Journal of Family Law and Practice

Volume 3, Number 2 • Winter 2012

The Journal of the Centre for
Family Law and Practice
London Metropolitan University

Journal of Family Law and Practice
Volume 3, Number 2 • Winter 2012

CONTENTS

Editor's Message

Our second and final issue of 2012 continues to look forward to the Centre's 2nd International Conference in July 2013.

Sir Peter Singer continues our previous examination of the potential use of Family Arbitration with an account of how an arbitral agreement made in a cultural and religious context can be recognised in English Divorce Law when the parties' autonomous private ordering is approved by the Court - in accordance with the overriding discretion of the Family Division of the High Court which is able to approve such agreements, subject to natural justice and other safeguards. Sir Peter will be the Arbitrator in the Conference's mock IFLA Family Arbitration hearing session.

Anne-Marie Hutchinson provides a welcome overview and update on the topical subject of Forced Marriage, on which the government has indicated that it means to legislate to provide criminal sanctions, following the MOJ consultation on the way forward to continue to improve control of this human rights abuse. Anne-Marie, whose international practice at Dawson Cornwell is well known, will be chairing a session on International Child Abduction at the conference and also giving a paper on international surrogacy, suggesting the need for a multi-lateral convention.

From Spain we have two articles, building on our last issue's examination of the implementation of the 1996 Hague Convention, particularly in British expatriate cases in the various provinces of Spain. This time our writers are from Barcelona and Madrid, the first from Barcelona, focussing on an innovative sanction in international child abduction by the Spanish Supreme Court, and secondly from Madrid, on the way that Spain is using the Hague Convention and Brussels II in international child abduction within the EU Member States. Dr Monica Navarro-Michel, Reader in Civil Law of the University of Barcelona, will be continuing this theme of creative Spanish law in the post-Franco era, speaking at the Centre's 2nd international conference on protection against gender violence under Spanish Law.

A Note from our India correspondents, Malhotra & Malhotra, well known at the Hague and in the international specialist Family Law community, brings news of India's decision to control their burgeoning local surrogacy phenomenon by introducing special visas for foreigners travelling to India for surrogacy. Both Anil and Ranjit Maholtra will again be speaking at the conference in July, Anil on Abduction and Ranjit on the need for a regulatory law to supplement the new visa regulation on surrogacy in India, which is likely to echo the thoughts of Anne-Marie Hutchinson's international experience which has inspired her thoughts of the need for the multi-lateral convention on which she will speak.

Dr Lars Mosesson, our public lawyer who has previously looked at the constitutional impact of

other issues in Family Law, has provided a useful insight into the constitutional aspects of the severe cuts in legal aid effected by LASPO 2012. These deep cuts are unfortunately now beginning to bite, as predicted, following their introduction in April 2012. With one or two exceptions, there is little alternative help emerging at present for the now unfunded lay person who needs legal advice on Family Law and cannot afford to pay for it. There are of course further cuts to come, already announced and currently the subject of public consultation.

Our next issue is concerned with the Tromso, Norway, Child Law conference of late January 2013, of which we will be collating a commemorative collection of papers for issue in the summer of 2013, following which we are planning a series of issues in relation to the Centre's 2nd International Conference itself, this time on "Parentage, Equality and Gender".

Our authors and readers will notice that in the interests of our increasingly international group of writers whose articles are published in the journal we have now obtained the assignment of an ISSN number by the British Library, so that writers may now claim credits from the Authors Licensing and Collecting Society in the UK for their contributions: in Europe other credits apply about which those authors affected will be aware.

Frances Burton

Editor, Journal of the Centre for Family Law and Practice

This issue may be cited as (2012) 2 FLP 1, ISSN 2052-6598
online at www.londonmet.ac.uk/flp

An Innovative Transatlantic Interface

How Family Law can accommodate Faith-Based Arbitration: and An Object Lesson in Journalistic Distortion

Sir Peter Singer*

This article builds on a paper presented in March 2013 at the Sixth World Congress on Family Law and Children's Rights, held at Sydney, Australia, appropriately close to the Harbour given that its theme was *Building Bridges – from Principle to Reality*. There I had planned to suggest that there should be a Board of Transnational Mediators established to provide accreditation and support for a standing panel of mediators able to address ongoing problems in resolving cross-border disputes in Family Law: such a panel being open to approaches from individuals or to referral from national courts, and encompassing practitioners of various disciplines such as psychiatrists, psychotherapists, paediatricians, social workers, lawyers and retired judges from a spread of different jurisdictions. However detailed development of this topic will have to be for another day and a different venue as, just on cue, a judgment was handed down in the Family Division of the High Court in London which indicated how useful such a facility would be.

The catalyst for this paper was a case heard by my friend and erstwhile colleague Sir Jonathan Baker (a Family Division High Court judge, one of the 20 at the pinnacle of first instance jurisdiction in England and Wales for family issues of every description) whose published judgment demonstrates something practical, inspirational, innovative and particularly topical in the light of the potential project mentioned above.

The judgment *AI v MT*[1] is online (but otherwise unpublished at the time of writing) at www.bailii.org/ew/cases/EWHC/2013/100.html. It was handed down on 30 January 2013. It was then promptly and woefully misreported in the press by no less august an organ than *The Times* – and unfortunately the same utterly misleading headline and article were reiterated in newspapers in Australia, and no doubt elsewhere, which was unfortunate in view of the subject matter of the case and the innovative nature of a judgment which makes such a sensitive contribution to English family law.

This was in truth not so much a judgment as a narrative and instructive account of the steps taken between them by the judge, the solicitors and counsel who acted in the case, and of course their clients, in order to arrive at a result (which is an object-lesson in how to resolve a potentially messy situation and rescue all participants from it) could have been a far unhappier ending. Together they crafted what is undoubtedly a textbook response to an oft-perceived but rarely resolved clash of cultures and norms: between personal religious beliefs and requirements on the one hand, and the law and the state, and its national domestic laws, on the other.

The facts can be swiftly summarised. The separating couple, still in their twenties, had married in 2006 and had two children: a daughter in 2007 and a son in 2009. They came from well-to-do backgrounds, the husband's in Canada and the wife's in London. They shared devotion to and observance of Orthodox Jewish tenets and traditions. They lived together after their marriage in Israel, and then in 2009 prepared to move, and effected their move, to Canada. The judgment notes that this move necessitated the transportation of no less than 231 boxes of belongings, which is, one supposes, a good basis for two conclusions: their comparative affluence, and that their departure from Israel was to be conclusive. But over the summer of 2009 their relationship fell apart, and the fall-out left the wife and children located in London, and the husband in Toronto.

By the time their affairs first came to Baker J's attention in February 2010 there were four sets of proceedings, some of them in rival jurisdictions. The wife commenced proceedings in England under the Children Act for protection against what she apprehended might be the removal of the children by the husband. He for his part took proceedings in London based on the 1980 Hague International Child Abduction Convention, seeking the return of the children to Canada. She in those proceedings contested his claim that Canada was, or ever had been, the children's habitual residence, and that issue alone might have run up to the Supreme Court given that the younger child, born that summer in England, had never set toe in

* Formerly a Judge of the Family Division of the High Court, now a Family Dispute Resolution Facilitator and Arbitrator, MCIArb, 1 Hare Court, Temple, London EC4Y 7BE. One of a team jointly voted Innovative Lawyer of the Year, Jordan's Family Law Awards 2012.

[1] [2013] EWHC 100 (Fam)

Toronto. There were also contested divorce proceedings in each jurisdiction, no doubt with the usual arid but expensive prospect of forum disputes in both. And, for good measure, in due course the children were made wards of the English court.

So it looked in February 2010, when Baker J first surveyed this minefield, as though the conventional war of attrition was set to rumble on. There was scope, one would have thought, for a couple of years and £1 million worth of legal fees between them (if not each: such cases do happen), at the end of which they might perhaps have reached the less than conclusive point that at least the country of decision-making, England or Canada, had been satisfactorily decided in both jurisdictions.

[In parentheses, theirs was not the worst example of such a case. The story usually goes like this: one party, say the wife, seeks divorce. The husband responds, asserting: we were never validly married (for instance, you were still married to your "previous" husband); and in any event the marriage was invalid for some technical reason; and if we were married I have already divorced you, so this court has no jurisdiction; and anyway you aren't entitled to commence proceedings here as in any event you don't meet the jurisdictional requirements for divorce proceedings. And meantime you (the court) should not make me pay her maintenance pending suit while these issues are undecided (not least because I am heavily in debt and not, as she deliberately falsely fabricates, rich beyond measure); and certainly should not make provision for me to pay her yet more money on top, just so that she can pay her lawyers to enable her on a more or less level playing field to deal with this farrago of complex and obscure irrelevancies. And by the way the children aren't mine… and she is living with another man.

To which she might well retort, amongst other things, that this court should injunct him from rushing pell-mell to judgment in the other jurisdiction; should not recognise the divorce he says he obtained; should require him to submit to DNA testing; and meanwhile should pay me huge amounts of money to maintain me in the style to which I say I have become accustomed; and even huger amounts of money to my lawyers.

Every international family law practitioner knows the sort of case… I have always thought that there must be a place for mediation in situations like that, at an early stage, when the lawyers recognise the problems looming. If the parties could both be helped to understand the trauma which lies ahead, and that they could probably settle the financial aspects more or less on the spot for less than their next two years' irrecoverable costs…? Unfortunately, it is rare that such good sense either overtakes such a couple – happily this was such a rare case, which brings us back to Baker J.]

By the time it first got to him light was dawning for this couple. They had agreed in principle to submit their differences for decision by a Beth Din, a rabbinical court, in New York. What they wanted to know was would the English court play ball and allow the parties to put the Hague proceedings on hold or on ice (since normally under the rules these are not supposed to be adjourned for more than three weeks, and always to be dealt with expeditiously), and to facilitate this dispute resolution procedure?

The judge adopted a cautious approach. What the parties were at that stage proposing was that they would enter into "binding arbitration" with a specified and nominated Rabbi. That, correctly, Baker J rejected as unacceptable in the English law context of post-divorce disputes concerning finance or children. As he put it, that would "flout the principle that the court's jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of children, cannot be ousted by agreement." In other words (as in the law and practice of some jurisdictions: but not for instance in Scotland) the English court as a matter of statutory prescription is required to play a paternalistic role. Judges must guard and protect from the consequences of their own bad judgment or (in some cases) bad advice the weak, (historically, almost by definition, women), but also the disadvantaged or the simply foolish and of course that particularly vulnerable category, children.

However there is also a perceptible trend for the state's paternalistic duty in this regard (some nowadays might even call it nannying) to be less jealously upheld (and certainly less zealously as though the dignity of the court depended upon it) than in days of yore, and for the principles of individual party autonomy to be allowed freer rein, and it was this contemporary principle on which Baker J was able to draw.

This principle of adult autonomy is, incidentally, now an important new influence in the context of a court's approach to the Award of a family arbitrator under the IFLA Scheme[2] now in force in England and Wales, a dispute resolution process which has recently begun to insert itself

[2] The Scheme operated by IFLA, the Institute of Family Law Arbitrators, is the product of a pan-professional grouping of the Chartered Institute of Arbitrators, the Family Law Bar Association and Resolution (formerly the Solicitors Family Law Association). Under the Scheme Rules, experienced and accredited practitioners trained as arbitrators resolve post-breakdown financial disputes by an Award at which they arrive in accordance with and by the application of the domestic family law of England and Wales.

into the interface and apparent conflict between the concepts of the court as gatekeeper and arbiter, in its role to ensure a fair result as well as fair play. As a consequence, in any apparent contest in the mind of the deciding judge, this traditional role of the court now remains in one corner, while across the ring stands the divergent notion underpinning the IFLA Scheme that adult parties should be free to reach their agreements without undue judicial interference, and that the parties should then expect to honour them.

The procedural development realised by Family Arbitration has recently been the subject of a two-part article in the November and December 2012 issues of Jordan's *Family Law*[3], where I deal with this and other issues relating to the innovative IFLA Scheme launched in March 2012. The article can also be accessed on the website http://www.FamilyArbitrator.com. Baker J refers to it at paragraph [21] and, in particular on this autonomy issue, at paragraph [31] of *AI v MT*.

Thus Baker J required to be satisfied about the principles which would be applied by the Beth Din, and once indeed satisfied on the evidence that appropriate principles (in particular in relation to issues relating to children) would be applied, he decided to endorse the parties' proposal to refer their disputes to a process of non-binding arbitration (in the sense that the English court would not automatically be bound by the result) but, "on the basis that the outcome, although likely to carry considerable weight with the court, would not be binding and would not preclude either party from pursuing applications to this court in respect of any of the matters in issue." For the detail of the undertakings and orders he made to reflect that quite complex balancing act, see paragraph [16] of the judgment.

A process that, it had been envisaged, might take a matter of weeks in the event took far longer. It was not until September 2011, some 18 months later, that the New York Beth Din handed down its ruling on the arbitration, and thereafter for some six months the parties engaged in further negotiations which to an extent consensually varied that ruling. The complexities of the agreement may be indicated by the fact, noted by the judge, that the final order runs to some 17 pages and over 4300 words, and covers many minutiae. But that, surely, is fine if that is what the parties want, and agree.

The judge demonstrated very considerable cultural sensitivity. In the course of his judgment he recognised that "it was a profound belief held by both parties, and their respective extended families, that the marriage which had been solemnised in accordance with the tenets of their faith should be dissolved within those tenets."

Furthermore he observed that

> … at a time when there is much comment about the antagonism between the religious and secular elements in society, it was notable that the court was able not only to accommodate the parties' wish to resolve their dispute by reference to their religious authorities, but also buttress that process at crucial stages…

thereby referring to interim steps taken, for instance, to use wardship as a protective mechanism for the children pending the outcome of the arbitration; by making "safe harbour" orders that enabled the mother to travel to New York with one child for the purpose of taking part in the process, and to return; and by giving provisional approval of the final order to facilitate as a pre-condition the grant of a *get*.

So what conclusions can be drawn from a study of this case?

First, it should be noted that at the date of institution of the non-binding arbitral process, in February 2010, the option of selection by the parties of an accredited IFLA arbitrator well versed in Jewish law and practice was not open, as the Scheme did not commence until two years later.

But, that apart, there is much to be learnt from this decision. It underscores parts of the regulatory code in English family law, the Family Procedure Rules 2010, which impose upon the court an obligation to further the overriding objective, that is to deal justly, expeditiously and fairly, in ways that are proportionate and which save expense, by actively managing cases in a way which includes encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate. And if so to encourage and facilitate the use of that procedure. I refer, as did the judge, to rule 1.4 and to Part 3 of the Rules.

The judge was also referred to and cited a passage from a public lecture given in 2008 by the then Archbishop of Canterbury, Dr Rowan Williams. *Entitled Civil and Religious Law in England: a Religious Perspective* it was delivered at a London Mosque to a broad audience, and, although enlightened, received inappropriate criticism, in part as a result of media misrepresentation which succeeded in stirring up something of a furore. (In *that* case such misrepresentation may, in part at least, have been because

[3] [2012] Fam Law 1353 and [2012] Fam Law 1496 respectively.

the language and logic of the Archbishop were expressed in cerebral rather than transparent terms, and it is *possible* that on that occasion the misinterpretation arose from inadequate comprehension on the part of the press, rather than any inattention – rather, perish the thought, than from any irresponsible tub-thumping.)

In it, as quoted by Baker J, the Archbishop said:

> Citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship.

A particular red rag to some insular Bulldog "Brits" was their erroneous belief that the Archbishop was advocating the importation of Sharia family law into our domestic family law: a total misinterpretation of his position.

So in this case we see a beneficial example of cultural relativism, a concept largely decried and despised in other contexts. It may seem a far cry from the Beth Din in New York to forced and underage marriage and betrothal, and to the abhorrent practice of female genital mutilation, but there are interesting parallels and paradoxes to be drawn.

It was in the late 1990s that as a judge I first came across the practice of forced marriage. A young woman brought up and educated in England, of Sikh origin, had been taken to India by her parents with a view to a marriage about which she had not been consulted and to which she did not consent. Her older sister, back in London and estranged from her parents, raised the alarm. Her inventive and innovative lawyers, Anne-Marie Hutchinson and Henry Setright QC, instituted wardship proceedings notwithstanding the fact that they had but indirect contact and that very limited with their client, effectively imprisoned in her family's home village. The story is a fascinating one, and ultimately had a happy ending as the young woman (or rather, adolescent: she was 17) was successfully repatriated. The tale is told in *Re KR (Abduction: forcible removal by parents)*[4].

One immediate reaction came from an ethnically-based association of lawyers, who condemned the intervention of the English court as entirely inappropriate. What, they effectively and more or less in these words demanded to know, was a white middle-class and middle-aged English judge doing, interfering in the cultural practices of another ethnic group? And anyway, forced marriage as a phenomenon simply "did not happen". That, was not however the information that I anecdotally received from my own then 16-year-old daughter, who when I outlined the facts of the case to her as it was progressing and expressed my astonishment at what I was discovering (never before encountered in a professional life spent in family law) responded "Dad! Where have you been? At school we always know when this is going to happen to a fellow student from one of the relevant communities. They get depressed and upset because they know that they are to be taken home to be married, and that their dream of going to university and becoming a doctor or whatever will be smashed to smithereens."

Anyway, it did not take long before religious authorities were falling over each other in the scramble to explain that the practice, far from being acceptable and consistent with their religious principles, was in fact condoned by none of the major world religions.

The point to be made from this is that we should not in the modern world, in the global village, fear to go where angels are not treading. We should not be deterred from combating, and attempting by education, and if necessary by sanction to prevent, practices which trespass on the human rights of others, adult or children, whether suffered individually or within an ethnic, cultural or religious group. Hence my references to the scourges of underage marriage and betrothal, and female genital mutilation, examples only to which one might add forced participation of children (and adults) in war zone atrocities, and servitude and sexual exploitation in all their manifold guises.

But Mr Justice Baker's case of *AI v MT* scores the counterpoint and underlines the concomitant: we should permit, and encourage, sensitively and with suitable cultural understanding and respect, novel endeavours which integrate faith-based traditions and values with our own (that is to say the predominant majority's) legal systems and comfort zones. There in a sentence you have my theme.

In comment on the website of their firm, Manches, James Stewart, who acted for one of the parties in this case, and his partner, Rebecca Carlyon, sagely observed:

> The relationship between civil and religious

[4] [1999] 2 FLR 542.

> tribunals is a sensitive one. The discussions which this case has opened up, together with the huge degree of respect and courtesy afforded to the Beth Din by the court, should not be misconstrued or used to undermine Sharia or any other form of religious law.

But by then Pandora's box was well open and its contents released cat-like out of the bag and into the world. And what did the press make of it?

"High Court opens way to Sharia divorces" thundered that august organ *The Times*, over a picture of the Dome on the Rock in Jerusalem, and the caption **"The Dome of the Rock in Jerusalem: the judgment could lead to acceptance of Sharia divorce".**

The article commenced:

> The prospect of divorce cases being settled by Sharia and religious courts has been opened up by a landmark legal decision.
>
> A Jewish couple have had their divorce settlement under Beth Din, rabbinical law, approved by the High Court. The decision is thought to be the first in British legal history where an English family judge agreed to refer a divorce dispute to a religious court.
>
> Lawyers said that the judgment could have far-reaching consequences and clear the way for other couples to seek a divorce in a religious court.
>
> The decision was welcomed by the Muslim Council of Britain. A spokesman said: 'If it leads to the eventual acceptance of Sharia court divorces, then Muslims will be very encouraged.'

