1.1 WHY DO I NEED TO KNOW ABOUT INTERNATIONAL FAMILY LAW?

International family law work used to involve only wealthy clients and highly specialised practitioners. Accordingly it was safely left, indeed consigned, to an easily disregarded black hole. That black hole imploded many years ago, although the impact has only been fully felt in the last decade.

The past couple of decades have seen a massive movement of people around the globe for reasons of work, personal travel and personal/political/financial betterment as well as significant numbers fleeing the situation in their home country. Within the European Union (EU), this was accelerated by the policy of the free movement of labour, even further accelerated with the eastern European accession states.

The inevitable consequence has been a vast increase in the number of international relationships, families and children. Equally inevitably, there has also been an increase in relationship breakdown and disputes involving these international families. For some, the international element has ultimately been of no relevance in their family disputes, which are resolved within one country by that country's national laws and where all of the marital assets are situated and where the children are living.

However, very many international families have real and ongoing connections with more than one country. It is here that such families look for help to an international family law and to lawyers able to advise them on international family law. On both counts, these international families are sometimes disappointed.

There is still relatively little family law, certainly outside the EU, for the direct benefit and application of international families. Actual pure international family law, ie law which is international in content and application, is moderately limited, although growing fast.[1] There are now many family laws within the EU but some are highly unsatisfactory and out of step with the conciliatory doctrines and settlement/appropriate dispute resolution (ADR) orientated philosophies of the practice of domestic English family law. Moreover by being so continental European-centric, many EU laws are very alien to the culture of law and practice in England. There are international children multilateral agreements, especially from The Hague, which work very well but are sometimes subject to very different national interpretations and sometimes inadequate resources of national laws and courts.

[1] The first edition of this book was in 2008. The number of international regulations, conventions and other bilateral or multilateral laws directly applying in England and Wales has increased hugely in the intervening 7 years. This has been from the EU which is frequently producing either laws directly referable to family law or dealing with a broad range of civil remedies which are of use and relevance to the family lawyer, and from The Hague for laws for worldwide effect.

Instead too often these international families find a hotchpotch of historic laws, inconsistently or nationalistically applied and interpreted, minimal consistency and little coherent philosophy, thereby failing many families. They search in vain for a perceived sense of justice, fairness and ease of resolution. Sadly it then gets worse for these families.

Although international family law has had to make the leap from mega-money couples to average families, the family law practitioners across the world dealing with average wealth families have too often not made the same leap and learnt about international family law. This is for a very understandable reason: it is a complex, alien and quickly changing area of law. Its concepts and approaches are very different to national law. It has less national scrutiny, often less professional commentary and mostly minimal advance consultation or publicity. The level of knowledge and practical experience of some specialist domestic family lawyers in many westernised countries across the world is relatively low although increasing. In context, the standard and level of knowledge about international cases in England is much higher than almost every other country and profession across the world.

Despite its small size, England is probably the world's leading family law jurisdiction for international cases. It has very many and diverse connections around the entire world. Naturally it has very close connections within Europe. It has strong links with North America. It retains close family links with the (existing and former) Commonwealth countries including across Africa, the Caribbean and the Asian subcontinent as well as Australia, New Zealand, South Africa, Hong Kong and elsewhere. It is home to many families from the Middle East, Russia, China and Southeast Asia and other regions of the world. No other country has the breadth and extent of international families, moreover spread across the whole country and not in just a few big cities.

There is a huge market of work awaiting law practices. The law coming from Brussels and The Hague affecting international families will only increase. The specialist family law practitioner can no longer neglect this very important area of work, affecting many clients of all law firms and barristers' chambers. The clients of the specialist family law practitioner now expect an ability to deal with the international dimension quickly, knowledgeably and expertly.

1.2 WHAT IS AN INTERNATIONAL CASE?

Regard should be had to international aspects in a case if either party or a child:

- is or has been resident abroad, including spending any time abroad;
- is or has been habitually resident abroad;
- is or has been domiciled abroad (beware different definitions);
- is or has been a foreign national (beware multiple nationalities);
- is or has been a citizen of another country (beware multiple citizenships);
- has passports of more than one country (beware multiple passports);

In *C v S*,[110] the wife issued judicial separation proceedings in Italy, then 2 months later issued divorce proceedings in England. When a further 2 months later the proceedings came before the Italian court, she did not attend and the proceedings were declared void. Several months later the husband himself issued in Italy. The English court had to decide whether the first in time proceedings were Italy or England. Expert evidence held that the wife's original Italian proceedings could have been revived within 12 months but was now out of time. So the English petition proceeded. It might be thought the wife was lucky in that if the husband had taken an active earlier part in the original Italian proceedings, they were then first in time.

In *Wermuth*,[111] Thorpe LJ described these issues including reminding the English courts not to take any steps to usurp the function of the courts in the member state first served:

> 'First, we must espouse Brussels II and apply it wholeheartedly. We must not take or be seen to take opportunities for usurping the function of the judge in the other Member State. Once another jurisdiction is demonstrated to be apparently first seized, the jurisdiction must defer by holding itself in waiting, in case that apparent priority should be disproved or declined. Secondly, one of the primary objectives of Brussels II is to simplify jurisdictional rules and to eliminate expensive and superfluous litigation. A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed. In reality it is a curse restricted to the rich. Only they can afford such folly. This case is a paradigm example.'

In *Ville de Bauge v China*,[112] the husband in Italy issued first Italian separation proceedings, a prerequisite to divorce in 2008. After the wife's unsuccessful appeal to the Italian court and the Italian court ruling on the legal separation in 2012, she issued a petition in England in 2013 and the husband issued a divorce petition in Italy later in 2013. The wife's petition was dismissed. The husband was first in time and there was a lis pendens connection between the initial separation proceedings and the subsequent Italian divorce proceedings. Once the appeal period from the Italian court ruling had expired, the husband issued the petition in Italy and therefore it was not open to the wife to issue a fresh petition in England in the intervening period. This should be contrasted with the following case with some similarities but some distinction being the expiration of the period of the legal separation proceedings with no activity in the intervening period by the petitioner, as below, and the expiration after active appeal proceedings, as here.

Unhappiness with the impact of the first to issue principle came significantly to a head in the particular circumstances of *S v S (Brussels II Revised: Arts 19.1 and 19.3: reference to CJEU)*[113] in which Mostyn J made a reference to the European Court of Justice. The timing highlighted the inherent injustice in the

[110] [2011] 2 FLR 19.
[111] [2003] 1 FLR 1029 at [34].
[112] [2014] EWHC 3975.
[113] [2014] EWHC 3613.

first to issue, lis pendens principle. French nationals married in France and then a couple of years later, 2000, moved to London until their separation 10 years later. The husband issued judicial separation proceedings in France in March 2011. The wife issued a divorce in England which was dismissed by consent as second in time. There were other proceedings in both jurisdictions including the husband issuing proceedings in England under TOLATA in relation to his interest in the former matrimonial home in London. As the judge said, he was of the clear view that the state of affairs with which he was presented could not have been in the contemplation of the architects of the Brussels Regulation. In the meantime the husband did absolutely nothing with the judicial separation proceedings. He did however thereby prevent the wife issuing a divorce in England. By French law, 30 months after the judicial separation if there was no further steps, it lapsed, namely midnight Monday 16 June 2014. Only then could either party issue a divorce in any jurisdiction. Three days before, the wife applied unsuccessfully in England for permission to issue a divorce petition to take effect one minute past midnight, described as an unprecedented order but to avoid the disadvantage to her of issuing in the most Western time zone in the EU. Once midnight struck, the husband issued in France at 7:20 AM English time when it was impossible for the wife to issue in the English family courts. In other words, once the judicial separation proceedings had elapsed, he could be first in time because he could issue in France before the wife had the first opportunity to do so in England.

The judge described it as a sorry tale of manoeuvring in the face of the seemingly inflexible jurisdiction rules in relation to divorce in BII. He criticised the lack of a transfer provision in respect of divorce proceedings as exists in children matters under Art 15 and as exists in the new EU Judgments Regulation[114] in force 10 January 2015. In circumstances where the judge was satisfied the husband had more or less done nothing in relation to the French judicial separation proceedings, could it be said that the jurisdiction of the French court had been 'established' (Art 19).

