

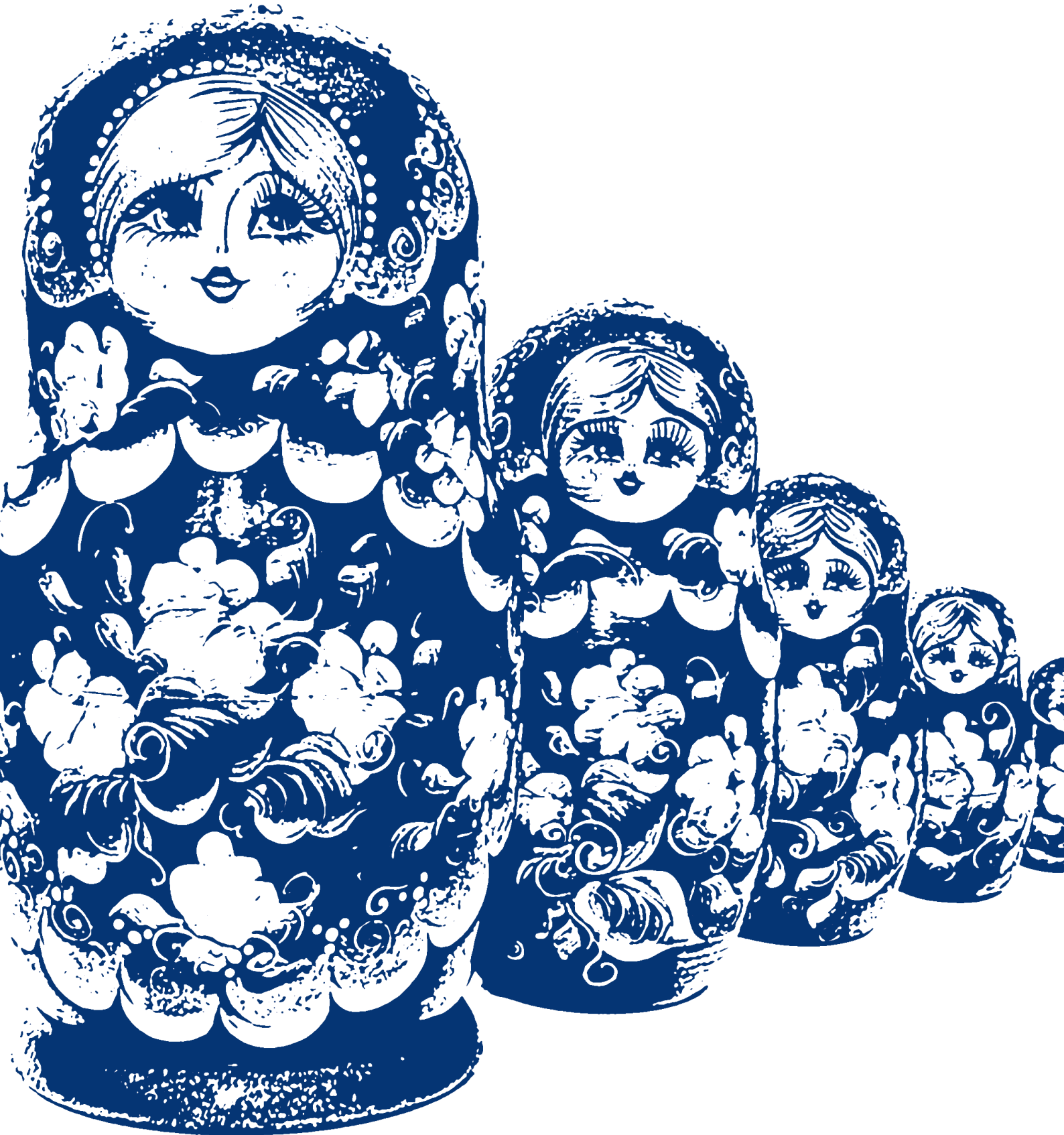


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# Family Law News

Newsletter of the International Bar Association Legal Practice Division

**VOLUME 6 NUMBER 1 SEPTEMBER 2013**





# ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



the global voice of the legal profession

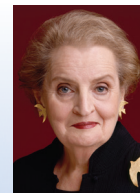
The energetic and prosperous city of Boston is renowned for its cultural facilities, world-class educational establishments, and its place at the forefront of American history. As New England's social and commercial hub, home to a number of major national and international businesses, and one of the oldest operational sea ports in the western hemisphere, Boston is a fitting and inspiring setting for the International Bar Association's 2013 Annual Conference.

## WHAT WILL BOSTON 2013 OFFER?

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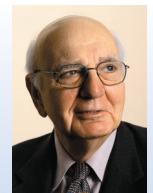
### KEYNOTE SPEAKERS INCLUDE:



Madeleine K Albright *Former US Secretary of State, Opening Ceremony Keynote Speaker*



Justice Stephen Breyer *Associate Justice, US Supreme Court*



Paul Volcker *American Economist and former Chairman of the Federal Reserve*



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This newsletter is intended to provide general information regarding recent developments in family law. The views expressed are not necessarily those of the International Bar Association.

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# From the Chair

**Gillian Rivers**

Penningtons, London

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**W**elcome to the latest edition of our Family Law Committee newsletter. I hope you enjoy the articles. My thanks go to all of the contributors for their hard work and efforts.

The Family Law Committee focuses on international matters in family law concerning finance, jurisdiction, enforcement, tax and child law, from abduction to surrogacy to adoption. Our International Children's Issues Subcommittee has made connections to the IBA African Regional Forum Committee on the rights of the child. This Committee is linked with the African Charter, an important step in law reform regarding children across Africa to ensure children are afforded adequate protection.

We are also involved in the organisation and presentation of seminars and sessions for the annual and regional IBA conferences, and continue to work with the IBA Individual Tax and Private Client Committee to produce the International Wealth Transfer Conference held in London every March.

In London, the summer is drawing to a close, and the evening chill and darker evenings are a reminder to me that the IBA Annual Conference in Boston is a matter of weeks away. It is not too late to register for the Boston Conference which will take place on 6–11 October 2013 (see [www.ibanet.org](http://www.ibanet.org)).

Our Committee has, again, worked hard to prepare interesting, mentally stimulating and informative sessions (full details on p 7).

On Monday morning we will take part in an IBA Presidential Showcase session on *Human Trafficking: Modern Slavery*. I will co-chair this session with Gabrielle Williamson, Chair of the Section on Public and Professional Interest. We have focused on the scope of the trafficking (de facto slavery) problem. Our speakers are drawn from a distinguished and high-level panel of leading experts from around the world.

The aim of the session is to define and highlight the problem of human trafficking.

At the end of the session we will announce the creation of an IBA Presidential Taskforce on Human Trafficking, which will establish a two-year project. The purpose of the Task Force is to examine how to combat trafficking; rehabilitate victims; punish the perpetrators; and bring about law reform.

On Monday afternoon the Family Law Committee will join forces with the Arbitration and Mediation Committees to present *Collaborative law mediation and arbitration of family disputes*. The session will consider financial family law perspectives in mediation; how to listen to the voices that cannot speak; lawyering and mediation for children; and mediating the voice of the child in relocation matters.

On Wednesday morning, as has become our tradition, we will be hosting our Committee breakfast. All welcome!

Following this, on Wednesday afternoon we will present together with the Individual Tax and Private Client Committee and their session is entitled *Mobile Marriage and Divorce: 'What is mine is mine, what is yours in mine'*. This will be a panel presentation discussing a cross-border view of the challenges and legal pitfalls that may affect individual's property rights as they move between jurisdictions.

Before the leaves have fallen in Boston, and the dust has settled after the Conference, we need to turn our attention to the IBA Annual Conference 2014, which will take place in Tokyo. We are always interested to hear from our Committee members in relation to topics that you would like us to present. So if you have any ideas and suggestions, please speak to me or any of the other Family Law Committee officers in Boston or contact us by email.

I am looking forward to seeing you in Boston.

Best wishes to you all.

**Ranjit Malhotra**

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## From the Editor

It is with great pleasure that I pen my editor's message for the third time, as part of this official duty assigned to me. Not only is it my privilege to do so, but I immensely enjoy this commitment.

First of all, we have profoundly to congratulate Lord Justice Thorpe, very recently retired from the Court of Appeal, UK and as Head of International Family Justice for England and Wales, 'for his continued tireless unrivalled long standing contribution in the arena of international family law', and of course in creating an awareness, a momentum full of vigour, bonding and fusion in perfect harmony on a global scale. It would not be prudent for me to elaborate further on his achievements, as Elizabeth Walsh, Editor of *Family Law* and *International Family Law*, has very succinctly and beautifully summed up the work done by Lord Justice Thorpe in this newsletter on p 8.

Three major international family law events of the year so far deserve special mention. The first was the 6th World Congress on Family Law and Children's Rights on 17–20 March 2013 at the Sydney Convention and Exhibition Centre, Sydney, Australia. The Child Law Symposium was very successfully held in New Delhi on 13 May 2013, with active support from the Foreign and Commonwealth Office, London and the

British High Commission, New Delhi. This event was graced by Justice Vikramajit Sen, the Honourable Judge, Supreme Court of India; Soli Sorabjee, former Attorney-General and Senior Advocate, Supreme Court of India; the Honourable Chief Justice Diana Bryant, Family Court of Australia and very eminent panellists from different walks of life. The event was very well attended by senior consular staff of all major embassies in New Delhi.

The third major event was the 2nd International Family Law and Practice Conference 2013, 'Parentage, Equality and Gender', held in London on 3–5 July 2013. Marilyn Freeman, Co-Director of the Centre for Family Law and Practice, and her team deserve a special commendation for the huge success of this conference, which was a treat in every respect. Lord Justice Thorpe's plenary session resonated with thundering applause from delegates all over the world.

We all welcome Gillian Rivers as the new Chair of the Family Law Committee.

Lastly, it is my pleasant duty to thank all the very eminent contributors, who have made such valuable contributions at very short notice, which of course contributes immensely to the success of the newsletter.

With my very best wishes to all the readers and the contributors.

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# ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



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## Family Law Committee sessions

### Monday 0930 – 1230

#### **IBA SHOWCASE: Human trafficking: modern Presented by the Section on Public and Professional Interest and the**

*Legal Practice Division Family Law Committee*

This Presidential Showcase Session will focus on the scope of the trafficking (de facto slavery) problem.

We will also discuss recent activities and developments of the key stakeholders, individuals, private institutions, corporations, governmental and inter-governmental agencies, NGOs and trafficked persons themselves. Human trafficking is a global problem that touches all of us throughout the world in developing and developed countries. It has been reported that the impact of human trafficking from an economic perspective is staggering with respect to relative size of criminal industries. Human trafficking as a criminal industry is behind only trading and selling of illegal drugs in terms of size of its profit (it has been estimated that the annual profit of trafficking is approximately US\$32 billion).

A distinguished high level panel of leading experts from various regions of the world will discuss human trafficking and its economic, legal and human rights implications.

At the end of the session, we will announce the creation of an IBA Presidential Task Force on Human Trafficking and a concrete project for the IBA to carry out in the next years. There is much we can do as lawyers to help mitigate this problem.

Finally, this session is not intended to be a one-way information disclosure, but the session will be interactive with the audience, so please come prepared with any questions/comments you may have.

### Monday 1430 – 1730

#### **Collaborative law mediation and arbitration of family disputes**

*Presented by the Family Law Committee and the Mediation Committee*

The session will deal with the following issues:

- Financial family law perspectives in mediation negotiation;
- Hearing the voices of those who cannot speak;

- Lawyering and mediation for children; and
- Mediating the voice of the child in relocation matters

### Wednesday 0800 – 0930

#### **Open committee business meeting and breakfast**

*Presented by the Family Law Committee*

An open meeting of the Family Law Committee will be held to discuss matters of interest and future activities.

### Wednesday 0930 – 1230

#### **Mobile marriage and divorce: 'what is mine is mine, what is yours is mine'**

*Presented by the Family Law Committee and the Individual Tax and Private Client Committee*

A panel discussing a cross-border view of the challenges and legal pitfalls that may affect a client's property rights as they move between, or have property in, different jurisdictions.

# Sir Mathew Thorpe

**Elizabeth Walsh**

Editor, Family Law and  
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**A**t the end of July, Sir Mathew Thorpe retired from the judiciary, the Court of Appeal and particularly as Head of International Family Justice for England and Wales, a post he has held since 2005. After graduating from Oxford University, Sir Mathew was called to the Bar in 1961. He practised in various areas of law until he took Silk in 1980, thereafter he specialised in family law. He was appointed a judge of the High Court, Family Division, in 1988 and Lord Justice of Appeal in 1995 until 2005.

To mark the tremendous stature and recognition Sir Mathew brought to the post of Head of International Family Justice, the editors of *International Family Law*, of which he is consultant editor, decided to produce a special issue in his honour with contributions from over 30 leading members of the international judiciary and academic life including the Lord Chief Justice and Baroness Butler-Sloss. The special issue, signed by all the contributors, was presented to Sir Mathew at the 15th anniversary conference for the International Hague Network of Judges, which he was hosting, assisted by the Hague Conference, in Windsor in July. As Lord Igor Judge said in the preface to the special issue:

‘The Court of Appeal will not only lose an undisputed master craftsman in the art of the *ex tempore* judgment but an outstanding judge whose focus has always been grounded in common sense, and the reality that in the deeply sensitive world of family law, any attempt to resolve such disputes should be firmly centred on practical and swift solutions. The Office of Head of International Family Justice was created in 2005 by the then Lord Chief Justice and Lord Chancellor in order to deal with the steady and continuing growth of international family litigation and its consequent demands. There will be no surprise in the international family

law community if I say that Sir Mathew has made this role his own.

A great and lasting expression of Sir Mathew’s practical approach has been his commitment to the development and facilitation of trans-national judicial collaboration and direct judicial communication in international family cases. The advantages of judges of different jurisdictions communicating with each other to assist in the resolution of cases are significant, and tangible examples where it has had a real impact in a case are numerous. Amongst other things, it can reduce delay, financial costs to litigants and to individual states, and can reduce the emotional distress that can often be heightened in such cases. Mathew’s punishing and tireless travel schedule in his support for this cause is known by many. The fruits of those labours have been his instrumental role in the creation of the International Hague Network of Judges in 1998. Now in its 15th year, the Network, the only global formally established network of family law judges, is the key tool by which judicial collaboration is facilitated. Across the spectrum of international family law cases, from relocation to child abduction, surrogacy to financial remedies, it is now almost inconceivable to imagine an approach to resolving trans-national family disputes, without considering whether it would be appropriate to engage it.’

In August, Jordan Publishing announced that Sir Mathew Thorpe has been awarded the Cornwell Award for Outstanding Contribution to Family Law. He will collect his award at the Family Law Awards ceremony on 9 October 2013 in London. Sir Mathew has now returned to self-employment at 1 Hare Court, Temple – his former Bar chambers – and will continue in his role as Consultant Editor to *International Family Law*. Copies of the special issue are available on request from the Family Law office.

**Richard McKee**

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# Maintaining family life? New immigration rules restricting family migration to the UK have received a judicial drubbing

In July 2012, the Home Secretary made drastic changes to the Immigration Rules, as part of the coalition government's programme to reduce net migration to the UK from hundreds of thousands annually to tens of thousands. The 'points-based system' was set up to regulate the flow of workers and students, but it was now the turn of those seeking to join sponsors in the UK on the basis of family ties. Although no points have to be scored, the new rules resemble the points-based system in their intricacy and complexity. In February this year, a major challenge to one subset of the new rules was launched at the High Court in London, by way of three linked applications for judicial review, which came before Mr Justice Blake, who is also President of the Immigration and Asylum Chamber of the Upper Tribunal, London.

The case is *MM & ors* [2013] UKHC 1900 (Admin), and judgment was only handed down on 5 July. It took nearly five months for Blake J to write his judgment, and it is indeed a monumental work, running to some 37 pages, with a further 15 pages of appendices. It is actually a distillation of a huge amount of material, some 3,000 pages of documentary evidence having been put before his Lordship. But the problem can be stated quite shortly. If someone who has 'settled' (or refugee) status in the UK wants to be joined by a spouse or partner from overseas, the 'sponsor' in this country must have a gross annual income of at least £18,600. If his income falls short of that, the difference can be made up from savings. But the savings must amount to more than £16,000 if they are to count (how much more depends on a formula, outlined below). Under the previous rules, a couple only had to show that they would be maintained and accommodated adequately, without recourse to public funds.

So the new rules have raised the threshold for admission much higher.

Apart from the Immigration Act 1971 and the Immigration Rules made thereunder, immigration control is subject to the European Convention on Human Rights (ECHR), brought into domestic law by the Human Rights Act 1998. Our municipal courts must be guided by the jurisprudence of the European Court of Human Rights at Strasbourg, and Blake J traces the interaction between the right to respect for family life, enshrined in the Convention, and the immigration rules governing the admission of spouses and partners.

The Strasbourg jurisprudence was initially not very supportive of matrimonial migration. In *Abdulaziz, Cabales & Balkandali* [1985] 7 EHRR 471, three settled women, whose husbands were unable to join them in the UK under the Immigration Rules as then in force, did not get a ruling that Article 8 gave their husbands an entitlement to live with them in this country. The Court said:

'The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries.'

There was accordingly no lack of respect for family life, and hence no breach of Article 8, taken alone (although there was a breach, taken together with Article 14, which forbids discrimination – the Immigration Rules at that time discriminated against women, in that men could bring their wives in

more easily than women could bring their husbands). This case, as Blake J observes, for many years constituted a major restriction on the ability of applicants to rely on Article 8 in entry clearance cases. But since then, the right of the citizen to enjoy family life in the country of his nationality has emerged as a significant theme in both European and domestic case law.

Much of this development has concerned family ties between parents and children, with both the Strasbourg Court in *Maslov v Austria* and our Supreme Court in *ZH (Tanzania)* emphasising the welfare of the child as a primary, albeit not the paramount, consideration. This indeed is enjoined by Article 3 of the UN Convention on the Rights of the Child. When the UK withdrew its reservation from that Convention in respect of immigration, section 55 of the Borders, Citizenship and Immigration Act 2009 placed a duty on the Secretary of State to 'safeguard and promote the welfare of children who are in the United Kingdom'. While this does not expressly include children who are outside the UK, guidance issued to Entry Clearance Officers enjoins them to act in the spirit of this duty.<sup>1</sup>

Meanwhile, the Strasbourg Court was developing its Article 8 case law, in such matters as the principles to be applied when a foreign spouse faces deportation for criminal conduct.<sup>2</sup> But on the maintenance requirements for the admission of spouses, unaccompanied by children, the Court has had little to say. This is a sphere in which the national authorities enjoy a wide 'margin of appreciation' or 'discretionary area of judgment'. Nor, as his Lordship observed, is it something on which the law of the EU has any leverage in respect of the UK's policy on the admission of foreign spouses, as this country opted out of the Family Reunification Directive. (Citizens of other EU Member States are not actually subject to the Immigration Rules at all, and if they are exercising 'treaty rights' in this country, they can be joined by their spouses regardless of how much money they are earning.)

As for the Immigration Rules, Blake J reminds us that they are neither primary nor delegated legislation, but a statement of the Secretary of State's policy, albeit laid before parliament and subject to the negative resolution procedure. They can be struck down by the High Court, as happened once on *R v IAT*<sup>3</sup> In order to be admitted for settlement under the rules at

that time, elderly relatives had to be both dependent on sponsors in the UK and living at a standard substantially below that of their own country – a very unlikely combination. In fact, so unreasonable was the rule that Mr Justice Simon Brown, as he then was, held it to be *ultra vires* the Secretary of State's rule-making powers.

The maintenance requirements used to be very straightforward. An overseas spouse was not, during the 'probationary period' before settlement, allowed to have recourse to public funds, nor was the sponsor allowed to claim any welfare benefits, additional to those that they may already have been entitled to, because of the admission of the overseas spouse. Adequate maintenance would have to be provided from other sources, but 'adequate' was not defined in the Rules. Case law, notably *KA & ors*,<sup>4</sup> established that 'in order to be adequately maintained, one has to have resources at least equivalent to those which would be available to a family on Income Support'. A couple at that time would have received around £5,500 a year as Income Support (their accommodation being paid for out of Housing Benefit, which would have to be added to the £5,500 in order to gauge equivalence).

What if the couple did not have enough income of their own to match that of a 'comparator' family on Income Support? Third-party support from relatives or friends had long been thought acceptable, until the Asylum and Immigration Tribunal and the Court of Appeal came to the opposite view in 2007–2008. The status quo ante was then restored by the Supreme Court in *Mahad & ors*,<sup>5</sup> holding that the plain language of the Immigration Rules did not forbid third-party support at all. Lord Brown (as he had now become) noted the view of Laws LJ below, that human rights considerations had no place in construing the Immigration Rules, but did not think it necessary to revisit that argument.

Human rights had, however, featured in an earlier decision by the House of Lords,<sup>6</sup> in which a statutory scheme requiring persons subject to immigration control to obtain a Certificate of Approval from the Home Office before they could get married (unless they were marrying in the Church of England) was held to be both discriminatory on the grounds of religion and an unjustified and disproportionate interference with the right to marry, recognised by Article 12 of the ECHR. Lord Bingham considered that the

fee of £295 (£590 for a couple subject to immigration control) would be beyond some people's means, and would thus 'impair the essence of the right to marry'.

The Certificate of Approval scheme was considered by the European Court of Human Rights in *O'Donoghue v United Kingdom*,<sup>7</sup> holding that a discretion to waive the fee in compassionate circumstances was not enough to save the scheme. Another interference by the Home Office with married life kicked off in 2008, when the minimum age for spouses was raised from 18 to 21. It was thought that young people were more susceptible to being forced into marriage against their will when they were under the age of 21, therefore the Immigration Rules were changed so that both the sponsor and the applicant from abroad would have to be aged at least 21 in order to live together in the UK.

A challenge to the legality of this change in the Rules failed initially before the Administrative Court, but succeeded before the Court of Appeal, and eventually reached the Supreme Court as two linked cases. One case involved an English girl and a Chilean boy who were unrelated and whose marriage was not arranged, while the other involved a girl and a boy, both of Pakistani origin, who had entered willingly into an arranged marriage. In neither case was there any suggestion of a 'forced' marriage.

*Quila*<sup>8</sup> was, said Blake J, a decision of profound importance for the challenges that were before him. First, the proposition in *Abdulaziz* that refusal of entry clearance was not an interference with the right to respect for family life enshrined in Article 8 was swept away. Secondly, the answer to the ultimate question posed by Lord Bingham in *Razgar* – whether any interference was justified and proportionate to a legitimate aim – was to be found by applying a test of proportionality developed in UK public law, ultimately from *Daly*.<sup>9</sup> This test requires affirmative answers to the following four questions:

1. Is the legislative objective sufficiently important to justify limiting a fundamental right?
2. Are the measures that have been designed to meet it rationally connected to it?
3. Are they no more than is necessary to accomplish it?
4. Do they strike a fair balance between the rights of the individual and the interests of the community?

The main focus for Blake J was on questions 3 and 4. In *Quila*, Lord Wilson explained

that, although raising the age of marriage to 21 was rationally connected to the objective of deterring forced marriages, it failed the test of being no more than was necessary to accomplish that objective, and of striking a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages. Raising the age of marriage was, said Lord Wilson 'a sledgehammer', but the Secretary of State had not identified 'the size of the nut'.

While the judgments of the House of Lords in *Baiai* and of the Supreme Court in *Quila* led to the reversal of the impugned measures, another challenge to an interference with family life had recently failed. In November 2010, it became necessary that applicants for spouse visas should have achieved at least a very basic knowledge of English (level A1 on the Common European Framework of Reference), and unless this could be shown in another way – for example, by being a national of an English-speaking country – or one was exempt because of age or infirmity, a language test would have to be passed.

A challenge to this new requirement failed before Beatson J (as he then was) in *Chapti*,<sup>10</sup> and failed again before the Court of Appeal in *Bibi & ors*.<sup>11</sup> According to Maurice Kay LJ, while the social problem of spouses coming to the UK with no knowledge of English was less pressing than that of forced marriages, the interference with family life was less invasive than in *Quila*. The aim of the language requirement was to facilitate the integration of migrants, and in furthering this benign social policy, the state was entitled to a wide margin of appreciation.

On the other hand, in *Zhang*,<sup>12</sup> Turner J disapproved, without striking down, paragraph 319C of the Immigration Rules, insofar as it makes no provision for people to 'switch' in-country to the status of spouse of a 'relevant points-based system migrant'. The insistence that people who get married in the UK to migrants who have limited leave on one of the 'Tiers' of the points-based system should go home and apply for entry clearance would, it was held, in most cases be a disproportionate interference with Article 8 rights.