The judgment, of course, had absolutely nothing to do with Sharia, or for that matter any other than Jewish religious law. Moreover it is essential to note the *non sequitur* and that insidious slide which take us from "settling divorce cases" to "seeking a divorce." In no sense did the judge recognise, nor can his judgment be read as recognizing, as an effective English civil divorce (or even as one recognisable in England), the change of status from married to divorced effected by the parties according to their personal religious law. The connection of the case with the granting of the *get*[5] was tangential, the judge simply agreeing to allay anxieties and avert any slip between cup and lip by taking the simple (but ingenious) tactical step of indicating in the morning that he would be prepared to make an order in terms of the draft put before him and then adjourning the actual making of the order until that afternoon, thus giving the parties the opportunity in the interim of completing the formalities required to secure the *get* and avoid for the wife any possibility of a limping divorce which in accordance with her faith would see her still chained to her former but now liberated husband.

It is not surprising therefore that this inaccurate (and in my personal view irresponsible) treatment of the topic stirred up some shock and horror in the hearts and minds of those who would deprecate English law rubber-stamping divorces obtained within our jurisdiction, perhaps unilaterally, or otherwise in a manner which would offend principles of what we regard as natural justice.

But the mistaken references to Sharia law also offended elements within the Muslim community, as might have been anticipated. In a letter to *The Times* the Secretary General of the Muslim Council of Britain wrote:

We find it odd that your report of a landmark divorce settlement under Jewish Beth Din Courts should be framed under the narrative of Islamic Sharia courts ('High Court opens way to Sharia divorces', 1 February).

> Of course, we do welcome any move facilitating choices for those who wish, as Muslims, for their personal relationships to be governed by a Shariah civil code. This legitimate aspiration requires full discussion in an atmosphere of understanding and tolerance. It

[5] It is provided by s 10A of the Matrimonial Causes Act 1973 (inserted by the Divorce (Religious Marriages) Act 2002) and FPR 2010, rule 7.30 that an English divorce court may require both parties to declare in prescribed form that they have obtained a religious divorce before a decree under the 1973 Act is made absolute. Such an order can be made if the spouses' marriage was "in accordance with the usages of the Jews" so as to avoid the situation where a Jewish husband is divorced under his religious law but the wife is not until he has delivered to her the get which confirms that she too is free to remarry. The Act enables the Lord Chancellor by statutory instrument to give divorcing spouses of other religious marriages equivalent protection, but to date that power has not been exercised.

> allows for British Muslims to fulfil their religious obligations under British law. It does not require a change in British law, or a diminution in human rights. We seek parity with other faiths, not special favours.

The letter was printed in the newspaper on 4 February but, the Editor exercising his undoubted right to edit material submitted for publication, excised the following sentence from the end of the first paragraph, perhaps to limit the potential for further criticism from the many who would have already noted the unfortunate confusion into which his publication had aroused, between two world class religions with significant communities resident here:

> Once again such reporting raises uninformed hackles against our faith, and what British Muslims really want. With a recent YouGov poll highlighting prevailing negative attitudes against British Muslims, there is a responsibility to report such matters fairly.

So you will understand why my nostrils, metaphorically, quivered in sympathy when I read how one online commentator pungently put it:

> The headline is not only misleading, but is intentionally stirring faeces. It is shoddy journalism …

The record was fortunately at least set straight by a better-informed source than *The Times* proved to be on this occasion. Comment published by Anne-Marie Hutchinson, Edward Devereux and Lucy Marks (who were also amongst those acting in the case) included this:

> Whether such an approach can be replicated in the future in relation to other religious authorities will depend upon the principles by which those authorities direct themselves and the content of the disputes. In this case, the English High Court appears, adopting an entirely novel approach, to have struck the balance between personal autonomy and paternalism in a way that accommodated the parties' wishes and beliefs, and, most importantly, achieved a result that was manifestly fair.

It is encouraging that *AI v MT* is not only so excellent an example of putting bridge-building into practice but also that it endorses the growing respect for adult autonomy which is key to the new IFLA Scheme for the arbitration of family financial disputes.

Forced Marriage: What Should the Legal Response Be?

Anne-Marie Hutchinson OBE*

The Universal Declaration of Human Rights, Article 16 (2)[1] states "marriage shall be entered into only with the free and full consent of the intending spouses".

A Forced Marriage is a marriage in which one or both spouses do not (or in the case of some vulnerable adults, cannot) consent to the marriage.

"Force" in a context of such a marriage can take many forms. It may include physical, psychological, financial, sexual or emotional pressure or an amalgam of all or some of these. It rarely relates to one incident of coercion. There tends to be a pattern of conduct by the perpetrators that covers a long period of time. The pressure to marry is often part of the background in which a child grows up and victims are aware of the expectation to marry from a very young age. Coercive behaviour ranges from emotional pressure exerted by close family members to specific threatening behaviour including abduction, forced imprisonment, physical violence and in some cases threats to kill. Given the family context within which the pattern of behaviour takes place many victims do not understand that their situation, when looked at objectively, amounts to attempts to force them into a marriage. Indeed many find it difficult to understand that their 'consent' once given was in fact extracted by coercion. The factual nexus is always complex and it is often hard to pinpoint the moment that family expectations and a culture of obedience reaches the tipping point that amounts to force.

Government responses to Forced Marriage throughout the globe have been diverse and disparate. In the UK the existing and present response is set out in the Forced Marriage (Civil Protection) Act 2007 that came into force in the UK in November 2008. That was preceded by a long line of case law under the Children Act 1989, The Matrimonial Causes Act 1973 and under the inherent jurisdiction of the High Court whereby the incidence of Forced Marriage was recognised and addressed. Case law evolved to provide guidance for the prevention, protection and where necessary the repatriation of victims. See *Re KR: (Abduction, Forcible Removal By Parents)* [2].

Criminalisation

At present there is no specific offence of forcing someone to marry in England. Where there is a Forced Marriage or threatened Forced Marriage a number of offence may be committed (e.g. kidnap/assault).

The *Choice by Right* report was published in June 2000. It was the first comprehensive government commissioned report in respect of the incidence and practice of Forced Marriage. Through the input of government departments (Home Office/Foreign & Commonwealth Office), non-governmental agencies and stakeholders, the extent of this human rights abuse was recognised – as was the finding that much of the practice remained unreported and hidden. A public awareness campaign was undertaken and a commitment to set up a dedicated Government unit was made[3]. Following on from the publication of the *Choice by Right* report the then Government undertook a consultation as to what the Government response to the practice of Forced Marriage should be. The Government consulted on whether a specific criminal offence of Forced Marriage should be introduced. The response, at that stage, was that on balance the proposal to create a specific criminal offence of Forced Marriage be rejected[4]. The main arguments against criminal legislation and the creation of a specific criminal offence were that, it would not represent an affective deterrent, that it was likely to create an emblematic but ineffective criminal statute – given the difficulties in securing successful prosecution – and further that it would not provide adequate protection for victims. The response pointed to the significant number of existing offences (including kidnapping and offences against the person) which could

* Partner at Dawson Cornwell, London, England, www. dawsoncornwell.com.

[1] http://www.un.org/en/documents/udhr/

[2] [1999] 4 All ER 954.

[3] www.fco.gov.uk/resources/en/pdf/pdf14/fco-choicebyright2000.

[4] September 2005 joint Foreign & Commonwealth Office and Home Office Forced Marriage Unit consultation.

in appropriate circumstances be utilised for the purposes of a criminal prosecution on a case by case basis. A major objection to the proposed legislation was that it would be difficult to secure sufficient evidence in individual cases to satisfy the criminal burden of proof especially where the constituents of the offence took place overseas.

A major concern of groups working in the charitable and non-governmental sector was that a proposed criminal law would deter victims and potential victims of Forced Marriage from seeking help from public authorities for fear that their family members would be the subject of a criminal prosecution. Many groups in this sector felt that a criminal prosecution would disempower victims and remove the control which victims had over their own life choices. They further pointed to the risk that the prospect of a criminal prosecution would expose the victims to a wide range of pressure and coercion not to involve State Agencies because of the potential criminalisation of their family members. As a result in 2005/2006 the Government did not proceed to introduce a criminal statute. There followed something of a hiatus which was eventually filled by the private members bill spearheaded by Lord Lester of Hearne Hill which ultimately brought into being the Forced Marriage (Civil Protection) Act 2007. This coincided with the setting up of the Forced Marriage Unit, a joint Foreign & Commonwealth Office/Home Office initiative (FMU)[5].

That Unit is now the established frontline UK organisation that deals with Forced Marriage on a policy and practical level.

In 2008 the FMU provided advice and support in 1618 cases. In 2009 it provided advice and support in 1682 cases and in 2010 it provided advice and support in 1735 cases. It is hoped that the increase (which continues) is reflective of successful awareness raising and willingness of victims to seek help rather than an increase in the number of cases.

The current figures from the FMU are that in 2012 it provided advice and support in 1485 cases. As a result of continued public awareness raising the Home Affairs Select Committee (HASC) published a report on 20 May 2008[6]. That report drew attention to the continued existence of the abusive practice of Forced Marriage and highlighted its scale. It suggested that there was a weakness in the approach previously taken by the government. That was followed by a further report by the HASC on 17 May 2011[7]. That report identified the continued widespread practice of Forced Marriage and proposed that consideration again be given to the creation of a specific criminal offence.

In December 2011 the Home Office issued a further Forced Marriage Consultation. This followed on from the stated commitment of the government given in October 2011 to criminalise the breach of Forced Marriage Civil Protection Orders and to consult on making "forcing someone to marry a specific criminal offence". The consultation was to cover two areas, firstly the introduction of a specific offence for the breach of Forced Marriage Civil Protection Order and the introduction of a specific criminal offence[8].

Questions raised as part of the consultation and arguments in support of the creation of a specific criminal offence of forcing a person to marry

A specific offence could have a deterrent effect and send a clear signal (domestically and abroad) that forcing a person to marry is unacceptable. It was suggested that there was a need to send a stronger, clearer message to communities and internationally that Forced Marriage will not be tolerated in the UK and that there will be 'consequences' for those who commit this form of abuse. The consultation looked to other nation States that had introduced such a specific criminal statute.

It was suggested that a specific offence could empower young people to challenge their parents and/or families and that creating a specific offence of Forced Marriage could not only act as a deterrent to families who might otherwise resort to this form of abuse, but it could also give victims a stronger sense that what is happening to them is "wrong", because it is something that is against the law. It was suggested this could make it easier for victims to challenge their parents and wider family. Looking to public awareness and agency responses it was suggested that a specific offence could make it easier for police, social services and health services to identify that a person has been or might be forced into a marriage. Existing legislation it was said may not be easily linked to Forced Marriage and factual scenarios not recognised for what they are. The existing amalgamation of various criminal statutes are, it was said, confusing and complicated, and whilst frontline

[5] www.gov.uk/Forced-Marriage.

[6] Report 20 May 2008:https://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/880/88002.htm.

[7] Report Forced Marriage, 17 May 2011. http://www.publications.parliament.uk/pa/cm200708/conselect/cmhaff/263/26302.htm.

[8] https://www.gov.uk/government/consultations/forced-marriage-consultation.

agencies might recognise a Forced Marriage situation they might not recognise that an offence had been committed. In short it was proposed that a specific offence would clarify the issues for law enforcement bodies, make them fully aware of how they should intervene and thus allow them to provide a more effective response.

Finally it was said that a specific offence would provide punishment to the perpetrator. Those who forced a victim, or participated in an act of Forced Marriage, could be convicted of a specific offence and sentenced. Robust sentencing, it was said, could be seen as acting as a deterrent by demonstrating that people are being brought to account for their actions in a public domain.

Arguments against the creation of a specific offence were outlined:

Concerns were expressed that victims may stop asking for help and/or applying for civil remedies, owing to a fear that their families will be prosecuted and/or because of the repercussions from failed prosecutions. The concern, in some groups, is that the creation of a separate specific criminal offence might deter victims from not only reporting a criminal offence but coming forward to seek help, whether by way of civil remedy and protection under the existing Forced Marriage (Civil Protection) Act 2007, or at all. There would be more pressure on a victim not to report instances of fear of a Forced Marriage if the result were that their family members might be the subject of a criminal investigation and receive a criminal conviction. If, there were a raft of failed prosecutions (because the evidence did not stand up to the criminal standard, not least where all of the 'evidence' was abroad) that might lead to a lack of confidence in the remedy and dissuade victims from coming forward. Finally there might develop a perception that all reporting to State Agencies (even those with only a protective remit) might lead to a criminal investigation thus dissuading the victims from seeking any 'official' assistance.

There is an argument that the creation of a specific offence would, rather than being a deterrent, lead perpetrators to engage in other practices in order to avoid prosecution, but that they would still force their children to marry. There is a concern that parents might send their children abroad at a younger age and leave them there until they marry, or, following a marriage, leave them abroad within the marriage, rather than allowing them to travel back to the UK to sponsor their spouse in to the UK.

Finally it was argued that increased risk of prosecution or the threat of prosecution might make it more difficult for victims to reconcile with their families or parts of their family in the future (which many victims wish to do).

Response to the Consultation[9]

The Response was published in July 2012.

(i) 54% of consultees were 'for' the creation of a specific criminal offence.

(ii) 37% of consultees were "against" the creation of specific criminal offence, and 9% were undecided.

Most interesting perhaps was that 80% of consultees felt that the existing civil and criminal remedies were not, and are not, being used actively and consistently.

As a result of the consultation the UK government has announced that it will be legislating with a specific criminal offence of forcing a person into a marriage.

A number of general themes and issues emerged from the consultation responses. Those include:-

- A recognition of an urgent need to tackle Forced Marriage more effectively to ensure that the needs of all victims and potential victims were considered, alongside with the requirement to prosecute those responsible for perpetrating Forced Marriage.
- The need for more effective training for professionals on the implementation of the multi-agencies statutory guidance and how to utilise civil remedies more effectively.
- The need for clarification of the differences between forced and arranged marriage, to ensure that perpetrating the act under the misconception of culture and religion is no longer a justifiable action.
- The need for more funding, for more support services to provide refuge space and support for Forced Marriage victims.
- The need for awareness, training, campaigns in the media and in schools in order to highlight Forced Marriage, as it was felt it is not sufficiently recognised in mainstream society.
- Additional concerns were raised about the impact of Forced Marriage, and the proposals to tackle it,

[9] https://www.gov.uk/government/consultations/forced-marriage-consultation.

on minority groups. Approaches to tackling Forced Marriage will have to apply to all communities in order not to stigmatise any particular culture or religions.

Taking into account and recognising the highly sensitive and complex issues that arise within the nexus of a Forced Marriage situation the government announced that it did recognise the concern that a new criminal offence 'may' deter reporting a Forced Marriage.

The government announced that it would therefore ensure that it works closely with partners in implementing legal change and will work closely with partners to ensure that a sensitive and appropriate response to all cases is created and which puts the victim at the centre of the stage.

In 2012 the UK Government stated, "we have decided to make forcing someone to marry a criminal offence. In doing so, we are sending out a clear message that this practice is totally unacceptable and will not be tolerated".

The consultation also made a commitment to making the breach of a Forced Marriage Civil Protection Order a criminal offence.

The aim is to bring a specific Forced Marriage offence into legislation in 2013/2014.

Civil responses

In England and Wales the Marriage Act 1949 (as amended) and the Matrimonial Causes Act 1973 are the statutes which govern the law on, and the validity of, marriages.

The minimum age at which a person can enter into a valid marriage in England and Wales is 16 years. A person under the age of 18 years (but over 16 years) may not marry without parental consent. The UN Convention On the Rights Of The Child (Article 1) defines a child as "a person under the age of 18 years". The Child Rights Convention (Article 1), the 1964 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (Article 2), and the Convention on the Elimination of All Forms of Discrimination Against Women (Article 16) all contain provisions about capacity for marriage and the right to choice in marriage, and appear to agree that 18 years is an appropriate minimum age for marriage. It might be said that the issue of parental consent (16-18 years) is of itself a factor in the continued practice of Forced Marriage in England.

A marriage entered into without consent is not a valid marriage, but where a marriage has on the face of it complied with the formal and substantive requirements of the Marriage Act (as amended) it will be presumed valid and will remain valid unless and until it is a judged by a court to be void.

Section 12(c) of the Matrimonial Causes Act 1973 provides that a marriage shall be voidable if "… either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise". The crucial question in all cases is whether "the threat, pressure or whatever it is, is such as to destroy the reality of the consent and overbear the will of the individual"[10].

Nullity petitions must be brought within the period of 3 years of the date of the marriage.

Victims of a Forced Marriage may for various reasons delay in coming forward for assistance. They may not take steps to have their marriage declared void immediately following the event. Often they do so very much as a last resort and when there is no other "way out". This frequently occurs when the reality of the intention of their spouse to join them in the UK as a spouse becomes a reality.

A clear explanation of the importance of a Decree of Nullity (as opposed to a Decree of Divorce) to victims of a Forced Marriage is set out in the case of *P-v-R*[11].

As Coleridge J said in *P v R (Forced Marriage: Annulment:Procedure)*: 'In cases where a forced marriage is alleged the proper course is for a petition under s 12(c) to be brought before the court. I am informed by counsel for the petitioner that there is a real stigma attached to a woman in the petitioner's situation if merely a divorce decree is pronounced and it is desirable from all points of view that where a genuine case of forced marriage exists the court should, where appropriate, grant a decree of nullity and as far as possible remove any stigma that would otherwise attach to the fact that a person in the petitioner's situation has been married. [18] It follows from that that those charged with the decision of whether or not public funds should be made available in these circumstances should be ready, in the right case, to grant public funding to enable such nullity proceedings to be brought. It is necessary for public funding to be made available so that these cases, which are now not rare, can be investigated by the court. They are of special significance in the community from which the petitioner originates and it is appropriate that they

[10] *Hirani –v- Hirani* (1983) 4 FLR 232.

[11] See *P –v- R (Forced Marriage…Annulment.:Procedure)* [2003] 1 FLR 661.

should be transferred to the High Court and investigated properly and fully in open court.'

Where a marriage has been entered into without consent there is a strong emotional resistance to the remedy of 'a divorce' which itself implies an element of consent. Further Divorce in many cultures and religions carries its own stigma – usually of failure or misbehaviour. It is not therefore a sufficient or appropriate remedy for victims of a Forced Marriage.

Development of the concept of a marriage that is not capable of recognition[12].

An application was made under the inherent jurisdiction of the High Court for declaration that a marriage was not capable of recognition. The British born spouse was forced to marry overseas at the age of 16 years. She had returned to the UK, carried on with her studies and not taken steps to extract herself from the marriage until after the 3 year period had expired: thus a decree of nullity was not available to her. On the facts of the case Mrs Justice Baron found that the ceremony of marriage was entered into under duress so far as the female spouse was concerned and that she had been a subject of duress and coercion. It was found that when she was taken overseas to marry she had had her freedom of movement restricted. It was noted that the inherent jurisdiction is a flexible tool which must enable the court to assist parties where statute fails. The Judge reminded herself of what had been said in *P-v- R*.

Mrs Justice Baron acknowledged the distinction between holding that such a marriage was void at its start and making a declaration that a marriage never existed. Whilst it is not possible to make a declaration that a marriage was void at its inception, the Judge found that it is possible to declare that there was never a marriage which is capable of recognition because of coercion, duress and the lack of consent. Accordingly the victim was, pursuant to the inherent jurisdiction, entitled to relief and to a recognition of the wrong that had been done to her when she was forced to marry.

For many years petitions for Nullity were a rarity in England and it was a relief that was very rarely used. Since the mid 1990s petitions for the dissolution of marriage by a decree in Nullity on the grounds of lack of consent have come before the Court with some regularity.

Nullity decrees unravel the marriage, however they do not of themselves offer any protection from harm and it is a post-facto remedy.

Prior to the inception of the Forced Marriage Civil Protection Act 2007 a line of cases relating to a threatened forced marriage or forced marriage had come before the High Court in England.