It was argued on behalf of the wife that 'establish' must mean more than simply filing proceedings. It should involve an obligation to progress those proceedings with due diligence and expedition particularly given the subject matter of the proceedings, divorce, is so personally and emotionally taxing on the litigants concerned. It was further said that any other interpretation would enable people in divorce proceedings to file divorce proceedings and then delay matters as long as they chose. Faced with these arguments, the judge decided that it was appropriate to refer the questions to the Court of Justice of the European Union.[115] There was also a request that it was dealt with under the CJEU expedited procedure.[116] The reference is as follows:

[114] No 1215/2012, Recitals 23 and 24 and Arts 33 and 34 and 9.3.1.
[115] Under Art 19.3.2 of the Treaty of the European Union and Article 267 of the Treaty on the Functioning of the European Union.
[116] Pursuant to Rule 105 of the Court's Rules of Procedure, previously only used in exclusively children cases but used here because of the emotional toil not only on the adults but on the minor children whose interests were being harmed by the dispute.

undoubtedly be correct in law, it should not be regarded as a safety net by practitioners. Moreover, a judge, perhaps unfamiliar with European family law legislation, may not feel so bold or inquisitorial in analysing jurisdiction. This was followed in *Z v Z*.[48] In *Saward*,[49] a decree nisi was pronounced but later and before decree absolute, the respondent successfully applied to set aside on the basis that England did not have jurisdiction, upheld by the Court of Appeal which stated that notwithstanding the respondent's apparent acceptance of jurisdiction in his acknowledgement of service and participation in both divorce and ancillary financial proceedings, this did not prevent the respondent from making an effective challenge to jurisdiction later and the court had to determine whether or not there was in fact jurisdiction.

Chai v Peng[50] was a surprising and unexpected procedural allowance by the judge in favour of the applicant in heavily contested jurisdiction proceedings to allow her to withdraw her petition, based on domicile and residence, and allow her immediately to issue a fresh petition, effectively resetting the jurisdictional clock. This was over 12 months after the petition was originally issued and less than 6 months before the final jurisdiction hearing, scheduled to last 10 days. The consequence of course was that it was thereby much easier for her to prove residence and domicile at the date of the later petition rather than the first petition. Despite assertions by the wife that it made no difference and that she was able to prove jurisdiction at the time of the first petition, the reality in most cases is that the connection with England and Wales is significantly stronger after 12 months' litigation in this country where a party has been ensuring every indice of residence and domicile. It also encourages premature issuing of proceedings in the hope of being able to reissue later when the connection is stronger.[51]

Mention must be made of the so-called Italian divorce fraud case, *Rapisarda v Colladon (No 2)*,[52] in which the President of the Family Division dismissed petitions and stayed and then set aside decrees of divorce obtained in what was described as 'can only be a conspiracy to pervert the course of justice on an almost industrial scale'. In each of 180 petitions presented to 137 (almost all) family courts around the country, the parties who were in almost all cases both Italians had pleaded in support of jurisdiction that the petitioner was habitually resident or, in a few, the respondent was habitually resident in England and Wales, invariably giving an address in Maidenhead. Police enquiries found this

[48] [2010] 1 FLR 694.
[49] (2013) EWCA 1060.
[50] (2014) EWHC 1519 and see article by Michael Allum: 'Laying one's towel at dawn upon the sun lounger of the English court: Should a court dismiss a petition in order that the petitioner may re-issue and re-set the jurisdictional clock?' at http://www.familylawweek.co.uk/site.aspx?i=ed129940.
[51] The husband legal team colourfully and creatively said as follows: 'to file prematurely is the equivalent of laying one's towel at dawn upon the sun lounge of the English court and returning at high noon to bask in the warmth of the law of England and Wales on divorce and financial remedies'.
[52] (2014) EWFC 35.

was impossible.[53] The underlying reason had apparently been to avoid the very long delays inherent in Italian family court divorce proceedings. Some of the parties had remarried. One consequence of the case and to avoid any possible repetition is that there will be a dramatic limitation on the family courts able across the country to receive and deal with divorces, possibly in due course being limited to only one centre.

Although family law has its own interpretation of residence and habitual residence, the concepts have fiscal implications for parties admitting residency, as above, and there is occasional crossover into family law from statute and case tax law. In this regard note the 'Statutory Residence Test'[54] of HMRC effective from 6 April 2013 and intended to produce certainty and clear guidance in fiscal matters. It is quite possible that some elements of this test may be indicative in the family law context and so needs to be given consideration.

Where residence is required for a specific period of time, such as in some jurisdictional bases of BII, the element of physical presence is of particular importance.

The English courts have said that residence must be given its ordinary and natural meaning. It must be decided by reference to all of the circumstances in any particular case. It includes a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life, for the time being, whether of short or long duration.

Ascertaining residency requires a less detailed inquiry than domicile. It is a question of fact in all the circumstances of the case. Residence does not have to be lawful, eg for immigration purposes: *Mark*[55] and see Canadian and Californian cases referred to by Dicey and Morris in this regard. A person's presence for the purpose of medical treatment is not sufficient for habitual residence: *Breuning*.[56] Also 71 days in a year was insufficient even though the husband was a deep sea diver and often abroad on work and had a flat in England: *Armstrong v Armstrong*.[57]

[53] The Thames Valley Police which had raided the premises expecting to find a couple of hundred Italians duly enjoying their habitual residential status in this jurisdiction, clutching their English divorce papers and eagerly awaiting their decrees absolute, reported with due solemnity that it was unlikely that any of the parties had ever resided at that address given that it was a PO Box number!
[54] The previous system was uncertain and case-law, particularly *Gaines-Cooper v HMRC* [2011] UKSC 47 showed the reliance could not be placed on previous published HMRC guidance. It categorises into so-called leavers and arrivers. It gives automatic tests for non-residency and non-residency, and then for those in neither automatic category, tests of sufficient ties, including family ties, accommodation, work, the 90 days test and the country tie, including the midnight test.
[55] [2005] 2 FLR 1193.
[56] [2002] 1 FLR 888.
[57] [2003] 2 FLR 375.

an order to be made. The profession should also remember that the judge on duty, whilst always available on the telephone, will be at home, and that 'home' may not be in London or a metropolitan centre.

Lawyers who abuse the system, particularly those who seek to take advantage of an order not made on notice and out of hours with a speedy return date in hours may not only be the subject of orders for wasted costs, but may find themselves reported to their professional bodies for serious professional misconduct. The Guidance concludes by saying the profession is thus reminded of the definition of 'urgent' set out in the note.

Out of hours applications, particularly those which have become urgent because they have not been pursued sufficiently promptly, should be avoided and will be criticised. A judge who has concerns that the urgent out of hours facilities may have been abused may require a representative of the applicant to attend a subsequent directions hearing to provide an explanation.[133] Wherever possible urgent applications should be made within court hours. Where not possible, an out of hours process applies and see para 1.4 of the Guidance.

To make the application, telephone the Royal Courts of Justice[134] to be put in contact with the clerk to the appropriate duty judge in the High Court or the appropriate area Circuit Judge where known or telephone the Urgent Court Business Officer of the appropriate Circuit who will contact the local duty judge. In practice an associate or clerk will then return the call as soon as possible. They will take further details in relation to the case. It will be necessary to explain the case to the associate and the necessity for the out of hours application. Where the facility is available, it is likely the judge will require a draft order to be faxed to him.[135]

The associate will then relay the information given to the duty judge. After this either the judge or associate will telephone the lawyer. Generally the associate will telephone if the judge has agreed to grant the orders sought without needing any further information. In this case the associate will provide the appropriate email address to send the orders for sealing unless this is given by the judge as below.

In other cases the judge may telephone the lawyer direct and may need submissions to be made over the telephone or more information before considering whether to grant the orders sought. The judge will then give an email address or fax number to which any orders made should be sent.