His Lordship now turned to the justification offered by the Secretary of State for imposing a new income threshold for spouses. Under Article 8, Blake J reminds us, the burden of justification rests on the respondent to show that any interference is

necessary and proportionate to the legitimate aim being pursued. According to a senior civil servant at the Migration Policy Unit of the Home Office, the previous undefined maintenance requirement for spouses contrasted with the move, under the points-based system, away from broad, discretionary criteria, towards more precise, objective requirements for managing the work and student routes.

But it was not just a matter of replacing the unspecified ‘adequacy’ test for maintenance with specific figures for income and savings. The figures had to be set above the basic subsistence level of Income Support, both to ensure that sponsors and their partners from overseas would be able to maintain themselves in the long term without becoming a burden on the public purse, and to ensure that the integration of overseas partners into British society would not be inhibited by the lack of financial resources. It was emphasised that the purpose of the new Rules was not to assist in reducing net migration from 252,000 in the year to September 2011 to the government’s target of tens of thousands per annum. Nevertheless, it was estimated that the new financial requirements would reduce net migration by around 9,000 a year. (On 27 July 2013 the Public Administration Committee of the House of Commons castigated the Home Office figures for annual net migration as no more than guesswork, based on such a statistically small sample as to be capable of a wide margin of error.)

His Lordship now set out his conclusions, observing that this was a challenging case, representing ‘in an acute form the tensions between the competing calls for judicial respect for sensitive issues of policy-making by the democratically accountable executive, and judicial scrutiny, with an appropriate degree of intensity, of rules that affect the enjoyment of a fundamental human right’. (The tensions arising between the executive and the judiciary were mentioned in a statement of 16 July 2013 by Sir John Thomas, on his appointment as the new Lord Chief Justice of England and Wales.)

The cases cited earlier in this judgment demonstrated, said his Lordship, how judicial decisions in this contentious area of policy endeavoured to navigate a course between ‘the Scylla of improper intrusion’ into the sphere of executive policy and ‘the Charybdis of undue deference’ to executive measures not incorporated in primary legislation.

Blake J drew a distinction between

couples who are both foreign nationals and couples where, as in the present linked cases, the sponsor is either a refugee or a British citizen. A refugee cannot go back to his country of nationality and live there with his spouse, whereas a British citizen has an independent right to reside in his own country, a fundamental right of constitutional significance. If the spouse cannot obtain admission under the Rules, and the citizen sponsor wants to enjoy family life and matrimonial cohabitation following marriage, he will have to leave the country of his nationality in order to do so. That, says Blake J, is a serious interference with the right of residence, which requires compelling justification.

His Lordship compared the right of an EU citizen working in another Member State to be joined by his spouse, with the absence of such a right for British citizens working in Britain. The right of the former is contingent on exercising EU ‘treaty rights’, whereas the latter have an indefeasible right of residence. This imbalance is of considerable concern, in view of the scale of the interference with family life introduced by the new Immigration Rules. His Lordship gives some illustrations, including:

- After 40 years of rule-making under the Immigration Act 1971, a specific income figure has been set, and it has been set at a figure three times higher than what the previous case law held to be ‘adequate’ for a couple;
- The Migration Advisory Committee calculated that the minimum income figure of £18,600 would mean that 45 per cent of the sponsors who had supported spouse applications in 2009 would not have been able to meet this requirement;
- One of the sponsors in the present cases earns £15,600 per annum, £3,000 short of the minimum amount. In order for savings to make up for this shortfall in income, he would need £16,000 to start off, plus the £3,000 shortfall, multiplied by the two and a half years of initial admission as a spouse. The formula is thus  $£16,000 + £3,000 \times 2.5 = £23,500$  in savings, to make up for a shortfall of £3,000 in income;
- The income figure is set at a level higher than the average salaries in a great many trades and occupations. The national minimum wage is currently £6.31 per hour for adults over 21, and working for this wage 40 hours a week, 52 weeks a year would yield an annual income of only £13,124;

- Many ethnic minorities and women earn less than the national average. On the other hand, the £18,600 figure does not take account of the fact that it is much more expensive to buy or rent accommodation in London and the southeast of England than in the rest of the country, so that a person earning less than the national average, but living in an area where accommodation is cheap, cannot have that cheapness factored into the calculation. Even more is this imbalance evident when accommodation is offered free, or almost free, by relatives or friends;
- Proof of income has become more onerous, with pay slips and bank statements covering a continuous period of six months being required, or 12 months where the sponsor has changed jobs; and
- Third-party support has been unambiguously excluded from the Rules for the first time. So too has the ability of the spouse to generate income after admission to the UK, despite the fact that husbands of female sponsors have historically had a good record of entering the job market within 12 months of arrival.

Blake J was satisfied that such measures amount to a considerably more intrusive interference with family life than what Lord Wilson in *Quila* described as the ‘colossal’ interference deriving from the minimum age rule. While death and taxes are certain, quipped his Lordship, so also is the prospect of getting older. A couple who would have had to wait until they were both 21 before they could live together in the United Kingdom would at least not have had to wait any longer than three years. By contrast, the ability of a sponsor to earn £18,600 per annum gross or to have accumulated £16,000 in savings is neither assured nor even likely at the age of 21. Again, this interference is considerably greater than postponing entry for overseas spouses until they have attained a basic level of English. The Court of Appeal did not consider this to be a difficult, far less insuperable, barrier to the future enjoyment of family life.

Nevertheless, Blake J was satisfied that the new measures both have a legitimate aim and are rationally connected to that aim, namely to promote economic well-being and social cohesion. He did not think that, taking Article 8 with Article 14, the new rules are unlawfully discriminatory. Although there are significant differences in the wage levels

of men and women (14.9 per cent) and in the earnings of workers in London and the southeast of England compared with the rest of the country, with accommodation costing much more in the former than in the latter, his Lordship thought that it would be both impractical and inappropriate to make provision for such differential impact in the Rules themselves.

Nor was his Lordship persuaded that the maintenance provisions are unlawful, because they do not give overriding importance to the best interests of children affected by immigration decisions. Entry Clearance Officers, he observed, have a statutory duty to have regard to the best interests of children who are in the UK when considering the admission of someone whose presence or absence will impact on those children. His Lordship did not think it possible to summarise the circumstances when application of the maintenance rules would be contrary to the Article 8 rights of children. It was likely to happen, however, if children were separated from both of their parents or from their principal carer.

Blake J stopped short of quashing the new rules, observing that in *Quila*, both the Court of Appeal and the Supreme Court contented themselves with judicial remarks about the improbability that the Immigration Rules as they stood could be applied without a breach of Article 8. The position was similar here. But as for the central question in these linked cases – namely, whether the minimum income requirements are a disproportionate interference with the right to family life for sponsors who are British citizens or refugees – his Lordship concluded that if more than one of the following five features affected an individual case, there would indeed be an unjustified and disproportionate interference with a genuine spousal relationship:

1. setting the minimum income level above the threshold of the ‘benefits and net fiscal’ approach identified by the Migration Advisory Committee, which is £13,400;
2. requiring £16,000 before savings can be taken into account to make good a shortfall in income;
3. using a 30-month period for forward income projection, instead of the previous 12-month period;
4. disregarding even credible and reliable offers of ‘third-party support’; and
5. disregarding the earning capacity of the overseas spouse during the first two and a half years after admission.

The Migration Advisory Committee, explained his Lordship, chose £18,600 as representing the level at which a two-adult household would be completely ineligible for Housing Benefit. But this effectively denies many young people and many thousands of low wage-earners in full-time employment the opportunity of being joined by their non-EEA spouses from abroad. As professionals in the ‘dismal science’ of economics, the members of the Committee were not making an assessment of when it would be justified, on economic grounds alone, to prevent a British citizen or a refugee from being joined by a spouse.

As for the approval expressed by the House of Commons in their vote on the new rules in June 2012, Blake J noted that this was different in kind from the passage of primary legislation through parliament, with debate on individual clauses and the introduction of amendments. Even parliament might fail to achieve the right balance between the political interests of the majority and the human rights of the minority.

Rather than such a high financial threshold for the sponsor, his Lordship suggested the imposition of a strict burden of proof pre-entry, as to the reliability of third-party support or a job offer for the applicant, and the introduction of a post-entry check on foreign spouses after one year, to see whether, for example, third-party support has been made available as promised, or whether the spouse has taken the job for which he supposedly had an offer. One wonders, however, whether this would appeal to the Home Office. It is always much easier to keep people out, than to expel them once they are in!

The greater transparency of the new requirements, compared to the vagueness of the old ‘adequacy’, comes at too high a price, in his Lordship’s view. It cannot justify an agglomeration of measures that restrict the ability of so many law-abiding and decent citizens of this country to live with their spouses in the land of their nationality. But his Lordship accepted that ‘a wider margin of

appreciation is likely to be relevant to foreign sponsors who are voluntary migrants but not British citizens or refugees’. (Here, Blake J appears to have in mind not just migrants who are here with limited leave on one of the tiers of the points-based system, but people with indefinite leave to remain who have not naturalised as British citizens. Can it legitimately be made more difficult for them to be joined by spouses from abroad, than for migrants who have naturalised?)

His Lordship ends with a consideration of whether the executive discretion to admit spouses where the Rules are not met in ‘exceptional circumstances’ is enough to make the Rules compatible with the Convention. He thinks not, noting that the Home Office guidance on what is meant by ‘exceptional circumstances’ is very narrow. It does not, for example, include someone who nearly reaches the £18,600 threshold. Indeed, in *Miah*,<sup>13</sup> the Court of Appeal confirmed that there is no doctrine of a ‘near miss’ that can cure in the Article 8 balance a failure, by a narrow margin, to meet the requirements of the Rules. It is the consequence of, as Sedley LJ put it, ‘indirectly sending the citizen into exile’, that will make the application of the new maintenance rule, in many cases, a breach of the Human Rights Convention.

#### Notes

- 1 See *T (s 55 BCIA 2009 – entry clearance) Jamaica* [2011] UKUT 413 (IAC).
- 2 See, for example, the guidance of the Grand Chamber in *Boultif v Switzerland*.
- 3 *R v IAT ex parte Manshoora Begum* [1986] Imm AR 385.
- 4 *KA & ors (adequacy of maintenance) Pakistan* [2006] UKAIT 65.
- 5 *Mahad & ors* [2009] UKSC 16 (Immigration Law Update Vol 13, No 2).
- 6 *Baiai* [2008] UKHL 53 (Immigration Law Update Vol 11, No 17).
- 7 *O’Donoghue v United Kingdom* [2011] 53 EHRR 1.
- 8 *Quila* [2011] UKSC 45.
- 9 *Daly* [2001] UKHL 26.
- 10 *Chapti* [2011] EWHC 3370 (Admin).
- 11 *Bibi & ors* [2013] EWCA Civ 322 (Case Law Review Vol 3, No 9).
- 12 *Zhang* [2013] EWHC 891 (Admin) (Case Law Review Vol 3, No 10).
- 13 *Miah* [2012] EWCA Civ 261.

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# Waiting for rights-driven evolution in law reform: the impact of social change in family law reform

In the 28 June 2012 issue of *Jordans Family Law Newswatch*, Duncan Ranton<sup>1</sup> drew attention to the role of time in evolution-based reform of family law. He was actually referring to the debate preceding the recent enactment of the Marriage (Same Sex Couples) Act 2013, questioning why the then government, which sponsored the Civil Partnership Act 2004, had not simultaneously ‘grasped the nettle’ of gay marriage, instead compromising on civil partnership – when only eight years later, there was suddenly an executive will (albeit in a different coalition government) to raise civil partnership to full marriage.

Despite some expected opposition and heated media debates (which had not subsided when the Bill was introduced in January 2013), the Marriage (Same Sex Couples) Act in fact navigated the parliamentary process without the predicted fracas and, to some surprise, was finally enacted on 17 July 2013. This was unexpected by some as rumour had it that the government might still retreat by postponing the legislation to the 2013–2014 session, or even dropping it.

Ranton found the explanation for the limited 2004 Act, and the relatively quick decision on full marriage, in the necessary passage of time to reflect social change before introducing fundamental legislation. The concept is not new, being first addressed in Sir Henry Maine’s classic text *Ancient Law*,<sup>2</sup> where he identified the universal existence of identifiable status in early societies, as always *preceding* the introduction of formal legislation. In summary, social change always came first, and law afterwards.

The oddity Ranton highlighted is the relatively short timescale between the 2004 Civil Partnership Act, and the 2012 proposal for full marriage after all. It is fair to say it is odd that the government found parliamentary time for this Act, despite finding none for much other urgent

business, for example, rights for unmarried or unregistered cohabitants – now numerous, and numbers steeply rising. This contrasts with only around 6,000 civil partnerships each year, now able to upgrade their status to marriage if they wish, and only eight years after such partnerships were introduced. Moreover, the 2004 Act already gave civil partners substantially the same rights as heterosexual married couples under the Matrimonial Causes Act 1973.

This sits oddly with much larger numbers of informal cohabitants, whether of the same or opposite sex, who have been waiting far longer for law reform addressing their needs – now left still relying on some extremely fragmented and uncustomised legislation, not providing rights comparable to the 1973 and 2004–2013 Acts, which provide appropriately for those they protect.

Of course, law reform as speedy as the 2013 Act has sometimes occurred over even shorter periods, for example, where revolution makes dramatic change in a very short time:<sup>3</sup> but this is usually explained by an urgent social demand for reform, suddenly enabled by a shift in political power when supporters achieve government office permitting the enactment of desired changes.

This is not the explanation in the case of gay marriage, which was presented by the current UK government not as family law reform but as a simple *equality* measure – since such *marriages* were in fact a missing element from the Equality Act 2010, which consolidated into one statute a holistic approach to most discriminations, which a modern liberal democracy deplors.

Thus, while the 2004 Act was the previous Labour government’s, it was not a political shift that in 2013 quickly brought gay marriage into the equality fold, but equality ideology, also happening to coincide with a wholesale modernisation of family law following the 2011 Family Justice Review, an obvious opportunity

to upgrade civil partnership to full marriage on equality grounds.

Unfortunately there seems no equivalent equality basis available to cohabitants, since cohabiting partners of both sexes can now marry. Carrying this argument to its logical conclusion, cohabitants may now wait indefinitely for reform, despite increasingly affirmative research showing that unmarried cohabitation is no longer seen as socially deviant.

However there seems as strong a lobby against law reform for cohabitants as there was for opposing same-sex marriage, now apparently leaving cohabitants either to marry or take the adverse consequences when they separate – meaning, in practice, unless they settle their affairs by agreement, they must litigate at significant expense under the law of trusts (which is substantively and procedurally unsuitable for them) particularly when legal aid has been virtually obliterated. Thus unless they can afford lawyers to advise them of their legal rights, no accessible normative regime or guidance exists to assist them in crafting the private agreements that the government's public funding policy requires.

Examination of the way in which English family law has developed supports Maine's classic theory and Ranton's explanation that legislation only reflects change when the mood of society has sufficiently evolved to accept that change.

It seems that this evolution has not yet happened in support of cohabitants who do not marry. Will it ever, when it seems that both public and lawyers are, if anything, fairly apathetic about English law reform for cohabitants? The 2006–2007 work of the Law Commission<sup>4</sup> identified the continued existence of a broad feeling among both laymen and lawyers that any rights for cohabitants should *not* replicate those of married partners, despite many similar regimes overseas.

This seems to be despite this attitude clearly not necessarily being connected to religious belief, and despite schemes produced by Resolution<sup>5</sup> and the Law Society, suggesting reforms with limited reference to married rights. The format of these schemes is hardly surprising since, to all intents and purposes, many committed cohabiting partnerships function similarly to, and are otherwise indistinguishable from, those where the partners are married. The Law Commission recorded that avoiding asset division on divorce was *not* the only reason for choosing cohabitation instead of marriage.

Accordingly this raises some questions, not so much about whether, but *when* cohabitants might expect the timeline to have reached their turn for legislation?

### The pace of legislative change before the 21st century

The current hectic pace of change in family law is far faster than the post-Second World War reforms) and than the hesitant 19th and earlier 20th-century developments (which were slow and cautious). Perhaps the eight years between 2004 and 2012 should not be viewed as 'brief in calendar years', but 'crucial in terms of social thought and policy', essential to society's grasping equality arguments in favour of same-sex marriage that drove the change. Looking at past timescales and social influences helps to reinforce this understanding of the 'right' time for any reform.

The slow 19th century pace of legislative change was typical of child law then and earlier, when children were treated, and even dressed, as 'little adults'.<sup>6</sup>

Before the 19th century, there was no significant child protection<sup>7</sup> and not much divorce, although successive 19th century Acts gave courts limited power to award custody of children to divorced or separated mothers. There was a preoccupation with parentage, important in connection with inheritance of property. Famous 19th-century cases included that of the Tichborne Claimant,<sup>8</sup> supposedly the lost son and heir of the Dorset landowner Sir Roger Tichborne, since there was no DNA or blood testing to establish paternity.

Paternity of extramarital children was therefore important: parentage as such was mostly about rights *over* children rather than obligations *to* them, and was closely connected to fixing legal responsibility for their maintenance to avoid that falling upon the local parish where the child was found. Thus, under the Bastardy Laws Amendment Act 1872, a single woman could take out a summons against a man alleged to be the father of her child, so as to provide for its education and maintenance. The term 'a single woman' also included a married woman who had lost the common law right to be maintained by her husband: a long way from the modern Child Support Agency's comparatively simple routine DNA testing, facilitating child support regardless of the marital status of parents.

The end of the Second World War permitted examination of social change and the consequent legislative need for reform. But instances of ‘cuckoos’ in the marital nest were hushed up. While we now accept it is in any child’s interest to know its true parentage because of the psychological importance of origins to identity, for years it was difficult to prove that a husband could *not* be the father of a child because it was not in the interests of public decency to allow either party to give evidence about intercourse at the relevant time. This subsisted until statutory abolition by the Law Reform (Miscellaneous Provisions) Act 1949, although in 1900 there was a crucial breakthrough in blood grouping by the Austrian scientist Karl Landsteiner (1868–1943), only first used by courts in 1942 in the nullity case of *Wilson v Wilson otherwise Jennings*.<sup>9</sup>

The Family Law Reform Act 1969 then legislated in the child’s interests to know its genetic origins, enabling blood testing to be directed; if refused by the parties (because their autonomy of consent was preserved by the statute), the court drew such inferences as were appropriate unless there were clear and cogent reasons for the refusal. Today tests are often *demand*ed, not avoided, by putative fathers, the results cheerfully publicised and society far from shocked by the revelations, since it has long been recognised that there are no genuinely ‘illegitimate children’, only illegitimate parents. This too was a development of the watershed of the later 1960s and 1970s, and probably owes its origins to the reforms of divorce law in 1969.

It took some time for society to address the legal status of a child’s parentage, originally because of the importance of the concept of ‘the heir’ in English property law, which was hard to displace.

Historically, English common law did not admit legitimisation by subsequent marriage, unlike civil and canon law. Illegitimate children suffered in medieval times without legitimisation even if their parents married, as they were barred from entry to the church, an important exclusion in medieval society and employment: this continued, despite many famous illegitimate births among the nobility and royal families.<sup>10</sup> Many kings had natural sons, and many succession problems could have been solved<sup>11</sup> if these able natural children had replaced their often weaker half siblings.

Thus, it took an Act of Parliament of Richard II to legitimise the children of a son of Edward III, from whom all English monarchs after 1471 descend.<sup>12</sup> Only the

Legitimacy Act 1926 made such children legitimised by their parents’ subsequent marriage, although this Act still excluded those born owing to their parents’ adultery.<sup>13</sup> A large post-Second World War increase in adulterous illegitimacies generated a further Legitimacy Act 1959 removing this restriction, after much moral debate and opposition. The Family Law Reform Act 1987 then abolished the concept of illegitimacy altogether, although the legislators declined complete assimilation of children born in wedlock and those outside it for practical reasons. Until the 1959 Act, parents of ‘adulterine children’ had to adopt in order to legitimate them. Only the increased centralisation of the child and its welfare in family law has since enabled an unmarried father to have parental responsibility if his parental presence was in the child’s interest. This is now updated in the Adoption and Children Act 2002 (where if the father registers the birth with the mother, or uses other provisions from the Children Act 1989, he has parental responsibility).

### Parental authority

Time has also developed the concept of parental authority, creating a major change, from absolute power of the father in the late 19th century to the present in which children’s law centres on the child and is no longer driven by the parents’ relationship. The watershed for this was the change in status from the father as head of the family, with power and authority over his family unit.

This was, as Cretney mentions,<sup>14</sup> ‘clear and simple’ at the beginning of the 20th century: the father was entitled to decide everything in the life of a legitimate child, the child’s mother had no rights. Married women were clearly disadvantaged as a single woman had sole legal authority over her child as established in *Barnado v McHugh* in 1891.<sup>15</sup> Divorced women might also have the same legal authority over their children by court order, but if a marriage subsisted, the father could even appoint a testamentary guardian of the child: on the father’s death the guardian would step into the father’s shoes and the mother could not interfere in his decisions.<sup>16</sup> This remained despite the Guardianship of Infants Act 1925 importing *into the preamble only* some of the principles of equality between the sexes, also creating in section 1 the welfare principle later in section 1(1) of the Children Act 1989. The mother did not have equal authority until as late as

the Guardianship Act 1973, which had far-reaching effects, prior to which a married mother had no autonomous powers.

### State intervention

These developments brought state intervention, in new comprehensive schemes: the 1970s were fertile ground for further developments in public and private child law occasioned by increased divorce following the Divorce Reform Act 1969. While previously there was a general reluctance to allow state intervention in the family, when parents split up and the family was no longer a unit, orders were clearly necessary. It was not until after the Second World War that it was realised that the fact that a woman had committed adultery was not necessarily inconsistent with her being a good parent. However, practical implementation was longer in arriving: it was common in the 1960s and 1970s for women to settle cases with husbands on the basis that he would not contest care and control if he had ample access.

Naturally, there had been previous protection of children, but in the 19th century these focused on child labour, factory legislation and abuses of children in Victorian novels.<sup>17</sup> Time passed before it was realised that children needed protection from their parents as much as from their employers.

### Towards the Children Act 1989

Although there had been some legislation in the late 19th century, it was not until 1908 that an Act was passed to create a ‘Children’s Charter’ in setting about the task of ‘the rescue as well as punishment’ of young offenders, although legislation was fragmented and infrequent until the post-Second World War reforms. Wives who had no rights of parental authority over their children could be prosecuted for neglect under this Act, including for failing to see that the children went to school.

Following public pressure, the Adoption of Children Act 1926 created a process for adoption, previously an informal status recorded in Victorian literature.<sup>18</sup> The regime was originally barely regulated, but then developed into a state-controlled system under Adoption Acts in 1939 and 1949, as this was recognised as providing the ‘fresh start’ that abandoned or neglected children required, finally becoming a local authority social service consolidated in 1976 and

2002, currently in development to speed up adoption and reduce hurdles.

### Child protection in the welfare state

Only after the Second World War did the government action growing public interest in ‘less fortunate children in the community’. Cretney identifies these Acts in *History of Family Law in the Twentieth Century*<sup>19</sup> as ‘properly... regarded as an integral and important part of machinery of the post WWII Welfare State’.

### Conclusion

When this timeline is examined, it is clear how the evolution of ideas and replacement of long-held concepts (not revolution) achieve reform when legislation reflects developing society. Obviously in 2004, the then-government was only ready to sponsor civil partnership but in 2012 accepted the equality argument. The question is thus whether the time has now come for ‘left behind’ cohabitants not covered by the 1973 and 2004–2012 Acts.

### Notes

- 1 Solicitor, then at Russell, Jones & Walker, now at Bishop & Sewell.
- 2 1861, later republished by Oxford in 1906. Sir Henry James Sumner Maine (1822–1888), Regius Professor of Civil Law in the University of Cambridge, later, inter alia, first Professor of International and Comparative Law in the University of Oxford. One of the forefathers of modern sociology of law and a leading figure of the English and German schools of historical jurisprudence.
- 3 For example, in the French Revolution of 1789, in which provision for civil marriage was quickly enacted, this being one of the main demands of the revolutionaries who wanted secular marriage to escape what was seen as the baleful influence of the church, whose abuses were early attacked, along with the monarchy, which was similarly resented.
- 4 Law Com 179 and Law Com 307.
- 5 The Solicitors’ Family Law Association.
- 6 As in the famous painting of *Las Meninas*, the Spanish painter Velasquez’s portrait of the daughters of a 17th-century King of Spain, which Professor Stephen Cretney used on the cover for one edition of his textbook *Family Law*, presumably to make this point.
- 7 What there was mainly addressed child labour, as parents’ authority was absolute, and that authority was the father’s in relation to the child as an asset, like any other species of property.
- 8 See D Woodruff, *The Tichborne Claimant* (Hollis and Carter, 1957).
- 9 (1942) LJ 129, 226.
- 10 The most famous being William, Duke of Normandy – William the Conqueror.
- 11 Such as on the death without a legitimate male heir of William the Conqueror’s most-able son, Henry I, in 1135, which led to civil war between his daughter, Matilda, and nephew, Stephen of Blois (who, with the support of the Barons, succeeded to the throne as King Stephen) while

the King's illegitimate son, Robert of Gloucester, who had many of his father's talents, would have made a fine king. Instead he could only support his half sister in her claim to be recognised as Queen in accordance with the Barons' oaths to their father that her right to the succession was fully acknowledged in his lifetime.