The leading and first case was *Re K R (Abduction: Forceable Removal By Parents)*[13]. That case related to a female from a Sikh family. She was aged 16 years and thus still subject to her parents' obligations and rights. She was a British national living in London who had gone missing in circumstances that caused concern. Her elder sister commenced proceedings in order to locate her (she had in fact been sent to India by her parents and arrangements were being made for her to marry). Mr Justice Singer made it clear that the inherent jurisdiction, and proceedings in Wardship, would be utilised in order to prevent a Forced Marriage and, that where a victim was overseas, to locate and assist in repatriating the child. This also made it clear that the Court in its inherent jurisdiction would override Parental Responsibility and take full cognisance of the mature child's wishes and feelings.

From that time there were a significant number of cases where the English High Court made orders to prevent the removal of children from the jurisdiction, specifically prohibiting family members and respondents from taking any steps that would result in the marriage of the minor and specific orders to locate such children. Where a child was already overseas, the child's return to the UK was ordered.

The difficulty was that there were a number of cases coming to the attention of the Forced Marriage Unit, which identified chronological adults who were nonetheless in a vulnerable and dangerous situation. These adults were frequently overseas and were seeking assistance to prevent a Forced Marriage, and to obtain assistance and repatriation to the UK.

The next landmark case was *Re SK (an adult) (Forced Marriage:Appropriate Leave)*[14]. The case related to female adult who had full mental capacity. There was nothing to suggest that she was a vulnerable adult in terms of her capacity to consent to a marriage save that she was overseas in circumstances that gave rise to concerns as to her freedom of movement, and she was not able to

[12] *B –v- I (Forced Marriage)* [2010] 1 FLR 1721.
[13] (1999) 2 FLR 524.
[14] (2005) 2 FLR 230.

communicate with the authorities who were seeking to locate her. As she was an adult there was no agency such as social services which had authority and an obligation to intervene and police were only able to treat her as 'a missing person'.

Mr Justice Singer made it clear that the inherent jurisdiction of the High Court which had been used innovatively to protect children in such cases was also available to make orders to ensure that SK was produced at the British High Commission to be interviewed, so that her true wishes and feelings as to her situation could be ascertained, and assistance offered to her should she wish to take it.

It was said by Mr Justice Munby (as he then was) in a further case involving the inherent jurisdiction *NS -v- MI*[15] "The court's protective jurisdiction is also particularly important in this context because, sadly, it is precisely from those who ought to be their natural protectors – parents and other close relatives – that all too typically the victims of forced marriages need to be protected. The law must always be astute to protect the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives. If the court cannot intervene in time to prevent what Singer J in *Re SK*, at para [5] aptly described as these 'gross transgressions of an individual's integrity', then, as he went on to say, the court must attempt, wherever possible, to remedy their consequences".

The Forced Marriage (Civil Protection) Act 2007 (FMCPA)

The FMCPA became law in England and Wales in November 2008. One of the first cases to come before the English Court under the Act was that of Dr Humeyra Abedin, an adult, non-British national, a GP who had taken leave from her employment in the UK to travel to Bangladesh to visit family. Her whereabouts were unknown and attempts by an NGO in Dhaka to contact her on behalf of worried colleagues failed. Proceedings were commenced in her name under the FMCPA and the inherent jurisdiction of the High Court. Her case was the subject of international media coverage. Dr Abedin was ultimately repatriated to the UK. In separate connected proceedings a decree of Nullity of the marriage she was forced into was granted.

The FMCPA came into being because it was believed that the amalgamation of reliefs under various statutory provisions and case law insufficiently drew attention to the wrong that they were addressing – the practice of Forced Marriage. Whilst effective on a case to case basis they did not, it was felt, send a strong enough message to the perpetrators and public at large. Further non legal professionals and agencies found the disparate range of remedies difficult to navigate.

It is important to note that FMCPA does not replace the existing and concurrent remedies in civil law in respect of protection of children and adults but adds to them.

The Children Act 1989 sets out the duties and powers of local authorities (social services) in respect of children who are at risk of physical or other harm (including Forced Marriage) and where necessary local authorities can make care orders under s31 of the Children Act 1989 to remove such children from the care of their parents and place them in foster or other alternative care arrangements.

Law enforcement agencies have power to make emergency protection orders in respect of children and those in imminent risk of danger can be taken into police protective custody. These powers are used sometimes concurrently with FMPCA orders and sometimes alone where children are at risk of a Forced Marriage. Equally where a person is sent overseas, Wardship and the inherent jurisdiction continue to be used in order to assist in protection and repatriation together with FMPCA proceedings. However by far the most commonly used procedure is the FMCPA.

Provisions of the FMCPA

Force (and related expressions) …… includes coerce by threats or other psychological means.

Marriage means any religious or civil ceremony of marriage (whether or not legally binding).

Powers are contained in s 63.

Section 63A

(1) The court may make an order for the purposes of protecting—

(a) a person from being forced into a marriage or from any attempt to be forced into a marriage; or

[15] (2007) 1 FLR 445.

(b) a person who has been forced into a marriage.

(2) In deciding whether to exercise its powers under this section and, if so, in what manner, the court must have regard to all the circumstances including the need to secure the health, safety and well-being of the person to be protected.

(3) In ascertaining that person's well-being, the court must, in particular, have such regard to the person's wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person's age and understanding.

(4) For the purposes of this Part a person ("A") is forced into a marriage if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent.

(5) For the purposes of subsection (4) it does not matter whether the conduct of B which forces A to enter into a marriage is directed against A, B or another person.

(6) In this Part—

"force" includes coerce by threats or other psychological means (and related expressions are to be read accordingly); and

"forced marriage protection order" means an order under this section.

Section 63B Contents of orders

(1) A forced marriage protection order may contain—

(a) such prohibitions, restrictions or requirements; and

(b) such other terms as the court considers appropriate for the purposes of the order.

(2) The terms of such orders may, in particular, relate to—

(a) conduct outside England and Wales as well as (or instead of) conduct within England and Wales;

(b) respondents who are, or may become, involved in other respects as well as (or instead of) respondents who force or attempt to force, or may force or attempt to force, a person to enter into a marriage;

(c) other persons who are, or may become, involved in other respects as well as respondents of any kind.

(3) For the purposes of subsection (2) examples of involvement in other respects are—

(a) aiding, abetting, counselling, procuring, encouraging or assisting another person to force, or to attempt to force, a person to enter into a marriage; or

(b) conspiring to force, or to attempt to force, a person to enter into a marriage.

Section 63C Applications and other occasions for making orders

(1) The court may make a forced marriage protection order—

(a) on an application being made to it; or

(b) without an application being made to it but in the circumstances mentioned in subsection (6).

(2) An application may be made by—

(a) the person who is to be protected by the order; or

(b) a relevant third party.

(3) An application may be made by any other person with the leave of the court.

(4) In deciding whether to grant leave, the court must have regard to all the circumstances including—

(a) the applicant's connection with the person to be protected;

(b) the applicant's knowledge of the circumstances of the person to be protected; and

(c) the wishes and feelings of the person to be protected so far as they are reasonably ascertainable and so far as the court considers it appropriate, in the light of the person's age and understanding, to have regard to them.

(5) An application under this section may be made in other family proceedings or without any other family proceedings being instituted.

(6) The circumstances in which the court may make an order without an application being made are where—

(a) any other family proceedings are before the court ("the current proceedings");

(b) the court considers that a forced marriage protection order should be made to protect a person (whether or not a party to the current proceedings); and

(c) a person who would be a respondent to any such proceedings for a forced marriage

protection order is a party to the current proceedings.

(7) In this section—
"family proceedings" has the same meaning as in Part 4 (see section 63(1) and (2)) but also includes—
(a) proceedings under the inherent jurisdiction of the High Court in relation to adults;
(b) proceedings in which the court has made an emergency protection order under section 44 of the Children Act 1989 (c. 41) which includes an exclusion requirement (as defined in section 44A(3) of that Act); and
(c) proceedings in which the court has made an order under section 50 of the Act of 1989 (recovery of abducted children etc.); and "relevant third party" means a person specified, or falling within a description of persons specified, by order of the Lord Chancellor.

(8) An order of the Lord Chancellor under subsection (7) may, in particular, specify the Secretary of State.

Section 63D Ex parte orders: Part 4A

(1) The court may, in any case where it considers that it is just and convenient to do so, make a forced marriage protection order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.

(2) In deciding whether to exercise its powers under subsection (1), the court must have regard to all the circumstances including—
(a) any risk of significant harm to the person to be protected or another person if the order is not made immediately;
(b) whether it is likely that an applicant will be deterred or prevented from pursuing an application if an order is not made immediately; and
(c) whether there is reason to believe that—
(i) the respondent is aware of the proceedings but is deliberately evading service; and
(ii) the delay involved in effecting substituted service will cause serious prejudice to the person to be protected or (if a different person) an applicant.

(3) The court must give the respondent an opportunity to make representations about any order made by virtue of subsection (1).

(4) The opportunity must be—
(a) as soon as just and convenient; and
(b) at a hearing of which notice has been given to all the parties in accordance with rules of court.

63E Undertakings instead of orders

(1) The court may, subject to subsection (3), accept an undertaking from the respondent to proceedings for a forced marriage protection order if it has power to make such an order.

(2) No power of arrest may be attached to an undertaking given under subsection (1).

(3) The court may not accept an undertaking under subsection (1) instead of making an order if a power of arrest would otherwise have been attached to the order.

(4) An undertaking given to the court under subsection (1) is enforceable as if the court had made the order in terms corresponding to those of the undertaking.

(5) This section is without prejudice to the powers of the court apart from this section".

63F Duration of orders

A forced marriage protection order may be made for a specified period or until varied or discharged.

63G Variation of orders and their discharge

(1) The court may vary or discharge a forced marriage protection order on an application by—
(a) any party to the proceedings for the order;
(b) the person being protected by the order (if not a party to the proceedings for the order); or
(c) any person affected by the order.

(2) In addition, the court may vary or discharge a forced marriage protection order made by virtue of section 63C(1)(b) even though no application under subsection (1) above has been made to the court.

(3) Section 63D applies to a variation of a forced marriage protection order as it applies to the making of such an order.

(4) Section 63E applies to proceedings for a variation of a forced marriage protection order as it applies to proceedings for the making of

such an order.

(5) Accordingly, references in sections 63D and 63E to making a forced marriage protection order are to be read for the purposes of subsections (3) and (4) above as references to varying such an order.

(6) Subsection (7) applies if a power of arrest has been attached to provisions of a forced marriage protection order by virtue of section 63H.

(7) The court may vary or discharge the order under this section so far as it confers a power of arrest (whether or not there is a variation or discharge of any other provision of the order).

63H Attachment of powers of arrest to orders

(1) Subsection (2) applies if the court—

(a) intends to make a forced marriage protection order otherwise than by virtue of section 63D; and

(b) considers that the respondent has used or threatened violence against the person being protected or otherwise in connection with the matters being dealt with by the order.

(2) The court must attach a power of arrest to one or more provisions of the order unless it considers that, in all the circumstances of the case, there will be adequate protection without such a power.

(3) Subsection (4) applies if the court—

(a) intends to make a forced marriage protection order by virtue of section 63D; and

(b) considers that the respondent has used or threatened violence against the person being protected or otherwise in connection with the matters being dealt with by the order.

(4) The court may attach a power of arrest to one or more provisions of the order if it considers that there is a risk of significant harm to a person, attributable to conduct of the respondent, if the power of arrest is not attached to the provisions immediately.

(5) The court may provide for a power of arrest attached to any provisions of an order under subsection (4) to have effect for a shorter period than the other provisions of the order.

(6) Any period specified for the purposes of subsection (5) may be extended by the court (on one or more occasions) on an application to vary or discharge the order.

(7) In this section "respondent" includes any person who is not a respondent but to whom an order is directed.

63I Arrest under attached powers

(1) Subsection (2) applies if a power of arrest is attached to provisions of a forced marriage protection order under section 63H.

(2) A constable may arrest without warrant a person whom the constable has reasonable cause for suspecting to be in breach of any such provision or otherwise in contempt of court in relation to the order.

(3) A person arrested under subsection (2) must be brought before the relevant judge within the period of 24 hours beginning at the time of the person's arrest.

(4) In calculating any period of 24 hours for the purposes of subsection (3), Christmas Day, Good Friday and any Sunday are to be ignored.

63J Arrest under warrant

(1) Subsection (2) applies if the court has made a forced marriage protection order but—

(a) no power of arrest is attached to any provision of the order under section 63H;

(b such a power is attached only to certain provisions of the order; or

(c) such a power was attached for a shorter period than other provisions of the order and that period has expired.

(2) An interested party may apply to the relevant judge for the issue of a warrant for the arrest of a person if the interested party considers that the person has failed to comply with the order or is otherwise in contempt of court in relation to the order.

(3) The relevant judge must not issue a warrant on an application under subsection (2) unless—

(a) the application is substantiated on oath; and

(b) the relevant judge has reasonable grounds for believing that the person to be arrested has failed to comply with the order or is otherwise in contempt of court in relation to the order.

(4) In this section "interested party", in relation to

a forced marriage protection order, means—

(a) the person being protected by the order;

(b) (if a different person) the person who applied for the order; or

(c) any other person; but no application may be made under subsection (2) by a person falling within paragraph (c) without the leave of the relevant judge".

Applicants

Local Authorities (Social Services) are a 'relevant third party' and will invoke proceedings in respect of children (under the age of 18) or in respect of vulnerable adults who are subject to mental health services support. Frequently police constabularies, NGOs or teachers will seek permission from the Court to bring proceedings. The majority of applications are commenced by the victims themselves. Where a victim is overseas and not able to communicate an application can be made on their behalf on the criteria as set out in SK above, on the basis that they would make such an application for their own protection were they physically able to do so.

The object of the exercise it to have persons who may be at risk produced at a secure venue (often an Embassy) so that they can provide their frank views as to their situation in a secure setting and be provided with assistance to return to the UK if that is what they wish for.

Other initiatives which support the Act

The Forced Marriage Unit[16] is a specialist unit jointly run by the Home Office and the Foreign & Commonwealth Office.

It provides advice assistance and support to victims and to all who contact the unit in connection with issues arising out of a Forced Marriage or a feared Forced Marriage whether in the UK or overseas.

Multi-agency practice guidelines are available on the unit's website.

The FMU collates statistics as to the number of cases and type of assistance that it deals with including the gender, ages of the victim and the countries involved: ***see annex A***.

A number of practice guidelines have been produced by FMU to assist professionals encountering cases of Forced Marriage in its various scenarios. The primary guidelines are The Multi Agency Practice Guidelines: Handling Cases of Forced Marriage (MAPG, 2009). The practice guidelines are intended to be used by all front line practitioners, volunteers and agencies that work with children and adults who are the victims or potential victims of a Forced Marriage.

The FMU has produced a specific guideline relating to Forced Marriage and Learning Disabilities. The guidelines to deal with situations of Forced Marriage in respect of person, be it a child or adult, who has learning or other disabilities or who is a vulnerable adult.

As public awareness of the incidence of Forced Marriage developed, a trend was noted in the increasing number of cases involving a vulnerable adult.

Re SA (Vulnerable Adult with Capacity: Marriage)[17] involved a 17-year-old female,s profoundly deaf and mute, who had an intellectual functioning of a 13- to 14-year-old. Her parents were making arrangements for her to enter into a marriage overseas. The Court ordered psychological tests and it was found that she had capacity to consent to a marriage. However she clearly had special needs and low functioning intellectual cognition. It was held the Court had power to make an order "requiring that the daughter be properly informed, in a manner she could understand, about any specific marriage prior to entering into it, with associated injunctions –

1. The court's inherent protective jurisdiction could be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, was, or was reasonably believed to be, either:
   (i) under constraint; or
   (ii) subject to coercion or undue influence; or
   (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The inherent jurisdiction was not confined to vulnerable adults, nor was a vulnerable adult amenable as such to the jurisdiction; it was simply that an adult who was vulnerable was more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction was exercisable than an adult who was not vulnerable.

[16] www.fco.gov.uk/.

[17] [2005] EWHC 2942 (Fam), (2006) 1 FLR 867.

(2) The court had power to make orders and to give directions designed to ascertain whether or not a vulnerable adult had been able to exercise her free will in decisions concerning her civil status. The principle that the jurisdiction was exercisable on an interim basis while proper inquiries were made applied whether the suggested incapacity was based on mental disorder or on some other factor capable of engaging the jurisdiction.

(3) In the context of the inherent jurisdiction, a vulnerable adult could be described (rather than defined) as someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, was or might be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who was substantially handicapped by illness, injury or congenital deformity. The principle that the court should seek to prevent damage to children that it could not repair was equally applicable in relation to vulnerable adults.

(4) While it was no part of the court's function to decide whether it was in a person's best interests to marry, the court was not debarred from considering whether it was in the best interests of someone lacking capacity to be exposed to an ineffective betrothal or marriage.

(5) There was nothing to prevent a local authority from commencing Wardship proceedings, or proceedings under the inherent jurisdiction in an appropriate case, as a body with a genuine and legitimate interest in the welfare of the individual in question.

(6) The daughter was a vulnerable adult who might, by reason of her disabilities, and even in the absence of any undue influence or misinformation, be disabled from making a free choice and incapacitated or disabled from forming or expressing a real and genuine consent. There was a pressing need to intervene to protect the daughter from the serious emotional and psychological harm which she would suffer if she went through a ceremony of marriage with which she did not in fact agree, or if she were to find herself isolated and helpless in a foreign country".

The Mental Capacity Act 2005 operates to identify and protect those who lack capacity to marry (amongst its other powers) and for Orders and Declarations to be made through the Court of Protection.

Immigration responses to Forced Marriage

Many jurisdictions have sought to address the issue of Forced Marriage by the imposition of immigration controls or the creation of immigration offences. This approach is based on the proposition that intended 'victim' spouse is a national of the country in which he or she lives, or has an immigration status that would allow him or her to sponsor a spouse and that the intended overseas spouse is will join them and the family will live in the state of sponsorship.

The issue of appropriate immigration responses came before the Supreme Court of England and Wales in the case of:

R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)

R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)[18]

Historically in the UK a British spouse could sponsor foreign spouse into the UK on a spousal visa from the age of 16 years. In 2003 the immigration rules were changed and the age at which a UK spouse could sponsor their foreign spouse was increased from 16 years to 18 years.

In July 2008 the Home Office announced that it was to increase the minimum age for both the foreign spouse and the UK sponsoring spouse from 18 to 21 years. The change of law became effective from 27 November 2008. The change followed on from the 2007 consultation by the Home Office which proposed several changes to the immigration law in order "to change practice in this area so that those who are at risk of being pressurised into marriage to a partner from overseas are protected, and that these visas are not abused[19]. The proposals were:-

i. Raise the visa age to 21,
ii. Require sponsors to declare an intention to sponsor for a marriage visa before leaving the UK to get married;
iii. Incorporate a confidential interview with the

[18] [2011] UKSC 45.

[19] http://www.ukba.homeoffice.gov.uk/departmentsfromoverseas.

sponsor into all marriage visa applications;

iv. Introduce a Code of Practice for officials and immigration Judges on cases where one of the parties in a marriage visa case is felt to be vulnerable, based on significant disparities in age, the main language being spoken, education and time spent in each other's country.

v. Consider revoking leave if the foreign spouse later abandons the UK-based sponsor after achieving settlement.

Prior to the consultation the Home Office had commissioned independent academics to research into the questions of whether (a) raising the minimum age for sponsors from 16 to 18 has helped to prevent Forced Marriages and (b) whether raising the age further from 18 to 21 or indeed 25 would help prevent Forced Marriage[20].

