indicated in the covering email where in the article such an item should appear.

## Headings

Other than the main title of the article, only headings which do substantially add to clarity of the text should be used, and their relative importance should be clearly indicated. Not more than three levels of headings should normally be used, employing larger and smaller size fonts and italics in that order.

## Quotations

Quotations should be indicated by single quotation marks, with double quotation marks for quotes within quotes. Where a quotation is longer than five or six lines it should be indented as a separate paragraph, with a line space above and below.

All quotations should be cited exactly as in the original and should not be converted to *International Family Law, Policy and Practice* house style. The source of the quotation should be given in a footnote, which should include a page reference where appropriate, alternatively the full library reference should be included.

## Cross-references (including in footnotes)

English terms (eg above/below) should be used rather than Latin (i.e. it is preferable NOT to use 'supra/infra' or 'ante/post' and similar terms where there is a suitable English alternative).

Cross-referencing should be kept to a minimum, and should be included as follows in the footnotes:

Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

Full case citations on each occasion, rather than cross-reference to an earlier footnote, are preferred. Please do not use End Notes (which impede reading and will have to be converted to footnotes by the typesetter) but footnotes only.

## **Latin phrases and other non-English expressions**

These should always be italicised unless they are so common that they have become wholly absorbed into everyday language, such as *bona fide*, *i.e.*, *c.f.*, *ibid*, *et seq*, *op cit*, etc.

## **Abbreviations**

If abbreviations are used they must be consistent. Long titles should be cited in full initially, followed by the abbreviation in brackets and double quotation marks, following which the abbreviation can then be used throughout.

Full points should not be used in abbreviations. Abbreviations should always be used for certain well known entities e.g. UK, USA, UN. Abbreviations which may not be familiar to overseas readers e.g. 'PRFD' for Principal Registry of the Family Division of the High Court of Justice, should be written out in full at first mention.

## **Use of capital letters**

Capital letters should be kept to a minimum, and should be used only when referring to a specific body, organisation or office. Statutes should always have capital letters eg Act, Bill, Convention, Schedule, Article.

Even well known Conventions should be given the full title when first mentioned, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 may then be abbreviated to the European Convention. The United Nations Convention on the Rights of the Child should be referred to in full when first mentioned and may be abbreviated to UNCRC thereafter.

## **Spellings**

Words using 's' spellings should be used in preference to the 'z' versions.

## **Full points**

Full points should not be used in abbreviations.

## **Dates**

These should follow the usual legal publishers' format:

1 May 2010

2010–2011 (not 2010-11)

## **Page references**

These should be cited in full:

pp 100–102 (not pp 100–2)

## **Numbers**

Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

## **Cases**

The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first

mentioned but may then be referred to as *Livesey* or *Livesey v Jenkins*. Where reference is to a particular page, the reference should be followed by a comma and 'at p 426'.

For English cases the citation should follow the hierarchy of reports accepted in court (in order of preference):

- The official law reports (AC, Ch, Fam, QBD); WLR; FLR; All ER
- For ECHR cases the citation should be (in order of preference) EHRR, FLR, other.
- Judgments of the Court of Justice of the European Communities should be cited by reference to the European Court Reports (ECR)

Other law reports have their own rules which should be followed as far as possible.

## **Titles of Judges**

English judges should be referred to as eg Bodey J (not 'Bodey', still less 'Justice Bodey' though Mr Justice Bodey is permissible), Ward, LJ, Wall, P; Supreme Court Justices should be given their full titles throughout, e.g. Baroness Hale of Richmond, though Baroness Hale is permissible on a second or subsequent reference, and in connection with Supreme Court judgments Lady Hale is used when other members of that court are referred to as Lord Phillips, Lord Clarke etc. Judges in other jurisdictions must be given their correct titles for that jurisdiction.

## **Legislation**

References should be set out in full in the text:

- Schedule 1 to the Children Act 1989
- rule 4.1 of the Family Proceedings Rules 1991
- Article 8 of the European Convention for the Protection of Human Rights 1950 (European Convention)

and in abbreviated form in the footnotes, where the statute usually comes first and the precise reference to section, Schedule etc follows, e.g.

- Children Act 1989, Sch 1
- Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)
- Art 8 of the European Convention

'Act' and 'Bill' should always have initial capitals.

## **Command papers**

The full title should be italicised and cited, as follows:

- (Title) Cm 1000 (20--)
- NB Authors should check the precise citation of such papers the style of reference of which varies according to year of publication, and similarly with references to Hansard for Parliamentary material.

Contributions in edited books should be cited as eg J Bloggs, 'Chapter title' (unitalicised and enclosed in single quotation marks) in J Doe and K Doe (eds) 'Book title' (Oxbridge University Press, 2010) followed by a comma and 'at p 123'.

## **Journals**

Article titles, like the titles of contributors to edited books, should be in single quotation marks and not italicised. Common abbreviations of journals should be used

whenever possible, e.g.

- J. Bloggs and J. Doe 'Title' [2010] Fam Law 200

However where the full name of a journal is used it should always be italicised.