12 That is, after the death of Henry VI, the legitimate line of descent of the Lancastrian Plantagenet kings was extinct.

13 When one or both were married to another person at the time of the child's birth.

14 S Cretney, *Family Law in the Twentieth Century* (Oxford University Press, 2003) 564.

15 [1891] AC 388.

16 *Wellesley v Wellesley* (1828) 2Bl (NS) 124, 145–146.

17 For example, Charles Dickens' *Oliver Twist*, Charles Kingsley's *The Water Babies* and George Crabbe's *Peter Grimes*, more recently a Benjamin Britten opera.

18 For example in Anthony Trollope's *Dr Thorne*.

19 Oxford University Press, 2003, 672.

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# Surrogacy, South African style

The South African Children's Act 38 of 2005 (fully in force from 1 April 2010) has, for the first time, made surrogacy agreements legal, provided that the conditions set out in the Act are met. This article reviews the Act's provisions concerning surrogacy (Chapter 19 of the Act) and raises some questions for consideration.

First, a brief history of the inclusion of surrogacy in the omnibus Children's Act needs to be recorded. The issue was the subject of a pre-constitutional investigation by the South African Law Reform Commission, which produced a Report and a draft Bill on surrogacy in 1992.<sup>1</sup> The intention was that surrogacy would be regulated in a dedicated Act devoted to this. After the introduction of a new constitutional order in 1994, an ad hoc parliamentary committee was formed to enquire into and report on the SALC report, producing its own report in 1999. From 1997, the process of review of the Child Care Act 74 of 1983 (which led to the new Children's Act) was under way, also spearheaded by a project committee of the South African Law Reform Commission. Ultimately, since the earlier recommendations had not been brought to parliament in legislative form, surrogacy was added to the Children's Bill (now Act) since it purported to deal with the status of the child born of a surrogacy agreement, among other aspects.

The Act requires that a surrogacy agreement must be finalised and confirmed by a High Court before the fertilisation of the surrogate mother takes place. The commissioning parents – or a commissioning single person – must be domiciled in South Africa at the time of entering into the agreement, as must the surrogate mother and her husband or partner.<sup>2</sup> The possibility of South Africa becoming a destination

for surrogacy tourism is therefore severely curtailed.

Commercial surrogacy is not permitted, and the Act specifically provides that a court confirming the agreement must ensure that the surrogate mother is not using surrogacy as a source of income and is entering into the agreement for altruistic reasons.<sup>3</sup>

There are some limitations imposed on both the commissioning parent(s) and upon the surrogate. As regards the commissioning parent(s), it is required that they confirm to the court that they are not able to give birth to a child, and that this condition is permanent and irreversible.<sup>4</sup> Furthermore, the gametes of both commissioning parents are required to be used, or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents must be used. Where the commissioning parent is single, the gamete of that person must be used.<sup>5</sup> Thus an infertile couple or single person is excluded from being party to a surrogacy agreement – a position that might be constitutionally suspect.

The Act further requires that the commissioning parents must 'in all respects' be suitable persons to accept parenthood of the child that is to be conceived, which sets a standard not applicable to parents of children conceived naturally.<sup>6</sup>

As far as the surrogate mother is concerned, she must furnish the written consent of her husband or partner if involved in a permanent relationship.<sup>7</sup> Further, she is eligible only if she is in all respects suitable to act as a surrogate mother,<sup>8</sup> if she has a documented history of at least one pregnancy and a viable delivery,<sup>9</sup> and has at least one living child of her own.<sup>10</sup> It was thought that this would promote adherence to the terms

of the agreement by the surrogate, but again, it can be raised whether these requirements are necessary and would pass constitutional muster if challenged.

There are no upper or lower age limits set for either commissioning parent(s) or surrogate, although any medical risks to the surrogate mother relating to the pregnancy must be disclosed to the court.<sup>11</sup>

Both full and partial surrogacy are contemplated in the Act, the distinction being that a surrogate mother who is genetically related to the child may apply to court to terminate the contract within 60 days of the birth of the child.<sup>12</sup> Where this occurs, the parental rights that would otherwise vest in the commissioning parent(s) are terminated and vest in the surrogate mother, her husband or partner, if any, or if none, the commissioning father.<sup>13</sup> Where full surrogacy agreements are in place, the effect is that the child is for all purposes the child of the commissioning parents as from birth, and the surrogate mother is obliged to hand over the child as soon as reasonably possible after the birth.

In *ex parte WH* (2011) (6) SA 384 GNP, one of the first surrogacy cases decided after the Act came into operation, the court laid down further criteria to be met before a surrogacy agreement would be confirmed. These include proposals relating to the involvement of agencies who may be involved in surrogacy on which the Act is currently silent. The matter before involved an agency who sourced the surrogate mother and effected the link to the commissioning parents.

If any agency is involved, full particulars regarding that agency should be revealed in the papers filed. An affidavit by the agency should contain information relating to the business of the agency, whether any form of payment is paid to or by the agency in regard of any aspect of the surrogacy, what exactly the agency's involvement was regarding the introduction of the surrogate mother, how the information regarding the surrogate mother was obtained by the agency and whether the surrogate mother received any compensation at all from the agency or the commissioning parents.

Full particulars should be set out in the founding affidavit on how the commissioning parents came to know the surrogate mother and why she is willing to act as a surrogate to them. The surrogate mother's background, as well as her financial position, should be

investigated and set out in the affidavit.

Furthermore, a comprehensive report by a psychologist is essential to parents, and a separate report in respect of the surrogate and her partner, as well as a medical report regarding the surrogate mother, which must include the details referred to as to whether the proposed surrogacy poses any medical risk for her or the child and her HIV status.

The court required that details and proof of payment of any compensation for services rendered be provided, either to the surrogate herself or to the intermediary, the donor, the clinic or any third party involved in the process; further, that copies of all agreements between the surrogate and any intermediary or any other person who is involved in the process be furnished; and information as to whether any of the commissioning parents have been charged with or convicted of a violent crime or a crime of a sexual nature.

The court also required a proper list of estimated costs (maternity clothes, health and life insurance) and copies of any additional agreements between the surrogate and the commissioning parent(s) for the purposes of transparency and curtailing commercial surrogacy.

The surrogacy provisions discussed above are probably being quite widely used, especially by same-sex couples, if anecdotal reports are to be believed. Also, the involvement of agencies – for example, egg donor clinics – was not foreseen at the time of drafting of the provisions in the 1990s. Therefore, although the Act does not currently provide for regulations on surrogacy to be drafted, it is proposed that the suggestions of the court in *WH* could usefully be added as further requirements to guide courts. At the same time, it may be necessary to revisit some of the exclusionary clauses, which deny eligibility to certain categories of people.

#### Notes

- 1 SALC Report on surrogate motherhood, 1992.
- 2 Section 292(1)(c) and (d).
- 3 Section 295(c)(iv) and (v).
- 4 Section 295(a).
- 5 Section 294.
- 6 In *ex parte WH* (2011) (6) 384 GNP, the court opined that when deciding on the suitability of a parent 'an objective test should be applied which would include an enquiry into the ability of the parents to care for the child both emotionally and financially and to provide an environment for the harmonious growth and development of the child'.
- 7 This can be dispensed with by a court if unreasonably withheld.

- 8 Section 295(c) (ii).  
 9 Section 295(c) (vi). It is not required that this child still be alive.  
 10 Section 295(c) (vii). It is not specifically required that this child be genetically linked to the surrogate – technically

- the provision could refer to an adopted child.  
 11 Ex parte *WH* (2011) (6) SA 384 GNP.  
 12 Section 298(1).  
 13 Section 299(a).

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# Surrogacy for single and unmarried persons: a challenge under Indian law

## Introduction

At a time when the world's first test-tube baby – Louise Brown, born in 1978 in the UK – has now herself become a mother, and high-profile international adoptions by celebrities such as Madonna and Angelina Jolie are glorifying international adoption, India does not lag behind. Noted Indian film actress Sushmita Sen inspires single women both in India and abroad to adopt children, breaking conventional taboos and age-old practices. As a result, orphan girls are finding mothers in India and abroad. However, genuine adoptive foreign and non-resident would-be parents are also pitted against an insurmountable wall. Child adoption in India is a complicated issue. It is over-burdened with knotty legal processes and complicated lengthy procedures for those who want to give a new home and a new life to a reported 12 million Indian orphans.

A silent revolutionary change is fast heralding a new dawn in matter of inter-country adoptions. However, the plethora of Indian laws does not improve the plight of 12 million orphaned children in India who need adoptive parents. The Guardian and Wards Act 1890 (GWA) permits guardianship and not adoption. The Hindu Adoption and Maintenance Act 1956 (HAMA) does not permit non-Hindus to adopt a Hindu child. Requirements of immigration have further hurdles, even after adoption. Perhaps the urge to be a parent has now taken over in the form of 'embryo adoption' wherein fertilised sperm and eggs developed into an embryo are successfully implanted in Indian clinics and nurtured by foreign mothers in their homeland, ensuring hassle-free adoption

of Indian embryos without complicated procedures. Technology has overtaken law.

As a background to the practice of surrogacy today, mythological surrogate mothers in the past are well known in India. Yashoda played mother to Krishna, though Devki and Vasudeva were biological parents. Likewise, in Indian mythology, Gandhari made Dhritarashtra the proud father of 100 children, though he had no biological relation to them. The primordial urge to have a biological child of one's own flesh, blood and DNA aided with technology and the purchasing power of money coupled with the Indian entrepreneurial spirit have generated the 'reproductive tourism industry'. This comes as a boon to childless couples all round the world. Clinically called assisted reproductive technology (ART), it has been in vogue in India since 1978 and today an estimated 200,000 clinics across the country offer artificial insemination, in vitro fertilisation (IVF) and surrogacy.

## Recent cases

In a decision of the Supreme Court on 29 September 2008 in *Baby Manji Yamada v Union of India & Anr* AIR 2009 SC 84, the Japanese baby Manji, born on 25 July 2008 to an Indian surrogate mother with IVF technology upon fertilisation of her Japanese parents' eggs and sperm in Tokyo and the embryo being implanted in Ahmedabad, triggered off complex, knotty issues. The Apex Court directed the central government to issue the infant with a passport so as to facilitate travel with its grandmother, even though the Japanese biological parents were divorced and the biological mother had disowned the

child on birth. Likewise, in the year 2010, a gay Israeli couple was allowed to travel back to Jerusalem with their surrogate twins and no objections were raised, even in the case of same-sex couples. A gay German couple was allowed to return back with their surrogate twins on the direction of the Apex Court to grant the surrogate twins with exit permits and thus resolving the issue of rendering the twins as stateless.

### Prevailing legal position

In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) issued the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India 2005 (the 'Guidelines'), to check the malpractices of ART. The preface of these guidelines clearly states that in the Indian context, where barrenness is looked down upon, infertile parents look to ART as the last resort to parenthood. These Guidelines are said to be widely publicised, discussed and debated by experts and practitioners of ART involving over 4,000 participants. Paragraph 3.5.2 of these Guidelines, stating Desirable Practices/ Prohibited Scenarios, states that there would be no bar to the use of ART by single women and the child thus born will have all the legal rights of the woman or the man, as follows:

'3.5.2 There would be no bar to the use of ART by a single women who wishes to have a child, and no ART clinic may refuse to offer its services to the above, provided other criteria mentioned in this document are satisfied. The child thus born will have all the legal rights on the women or the man.'

A reading of the above clearly indicates that these guidelines permit single parents to commission surrogacy and prescribe that no ART clinic may refuse to offer its services to single women/men. These Guidelines are still prevalent to date.

In a phenomenal exercise to legalise commercial surrogacy, the Assisted Reproductive Technology (Regulation) Bill and Rules – 2010 (ART Bill), a draft bill prepared by a 12-member committee, including experts from ICMR, medical specialists and other experts from the Ministry of Health and Family Welfare, Government of India, has been posted online for feedback. Also earlier floated in 2008 for comment, the ART Bill is stated to be an Act to provide for a

national framework for the Regulation and Supervision of Assisted Reproductive Technology and matters connected therewith or incidental thereto as a unique proposed law to be put before the Indian Parliament. Abetting surrogacy, it legalises commercial surrogacy, stating that the surrogate mother may receive monetary compensation and will relinquish all parental rights. Single parents can also have children using a surrogate mother. Foreigners, upon registration with their Embassy, can seek surrogate arrangements. It also legalises commercial surrogacy for single persons, married or unmarried couples stating that the surrogate mother shall enter into a legally enforceable surrogacy agreement. The 2010 draft bill states that foreigners or non-resident Indians (NRIs) coming to India to rent a womb shall have to submit documentation confirming that their country of residence recognises surrogacy as legal and that it will give citizenship to a child born through a surrogacy agreement from an Indian mother. Chapter IV of the ART Bill – duties of an ART Clinic – clearly stipulates that individuals or couples will be provided professional counselling, knowledge about choices of treatment and other information to create awareness about ART. Likewise, section 32 of Chapter VII – Rights and Duties of Patients, Donors, Surrogates & Children – states as follows:

**'32. Rights and duties of patients –** Subject to the provisions of this Act and the rules and regulations made thereunder, assisted reproductive technology shall be available to all persons including single persons, married couples and unmarried couples.'

It is abundantly clear that the competent authority in the matter has clearly spelt out the legislative intent of making ART available to all persons, including single persons, married couples and unmarried couples. This policy decision is already clearly in vogue today in the shape of the ICMR Guidelines. Hence, surrogacy and ART, which is a subject to be dealt with as a portfolio, has been appropriately dealt with by the Ministry of Health and Family Welfare, which is competent to take decisions with respect to issues pertaining to them.

It may also be pertinent to point out that the Law Commission of India, in Report No 228 of August 2009 titled 'Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy', has given its views

on surrogacy achieved through ART. After examining all the issues and various viewpoints besides discussing actual cases of foreign nationals who have utilised ART for commissioning surrogacy in India, various recommendations have been made by the Law Commission of India in the Report and in Chapter IV of the Report – dealing with conclusions and recommendations – para 4.2 [4] reads in the following terms:

‘[4] In case the intended parent is single, he or she should be a donor to be able to have a surrogacy child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.’

Clearly, the Law Commission of India, which recommends that a pragmatic approach should be adopted by legalising altruistic surrogacy arrangements, recommends and approves of surrogacy arrangements for single parents as well. Hence, there is no move indicated by the Law Commission to propose that single parents should not be allowed to use ART for surrogacy and its position is to the contrary.

### Indian law on surrogacy

Surrogacy in India is legitimate for married and unmarried couples and single persons because no Indian law prohibits surrogacy. To determine the legality of surrogacy agreements, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would be within the domain of section 9 of the Indian Code of Civil Procedure 1908 (CPC). Alternatively, the biological parent(s) can also move an application under the GWA for seeking an order of appointment for a declaration to be declared as the guardian of the surrogate children.

In the absence of any law to govern surrogacy, the 2005 ICMR Guidelines apply to all couples/single persons. Under para 3.10.1, a child born through surrogacy must be adopted by the genetic (biological parents). However, this may not be possible in the case of non-Hindu foreign parents who cannot adopt in India but can be appointed as guardians under the GWA. Under para 3.5.2 of the ICMR Guidelines, there would be no bar to the use of ART by single women, and a child born will have all the legal rights of the woman or man as the case may be.

Under section 10 of the Indian Contract Act 1872, all agreements are contracts if:

they are made by free consent of parties competent to contract; are for a lawful consideration; are with a lawful object; and are not expressly declared to be void. Therefore, if any surrogacy agreement of a married or unmarried couple or single parent satisfies these conditions, it is an enforceable contract. Thereafter, under section 9 of the CPC 1908 prescribing that the courts may try all civil suits unless barred, it can be the subject of a civil suit before a civil court to establish all/any issues relating to the surrogacy agreement and for a declaration/injunction for the reliefs prayed for.

Other issues that have now cropped up are as to whether a single parent or unmarried couple can be considered to be the custodial parent of a surrogate child. As of today, it may be stated that a single parent or unmarried couple can be considered to be the custodial parent by virtue of being the genetic or biological father of the surrogate child born out of a surrogacy arrangement. Japanese baby Manji Yamada's case (JT 2008 (11) SC 150) and the Israeli couple's case who fathered the child in India are clear examples to establish that this is possible. Under paras 3.16.1 and 3.5.2 of the 2005 ICMR Guidelines dealing with legitimacy of children born through ART (which were the basis of the claim in the Japanese baby's case in the Supreme Court), this claim can be made. However, only in a petition for guardianship under the GWA and/or in a suit for declaration in a civil court, can the exclusive custodial rights be adjudicated by a court of competent jurisdiction on appreciation of evidence and considering all claims made in this regard.

Would biological parent/s be considered the legal parent of the children? In answer to this question, it can be stated that the biological parents would be considered to be the legal parents of the children by virtue of the surrogacy agreement executed between the parties and the surrogate mother. Under para 3.16.1 of the 2005 ICMR Guidelines dealing with legitimacy of the child born through ART, it is stated that 'a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance'. Under para 3.5.2 of the ICMR Guidelines, a single man/woman can have a child by ART through surrogacy. Even in the 2010 Draft Bill and Rules, a child born to a married couple, an unmarried

couple or a single man or woman shall be the legitimate child of the couple, man or woman as the case may be.

As per the Law Commission of India Report, in its conclusions and recommendations in para 4.2 (4), it has been stated that where the intended parent is single, he or she should be a donor to be able to have a child through surrogacy. Clearly, in the views of the Law Commission, there is a clear recommendation to the Government of India to permit surrogacy for single parents.

### Law for entry of foreigners in India

The entry, stay and exit of foreigners into India is governed by the Passport (Entry into India) Act 1920, the Passport (Entry into India) Rules 1950, the Foreigners Act 1946 and the Registration of Foreigners Rules 1992. The Policies, Acts and Rules relating to entry of foreigners into India are framed by the Ministry of Home Affairs, Government of India. The purposes of the above Acts is as follows:

- *The Passport (Entry in India) Act 1920 and The Passport (Entry into India) Rules 1950*: prescribes specific authorisation of foreigner nationals on their valid travel documents/passports for allowing entry into the country. Under this Act and the Rules made thereunder, foreigners coming to India are required to obtain a visa from Indian missions/posts.
- *The Foreigners Act 1946 and the Foreigners Order 1948*: regulates the entry of foreigners into India, their presence therein and their departure therefrom.
- *The Registration of Foreigners Act 1939 and the Registration of Foreigners Rules 1992*: mandates that certain categories of foreigners whose intended stay in India is more than the specified period, or as provided in their visa authorisation, are required to get themselves registered with the registration officer.

It is evident that under the above provisions, the Ministry of Home Affairs can make provisions for prohibiting, regulating or restricting the entry, departure and presence of foreigners into India by enacting justifiable

and legitimate Visa Rules and Regulations with a classification for different purposes. The basic principle of the visa policy is non-discrimination. Though the decision to grant a visa in a particular category may depend on requisite conditions, it cannot create an unjust classification by debarring any category of persons from being ineligible to apply for a particular category of a specific visa in violation of Articles 14 and 21 of the Constitution of India, which provides equality of laws besides protection of life and personal liberty to all persons including foreign nationals.

### Bar on single and unmarried persons

Even though the Ministry of Health and Family Welfare does not prohibit or ban single persons or unmarried couples from commissioning surrogacy through ART in India, the Ministry of Home Affairs by administrative guidelines, dated 9 July 2012, has stipulated that only married foreign couples whose marriage has lasted for at least two years would be eligible to apply for medical visas for purposes of surrogacy in India. Consequently, all single persons and unmarried couples have been declared ineligible from even applying for a visa in any category whatsoever for coming to India for the purposes of surrogacy. This unreasonable classification disregards Articles 14 and 21 of the Constitution and has no nexus with the object sought to be achieved and directly curtails/interferes with ‘the right of reproductive autonomy’, which is a facet of the ‘right of privacy under Article 21 of the Constitution. No reasons, justification, logic or explanation is forthcoming as to why single persons or unmarried couples have been excluded from commissioning surrogacy in India. None of the grounds made out in the impugned Guidelines justifies or validates this arbitrary exclusion and unfounded ineligibility of single persons/unmarried couples being banned from even applying for visas to India, even though the ICMR Guidelines, ART Bill and Law Commission Report do not contemplate any such restrictions.

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## ***Prest v Petrodel*: overturning the ‘Cheat’s Charter’ and the implications for family practitioners**

**O**n 12 June 2013, the Supreme Court reached a unanimous decision, which should be viewed as a victory for common sense. The Court in *Prest v Petrodel* has gone out of its way to reach a fair decision and in allowing the wife’s appeal has narrowed the gap between the family courts and the Chancery Division when determining when and if the corporate veil could be pierced.

The long-running case saw a clash between commercial and family law; within this article I will consider the implications of the decision for matrimonial practitioners.

The facts of the case, briefly, are that Michael Prest (the ‘husband’) was a wealthy businessman born in Nigeria, and in 1993, he married Yasmin Prest (the ‘wife’). The wife was born in England and their main residence was in London, but they also had properties in Nigeria and the Caribbean. The parties had four teenage children together and, due to the husband’s successful business career in international oil trade, they enjoyed a very high standard of living, until the marriage broke down in 2008. The former matrimonial home was worth around £4m and there were a number of other properties that the husband acquired, most of which were in the name of three companies owned by the husband.

In addition to the parties, there were corporate respondents, although they did not play any part in the proceedings until the final hearing. Within the proceedings, the husband was heavily criticised for failing to provide full and frank disclosure and he was assessed by the Court as having assets in the region of £37.5m. The wife maintained that his assets were worth considerably more than the Court’s assessment.

In October 2011, Mr Justice Moylan ruled that the husband must ‘transfer or cause to be transferred’ four London properties and an interest in a fifth – all held in the name of Petrodel Resources Ltd – and two

London properties – held in the name of Vermont – to the wife as part of the divorce settlement. The husband wholly owned and controlled those companies and, in reaching the conclusion he did, found that the Court did have the jurisdiction to make orders directly against companies as the assets held within the companies were effectively the husband’s property.

The companies appealed and the decision was overturned by the Court of Appeal by a two to one majority. The Court ruled that the properties were not the husband’s to give away and instead belonged to the companies.

Following the decision of the Court of Appeal, the wife appealed to the Supreme Court. The question on appeal was whether the Court had the power to order the transfer of the properties to the wife, given that they were legally owned by companies, albeit controlled by the husband. The courts have repeatedly made it clear that no shareholder has any right to any assets owned by a company and maintained that only the company, not any shareholder or creditor, has any legal or equitable interest in the company’s property.

The eagerly awaited and widely reported judgment was given by the most junior member of the seven-strong bench on 12 June 2013, Lord Sumption, who was appointed straight from the Bar in 2011. The judgment is surprisingly easy to read for a Supreme Court judgment. The Supreme Court unanimously allowed the appeal by the wife and ruled that the disputed properties were held on trust for the husband on the ground that, in the particular circumstances of the case, the properties were held by the husband’s companies on a resulting trust for the husband, and were accordingly ‘property to which the [husband] is entitled, either in possession or reversion’.

The Court considered that there were three possible legal bases on which the assets of

the company might be available to satisfy the lump sum order against the husband:

1. that the case was within the exceptional category of cases where the Court may disregard the corporate veil in order to give her effective relief;
2. that section 24 of the Matrimonial Causes Act 1973 confers a distinct power to disregard the corporate veil in matrimonial relief cases; or
3. that, in the circumstances of the case, the companies had received and held the properties on trust for the husband.

The first two, which would have involved piercing the corporate veil, were rejected. The third, which had not really been argued but had been pleaded, was successful.

There was wide media coverage following the judgment, which on the whole was misleading. The press widely reported that the corporate veil had been pierced by the ruling, which is not factually correct. Lord Sumption made the important point when considering whether the corporate veil should be pierced ‘in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and the controller which will make it unnecessary to pierce the corporate veil’. The court will not pierce the corporate veil save for very limited circumstances and for very specific purposes.

Sumption explained in his oral summary of the ruling that the husband had bought the family home in the name of a company that had no resources at the time. He bought the family home with his own money and the law presumes that the property was held on trust for the person who paid for it. In its unanimous decision, the Supreme Court asserted that the English family courts cannot in general ‘pierce the corporate veil’, but in this case they could in effect do so, because

the companies actually held their assets on trust for the husband as beneficial owner.