Where the out of hours hearing takes place by telephone it should, unless not practicable, be a tape recorded conference call. Several facilities for this now exist and solicitors for the applicant should have these arrangements generally in place in advance. All parties, especially the judge, should be informed that

[133] See the situation in FPR 2010 PD 12E, para 1.2.
[134] Tel: 020 7947 6000.
[135] Practice Direction 20A, para 4.5(2).

the call is being recorded by the service provider. The solicitors for the applicant should order a transcript of the hearing from the service provider otherwise the applicant's solicitor should prepare a note for approval by the judge.[136]

The application notice and evidence in support must be filed with the court the same or next working day as ordered.[137] Injunctions will be heard by telephone only where the applicant is acting by solicitor or counsel.[138]

Each Designated Family Judge area of the Family Court will have its own scheme for out of hours applications, details of which will be given locally to the police, any local law society and bar organisation and the local authority social services department.[139]

8.13 WORLDWIDE (CONTRA MUNDUM) NON-PUBLICITY ORDERS

The international injunctions in this chapter are primarily in the financial context including freezing orders of bank accounts and other foreign assets. However, it is also essential to refer here to international injunctions based on similar foundations eg Dadourian guidelines (see 8.2 above) providing worldwide non-publicity protection for children and other family members. This is the so-called '*contra mundum*[140] reporting restriction order'. It has recently been analysed in careful detail by Munby P in *Re J (A child)*[141] and is especially crucial because of his comments regarding information on the Internet. He set out the factors to be taken into account and various practice elements.

The context was a local authority care case in which the father was very unhappy at the steps that had been taken and which he publicised extensively on the Internet. Two of their four children were taken into care on the day of birth with photos of the child and social worker posted on Facebook. He used language which was described as 'abusive, insulting and highly offensive'.[142] The father breached a worldwide reporting restriction order and continued to post widely the relevant details on the Internet. Some were on a UK-based website but others were on the Facebook site based in California. The local authority sought an order prohibiting 'the publishing or broadcasting in any newspaper, magazine, public computer network, Internet website, social networking website, sound or television broadcast or cable or satellite service for the purpose of preventing the identification ... of the child' and related information. It was not directed to any named respondents, apart from the parties to the proceedings. It was intended to have a worldwide effect. The

[136] FPR 2010 PD 12E, para 1.5.
[137] Practice Direction 20A, para 4.5(3).
[138] Practice Direction 20A, para 4.5(4).
[139] Practice Direction 20A, para 4.6.
[140] Latin: against the world; defying or opposing everyone.
[141] [2013] EWHC 2994.
[142] Full details of his various actions are set out in the judgment.

Refer to Procedural Table C1(9) of the Red Book (2014).

See *Bhura v Bhura*[309] where an award of a US court to the wife of a lump sum of $2 million and $4000 per month was registered in the High Court[310] pursuant to the 1972 Act. It was then enforced as a judgment summons. The judge indicated that the procedure in the FPR 2010 was fully HRA 1998 compliant. He followed and endorsed the Court of Appeal in *Karoonian v C-Mec*,[311] describing their judgment as the locus classicus for committal applications whether under the Debtors Act 1869 or the Child Support Act 1991.

9.5.6 Civil Jurisdiction and Judgments Act 1982 and 1991

This legislation introduced BI and the Lugano Conventions and now by statutory instrument, the MR, into domestic law. There is often shorthand reference to this legislation in many other legislative amendments following the introduction of the MR as a device to refer to all the several Conventions brought into force by this legislation or by secondary statutory instrument.

See Procedural Table C1(12) of the Red Book (2013) and CPR, rr 74.2–74.14 and PD 74A. BI and the MR have separate Procedural Tables.

Apart from enabling legislation, it does not allow for enforcement of maintenance orders in its own right.

9.5.7 European Convention between EC Members States on the Simplification of Procedures for the Recovery of Maintenance Payments 1990 (the Rome Convention)

This is included for completeness and reference although not yet in force. However, it aims to simplify procedures. It seems unlikely to make any progress now in view of MR.

9.5.8 Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1993

This order applies Part 1 of the 1972 Act, above, to the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations concluded on 2 October 1973. This was probably the first Europe-wide family law financial legislation. Australia was also an original signatory. It has since been overtaken for most countries within Europe by other conventions and legislation. However, there are important modifications to the 1972 Act as it applies to the Hague Convention countries.

[309] [2012] EWHC 3633 (Fam).
[310] After initial registration in the Westminster Magistrates' Court as the rules require and eventually reregistered in the High Court.
[311] [2012] 3 FCR 491 especially paras 56–58.

It sets out a system of registration. Enforcement takes place on proof of service from the other country. The hearing is wholly in the sending country. There are no split hearings. It moved away from the previous regimes and practices. Foreign courts can refuse to recognise English orders just as England can refuse to recognise foreign orders. The definition of maintenance orders differs from the 1972 Act and it covers only maintenance: there is no provision for enforcement of a non-maintenance lump sum payment.

See above under Part II of the 1972 Act at 9.5.4. However take care in r 34 and PD 34A to distinguish between reference to these Hague Convention Countries and 2007 Hague Convention. The former are countries listed in Sch 1 to the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1993, per r 34.12(3) and includes r 34.27 and PD 34A Annex 2.

The Convention previously governed relations between the UK and other EU member states which were contracting parties to the Convention, rather than BI. Now following the MR these arrangements in the Convention no longer apply between the UK and other EU member states including Denmark.[312]

Moreover the 1973 Hague Convention is repealed and replaced by the 2007 Hague Convention, see 9.4.1, for those countries which in any given case are both signatories to the latter.

9.5.9 Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1993

This is included for completeness. It dealt with the Republic of Ireland only and also modified the provisions of the 1972 Act. This has now been revoked as a consequence of the MR.[313]

9.5.10 Reciprocal Enforcement of Maintenance Orders (United States of America) Orders 1993, 1995 and 2007

This applies to Parts I and/or II of the 1972 Act to US states (until 1 October 2007, four were not even signatories[314]), with modifications. Maintenance orders could be registered providing the payer is resident or has assets in the country or state in which enforcement is intended. It adopts the approach favoured by the US of vesting power to vary an order solely in the courts which made it. Now post 2007 enforcement of English orders in the US will be dealt with at federal level, not at state level as before, and orders between the US and the UK[315] cannot now be revoked or varied in the country/state undertaking the enforcement.

[312] Practice Direction 34C, para 2.1.4.
[313] Family Procedure Rules (Amendment) Rules 2011, r 22.
[314] Becoming effectively international refuges for those fleeing maintenance obligations.
[315] Not Scotland which has a separate agreement.

> Once these choices are set out it becomes apparent in each case that only the third, in spite of its inevitable uncertainties, is consonant with the boys' best interests. The two fathers, whose decency and concern for their sons is not in doubt, might want to reflect on two particular things. One is that brief intermittent contact is not an ideal way of preserving bonds: it can sometimes be upsetting and disruptive, whereas substantial periods of residence, such as are to be provided for here, make it possible for deeper bonds to be created and maintained. The other is that children grow up fast. It will not be many years before these boys are able to make their own choices about where they want to be. This is not to suggest a bidding contest between the respective parents: it is to suggest that a good father can have confidence, provided worthwhile contact is maintained in the interim as it will be here, that he will not be losing his children simply because they are living away from him.'

It may be of very little comfort but this particular passage can usefully be quoted by lawyers to clients who are left behind fathers, not least as most have difficulty understanding the rationale behind the position adopted by the family courts. Moreover this is one of the cases which might now be decided differently following *MK v CK*.

In *Re Y (Leave to Remove from Jurisdiction)*,[20] the child had been brought up to be bilingual in Welsh and English and the parents had shared his care since separation and 'achieved a remarkable harmony'. The court refused the American mother's subsequent application for leave to remove him from Wales to the US. A removal from the jurisdiction would have caused a significant loss to the child in relation to emotional and educational issues. It was said the case fell out of the normal ambit where the child was living with one parent who wished to leave the jurisdiction. Here the child was equally at home with both parents, who conducted the case with utmost decency and concern for the child. But their claims were now mutually exclusive. The only test therefore was the welfare of the child. The least detrimental outcome was to remain in Wales.