The overwhelming conclusion of the research team was that age made very little difference to the incidence of Forced Marriage and further that raising the visa age would not only have little, if any, beneficial impact but indeed might put the victims at further risk and in more danger. The research highlighted a concern that the sponsors would be taken abroad and retained abroad until they had reached the age of 21 years at which point the couple and indeed any children of the marriage would then relocate to the UK. The general pattern of cases at that time (and now) is that there is a short term removal of the UK sponsor abroad for the marriage which is followed by their return to the UK where upon they will set about meeting the criteria for sponsoring their spouse into the UK (housing, employment, support system etc). The research found that if the removal from the UK is to be longer term there is less possibility of the victim securing advice, help and assistance or indeed opposing the sponsorship from a place of safety. Findings included the following:

- Generally, respondents from the different aspects of the research tended to see a rise in age to 21 to 24 as a potentially negative step.
- None of the organisations interviewed for the familiarisation visits wholeheartedly endorsed an increase to either 21 or even partially to 24 years.
- Only four out of 45 (8.9%) stakeholder organisations interviewed wholeheartedly endorsed an age increase to 21 and only three (6.7%) wholeheartedly supported an increase to 24 years.
- Benefits associated with greater maturity and access to education and potential financial independence were most frequently cited, but these were perceived as largely outweighed by the risks.
- Risks included young people being taken abroad to marry, the discriminatory nature of the proposals as largely to do with immigration, breaching of human rights, and not actually tackling domestic/EU Forced Marriages.

The Secretary of State declined to accept the findings of the research, as was said by Lord Wilson when the case of Aguilar Quila came before the Supreme Court, "for good reasons or bad".

The raising of the sponsorship age whilst based on a policy to prevent Forced Marriage of course caught all marriages of under 21 years olds to a foreign non-EU spouse, whether they were forced or not. Thus it was that a British national and his bride from Chile applied for a judicial review of the rule change. The High Court refused the judicial review. The Court of Appeal[21], where the case was joined with an appeal by a couple from Pakistan, granted the judicial review quashing the decision of the High Court holding inter alia:

"Rule 277 exceeded what was necessary and proportionate to accomplish the objective of excluding parties to forced marriage, and was arbitrary in its effect: the limited extent to which the rule achieved this objective could not justify the adverse impact of the rule on the far larger class of innocent young couples. Further, the policy imperative was only obliquely, partially, and in large part speculatively, related to the measure under scrutiny: while the court must be careful to refrain from substituting its judgment for that of the Secretary of State on policy issues, the court was not entitled to refrain from evaluating the strength of the policy imperative and its rationale in deciding whether its impact on innocent persons was proportionate".

The Government appealed to the Supreme Court[22].

The leading Judgments are those of Lord Wilson of

[20] Hester, M. Khatijada Chantler & Gangoli, G *Forced Marriage: the risk factors and the effect of raising the minimum age for a sponsor and of leave to enter as a spouse or fiancé*, School for Policy Studies, University of Bristol 2008.

[21] *Aguilar Quila and Aguilar Bibi and Mohammed v Secretary of State for the Home Department and others* [2010] EWCA Civ 1482

[22] *R (on the application of Quila and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)*; *R (on the application of Bibi and another) (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* [2011] UKSC 45

Culworth and Baroness Hale of Richmond, with whom Lords Phillips and Clarke agreed. Lord Brown of Eaton-under-Heywood gave a dissenting judgment. Lord Wilson observed that the impact on the two British claimants was severe in family life terms: 'These were two British citizens who had lived throughout their lives in the UK and who, aged 17 and 18 respectively had just embarked upon a consensual marriage. The refusal to grant marriage visas either condemned both sets of spouses to live separately for approximately three years or condemned the British citizens in each case to suspend plans for their continued life, education and work in the UK and to live with their spouses for those years in Chile and Pakistan respectively. Unconstrained by authority, one could not describe the subjection of the two sets of spouses to that choice as being other than a colossal interference with the rights of the respondents to respect for their family life, however exiguous the latter might be".

Both Lord Wilson and Lady Hale were content to assume without comment that the increase in the spouse visa age was taken in accordance with the law and for a legitimate aim, the real question was whether the measure was necessary. To this end, Lord Wilson set out the four questions on proportionality posed by Lord Bingham in *Huang v Secretary of State for the Home Department*[23]:

(a) is the legislative objective sufficiently important to justify limiting a fundamental right?
(b) are the measures which have been designed to meet it rationally connected to it?
(c) are they no more than are necessary to accomplish it?
(d) do they strike a fair balance between the rights of the individual and the interests of the community?

It is universally accepted that forced marriage is a scourge that certainly justifies a public policy response and that question (a) must be answered in the affirmative. Question (b) is more contentious, in addressing this question, Lord Wilson went on to consider the effect of the change in the immigration rules he posed ten questions on the potential link between forced marriage and immigration abuse:

"(a) Of the 13 motives for forcing a marriage suggested in para 36 of the guidance published by the Secretary of State in November 2008, how prevalent in the genesis of forced marriages is that of "Assisting claims for UK residence and citizenship"?
(b) From the fact that a forced marriage has precipitated an application for a marriage visa does it follow that the motive behind it was immediately to secure the visa and that, were it not immediately available, the marriage would not have occurred?
(c) Even if by virtue of the amendment, the ages of the girl and/or of the man were such as to preclude the grant of a marriage visa for up to three years, might the parents nevertheless force the girl into the marriage in order, for example, to prevent her from entering into a consensual marriage which they regarded as unsuitable?
(d) Even if the effect of the amendment were to preclude the immediate grant of a marriage visa, might the girl nevertheless be forced to marry the man abroad and thereupon be kept under control abroad until their ages were such as to enable her successfully to sponsor his application for a visa?
(e) In the example at (d) might the girl kept under control abroad there have a lesser opportunity to escape from the forced marriage than if the rules had enabled her to set up home with the man in the UK immediately following the marriage?
(f) Alternatively to the example at (d), might the girl be brought to the UK following the forced marriage and be kept under control in the UK until their respective ages were such as to enable her successfully to sponsor the man's application for a visa?
(g) Even if the preclusion of the grant of a marriage visa for up to three years were to deter her parents from forcing the girl to marry at that stage, might the result be an increased intensity of control on their part over her for that period – whether by moving her abroad or by continuing to keep her in the UK – and, in either event, would her increasing maturity be likely to enable her to combat it?

[23] (2007) 2 AC 167.

(h) How readily could one or more false certificates of birth be obtained which would deceive the immigration authorities into accepting that the girl and the man were both aged over 21?

(i) Might the effect of the amendment be to precipitate a swift pregnancy in the girl, following the forced marriage and an act or acts of rape, such as might found an application for a discretionary grant of a marriage visa by reference to exceptional, compassionate circumstances?

(j) Even if the effect of the amendment were to deter her parents from forcing the girl to marry a man resident abroad without a pre-existing right of abode in the UK, might they instead force her to marry a man with UK or EU citizenship or some other pre-existing right of abode in the UK?"

Lord Justice Wilson concluded that the amendment to the rules was rationally connected to the deterrence of Forced Marriages, in answer to Lord Bingham's question (b).

As to questions (c) and (d)

'[The Secretary of State] clearly fails to establish, in the words of question (c), that the amendment is no more than is necessary to accomplish her objective and, in the words of question (d), that it strikes a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages. On any view it is a sledge-hammer but she has not attempted to identify the size of the nut.'

Lady Hale in agreeing that the measure was disproportionate pointed to the unquantified nature of the problem and proposed solution, the divided opinion on the benefits of the measure, the fact that the measure might do more harm than good where a young woman was taken abroad to be married then kept there until over the age of 21 and the interference with the ECHR Article 12 right to marry as well as with the Article 8 right to a private and family life.

The majority went further than concluding merely that the Secretary of State had interfered disproportionately with the private and family life of the particular claimants. Effectively, the Immigration Rule which increased the spouse visa age was struck down.

Lord Brown gave a dissenting judgment. He observed that several signatory States to The European Convention on Human Rights have imposed spouse visa ages of 21 or 24 partly for the avowed purpose of deterring forced marriage and that European Union Council Directive 2003/86/EC allows a maximum age of 21 for spouse sponsorship partly to prevent forced marriages. Lord Brown concluded that Lord Wilson's 'perfectly good' questions are largely unanswerable and therefore a 'judgment call' is required and that '[u]nless demonstrably wrong, this judgment should be rather for government than for the courts.' He went further: 'in this particular context the courts should to my mind accord government a very substantial area of discretionary judgment' because 'it is the Secretary of State who has the responsibility for combating forced marriages in the context of immigration and who should be recognised as having access to special sources of knowledge and advice in that regard.'

International Responses

EU States that have raised the spousal sponsorship age pursuant to the Directive 2003/86/EC are:

Sweden – 21 years

Germany – 21 years

The Netherlands – 21 years

Denmark, which is not bound by the Directive, raised the age to 24 years in 2002.

Through a range of civil and/or criminal measures, a number of EU member states have looked to address the occurrence and practice of forced marriage. Some of these countries have a range of criminal offences that may apply in the context of a forced marriage, which may include offences of rape, assault, kidnapping, abduction, false imprisonment, duress, and crimes against sexual freedom. A smaller number of these countries also have more specific legislation to cover the practice of forced marriage or the conduct causing a person into a forced marriage.

The countries that have criminalised forced marriage are **in bold type**.

Austria: Forcing someone into marriage is a distinct criminal offence in Austria. Austrians and people living in Austria are facing legal consequences for such actions only if this kind of marriage occurs within the country's borders. From January 2012 the Federal Government has amended the anti-forced marriage law to allow prosecutors to press charges against perpetrators over forced marriages abroad.

Belgium: Forcing someone to marry is a criminal offence.

Bulgaria: The criminal code contains a number of articles that criminalise activities that could be related to trafficking, such as kidnapping, false

imprisonment, rape, inducement to prostitution, abduction of a woman for the purposes of sexual exploitation or for the purposes of forced marriage and illegal transport of a person across the border.

Cyprus: Forcing someone to marry is a distinct criminal offence in Cyprus.

Denmark: The Danish Criminal Code includes an offence of unlawful coercion, prohibiting the use of threats by a person to force another person to do something against their will. This offence would apply to marriage if threats were used to force a person into marriage against their will. The penalty for this offence ranges from a fine to a period of imprisonment not exceeding two years.

Estonia: Forced Marriage is not a criminal offence – civil courts will annul a marriage if the consent was obtained through fraud or duress.

Finland: Not expressly prohibited by Finnish law, although the law assumes that actions taken against the will of a person are prohibited.

France: No specific offence of forced marriage in the French Criminal Code, although French civil law has been amended numerous times in order to prevent forced marriages and to protect the affected individuals.

Germany: Forcing someone to marry is a distinct criminal offence and can be punished by up to five years in prison. The law also gives non-German citizens who are forced by their husbands/families to leave the country after their marriage a legal right to return to Germany.

Greece: Forced Marriage is not a specific offence in the Greek Penal Code; however the issue may be subsumed under other criminal offences such as coercion through violence or the threat of force.

Hungary: Hungary lacks specific legislation on forced marriage; such situations may be subsumed under other criminal offences such as coercion through violence or the threat of force.

Ireland: Forced Marriage is not a specific criminal offence. The law of nullity allows a marriage to be set aside where it was contracted in the face of fear, duress, intimidation or undue influence.

Incidence of Forced Marriages in Britain may be accessed through the general FMU Statistics.

Further reading

More information on consultation in respect of a specific criminal offence may be obtained as follows:

- Ashiana Network – www.ashiana.org.uk
- ECHR response– www.equalityhumanrights.com/consultations/responsetoconsulation
- Forced Marriage Consultation response Southall Black Sisters – www.southallblacksisters.org.uk
- Forced Marriage Consultation Odysseus Trust – www.odysseustrust.org/projects/fmc_ot_response_march12
- Safe Forced Marriage Consultation – www.safedvs.co.uk
- Forced Marriage Coram Chambers – www.coramchambers.co.uk
- Law Society of England and Wales – www.lawsociety.org.uk/slap/consultation-on-forced-marriage-lawsociety
- IKWRO response – www.ikwro.org.uk
- Karman Nirvana response – http://www.karmanirvana.org.uk/.
- Henna Foundation response – http://www.hennafoundation.org/forced_marriage.html.

Immigration guidance

- UK Border Agency Guidance and instruction on Forced Marriage is available on www.ukba.homeoffice.gov.uk/citecontentdocuments//forcedmarriage
- Roehampton University – Aisha Gill – http://www.roehampton.ac.uk.
- Forced marriage statistics – updated 13 March 2013 – FMU.
- Ministry of Justice – November 2008/2009 2009/2010 – 2012 applications made under FMPA.

Costs of implementation of specific offence of Forced Marriage

https://www.gov.uk/government/consultations/forced-marriage-consultation

The 1996 Hague Convention in Spain

1. Child Abduction and the Law of Tort

Cristina González Beilfuss* and Monica Navarro-Michel**

I. Introduction

This article aims to analyse under what circumstances child abduction may give rise to a valid claim for compensation for the parent who is prevented from seeing his/her child by the other parent. In order to do so, we focus on Spanish Supreme Court ruling, dated June 30, 2009 which, for the first time, applied the law of tort to a child abduction case.

II. Facts of the case

On 23 August 1991 Ms. Remedios, who until then lived in Spain, moved to Tampa (Florida, US), taking her seven year old son with her. The decision to move was made unilaterally and against the will of Mr Paulino, the child's father. Mr Paulino filed a criminal complaint on 3 October 1991, and a custody order, which was granted on 13 October 1992 on the basis of the child's best interest. The court took into account the negative impact the mother's attachment to the Church of Scientology could have on the child's personality. The court order was confirmed by the court of first instance, in its ruling of 28 June 1993, and by the Court of Appeal in Madrid on 13 January1995. The civil court noted that the mother had unilaterally and unjustifiably deprived the father from exercising his rights and duties inherent to child custody since 1991 by excluding the father from any decisions regarding the child's education and, moreover, had ignored the ruling which gave custody to the father.

Mr Paulino attempted to enforce the judgment in the US but failed, due owing to his limited means, and subsequently made several complaints to the President of the Spanish Government, who referred him to the Ministry of Foreign Affairs. Mr Paulino also presented claims before the Ministry of Social Affairs and the Ombudsman, and even tried to be a party in the criminal proceedings against Dianetics-Scientology, all unsuccessfully.

Eventually, Mr Paulino filed a tort claim on 16 October 1998 against Ms. Remedios and the "Dianetics Association" (the name under which the Church of Scientology is registered as an association in the Spanish Ministry of the Interior) to obtain compensation for the damage suffered. At the first and second instance, the courts (Court of First Instance in Madrid in a ruling issued on 2 April 2003, and subsequently Court of Appeal in Madrid in a ruling dated 27 October 2004), dismissed the claim on the grounds that the claimant had exceeded the time limitation period. Finally, the Spanish Supreme Court, in its ruling of 30 June 2009, held that the action had not become time barred given that the damage was a continuous damage, and ruled in favor of the claimant, stating that when one parent intentionally prevents the other parent from maintaining relations with the child, with complete disregard to the custody order, he/she is liable for compensation.

This case provides an opportunity to analyse the facts from two different perspectives. On one hand, the legal remedies available after child abduction; on the other hand, whether this situation fulfills all the requirements for a valid claim under the law of tort. This commentary is divided into two parts.

* Professor of International Law, University of Barcelona; ** Reader in Civil Law, University of Barcelona.

III. Available remedies to a child abduction

The factual circumstances that give rise to the case decided by the Spanish Supreme c Court began on the 23 August 1991. On that date a Spanish child, aged 7, was unilaterally removed by its mother from its habitual residence in Spain to Tampa, Florida, United States.

Although the child's parents were not married, the father had acquired the status of a parent by acknowledging paternity. According to article 154 Spanish Civil Code (hereinafter "CC"), legal parents *ex lege* share parental responsibility over minor children, regardless of whether they are married or not. The removal apparently took place without the father's consent and was therefore in breach of his custody rights.

The child's removal was prima facie a child abduction falling under the 1980 Hague Convention on the civil aspects of child abduction (hereinafter "the Hague Convention"), which was in force in Spain from 1 September 1987 and in the United States since 1 July 1988. It is therefore unfortunate that Mr. Paulino did not activate the return mechanism established by that instrument. He would have had a fair chance of obtaining the child's return if he had done so, particularly if return had been requested within a year after the removal. Article 12 of the Hague Convention establishes that where a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The obligation to return abducted children is subject to a limited number of exceptions (arts. 12, 13 and 20 Hague Convention), that are to be interpreted restrictively and proven to apply by the abductor. If more than one year has passed since the abduction the competent authority is still under the obligation to return the child to its place of habitual residence, unless it is demonstrated that the child is settled in its new environment.

Mr. Paulino cannot be blamed for not reacting immediately. He filed a criminal complaint that was dismissed on the 3 October 1991, because at that time the removal of a child by one parental responsibility holder without the consent of the other parental responsibility holder did not amount to a criminal offence under Spanish law[1]. A criminal complaint could therefore only succeed if the removal of the child could be connected to offences such as coercion, extortion or disobedience[2]. Even today when the unilateral removal of a child constitutes a criminal offence under certain circumstances, filing a criminal complaint very rarely provides an adequate remedy. It may open the way to the extradition of the abductor under criminal law instruments in force between Spain and the country where the abductor and the child have settled into, but this in itself does not guarantee that the child will be returned with the abductor to Spain.

Extradition procedures moreover do often not succeed if the abductor is a national of the requested State or if the conduct is not a criminal offence under the law of that State (the so called principle of double incrimination). Resorting to criminal law in family disputes often leads to very unfortunate results. Spanish public opinion is at present particularly alarmed by the situation of a Spanish citizen, Maria Jose Carrascosa[3], who removed her daughter from the United States to Spain and subsequently returned to the United States where she remains in prison for refusing to comply with a court order requiring her to return the child. The child's father, a US citizen, who unsuccessfully requested the return of the child under the Hague Convention, has no contact with the child, who remains in Spain under the custody of the maternal grandparents. The child is therefore deprived of meaningful contact with both parents. Such an outcome shows that resorting to criminal law is most of the times not conducive to a solution that guarantees the well-being of children.

Once Mr. Paulino's criminal complaint was dismissed, he continued to be active and applied for a court order granting him sole custody over the child. He was provisionally granted sole custody on 13 October 1992; the order became final after appeal in January 1995. But

---

[1] The Criminal Code was amended in 2002 and a new criminal offence of child abduction was introduced in art. 225 bis Criminal Code. See Ley Orgánica 9/2002, de 10 de diciembre, de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código penal, y del Código civil, sobre sustracción de menores (BOE núm. 296 de 11 de diciembre).

[2] TORRES FERNÁNDEZ, "Los nuevos delitos de secuestro parental e inducción de hijos menores al incumplimiento del régimen de custodia", *Diario La Ley* núm. 5857 of 25 September 2002

[3] From the press. See *El País*, 25 December 2009.

Mr. Paulino's success under Spanish law did not lead to a positive outcome of the case either, since both the mother and the child remained in the United States. The Supreme Court's judgment states that Mr. Paulino sought the recognition and enforcement of the Spanish custody decision in the United States, but could not pursue it any further owing to his precarious financial situation. The details are not known and it is therefore difficult to say whether such difficulties could have been overcome. In any case the recognition of the Spanish judgment would have been rendered difficult by the sheer passage of time. The child was aged seven when it was removed in August 1991; the custody judgments only became final in January 1995, almost three and a half years later. In the meantime father and child had had no contact and the child was in all likelihood settled in its new surroundings.

Subsequently the desperate father, Mr. Paulino, applied to all sorts of institutions, to the Spanish Prime Minister who referred the case to the Ministry of Foreign Affairs, to the Social Affairs Ministry and to the Spanish Ombudsman: to no avail. He was not able to have any contact with the child from the date of the removal.