Clearly the message given is that a company owner cannot simply move their assets to within the company structure as a means to hide them behind the corporate veil. Family law judges should have the right to be sceptical about properties bought by a husband or wife’s company and should consider whether the arrangement is a sham to conceal the reality of the husband or wife’s ownership. The Supreme Court’s decision will certainly make it harder for litigants to treat corporate assets as belonging to corporate shareholders. However we shall have to wait and see whether the decision represents a victory for spouses generally, as this case was very much decided on its own facts and the husband’s refusal to provide open and honest disclosure cost him dearly.

The pitfalls into which the husband fell will certainly mean that family practitioners are going to be familiar with the basic principles of company law. The burden will be on the companies and respondents caught up within the divorce proceedings to show that the company is the beneficial owner of the assets although this will need to be treated with caution and be wary of the implications of establishing the truth.

The decision sends out the message that London remains a fair place to determine divorce proceedings and for both parties to have at least a semi-level playing field. Certainly in this case, the dishonest party has not got away with keeping assets from within the reach of his spouse. Although the principle of the corporate veil remains intact, the decision has at least delivered a chink of light to family practitioners seeking to demonstrate that a party has deliberately hidden assets within a corporate structure to protect them within matrimonial proceedings.

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# The Israeli Family Court: judicial powers and therapeutic interventions

**T**he Family Court in Israel was set up by the Family Court Law, 5755-1995, and I had the privilege of serving as a judge of the Jerusalem Family Court from its opening until my retirement in 2012. So I welcome this opportunity to present it before learned colleagues.

## History

On achieving independence in 1948, the Israeli legislature took over the existing court system, which included religious courts having exclusive jurisdiction in matters of personal status and secular courts having parallel jurisdiction in other family law matters. Amending legislation was added, as necessitated by the expansion of the population and changing social and economic needs.

To this day, religious courts retain exclusive jurisdiction in matters of divorce or annulment of marriage, where both parties are Jewish, Muslim, Druse or belong to one of the 22 Christian denominations recognised by the state as having jurisdiction. They also have parallel jurisdiction in other matters associated with the termination of marriage, including child custody, maintenance, property division and, with the consent of all the parties concerned, wills and estates.<sup>1</sup>

The situation in secular courts immediately prior to the introduction of the Family Court Law was widely regarded as unwieldy, expensive and inadequate in many ways. For example, in the classic case of a couple with children who were in the process of separation, the couple might find themselves before different judges of different tribunals in the secular courts, in addition to the religious court dealing with their divorce:

- claims involving some kinds of property were dealt with by the magistrates court, and some by the district court;
- matters of custody and access of children were heard before a judge of the district court; and
- matters of spousal and child support were also in the jurisdiction of the district court, but were often heard before a different judge.

If there was an allegation that the child had been abducted to Israel, the case was brought as a petition for habeas corpus before the High Court of Justice.

If the welfare authorities were of the opinion that the parents were abusing or neglecting the children, the case would proceed before the Juvenile Court.

A Commission of Enquiry, headed by Justice Elisha Sheinbaum, who heard family law matters in the Tel Aviv District Court for many years, was set up to make recommendations for streamlining and modernising the system, and most of its recommendations were enacted into law.

## Principles

The Family Court sits formally as a division of the magistrates' court, and the senior judge of the Family Court is a Deputy President of the magistrates' court.

### *Unified court of wide jurisdiction*

The underlying concept of the Family Court is that all matters arising from conflict in a family will be dealt with in a single tribunal, utilising social work and mental health professionals so as to ensure that only those cases where there is no alternative shall reach the stage of judicial determination.

Section 1 of the Family Court Law provides the definition of family matters that are in the court's exclusive jurisdiction:

'A civil claim between one person or his estate and a member of his family or his estate, where the grounds of the claim arise from a family dispute, regardless of the value of the claim.'

In addition to the classic case, involving child custody and support, spousal support and property division on separation, the Family Court adjudicates disputes of all kinds where the parties are family members. For example, even though matters of company law are by the Companies Law 5759-1999 in the exclusive jurisdiction of the district court, if the owners

of the company are siblings or parents and children, and the dispute is part of a family dispute, the Family Court has jurisdiction.

The first section also contains a list of specific types of claims and specific statutes in respect of which the Family Court has exclusive jurisdiction. These include:

- paternity and maternity claims;
- claims for return of abducted children under the 1980 Hague Convention;
- applications relating to guardianship of minors and disabled adults;
- claims under the Succession Law, including disputed probate and intestate succession;
- claims for dissolution of marriage (where a religious court does not have jurisdiction);
- claims for division of matrimonial property;
- adoption cases;
- claims under the Prevention of Family Violence Law, 5751-1991; and
- claims relating to surrogate parenting.

In matters of child protection, the Juvenile Court has jurisdiction, but section 6 of the Law provides that where a matter concerning the specific child or his family is pending before the Family Court, jurisdiction under the child protection legislation is transferred to the Family Court.

### *Specialist judges*

Section 2 of the Law provides that only a person who has knowledge and experience in family law matters is qualified to be appointed as a judge of the Family Court. So judges do not serve in the Family Court for a year or two as part of a rotation through different departments of the court; they are assigned to the Family Court because of their specific competence for an unlimited period.

### *One family, one judge*

One of the central innovations of the Family Court Law is the provision that so far as possible, one judge will deal with every matter relating to a specific family. This relates to all stages of the proceedings, with the exception of some minor and essentially procedural matters, such as applications for waiver of court fees, uncontested applications for injunctions, etc, which are dealt with by a Registrar.

In this way, the judge assigned to the family learns not only the parties' claims in depth, but also their personalities, and because he handles all pre-trial motions and processes, can and does limit tactical applications, which do not advance the determination of relevant issues.

The judge is also able to see all the relationships in the family, but perhaps most importantly, is seized of all the aspects of the family breakdown, and can propose comprehensive solutions for all the issues at stake.

Thus, in the classic case mentioned above, the judge is able to suggest a resolution that balances the personal issues, including how much time the children will spend with each parent and where the transfers will take place, with property and maintenance issues which are connected to the question where the child will live, and what assets and income are available for the child's support. The same judge will hear about the functioning of each parent vis-à-vis each child, and, if necessary, order child protection measures, in combination with the distribution of other parental responsibilities; evidentiary hearings will be combined or at least coordinated, to avoid duplication.

The saving of expenses, for the court system and the parties, is substantial, but more important is the saving of time; the parties do not have to explain to a new judge at the start of every hearing what has gone before, since the judge is already familiar with the salient points of the case.

### *Evidence and rules of procedure*

Special rules of procedure in family matters were enacted in a new part of the Civil Procedure Rules 5744-1984, but section 8 of the Family Court Law provides that in matters of evidence and procedure, the court is not bound by the strict rules that apply in other civil cases and shall conduct itself as it sees fit in the interests of justice.

These provisions allow the court substantial flexibility in the conduct of the proceedings, and can substantially shorten pre-trial procedures.

Two particular issues are worthy of mention in this regard:

- The family courts are at the forefront of the movement to relax rules of admissibility of evidence. This permits the reception of evidence from varied sources, including hearsay, while the parties are given a full opportunity to cross-examine and address the court as to whether such evidence should be given credence and, if so, how much.
- According to this section and the procedural rules enacted, the parties are not permitted to file expert assessments without the leave of the court. The judge will decide, at the appropriate stage in the proceedings,

whether an expert assessment is required and, after hearing representations from the parties, select the expert, determine who is responsible for his fees and when the assessment is to be delivered. The parties are given an opportunity to require the expert to respond in writing to questions arising out of his opinion, but they may only cross-examine him and file additional expert evidence with the leave of the court.

### *Support unit*

Section 5 of the Family Court Law mandates the setting up of a support unit (also known as the Family Court Services Unit) in each Family Court. The unit consists of social workers, with access to a psychologist and a psychiatrist as needed. The mandate of these units is to give assessment, advice and assistance to litigants and to the court, but this provision has been broadly interpreted, so that the units have initiated processes and programmes that enhance the ability of the court to bring about appropriate resolutions of cases, in the interests of all family members. The activities of the unit are confidential and free of charge to the parties.

Some examples follow:

- *Application for dispute resolution.* The procedure rules provide that a party may, instead of filing a formal claim, apply to the court for a referral to the support unit for dispute resolution. The court will usually order that the parties meet a social worker of the unit, who will explain to them the ways in which a dispute can be resolved without recourse to full-scale court proceedings. The unit will refer the parties to outside sources of help, or may, with the agreement of the parties, conduct a formal mediation; in the Jerusalem Family Court Support Unit, the social worker is often joined by a lawyer from the court staff, and the mediation is carried out by both.
- *Initial assessment.* Many judges refer new cases to the support unit at the outset; for example, where an application is made for an exclusion order under the Prevention of Family Violence Law 5751-1991, and an order is made ex parte removing a family member from the home, there being substantial grounds to believe that there is no alternative way of protecting the applicant, an *inter partes* hearing must take place within seven days. The judge may, at the time of making the initial order, refer the parties to the support unit. A social worker

from the unit will meet the parties in order to help them to reach an understanding of their situation, and its effects on their children, and will conduct joint or separate meetings with them, at which she may suggest interim arrangements (for example, for contact between the excluded party and the children), or suggest that one or both of them be referred to counselling or treatment. The social worker will provide the court with a brief written report with recommendations.

- *Courses for parents.* The units provide short courses for parents undergoing separation, to equip them with awareness of what their children are going through and enable them to help the children.
- *Involvement of children in proceedings.* Social workers from the units are an integral part of the programme for involvement of children, which starts with the invitation of children to meet with a social worker in the unit; the social worker hears the child's feelings, opinions and desires, and asks the child if they wish their views to be made known to their parents, and also if they would like to speak with the judge. If the answer is in the affirmative, the social worker will accompany the child when they meet with the judge in chambers. In any case, the social worker delivers a report to the judge.

### *Achievements*

Two examples of cases that demonstrate the effectiveness of the Israeli model:

#### *H v J*

Mr H came before me with an application for an immediate ex parte order banning his parents-in-law, the parents of his lately deceased wife, from having any contact with his children. His wife, the children's mother, had died after an illness, and Mr H stated that the respondents, the grandparents, blamed him for the death of their only daughter and told the children, or at least implied, that he was responsible. I made an order that the grandparents could not speak to the children by telephone, and that meetings could be arranged, but only in the presence of an adult, acceptable to the father and the grandparents, until further order of the Court. The order was to be in force for three months. At the same time, I referred the parties to the Court's support unit.

The unit social workers conducted

meetings with the father, the grandparents and the children, and the parties arrived at a satisfactory arrangement for contact, harnessing the court's powers and the social workers' experience.

Without the authority of the Court, and the parties' awareness that the Court had a wide discretion to make orders and enforce them, it is unlikely that the parties would have approached social workers or other professionals, and even if they had done so, these professionals would have been limited to making suggestions, and not a binding agreement to be backed by a Court decision.

On the other hand, if the Court had not been assisted by the support unit, the father's allegations would have necessitated a trial: he would have been compelled to prove that the grandparents had said and done the things attributed to them, and they in turn would have denied the allegations or ventilated their conviction that the death of their daughter *was* because of the acts or omissions of their son-in-law, and he in turn would have tried to disprove their claims. The children, because of their age, would not have been permitted to give evidence and their views would not have become known. The trial would have been long and expensive, and the result, one way or the other, would have left all the parties dissatisfied.

Instead, I held only two short hearings, the first to hear the father's application and the second to approve the agreement; and the result was to the complete satisfaction of all concerned, particularly of the children, who were allowed to have a part in the process, which was age-appropriate and respectful of their feelings.

#### *FAMILY X*

The elderly couple and their four adult children had substantial property, including land and businesses, in Israel and abroad. There were disputes regarding the assets and profits of a partnership, and the disposal in the past of certain assets, about the transfers of shares in a company and the ownership of substantial tracts of land, and one of the sons sued the lawyer who had handled certain transactions and conducted certain litigation for the father and had held himself out as representing that son. Each claim was filed separately, some in the District Court in Jerusalem, one in the District Court in Tel Aviv, and others in the Family Court, but in the nature of things, much of the evidence and

many of the submissions in the different cases, including of course those about the reliability of witnesses, would overlap. Under the powers given by the Family Court Law, all the proceedings were consolidated before me; the mother died while the proceedings were pending, and the probate proceedings (she had written three wills, all of which were disputed) also came before me.

As a result, the parties needed to present their documents and evidence (including testimony before me via Skype from various places abroad) only once, and I was able to give a comprehensive judgment on all the issues.

#### **The way forward**

Despite the undoubted success of the Israeli Family Court system, in particular the multidisciplinary approach and the consolidation of matters before a single judge, there is always room for improvement.

In particular, Israel is at present considering ways to ensure that families in crisis can receive help and advice, and be informed about alternative dispute resolution at the earliest possible stage, before instituting court proceedings.

There are also proposals for reform of the law relating to parent-child relationships, and changes in the determination of child support, and I have proposed changes in certain procedural rules relating to discovery and pre-trial assessment hearings.

#### **Conclusions**

My impression, from studies and contact with professionals from many countries, is that the Israeli Family Court system is among the most attentive to the legal and emotional needs of families affected by a dispute, by providing coordinated judicial and therapeutic services.

I would be delighted to share my experience with colleagues and advise on adapting existing systems in the light of the Israeli experience.

#### **Notes**

- 1 The Rabbinical (Jewish), Sharia (Muslim) and Druse religious courts are set up by statute and funded by the state. The judges of the secular courts and the Dayanim and Kadis of the religious courts are equal in all ways, including selection procedures, salaries and conditions of service, and hold joint in-service training seminars (which are also open to and attended by judges of the Christian religious courts) on matters of common interest and concern.

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# An update on the work of the Hague Conference on Private International Law concerning international family mediation and parentage/surrogacy

**W**ith 74 members (73 states and the EU) representing all continents, the Hague Conference on Private International Law (the ‘Hague Conference’) is a global, intergovernmental organisation that develops and services multilateral legal instruments responding to international needs. With an increasing number of non-Member States also becoming Parties to the Hague Conventions, the work of the organisation now encompasses more than 140 countries around the world.

The statutory mission of the Hague Conference is to work for the ‘progressive unification’ of rules of private international law. This involves finding internationally agreed approaches to issues such as jurisdiction of the courts, applicable law and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure, and from child protection to matters of marriage and personal status. In addition, over the years, the Hague Conference has increasingly become a centre for international judicial and administrative cooperation in the area of private law and, in particular, in the area of the protection of the family and children. Indeed, the modern Hague Children’s Conventions (the 1980 Hague Child Abduction Convention, the 1993 Hague Intercountry Adoption Convention, the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention and Protocol) represent some of the organisation’s most well-known treaties.

This contribution to the IBA newsletter seeks to update readers in relation to two ongoing areas of work of the organisation in the field of international family law. The projects, while different in scope, both have

as their aim to further the protection of children in international situations.

## International family mediation and the Malta Process<sup>1</sup>

In 2004, the Hague Conference launched a dialogue between senior judges and government officials from Contracting States to the 1980 Child Abduction and the 1996 Child Protection Conventions and non-Contracting States with Sharia-based legal systems. This dialogue, because it arose out of a Judicial Conference convened in St Julian’s, Malta, is called the ‘Malta Process’. The Malta Process aims to improve state cooperation in resolving cross-border family law disputes where the relevant international legal framework is not applicable. It seeks, in particular, to improve child protection between the states by ensuring that the child’s right to have continuing contact with both parents is supported (even though they live in different states) and by combating international child abduction.

The first judicial conference was held in March 2004, and involved a discussion about cross-frontier family law issues involving certain Hague Convention and Non-Hague Convention states with Sharia-based law. This was the first in a series of, so far, three so-called ‘Malta Conferences’ bringing together top-ranking judges and government officials, as well as officials of regional organisations, non-governmental organisations and academics. Participants in the first Malta Conference focused on identifying common legal principles upon which they could build better cooperation and develop the rule of law between the states. At the conclusion of the meeting, participants drafted the ‘Malta Declaration’, the primary focus

of which is developing a legal framework with recognition of establishing common jurisdictional standards.

A second 'Judicial Conference on Cross-Frontier Family Law Issues' took place in Malta in March 2006, followed by a third judicial conference in March 2009. The discussions and achievements made at these conferences were summarised in two Declarations, which, together with the Declaration made at the 2004 conference, constitute the 'Malta Declarations'. In addition to the three conferences, there have been other initiatives undertaken by the Hague Conference on Private International Law as part of the Malta Process.

The third Malta Conference's participants acknowledged the urgent need to give individuals some assistance in cases to which no international legal framework applies by encouraging the development of mediation structures. They recommended establishing a working party to draw up a plan of action for the development of mediation services to assist in the resolution of cross-frontier disputes concerning custody of and contact with children, where the 1980 Convention and the 1996 Convention do not apply.

In June 2009, a small number of Contracting States to the 1980 Convention and non-Contracting States, selected on the basis of demographic factors and differing legal traditions, were invited to designate an expert to the working party. These states were Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the UK and the US. In addition, a small number of independent mediation experts were invited to join. The working party held a number of telephone meetings, as well as one in-person meeting in May 2010 in Ottawa, Canada. The meetings were co-chaired by Lillian Thomsen from Canada and Justice Tassaduq Hussain Jillani from Pakistan. Two questionnaires, one on existing mediation structures and the other on the enforceability of mediated agreements, were circulated in preparation for the discussions within the working party.

From 2009 to 2010, the working party drafted the Principles for the Establishment of Mediation Structures in the context of the Malta Process (the 'Principles') and the Explanatory Memorandum accompanying these Principles. The Principles call for the establishment of a 'Central Contact Point for international family mediation' in each state. The Principles envision that these central contact points would provide information on mediation services, access to

mediation and relevant legal information in their respective jurisdictions. The Principles set certain standards for identifying international mediation services, as well as information about the mediation process and mediated agreements. The Principles emphasise the importance of rendering a mediated agreement binding or enforceable in all the legal systems concerned in a case before its implementation.

During the Sixth meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions, the participants of the Special Commission welcomed the Principles and further encouraged countries to name a central contact point. At this stage, Australia, France, Germany, Pakistan, Slovakia and the US have named central contact points.<sup>2</sup> In addition to its efforts related to the Principles, the working party has begun organising regional workshops to continue the dialogue and promote the use of mediation in international parental abduction or access cases. It has held two in-person meetings since the Special Commission met in June 2011, including one in 2013 with the participation of two expert speakers on the use of mediation in cross-border family matters from the Islamic perspective. The working party reported to the Council on General Affairs and Policy at its 2012 and 2013 meetings, and the Council welcomed the efforts of the working party in the context of the Malta Process and requested that the working party continue its work towards the implementation of mediation structures and to facilitate wider acceptance and implementation of the Principles as a basic framework for progress.

### **The Parentage/Surrogacy Project<sup>3</sup>**

In 2001, during informal discussions concerning the future work programme of the Hague Conference, it was suggested that the organisation may wish to consider work on the 'private international law issues surrounding the status of children and, in particular, the recognition of parent-child relationships (filiation)'. In April 2010, the members of the Hague Conference decided to include this topic in the work programme of the Permanent Bureau. At this time, members also acknowledged the complex issues of private international law and child protection arising from the growth in international surrogacy arrangements.

In June 2010, at the Special Commission on the practical operation of the 1993 Hague Convention on Protection of Children and

Co-operation in Respect of Intercountry Adoption, it was noted that the number of international surrogacy arrangements was increasing rapidly. Concern was expressed about the uncertain status of many of the children who are born as a result of these arrangements. The Special Commission concluded that the use of the 1993 Hague Intercountry Adoption Convention in cases of international surrogacy is inappropriate and recommended that the Hague Conference should carry out further study of the legal, especially private international law, issues surrounding international surrogacy.

In 2011, the Permanent Bureau drafted a 'Preliminary Note on the Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements'.<sup>4</sup> This Preliminary Note presented the background to the topic, explaining why it was that legal parentage (filiation) had become a matter of international concern. It also provided some case examples which illustrated the problems arising from international surrogacy arrangements and hypothesised about the problems that might arise in relation to legal parentage in cross-border situations outside the international surrogacy context (eg, in relation to paternity establishment or disestablishment, parentage following assisted reproductive technologies – not involving surrogacy – or same-sex parenting). The paper also provided a brief comparative summary of the approaches of states to the establishment or contestation of legal parentage from a private international law perspective. It also presented some of the broader concerns regarding international surrogacy arrangements such as the child protection concerns, the vulnerability of *all* parties to the arrangements (ie, the surrogate mother, intending parent(s) and the child), the possibilities for exploitation and abuse and the challenges arising from unregulated intermediaries. Finally, the paper summarised the existing international and regional efforts being undertaken in fields related to this area and described how the Hague Conference might be able to assist in relation to this topic in future.

In 2012, the Permanent Bureau presented a 'Preliminary Report on the issues arising in relation to international surrogacy arrangements'.<sup>5</sup> This Preliminary Report looked at why the practice of international surrogacy has developed in the last decade or so and seemingly increased sharply in recent years. It continued with a comparative

overview of the position of countries globally in relation to surrogacy, first in relation to their internal (domestic) law, and then concerning their approach to international surrogacy cases. This latter point was examined from a private international law perspective, and also more broadly (eg, concerning immigration and nationality issues). Lastly, the paper provided tentative thoughts (following on from the 2011 document) concerning some possible avenues for Members of the Hague Conference to consider in future in light of the preliminary research undertaken.

The 2012 Preliminary Report was warmly received by Hague Conference members and the Permanent Bureau was asked to undertake further research, including by preparing and circulating questionnaires on the topic. This work is currently under way and several questionnaires have been prepared for interested stakeholders. Questionnaire No 1 is addressed to Hague Conference members and other interested states; Questionnaire No 2 is addressed to those legal practitioners with relevant practical experience in the field; Questionnaire No 3 is addressed to health professionals working in the field; and Questionnaire No 4 (currently in preparation) will be directed to surrogacy agencies. These questionnaires seek detailed information, including on the needs to be addressed by any possible future work in this field and on the approaches that might be taken by the international community. The latter three questionnaires are available for online completion.

The Permanent Bureau will be writing a final report for the next meeting of the Hague Conference's Council on General Affairs and Policy (the annual meeting of members at which the organisation's work programme is determined) in Spring 2014. This report will facilitate consideration of, among other matters, whether the development of a new international treaty (ie, a new Hague Convention) on this topic might be desirable and feasible, or whether any other work should be undertaken by the Hague Conference to resolve the private international law issues arising in relation to international surrogacy arrangements, and/or in relation to the legal parentage of children (or filiation) more broadly. The Council of the Hague Conference will take the final decision in relation to whether any further work is undertaken by the organisation and, if so, in what form and with what priority.

The Permanent Bureau encourages any legal practitioners with relevant experience in this field to complete Questionnaire No 2 online<sup>6</sup> and/or to share their experience with the Permanent Bureau by emailing [secretariat@hcch.net](mailto:secretariat@hcch.net), addressing their email for the attention of Laura Martinez-Mora (Principal Legal Officer) and Hannah Baker (Senior Legal Officer). Any such information will be greatly appreciated and will inform the writing of the final report. Please note, however, that the Permanent Bureau does not have the means or mandate to intervene in individual cases and this information is sought for research purposes only; a response is therefore not guaranteed.

#### Notes

- 1 The Principles for the Establishment of Mediation Structures in the context of the Malta Process, the Malta Declarations and other information on the Malta Process and the Working Party on Mediation are available on the Hague Conference website at [www.hcch.net](http://www.hcch.net), under the Child Abduction Section.
- 2 See [www.hcch.net/index\\_en.php?act=publications.details&pid=5360&dtid=52](http://www.hcch.net/index_en.php?act=publications.details&pid=5360&dtid=52).
- 3 All documents mentioned above are available on the project webpage of the Hague Conference at [www.hcch.net](http://www.hcch.net), under The Parentage/Surrogacy Project at [www.hcch.net/index\\_en.php?act=text.display&tid=178](http://www.hcch.net/index_en.php?act=text.display&tid=178).
- 4 Prel Doc No 11 of March 2011 at [www.hcch.net/upload/wop/genaff2011pd11e.pdf](http://www.hcch.net/upload/wop/genaff2011pd11e.pdf).
- 5 Prel Doc No 10 of March 2012 at [www.hcch.net/upload/wop/gap2012pd10en.pdf](http://www.hcch.net/upload/wop/gap2012pd10en.pdf).
- 6 Visit The Parentage/Surrogacy Project at [www.hcch.net/index\\_en.php?act=text.display&tid=178](http://www.hcch.net/index_en.php?act=text.display&tid=178).

## Getting abducted children back from non-Hague Convention countries

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A problem that is on the increase is that when British citizen children are forcibly taken or kept by one parent in a non-Hague Convention<sup>1</sup> country against the wish of the other British citizen parent resident in the UK who wants the children to be brought up in the UK. The parent in the non-Hague Convention country will simply not return the children to the UK, despite the local family courts in the foreign country granting custody to the parent who is resident in the UK. Typically the family ordinances in these countries make no provision for the removal of the children from their territory to a foreign territory, even on the grant of a custody order in respect of the British citizen children to the UK parent.