Also see a similar case, *Re D (Leave to Remove: Shared Residence)*,[21] where a mother applied for leave to remove three children aged 10, 11 and 14 to the US, although they had been dividing the time equally between both parents in a shared care arrangement in England. The court held there was no reason why a joint residence order should not be made spanning more than one jurisdiction as the children would spend significant amounts of time in the UK and in the US and shared residence was an appropriate order.

Re Y was a major influence on the *MK v CK* decision and was clearly part of the move away from *Payne* and back towards the welfare of the child.

In *R v R*,[22] the court rejected the mother's application for leave to remove her children to live in France on a permanent basis. In arriving at its decision, the court had regard to the need of the children for uncompromising contact with

[20] [2004] 2 FLR 330.
[21] [2006] Fam Law 1006.
[22] [2005] 1 FLR 687.

their father, the mother's lack of emotional stability to establish a new life in another country, the lack of evidence showing a strong connection to France and the fact that the court would lose jurisdiction over the children's welfare. The children would have lost mid-week contact with their father and would have been tired by the commute of the proposed alternative weekend visits between Paris and London. The judge held that the mother's current plans had not been sufficiently or carefully considered (despite having leading counsel and top London solicitors) because the mother assumed that life would improve when she arrived in France and she had failed to make certain basic arrangements assuming they could or would be organised. The mother's assurances that the English court would retain jurisdiction were ineffective as once the children were habitually resident in France, French law would inevitably apply to questions concerning them including contact and parental responsibility. It must always be taken into account that once the relocation has occurred, parental responsibility and with it ancillary issues of parenting will pass to the country in which the child is now located.

Habitual residence also moves in these types of cases to the receiving country. All applications in respect of the child would therefore be made in that new jurisdiction.

In *Re G (Children)*,[23] a judge had understated in his assessment the emotional and other impact that a refusal would have on the child and on the primary carer applying for permission permanently to remove to Argentina. Leave was conditional on continued contact, the children's schooling and cessation of periodical payments.

In *Re B (Leave to Remove: Impact of Refusal)*,[24] the Court of Appeal emphasised that it was important to give greater weight to the emotional and psychological well-being of the primary carer, and not merely to take note of the impact of refusal on the primary carer. There was also no difference in principle between a 'lifestyle' case, being a move inspired by a desire to improve general living conditions and the more familiar cases of return of foreign nationals to their home country or by reason of new employment opportunities or moving with a new family.

In *Re A (Leave to Remove: Cultural and Religious Considerations)*,[25] the mother applied for permission to remove her son, 9, to live with her and her new husband in Holland. All parties including the mother's new husband were Iraqi nationals and the mother had given birth to a child of her new husband. It was held the mother's plan to go to Holland was genuinely motivated and was not made for the purposes of stopping contact. Her family as well as her new husband lived in Holland and whilst there were drawbacks to the plan, these could be overcome. The father opposed on the basis of the child's consequential loss of right to succeed him as 'a mantle head' of the group of families. It was

[23] [2005] 2 FLR 166.
[24] [2005] 2 FLR 239.
[25] [2006] 2 FLR 572.

(3) adoption is in the child's best interests;

(4) consents have been freely given, for example:
   (a) the persons, whose consent is necessary for the adoption, have been counselled and informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his family of origin;
   (b) such persons have given their consent freely, in the required legal form and expressed or evidenced in writing;
   (c) the consents have not been induced by payment or compensation of any kind and have not been withdrawn;
   (d) the consent of the mother has been given only after the birth of the child;

(5) having regard to the age and degree of maturity of the child, consideration has been given to the child's wishes and opinions and that he has been counselled, informed of the effects of the adoption and of his consent to the adoption (such consent to be freely given, in the required form, in writing and not induced by payment of any kind).

Further key requirements are imposed on the receiving state.[38] The competent authorities of the receiving state must ensure that:

(1) the prospective adopters are 'eligible and suited to adopt';

(2) 'have been counselled as may be necessary'; and

(3) the child 'is or will be authorised to enter and reside permanently in that state'.

Moreover, there must be no unsupervised contact between the prospective adopters and the natural parents until the essential requirements of Arts 4 and 5 have been met. This is intended to prevent the natural parents being placed under any form of pressure from the prospective adopters.

A Convention adoption 'shall take place only if the competent authorities of the state of origin ... have determined, after the possibilities for placement of the child within the state of origin have been given due consideration, that an intercountry adoption is in the child's best interests'.[39] The source is in the principle of subsidiarity in Art 21(b) of the UN Convention, which states that member states are required to consider intercountry adoption only 'if the child cannot be placed in a foster or an adoptive family or cannot be cared for in the child's country of origin'. It is implicit in the principle of subsidiarity in both conventions that 'state of origin' placements are necessarily to be preferred over 'intercountry' solutions. This preference reflects one of the principal concerns underlying the growth of intercountry adoptions. This was to ensure that children abandoned in developing countries should, if at all possible, be placed with families within their own communities and intercountry adoption only considered when all the possibilities in the child's state of origin had been exhausted.

[38] Article 5.
[39] Article 4(b).

The objective of the Convention is, therefore, not just to 'facilitate' intercountry adoption but to 'regulate' it in a manner which best protects and promotes the interests of children. One of its side effects, however, is to create a tension between the principle of adoptions in the child's home country and the 'best interests' principle. In practice, however, English courts are likely to bridge the gap by giving weight to the matters in ACA 2002, s 1(4)(c), (f) and (5) in the welfare balance.

16.5.2 Recognition and effect

Article 23 regulates the recognition of a certified Convention adoption by operation of law in other contracting states, which may under Art 24 only be refused if the adoption is 'manifestly contrary to its public policy, taking into account the best interests of the child'.

Whether the adoption is made in accordance with the Convention, therefore, turns upon a 'simple' certification by the state of origin. Where the requirements of the Convention are not complied with and therefore the certification is in fact incorrect, recognition can be refused but only in the exceptional circumstances in Art 24. The justification for this simplicity of process is founded upon a basis of reciprocal trust and confidence between the contracting states to the Convention.

16.5.3 Full and simple adoptions

English domestic adoption law only recognises one form of adoption; that is, 'full adoption', whereby a new and irrevocable legal relationship is created between the child and the adopters which severs all ties with the natural parents.[40] However, the clean-break model of adoption is not universal. Other countries[41] have 'simple adoptions', which do not have the effect of severing completely all ties with the natural parents.

The 'recognition of an adoption' includes recognition of:[42]

(a) the legal parent-child relationship between the child and his or her adoptive parents;
(b) the parental responsibility of the adoptive parents for the child;
(c) the termination of a pre-existing legal relationship between the child and his or her mother and father if the adoption has this effect in the Contracting State where it is made.

[40] Similar countries are the US, Australia, the Nordic countries, Norway, Sweden, Denmark and Finland, and Italy.
[41] For example, France, Belgium, Portugal, Bulgaria, Romania, Japan, most of the South American countries and some African countries (generally former French colonies, eg Senegal, Madagascar, Mauritius).
[42] Article 26(1).

legal separation under Art 22.2 and as to parental responsibility under Art 23.3. The wording is fairly similar and as to the former is: 'A judgment relating to divorce [etc] shall not be recognised (c) where it is given in default of appearance if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally'. The latter refers instead to the person in default rather than the respondent, otherwise the same. There is a similar provision in Art 34 BI but with reference to: 'unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so', as distinct from BII which says: 'unless it is determined that such person has accepted the judgment unequivocally.'