The crucial issue therefore seems to be: Why did Mr. Paulino not seek the return of the child under the Hague Convention? We cannot be certain, but it seems likely that he simply did not know that such an instrument was in force between Spain and the United States and that nobody told him during the crucial first year after the removal that he could request the child's return and had a fair chance of obtaining it.

Spain did not adequately prepare for the ratification of the Hague Convention and was in fact specifically mentioned in the Conclusions of the First Special Commission on its implementation for failing to apply the instrument[4]. None of the authorities Mr. Paulino turned to when his child was unilaterally removed to the US, or the lawyer or lawyers he consulted, was probably even aware of the existence of such an instrument. Fortunately the situation improved significantly, particularly after 1995 when implementing measures were taken[5].

Mr. Paulino's case is very much reminiscent of *Iglesias Gil v. Spain*, decided by the European Court of Human Rights on 29 April 2003. *Iglesias Gil* also deals with the removal of a child from Spain to the United States. The left-behind mother reacted in exactly the same way as Mr. Paulino by filing a criminal complaint and seeking a custody decision in her favor. The Hague Convention's return mechanism was not activated.

The European Court of Human Rights established that such omission constitutes an infringement of article 8 (right to a family life) of the European Convention on Human Rights. The Court's reasoning is essentially as follows. The right to a family life imposes on Contracting States both negative and positive obligations. Public authorities have to abstain from arbitrarily interfering with family life, but also have an obligation to adopt adequate measures in order for the right to a family life to be effective. In cases of unlawful removal of children such measures should strive for the reunification of the removed child and the left-behind parent.

According to the European Court of Human Rights, it is essential in such circumstances to ascertain whether public authorities adopted the measures they could have reasonably been expected to adopt. Bearing in mind that the Hague Convention was binding between Spain and the United States the court concludes that Spanish authorities did not adopt sufficient and adequate measures in order to seek the reunification between the child and its parent and thereby infringed both the child's and the left-behind parent's right to a family life. In *Iglesias Gil* Spain was therefore condemned to damages in the amount of 20.000 Euros (plus 14.000 Euros covering legal costs).

In the present case it also seems that Spanish public authorities could be held liable for infringing the right to a family life of both Mr Paulino and the abducted child. The facts of the two cases are very similar; legally there is, however, one major difference. The removal of the child in *Iglesias Gil* took place after the entry into force of a provision establishing that public authorities guarantee the respect for the rights of children in accordance with international norms[6]. Accordingly, public authorities

[4] They read as follows:"In light of the fundamental difficulties of a structural, legal and procedural nature encountered by States Parties in the handling by Spain of incoming requests for the return of children during the two years since the Convention entered into force for that country, Spain is strongly encouraged without further delay to take all appropriate measures to ensure that its Central Authority and its judicial and administrative authorities are provided the necessary powers and adequate resources to enable it fully to comply with its obligations under the Convention.

[5] See footnote 1.

[6] Article 3 of the Ley Orgánica 9/2002 (see footnote 1).

could have acted *ex officio*, as the European Court highlights in its reasoning.

In our opinion, public authorities could have acted *ex officio* at the time when Mr. Paulino was desperately seeking assistance even before the entry into force of the aforementioned legal provision. The obligation adequately to protect children and to comply with international norms that are binding upon Spain is actually a constitutional obligation that can be directly derived from article 39 of the Spanish constitution. In cases affecting children public prosecutors are in fact bound to safeguard the fundamental rights of children in all cases going into court[7]. They could, in our opinion, have acted ex officio or at least indicated to Mr. Paulino that he should request the return of the child under the Hague Convention. In all likelihood they did not.

Mr. Paulino could therefore have obtained damages from the Spanish State insofar as Spanish public authorities did not take adequate measures in order to safeguard his and also the child's right to a family life. He could also have sued his lawyer or lawyers for professional negligence if he was never, as it seems, adequately informed about his rights under the law and the different courses of action open to him.

Whether he did so is not mentioned in the judgment of the Supreme Court that gives rise to this article. This case deals with a claim to moral damages filed by Mr. Paulino against Ms. Remedios, the abducting mother, and an association linked to the church of Scientology, *Asociación Civil Dianética*. As will be further analysed the Spanish Supreme Court finally only held the abducting mother responsible.

IV. The Law of Tort

When everything else fails, the aggrieved party's thoughts usually turn to the law of tort. This case is the first time the Spanish Supreme Court has dealt with a claim for damages following a child abduction case. The main issues will be presented here.

1. Time limitation period. Starting to run when?

Initially, both the court of first instance and the court of appeal dismissed the claim for damages on the grounds that it had become time barred. In Spain, all claims for extra-contractual liability become so after one year (article 1968 CC), and the time limitation period starts to run from the moment when "the claim could have been made" (article 1969 CC). The claim for damages, both courts maintained, could have been brought to court when the child left Spain, that is, on 23 August 1991. The claim, however, could not have been brought within one year from that date for the simple reason that no harm had occurred yet. When the mother moved to another country, that in itself did not eliminate all personal relations between father and child. Undoubtedly relations may become less frequent the farther away one parent moves, which is usually taken into account by the courts when deciding on custody cases and visitation rights, but that does not imply that the other parent will be deprived necessarily and automatically of all contact and communication with the child.

There was no harm yet when the child moved with the mother to the United States, because personal relations could still take place. In this particular case, as stated by the Spanish Supreme Court, "harm occurred when the father finally realized that his right to communicate with his child had been severed definitively, that he would not be able to exercise his custodial rights, and that [normally] only happens when parental responsibility ends, that is when the child becomes of legal age (18 years old)". The mother did not allow any contact between father and child, but that was not known at the time the mother moved to the US. To imply that whenever a child is taken abroad all relations with the remaining parent will be severed is certainly an excessive interpretation of the reality.

The Spanish Supreme Court deemed this harm to be a continuous harm, thus applying the limitation periods applicable to such harm on the basis that continuous damage should be distinguished from permanent damages. The loss suffered by Mr Paulino, which was the loss of the child's company, was treated as a continuous damage, because it happened constantly. Until the conduct that caused it did not disappear, the damage continued to occur, and therefore the limitation period did not start to run. The harmful conduct was not the initial move to the US, but the constant conduct of preventing any communication between father and child.

[7] Article 3 of the Statute regulating the Public Prosecutor (Ley 50/1981, de 30 de diciembre, por el que se regula el Estatuto Orgánico del Ministerio Fiscal).

When damages takes place constantly, the time limitation period does not start to run until the final damage occurs (in order to be able to ascertain what damage to claim), which is common to all claims, and also one must wait until the cause of the harm ends. This is a particular requirement of continuous damage. If the damage consists of being deprived of any contact with the child, the cause of it persists until personal relations are not resumed. And this may occur at any time during the minority of the child. In this particular case, the child became of legal age on 23 August 2002, and from that moment, the claimant had one year to bring the claim to court. The civil claim was brought on 16th October 1998, well within the valid timeframe.

2. Negligence.

Spanish tort law is based on negligence, as established in the general rule contained in article 1902 CC. Ms. Remedios' behaviour fulfilled the fault criteria: she did not allow the child to contact his father, and therefore his father was unable to exercise his custodial rights and deprived from participating in the decisions that affected the child. More than negligence, this conduct could be qualified as intentional.

Some legal writers in Spain deem that tort law may only be applied to family law cases where there is intent or gross negligence[8]. This would not derive from the rules of tort[9], but from certain rules pertaining to family law. From certain provisions in the Spanish Civil Code law one may conclude that family law is governed by more lenient standards that in other areas, and that negligent behavior, unless gross or reckless, has no consequences[10]. The provisions which may lead to this conclusion deal with patrimonial consequences of marriage, so it would be unwise to extract conclusions for other areas. Another argument that has been used in order to avoid the law of tort being applied to family relations (unless intention is involved) is the need to preserve harmony and peace within the family. However, the concept of the family may not be protected more or above the interest of individuals. In any event, this discussion is moot in the case at hand, since the conduct is, indeed, intentional. To "prevent" the other parent from contact with the child is, and may only be, by its own nature an intentional conduct.

3. Causation.

In Spain there is no provision that sets up criteria for establishing causation. The test that has been consistently applied by the Supreme Court is the adequacy test, by which the probability of damage is analysed. Damage must be foreseeable and avoidable. In this particular case, there is no doubt as to the cause or origin of the harm. Causation stems from the mother's conduct, as she is the only person with the duty to cooperate with the father (who holds legal custody of the child); she is thus solely responsible for the damage caused to the child's father.

As regards Scientology, the causal link with the resulting harm seems more distant. The mother's behavior may have been manipulated by Scientology, but this would be difficult to prove, and has to be balanced with the freedom of religion, enshrined in article 16 of the Spanish Constitution. In any case, there is no proximate or direct cause with the subsequent damage claimed, since Scientology does not bar relations between the father and the child. Unless evidence could be brought to prove that the abovementioned association prevents the child from communicating with the father, or holds the child captive, there is no causal contribution to the final damage.

4. Damage.

2.3.1. Harm consists of preventing parent-child relations.

After a family break-up, traditionally one parent is

---

[8] SALVADOR CODERCH, RAMOS GONZÁLEZ, LUNA YERGA, "Un ojo de la cara (I)", InDret, 2000-3, en p. 9; FERRER RIBA, "Relaciones familiares y límites del derecho de daños", *InDret*, 2001-4, pp 1-21, en p. 17; RODRÍGUEZ GUITIÁN, "Función de la responsabilidad civil en determinadas relaciones de convivencia: daños entre cónyuges y daños entre los miembros de la pareja de hecho", *Revista de Derecho Patrimonial*, 2003-1, nº 10, pp. 65-93, en p. 74; MARÍN GARCÍA DE LEONARDO, "Aplicación del derecho de daños al incumplimiento del régimen de visitas", en *Daños en el Derecho de Familia*, de De Verda y Belmonte (coord), Thomson-Aranzadi, Cizur Menor, 2006, pp. 179-201, en p. 193-194.

[9] Art 1902 CC, which sets out the general rule of liability does not require it; art. 1089 CC which mentions the various degrees of negligence, states that liability arises even in cases of *culpa levísima*, for very slight negligence.

[10] Arts. 168, 1390 and 1391 CC.

given sole custody of the child, while the other has visitation rights (article 92 CC) [11]. Regardless of what the court attributes to the parent (custody or visitation rights), when one parent prevents the child from having any form of personal relationship with the other, this causes a non-pecuniary loss. It may be interesting to point out that there is no liability for breach of the court's judgment: if the mother would have allowed (some form of) contact between father and child, even though she would still be in breach of the custody order, there would be no liability.

To deem this damage as a source of liability has been recognised in Italy, by the Tribunal de Roma 13 June 2000[12]. In this case, the mother breached the visitation rights awarded to the father, and the court held her liable for preventing the exercise of the right (which is also a duty). The court stated that when the custodial parent prevents relations in a constant manner, for a long time and with no justification, liability may ensue.

The claim was made for non-pecuniary compensation[13] in an amount of 210.354.24 euros (30.050.61 euros for every year he could not communicate with his child)[14]. The Supreme Court awarded s 60.000 euros. The assessment of damages is a very difficult task; there is a high degree of discretion, since there are no objective criteria for compensation of non-pecuniary damages. The court took into account the fact that Mr Paulino needed psychological assistance to deal with his anguish and suffering, as well the loss of opportunity for having been deprived of participating in decisions affecting the child, and of being involved in the child's life generally.

A remaining issue is the effectiveness of the Supreme Court's decision ordering the child's mother to pay damages in the amount of 60.000 Euros for the pain and suffering involved. Ms. Remedios left Spain in 1991 and settled in the United States. If no property can be seized in Spain a possibility to be considered is the recognition and enforcement of the judgment in that country, where she might be employed or have assets. If Ms Remedios had property in another EU member state, the recognition and enforcement of the Spanish judgment would be generally governed by the EU Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) provided that such judgments fell under the Regulation's scope of application. Difficulty would however arise in connection with the substantive scope since on the one hand the Regulation is applicable to civil and commercial matters (article 1.1), which would include tort cases (they are specifically mentioned in connection with jurisdiction rules in article 5.3), but on the other hand article 1.2 establishes that the Regulation shall not apply to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession.

In our opinion the Regulation Brussels I is applicable, essentially because Mr Paulino's claim sought compensation for damage caused by Ms Remedios' conduct. The judgment is not directly concerned with parental responsibility or status but with harmful conduct in the context of a family relationship.

---

[11] This may be changing, as shared custody is promoted (art. 92.8 CC).

[12] Il Diritto di famiglia e delle persona, 2001-1, vol. XXX, pp. 209-220.

[13] Other costs could have been included in the claim. Perhaps travelling costs (if Mr Paulino had travelled to the US to visit his child and the mother had avoided contact), or the cost of all the judicial proceedings brought after the child abduction (as the Supreme Court hints at one point).

[14] Quantities are translated from pesetas, the Spanish national currency at the time the claim was made. This explains why the figures are uneven.

2. Child Abduction in the European Union: Applications for the Return of a Child before the Spanish Courts

Celia M Caamiña-Domínguez*

Introduction

This article deals with applications for the return of a child that who has been wrongfully removed or retained in Spain, when that child was habitually resident immediately before the removal or retention in another Member State.

The Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereafter, the 'Brussels II Regulation') will be analysed, in particular Article 11 which, as will be explained, supplements the Hague Convention of 25 October on the Civil Aspects of International Child Abduction (hereafter, the 1980 Hague Convention). Since the Regulation leaves some questions to national law, the law applied by a Spanish court to which an application for the return of a child is made will also be analysed.

As this article focuses on the application for the return of a child before the courts of the requested Member State where the child is present, it is not related to Article 11.8 of the Brussels II Regulation; that article deals with judgments that entail the return of a child following an order of non-return of the requested Member State pursuant to the 1980 Hague Convention[1].

Definitions

For the purpose of the Brussels II Regulation, applications for the return of a child must fulfil the following prerequisites:

(a) there must be an application for the return of a 'child', which we consider should be defined in the same sense as Article 4 of the 1980 Hague Convention ('The Convention will cease to apply when the child attains the age of 16 years') although the Brussels II Regulation does not state that[2];

(b) that the child has been subjected to a 'wrongful removal or retention' which , under Article 2 of the Brussels II Regulation, is defined as a removal or retention in breach of rights of custody -actually exercised or that would have been exercised but for the abduction- and acquired by judgment, agreement with legal effect or by operation of the law of the Member State where the child was habitually resident before the abduction[3],

(c) both the State where the child was habitually resident before the abduction and the requested State are Member States[4].

These prerequisites were considered in a case related to a child who was brought from England to Spain in AAP Barcelona (Sec 18ª), 23 April 2012[5]. The Spanish judge of the first instance ordered the return of the child to England, stating that the United Kingdom was the

* Lecturer (Interim) in Private International Law, Carlos III University of Madrid. This article is based on a paper prepared on the occasion of the 2nd International Family Law and Practice Conference 2013 'Parentage, Equality and Gender'.

[1] See C M Caamiña Domínguez, *La sustracción de menores en la Unión Europea* (Colex, 2010), at pp 85 et seq; C M Caamiña Domínguez 'La supresión del exequátur en el Reglamento 2201/2003' [2011] *Cuadernos de Derecho Transnacional.CDT*, 3.1, 63-83; C M Caamiña Domínguez, 'Tutela y protección de menores en el derecho internacional privado (epígrafes XVI a XXII)', in M Yzquierdo Tolsada and M Cuena Casas (dirs.), *Tratado de Derecho de la Familia*, vol 6 (Aranzadi-Thomson Reuters, 2011), at pp 636-645.

[2] On the stated concept, e. g., see A Devers, 'Les enlèvements d'enfants et le Règlement 'Bruxelles II *bis*', in H Fulchiron (ed.), *Les enlèvements d'enfants à travers les frontières* (Bruylant, 2004), at pp 35-36; P Jiménez Blanco, *Litigios sobre la custodia y sustracción internacional de menores* (Marcial Pons, 2008), pp 158-159; P Maestre Casas, 'Sustracción y restitución internacional de menores', in E. Llamas Pombo (coord.), *Nuevos conflictos del Derecho de Familia* (La Ley, 2009), at p 511; J M de la Rosa Cortina, *Sustracción parental de menores. Aspectos civiles, penales, procesales e internacionales* (Tirant lo Blanc, 2010), at p 196.

[3] On 'custody' in Spanish law, see P. Maestre Casas (2009), at p 507.

[4] On the influence of the free movement of persons within the European Union, see R Lamont, 'Linking Child Abduction and the Free Movement of Persons in European Law ' (2010) 1 *Family Law and Practice*, 3 , 39-44.

[5] AAP Barcelona (Sec 18ª), 23 April 2012 (AC 2012\958).

Member State where the child was habitually resident before the abduction. The mother appealed against that decision claiming, among other grounds, that the father was not the holder of rights of custody.

The Spanish court of the second instance (*Audiencia Provincial*) stated that no judgment (neither English nor Spanish) had been issued relating to rights of custody before the removal[6]. Failing that, the court pointed out that, pursuant to the law of England and Wales, both parents must consent to a change in the child's residence[7]. Therefore, the Spanish court concluded that, owing to the lack of agreement between the parents, the child had to be returned to England.

Under Article 11.1 of the Brussels II Regulation, when an application is made before the courts of the requested Member State pursuant to the 1980 Hague Convention in order to obtain the return of a child, the court shall apply paragraphs 2 to 8 of the Regulation, that, in terms of Recital 17, means that 'the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11'.

The most expeditious procedures available in national law

Proceedings for the return of a child must be brought by the holder of rights of custody in the requested Member State – where the child is present because of his or her abduction[8]. Under Article 11.3 of the Brussels II Regulation, the court must act expeditiously in order to issue its judgment, establishing that the decision must be given no later than six weeks after the application is lodged by the holder of rights of custody. The Regulation establishes that the Member States must use 'the most expeditious procedures available in national law'. Therefore, the Member States do not have to establish new procedures in national law to act expeditiously, but the obligation pursuant to Article 11.3 consists in choosing, among the procedures available in national law, the one that permits issuing a prompt judgment[9].

The requested Member State is to apply its own national law, which in Spain is the 'Ley de Enjuiciamiento Civil de 1881' (Articles 1901 to 1909) (hereafter, the LEC 1881)[10]. The Spanish court having jurisdiction is the one where the child is present (Article 1902 of the LEC 1881). Spanish law stipulates that the court shall issue its judgment within six weeks.

Pursuant to the LEC 1881, the one who has abducted the child is to be summoned to appear before the Spanish court within three days to say if he or she consents to the voluntary return of the child or if there are any exceptional grounds for refusing the return pursuant to the 1980 Hague Convention.

If that party does not consent to the voluntary return of the child[11] because there are no exceptional grounds for refusing the return, he or she will be summoned to appear before the Spanish court within five days, to be heard and to give evidence (Article 1907 LEC 1881)[12]. After that, the Spanish court is to issue its judgment within three days (Article 1908 of the LEC 1881).

Unfortunately, the Regulation allows the competent court to issue its judgment later than six weeks 'where exceptional circumstances make this impossible' (Article 11.3 of the Brussels II Regulation). Taking into account that this provision can be used by some courts to conceal undue delays and, what is more, the Regulation does not establish any consequences if the court of a Member State exceeds the six weeks time-limit, it is considered that this provision about 'exceptional circumstances' can frustrate the objective of the Regulation[13].

Although the Regulation does not establish that the decision of the court of the requested Member State shall be enforceable within the abovementioned time limit[14], the '*Practice Guide for the application of the new Brussels II Regulation*' (hereafter, the Practice Guide) recommends this interpretation[15].

This interpretation of the six week time-limit awakens particular interest when Spain is the requested Member

---

[6] Ibid, at para 1.

[7] Ibid, at para 1.