Similarly the UK courts are reluctant to interfere with the legal systems of foreign countries simply based on the fact that the children are British citizens. In one case, *Al Habtoor v Fotheringham*,<sup>2</sup> an English mother had a child by a citizen of Dubai, and the question for the court was whether the English court should exercise its jurisdiction over the child situated in Dubai on the grounds that the child had retained habitual residence in the UK and that the forcible removal of the child from the shores of the UK did not interrupt his habitual

residence in the UK. It is settled law that habitual residence of the children could not be changed by the unilateral action of one parent, which was not consented to or acquiesced in by the other.

Primarily the argument was based upon the child having habitual residence here, but a subsidiary argument was based upon the inherent jurisdiction of the court to grant relief; however the court expressed the view that the courts of this jurisdiction should be extremely circumspect in assuming any jurisdiction in relation to children physically present in some other jurisdiction founded only on the basis of nationality. The court was not prepared to make a declaration of unlawful detention in relation to the child of dual nationality cared for by a biological parent in a jurisdiction whose courts have sanctioned the arrangement by order.

In the case of Pakistan, there is an agreed protocol between the UK and Pakistan to facilitate the return of British citizen children of Pakistani origin forcibly retained in Pakistan.<sup>3</sup> There are no other similar protocols with other non-Hague Convention countries, but there are other bilateral agreements. For a number of years, the UK has been anxious, on an ongoing basis, to forge relations with non-Hague Convention countries (eg, Bangladesh, Egypt and Pakistan).

In the European Community,<sup>4</sup> the requirements of the Hague Convention are codified and decisions on return of an abducted child are usually given within six weeks of the application. Baroness Hale acknowledged in extrajudicial lectures that:

‘The Convention is widely regarded as a great success, particularly in combating the paradigm case which its authors had in mind: the child who was living with one parent but snatched or spirited away by the other. Currently the Convention is in force between the United Kingdom and the 74 Contracting States listed in Schedule 2 to the Child Abduction and Custody (Parties to Convention) Order 1986 (SI 1986/1139), as amended. The two most recent entrants are Brazil and Lithuania. In at least three Contracting States, Turkey, Turkmenistan and Uzbekistan, the predominant religion practiced by their populations is Islam. One group of States is conspicuous by its absence. These are States which adopt some form of Shariah Law.’<sup>5</sup>

Baroness Hale has attempted to enlist non-Hague Convention countries to enter into agreements with the UK for the return of abducted children.

However, there is a growing trend in applications made by parents of British citizen children habitually resident in the UK for their return to the UK from non-Hague Convention countries. A parent typically applies for a declaration and protective or custodial order from the UK court:

- That his children have at the material times been habitually resident in the UK and did not lose their habitual residence when they left the UK for a holiday with the foreign parent;
- the children have been wrongfully removed from the UK and have been wrongfully retained in that country against their best interest;
- the applicant and their children’s rights have been violated under Article 8 ECHR by the wrongful removal to and retention in the foreign country (that is a non-Hague Convention country); or
- that the children should be returned to the UK where the court can determine what steps to take for their future.

The question that has not been determined conclusively by the courts is whether the applicant parent in the UK is entitled to injunctive order ‘*contra mundum*’ in addition to an injunctive order against the abducting

parent ordering the return of the children. Even if such injunctions are granted, the question still remains: to what use can they be put to in the family courts of the non-Hague Convention countries?

There are powerful indicators that the UK courts have jurisdiction to make such orders as described below:

- First, the court has jurisdiction to make an order on the grounds that the child is habitually resident in the UK on the date of the issue of the originating summons; they have not lost their habitual residence even though they have been taken abroad and retained there forcibly or without the consent of the UK parent. This order shall be that children do remain wards during their respective minorities or until further order and that their care and control be given to the applicant parent.
- Secondly, the applicant parent is entitled to an injunctive order (directed at the mother and an order ‘*contra mundum*’); this order is directed to both the mother and the world at large, so that the British citizen child should be returned to the UK as soon as is possible, so that the courts can determine their welfare.
- Thirdly, it is in the child’s best interest that they should be returned to England forthwith (although this issue can be determined at a second stage of the proceedings).
- Fourthly, it is in the best interest of the children and the applicant’s parents’ Article 8 ECHR rights that they should be reunited with the applicant in England as soon as possible.<sup>6</sup>

The jurisdiction of the court to grant *in personam* and *in rem* (or *contra mundum*) injunctions are well established.

Section 37 of the Senior Courts Act 1981 provides:

**‘37.— Powers of High Court with respect to injunctions and receivers.**

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court,

or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.’

The court can exercise its declaratory powers, and its powers under section 37 of the Senior Courts Act 1981, to grant an injunction in the terms sought namely that British citizen children should be returned to the UK where their welfare can be considered. An injunction is normally obtainable where:

(a) one party can show that the other party has invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court; and (b) one party to any action has behaved, or threatens to behave, in a manner that is unconscionable.

In the case of an abduction of children, the applicant father can satisfy both conditions; first, the parent abroad has forcibly retained the children abroad against the other parent’s will; and accordingly has invaded his parental rights (including Article 8 rights) in doing so.

The prospects of the UK parent succeeding in obtaining such an injunction are substantially increased if he obtains a custody order in respect of the children in the foreign courts. In this situation, when exercising jurisdiction in favour of the applicant, the UK court will not offend the legal systems of the country where the children are forcibly retained. Some non-Hague Convention states do not prohibit British citizen children from being removed from their jurisdiction where the local family court has made a custody order in favour of the foreign-based parent.

In one case, the court made an injunction *in personam*, relying on section 37 of the Senior Courts Act 1981. But the court thus far has not made an injunction in rem to protect children openly against the world in a custody case.

The Strasbourg case law emphasises that the parents have the right to decide whether the child must reside.

In *Nielsen v Denmark*,<sup>7</sup> the court stated:

‘61. It should be observed at the outset that family life in the Contracting States encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children.

The care and upbringing of children normally and necessarily require **that the**

**parents or an only parent decide where the child must reside** and also impose, or authorize others to impose, various restrictions on the child’s liberty. Thus the children in a school or other educational or recreational institution must abide by certain rules which limit their freedom of movement and their liberty in other respects. Likewise a child may have to be hospitalised for medical treatment. Family life in this sense, and especially **the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognized and protected by the Convention, in particular by Article 8** (art 8). Indeed the exercise of parental rights constitutes a fundamental element of family life.’<sup>8</sup>

In one case, the court stated that it could exercise its inherent custodial jurisdiction to grant an injunction if the circumstances of the children fall within the exceptional category, which is capable of invoking the inherent jurisdiction of the court.<sup>9</sup>

This threshold of the ‘exceptional category’ test does not sit easily with the Article 8 ECHR jurisprudence: there is no exceptionality test when Convention rights are in play.<sup>10</sup>

Reasons why the family court should exercise its power to issue an injunction (merits):

- the court is exercising a custodial jurisdiction because the aim is to get the British citizen children back into the UK, which is an important or major step in the life of the ward of court and accordingly the best interests of the child are engaged in the performance of this exercise;
- ‘best interests’ of the children encompasses all other welfare issues, including whether they should reside in the UK with their father;
- the children are British citizens;
- there is no provision in the Family Ordinance (Bangladesh, by way of example) for the courts in Bangladesh to make an order for the return of the children to the UK or outside Bangladesh. The lack of remedy (as there is no protocol existing between these two countries) is a strong point in favour of the applicant seeking the court’s assistance for the return of his children to the UK; and
- the family courts in Bangladesh have exercised custody jurisdiction over the children in favour of the applicant and

by granting the injunction sought by the applicant those courts will endeavour to assist the applicant in line with the terms of the injunction.

### **Evidence of habitual residence to make a section 1(1)(d) Family Law Act 1986 Order**

The test for habitual residence is as set out in *B v H* [2002] 1 FLR 388.<sup>11</sup> *A v A and another*<sup>12</sup> overruled part of *B v H*.<sup>13</sup> Children born abroad cannot be habitually resident in the UK if they have not been physically present in the UK.

### **Article 8**

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

The court is a public body and must act compatibly with an applicant’s Article 8 rights in both Hague and non-Hague Convention cases when the court is concerned with whether the abducted child should return to reside with the non-abducting parent and, if not, whether this would be incompatible with his Article 8 rights.<sup>14</sup>

Article 8 confers procedural and substantive rights.

The procedural rights under Article 6 or 8 ECHR apply with equal force in this case. An applicant parent must have some procedural protection to ensure respect for family life.<sup>15</sup>

### **The test for determining whether it is appropriate to order the return of the children to reside with the applicant**

In *Neulinger* [2011] 1 FLR 122, the Strasbourg Court considered the position of the parent and child in the context of abductions:

‘The child’s interest comprises two limbs. On the one hand, it dictates that the child’s ties with its family must be maintained, except in cases where the family has proved particularly unfit.

It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to “rebuild” the family (see *Gnahoré*, cited above, § 59). On the other hand, it is clearly also in the child’s interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child’s health and development.’<sup>16</sup>

To same effect see: *X v Latvia*.<sup>17</sup>

‘In order to determine whether the contested measure was “necessary in a democratic society”, the Court has emphasised the national authorities’ role in striking a fair balance between the competing interests of the child and the parents in matters of this kind (see, among other authorities, *Maumousseau and Washington*, cited above, § 62).

In the balancing process, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents.<sup>18</sup>

66. It leaves the Court to review, in the light of the Convention, the decision taken by the national authorities in the exercise of their power of appreciation,<sup>19</sup> including, inter alia, the observance of the procedural requirements implicitly enshrined by Article 8 of the Convention. In particular, the Court shall assess whether the decision-making process leading to the interference was fair and such as to afford due respect to the interests safeguarded by this Article.<sup>20</sup> In other words – the interference cannot be regarded as having been “necessary” if, inter alia, (1) the persons concerned by the interference were prevented from being sufficiently involved in the decision-making process, seen as a whole,<sup>21</sup> and (2) the domestic courts failed to conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.’<sup>22</sup>

### The grant of an injunction to comply with Article 8 ECHR

At the first stage, the court should be invited to consider, on the facts of the case, whether it will be disproportionate and incompatible with the applicant's Article 8 rights (taking into account the best interests of the children), if the order for the return of the children is not made. A provisional assessment of the facts of the case may be made at this stage. If the children are returned to the UK, a second and final assessment may be made to determine where the children should reside permanently. Whether an in-depth examination of where the children should ultimately reside should be undertaken in these proceedings may not arise for consideration.<sup>23</sup>

The court is required, exercising its powers, to protect the applicant's right to respect for family life. This is a positive obligation imposed on the court. This obligation extends if necessary to granting the applicant an injunction to ensure that the children are returned to the UK to reside with the applicant.

If the court is satisfied that the mother has abducted the children, contrary to section 1 of the Child Abduction Act 1984, or kidnapped them,<sup>24</sup> then this too adds to the positive duty on the court as a public authority to take steps to protect individuals from the criminal acts of others.

In *Glaser v UK*,<sup>25</sup> the Strasbourg Court stated: 'The Court has already had occasion to examine the question whether the conditions of enforcement of a child's return were compatible with Article 8 of the Convention. It defined the obligations of States in such matters in the case of *Maumousseau and Washington* (cited above, s 83) as follows:

"The Court points out that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. As to the State's obligation to take positive measures, Article 8 includes the right of a parent – in this case the father – to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action (see, for example, *Ignaccolo-Zenide*, cited above, s 94). However, this obligation is not absolute, since the reunion of a parent with his or her child may not be able to take place immediately and may require preparation.

The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients. In addition, when difficulties appear, mainly as a result of a refusal by the parent with whom the child lives to comply with the decision ordering the child's prompt return, the appropriate authorities should then impose adequate sanctions in respect of this lack of cooperation and, whilst coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives (see *Maire*, cited above, s 76). Lastly, in this kind of case, the adequacy of a measure is to be judged by the swiftness of its implementation. Proceedings relating to the award of parental responsibility, including the enforcement of the final decision, require urgent handling as the passage of time can have irreparable consequences for relations between the child and the parent with whom it does not live. The Hague Convention recognises this fact because it provides for a range of measures to ensure the prompt return of children removed to or wrongfully retained in any Contracting State. Article 11 of the Hague Convention requires the judicial or administrative authorities concerned to act expeditiously to ensure the return of children and any failure to act for more than six weeks may give rise to a request for explanations (see *Maire*, cited above, s 74)."

It is for the court to consider for itself whether the grant of an injunction is proportionate.<sup>30</sup>

### How will the injunction help?

The grant of a worldwide injunction may fall on deaf ears, but at least the parent who has it in hand can persuade the legal authorities abroad to assist him have his children back; furthermore, if the children travel to a Hague Convention country, the authorities there may be persuaded to assist the parent armed with the injunction get his or her children back.

An applicant father armed with the UK injunction may also persuade the family court when granting him custody of his children to allow him to remove the children from their territory. An order of the local family court incorporating the terms of the UK injunction may allow for the children to be removed abroad, and may ease travel arrangements so that the parent is less likely to be stopped by the local police or authorities preventing him from taking the children abroad.

## Notes

- 1 Hague Convention on the Civil Aspects of International Child Abduction 1980.
- 2 [2001] EWCA Civ 186, see [www.bailii.org/ew/cases/EWCA/Civ/2001/186.html](http://www.bailii.org/ew/cases/EWCA/Civ/2001/186.html).
- 3 UK-Pakistan Judicial Protocol on Children Matters 2003 (the 'Pakistan Protocol').
- 4 27 countries under the Brussels II (Revised) Regulation.
- 5 Available at [www.supremecourt.gov.pk/ijc/Articles/12/2.pdf](http://www.supremecourt.gov.pk/ijc/Articles/12/2.pdf).
- 6 Human Rights Act 1998, S 6(1).
- 7 (1988) 11 EHRR 175 [61].
- 8 See *R v United Kingdom* judgment of 8 July 1987, Series A no 121-C, 117, para 64.
- 9 *In the Matter of N (A Child)* [2012] EWCA Civ 1086 [21], [28], [29], [31].
- 10 *Huang v SSHD* [2007] 2 AC 167 [18]–[20].
- 11 See also, *PJ (Children), Re* [2009] EWCA Civ 588, [2010] 1 WLR 1237, [2009] Fam Law 786 [24]–[26].
- 12 *A v A and another (Children: Habitual Residence)* [2012] EWCA Civ 1369, [2013] 2 WLR 1061.
- 13 In respect of the position of a child born in a foreign country [41].
- 14 *In re D (Abduction: Rights of Custody)* [2007] 1 AC 619 [65], [2006] 3 WLR 989; *In re M* [2008] AC 1288 [19], [2007] 3 WLR 975.
- 15 *Wright v Secretary of State for Health* [2009] UKHL 3, [2009] 2 WLR 267 at s 36.
- 16 See, among many other authorities, *Elsholz v Germany* [GC], no 25735/94, s 50, ECHR 2000 VIII, and *Mar álek v the Czech Republic*, no 8153/04, s 71, 4 April 2006.
- 17 App No 27853/09 [65]–[66].
- 18 See, among other authorities, *Sommerfeld v Germany* [GC], no 31871/96, s 64, ECHR 2003-VIII (extracts).
- 19 See, among other authorities, *Hokkanen v Finland*, 23 September 1994, s 55, Series A no 299-A, and, more recently, *Neulinger and Shuruk*, cited above, s 138.
- 20 See *Eskinazi and Chelouche v Turkey* (dec), no 14600/05, 6 December 2005.
- 21 See, *mutatis mutandis*, *W v the United Kingdom*, 8 July 1987, s 64, Series A no 121.
- 22 See *Maumousseau and Washington*, cited above, s 74, and, more recently, *Neulinger and Shuruk*, cited above, s 139.
- 23 *In re S (A Child)* [2012] 2 WLR 721 [38].
- 24 See *R v Kayani* [2012] 1 WLR 1927.
- 25 [2000] FCR 193 [63].
- 26 See, among other authorities, *X and Y v the Netherlands*, judgment of 26 March 1985, Series A no 91, 11, s 23, and, *mutatis mutandis*, *Osman v the United Kingdom*, judgment of 28 October 1998, Reports 1998-VIII, 3159, s 115.
- 27 See, among other authorities, *Keegan v Ireland*, judgment of 26 May 1994, Series A no 290, 19, s 49.
- 28 See, among other authorities, *Ölsson v Sweden* judgment of 24 March 1988, Series A no 130, 32, s 68.
- 29 See, inter alia, the *Ölsson v Sweden (No 2)* judgment of 27 November.
- 30 *South Bucks DC v Porter* [2003] UKHL 26, [2003] 2 AC 558, [2003] 2 WLR 1547 at s [29] and [37].

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## Separating siblings in Hague Convention abduction cases

### When does the issue of separation of siblings arise?

There are a number of situations in which a return order under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the 'Convention') may result in the separation of siblings.<sup>1</sup> The first is where the child objection defence in Article 13(2) is established in relation to the mature sibling, but not in relation to a younger sibling. The second, less common, situation is where the grave risk of harm defence in Article 13(1)(b) is established only in relation to one of the siblings.<sup>2</sup> Finally, in some cases the Convention might apply to one sibling and not to the other, for example, if they had different habitual residences at the time of removal or retention<sup>3</sup> or if the father had custody rights in relation to one and not the other.<sup>4</sup> The latter situation will arise where there are half-siblings who have different fathers.<sup>5</sup>

### The importance of the sibling tie

The connection between siblings is often one of life's most significant and long-lasting relationships.<sup>6</sup> Even during infancy, siblings often already enjoy a special connection and provide emotional support and company for each other. This will be of particular importance in families that experience divorce or the death of a parent.<sup>7</sup> Accordingly, in many jurisdictions, courts will not usually make custody decisions that split siblings, at least where both parents do not agree thereto.<sup>8</sup> In addition, it may be argued that the right of siblings to contact with each other should be constitutionally protected.<sup>9</sup>

### Older sibling objections

There are a number of options open to the court in the situation where an older sibling objects to return to the country of origin. The

first is to return the younger child alone.<sup>10</sup> The second is to refuse to return the older child on the basis of his objections and then to refuse to return the younger child on the basis that his return without the older child creates a grave risk of exposing the young child to harm or placing him in an intolerable situation under Article 13(1)(b).<sup>11</sup> The third is to return all the children, including the older child, despite his objections. Such a decision may be justified either on the basis of the welfare of the older child himself<sup>12</sup> or on the basis that since upholding his objections would require not returning all the children, the policy of the Convention prevails over his wishes.

None of the options is ideal. On one hand, it is clear that separating children from their siblings, in a situation where such children have inevitably already suffered separation from family members, is likely to cause them harm or to place them in an intolerable situation. On the other hand, refusing to return younger siblings simply because an older one objects to returning appears inconsistent with the objectives of the Convention and may well also be inconsistent with the rights of those children to contact with the parent that is left behind.<sup>13</sup> Similarly, returning older children against their will just because they happen to have siblings would seem to be in violation of their right of participation.<sup>14</sup> With respect, the Court of Session's suggestion that a view should be reached on the Article 13(1)(b) defence before considering the child objection defence<sup>15</sup> is not helpful because the issue of harm or intolerable situation does not arise until it has been decided not to return the older child because of their objections.

It is suggested that while each case has to be determined on its merits, in most cases the option of relying on the grave risk/intolerability defence in relation to the younger child will be the most appropriate solution and, indeed, this appears to be the approach most commonly adopted by the courts. In addition, the arguments in favour of invoking the grave risk/intolerability defence will be strengthened where the reasons for the older child's objections also apply to the younger child and so it is reasonable to assume that the younger child would have objected if he were old enough to do so.<sup>16</sup>

However, there may be unusual cases where the separation will cause harm only or mainly to the older objecting child. In such a case, this fact might be a reason for exercising the discretion to override his objections.

### **Grave risk exception established in relation to one child alone**

This situation will only arise rarely, where the basis of the grave risk exception applies to one child alone, such as where that child has special needs<sup>17</sup> or where abuse has been directed at that child alone.<sup>18</sup> While the courts have justified not returning the other child alone on the basis of the grave risk to that child, it is likely that they have also had in mind the impact on the remaining child.

### **Convention only applies to one child**

#### *Half-siblings*

In cases involving half-siblings, courts have tended to see the reason for the separation as being the abductor's decision not to return to the country of origin with the half-sibling. Thus, in a number of cases, courts have ordered the return of a child, despite the fact that an older half-sibling, who was not the subject of the Convention application, was refusing to return and this caused in an intractable dilemma for the abducting mother.<sup>19</sup> In all these cases, the court emphasised the fact that the mother had herself caused this situation by removing or retaining the child.

However, insufficient weight seems to have been given to the potential separation from the mature half-sibling who refuses to return. The reason for this seems to be that since the Convention does not apply to the half-sibling, there is no need to consider his objections to return independently.<sup>20</sup> However, surely these objections still create an objective obstacle to returning the younger child? Moreover, from the point of view of the returning child, the degree of intolerability of separation from a sibling is caused by the strength of the de facto connection between the siblings and not by the blood relationship.<sup>21</sup>

It may well be that the reason for the courts' stringency is concern that any other approach would encourage abductions by parents in the not-uncommon situation where there is an older sibling from a former relationship who can be relied upon to object to return.

#### *Full siblings*

The author has only found three cases in which separation will be caused by the fact that Convention only applies to one of the full-siblings. In two of these,<sup>22</sup> the Supreme

Court of Israel ordered return of the older sibling to whom the Convention applied, on the basis that there was no objective reason why the mother could not return with both siblings. Thus, the case was seen as akin to those in which the mother refused to return with the child and accordingly invocation of the grave risk exception would be giving a reward to the abducting mother. In the third case,<sup>23</sup> the Ontario court held that there was no evidence that if the older child was returned to Australia he and the younger child would be separated, since this would be a matter of custody and access. With respect, this conclusion is difficult to understand and indeed, subsequent litigation between the parties concerning child support<sup>24</sup> shows that in fact the children were separated.

With respect, the Israeli Supreme Court's claim that any separation would be caused by the mother and not by its decision is difficult to accept. In both cases, the court was fully aware of the mother's claims about the difficulties associated with return to the country of origin, in which she did not have any status or support, including, in one case, allegations of violence. Even if these did not meet the very high threshold of the Article 13(1)(b) exception, there was a real question of whether the best interests of the younger child lay in staying in Israel or returning with the older sibling. Since the mother was surely obliged to act in accordance with the best interests of the younger child, it is too simplistic to say that there was no objective reason for her not to return with both children and naïve to assume that she would do so. Indeed, in both cases, only the older child returned. Accordingly, the real reason for the potential separation was the fact that the Convention only applied to one of the siblings and there is no reason why the children themselves should suffer because of this fact.

With respect, the court's concern about weakening the deterrent effect of the Convention is not convincing because there are relatively few cases where a parent can consciously create a situation where the Convention applies to only one child. Indeed, in one of the Israeli cases, it was the father's failure to register his rights in relation to the younger child on birth that created the situation. Thus, this scenario can be distinguished from that in which the abductor refuses to return with the child, which can arise in very many cases.

## Conclusion

The above analysis shows that in cases where older full siblings object, most courts, showing awareness of the real importance of the sibling tie to children, have refused to also return younger siblings. However, in cases where the potential separation arises because of the objection of an older half-sibling, or for some other reason the Convention only applies to one child, the approach is different and return is ordered on the basis that the mother is responsible for the situation. This distinction is the result of an adult-focused approach to the Convention, rather than a child-focused one. The degree of harm caused to a child by being separated from a sibling is not a function of the apparent reason for the separation and not, per se, a function of the degree of common blood between the siblings.

While the courts' concern not to give a prize to an abductor is understandable, it has to be remembered that the main objective of the Convention is to protect children<sup>25</sup> and that the very existence of the defences presupposes that there will be cases where abductors will be 'rewarded'. Thus, in all cases, the question of whether the grave risk exception should be invoked in cases where return will cause separation between siblings should be determined from the children's perspective.