The provision in BII was examined by Mostyn J in *MD v CT*.[45] He found there were no cases on this ground for non-recognition in BII but a few under BI. He said there were three stages for a defendant to establish this defence. First, the judgment had to have been given 'in default of appearance'. This is more than physical absence. If a defendant lodges a formal document defending the proceedings or challenging the jurisdiction then he will have appeared.[46]

Secondly, was the defendant served with the document which instituted the proceedings etc in sufficient time or in such a way as to enable him to arrange his defence? This therefore first requires service which will be as set out in this chapter, including the EU Service Regulation. Then the service must have been of insufficient time and in such a way to enable him to arrange his defence. This was summarised by Coulson J in *British Seafood Ltd v Kruk*[47] as follows:

> '(a) what matters most ... is not form but function: whether the defending party has been given a proper opportunity to contest the proceedings prior to the entering of judgment;
> (b) the mere fact that service has been found to be good in one state is not binding on the court of registration in another state and the court must always very minor challenges made after the event are more difficult to sustain;
> (c) however the court's findings relating to the service in one state may be taken into account in the other, because all the circumstances relevant to the questions of service "including whether non-service was the defendant's fault) are to be taken into account by the court".'

See also Dicey and Morris para 14-233.

Therefore, per Mostyn J:

> 'even where there has been formal valid service the court of registration is entitled to examine whether on the ground and in the real world there was actual service of the originating application or an acceptable substitute sufficiently far ahead of the hearing to enable the defendant to arrange for his defence. In an exceptional case the court can so conclude. It is noteworthy that mere notification of the proceedings by the claimant to the defendant will not suffice to knock out this defence.'[48]

[45] [2015] 1 FLR 213.
[46] *Tavoulareas v Tsavliris* [2006] EWCA 1773 per Longmore LJ at para 13.
[47] [2008] EWHC 1528 at paras 24–27.

The third and last stage was more problematical. In the BI equivalent it says: 'unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.' Therefore a defendant could not oppose recognition of a judgment or order from another EU member state if he failed to challenge the judgment when it was possible to do so. This is perfectly sensible and overcomes the tactics of the defendant who elects to do nothing and then relies on purported shortcomings and any procedural irregularities in the service of the process. But this is not in BII which instead refers: 'unless it is determined that such a person has accepted the judgment unequivocally'. With good reason Mostyn J says in the judgment that it is hard to imagine a state of affairs where this comes into play. With considerable misgivings, the judge had to accept that this wording in BII allows subsequent inaction by a recipient to be irrelevant to the merits of an appeal against registration of enforcement of a previous order. The fact that she may have concealed her whereabouts appears to have been deliberately excluded by the drafters of BII as a relevant matter. This must be appropriate for fast reform given the inconsistencies between the EU instruments.

See also referral to the CJEU on whether, having served and taken no further action in French judicial separation proceedings, the proceedings had been '*established*' for Article 19 BII, at 5.3.4.

21.3 SERVICE IN ACCORDANCE WITH THE EU SERVICE REGULATION

The Service Regulation (21.1 above) provides an official system of service within the European Union. It is not mandatory. Some countries and their lawyers use it more than others. It has the benefit of being the official EU Service provision and may be more persuasive in some EU countries than other methods of service; a factor to be taken into account if there is likely to be an issue about BII first to issue proceedings. Some lawyers affect service through direct means as well as using the mechanism of the Service Regulation. The Regulation can be found at PD 6B Annex (and App 31). See also CPR, r 6.26A and Dicey and Morris at 8–048.[49] Denmark is for practical purposes a party by an ancillary agreement from 1 July 2007. The 2007 replacement Regulation applies from 13 November 2008 but is in fairly similar terms to its predecessor, which still governs service pre-13 November 2008. In furtherance of the objectives of the Service Regulation, a Manual containing information relating to the Receiving Agencies is published on the European Commission website.[50]

[48] Paragraph 14.
[49] *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 15th edn, 2012).
[50] http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_docs_en.htm.

(a) in the title, the words "to adoption cases not involving placement" are repealed;
(b) the existing text becomes subsection (1);
(c) after that subsection there is inserted –

"(2) The Secretary of State may by regulations provide for this Part to have effect in relation to cases which involve a person who has applied, or intends to apply, with another person for a parental order under section 54 of the Human Fertilisation and Embryology Act 2008 and a child who is, or will be, the subject of the order, with such modifications as the regulations may prescribe.

(3) Regulations under subsection (2) may modify section 171ZL(8)(c) so as to enable regulations to impose requirements to make statutory declarations as to –

(a) eligibility to apply for a parental order;
(b) intention to apply for such an order."

123 Statutory paternity pay: notice requirement and period of payment

(1) The Social Security Contributions and Benefits Act 1992 is amended as follows.

(2) In section 171ZC (further provision as to entitlement to statutory paternity pay) –

(a) in subsection (1) (requirement to give notice), for the words from "only if" to the end there is substituted " only if he gives the person who will be liable to pay it notice of the week or weeks in respect of which he expects there to be liability to pay him statutory paternity pay. ";
(b) after subsection (1) there is inserted –

"(1A) Regulations may provide for the time by which notice under subsection (1) is to be given."

(3) In section 171ZE (rate and period of statutory paternity pay)—

(a) in subsection (2) (period of pay), for the words from "be payable" to the end there is substituted "be payable in respect of –
"(a) such week within the qualifying period, or
(b) such number of weeks, not exceeding the prescribed number of weeks, within the qualifying period,

as he may choose in accordance with regulations. ";
(b) after subsection (2) there is inserted –

"(2A) Provision under subsection (2)(b) is to secure that the prescribed number of weeks is not less than two.";

(c) after subsection (2A) (as inserted by paragraph (b)) there is inserted –

"(2B) Regulations under subsection (2) may permit a person entitled to receive statutory paternity pay to choose to receive such pay in respect of non-consecutive periods each of which is a week or a number of weeks."

(4) In section 176 (Parliamentary control of subordinate legislation), in subsection (1) (affirmative procedure), in paragraph (a), after "section 171ZE(1)" there is inserted " or (2)(b) ".

124 Rate of statutory adoption pay

(1) In section 171ZN of the Social Security Contributions and Benefits Act 1992 (rate and period of statutory adoption pay) –

(a) subsection (1) is repealed;

(b) after subsection (2D) (as inserted by section 120(6)) there is inserted –

"(2E) Statutory adoption pay shall be payable to a person –

(a) at the earnings-related rate, in respect of the first 6 weeks in respect of which it is payable; and
(b) at whichever is the lower of the earnings-related rate and such weekly rate as may be prescribed, in respect of the remaining portion of the adoption pay period.

(2F) The earnings-related rate is a weekly rate equivalent to 90 per cent of a person's normal weekly earnings for the period of 8 weeks ending with the week in which the person is notified that the person has been matched with a child for the purposes of adoption.

(2G) The weekly rate prescribed under subsection (2E)(b) must not be less than the weekly rate of statutory sick pay for the time being specified in section 157(1) or, if two or more such rates are for the time being so specified, the higher or highest of those rates.";

(c) in subsection (7), for "subsection (2)" there is substituted " subsections (2) and (2E) ".

(2) In section 176 of the Social Security Contributions and Benefits Act 1992 (Parliamentary control of subordinate legislation), in subsection (1) (affirmative procedure), in paragraph (a), the entry for section 171ZN(1) is repealed.

125 Abolition of additional paternity leave and additional statutory paternity pay

(1) In Part 8 of the Employment Rights Act 1996, sections 80AA and 80BB (entitlement to additional paternity leave: birth and adoption) are repealed.

(2) In Part 12ZA of the Social Security Contributions and Benefits Act 1992, sections 171ZEA to 171ZEE (additional statutory paternity pay: birth and adoption) are repealed.

Further amendments

126 Further amendments

(1) Schedule 7 (which contains further amendments relating to statutory rights to leave and pay) has effect.

(2) A reference to ordinary statutory paternity pay in an instrument or document made before the commencement of paragraphs 12 and 13 of Schedule 7 is to be read, in relation to any time after that commencement, as a reference to statutory paternity pay.

(3) A reference to statutory paternity pay in an enactment (including an enactment amended by this Act) or in an instrument or document is to be read, in relation to any time that falls –

(a) after the commencement of paragraphs 12 and 13 of Schedule 1 to the Work and Families Act 2006, and
(b) before the commencement of paragraphs 12 and 13 of Schedule 7,

as a reference to ordinary statutory paternity pay.