[8] On the role of Central Authorities, see Article 6 et seq of the 1980 Hague Convention.

[9] See H Fulchiron, 'La lutte contre les enlèvements d'enfants', in H Fulchiron and C Nourissat (dirs), *Le nouveau droit communautaire du divorce et de la responsabilité parentale* (Dalloz, 2005), at p 240.

[10] Gaceta de 5 febrero 1881; rect Gaceta de 5 marzo 1881 (LEG 1881\1), modified by Ley Orgánica 1/1996 of 15 January (RCL\1996\145).

[11] See Article 1905 LEC 1881 and see M Montón García, *La sustracción de menores por sus propios padres* (Tirant lo Blanch, 2003) at pp 191-198; J M de la Rosa Cortina (2010), at p 264.

[12] C M V Clarkson and J Hill, *The Conflict of Laws* (Oxford University Press, 2006), at p 407.

[13] See C Caamiña Domínguez (2010), at pp 59-60.

[14] C M V Clarkson and J Hill (2006), at p 415.

[15] *Practice Guide*, p 33; M. Tenreiro, 'L'espace judiciaire européen en matière de droit de la famille. Le nouveau Règlement 'Bruxelles II', in H Fulchiron and C Nourissat (dirs), *Le nouveau droit communautaire du divorce et de la responsabilité parentale* (Dalloz, 2005), at pp 46-47.

State, because the LEC 1881 allows the possibility of an appeal, establishing that the court must give its decision within twenty days (Article 1908 of the LEC 1881). The *Practice Guide* suggests, among the procedures that may be envisaged to obtain an enforceable decision within the six week time-limit, that national laws which allow an appeal should provide that the decision issued by the judge of the first instance is enforceable pending any appeal[16].

The possibility of an appeal pursuant to the LEC 1881 can be examined from two perspectives:

(a) the party who appeals against the decision is the abductor because it entails the return of the child; and

(b) the party who appeals against the decision is the holder of rights of custody because it is a non-return order.

The two perspectives

(a) Pursuant to Article 1908 LEC 1881, the decision of the judge of the first instance may be appealed but, if that decision entails the restitution of the child, he or she will be returned to the Member State of origin. Logically, as it was explained by the Constitutional Court (Tribunal Constitucional), although the decision has been enforced and the child has been returned to the Member State of origin, the Spanish court of the second instance (Audiencia Provincial) cannot refuse to issue its judgment because of those grounds[17]. Some scholars suggest that, when an appeal against a decision that entails the restitution of the child has been lodged, the return of the child to the holder of the rights of custody should be ordered, but without allowing him or her to leave the requested Member State pending the decision of the court of the second instance[18].

(b) In the event of a non-return order, the holder of rights of custody who decides to appeal against that decision should take Articles 11.8, 40 and 42 of the Brussels II Regulation into consideration, because any subsequent judgment which requires the return of the child issued by a court having jurisdiction under the Regulation is to be recognised and enforceable in another Member State –e.g. Spain- without the need for a declaration of enforceability –if it has been certified in the Member State of origin in accordance with Article 42.2 of the Regulation. Furthermore, we have to remember that the European Court of Justice has established in Case C-195/08 PPU 'Rinau' that the objective of the immediate return of the child must not remain subject to the condition that the redress procedures allowed by the national law of the requested Member State have been exhausted[19]. Therefore, we might maintain that it is worth the holder of rights of custody applying to the court having jurisdiction under the Regulation –usually, the court of the Member State where the child was habitually resident immediately before the abduction - to deliver a judgment which entails the return of the child pursuant to Article 11.8 of the Brussels II Regulation, rather than to appeal before a court of the requested Member State against the non-return order[20].

The right to be heard

Pursuant to Article 11.2 of the Brussels II Regulation ' When applying Articles 12 and 13 of the 1980 Hague Convention, it must be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity'.

Within the scope of the Regulation, we must distinguish between a general rule, which consists in ensuring that the child is given the opportunity to be heard during the proceedings; and an exceptional rule – subject to a restrictive interpretation-, that permits not giving the child the opportunity to be heard because of his or her age or degree of maturity[21].

This opportunity to be heard must overcome an

---

[16] *Practice Guide*, pp 33-34; M Tenreiro (2005), at pp 46-47.

[17] STC 20 May 2002 (RTC 2002\120), at para 4. See, e.g., M D Adam Muñoz, 'Regulación autónoma del procedimiento relativo a la devolución de menores trasladados ilícitamente', in M D Adam Muñoz and S García Cano (dirs), *Sustracción internacional de menores y adopción internacional* (Colex, 2004), at pp 66-69; M Montón García (2003), at pp 210 et seq.

[18] J M de la Rosa Cortina (2010), at p 275.

[19] Judgment of the Court (Third Chamber) 11 July 2008, *Inga Rinau*, Case C-195/08 PPU [2008] ECR I-05271, at para 81.

[20] See M Herranz Ballesteros, 'International Child Abduction in the European Union: the Solutions Incorporated by the Council Regulation' [2004] Rev Gen 34, 362 and p 363, where she states: '…the possibilities of appeal that Spanish law offers are going to be less effective'; View of Advocate General Sharpston delivered on 1 July 2008, *Inga Rinau*, Case C-195/08 PPU [2008] ECR I-05271, at para 36-37; C M Caamiña Domínguez, 'Las resoluciones de restitución de menores en la Unión Europea: el caso *Rinau*' [2010] *Cuadernos de Derecho Transnacional.CDT*, 2.2, 231; H Muir Watt [2008] RCDIP, 97, 886; J M de la Rosa Cortina (2010), at p 216.

[21] *Practice Guide*, p 41; A L Calvo Caravaca and J Carrascosa González, 'Protección de menores', in A L Calvo Caravaca and J Carrascosa González (dirs.), *Derecho Internacional Privado*, vol 2 (Comares, 2012-2013), at p 446.

important obstacle, because it is necessary to make the child feel free to speak but it is hard to determine if the abductor –the only parent the child has been in touch with since the wrongful removal or retention- is putting pressure on him or her[22].

The Brussels II Regulation stipulates, on the subject of hearing the child, that it 'plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable'[23]. Therefore, again, this is a question which has been left to national law, where the approach based on the principle of mutual trust has particular implications[24]. The LEC 1881 stipulates that the Spanish court, in that event, must hear the child separately (arts. 1905 and 1907 of the LEC 1881)[25].

Some scholars suggest that the child's right to participate in proceedings like this 'require that a child be given the opportunity to be heard directly by the judge hearing his case', but they accept that if a child does not want to talk to the judge directly, he or she should not be forced to do so[26].

Article 11.5 of the Brussels II Regulation prevents the court of the requested Member State from issuing a non-return order if the person who requested the return of the child has not been given the opportunity to be heard[27]. So, pursuant to Article 11.5 of the Brussels II Regulation, these proceedings shall ensure, as traditionally, not only the defendant's rights but also ensure that the plaintiff has been given the opportunity to be heard[28].

As regards the opportunity to be heard, a case related to the enforcement of a decision of the Spanish judge of the first instance can be quoted which entailed the return of a child to England (AAP Almería (Sec 3ª), 9 June 2008)[29]. The child was eleven years old and her mother, who lived with her in Spain, appealed against the decision claiming that neither she nor her child had been given the opportunity to be heard and to state that their circumstances had changed. When the decision that entailed the restitution of the child was given, the mother agreed to return the child once the academic year was over. Then the mother stated that she could not return the child to England owing to her employment. The Spanish court of the second instance stated that the fact that the mother was working in Spain did not justify that the child had not been returned to England[30]. The Spanish court concluded that those employment reasons did not prevent her from travelling abroad, e. g. during vacations, and that there was no evidence about those circumstances[31].

"Adequate arrangements to secure the protection of the child after his or her return"

As a general rule, the Brussels II Regulation does not modify the grounds that, in the field of the 1980 Hague Convention, allow the court of the requested Member State to issue a non-return order, so those grounds continue to apply[32]. It is also relevant if the application for the return of the child is made when a period of less or more than a year from the date of the wrongful removal or retention has elapsed.

The above mentioned general rule needs to be clarified as regards Article 13.b) of the 1980 Hague Convention, because pursuant to Article 11.4 of the Brussels II Regulation, the court of the requested Member State cannot refuse to return a child '… if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'. Article 13.b) of the 1980 Hague Convention stipulates that the court of the requested State is not bound to order the return of the child when there is a

---

[22] See A L Calvo Caravaca and J Carrascosa González, 'Protección de menores', in A L Calvo Caravaca, J Carrascosa González and E Castellanos Ruiz, *Derecho de familia internacional* (Colex, 2008), at p 368.

[23] Recital 19 of the Brussels II Regulation.

[24] R Lamont [2010], .fn 4.

[25] On this provision, see, e.g., M D Adam Muñoz (2004), at p 59; J M de la Rosa Cortina (2010), at p 266.

[26] R. Schuz, 'The Influence of the CRC on the Implementation of the Hague Child Abduction Convention', [2010] 1 *Family Law and Practice*, 3, 45-46.

[27] *Practice Guide*, p. 33; A Devers (2004), at p 44.

[28] See Article 6 of the European Convention for the Protection of Human Rights 1950. See A Devers (2004), at p 44.

[29] AAP Almería (Sec 3ª), 9 June 2008 (AC 2008\2352).

[30] Ibid, at para 1.

[31] Ibid, at para 1.

[32] See C González Beilfuss, 'Sustracción internacional de niños y ejercicio transnacional de los derechos de visita ', in M. D. Adam Muñoz and S. García Cano (dirs.), *Sustracción internacional de menores y adopción internacional* (Colex, 2004), at p 113; R Espinosa Calabuig, *Custodia y visita de menores en el espacio judicial europeo* (Marcial Pons, 2007), at pp 144-146.

grave risk for him or her to be exposed to physical or psychological harm or another intolerable situation.

The courts of the requested States have already taken into account those adequate arrangements under the 1980 Hague Convention, but with the provision of Article 11.4 of the Brussels II Regulation, the *undertakings* or *engagements* are specifically covered by the Regulation[33]. So, under the Brussels II Regulation those arrangements are more than a factor to take into account[34].

This provision is aimed at ordering the restitution of the child to the Member State of origin in the event of 'restitution without danger'[35]. So trust in the Member State of origin to secure the welfare of the children after his or her return is encouraged[36].

The *Practice Guide* specifies that in order to issue a judgment that entails the return of the child to the Member State of origin, it must be established that the authorities have taken concrete protective measures relating to the child, so it is not sufficient that procedures exist in that Member State[37].

Finally, a case relating an appeal against a non-return order of a child (AAP Málaga (Sec 6ª), 11 September 2006)[38] can be quoted. The Spanish judge of the first instance refused to order the return of a child to England pursuant to Article 13.b) of the 1980 Hague Convention - grave risk of psychological harm. The party who appealed against that decision claimed the court had to take into account if adequate arrangements had been made to secure the protection of the child after her return. The court stated that the grave risk consisted in separating the child from her mother and her mother's husband, because the child had been living with them for eight years[39]. The fact is that the court of the second instance considered that the mother was the holder of the rights of custody -by virtue of a decision of an English court- and so the removal of the child was not wrongful.

The court also stated that, on the acquisition of a new habitual residence of the child in Spain, the father – whose habitual residence was in England - could apply to the competent court to modify the judgment on contact rights[40].

Conclusion

As has been explained, the Brussels II Regulation supplements the 1980 Hague Convention but some questions have still been left to national law. The exceptional circumstances that make it impossible to issue a judgment within six weeks, the possibility of an appeal, the hearing of the child and his or her age or degree of maturity, and the trust in the Member State of origin to secure the welfare of the children, can be used to frustrate the objective of the Regulation. For this reason, it is essential to take into account that objective when applying national laws.

---

[33] See P Jiménez Blanco (2008), at p 160 and pp 87-95; A L Calvo Caravaca and J. Carrascosa González, (2008), at p 370.

[34] C M V Clarkson and J Hill (2006), at p 415.

[35] See M Herranz Ballesteros [2004], 354-355.

[36] R Lamont [2010], 42.

[37] *Practice Guide*, p 32.

[38] AAP Málaga (Sec 6ª), 11 September 2006 (JUR 2007\124315).

[39] Ibid, at para 2.

[40] Ibid, at para 2. About relocation, see M Freeman and N Taylor, 'The Reign of *Payne*' [2011] 2 *Family Law and Practice* 2, 20-27; M Freeman, 'Themes from the reunite Relocation Research Project' [2010] 2 *Family Law and Practice*, 2, 98-10[33]7.

The Impact of the Withdrawal of Legal Aid in Family Law

1. Note on "LASPO 2012": the Legal Aid Sentencing and Punishment of Offenders Act 2012 and its wider impact

Frances Burton*

Introduction

The latest cuts implemented in public funding from April 2013[1] (and with more planned) have left some areas of law seriously unfunded and the government pressing for "more ADR", which they have now renamed "Dispute Resolution". The removal of the more familiar word "Alternate" is apparently in the hope that this will focus users on the various available ADR methods as an integral part of litigation, rather than as the bolt-on which they so far still been regarded as, despite efforts to encourage those in dispute to stay out of court .

This time Family Law is particularly affected by public funding cuts[2], since (on the grounds that even providing judicial determinations in the courts is too expensive for the government) even privately paying clients have now, for over a year, been obliged to have their cases assessed for suitability for mediation before they are even permitted to institute proceedings, by the imposition of "MIAMs" – Mediation Information and Assessment Meetings[3] . Thus it is not just less public funding which the cuts programme has achieved, but a further straitjacket which has been applied to Family justice in general.

Some District Judges have not been enforcing the MIAM process strictly, which suggests that the public may not be the only people who think this is a step too far in rigorous cost cutting. However if litigants do not have available to produce the relevant form on which the mediator certifies that the case is *not* suitable for mediation, there are judges, including at least one robust DJ at the Principal Registry of the Family Division in London, who send litigants away until they can produce that form duly completed.

However, anecdotally, in the winter of 2011-2012, following the introduction of the FPR 2010, the Senior District Judge commented at a specialist lecture that he was aware that some of his team were not enforcing the rule as they were sceptical of the value of mediation. He added that he was not entirely sure of the appropriate remedy for this judicial divergence of view. There is of course the principle of judicial independence. Alternatively is it that they disapprove of the cuts? Or is it perhaps more likely that there are some judges still as ignorant of the benefits of mediation or unconvinced of its value as they were a decade and a half ago, when the Woolf Reforms and the replacement of the Rules of the Supreme Court by the Civil Procedure Rules began this long standing attempt to save the cost of running the courts by introducing more efficiency into litigation? If this is the case then 15 years of information, education and familiarising of the coalface judiciary with front line Dispute Resolution appears to have achieved even less impact than was thought. Nevertheless it would be helpful to have some accurate information about judicial attitudes - as well as a host of other data - about the use of Dispute Resolution after all the time that has gone by with hopes of its expansion still triumphing over experience, since now LASPO means that mediation is no longer strictly a "choice".

* Editor. Research Fellow and Co-Director, Centre for Family Law and Practice. An earlier version of this paper was delivered to the Practice, Profession and Ethics Specialist Subject Section of the Society of Legal Scholars, at its annual conference at Bristol University, 11 September 2012.

[1] By the Legal Aid Sentencing and Punishment of Offenders Act 2012 which has had the effect of slashing £350m from the 2.5 billion public funding budget .

[2] Although public child law, mental health and some other small areas are left within legal aid scope.

[3] Family Procedure Rules 2010, r. 3A and Protocol, in force since 6 April 2011. These provisions will now have the force of primary legislation as their compulsory use is included in the Children and Families Bill 2013 which (in the 2012-2013 Parliamentary session) still has to make its way onto the statute book.

Outside Family Law, public funding (still called "legal aid" by the public) has also all but disappeared, but it is also the case that Family Law currently bears the most significant brunt of the LASPO cuts, *except* for mediation, which is funded subject to means and merits. It is not true that there is *no more* public funding at all in Family Law cases, as Resolution has been at pains to publicise, since there are exceptions, for certain types of private law cases (eg international child abduction) or in certain contexts (eg where domestic violence is present), but the very substantial withdrawal of most funded advice and representation affects the broad range of Family Law cases including significant numbers of Divorce and Nullity cases, which probably can be managed by litigants in person though they will struggle without the former advice which was available, and financial provision following such decrees, which the ordinary public probably *cannot* successfully manage alone .

April 2012 saw the first anniversary of the MIAMs system and Resolution (formerly the Solicitors Family Law Association) had been encouraging some limited research before a new project was funded by the ESRC to enable researchers at the Universities of Exeter and Kent to investigate not only *how far* MIAMS are *in fact* being used, but also much more *about peoples' experiences of mediation* and, indeed, about 2 other forms of traditional out of court dispute resolution too, namely *solicitor to solicitor negotiation and collaborative law*, a relatively new form of out of court settlement which is practised, albeit by small numbers, world wide. Neither of these forms of dispute resolution attracts public funding, although mediation does (but without any concomitant legal advice which would inform disputing parties of the legal infrastructure of the agreements they are thus invited to make – unless they pay for that separately themselves, if they can afford to do so). The researchers thus hope, following their fact finding, to be in a position to influence policy makers, funders, practitioners and disputing couples.

This seems much more promising than previous well known research[4] as the series of reports on what to do to cut litigation costs has focussed on other issues and not had the benefit of much up to date empirical research. It does seem that there would be a better chance of promoting ADR as a genuinely alternative to litigation if more was known about existing experience and indeed about why it has apparently taken so long to establish the use of mediation despite articulated government support and enthusiastic judicial pronouncements about what it can achieve.

The Exeter-Kent research questions are as follows:

1. How widely is each method actually used and how firmly is it embedded in the public mind as a means of resolving disputes?
2. What norms of family dispute resolution are embedded in each alternative ADR method?
3. Are particular approaches more or less appropriate for different kinds of cases and parties?

The impact should be emphasised of that fact that only one of the 3 methods to be examined attracts any public funding – mediation. There is no funding for family disputes settled by solicitors' negotiation since from April 2013 there has no longer been public funding for solicitors' ordinary family law work in any case (and precious little remaining at present or for the previous year or more). There is also no public funding for collaborative law, although Resolution claims that there are many clients who would like to use that method because it has – allegedly – a high success rate, but that they have to fall back on mediation which does attract public funding. The government has moreover confirmed[5] that funding will be increased for mediation, from £15m to £25m.

The impetus for giving mediation this favoured status in Family Law appears to come to a great extent from the principles of the immediately past President of the Family Division, Sir Nicholas Wall, who frequently stated that he wished to see less litigation damaging children and families and more private ordering. The fact that this chimes with the policy for the cash strapped Ministry of Justice and HM Courts and Tribunals Service to retrench because of their increasing costs of running the courts may not be entirely uncoincidental.

However it is not clear how the government means mediation to fill the gap of previously funded legal advice and representation, and how that will in practice work to avoid, instead of increasing, the costs of providing judicial determination of cases brought by litigants in person. Such litigants are notorious for extending court running times and increasing workload in the absence of skilled lawyers who can both advise them and present their cases succinctly and in a focussed manner to the judiciary[6].

[4] Such as by Professor Hazel Genn at Central London Civil Trial Centre and Professor Simon Roberts at the Mayor's and City of London Court.

[5] Their response to the Family Justice Review.

[6] See the examples of the reality of extra costs caused by litigants in person in Dr Lars Mosesson's article elsewhere in this issue on the "Constitutional Implications of the Withdrawal of Legal Aid in Family Cases".

David Pannick QC[7] has commented that the LASPO cuts do "not recognise that access to justice is an important constitutional principle" and that a duty must be imposed on the Lord Chancellor "to secure within the resources available, that individuals have access to legal services that effectively meet their needs". He says that "the removal of legal aid will result in many hopeless claims being pursued ineffectively by litigants in person…do it yourself litigation will be as effective as do it yourself medical operations" and that "litigants in person waste valuable and expensive court resources": and further that "the health and housing agencies of the State will have the burden of dealing with the consequences of vulnerable children and adults being denied the benefits to which the law entitles them". The fact is that the government has conducted no study of the associated costs of the LASPO provisions.