## Notes

- 1 For convenience, reference will be made to the situation where there are only two siblings. However, this should be read as including a situation where there are more than two siblings of whom only some will be returned.
- 2 As in the Scottish case of *Q Petitioner* [2001] SLT 243.
- 3 For example, the Israeli case of RFamA 2338/09 *LM v MM*. See <http://elyon1.court.gov.il/files/09/380/023/h12/09023380.h12.pdf> – in Hebrew), 3 June 2009 [INCADAT cite HC/E/IL 1037], in which the Abduction Convention proceedings only related to the five-year-old boy who had lived with the parties in France before the retention and not to the baby who had been born in Israel and remained there since his birth. See also *Cawdrey v Cawdrey* [2010] OJ No 4733.
- 4 For example, the Israeli case of RFamA 2270/13 *DZ v YVAMVD* (30 May 2013) See <http://elyon1.court.gov.il/files/13/700/022/t04/13022700.t04.pdf> – in Hebrew, in which the unmarried Dutch father had registered his rights in relation to the older son, but not the younger one.
- 5 As in *Re C (Abduction: Grave Risk of physical or Psychological Harm)* [1999] 2 FCR 507.
- 6 J E Hasday, 'Siblings in Law', 85 Vand L Rev 897 (2012); comment in *WF v RJ* [2010] EWHC 2909 'that it is recognised that the sibling relationship is generally the most enduring of all human relationships and of great importance and value to children'.
- 7 *Ibid* at 912.
- 8 For lack of uniformity among US states in this respect, *ibid* at 913–6.

- 9 B Jones, 'Do Siblings Possess Constitutional Rights?' 78 Cornell L Rev 1187; suggestion in *WF v RJ* (n 6) 'To separate the siblings could be a breach of their right to family life'.
- 10 For example, *In the Matter of LL Children* (Unpublished, 22 June 2000) [INCADAT cite: HC/E/USs 273], in which the Court held that if the 15-year-old child was mature enough to have her objections taken into account, she was also mature enough to decide whether or not to be separated from her sibling. However, the Court seems to have been influenced by the girl's statement that if the younger child was returned, she would go too. See also *Rajmakers-Eghage v Haro* 131 F Supp 2d 953 (ED Mich, 2001), in which the Court adjourned the case in relation to the older child in order to ascertain his views, but felt that it had no choice but to order immediate return of the younger child. While the Court advised the petitioner not to avail herself of the order made, but to wait for the outcome of the hearing in relation to the older child, this does not seem to have been binding.
- 11 For example, the English cases of *B v K* [1993] 1 FCR 382; *The Ontario Court v M and M (Abduction: Children's Objections)* [1997] 1 FLR 475, *Re W (Minors)* (n 7), *Re T (Abduction: Child's Objections to Return)* [2000] 2 FCR 159 and *WF v RJ* [2010] EWHC 2909; Australian cases of *Bassi* (1994) FLRC 92-465 and *State Central Authority v Hotzner (No 2)* [2010] FamCA 1041; Scottish cases of *Urness v Minto and Singh v Singh* [1998] SC 68; New Zealand case of *Sec for Justice v Penney* [1995] NZFLR 827; US case of *Ramirez v Buyauskas*, 2012 US Dist LEXIS 24899.
- 12 As in the English cases of *Zaffino v Zaffino* [2005] EWCA Civ 1012; *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392; *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515.
- 13 See comment of Court of Session in *W v W* [2004] SC 63, that a decision to give effect to the wishes of one child 'ought not to be regarded as necessarily sealing the fate of all the children'.
- 14 For analysis of the interpretation and application of the child objection defence in the light of the child's right to participation, see R Schuz, *The Hague Child Abduction Convention – A Critical Analysis* (Hart Publishing, October 2013) at chapter 12. Specifically, see comment of Ward LJ in *Re T* (see above, n 11) that 'there does appear to be something odd about refusing to return an elder child who is old enough to articulate an objection to return because of fears expressed for herself and for her young sibling because of what had happened to them without also inferring that if the younger was of an age and maturity where he had a voice and vote, he would echo the objection and vote with his elder sister'; but compare Australian decision in *Wolfe & Director-General, Department of Human Services* [2011] FamCAFC 42 [74], where one of the reasons for ordering the return of an objecting 15-year-old was so that he could give support to his younger sister. It might also be noted that two cases where older siblings were returned against their wishes in order to avoid separation from their younger siblings did not have successful outcomes. In *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515, the children resisted return and were eventually allowed to stay in the UK (see comment at Incadat cite: HC/UKe/419). In *HB (Abduction: Child's Objections) (No 2)* [1998] 1 FLR 564, it is reported that the older child who returned was in foster care. In this case, ironically the younger child had resisted return and was allowed to stay in the UK.
- 15 *Ibid*, *W v W*.
- 16 See above, n 14, comment of Ward LJ.
- 17 *JMH v AS* [2010] NBJ 281.
- 18 *Miltiadous v Tetervak*, 686 F Supp 2d 544, 5557; *Q Petitioner* (see above, n 2).
- 19 *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* (see above, n 5); *Re C(B) (Child Abduction: Risk of Harm)* [1999] 3 FCR 510 (CA); *S v B & Y (Abduction: Human Rights)* [2005] EWHC 733 (Fam); *KMA v Secretary for Justice* [2007] NZFLR 891.
- 20 Although the Court did take into account the half-sibling's difficult situation in the case of *S v B & Y* (see above, n 19), but it was held that the half-sibling's rights could not prevail over the rights of the father and the abducted child.
- 21 Ward LJ in *Re T* (see above, n 11), distinguishes the cases, inter alia, on the basis of the fact that in *Re T*, the children are full-blood siblings, without explaining the significance of this distinction.
- 22 *LM v MM* (see above, n 3); *DZ v YVAM VD* (see above, n 4).
- 23 *Cawdrey v Cawdrey* (see above, n 3).
- 24 *Cawdrey v Cawdrey* [2011] OJ No 593.
- 25 See the Preamble to the Abduction Convention.

## International judicial collaboration in family cases: why practitioners should care

**S**ir Mathew Thorpe, in an article featuring in the September 2012 issue of the IBA Family Law newsletter, sets out the intellectual case for judges across jurisdictions to communicate and collaborate with each other in family cases with an international dimension. At a practical level, over the last 15 years, the impact of this position has

been keenly felt. However, despite its focus on the judiciary, practitioners should not make the mistake of thinking that judicial collaboration is not their concern. In any case with an international family law angle, where judicial collaboration may be appropriate, practitioners from both England and Wales and abroad (if the case concerns England

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and Wales) will be expected to have an understanding of what it can achieve, factor it in to their case planning and to recommend its use to an English or overseas judge, where appropriate. Liaising with the Office of the Head of International Family Justice (the 'Office') is critical if such collaboration is to be facilitated.

### When and where to use it

Judicial collaboration is most relevant where there are: (i) questions over jurisdiction; (ii) gaps in the legal, factual or procedural matrix that hinder the making of a well informed decision or moving a case forwards; or (iii) any instances where the active involvement of a foreign judge will assist facilitating as just a result as possible. Legal advice should never be sought through judicial collaboration.

In the context of facilitating the making and enforcement of orders for the welfare of children, Baker J noted that 'Judicial cooperation is not only encouraged but essential'.<sup>1</sup> However, judicial collaboration should be considered for use across the family law spectrum where an international angle is present. *Re E*<sup>2</sup> concerned Article 13(1)(b) of the 1980 Hague Convention. *Abbassi v Abbassi*<sup>3</sup> involved the validity of a marriage allegedly dissolved by talak. *Chorley v Chorley*<sup>4</sup> centred on a forum dispute relating to divorce proceedings, as did *Bentinck v Bentinck*,<sup>5</sup> albeit with an additional focus on maintenance. *Re G*<sup>6</sup> was an appeal relating to the European Convention 1980. *WK (Minors)*<sup>7</sup> concerned a wrongful removal but had, at its centre, care proceedings in two jurisdictions. *Northumberland CC v Z*<sup>8</sup> concerned inter-country adoption.

Typical examples where judicial collaboration should be considered include:

- In circumstances where proceedings are ongoing in England and Wales, and where there is a suspicion that they are ongoing or have commenced in another jurisdiction, using it to: (i) ascertain what those proceedings are; and (ii) obtain copies of any orders/judgments in them.
- If a relocation is being considered, which would allow a child to be removed from the jurisdiction, using judicial collaboration to facilitate appropriate hearings in the foreign court, that is, for mirror orders.
- If evidence in English proceedings needs to be taken from a party abroad, using judicial collaboration to assist in facilitating it, for example, by video link.

- Assisting in listing/expediting hearings, for example, in relation to transfers of jurisdiction pursuant to Article 15 Brussels II bis or Articles 8 and 9 Hague Convention 1996. This received particular endorsement by Cobb J in *L-M (Transfer of Irish Proceedings)*<sup>9</sup> and Sir James Munby P in *HJ (A Child)*.<sup>10</sup>

The Permanent Bureau of the Hague Conference has published a helpful steer in the non-binding 'Emerging Rules Regarding the Development of the International Hague Network of Judges and Draft General Principles for Judicial Communications, Including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, Within the Context of the International Hague Network of Judges' (the 'Emerging Guidance'). This suggests areas that might be the subject of direct judicial communications:

'Matters that may be the subject of direct judicial communications include, for example:

- (a) scheduling the case in the foreign jurisdiction:
  - (i) to make interim orders, eg, support, measure of protection;
  - (ii) to ensure the availability of expedited hearings;
- (b) establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;
- (c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;
- (d) ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions);
- (e) confirming whether orders were made by the foreign court;
- (f) verifying whether findings about domestic violence were made by the foreign court;
- (g) verifying whether a transfer of jurisdiction is appropriate.'

*Re ML and AL (Children)*,<sup>11</sup> *Re M and J*<sup>2</sup> and *F (Abduction: Refusal to Return)*,<sup>13</sup> when viewed together, serve to emphasise the wide spectrum of assistance that judicial collaboration can offer. With *Re ML and AL*,<sup>14</sup> English judgments and orders were

communicated to Austria. With *F (Abduction: Refusal to Return)*,<sup>15</sup> the Court of Appeal alluded, within strict limits, to the Office being able to offer opinions as to the most efficient route to obtain a decision or determination that a removal was wrongful pursuant to Article 15 Hague Convention 1980. *Re M and J*<sup>16</sup> arguably shows direct judicial communication facilitating, with the consent of the parties throughout, something close to what arguably might amount to transnational judicial case management.

### Network judges

Transjudicial communication is effected and facilitated at first instance through networks of judges, both formal and informal, who act, through being part of them, as contact points for intra-judicial communication in international family matters. Networks can be bilateral, regional or under the auspices of a global-focused organisation. Judges belonging to such networks are referred to loosely as ‘network judges’, although the term ‘Network Judge’ properly refers only to members of the International Hague Network of Judges (see below). Aside from providing a centralised judicial contact point, communication through a network judge assists in maintaining judicial independence, a degree of separation between the two judges who wish to communicate, and fairness to the parties involved in an international dispute. A significant number of jurisdictions across the world have one or more network judges. Some jurisdictions are members of more than one network.

In England and Wales, the Head of International Family Justice is usually either: (i) the Network Judge if only one judge has been nominated; or (ii) the senior network judge for the jurisdiction if more than one has been nominated. In this function, they are supported by the Office, which is the first port of call for judges and practitioners who think that judicial collaboration might play a role in their case.

The International Hague Network of Judges is the most important intra-judicial network in family cases and the only global one that has formal international recognition. At last count, its membership consisted of some 76 judges representing about 52 jurisdictions. There is no obligation on signatories to the various Hague Conventions to appoint a judge to the Network. However, its influence is ever increasing, the Permanent

Bureau is supportive and, in mid-July 2013, the Network met in full for the first time at a conference in England.

In addition to having access to the Hague Network, the Head of International Family Justice and the Office have connections with other jurisdictions through bilateral agreements such as the Judicial Protocol signed in 2003 between the President of the Family Division and the Chief Justice of Pakistan. Furthermore, within the EU, Council Decision 2001/470 created a European Judicial Network (EJN) ‘to improve and expedite effective judicial co-operation between Member States in civil matters’. The EJN was launched in 2002. There is an obligation on each Member State (except Denmark) to nominate at least one contact point. The contact point nominated by England and Wales is an official in the Ministry of Justice. Out of the impetus for the EJN to have appropriate support in family matters, an informal network of European judges emerged, which broadly operates in the same way as the Hague Network. The use of the EJN, both formally and through these network judges, is commonplace in international family proceedings and, indeed, is encouraged in part X of the *Good Practice Guide* to Brussels II revised, produced by the European Commission.<sup>17</sup>

Even if jurisdictions exist where there is no judicial contact point, network judges might have informal contacts with judges from such places. These are particularly important where jurisdictions lie outside treaties on international family law. In 2012 for instance, the Office assisted in a case with a Guyanese element, having facilitated judicial collaboration with a senior Guyanese judge after being introduced to him by a judge from another Caribbean jurisdiction with whom informal links existed. A further informal option might be for the Office to establish contact through the Association of International Family Judges.

Network judges have to be sitting judges. This has an impact both on what can ultimately be expected by way of response from a network judge, and the time taken to get it. Thorpe LJ in *Re E* summed the situation up at para 89:

‘Practitioners need to understand that only this jurisdiction [England and Wales] and the Netherlands maintain offices for International Family Justice fully resourced to provide both an internal and external service. In other jurisdictions

the Network Judge is unlikely to have any administrative, let alone legal support. Equally the Network Judge is more likely than not to have a case load unrelieved to reflect the calls of the Network function.'

### Using judicial collaboration

Judicial collaboration is initiated either by the judge (with the knowledge of practitioners) or practitioners (with the assent of the judge) contacting the Office. Wherever there are circumstances where judicial collaboration might be useful, it should be initiated at whatever stage the litigation is at, providing of course a judge is willing and able to give assent to it.

This being said, it is good practice for practitioners to contact the Office in advance of their hearing to ascertain whether judicial collaboration might be suitable to bring to the presiding judge's attention. It can save time, for instance, if it can quickly be established whether there is a network judge or not, whether the request for judicial collaboration is suitable, whether a time estimate for receiving a response from the foreign network judge can be given, etc. The Office equally encourages overseas practitioners to raise the availability of judicial collaboration with the trial judge in their own jurisdiction, if it is relevant to their case.

It is helpful, but not essential, for a reference to the Office to be made in either a preamble or main body of an order made at a hearing. Those involved with drawing up such orders should be mindful of the diplomatic necessity to not demand anything of a foreign court, but to respectfully request assistance of a kind that is realistically able to be provided. If the circumstances of a case render judicial collaboration inappropriate at that point in time, but there remains a possibility that it may be relevant in the future, it would be entirely acceptable for the preamble to an Order to reflect that if the right circumstances arose, the matter could be referred to the Office.

All requests should be accompanied by: (a) a (preferably agreed) concise case summary; and (b) a set of questions to be put to the network judge, which: (i) ask for information of a practical and emphatically non-legal nature; and (ii) are in no way phrased in anything other than a neutral, non-tactical way.

Providing a common-sense approach is adopted by both practitioners and judges as to disclosure of the contents of any judicial

communication, issues of bias and recusal can be avoided. Common-sense practices might include ensuring that:

- (a) the parties are aware of, and agree to, judicial collaboration being sought;
- (b) the parties are either shown copies of all relevant correspondence (ie, responses of the foreign network judge) or, at least, are given a summary of it; and
- (c) if direct judicial communication takes place within the context of a telephone call, either take a detailed note of the call for the parties or allow them to listen in, as appropriate.

The Emerging Guidance also suggests ways in which fairness and judicial independence can be maintained.

Judicial collaboration/direct judicial communication is not intended as a tool for practitioners to: (a) receive legal advice by the back door; (b) avoid having to seek expert evidence as to foreign law or procedure in circumstances where it is appropriate; or (c) use as a substitute for their own legal research into English family law and practice. Likewise it would be a grave abuse of process to attempt to use network judges as a means of making submissions to a foreign court, thus short-circuiting the relevant procedural rules for such matters. This is not to say that sealed orders and judgments cannot be transmitted to judges in other jurisdictions quickly via network judges in certain circumstances, which is relatively common.

### Judicial collaboration in England and Wales

Direct judicial communication in respect of family matters has featured consistently in English case law since 1998, the year the Hague Network was established, and two years after the 1996 case of *D v B*,<sup>18</sup> the first known instance of direct judicial communication in relation to the 1980 Hague Convention. In its first family law-related appearance in the law reports, *Re HB (abduction: children's objections to return)*,<sup>19</sup> the Court of Appeal endorsed Wall J's efforts to effect it. In 1999, Singer J spent the vast majority of his judgment in *Re M and J* explaining how critical and beneficial direct judicial communication had been to the resolution of the case before him. In 2003, Thorpe LJ considered it a 'comparatively recent development and one fully supported by the Permanent Bureau of the Hague'.<sup>20</sup> In 2005, the judicial post of Head of

International Family Justice for England and Wales was created. By 2009, matters were being referred to judicial collaboration as a matter of course.<sup>21</sup> Judicial collaboration received unequivocal support in the Supreme Court installment of *Re E*.<sup>22</sup>

In 2012, it was mentioned in one Court of Appeal decision<sup>23</sup> and features in at least five judgments of the High Court. Small numbers are not reflective of its far-greater influence. It is regularly involved in many others without receipt of a mention, such as the proceedings culminating in *Re J (Children)*.<sup>24</sup> The increasing establishment of the use of judicial collaboration as seen through the case law is mirrored in the statistics of the Office for cases handled. In 2005, three requests for judicial collaboration were dealt with. By contrast, in 2011, 222 cases were processed. Of those, 180 were new (a 96 per cent increase on 2010) with 42 ongoing from the year before. The year 2012 saw a 40.5 per cent increase in requests to the Office from 2011, with 253 new requests. Furthermore, the Office dealt with disputes relating to 71 jurisdictions, a 40 per cent increase on 2011. Of those 71, the Office was able to offer meaningful assistance in relation to around 65 per cent of them (46 jurisdictions).

Given its ever-increasing use, it is not surprising that cases exist where the appellate courts have factored in a failure on the part of practitioners or judges to have recourse to it, or to recommend its use, into their decision-making. To this effect, the *obiter* remarks in the Court of Appeal judgments of *Chorley*, *Abbassi* and *Re W (Children)*<sup>25</sup> are of particular note.

*Chorley* concerned a forum dispute with parallel divorce proceedings existing in England and France. Owing to the procedural steps needed to be completed under French law in order for divorce proceedings to progress, an issue raised was the uncertainty as to the point in time at which a French court was first seised<sup>26</sup> of French divorce proceedings. Thorpe LJ, with whom Tuckey and Dyson LJ agreed, stated at para 44:

‘Had that new arrival [the *Good Practice Guide* to Brussels II, specifically part X, mentioned above] been drawn to the judge’s attention in June 2004, he might have seen the obvious opportunity for a telephone call or an email to the judge in Nice so that there could be a collaborative approach to ensure that the issue was, first, addressed by the more appropriate court, secondly, addressed without

unnecessary delay, and thirdly, addressed without unnecessary expense. I would have thought that, given all the facts of this case, such a conversation, had it taken place in June 2004, would inevitably have persuaded Roderic Wood J of the sense of leaving the case to the judge in Nice, whatever may be the terms of r.2.27A.’

*Abbassi* concerned a wife’s appeal against a declaration made pursuant to section 55(1)(d) of the Family Law Act 1986, that the marriage had been validly dissolved by talak pronounced in Pakistan. Among other things, the wife’s counsel submitted that: (i) there was insufficient evidence before the judge as to the nature of the application that might be brought in Pakistan or the likely duration of the Pakistan proceedings; and (ii) in addition, the judge did not have regard to the wife’s difficulties in her participating in the Pakistani proceedings, given that she was habitually resident in England and of limited means. Thorpe LJ, with whom Smith and Hallett LJ agreed, robustly rejected this criticism at paras 13 and 21:

‘[Para 13] It does not seem to me that those points were specifically put to the judge and manifestly had they been put, they could have formed either the basis of an application for adjournment for further investigation, or alternatively as the foundation for the submission that there should be direct communication between the judge in London and the liaison judge in Islamabad, in order to clarify the nature of the application and to enlist the aid of the liaison judge to ensure an expedited trial.’

‘[Para 21] As I have already observed, it would have been open to the parties to invite Wood J to communicate his decision to the liaison judge in Islamabad, supporting the approach with a copy of his transcribed judgment and perhaps inviting the assistance of the courts in Islamabad to ensure that the husband’s undertaking to seek an expeditious determination was recognised and supported in that jurisdiction. With the advantage of hindsight, it can be seen that had that step been taken almost a year ago, there is every probability that the jactitation suit in Islamabad would have travelled further down the road than it has. It is still not too late to invoke the aid of the liaison judge and I would propose to refer this case to him and to invite him to use any proper steps within

his jurisdiction to ensure that the issue referred on 11 April is determined at the earliest possible date.’

*Re W (Children) (Relocation: Removal outside Jurisdiction)* concerned an appeal against the refusal at first instance of a mother’s application to relocate to Australia with her two children. The Court of Appeal (Sir Nicholas Wall P, Lloyd and Elias LJJ), in three separate and subtly different judgments, allowed the appeal substantially on the basis that the balancing exercise came down firmly in favour of allowing relocation. Sir Nicholas Wall P, at paras 105–106, stated:

‘Thirdly, the judge was, in my judgment, wrong to assume the impotence of the court either here or in Australia. If either court refused to make a contact order – or rescinded an order already made, it could only do so on the basis that the new order – or lack of it – was in the best interests of the children. As to that, the common evidence was that the continuation and expansion of the relationship was in the best interests of the children, and speaking for myself, I would expect both courts so to order.

Equally, in these days of instant communication and liaison judges, I have more confidence than the judge (he expressed none) that neither court would sit idly by and allow the relationship to wither. In my judgment, the father should not be permitted to allow the fact that he is a litigant in person to lead the court to believe that as a consequence he is so disadvantaged that nothing will happen, or that his difficulties are insuperable.’

A similar attitude, albeit in the different context of considering whether to recognise a foreign divorce under s 51(3)(c) of the Family Law Act

1986, was espoused by Thorpe LJ in *Golubovich*,<sup>27</sup> a judgment with which Etherton LJ and Lord Neuberger of Abbotsbury MR agreed.

While none of these references to judicial collaboration (with the possible exception of *Re W*) form part of the *ratio* of an appellate decision, the integral role that direct judicial communication should play if it is relevant is explicitly and unequivocally recognised. In circumstances where it should be explored as an option, both practitioners and first instance judges should take advantage of it or risk short shrift from the appellate courts.

#### Notes

- 1 *HSE Ireland v SF (A Minor)* [2012] 2 FLR 1131.
- 2 [2011] 2 FLR 724.
- 3 [2006] EWCA Civ 355.
- 4 [2006] 2 FLR 415.
- 5 [2007] EWCA Civ 175.
- 6 [2004] 1 WLR 521.
- 7 [2012] 2 FLR 762.
- 8 [2009] 2 FLR 696.
- 9 [2013] EWHC 646 (Fam), at para 39.
- 10 [2013] EWHC 1867 (Fam) at para 6.
- 11 [2006] EWHC 2385 (Fam).
- 12 (*Abduction: International Judicial Collaboration*) [2000] 1 FLR 803.
- 13 [2009] EWCA Civ 416.
- 14 See above, n 11.
- 15 See above, n 13.
- 16 See above, n 12.
- 17 See also the comments of Thorpe LJ in *Chorley* at para 44; and *Mercredi v Chaffe* [2011] 2 FLR 515, at paras 89–90.
- 18 17 May 1996, Superior Court of Quebec, Terrebonne.
- 19 [1998] 1 FCR 398.
- 20 See *Re G* at n 6 above.
- 21 See Sir Mark Potter P in both *Re K (Children) (Rights of Custody: Spain)* [2010] 1 FLR 57 and *Re R (A Child) (Abduction: Child’s Objections)* [2010] 1 FLR 1229.
- 22 [2012] 1 AC 144.
- 23 *Re B (Children)* [2012] EWCA Civ 1631.
- 24 [2012] EWCA Civ 1511.
- 25 (*Relocation: Removal outside Jurisdiction*) [2011] EWCA Civ 345.
- 26 Within the meaning of Art 11 of the now superseded Brussels II (Reg 1347/2000 EC).
- 27 [2011] 2 FLR 1193, at para 81.

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# Problems in England and Wales: private international child law

**A**pril 2013 saw the UK Government remove public funding – through the recently renamed Legal Aid Authority – from private law work and representation, unless domestic violence of a serious nature is revealed. For years, as part of the legal culture and representation of parties before the courts of England and Wales, many mothers and fathers were represented as applicants and respondents to applications for relocation cases from England and Wales, formerly known as ‘leave to remove from the jurisdiction’.

As people continue to have children, with one of the parties in the relationship often being from outside England and Wales, relocation applications are on the increase, where one party to the former relationship wants to go back to their native country, inevitably seeking to take their children from the former relationship with them permanently.

Courts of England and Wales are already faced with such applications by those representing themselves. There will be times when both middle-income parties *will* be represented by a solicitor or a counsel advocate, but many will not be able to afford such luxury with the expense of many preliminary hearings, and will now no longer have such access to legal aid representation at all. This is already having an impact.

Judges of England and Wales on preliminary hearings will have to ascertain if the court service must pay for an interpreter, where one party is not represented and needs interpretation. They must also give consideration as to expert reports on, for example, immigration into the UK where one party can no longer remain in the jurisdiction or where a proposed relocation is to a non-Hague Convention country and the judge reasonably needs to know if any final orders of England and Wales can be registered abroad at all, especially where there will likely be an order for vacation contact. The reality of registration abroad may impact upon whether relocation is or is not granted.