(4) Subsection (3) does not apply to the extent that a reference to statutory paternity pay is a reference to additional statutory paternity pay.

5.4 Where a person may become the subject of a criminal investigation and it is considered necessary for the child who is a ward of court to be interviewed without that person knowing that the police are making inquiries, the application for permission to interview the child may be made without notice to that party. Notice should, however, where practicable be given to the children's guardian.

5.5 There will be other occasions where the police need to deal with complaints, or alleged offences, concerning children who are wards of court where it is appropriate, if not essential, for action to be taken straight away without the prior permission of the wardship court, for example –

(a) serious offences against the child such as rape, where a medical examination and the collection of forensic evidence ought to be carried out promptly;
(b) where the child is suspected by the police of having committed a criminal act and the police wish to interview the child in respect of that matter;
(c) where the police wish to interview the child as a potential witness.

5.6 In such instances, the police should notify the parent or foster parent with whom the child is living or another 'appropriate adult' (within the Police and Criminal Evidence Act 1984 – Code of Practice C for the Detention, Treatment and Questioning of Persons by Police Officers) so that that adult has the opportunity of being present when the police interview the child. Additionally, if practicable the child's guardian (if one has been appointed) should be notified and invited to attend the police interview or to nominate a third party to attend on the guardian's behalf. A record of the interview or a copy of any statement made by the child should be supplied to the children's guardian. Where the child has been interviewed without the guardian's knowledge, the guardian should be informed at the earliest opportunity of this fact and (if it be the case) that the police wish to conduct further interviews. The wardship court should be informed of the situation at the earliest possible opportunity thereafter by the children's guardian, parent, foster parent (through the local authority) or other responsible adult.

Applications to the Criminal Injuries Compensation Authority

6.1 Where a child who is a ward of court has a right to make a claim for compensation to the Criminal Injuries Compensation Authority ("CICA"), an application must be made by the child's guardian, or, if no guardian has been appointed, the person with care and control of the child, for permission to apply to CICA and disclose such documents on the wardship proceedings file as are considered necessary to establish whether or not the child is eligible for an award plus, as appropriate, the amount of the award.

6.2 Any order giving permission should state that any award made by CICA should normally be paid into court immediately upon receipt and, once that payment has been made, application should made to the court as to its management and administration. If it is proposed to invest the award in any other way, the court's prior approval must be sought

The role of the tipstaff

7.1 The tipstaff is the enforcement officer for all orders made in the High Court. The tipstaff's jurisdiction extends throughout England and Wales. Every applicable order made in the High Court is addressed to the tipstaff in children and family matters (eg "The Court hereby directs the Tipstaff of the High Court of Justice, whether acting by himself or his assistants or a police officer as follows...").

7.2 The tipstaff may effect an arrest and then inform the police. Sometimes the local bailiff or police will detain a person in custody until the tipstaff arrives to collect that person or give further directions as to the disposal of the matter. The tipstaff may also make a forced entry although there will generally be a uniformed police officer standing by to make sure there is no breach of the peace.

7.3 There is only one tipstaff (with two assistants) but the tipstaff can also call on any constable or bailiff to assist in carrying out the tipstaff's duties.

7.4 The majority of the tipstaff's work involves locating children and taking them into protective custody, including cases of child abduction abroad.

Practice Direction 12E – Urgent Business

This Practice Direction supplements FPR Part 12

Introduction

1.1 This Practice Direction describes the procedure to be followed in respect of urgent and out of hours cases in the Family Division of the High Court. For the avoidance of doubt, it does not relate to cases in respect of adults.

1.2 Urgent or out of hours applications, particularly those which have become urgent because they have not been pursued sufficiently promptly, should be avoided. A judge who has concerns that the urgent or out of hours facilities may have been abused may require a representative of the applicant to attend at a subsequent directions hearing to provide an explanation.

1.3 Urgent applications should whenever possible be made within court hours. The earliest possible liaison is required with the Clerk of the Rules who will attempt to accommodate genuinely urgent applications (at least for initial directions) in the Family Division applications court, from which the matter may be referred to another judge.

1.4 When it is not possible to apply within court hours, contact should be made with the security office at the Royal Courts of Justice (020 7947 6000 or 020 7947 6260) who will refer the matter to the urgent business officer. The urgent business officer can contact the duty judge. The judge may agree to hold a hearing, either convened at court or elsewhere, or by telephone.

1.5 When the hearing is to take place by telephone it should, unless not practicable, be by tape-recorded conference call arranged (and paid for in the first instance) by the applicant's solicitors. Solicitors acting for potential applicants should consider having standing arrangements with their telephone service providers under which such conference calls can be arranged. All parties (especially the judge) should be informed that the call is being recorded by the service provider. The applicant's solicitors should order a transcript of the hearing from the service provider. Otherwise the applicant's legal representative should prepare a note for approval by the judge.

General Issues

2.1 Parents, carers or other necessary respondents should whenever possible be given the opportunity to have independent legal advice or at least to have access to support or counselling.

(2) Subsection (1)(bd), (be) and (bg) above shall not apply where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in England or Wales of a dwelling-house which was a matrimonial home of the parties.

(3) Section 25D(1) of the 1973 Act (effect of transfers on orders relating to rights under a pension arrangement) shall apply in relation to an order made under section 17 above by virtue of subsection (1)(bd) or (be) above as it applies in relation to an order made under section 23 of that Act by virtue of section 25B or 25C of the 1973 Act.

(4) The Lord Chancellor may by regulations make for the purposes of this Part of this Act provision corresponding to any provision which may be made by him under subsections (2) to (2B) of section 25D of the 1973 Act or under subsections (1) to (3) of section 25G of that Act.

(5) Power to make regulations under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Notes

Amended by Welfare Reforms Pensions Act 1999 1999, ss 22(4),(5), 84(1), Sch 12, para 4, Sch 13, Pt II; Pensions Act 2004, Sch 12, para 4; Pensions Act 2008, Sch 6, Pt 2.

Orders for transfer of tenancies

22 Powers of the court in relation to certain tenancies of dwelling-houses

(1) This section applies if –

(a) an application is made by a party to a marriage for an order for financial relief; and

(b) one of the parties is entitled, either in his own right or jointly with the other party, to occupy a dwelling-house situated in England or Wales by virtue of a tenancy which is a relevant tenancy within the meaning of Schedule 7 to the Family Law Act 1996 (certain statutory tenancies).

(2) The court may make in relation to that dwelling-house any order which it could make under Part II of that Schedule if a decree of divorce, a decree of nullity of marriage or a decree of judicial separation has been granted in England and Wales in respect of the marriage.

(3) The provisions of paragraphs 10, 11 and 14(1) in Part III of that Schedule apply in relation to any order under this section as they apply to any order under Part II of that Schedule.

Notes

Amended by Family Law Act 1996, s 66(1), Sch 8, para 52; SI 1997/1892.

Avoidance of transactions intended to prevent or reduce financial relief

23 Avoidance of transactions intended to defeat applications for financial relief

(1) For the purposes of this section "financial relief" means relief under section 14 or 17 above and any reference to defeating a claim by a party to a marriage for financial relief from being granted is a reference to preventing financial relief from being granted or

reducing the amount of relief which might be granted, or frustrating or impeding the enforcement of any order which might be or has been made under either of those provisions at the instance of that party.

(2) Where leave is granted under section 13 above for the making by a party to a marriage of an application for an order for financial relief under section 17 above, the court may, on an application by that party –

(a) if it is satisfied that the other party to the marriage is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

(b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition.

(3) Where an order for financial relief under section 14 or 17 above has been made by the court at the instance of a party to a marriage, then, on an application made by that party, the court may, if it is satisfied that the other party to the marriage has, with the intention of defeating the claim for financial relief, made a reviewable disposition, make an order setting aside the disposition.

(4) Where the court has jurisdiction to entertain the application for an order for financial relief by reason only of paragraph (c) of section 15(1) above, it shall not make any order under subsection (2) or (3) above in respect of any property other than the dwelling-house concerned.