It may certainly be a mistake to see mediation as the panacea for all ills: research at the time of the enactment of the Family Law Act 1996 showed that the public did not like it then and there is no indication that they will like it any better 18 years later. Moreover the government's initiative in this respect does not appear to have been thought through. Abruptly changing the name from ADR to Dispute Resolution, which is said to be so as to place these processes on the same footing as litigation, may theoretically be sound if the argument is that a new identity is essential to engage the public with the new policy. Less sound is the decision to support, without further investigation, the Family Justice Review's recommendation that currently well understood features of the Children Act 1989, such as the Residence and Contact Orders, should at the same time be abolished and replaced with an unfamiliar new Child Arrangements Order.

While the Review body apparently considered this amendment of the Children Act an unspecified improvement, the result is that separated parents are now to be expected to negotiate this new outcome of their post separation parenting themselves, if necessary with the aid of mediation, but without benefit of the legal advice which used to be available under legal aid.

The rationale behind this is apparently because there is also to be a new initiative to educate parents more thoroughly into the concepts of shared and cooperative parenting. While this may be theoretically a worthwhile aim, it is also a pity since, (despite ongoing arguments about whether there should be a presumption of shared residence or not, and whether there should be legislative reform to reflect such an approach by amendment to the Children Act 1989 on which the Ministry of Justice has been consulting) Residence and Contact orders have at least become established in the 20 odd years since the implementation of the Children Act 1989.

Moreover it does not seem the moment to make such a change when simultaneously legal aid, and access to the legal advice and know how of specialist Family practitioners (the value of which is acknowledged in the Report) is taken away. The public is in future to be expected to obtain all the information the government thinks it is necessary for them to have from an automated "information hub" which was scheduled to be available from April 2013, but which from the start was being described as likely to be incomplete at that date, and has so far not appeared (although there is a new Child Support Agency website[8] written in much more accessible terms than any previous such site, and which gives a good deal of general legal and practical information to separated and separating parents). Resolution has meanwhile built a similar information portal on the web[9].

This automation of practical information (one cannot call it a substitute for legal advice) is the more disturbing as it is not the first time we have had initiatives enthusiastically recommending Dispute Resolution, but which have made little impact on the public's behaviour. Following Lord Woolf's promotion of mediation as long ago as the late 1990s, the most recent judicial support in a major report from a leading judge was that of Sir Rupert Jackson, completed in December 2009 and published in January 2010. This was the Final Report of the Jackson Inquiry into the costs of civil litigation[10]. Some of the more significant recommendations in this report go to the conduct of cases, the avoidance of counsel's prolixity, improvement of disclosure and recasting of conditional fee arrangements but he does devote an entire chapter – chapter 36 – to what was then called ADR. At the end of that chapter is a major endorsement of ADR in which Lord Justice Jackson says that he does not "recommend any rule changes to promote ADR" (itself a pity as that opportunity for robust articulation of the mediation alternative was already missed a decade or more earlier in the pro-active case management introduced in the CPR, where ADR is only weakly and indirectly mentioned).

However Jackson LJ does "accept that ADR does bring considerable benefits in many cases, and that the facility is

[7] *The Times*, 24 November 2011.

[8] https://www/gov.uk/child-maintenance/overview.

[9] www.resolution.org.uk.

[10] www.judiciary.gov.uk.

currently under used". He also recommends that there should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits that ADR can bring and (b) to alert the public and small businesses to the benefits of ADR. He then recommends that "an authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation"… and that "this should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation"[11].

To be fair, Sir Rupert does also mention another ADR tool in his report which can be of great use in encouraging Family Law settlements whether by mediation or other means: that is early neutral evaluation, which is little used in the UK but has a much higher profile in other common law jurisdictions such as Canada and the USA. However one wonders to what extent the unrepresented, unadvised, ordinary members of the public know about this ADR variant, or where to access it.

However the real point is that the Jackson Report is now nearly 3 years old, and has it heightened public awareness at all? There are no significant signs of that, although the annual CEDR audit of mediations and the Civil Mediation Council's annual count of those conducted by its members – both effected year on year - do show small increases in the numbers of mediations carried out. Moreover the CMC, which includes in its remit the raising of awareness of mediation, has set itself a target of establishing a minimum 10% annual increase in the use of mediation services.

Nevertheless, to have any impact something more needs to be done than either the government or respected judges unilaterally laying down norms that they would like to see established since this approach puts the cart before the horse. We have had a National Mediation Helpline routinely serviced by the leading providers for some years, and Mediation Services established at many courts but if significant numbers of individuals are *still* not rushing like lemmings into ADR, and apparently *still* need to be persuaded not to go to law, clearly a new approach needs to be considered.

More than 150 years ago Sir Henry Maine established in his classic seminal work *Ancient Law*[12] that social change comes first and then law enshrining it later, not the other way around. He drew these conclusions mainly from his studies of undeveloped 19th century societies, including of tribal customs and local laws in India, on which he advised the imperial government and administrators of the day, and by analogy with custom and law making in early societies.

There is therefore some arguable case for a similar approach to as radical a government decision as David Pannick deplores in their actually taking away the citizen's constitutional right to access to justice on the mere grounds that we cannot afford it. Governments exist to deploy budgets to afford public necessities such as a reliable system of justice, as David Pannick obliquely points out. Some work clearly needs to be done first on the *place* of Dispute Resolution, and of its different varieties, within the justice system, and only then might it be appropriate to make mediation in effect compulsory in certain circumstances as the MIAMs requirement sets out to do.

This trend towards a different culture is already to be seen in the development of Workplace Mediation, which now aims to resolve more employment disputes in house long before they might reach the Employment Tribunal. However the culture needs to be developed first and then legislation for its formal adoption afterwards rather than radical change imposed from above simply for the purpose of saving costs, despite the existence of data to show that Dispute Resolution *does* save litigation costs[13].

For example, no one doubts that family disputes are better kept out of the courts if possible, but the activity of pressure groups, such as Families Need Fathers, indicate that culture is slow to change. Fathers who feel excluded from their separated families would be unlikely to litigate if they could get the contact they feel they and their children need without either litigation or making an exhibition of themselves to draw attention to their unsatisfactory situation. In this respect the current MOJ consultation on whether there should be a legislative change formally to recognise the role of shared parenting is more likely to uncover cultural support for formal change and to achieve public cooperation than simply imposing MIAMs on anyone who feels that only litigation will achieve resolution of an apparently intractable family dispute.

One way in which such cultural change may eventually be achieved seems much more likely to come from innovative private enterprise than government diktats. For example, another recent (privately achieved and non-government sponsored) initiative *may* well go some way towards saving the resources, stress and delay in financial and property contexts within Family Law that both the

[11] This handbook guide has since been published by Oxford University Press. See www.oup.com.

[12] 1861, later republished by Oxford in 1906. Sir Henry James Sumner Maine, (1822-1888), Regius Professor of Civil Law in the University of Cambridge, and later, inter alia, first Professor of International and Comparative Law in the University of Oxford, was one of the forefathers of modern sociology of law and a leading figure of the English and German schools of historical jurisprudence.

[13] See http://www.adrcentre.com/jamsinternational/civil-justice/SurveyDataReport.pdf.

Jackson Report and the Sir Nicholas Wall have been advocating, and this may be another sound instance of an innovative practical scheme for determination of disputes outside court – like collaborative law has proved to be - which brings real benefits and thus goes on to establish itself without evidence of the cultural change demanding that new system first.

This initiative is the new Institute of Family Arbitration (IFLA) launched by the Chartered Institute of Arbitrators[14], the Family Law Bar Association and Resolution (Solicitors Family Law Association) in March 2012. This has real potential for improved outcomes in family financial disputes in ancillary relief, and also in other contexts under a range of statutes including TOLATA and the Inheritance (Provision for Family and Dependents) Act 1975. Nor is it essentially restricted to "big money" cases only, since the scheme has sensibly achieved training of arbitrators working regionally as well as in London, and its methodology is equally suitable to the "big" cases and small ones alike – including those where there might be a little searching around for modest inter-family members' loans to finance the arbitrators' and IFLA fees and expenses in order to set up the dispute mechanism of a Family Arbitration under the IFLA rules. The system can be applied to cases involving £50m (or £500m or more) or the £50,000 equity in a modest former matrimonial home.

The likely wide appeal is not least because clients can choose their arbitrators and participate in crafting their solutions while receiving a determination in a structured programme rather than facilitation from a mediator. Further uses of the concept of arbitration in conjunction with ordinary recourse to English Family Law are set out elsewhere in this issue of *Family Law and Practice* by the former Singer J, for many years a judge of the Family Division well used to deploying innovative aids to justice in his Family judicial role[15].

The inauguration of IFLA is therefore a development which has some advantages over adversarial litigation, especially if combined with mediation in relation to those issues which are not within the Institute's scheme for determination of financial disputes. It is a distinct advantage that it is possible to obtain an arbitrator of the parties' choice at short notice, whereas if solicitors' negotiation (which will have had to be privately paid for) has not achieved a resolution there will be a long wait of at least 8 months to list the dispute before a judge in the Family Division (or the Chancery lists in the case of a cohabitants' property dispute which is still subject to the CPR in the Chancery courts rather than the FPR 2010 in the Family Courts) and very likely a poor experience.

In the cases where the parties have had to pay solicitors themselves for advice, litigation also offers the additional potential for adverse experience when the parties may then have to consider conducting their cases themselves without legal representation if they decide there is no option but to have a determination in court – as Heather Mills McCartney famously did, eventually discharging her legal team as she said she could no longer afford to pay them since their advice over a period of time without resolution of the dispute had been so expensive.

It is as yet too early to assess whether this IFLA alternative to unfunded litigation will help to plug the gap in public funding for the normally essential advice on which the public has relied at the ancillary relief stage of post divorce decree financial provision, if a settlement cannot be worked out on their own by unrepresented litigants before the courts. All the same, it can be confirmed that those cases which have been undertaken under the IFLA Scheme so far have been duly satisfactorily determined and that this is a live scheme which is bringing an extra tool to the portfolio of Dispute Resolution methods.

This is hardly surprising as arbitration is long established in commercial and adjudicative contexts, such as construction where it delivers many benefits outside mainstream litigation. It is a unique selling point that it delivers a determination (rather than the facilitated remedy of mediation) but does so within its own sphere which offers greater participation to the parties in the resolution of their dispute before a respected arbitrator whom they can choose themselves. This is not possible in litigation before an unknown judge at a time not of the parties' choosing.

Conclusion

So far the response of the government to the objections to the severe reduction of public funding in pursuit of costs saving has been simply that of the former Justice Secretary and Lord Chancellor, Kenneth Clarke QC, that "we could not go on as we were". However this is unlikely to be a solid rationale for either actually reducing costs (since the changes maybe worse than costs neutral) or for in practice depriving the citizen of a constitutional right to access to justice. This is because acting in person in many cases is no more suitable than, as David Pannick has identified, performing your own medical operations.

[14] See www.ciarb.org.

[15] See Sir Peter Singer "An Innovative Transatlantic Interface" above.

2. Constitutional Implications of Withdrawal of Legal Aid in Family Cases

Lars Mosesson*

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") deprives most litigants of access to legal aid in cases involving Family Law. Other contributors to the Journal will be addressing various substantive issues arising from this Act, but this examines the changes to legal aid introduced, from the perspective of Constitutional Law. It will identify the reasons given by Kenneth Clarke, the then Justice Minister, for the changes; the relevant provisions of the European Convention of Human Rights ("ECHR") and the Human Rights Act ("HRA"); the requirements and status of the Rule of Law in the UK; and the likely fate of these changes. It will become clear that these muddled changes will offend some of the key values of our Liberal Democracy, and are likely to cause further expense over the coming months, and save little or no money in the longer term.

1. The Background and the Minister's Stated Reasons

The provisions in the Act relating to legal aid are contained in Part I.[1] The Minister, Kenneth Clarke, acknowledged[2] that the legal aid scheme is a vital part of the system of justice; and he stated that the aims of justice are sound results, delivered fairly, with proportionate costs and procedures, and with cases dealt with at reasonable speed.

However, Clarke asserted that legal aid contributes to some of the weaknesses in the system. He asserted that, although Law should generally be a place of last resort, not first, legal aid too often encourages people to bring their problems before the courts, even when they are not the right place to provide good solutions, and sometimes for litigation that people paying from their own pocket would not have pursued.

Clarke said that all this formed the backdrop to his proposals for "root and branch reform" of legal aid in the Act. His stated aims[3] were to discourage "unnecessary and adversarial litigation at public expense"; to target legal aid to those who need it most; to make substantial savings to the cost of the scheme; and to deliver better value for money for the taxpayer. He stated that he was strengthening some aspects of the original proposals to ensure that victims of domestic violence do receive legal aid for private family cases and to ensure that legal aid is available for children at risk of abuse or abduction. In other areas, however, his aim was for people to use alternative, less-adversarial means of resolving their problems instead (notably, in divorce cases, where the taxpayer will still fund mediation).

Clarke acknowledged there are concerns about access to justice arising from his proposals – especially for vulnerable groups – but asserted that his plans would protect fundamental rights to access to justice, whilst achieving a more-affordable system.

He admitted that his ultimate aim was a fundamental shift in the way justice works as a system, to one based on "continued access to justice where it counts, earlier resolution of disputes, less complexity and greater affordability."[4] Not the least of his aims was for a reformed profession: one where there is enough provision to ensure people have access to justice; but "more broadly, that we have competitive, consumer-focused law firms that can compete internationally."

He concluded: "In summary, these legal aid changes constitute a substantial set of very bold reforms, the overall effect of which should be to achieve significant savings whilst protecting fundamental rights of access to justice."[5]

These proposals and their predecessors have been

* Lars Mosesson, LLB, LLM, PhD, Dip International Law Human Rights, FRSA, Senior Lecturer, Department of Law, Buckinghamshire New University

[1] As expanded in Part 2 (on orders for payment) and by Part 1 of Schedule 1.

[2] Ministerial Foreword to Reform of Legal Aid in England and Wales: the Government Response - June 2011 - Cm 8072, p.2. Kenneth Clarke has since been replaced as Justice Minister and Lord Chancellor by Chris Grayling MP, although the same coalition government, and its policies, remains in place.

[3] Ibid, passim

[4] Ibid, p.4

[5] Ibid.

widely criticised[6]. The criticisms are not simply special pleading by a sector with financial interests in the present system, for they raise deep issues about access to justice and the Rule of Law in the UK, and, thus, about the real availability of the rights that the people are said to have in law.

The effects of, and amount of money that will be saved by, these changes are debated. The government has its views, but accepts that the Act will cause 600,000 people to lose access to advice & representation[7]: Shelter and the Red Cross say they are to close a number of their advice-centres, and one-third of law firms state they are likely to stop offering services in Family law because of these changes[8]. It is not clear how or whether these services for those in need are to be replaced.

It is worth noting that the provisions in the Act do not intend to stop parties from paying for legal advice and representation in adversarial proceedings: they merely prevent those who are unable to pay from receiving public funds to help them. Nevertheless the Children and Families Bill, now proceeding through Parliament, does give statutory force to the existing rule 3A of the Family Procedure Rules 2010 (in force since April 2011) requiring all Family proceedings to be preceded by a Mediation Information and Assessment Meeting (MIAM), and a new form has now been introduced which (unless an exception, such as domestic violence applies) must be completed before application is made to the Court.

2. The Relevant Provisions of the ECHR and the HRA

Article 6 of the European Convention of Human Rights ("ECHR") has been incorporated into English law by the Human Rights Act 1998 ("HRA"). The Article requires a fair trial in "the determination of (everyone's) civil rights and obligations..." What this means in practice has been examined by the European Court of Human Rights in many cases. The most-relevant here are *Airey v Ireland*[9] and *Steel & Morris v UK*[10].

In *Airey*, the applicant was a woman of modest means. She wanted an order of judicial separation from her violent husband. To get such an order, she would need to apply to the High Court, but she could not afford the fees of a lawyer[11], and no legal aid was available to her. She complained to the European Commission[12], *inter alia,* of a violation of art.6, on the grounds that she had been denied a right to a fair trial of her civil rights, because she could not get access to the court as she was too poor and was denied legal aid. The Commission and, later, the Court both agreed with her.

The Court criticized the government's argument that any applicant was free to go before the court without a lawyer as potentially merely "illusory"[13], and ruled that the question was whether to do so "would be effective, in the sense of whether she would be able to present her case properly and satisfactorily" in reality[14]. The Court said it seemed "certain ... that the applicant would be at a disadvantage if her husband was represented by a lawyer and she were not."[15]

The Court stated clearly both that there is no necessary right to legal aid under art.6, and that whether there is such a right will "depend on the particular circumstances"[16]. That is, what matters is the reality on the facts, not the form; and on these facts there was a clear violation.

In *Steel & Morris* the issue was defamation. The applicants had been involved in publishing a leaflet about the quality of McDonald's food, their employment practices and their effects on the global environment[17]. McDonald's sued them for libel. Under the Legal Aid Act

---

[6] See, for example, the issues raised in Lord McKay's Joseph Jackson Memorial Lecture in 1989; by David Pannick in *The Times* 24 November 2011; and in the joint manifesto of Family organisations (CAB, Gingerbread, FLBA) in winter 2011.

[7] *The Guardian*, Legal Correspondent, 11 March 2013.

[8] Catherine Baksi, *Law Society Gazette*, "Legal Aid 'deserts" warning", 8 April 2013.

[9] [1979] ECHR 3, (1979-80) 2 EHRR 305.

[10] Application no 68416/01, Judgment of the Court on 15 Feb 2005.

[11] Her income was about £40 a week and the estimated costs of a case were between £500 and £1,200.

[12] Under the original procedure, which governed this application, the Commission dealt with all applications under the Convention, the Court becoming involved only if the application could not be settled. This procedure was later changed by Protocol 11.

[13] At para 24

[14] Ibid. The procedure in the High Court was complicated. It was conceded by the government that, in all 255 cases for judicial separation in the previous seven years, the applicant had been represented by a lawyer.

[15] Ibid.

[16] Ibid, paras 24 to 28.

[17] McDonald's own a very large chain of "fast-food" outlets in many countries, through which they sell burgers and the like, supported by massive advertising aimed mainly at children.

1988, Steel & Morris could not seek legal aid to defend the action[18], because libel was excluded from the areas of law for which it could be available[19]. The case lasted for 313 days in court, the longest trial in English history. The main reason for the length was that the defendants had to represent themselves. The judge was commendably flexible in trying to enable them to present their side of the case, despite their lack of legal knowledge or experience. However, they were unable to prove the truth of all their allegations, and were ordered to pay damages. The decision was upheld by the Court of Appeal[20].

When their application was considered by the European Court, however, it was ruled that there had been, *inter alia*, a violation of their rights under art.6. The Court repeated that the Convention is intended to guarantee "practical and effective rights"[21], not merely formal provisions, and that access to a court or tribunal is an essential part of this; and they went on to examine when this means that legal aid must be provided. The Court accepted again that the right is not absolute, and that a state may restrict it where it is for "a legitimate aim and proportionate"[22], provided that all parties have a reasonable opportunity to present their case and suffer no substantial disadvantage from not having legal aid in each case[23]. The Court ruled that there had, on the facts, been an "unacceptable inequality of arms"[24], even though the case was not one "determinative of important family rights and relationships"[25]. This last comment makes clear that, where a case does determine such matters, the Court will assume that the requirement for legal aid will be all the stronger.