Ordinarily, either the privately funded party or the legal-aid party could incur a likely reasonable expense for such necessary expert reports through their own privately paying pockets or their legal aid certificate with prior authority. Even with the overspill from public law changes, a reduction of experts in that process and the private law relocation courts only seeking expert reports where absolutely necessary, there will be times when a judge requires such expert guidance nevertheless.

If you have two parties without any representation, there can be no letter of instruction other than from the court and no one is actually going to be reasonably able to arrange such expert instruction, never mind pay for it.

A further problem is that when such applications were infrequent some years ago, the jurisdiction of such cases pursuant to historic case law meant that around 90 per cent of these cases were heard by High Court judges of England and Wales assigned to the Family Division. This is no longer the case, with properly and inevitably family county courts across England and Wales entertaining such applications before circuit and even district judges. On one hand, this is all well and good, but on the other, there have been instances where such judges are not au fait with issues of habitual residence or the powers of their own court, never mind the jurisdictions of foreign courts, and have insufficient experience of Hague and wardship jurisdiction of an international nature to reveal a confidence when dealing with these applications, albeit they remain listed before themselves and are retained there.

The Judicial Studies Board of England and Wales has to acknowledge a need to assist county court judges by further training, otherwise those who represent themselves may find the well-meaning judge compounds their concerned applications and responses by being not adequate enough in all reality to offer a final decision with reasoned judgment after all.

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# Judicial interviews with children: a voice but not a choice

**T**here continues to be controversy about children's participation in decision-making post-separation; in particular, whether and how judges should meet children who are the subject of family disputes between their parents. Judicial meetings with children are now an accepted practice in Germany, Israel, New Zealand as well as some states in the US (eg, Ohio and California) and to some degree in the UK. Guidelines for judicial interviews have been developed for judges in some of these jurisdictions, and have recently been proposed by commentators for consideration elsewhere.<sup>1</sup>

This article reviews the different ways that children's perspectives and preferences can be shared in the post-separation decision-making process, with a particular focus on the controversy over the increasingly common practice of judges meeting with children who are the subject of these proceedings. Specifically, we discuss the results of our survey of Canadian judges about judicial interviewing of children, as well as discussing the empirical research on the experience with this practice in other jurisdictions. Reflecting the positive international experiences with judicial interviewing, we conclude that the rights and interests of children will be advanced if there is increased adoption of this practice, though it is clearly not appropriate for all cases. Further, family lawyers and mental health professionals have an important role in ensuring that children are appropriately involved in family dispute resolution and given the opportunity to meet with the judge.

## The context for the controversy

Article 12 of the Convention on the Rights of the Child<sup>2</sup> creates an obligation for governments to ensure that children are provided with an opportunity to express their views about decisions that affect their

well-being, consistent with their age, capacity and desire to participate. The social science literature and research on children's desire to be included suggests that they want to be kept informed and want their perspectives and views considered.<sup>3</sup> Yet, certain tensions remain between those that believe children need protection and nurturance and those that believe children have rights and need to be able to exercise their rights, particularly during family disputes that involve their well-being.<sup>4</sup> Most children want to be asked their opinions about the plans being made for their activities and living arrangements, though they generally do not want or expect to make decisions, and they should never feel pressured to 'choose' between their parents. In sum, children want a voice, but they generally do not want or expect a choice.

While many professionals express concerns about children meeting judges, opposition to the practice seems most pronounced in jurisdictions where it does not occur regularly. Research on the practice clearly suggests that children generally have better outcomes if they feel that they have a 'voice' in the process, but that they often report feeling ignored. Even if they have had a lawyer or assessment, a significant portion of children would also like to meet with the judge; though children are often anxious before they meet a judge, they usually report positively on the experience and there is no evidence that children are traumatised by meeting a judge. Children are often traumatised by being involved in high-conflict separations, but meeting the judge places the child in the same position vis-à-vis their parents as meeting a lawyer or assessor. Research has also shown that judges often find it helpful to meet children; while research on the experience of parents with judicial interviews with their children is limited, a recent Israeli study found that most litigating parents supported their children meeting the judge.<sup>5</sup> A German study suggests that most parents report relief that their child had met with the judge.<sup>6</sup>

### Hearing from children: international research

There are a number of ways that children can be involved in the family justice process. While much depends on the jurisdiction and legislation, if any, about how children are heard, typically children can:

- have their views conveyed through a trusted and reliable adult who provides hearsay evidence about the child's 'state of mind';
- have counsel, a guardian *ad litem* or an *amicus curiae* appointed for them;
- participate in a series of meetings with a mental health professional as part of an assessment process;
- meet with a lawyer or social worker who will then prepare a more focused 'voice of the child' report to reflect the child's perspectives and preferences;
- meet with a mediator; and
- meet with a judge.

Significantly, there is no research that demonstrates that, from a child's perspective, one method is superior, or that meeting a judge is any more stressful than meeting a lawyer or mental health professional. For children across the globe, the issue is to be *heard*.<sup>7</sup> For the adults around them the issue is how to *allow* them to be heard in a manner that is safe.

There is no single 'best' way to involve children in the process, and it may be appropriate to use more than one method as a case proceeds. The stage and nature of a case, the type of professional resources that are available, as well as the child's age and capacities, are important factors in determining how to engage a child. Further, children should be asked about how they would like to be involved. Research from Australia also suggests that when children's views are shared with parents involved in the mediation process, fathers – who are usually not the primary residential parents – are more likely to understand their children's needs and stay engaged with them. Research from Israel, where judicial meetings are now common, indicates that judges generally feel that they have a better understanding of cases if they meet with children, even though it is widely appreciated that a judge will not be able to gain as much reliable information about a child from a single interview as a mental health professional will obtain from several interviews as part of a full evaluation process. In Israel, as in Canada, judicial interviews are not intended to replace other

sources of information, such as child custody and access assessments or legal representation of children, but rather to complement them.

### The legal context for judicial interviews in Canada

As is common in many jurisdictions, legislation and case law in every province in Canada establish that a child's wishes are to be taken into account in making best interests decisions about custody, access or other aspects of their care. Further, the UN Convention on the Rights of the Child, which is recognised as part of the law of Canada, provides that a child 'shall ... be provided the opportunity to be heard in any judicial ... proceedings affecting the child, either directly, or through a representative'.

In Quebec, the Civil Code Article 34 explicitly states that children in family cases have the right to an 'opportunity to be heard' by the court. The Ontario's Children's Law Reform Act section 64 provides that judges 'may' interview children to learn their 'views and preferences'. In most provinces, case law has long accepted that judges have the discretion to meet children to ascertain their wishes, without the consent of the parties, but judges should avoid having a private interview that attempts to resolve factual matters that may be in dispute between the parents. While in most provinces judges have traditionally been reluctant to exercise their jurisdiction to meet children, some recent decisions have cited the Convention and emphasised that children have a 'right to be heard' in the family courts and meet with the judge.<sup>8</sup>

### Survey of Canadian judges

We surveyed judges attending a national family law judicial education programme about their views and experiences with interviewing children. There were 62 (35 males and 27 females) respondents to the questionnaire – almost two-thirds of the judges attending the programme – suggesting a high level of judicial interest and concern about this practice. Most of the judges did primarily family law, though some had mixed case loads.

Just over half (52 per cent) of the respondents had experience as a judge in meeting with a child in a family law case. In some measure, the variation in their practices reflected differences in the law, with judges from Quebec, with its statutory 'right'

for a child to be heard, generally having more experience with meeting children. Differences in availability of professional resources are also a factor, with a number of judges reporting that they do not feel that they need to meet with children because they have access to children's lawyers or mental health professionals who can interview children and present their views in court.

Although there are differences of judicial opinion and practice regarding meeting with children, even within jurisdictions, more judges are now engaging in the practice than a few years ago. About one-third of all respondents indicated that their attitudes or practices had changed in the past couple of years, with almost all of those who reported a change stating that they had started or increased the extent to which they engaged in the practice. They commented that they were more likely to meet children who are older, in cases where there is no assessment, when both parents consented to the interview, when the child requested it or there was urgency to the case (ie, the child moving to another locale).

### How judges interview children

Judicial meetings with children can occur at any stage of the proceedings, including at motions, pre-trial conferences, during the trial and post-trial. For example, some judges will meet with children after they have rendered a judgment to explain their decision, or write a letter to the child for this purpose (with copies to the parties).

Judges who meet with children generally expect to gain a sense of the child's personality and views from such meetings, and want to give the child an opportunity to ask questions. Judges generally also want to make clear to children that it is they, not the children, who must take responsibility for the decision.

While there is a growing trend for judges to meet with children, no judge considered it appropriate to meet with every child in every case. The majority of the judges reported that they always tell the child the purpose of the 'meeting' and that it would not be confidential. The most common reasons that judges gave for meeting with a child was to obtain their views and preferences, to meet the child and get a sense of their personality, and to allow the child to ask questions. About half the judges met the child in their chambers or in court with counsel present. Only a very few judges reported that they

meet with children outside the courtroom, for example, in their school or a nearby coffee shop. The vast majority of judges always have someone else present, such as a court clerk or child's counsel. Some judges, notably in Quebec and elsewhere in child welfare proceedings, are likely to meet the child in the courtroom with counsel for the parents present.

### Issues of fairness and confidentiality

Judges are clearly sensitive to wanting to provide the child with an opportunity to be heard, but also wanting to explain to the child the purpose of the interview with the child, and to emphasise that the judge is the final decision-maker. Many judges recognise the importance of discussing the issue of confidentiality with the child, but views about the extent of confidentiality were markedly varied.

The diverse views about confidentiality found in this study are similar to the results of earlier studies based on interviews with judges in Ontario and Ohio,<sup>9</sup> and British Columbia.<sup>10</sup> A survey of New Zealand cases also revealed that judges there do not always inform the parties of the child's views.<sup>11</sup> In contrast, a survey of judges in Australia,<sup>12</sup> where judicial interviewing of children is not common, expressed concern with the due process rights of the parents to know what children say to a judge. There are conflicting views and practices regarding the extent to which judges regard interviews as confidential, and how much information about them is shared with the parents about the interviews. This is an issue that clearly needs to be addressed in guidelines (or in legislation or appellate jurisprudence) to ensure a degree of consistency and fairness for both children and parents.

In our survey, a majority of the judges who meet children do not provide parents with a transcript or allow their lawyers to attend. Many judges have concerns about embarrassing children or potentially damaging their future relationships with a parent, and accordingly only provide the parties with a summary of the children's statements. This recognises that judicial interviewing is a practice unique to family cases: while the judge may rely on the information and insights obtained to formulate a decision, the evidence obtained is different from other types of evidence used in the justice system. The practice of only

providing parents with a summary of the child's statements, while keeping a full record for an appeal court, seems to adequately balance concerns about fairness to the parents and reliability against protection of the welfare of children who are the subject of litigation.

### Where do we go from here: lessons learned

It is significant that among the judges surveyed, more of them are meeting with children, albeit some tentatively, than was the case in Canada a few years ago, and more judges are considering doing this in the future. It is, however, also notable that some judges remain strongly opposed to this practice, and a number of others remain very cautious about starting to do it.

This study presents a window into the ongoing dialogue in Canada about judicial meetings with children and the tensions that continue to prevail. This study is limited and it may not be possible to generalise the results to all judges across Canada and attitudes and opinions continue to evolve as more research and practice about judicial interview with children continues. Although the response rate was high, only a relatively small portion of all judges in Canada attended this conference.

The one clear message that the judges gave that was unanimous is that if they are to be interviewing children, then guidelines, training and protocols must be developed for judges. Whether judges undertake the practice of meeting children or not, a common response from the judges is that there is a need for more research about the practice, and the development of protocols to provide guidance for judges in deciding whether, when and how to meet with children.

We argue that the time has come in Canada and other jurisdictions to focus on training all judges who deal with family cases and conducting research about the effects on parents and children as opposed to the

perceived benefits and risks as identified by judges, lawyers and mental health professionals.

As one judge commented: 'great tool [judicial interview] when used with wisdom and discretion'.

#### Notes

- \* The authors acknowledge the financial assistance of the Social Sciences and Humanities Research Council, Canada for their support.
- 1 N Bala, R Birnbaum, F Cyr and D McColley, 'Judges for children in family court: Guidelines for judicial interviews with children' (in press) *Family Law Quarterly*.
- 2 United Nations, UNGAOR 44th Session, UN Doc A/Res/44/25 (1989).
- 3 C Smart, 'From children's shoes to children's voices' (2002) 40(3) *Family Court Review* 307–309; R Birnbaum, N Bala and F Cyr, 'Children's experiences with family justice professionals and judges in Ontario and Ohio' (2011) 25:3 *International Journal of Law, Policy and the Family* 398.
- 4 RE Emery, 'Children's voices: Listening – deciding is an adult responsibility' (2003) 45 *Arizona Law Review* 621–627; JB Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10:1 *Virginia Journal of Social Policy and the Law* 129; R Parkinson and J Cashmore, 'Judicial conversations with children in parenting disputes: The views of Australian judges' (2007) 21:2 *International Journal of Law, Policy and the Family* 160.
- 5 See n 1, above.
- 6 Karle, Gathmann and Klosinki, 'Investigation into the practical implications of child hearings conducted pursuant to Section 50b of the German Act Governing Non-Contentious Proceedings' (2010) Department of Psychiatry and Psychotherapy in Childhood and Adolescence, University of Tübingen, Osianderstrasse.
- 7 R Birnbaum and M Saini, 'A qualitative synthesis of children's participation in custody disputes' (2012) 22 (4) *Research on Social Work Practice* 400–409; R Birnbaum and M Saini, 'A scoping review of qualitative studies on the voice of the child in child custody disputes' (2012) 20(2) *Childhood* 260–282.
- 8 *BJG v DLG*, 2010 YKSC 44, 324 DLR (4th) 376.
- 9 R Birnbaum and N Bala, 'Judicial interviews with children in custody and access cases: Comparing experiences in Ontario and Ohio' (2010) 24:3 *International Journal of Law, Policy and the Family* 300.
- 10 S Williams, 'Perspective of the child in custody and access decisions: Implementing a best interest and rights of the child test' (2007) 86:3 *Canadian Bar Review* 633.
- 11 P Tapp, 'Judges Are Human Too: Conservation Between the Judge and a Child as a Means of Giving Effect to Section 6 of the Care of Children Act 2004' (2006) 1 *New Zealand Law Reports* 35.
- 12 M Fernando, 'What do Australian family law judges think about meeting with children?' (2012) 26:1 *Australian Journal of Family Law* 51.

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# Breaking the gene of the Silent Generation through children parliamentarians in Nigeria

The label 'Silent Generation' was first coined in the 5 November 1951 cover story of *Time* to refer to the generation coming of age at the time. The Silent Generation is a generation of people born in the US between 1925 and 1945 during the Great Depression and the Second World War. Members of this generation experienced vast cultural shifts. The phrase gained further currency after William Manchester's comment that members of this generation were 'withdrawn, cautious, unimaginative, indifferent, unadventurous and silent'. There are several theories as to where the label Silent Generation originated. The children who grew up during this time worked very hard and kept quiet. It was commonly understood that 'children should be seen and not heard'.

Children in Africa, including Nigeria, can also be described as a silent generation, since they are seen but not heard. Children constitute about 71 million of the 140 million Nigerians (2006 census). In most Nigerian cultures, children are not allowed to participate in decision-making. They are not even allowed to contribute to issues and decisions that affect their lives. Apart from keeping the children at the rear, many children in Nigeria also experience early marriage, lack of education, poverty, child abuse, child labour, and social and political violence, among others.

However, with the passage of the Child Rights Act 2003 (CRA) in Nigeria, protection of the rights of the child received better attention. Under the CRA, a 'child' is any human being below the age of 18; this was derived from the provisions of the UN Convention on the Rights of the Child (1989) and African Charter on the Rights and Welfare of the Child (1990).

Under the Act, the ten basic human rights of a child in Nigeria are the right to:

- life;
- identity;
- freedom of association;
- freedom of expression;
- privacy;

- leisure and recreation;
  - education;
  - health and health services;
  - protection against inhuman treatment and exploitation; and
  - be free from every form of discrimination.
- These rights are grouped into four: survival rights, protection rights, development rights and participation rights.

## Survival rights

These include the right to life; identity; health and health services; the right of an unborn child to protection against any harm or injury caused wilfully, recklessly, negligently before, during or after the birth of that child; and to benefit from the estate of the deceased parents if either one of them dies intestate, having survived either one.

## Development rights

Under this, we have the right to free education; compulsory and universal primary education; as well as encouragement of the child to attend and complete secondary education; and rights to dignity of the child; privacy; leisure, recreation and cultural activities.

## Protection rights

This includes the right to protection against inhuman treatment and exploitation and to be free from every form of discrimination, through the prohibition of child marriage, infliction of tattoos and skin marks; exposure to use, production and trafficking of drugs and psychotropic substances; use of children in any criminal activity; abduction and unlawful removal and transfer of a child from lawful custody; forced, exploitative or hazardous child labour, including outlawing employment of children as domestic help outside their own home or family environment; buying, selling, hiring or otherwise dealing in children, for the purpose of hawking, begging for alms, prostitution, unlawful sexual intercourse,

other forms of sexual abuse and exploitation prejudicial to the welfare of the child.

**Participation rights**

Under this we have the right to freedom of association and peaceful assembly; freedom of movement; and freedom of expression. This has been entrenched particularly through the provisions on the establishment of the Nigerian Children’s Parliament, whereby children are elected into parliamentary offices from local to state and national levels. These parliamentarians are to represent Nigerian children on issues pertaining to and affecting the rights of the child.

**Mandate of the Children’s Parliament**

- To represent the voices, minds and aspirations of Nigerian children;

- To come up with high-quality supplementary advocacy for the survival, protection, development and participation rights of children;
- To deliberate on child-related issues and adopt child-friendly recommendations and forward to supervising ministry for consideration;
- To receive reports from peers and deliver same to the relevant authorities through the Child Development department; and
- To monitor issues involving child survival, development, protection and participation.

**Composition of the Nigerian Children’s Parliament at the national level**

The Federal Republic of Nigeria consists of 36 states and the Federal Capital Territory. At the national level, each state has two representatives, one each in the Senate and the House of Representatives, giving a total of 74 members in the national Children’s Parliament.

**Officers of the Children’s Parliament**

*Table 1: Composition of the Nigerian Children’s Parliament*

Senate President	
Speaker	
Deputy Senate President	
Deputy Speaker	
Senate Leader	House Leader
Deputy Senate Leader	Deputy House Leader
Chief Whip of the Senate	Chief Whip of the House
Clerk of the Senate	Clerk of the House
Chairpersons of the ten relevant committees of the Senate and the House, namely committees on: <ul style="list-style-type: none"> <li>• Survival</li> <li>• Development</li> <li>• Protection</li> <li>• Participation</li> <li>• Information, media and publicity</li> <li>• Ethics, rules and business</li> <li>• Water and sanitation</li> <li>• Millennium Development Goals (MDG)</li> <li>• National Agency for the Prohibition of Traffic in Persons (NAPTIP)</li> <li>• New Partnership for Africa’s Development (NEPAD)</li> <li>• (In Zamfara State, there is also a committee on Sharia Implementation)</li> </ul>	
Deputy Chairpersons of the Relevant Committees in the Senate and House	
Senators of the Upper House	
Representatives of the Lower House	
Sergeant At Arms of the Senate	Sergeant At Arms of the House

The Nigeria Children's Parliament was previously divided into an Upper and a Lower House; now they sit as a single parliament. Table 1 shows the hierarchy within the parliament and the members are ranked in descending order of importance.

It is heart-warming that the Nigerian Children's Parliament, now established in all 36 states, and the Federal Capital Territory provide a formal platform through which children may freely express themselves and have an input into the decision-making process of national issues that affect their lives; breaking the gene of keeping silent and making children not only seen but also heard.

### Highlights of the Children's Parliament Activities

#### *Representation*

Children Parliamentarians represent other children on issues that affect their rights and welfare in local, national and global meetings and conferences, including:

- Presentation of the views of Nigerian children to the Constitution Review Committee in 2006;
- Delegation to the 2nd Children's World Water Forum held in Mexico City, Mexico in March 2006;
- Participation at the National Conference on Water in 2006;
- Observers at the 52nd Commonwealth Parliamentary Conference held in Abuja, September 2006;
- Delegation at the Global Conference on Information and Communication Technologies for Education and Development;
- Delegation to the United Nations General Assembly Plenary Session on Children in New York, US, in December 2007;
- Delegation to the 5th World Summit on Media for Children in Johannesburg, South Africa, March 2007;
- Participation in the British Council 'Road to Davos' Programmes in London in January 2008;
- Attendance at the commemoration of Martin Luther King Jnr organised by the American Corner in January 2008; and
- Participation in the Climate Change Forum for Children in Copenhagen in December 2009.

The reports of the Parliamentarians from these meetings and conferences are submitted to appropriate authorities for implementation, thus making their voices heard.

#### *Advocacy*

Parliamentarians also have a mandate to advocate on issues that affect their rights and welfare and they do this in several ways, for example:

- Advocacy visits to states that are yet to pass CRA into law by members of the National Children's Parliament, so as to sensitise their counterparts in the affected states on the need for the enactment of the CRA in their respective states;
- Advocacy visit to the judiciary for the establishment of family courts where issues arising from CRA can be heard and determined;
- Advocacy on Child-for-Child Assembly – a school-based platform for promotion of children's participation that is currently being piloted in selected states and the Federal Capital Territory (from September 2009);
- Media advocacy on national television on HIV/AIDS as part of activities marking the International Children's Day of Broadcasting in 2007;
- Press interviews and dialogue sessions to air children's views on major national issues in Osun, Delta, Bayelsa and Ogun states.

#### *Deliberations and recommendations*

- In the years 2005, 2006 and 2007, sessions of the Parliament deliberated on issues such as the compulsory use of insecticide-treated nets in boarding schools, Almajiri,<sup>1</sup> HIV/AIDS, water and sanitation, child trafficking, passage of the Child Rights Law in different states and the establishment of Children's Parliament in the states;
- In March 2009, members had a special session on the marketing of food to children that marked the 2009 International World Consumer Rights Day;
- During the 2009 National Children's Day celebration, a capacity-building workshop was organised for members on parliamentary procedures and practice;
- In 2009, Members of the Parliament had a special sitting at the National Assembly on the theme: 'Expose Violence and Sexual Exploitation of Children: Uphold the Rights of the Child'. Resolution from the above sitting was forwarded to the President for consideration;
- Passing resolutions that protect the rights of the child and ensuring implementation by necessary authorities; and

- In 2009, members had a joint session with the adult honourable members of the House of Representatives in their chambers during the debate on the survival rights of children to mark the Children's Day.

### *Intermediaries*

Child Parliamentarians receive reports from peers and deliver same to the relevant authorities through the Child Development department;

- They serve as channels to the International Federation of Women Lawyers and necessary bodies to ensure violated children get legal redress; and
- Sometimes reports made to the Ministry of Women Affairs are taken to Social Welfare Department or the family court for redress.

### *Monitoring*

Parliamentarians monitor issues involving child survival, development, protection and participation.

- Two children Parliamentarians in Kwara State were paying interactive visits to hospital to sick children especially with eye diseases; and
- Establishment of programme to support indigent children.

### **Children's Parliament in Kwara State**

The activities of the Parliamentarians in Kwara State, Nigeria is undoubtedly significant and commendable in the protection and the defence of the rights of the child. Mention must be made of some of their work. For example, in 2007, Members of the Kwara State Children's Parliament passed resolutions that no child of school age should be found hawking during school hours and that all children up to five years must be given immunisation injections to prevent child mortality. The state government gave effect to these resolutions through implementation by the Ministries of Education and Health respectively.

Not only that, the establishment of the Kwara State Family Court in 2009 was a result of advocacy of the Children Parliamentarians to the Chief Judge of the State. Today, the family court sits to hear and determine issues arising from the State's Child Rights Law.

Also, in the same state, two National Parliamentarians who represented Kwara State served between 2008 and 2011 and, as

a legacy of their service to Nigerian children, the Kiddies Sight-Saving Endowment Fund was established in 2011, to treat and sponsor eye surgery free of cost for affected indigent children in Nigeria. No less than 35 eye surgeries at the cost of about US\$200 per eye have been sponsored. Currently, a child with a face tumour overlapping an eye is undergoing treatment (tumour and plastic surgeries) at the University of Ilorin Teaching Hospital, about US\$2,000 have been spent, also sponsored by the fund.