(5) Where the court makes an order under subsection (2)(b) or (3) above setting aside a disposition it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(6) Any disposition made by the other party to the marriage (whether before or after the commencement of the application) is a reviewable disposition for the purposes of subsections (2)(b) and (3) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

(7) Where an application is made under subsection (2) or (3) above with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied –

(a) in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence, or

(b) in a case falling within subsection (3) above, that the disposition has had the consequence,

of defeating a claim by the applicant for financial relief, it shall be presumed unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.

The father argued for application of Article 7 of the Charter of Fundamental Rights to the effect that the Regulation should be interpreted as meaning that such rights (of custody) are acquired by a natural father by operation of law in a situation where he and his children have a family life which is the same as that of a family based on marriage. On that basis the removal of the children would be unlawful within the meaning of the Regulation and the 1980 Convention.

In the particular case the CJEU held that the Charter was not to be interpreted so as to assess the national law but only the interpretation of the Regulation.[59] On this basis, and taking into account jurisprudence of the European Court of Human Rights ("ECtHR") it could not be said that the father had been deprived of the opportunity to acquire rights of custody. He could go to court to do so and the court would be able to assess whether these rights should be granted taking into account the best interests of the children. The CJEU held that a Member State is not precluded, on the basis of Article 7 of the Charter, from requiring under its national law that an unmarried father, in order to acquire rights of custody which would mean that removal of a child from the State of its habitual residence is unlawful for the purposes of Article 2(11) of the Regulation, must have obtained previously an order of a court granting custody to him of the child in question.

4.3.2.2. Actual exercise of custody and joint custody – Article 2(11)(b)

The removal or retention is considered wrongful, provided that, the custody rights, be it sole or joint custody, were actually exercised at the time of the unlawful removal or retention or would have been so exercised but for the removal or retention, Article 2(11)(b) of the Regulation.

That provision of the Regulation adds that custody is to be considered to be exercised jointly when one of the holders of parental responsibility cannot decide on the child's place of residence without the consent of the other holder of parental responsibility. As a result, a removal of a child from one Member State to another without the consent of the relevant person constitutes child abduction under the Regulation. If the removal is lawful under national law, Article 9 of the Regulation may apply[60].

4.3.3. The court shall always order the return of the child if she or he can be protected in the Member State of origin – Article 11(4)

The Regulation reinforces the principle that the court shall order the immediate return of the child by restricting the exceptions of Article 13(1) (b) of the 1980 Hague Convention to a strict minimum. The principle is that the child shall always be returned if she/he can be protected in the Member State of origin.

Under Article 13(1)(b) of the 1980 Hague Convention the court is not obliged to order the return if it would expose the child to physical or psychological harm or put her/him in an intolerable situation. The Regulation goes a step further by extending the obligation to order the return of the child to cases where a return could expose the child to such harm, but it is nevertheless established that adequate arrangements have been made to secure the protection of the child after the return.

[59] Ibid.
[60] See paragraph 3.2.4.

The court must examine this on the basis of the facts of the case. It is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question.

It will generally be difficult for the judge to assess the factual circumstances in the Member State of origin. The assistance of the central authorities of the Member State of origin will be vital to assess whether or not protective measures have been taken in that country and whether they will adequately secure the protection of the child upon his or her return.

4.3.4. Hearing the child – Article 11(2) and (5)[61]

4.3.4.1. The child and the requesting party shall have the opportunity to be heard

The Regulation reinforces the right of the child to be heard during the procedure. Hence, the court shall give the child the opportunity to be heard unless the judge considers it inappropriate due to the child's age and degree of maturity[62] (see paragraph 6.2 in chapter 6). The Regulation does not lay down criteria for determining the age or degree of maturity required or the procedure for hearing the child. In addition, the court cannot refuse to return the child without first giving the person who requested the return the opportunity to be heard. Having regard to the strict time limit, the hearing should be carried out in the quickest and most efficient manner available.

4.3.4.2. Use of the Regulation on the Taking of Evidence

One possibility is to use the arrangements laid down in Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in taking of evidence in civil or commercial matters ("the Evidence Regulation"). The Evidence Regulation facilitates co-operation between courts of different Member States in the taking of evidence in civil and commercial matters including family law cases. A court may either request the competent court of another Member State to take evidence or take evidence directly in the other Member State. Given that the court must decide within 6 weeks on the return of the child, the request must necessarily be executed without any delay, and considerably within the general 90-day time limit, prescribed by Article 10(1) of the Evidence Regulation. The use of video-conference and tele-conference, which is proposed in Article 10(4) of the Evidence Regulation, can be particularly useful for taking evidence in cases involving children.

4.3.5. The court shall issue a decision within a six-week deadline – Article 11(3)

The court must apply the most expeditious procedures available under national law and issue a decision within six weeks of being seised with the application for return of the child. This time limit may only be exceeded if exceptional circumstances make it impossible to achieve.

With regard to decisions ordering the return of the child, Article 11(3) does not specify that such decisions, which are to be given within six weeks, shall be enforceable within the same period.

[61] See also chapter 6 below.
[62] Article 12(2) of the UN Convention on the Rights of the Child contains a similar provision; see also Article 24(1) of the EU Charter on Fundamental Rights.

2 The appeal shall be lodged with the court notified by the Member State concerned to the Commission in accordance with Article 71.

3 The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4 If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 11 shall apply even where the party against whom enforcement is sought is not habitually resident in any of the Member States.

5 An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought has his habitual residence in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 45 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

Article 33
Proceedings to contest the decision given on appeal

The decision given on appeal may be contested only by the procedure notified by the Member State concerned to the Commission in accordance with Article 71.

Article 34
Refusal or revocation of a declaration of enforceability

1 The court with which an appeal is lodged under Articles 32 or 33 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Article 24.

2 Subject to Article 32(4), the court seised of an appeal under Article 32 shall give its decision within 90 days from the date it was seised, except where exceptional circumstances make this impossible.

3 The court seised of an appeal under Article 33 shall give its decision without delay.

Article 35
Staying of proceedings

The court with which an appeal is lodged under Articles 32 or 33 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.

Article 36
Provisional, including protective measures

1 When a decision must be recognised in accordance with this Section, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 30 being required.

2 The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

3 During the time specified for an appeal pursuant to Article 32(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 37
Partial enforceability

1 Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the competent court or authority shall give it for one or more of them.

2 An applicant may request a declaration of enforceability limited to parts of a decision.

Article 38
No charge, duty or fee

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.

SECTION 3
COMMON PROVISIONS

Article 39
Provisional enforceability

The court of origin may declare the decision provisionally enforceable, notwithstanding any appeal, even if national law does not provide for enforceability by operation of law.

Article 40
Invoking a recognised decision

1 A party who wishes to invoke in another Member State a decision recognised within the meaning of Article 17(1) or recognised pursuant to Section 2 shall produce a copy of the decision which satisfies the conditions necessary to establish its authenticity.

2 If necessary, the court before which the recognised decision is invoked may ask the party invoking the recognised decision to produce an extract issued by the court of origin using the form set out in Annex I or in Annex II, as the case may be.

The court of origin shall also issue such an extract at the request of any interested party.

3 Where necessary, the party invoking the recognised decision shall provide a transliteration or a translation of the content of the form referred to in paragraph 2 into the official language of the Member State concerned or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where the recognised decision is invoked, in accordance with the law of that Member State, or into another language that the Member State concerned has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the completion of the form.

4 Any translation under this Article must be done by a person qualified to do translations in one of the Member States.

Article 57 – Legal aid

Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.

Article 58 – Statute of limitation

Parties shall take the necessary legislative and other measures to ensure that the statute of limitation for initiating any legal proceedings with regard to the offences established in accordance with Articles 36, 37, 38 and 39 of this Convention, shall continue for a period of time that is sufficient and commensurate with the gravity of the offence in question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority.

Chapter VII – Migration and asylum

Article 59 – Residence status

1 Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law.

2 Parties shall take the necessary legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse or partner as recognised by internal law to enable them to apply for an autonomous residence permit.