From these cases, we can extract the general requirements under art.6. There is no automatic right to legal aid in all civil cases, but the state-system must enable it to be available in all appropriate cases, in effect, where the interests of justice require it: a blanket prohibition will almost certainly be a violation, particularly where one party is allowed to pay for legal assistance. Two further specific points should be noted. The Court will examine the real effect of inequality of arms, not merely the form, where one party has the funds and representation and other does not, as in both the cases above. If neither party is allowed legal representation, this problem will be greatly reduced. Secondly, the Court in *Steel & Morris* identified the availability of legal aid and representation as particularly important in cases involving "family rights and relationships", *semble*, because of the emotionally charged nature of such cases and the importance of the issues and outcomes for the people involved.

It appears that Clarke and his advisers tried to reconcile the wording of their policy with the wording of the Court in these cases. However, as we have seen, when the applications start coming before the Court, the Court will look at the reality behind the form.

3. The Requirements of the Rule of Law

Another objection to the changes is based on the requirements of the Rule of Law. These values of a Liberal Democracy underpin the provisions in the ECHR[26] (and HRA), but they also go wider and deeper – and they cannot be abolished by simple repeal of formal law[27]. Dicey may be credited with establishing the central place of "the Rule of Law" in a constitution; and he showed his sceptical pragmatism about formal provisions in documents, preferring to consider the practical realities of how a system operates[28].

However, there are many formulations of the phrase "the Rule of Law", and the details of Dicey's idiosyncratic formulation no longer warrant detailed scrutiny in a context such as this[29]. Some other formulations are very narrow and formalist[30], some are political-economic assertions about the proper role of the law[31], and others

[18] Steel worked part-time occasionally and Morris was a full-time carer for his child. They had very little money between them. However, they did receive some legal support *pro bono* during the trial. It was alleged that McDonald's spent up to £10m on their case.

[19] See Sch 2, Part II, para 1. This provision has been amended since, to allow legal aid in exceptional cases.

[20] [1999] EWCA Civ 1319.

[21] At para 59.

[22] Ibid para 62.

[23] Ibid.

[24] Ibid para 72. Waffengleichheit is the term in German law, which is translated as "equality of arms".

[25] Ibid para 65

[26] See the Preamble to the Convention, as well as the frequent references to it in the judgments.

[27] Hence the noises from Teresa May and other ministers of the current government in the UK about repealing both these provisions do not affect the force of the argument.

[28] See A V Dicey: *Introduction to the Study of the Law of the Constitution* (ed. ECS Wade, 10th edn 1959) p.454. Another way of expressing this is to say that "Fine words butter no parsnips".

[29] See Lars Mosesson: "Prevention of Terrorism Act 1974", *Poly Law Review*, (1975) Vol 1, No 1.

[30] Notably that of J Raz. See "The Rule of Law and its Virtue" in [1977] LQR 195-211.

[31] E.g. F Hayek: *The Road to Serfdom*, 1944 RKP IRoutledge Keegan Paul) London.

take a wide constitutional perspective. The best example of the last is the Declaration of Delhi by the International Commission of Jurists in 1959. This Declaration on what the Rule of Law requires included not only compliance with the formal requirements of legalism and of government being under the law, but also with the requirements of justice (as formulated in the Universal Declaration of Human Rights and the ECHR), the need for an independent judiciary, the need for an independent legal profession, and the need for access to the courts, with support from the state where needed. This is a broad agenda for the working of a Liberal Democracy.

For practical purposes, the most-useful formulation of "the Rule of Law" may be found in Lord Bingham's Sir David Williams Lecture in 2006[32]. His formulation is primarily synthetic, building on the good sense of many previous formulations, academic and judicial; but it is clear and coherent, and he does reject the views of some writers[33].

Bingham asserts that the Rule of Law has one basic principle. "The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts[34]."

From this, he extrapolates eight "sub-rules", of which five are directly relevant to the issues of legal aid and access to the courts and tribunals:

1. "The law must be accessible and, so far as possible, intelligible, clear and predictable."
3. "The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation."
4. "The law must afford adequate protection of fundamental human rights."
5. "Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve."
7. "Adjudicative procedures provided by the state should be fair."

The key words we may take from these formulations are "accessible", "apply equally to all", "adequate protection", "without inordinate cost", and "fair". Hence, there will be a violation if some people are unable to access the law, or they are unable to benefit from the law on the same basis as others, or the protection afforded to them is inadequate, or the means are available in practice only to those who can afford the cost, or the process of adjudication is not fair to those without money. These values reflect what is to be found in the reasoning of the European Court and in other courts; and they draw together both the requirements of formal and substantive justice, and the need for the practical enjoyment of the rights. This includes putting positive obligations on the state to provide the means for all to enjoy the rights, including by providing legal aid, where necessary. Clearly, if the law provides formal rights, but denies – formally or in practice – the ability to secure them, there is, at the least, a denial of justice and a violation of the Rule of Law[35].

It remains to be seen how far what LASPO causes in practice will be compatible with these basic requirements of a just and decent constitution and society; but it seems likely that the UK will have many cases to answer, so long as the Act remains in force.

4. The Status of the Rule of Law

One question which may be considered here is what the position would be if there were a denial of the justice which the Rule of Law requires, by the denial of legal aid in these cases, but if the HRA had been repealed and the UK had withdrawn from the ECHR and the EU. The issue is what the status of "the Rule of Law" is in the UK, and whether at *Common Law* the courts in the UK could declare such offensive legislation invalid.

This idea that the courts might be able and willing to do so may be heretical to a neo-Diceyan traditionalist, but it has been gaining increasing support in recent years, among both academics and judges[36]. It a manifestation of the debate as to whether the UK is now a system based on the Sovereignty of Parliament or on the Sovereignty of the Constitution.

One quietly revolutionary formulation was provided by Lord Woolf[37]. He hoped it would never be necessary

---

[32] Published in the *Cambridge Law Journal*, Vol 66 (2007) pp.67-85.

[33] Notably, Raz's assertion that slavery is compatible with the Rule of Law.

[34] Op. cit, p. 72.

[35] The motives for the denials may make the position one of cynical hypocrisy. Sadly, it is possible to think of many states where this has been or is the case.

[36] See Lars Mosesson: "Dr Bonham in Woolf's Clothing", *Mountbatten Journal of Legal Studie*s (2007) pp.5-17.

[37] (1995) *Public Law* 69 .

for the courts to do such a thing, but he contemplated the position if the "unthinkable" were to happen, that is, if the Queen-in-Parliament were to pass a manifestly unjust statute.

"Ultimately there are even limits on the supremacy of Parliament, which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions, which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved."

This view has been expressed in various formulations by other senior judges[38], all with the same caveat that they would not wish to have to make such a ruling. Nonetheless, it represents a view that, if the foundations of our constitution were being violated by even primary legislation, the courts would feel the need - the "responsibility" – to intervene. Whether a denial of access to the courts and tribunals through the denial of legal aid would be seen by the judges to fall within these "constitutional foundations" or the "modest dimensions" of the Rule of Law remains to be seen – and we must all hope it will never have to be seen.

5. The Likely Consequences of the Changes

Inevitably, much of the reality of the consequences of these changes will depend on the interpretation of the wording of the Act in the coming months. One issue which will be of great significance is how widely the Director interprets "exceptional" under s.10. This section allows for legal aid to be given, outside the specified categories, if the Director "is satisfied" that the case involves Convention rights or rights under EU law, or "that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach[39]."

Even allowing for a wide interpretation of this section, it seems inevitable that thousands of people will be unable to vindicate their rights in future, simply because they will not be able to seek legal aid.

On top of this hardship for these individuals and the closure of advice centres, mentioned above[40], which will have a more-general effect, withdrawing legal aid in Family cases may well produce other consequences. Hearings are likely to be longer, as was seen in *Steel & Morris*, which will increase costs for the court service. Refusals of legal aid are likely to be challenged in the domestic courts and the European Court, which will increase costs to the public purse, as well as do the reputation of the UK little good. That parties who can afford to pay legal representatives will be able to do so will aggravate the position under art.6. Victims and other vulnerable parties[41] are liable to be cross-examined by their abuser or dominant partner in person, rather than by a professional advocate. More people may feel forced into taking "the law" into own hands to try to solve their problems, if they feel they cannot get justice through access to the courts or tribunals. There will be the temptation for parties to claim falsely that there was domestic violence, in order to get legal aid.

Such results would be incompatible with the basic values of our constitution and the integrity of our legal system. They will be contested in the courts and may be judged to be illegal, which will cause further confusion and cost. It is hard to see how the short-term gains, financial and political, if any, of these changes will not soon be seen to be outweighed.

---

[38] See, inter alia, the comments expressed in *R (Jackson) v Attorney-General* [2005] 56, [2006] 1 AC 262 and *AXA General Insurance Ltd and Others v Lord Advocate and Others* [2011] UKSC 46 , in particular by Lord Hope; as well as the references in the article cited in fn 36, above.

[39] S.10(3)(b)

[40] See n.8, supra

[41] In cases short of "domestic violence".

Note from Our India Correspondent

on India's innovative decision to regulate surrogacy through immigration controls

Anil Malhotra*

The ART Phenomenon and the New Speed Breakers on the Road to Surrogacy

The burgeoning surrogacy industry in India is propelled by an absence of cohesive legislation and the mushrooming IVF and Assisted Reproduction Technology (ART) clinics which wantonly advertise services for providing "Wombs for Rent".

The unregulated reproductive tourism market for procreating through surrogates is booming, with India being the first country proposing to legalise commercial surrogacy. Whilst the new *Assisted Reproductive Technology (ART) (Regulation) Bill and Rules, 2010* are still not enacted[1], the non-statutory *Indian Council of Medical Research (ICMR) Guidelines, 2005*, has provided some regulation which has already had effect.

The Indian entrepreneurial spirit has ballooned the business of providing "Wombs for Rent" into a whopping trade, valued at Rupees twenty five thousand crores[2]. Despite legal, moral and social complexities that shroud surrogacy, economic necessity has enticed women to shake off their inhibitions and fear of social ostracism so far as to be lured into this trade by agents and corporate surrogacy consultants for international markets. Free availability of a large pool of women willing to be surrogates, a good medical infrastructure, fractional costs, less waiting time, close monitoring of surrogate mothers by over two lac[3] In-Vitro Fertilization (IVF) Clinics and no check of any law restricting single, gay or unmarried couples becoming parents by surrogacy, has made this unethical trade in India skyrocket to spiralling heights.

New Indian Medical Visa Regulations Will Cap Surrogacy

However, soon, the business of surrogacy will plummet and boomerang. In accordance with the latest new Indian visa regulations, effective 15 November 2012 onwards, all foreigners visiting India for commissioning surrogacy will be required to apply for "Medical Visas" and cannot avail themselves of simple tourist visas for surrogacy purposes. The Ministry of Home Affairs, by a letter of 9 July 2012, has stipulated mandatory conditions for such medical visas, which if not fulfilled, will lead to visa rejection. These new medical visa regulations stipulate that a letter from the Embassy of the foreign country in India or its Foreign Ministry should be enclosed with the visa application stating clearly that such country recognises surrogacy and that the child to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child of the commissioning couple, who will undertake to take care of their surrogate child.

The treatment will be effected only at registered ART Clinics in India recognised by ICMR and the foreign commissioning couple must produce a duly notarised agreement between them and the prospective surrogate Indian mother. After the surrogate baby is born, an exit permit will need to be obtained by a commissioning couple before leaving India. This will be available from the Indian Foreigners Regional Registration Office (FRRO), to verify issue of a certificate from the ART Clinic, confirming discharge of liabilities of the Indian surrogate mother and ensuring that custody of the child is with the commissioning parents. Clearly, these safeguards, checks and balances (since the moral and ethical dimensions so far remain unaddressed by any legislation) have been put in place administratively so as to regulate the surrogacy industry appropriately. This "dam", built with the strong bricks of conditions and medical visas, should at least stem the flow of unrestricted surrogacy which had, like the muddied waters of a flooding river, begun to pollute India by threatening women's health, their basic dignity and fundamental human rights.

* LLM (SOAS) Fellow of the International Academy of Matrimonial Lawyers (IAML), Malhotra & Malhotra, Chandigarh, India. Author of "India, NRIs and the Law, and co-author of "Acting for Non resident Indian Clients," anilmalhotra1960@gmail.com

[1] The recommendations of the Indian Law Commission for legislative reform appear in the appendix to this article, as do the new Indian Medical Visa regulations mentioned below.

[2] A crore is the Asiatic word for ten million (10,000,000).

[3] A lac" is an Indian expression for 100,000.

Medical Visa Regulations Will Harmonise With the Existing Indian and Foreign Law of the Countries of Commissioning Parents

Commercial surrogacy is illegal in the UK, though surrogacy itself is permissible under English Law on the basis of payment of reasonable expenses to the surrogate mother. In most US States, compensated surrogacy agreements are either illegal or unenforceable. In some Australian States, arranging commercial surrogacy is a criminal offence and surrogacy agreements giving custody to others are void. In New Zealand and Canada, commercial surrogacy is illegal, although altruistic surrogacy is allowed. In Italy, Germany and France, however, commercial or other surrogacy is unlawful. In Israel, commercial surrogacy is illegal: the law accepts only the surrogate mother as the "real" mother.

India, in total contrast, accepts commercial surrogacy and no law declares it illegal. The Supreme Court on 29 September 2008, in *Baby Manji Yamada Vs. Union of India and Another*[4] observed that "Commercial Surrogacy reaching Industry proportions is sometimes referred to by the emotionally charged and potentially offensive terms: "wombs for rent", "outsourced pregnancies" or "baby farms". However, the new Indian Medical Visa Regulations, by disallowing Indian visas to foreigners whose countries prohibit surrogacy, will ensure that India harmonises internationally with those foreign nations whose overseas citizens wish (wrongfully) to patronise surrogacy in India. Of our own initiative, we have banned foreign single, unmarried or gay parents by restricting surrogacy to couples constituted by a foreign man and woman who have been married for at least two years. The operations of unethical, unregistered and unrecognised ART shops cannot be accessed anymore.

Reactions and Responses of Foreign Governments

Most foreign embassies have indicated on their websites that the Indian Government now requires medical visas for foreigners coming to India for surrogacy. Besides this, stringent DNA tests are already in place to establish appropriate genetic conditions for parentage and foreign nationality. Indian Consulates overseas and Visa Facilitation Services (VFS) have also publicised the fact that foreign nationals must ascertain beforehand whether their country permits surrogacy and emphasised that they cannot enter India for surrogacy purposes on tourist visas. The British High Commission, New Delhi, in advance preparation, states by its letter of 30 October 2012 to the India High Commission, London, that the British Government recognises surrogacy and makes provisions for commissioning couples for children born overseas through surrogacy. The UK Human Fertilization and Embryology Act 1990 is cited in support. It allows surrogacy if one parent is genetically related to the surrogate child and no money, other than reasonable expenses, is paid in respect of the surrogacy arrangement. Alternatively, the letter also points to the support of the UK Human Fertilization and Embryology Act 1990, for providing parental orders to commissioning parents. This letter is stated to be a request for entertaining applications for medical visas for purposes of surrogacy in India, in accordance with requirements of the new Indian Medical Visa Regulations.

Conclusion

Rather than Parliament catching up to pass a law to regulate the unscrupulous surrogacy trade, the new Medical Visa Regulations have stepped in to do what the law ought already to have done. Rather than permitting surrogate children to be born in India with the risk of being stateless persons and being denied entry into foreign countries where their commissioning parents reside, it is apt and necessary that such unethical practices leading to such disastrous situations should be pre-empted and prevented. The Indian Government in its administrative wisdom has stepped in at a time when the regulatory law is nowhere near the horizon.

Recent instances of surrogate children from Germany, Japan and Israel born in India and leaving upon court intervention should make legislators think of enacting a strict surrogacy monitoring law. The ART Bill 2010 has legal lacunae: it lacks creation of a specialist legal authority for determination and adjudication of legal rights of parties, in addition to conflicting with existing family laws. These pitfalls should not become a permanent feature of an established surrogacy industry. Surrogacy needs to be checked and regulated by a proper statutory law. Till then, the much needed medical visa regulations will provide succour and relief. Unacceptable practices must not be allowed to be carried on in the absence of appropriate legislative provision.

---

[4] 2009 SC 84, *All India Reporter*

Appendix

Surrogacy in India
New Indian visa regulations for commissioning parent(s)
extracted from third party correspondence with the Indian Ministry for Home Affairs

Visa for foreign nationals intending to visit India for commissioning surrogacy

It may be noted that foreigners visiting India for commissioning surrogacy are required to apply for Medical Visas with the following conditions:

i. The foreign man and woman are duly married and the marriage should have sustained for at least two years.

ii. A letter from the Embassy of the foreign country in India, or the Foreign Ministry of the country, should be enclosed with the visa application stating clearly that:

   a. the country recognizes surrogacy; and
   b. the child/children to be born to the commissioning couple through the Indian surrogate mother will be permitted entry into their country as a biological child/children of the couple commissioning the surrogacy.

iii. The couple will furnish an undertaking that they would take care of the child/children born through surrogacy.

iv. The treatment should be done only at one of the registered ART clinics recognized by the Indian Council of Medical Research (ICMR).

v. The couple should produce a duly notarized agreement between the applicant couple and the prospective Indian surrogate mother.

vi. Before the grant of the visa, the couple needs to be informed that before leaving India for their return journey, an 'exit' permission from FRRO/FRO would be required. Before granting the 'exit' the FRRO/FRO will see whether the foreign couple is carrying a certificate from the ART clinic concerned regarding the fact that the child/children have been duly taken custody of by the foreigner and that the liabilities towards the Indian surrogate mother have been fully discharged as per the agreement.

vii. Further it may be noted, for drawing up and executing the agreement cited above at (5), the foreign couple can be permitted to visit India on a reconnaissance trip on Tourist Visa, but no samples may be given to any clinic during such preliminary visit.

viii. If the listed conditions are not fulfilled, the visa application shall be rejected."

A letter of support will be required to submit along with the visa application confirming points ii a. & b.

Government of India, Law Commission of India

Need for Legislation to Regulate Assisted Reproductive Technology Clinics
as well as Rights and Obligations of Partied to a Surrogacy

Report No. 228 August 2009
Recommendations

The draft Bill prepared by the ICMR is full of lacunae; in fact it is incomplete. However, it is a beacon to move forward in the direction of preparing legislation to regulate not only ART clinics but rights and obligations of all the parties to a surrogacy, including rights of the surrogate child. Most important points in regard to the rights and obligations of the parties to a surrogacy and rights of the surrogate child

the proposed legislation should include may be stated as under:

1. Surrogacy arrangements will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of the surrogate mother to bear the child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying the child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

2. A surrogacy arrangement should provide for financial support for the surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.

3. A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

4. One of the intended parents should be a donor, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.

5. Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.

6. The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.

7. Right to privacy of the donor as well as surrogate mother should be protected.

8. Sex-selective surrogacy should be prohibited.

9. Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

Journal of the Centre for Family Law and Practice

Submission of articles for publication in the journal *Family Law 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) before submission.

Each issue of *Family Law 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 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, ie 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 *Family Law 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 *Family Law 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 *Family Law 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 Rights1950 (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.

FORCED

YOU HAVE A RIGHT TO CHOOSE...

If you or someone you know is being forced into a marriage, contact the FORCED MARRIAGE UNIT.

Call 020 7008 0151 between 9am and 5pm Monday to Friday
Email fmu@fco.gov.uk

The Forced Marriage Unit offers confidential support and information

If you would like to know more about the work of the **Forced Marriage Unit** before you call us, log on to: **www.fco.gov.uk/forcedmarriage**

Confidential advice is also available from a large network of support groups, including The Police, the National Domestic Violence Helpline, and womens' refuges nationwide.