3 Parties shall issue a renewable residence permit to victims in one of the two following situations, or in both:

a where the competent authority considers that their stay is necessary owing to their personal situation;
b where the competent authority considers that their stay is necessary for the purpose of their co–operation with the competent authorities in investigation or criminal proceedings.

4 Parties shall take the necessary legislative or other measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.

Article 60 – Gender–based asylum claims

1 Parties shall take the necessary legislative or other measures to ensure that gender–based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.

2 Parties shall ensure that a gender–sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.

3 Parties shall take the necessary legislative or other measures to develop gender–sensitive reception procedures and support services for asylum–seekers as well as gender guidelines and gender–sensitive asylum procedures, including refugee status determination and application for international protection.

Article 61 – Non–refoulement

1 Parties shall take the necessary legislative or other measures to respect the principle of non–refoulement in accordance with existing obligations under international law.

2 Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

Chapter VIII – International co–operation

Article 62 – General principles

1 Parties shall co–operate with each other, in accordance with the provisions of this Convention, and through the application of relevant international and regional instruments on co–operation in civil and criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:

a preventing, combating and prosecuting all forms of violence covered by the scope of this Convention;
b protecting and providing assistance to victims;
c investigations or proceedings concerning the offences established in accordance with this Convention;
d enforcing relevant civil and criminal judgments issued by the judicial authorities of Parties, including protection orders.

2 Parties shall take the necessary legislative or other measures to ensure that victims of an offence established in accordance with this Convention and committed in the territory of a Party other than the one where they reside may make a complaint before the competent authorities of their State of residence.

3 If a Party that makes mutual legal assistance in criminal matters, extradition or enforcement of civil or criminal judgments imposed by another Party to this Convention conditional on the existence of a treaty receives a request for such legal co–operation from a Party with which it has not concluded such a treaty, it may consider this Convention to be the legal basis for mutual legal assistance in criminal matters, extradition or enforcement of civil or criminal judgments imposed by the other Party in respect of the offences established in accordance with this Convention.

4 Parties shall endeavour to integrate, where appropriate, the prevention and the fight against violence against women and domestic violence in assistance programmes for development provided for the benefit of third States, including by entering into bilateral

242 This development is reflected in the information provided by Contracting States in the Country Profiles[275] to the 1980 Hague Child Abduction Convention and was discussed at the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions. The Special Commission 'welcome(d) the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether an Article 13(2) defense has been raised'.[276] The Special Commission also recognised 'the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity'.[277]

243 It should be added that case law in many Contracting States also reflects the increased awareness of the need for separate representation of the child in certain difficult abduction cases.[278]

244 Nevertheless, it has to be said that the paths States take to protect children's rights and interests in legal proceedings are diverse and the manner in which the child may be involved or represented in legal proceedings, or the methods by which the child's views

in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State'; see also P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (*op. cit.* note 80), p. 585, para. 123.

273 For example, in 1996 the Council of Europe adopted the *European Convention on the Exercise of Children's Rights*, which entered into force 1 July 2000, aiming to protect the best interests of children through a number of procedural measures to allow the children to exercise their rights, in particular in judicial family proceedings. The Convention was in force at the time of writing in Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Montenegro, Poland, Slovenia, The former Yugoslavian Republic of Macedonia, Turkey and Ukraine, see < http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=8&DF=05/12/2010&CL=ENG > (last consulted 16 June 2012); also, the Brussels IIa Regulation, applicable as of 1 March 2005 for all EU Member States except Denmark, which supplements the application of the 1980 Hague Child Abduction Convention in these States, reflects the recent rapid developments in promoting children's rights in legal proceedings. Based to a large extent on the 1996 Hague Child Protection Convention, the Brussels IIa Regulation encourages even more vigorously the consideration of children's wishes.

274 For example, the 'Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice', adopted on 17 November 2010 by the Committee of Ministers of the Council of Europe, available at < https://wcd.coe.int/wcd/ ViewDoc.jsp?id=1705197&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F 5D383 > (last consulted 16 June 2012); see also 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An EU Agenda for the Rights of the Child', COM(2011)60 final of 15.2.2011, in particular p. 6, available online at < http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf > (last consulted 16 June 2012). See further the preparatory report by U. Kilkelly, 'Listening to children about justice: Report of the Council of Europe on Child-friendly Justice', available at < http://www.coe.int/t/dghl/standardsetting/childjustice/CJ-S-CH%20_2010_%2014%20rev.%20E%205%20oct.%20 2010.pdf > (last consulted 16 June 2012).

275 See section 10.4 of the Country Profiles under the 1980 Convention (*supra* note 121).

276 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 50.

277 *Ibid.*

278 See section 10.4 d) of the Country Profiles under the 1980 Convention (*supra* note 121) and the Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 51. See also regarding the **United Kingdom**, M. Freeman and A.-M. Hutchinson, 'Abduction and the Voice of the Child: Re M and After', *IFL* 2008, 163-167; see also, for example, in **New Zealand**, the Practice Note 'Hague Convention Cases: New Zealand Family Court Guidelines', available at < http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes > (last consulted 16 June 2012) and sec. 106 and 6 of the New Zealand Care of Children Act 2004 No 90 (as at 29 November 2010), available at < http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html > (last consulted 16 June 2012).

may be ascertained, differ considerably.[279] In some States judges in family proceedings concerning parental responsibility hear children directly; the child may be interviewed in a normal court hearing or in a special hearing, where the judge interviews the child alone or in the presence of a social worker, etc.[280] But even among the countries that involve children directly in judicial proceedings, views on the earliest age at which a child may be involved differ. In other States, where judges are reluctant to hear children directly, the child's view might be submitted to the court through a report prepared, for example, by a social worker or psychologist who interviews the child for that purpose.[281]

245 Apart from the question of how the child's views can be made known to the judge seised, the separate question of how much importance should be accorded the child's opinions and wishes will depend on the subject matter of the case and the child's age and degree of maturity.

246 At the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, the Special Commission 'note(d) the different approaches in (State's) national law as to the way in which the child's views may be obtained and introduced into the proceedings' and emphasised 'the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible'.[282]

7.2 *The voice of the child in mediation*

The child's views should be considered in mediation in accordance with the child's age and maturity.

How the child's views can be introduced into the mediation and whether the child should be involved directly or indirectly must be given careful consideration and depend on the circumstances of the individual case.

247 In the mediating of a family dispute concerning children, the child's views need to be taken into consideration.[283] The same applies to other alternative dispute resolution mechanisms. Particularly in view of the developments in safeguarding children's rights and interests in the context of judicial proceedings, there should be a parallel respect for

279 See for example a comparison of different European States in M. Reich Sjögren, 'Protection of Children in Proceedings', Note prepared for the European Parliament's Committee on Legal Affairs, Brussels, November 2010, PE 432.737.

280 See for example **Germany**: children have to be heard as of the age of 14 years or younger if the child's views are considered particularly relevant for the proceedings (§ 159 FamFG, *supra* note 227, replacing § 50 b FGG), which will normally be the case in custody proceedings (here, children are sometimes heard as early as 3 or 4 years old); see also a study requested by the Ministry of Justice on the hearing of children, M. Karle, S. Gathmann, G. Klosinski, 'Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach § 50 b FGG', 2010. In **France** children can be heard by the judge or a person designated by the judge to hear the child in accordance with Art. 388-1 of the French Civil Code.

281 See, with further references, M. Reich Sjögren (*op. cit.* note 279); in the **United Kingdom** the court can order a Welfare report from a specialist social worker of the Children and Family Court Advisory and Support Service (CAFCASS) in the context of custody or contact proceedings; see also M. Potter, 'The Voice of the Child: Children's 'Rights' in Family Proceedings', *IFL* 2008, 140-148, at p. 143.

282 See Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (*op. cit.* note 38), Recommendation No 50.

283 See also 'The Involvement of Children in Divorce and Custody Mediation – A Literature Review', published by the Family Justice Services Division of the Justice Services Branch (British Columbia Ministry of Attorney General), March 2003, available at < http://www.ag.gov.bc.ca/dro/publications/index.htm > (last consulted 16 June 2012).