Thus, as most Nigerian cultures are not favourable to children and do not agree with children instituting matters against their parents in court, and a child whose rights have been violated may not even have the boldness to bring the matter before the public, these situations have made many children who have been abused suffer in silence. However, with the establishment of Children's Parliament under the CRA, it is encouraging to witness the many positive contributions that members of the Children's Parliament have made to national, legal and socio-economic issues that affect children in Nigeria, some of which have been mentioned above.

### **Challenges**

Not all activities of the Children's Parliament are straightforward. Some of the challenges faced are listed below.

#### *Poverty*

It is evident that even with the enactment of the CRA, children still suffer some forms of abuse, which range from street hawking, serving as house help and trafficking. Most of these children do this at the request of their parents as a way of survival.

#### *Lack of efficient manpower and expertise*

There is a lack of required expertise to man the family courts. Even where family courts have been established, the necessary judicial officers, support staff and other stakeholders including counsel to defend the rights of the child are not given the required training.

#### *Funding/political will*

Members of the Children's Parliament are coordinated and sponsored by the government. Lack of funds, especially from

the government, has hindered the regular meetings and activities of the Parliamentarians. Funds are needed to transport, accommodate and feed the Parliamentarians in meeting venues and also to publicise the resolutions made. Funds are also required in domesticating the CRA at state level, the establishment of family courts, making statutory implementation committees function and training of personnel for administration of child justice. In many states, the funding is not made available or at times only slowly supplied by the government. Thus, the political will of the government at federal, state and local government levels cannot be undermined in the implementation of CRA and in good performance of the Children's Parliament.

### Conclusion

The establishment of the Nigerian Children's

Parliament is novel. It is interesting to know that children representing others are sitting in Parliament to discuss issues that affect them and they also pass resolutions that are executed in society.

With the establishment of the Children's Parliament under the CRA, there have been many positive contributions that members of the Children's Parliament have made to national, legal and socio-economic issues that affect children in Nigeria; and one can safely say that the gene of keeping silent and to be seen but not heard has been cracked by the activities of Child Parliamentarians. However, it remains to be seen whether this gene can be completely broken in the face of unfriendly cultures and beliefs that children in Nigeria encounter every day.

### Note

1 In this context, Almajiri means 'destitute' – mainly young and teenage boys begging and loitering around the roads in some northern parts of Nigeria.

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## International commercial surrogacy: why Manji could not establish parenthood

India has become famous as a destination of international medical tourism and also as one of the countries where commercial surrogacy is 'legal', or 'legally permissible'. In 2008, a baby girl was born in India through international surrogacy after her Japanese parents' divorce. The girl, Manji, failed to establish a legal parental relation as she fell into a gap between the Indian and Japanese legal systems, and thus she became stateless. India has no statute that prohibits surrogacy; Japan on the other hand bans surrogacy and does not recognise such babies as the legitimate children of Japanese nationals.

Medical tourism has boomed and assisted reproductive technology (ART) is one of the most popular treatments that patients seek. The legal system governing ART varies in every country, and it is much easier now for people to go anywhere in the world to receive treatments that are more expensive or not available in their own countries. The choice on receiving medical treatment is surely something that the individual should decide. However, in international surrogacy cases,

the commissioning parents are often not sufficiently aware of the fact that the children may be at a disadvantage.

The United Nations adopted the Convention on the Rights of the Child in 1989 to protect the basic human rights of children. The Convention is widely accepted and Article 7 states:

- '1. The Child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity'.

However, neither Japan nor India could provide Manji with a nationality.

In 2005, the Indian Council of Medical Research (ICMR) published the National Guidelines for Accreditation, Supervision

and Regulation of ART Clinics in India (the 'Guidelines') permitting surrogacy, and stated the commissioning parties should be the parent of such children. So it was quite natural for Indians to think the Japanese commissioning parents were the legal parents of Manji. However, surprisingly, the Japanese couple got divorced before Manji's birth, and it was reported that they were not able to take Manji back to Japan. The Indian media reported that the baby Manji case was the first international abandoned surrogate baby case. In fact, the commissioning father did not intend to abandon Manji and the reason he could not bring Manji back was the difficulties in establishing the fatherhood and giving Manji Japanese nationality under Japanese law. On the other hand, the commissioning mother, who had been forced to conclude the surrogacy agreement by the husband, did not wish to raise Manji – she did not have any biological relation so her feeling is indeed understandable.

The Citizenship Act of 1955 of India states that if a person is born in India and at least one of the parents is Indian, the person may acquire Indian nationality. Under the Guidelines, the commissioning couple is the parents of a baby who was born through surrogacy, and because of the divorce of the commissioning couple, the 'mother' under Indian law did not exist at the time of the birth. Indian officials could not issue Manji a birth certificate with the mother's name kept blank, and without such an official certificate, the 'father' was not able to ask the Japanese Embassy to register Manji as his own child. Therefore Manji became stateless.

In India, the Guidelines have no power to compel obedience, and it seems that commercial surrogacy had spread rapidly before serious ethical concerns were raised. After the Manji case, the Indian Ministry of Health and Family Welfare published the Assisted Reproductive Technologies (Regulation) Bill 2008 (the '2008 Draft Bill'). The 2008 Draft Bill permits commercial surrogacy and establishes parenthood between the surrogate child and the commissioning parents (Article 34). For the protection of surrogate children, the 2008 Draft Bill states that children are the legitimate children of a couple, as long as they have a mutual agreement to bring them up as their own children. Articles 34(11), (19) and 35(5) regulate to protect children like Manji. Article 34(11) criminalises the refusal of surrogate babies, Clause (19) requires

the nomination of a domestic guardian for custody of an international surrogate baby and Article 35(4) states that in cases where the commissioning parents get divorced, the child is deemed to have parenthood with both members of the couple. Under the 2008 Draft Bill, commercial surrogacy has become even more popular, and attracted non-resident-Indians (NRIs) and foreigners, too. As the numbers of such international surrogacy increased, the demand for enactment became stronger. In August 2009, the Law Commission of India submitted a report on surrogacy to the Minister of Justice (Report No 228). It confirmed that commercial surrogacy is recognised and the names of the commissioning parents should be written as legal parents on the birth certificate. The 2008 Draft Bill was replaced with the the Assisted Reproductive Technologies (Regulation) Bill 2010 (the '2010 Draft Bill') being revised according to the Report.

The 2010 Draft Bill added some more regulations for international cases; for example, a requirement for a formal document to the Ministry of Foreign Affairs of the commissioning parent's home country (Article 34 Clause (19)), a prohibition on sending Indian surrogate mothers abroad (Clause (22)), and on the nationality of surrogate children born from an international gamete donation or a surrogacy (Article 35(8)). The document must show proof that the home country of the commissioning parents permit surrogacy, and must also state that the child will be able to enter the country as a biological child of the commissioning parent(s). Under Article 35(8), a surrogate child whose parent is a foreigner and who was conceived with a donated gametes is not deemed as an Indian national. Those regulations were a direct result of Manji and other similar cases. However, whether the consulate of the parent's home country issues such documents depends upon the policy of the country. The 2010 Draft Bill states the conditions to approve the parenthood and Indian citizenship, but if the commissioning parent's home country adopts *jus soli*, giving children the birth country's nationality only when the child was born inside the territory, the child becomes stateless.

In Japan, since the media reported the first Japanese surrogacy in 1998, the Japan Society of Obstetrics and Gynaecology has prohibited its members from conducting

surrogacies. The sectional meeting on ART of the Ministry of Health, Labour and Welfare of Japan on ARTs published its report in 2003; it recognised ART and IVF only for married couples and it prohibited surrogacy. However, being without expressly stated regulations of surrogacy's illegality, a certain number of Japanese people have tried to have their children through international surrogacy. There are two cases on international surrogacy in Japan.

### Case 1

In 2003, the media reported that a baby who was born from surrogacy in the US was not permitted to register as a legal child of a Japanese couple. The Ministry of Justice doubted its legitimacy because the couple was over 50 years old – the baby was of a donor egg and born from an American surrogate mother. This case was handled at the Family Court,<sup>1</sup> and then at the High Court;<sup>2</sup> the legitimacy was not recognised at either level. Under the conflict of laws of Japan at that time – Article 17 of the Horei – the law of the country where either the father or the mother has nationality is the applicable law which decides legitimacy, in this case, the Civil Code of Japan. The Civil Code requires the mother to actually deliver the child, so the commissioning mother is not the mother and the baby is not the legitimate child of the couple.

The applicable law for illegitimate motherhood was the law of nationality of the mother, and for illegitimate paternity, the law of nationality of the father (the Horei, Article 18). Under the Civil Code, the parenthood of an illegitimate child is fixed by a declaration of acknowledgment (the Civil Code, Article 779). Case law has defined that the maternity of an illegitimate child based upon the fact of delivery of the child and the procedure of acknowledgment was not necessary for a mother. So the surrogate child is not the legitimate child of any of the commissioning couple, without a delivery and a declaration of acknowledgment.

### Case 2

Another noteworthy case was that involving TV celebrities who appeared and talked openly about the matter on television. The wife underwent a hysterectomy due to cancer and tried to have their biological child by surrogacy. An American surrogate mother

delivered twin boys and a relevant court in Nevada issued a parental order. The parties brought a suit to register them as legitimate children of the couple because their attempt to register them as their legitimate children on the family registration was rejected by the Ministry of Justice. The Tokyo High Court did recognise the parental order of the US court under Article 118 of the Civil Procedure Code, and ordered the registration of the twin boys as legitimate children of the commissioning parents. However, the Supreme Court reversed<sup>3</sup> the decision, coming to the completely opposite conclusion of the High Court decision. The Supreme Court applied the Art 118 of the Civil Procedure Code, and then considered if registering them as legitimate children would be against public policy (Article 118 Clause 3). Finally, the Supreme Court found that approval of the legitimacy of children was related deeply to the public policy of Japanese society; therefore the parental relationship should be recognised only when the Civil Code approved it. In this manner, the Supreme Court denied the parental relationship between a baby born from surrogacy and the commissioning father. The Nationality Law (Kokuseki Ho) of Japan at that time gave Japanese nationality to a child whose father or mother was a Japanese national at the time of the birth, accordingly the twin boys could not acquire Japanese nationality. Article 2 of the Nationality Law was strictly interpreted at that time, acquisition of Japanese nationality through paternity was approved depending upon the existence of a Japanese legal father at the time of its birth. The Japanese father needed to submit an acknowledgement form before the birth of the child to fix the parenthood at the time of the birth. Generally in Japan, the father takes care of the procedure of acknowledgement after the birth of the baby, along with a family registration form. And needless to say, the commissioning parents did not submit an acknowledgment form before the birth, most likely they were going to register as their legitimate children. As the result, the twin boys had neither Japanese legal parents, nor Japanese nationality. The Supreme Court decision raised criticism but the decision followed the standard of the Civil Code that a legal mother was the woman who gave birth, and potential commissioning parents started to seek any other destinations and methods to have their children.

The Manji case shows the difficulties in regulating international issues with a statute of one country. The Nationality Law of Japan was amended in 2009 and it

relaxed the requirements, so children like Manji might be able to acquire Japanese nationality by an acknowledgement after the birth. However another child like Manji will surely fall into the gap between different legal systems. So we need to share information and prepare for gaps of legal

systems, and to cooperate worldwide to solve legal disadvantages for children.

#### Notes

- 1 Kobe Family Court Akashi Brunch judgment, 12 August 2004, Hanrei Jiho (Vol 1919), 107.
- 2 Osaka High Court judgment, 20 May 2005, Vol 61 Minsyu (no 2), 619.
- 3 Supreme Court judgment, 23 March 2007, Vol 61 Minsyu (no 2), 619.

## Challenges facing counsel for children in the context of the Hague Convention

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Appointment of a child counsel in family law cases has dramatically increased in the last decade. Judges and decision-makers are becoming more inclined to hear what the child or children want. With Canada being a signatory to the UN Convention on the Rights of the Child (UNCRC) and the Hague Convention on International Child Abduction (the ‘Hague Convention’),<sup>1</sup> Canadian courts also feel obligated to respect the voice of the child and ensure that children are heard regarding their legal affairs.<sup>2</sup> However, since counsel for children are not required to have any training in child psychology or development, there is the potential for an argument from the opposing side that the child’s voice through his or her counsel is not in fact the child’s true voice and that an expert would do a better job determining the views and wishes of the child.

Our recent case, *JS v RM*, 2012 ABPC 184 (upheld in *JS v RM*, 2012 ABQB 669) is now being appealed to the Court of Appeal on the grounds that an expert should have been appointed to assess the maturity of the child and his objection to being returned to his habitual residence. The appellant mother is arguing that the child’s counsel was not sufficiently trained to provide the evidence required to meet the test under Article 13 of the Hague Convention. While the Hague Convention provides no requirement for how the views of the child are to be heard, and courts around the world have accepted the child’s counsel to be sufficient in providing these views to the court, we are still faced with the challenge of determining

whether an expert would be better to ascertain the child’s views, or whether a child’s counsel be sufficient.

The aim of this article is to discuss the challenges faced by counsel for children, especially in Hague Convention cases. Outlining the Code of Ethics for Alberta and the general objectives behind representing children, by drawing from our own experience in Hague Convention cases and existing research, we will endeavour to present the issues that the family law Bar faces when dealing with child representation.

### Child counsel and their role

Paragraph 2.02(12) of the Law Society of Alberta Code of Conduct states:

‘Clients with Diminished Capacity

‘2.02 (12) When a client’s ability to make decisions is impaired *because of minority* or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.’

(Emphasis added.)

Law Society of Alberta, Practice Advisors: Guidelines for Representing Children states:<sup>3</sup>

#### ‘3. GUIDELINES

‘3.1 A Normal Lawyer Client Relationship is the Default Role

‘When a child is able to articulate a preference, opinion, or position a lawyer must, as far as reasonably

possible, maintain a normal lawyer client relationship with a child client.’

There is a similar presumption in the October 2012 Policy Manual of the ‘Legal Representation For Children And Youth’ (LRCY):<sup>4</sup>

#### ‘3.1.4.1 Role of Counsel

‘Counsel appointed by LRCY shall assume an instructional advocacy role when representing children and youth who are able to express a wish, opinion, or position unless there are conditions present that would preclude counsel from doing so. Counsel should assess each child or youth individually to determine whether there are conditions present that would preclude him or her from assuming the role of an instructional advocate. When instructional advocacy is not possible, counsel will exercise discretion in determining which non-instruction based role to assume. See Appendix 7 for further Guidelines on the Role of Counsel including conditions that may preclude instructional advocacy, information pertaining to interest based advocacy and various roles of counsel.’

Across Canada and internationally, it is generally accepted that counsel representing a child can adopt three different roles: friend of the court, a best-interests guardian, or traditional advocate.<sup>5</sup> Although in practice, some lawyers adopt hybrid approaches or vary their approach from case to case.

Bala, Talwar and Harris<sup>6</sup> conclude that there are advantages and disadvantages to each of the processes when it comes to hearing the child’s voice in the parents’ dispute. The ultimate decision about which method to use depends on the attitudes of counsel and the parents, the age and maturity of the child, the consistency and strength of the child’s wishes, as well as the resources available. The authors cite a number of competing factors to weigh when deciding what approach to follow in ensuring that the child’s voice is heard. These are:

- providing the court with as much accurate information as possible;
- minimising trauma to the child;
- ensuring a fair process for the parents;
- ensuring a fair process for the child; and
- resolving the dispute as cost-effectively as possible for the parties and the state.

In summarising the literature that discusses the different ways children’s voices are being heard in court (in the context of separation),

Rachel Birnbaum and Nicholas Bala state the following in their paper:<sup>7</sup>

**‘35** The existing research suggests great diversity in what children understand regarding the role of child legal representation and their individual experiences with legal representation. Each child has a unique experience and story to tell, and any one model of child legal representation is not appropriate for all children. Children want and need to be heard during times of parental separation and divorce. They want their advocates or representatives to provide clear and consistent communication with them about what is going on in their parents’ dispute; they want their stories to be heard; and they want to be kept informed about the outcomes of the dispute.

**‘36** It is still difficult to determine which methods are most effective in hearing the voice of the child in family law disputes – child legal representation, judicial interviews, support persons, child custody assessments, written statements or video and audio recordings – as there is little systematic research to date on any one of these approaches, and no empirical research comparing one of them with another. Further, questions remain about significant issues. For example, how should a child’s age and stage of development be taken into account in deciding what method should be used to hear the voice of the child? How can advocates listen to and understand children from diverse cultures or traditional strict religious backgrounds, or those with developmental delays or language barriers? How should non-verbal forms of communication with children (i.e., drawing, play, writing letters) be used? These are important questions as children vary enormously.

[...]

**81** We in Canada clearly need more discussion about child legal representation and what is the appropriate role for a child’s lawyer. In cases where children are old enough to express and communicate clear views, allowing lawyers to provide their own contrary opinions about what is in a child’s interests clearly disappoints the expectations of their clients and undermines the rights of children. In the

absence of adequate assistance from a mental health professional, there are also serious concerns about the qualifications of a lawyer to develop such a position. While a traditional advocacy role may well be appropriate for children who are older and expressing clear views, it is important to recognize that many children are too young, ambivalent or confused to express clear views, and there may nevertheless be value to having legal representation in some of these cases. Even where an older child is expressing clear views, there may be issues of alienation, abuse or family violence that make it appropriate for the court to discount these views; it may not be appropriate for counsel for a child to advocate an outcome that poses a real risk of harm to a child. However, in many cases children have the best understanding of their views and interests, and hearing those views can lead parents to a negotiated resolution or the court to the best litigated resolution, suggesting a presumption that counsel for children should be their advocates.’

### Child counsel and the Hague Convention

While there are similarities between hearing the voice of the child in Hague Convention cases and domestic custody cases, there are also significant differences. Hague Convention cases, unlike most domestic custody cases, are scheduled on an expedited basis. Where a two-hour Domestic Special Date in Calgary, Alberta is not available for five to six months (pending any cancellations), a Hague Convention case could be scheduled within a month’s time. Further, courts are directed to hear a Hague Convention case on an expedited basis; it’s not a choice they have, but a mandatory direction. The limited time makes it harder to seek clinical experts for children who can conduct a comprehensive ‘voice of the child’ report on such short notice. Further, the evidence related to the child’s maturity and development is much more limited than a regular custody case. Children are brought into the abducted country after having lived somewhere else for some time. Information about the child’s school, grades, friends and extracurricular activities are often not as readily available. Even if the child has been in the abducted country for some time, it would generally not be more than a year prior to the hearing of the Hague case. A

third difference, and sometimes one of the biggest issues faced by the hearing courts, is the language barrier. If children are not fluent in the language of the abducting country, it makes the experts’ and lawyers’ job much harder. While translators may be hired, more often, significant details and facts are ‘lost in translation’. Fourthly and maybe most importantly, where in domestic custody cases it is all about the child’s ‘best interest’, a Hague case is not.<sup>8</sup> Neither parent in a Hague case can be advocating for the child’s best interest because the object of the Hague Convention is to have the child returned to his or her habitual residence, unless certain exceptions are met. These exceptions do not include the child’s best interest.

The differences between a Hague case and a domestic custody case make the challenges faced by the child’s counsel even more daunting. In the limited time they have, seeking instructions from child/adolescent clients who may or may not be fluent in their native language requires more than sheer experience and prudence. While much has been written about the voices of children in custody dispute cases and the importance of a child’s counsel, literature is still scant in studying the importance of the child’s counsel in Hague Convention cases.

Merle H Weiner in her paper<sup>9</sup> discusses six reasons why counsel for children should be appointed in Hague Convention cases, apart from guaranteeing that the children’s interests are accounted for. Her reasons, summarised briefly, are:

- A child’s representative can help ensure that all of the evidence relevant to important issues, such as a ‘grave risk of harm’ defence, is brought to the court’s attention. The child’s representative acts as a fact investigator for the court, either directly as a guardian ad litem or indirectly as a lawyer for the child. For example, a guardian ad litem (an attorney) can review records of the foreign country’s proceedings, as well as the foreign law, and outline concerns about whether contact between the mother and child (or father and child) would be terminated if the child were returned. Gathering additional facts can be critical because the parties’ lawyers may not always gather all the relevant facts, especially ones that are harmful to their clients.
- Children need counsel in Hague cases because one of the Convention defences relates to the child’s own views. The lawyer can educate the child about the benefits

or disadvantages of stating his or her views, help the child develop his or her views, and assist the child in articulating his or her reasons for the views. Counsel can also inform the court about if/when the child would like to be heard, especially when neither parent intends on calling the child. Further, zealous advocacy for the child is essential in light of all of the factors that courts consider when deciding whether to heed or ignore a child's voice.

- Counsel may also help alleviate the stress that the Hague proceeding produces in the child by keeping the child aware of the process, the evidence and the law. Counsel can also advocate for procedures that will mitigate the child's discomfort, for example, it may be important for the child to finish the school year, or move prior to the beginning of the next school year etc.
- Counsel can also help secure the child's well-being while the case is pending. For example, the court may need to increase the child's contact with the left-behind parent, or impose conditions to prevent another abduction of the child by either parent.
- The child's representative may facilitate settlement between the parents as well. By emphasising the child's interests and proposing solutions that go beyond the zero-sum position of the parents, the child's representative may help the parents find a middle ground.
- Finally, appointing a representative for the child enhances the likelihood that the child will follow the order. The child's representative can also monitor whether the order's execution is unnecessarily harmful to the child and ensure the child's return is as smooth and fair as possible.

These objectives might not be achieved by the appointment of just a child psychologist or the judge's meeting with the children, or even the appointment of a social worker to hear the wishes of the children. Our recent involvement in two Hague Convention cases involving children (of the age and degree of maturity for their objection to be heard), confirmed to us the critical role played by counsel for the children. In one case, *RM v JS 2012 ABQB 669*, we were appointed as counsel for a ten-year-old child. While in the other unreported case (discussed further below), we were appointed as counsel for the abducting parent, and there was no counsel for the children (aged 11 and 13). Both cases were challenging because of the ages of the children involved and the potential

risks in their return. The cases reinforced in our minds the challenges that exist in representing children.

### Case study

#### *JS v RM 2012 ABPC 184; JS v RM 2012 ABPC 184*

In the summer of 2012, we were retained by Legal Aid Alberta to represent a ten-year-old Muslim boy from East Jerusalem, NS. NS's parents, both Muslims, were married in Israel in April 2001. The Hague case arose when NS's father did not send NS back to Israel after the end of his summer break in 2011. NS's father sought interim custody of NS and alleged that it was NS's wish that he not be sent back to Israel. The case was significant as it involved a Muslim Arab child living in a predominantly Jewish state. In addition, the father submitted that the parents as Muslims were answerable to the Sharia Law Court in Jerusalem. The father questioned whether NS's mother had 'rights of custody' under the Hague Convention where Sharia law provides that the father retains full custody of the child until at least 12 years of age. Our role as counsel for NS was rather limited. We had to ensure NS's wishes were brought to the attention of the court, and to determine whether he was in fact of an age and degree of maturity for his wishes to be considered by the Court. As NS's counsel, we had to ensure that his wishes were separate and independent from those of his parents.

We consulted with Hanita Dagan, a well-respected child psychologist in Calgary, who has prepared numerous 'voice of the child' reports for the court. Dagan provided us with a list of questions to ask NS, to determine the independence of his views and his maturity. As NS's counsel, we argued that Article 13 of the Hague Convention and Article 12 of the UNCRC applied. We submitted case authority from Canada, as well as international Hague cases to support our submission to the Court that it considers NS's views before deciding whether to return him to Israel under the Hague Convention. While views of children are more likely to be taken into account when children are closer to the age of 15, recently, courts have been very clear in stating each child's maturity is to be considered independently, and no minimum age can be adopted as to when children's views are to be considered. We submitted that NS was in fact of an age and degree of maturity for his views

to be considered. We used excerpts from our interview with him that clearly reflected his maturity in our oral and written submissions to the court.

After a full-day hearing on 8 June 2012, the Court reserved its decision. On 3 July 2012 His Honour Judge Richard O’Gorman of the Provincial Court of Alberta gave his decision in favour of NS and refused to order his return to Israel from where he was considered to have been ‘unlawfully removed’. The Court held that Article 13 of the Hague Convention applied. The Court was clear that its decision was about this one child in very unique circumstances.

The mother in Israel then appealed Judge O’Gorman’s decision to the Court of Queen’s Bench of Alberta in August 2012. Different counsel for the mother raised a new argument on the appeal, namely that the English decisions relied upon by Judge O’Gorman were based upon different domestic law and that the law on this defence is applied differently in Canada. On 30 October 2012, the Honourable Madam Justice C Kenny of the Alberta Court of Queen’s Bench dismissed the mother’s appeal.<sup>10</sup>

The mother’s counsel filed a further appeal to the Alberta Court of Appeal on 3 December 2012. Among the grounds of appeal, the mother alleges the court erred in considering the voice of the child, that the child counsel was not adequately trained to hear the voice of the child and that an expert was required. The appeal will not be heard until autumn 2013.

### *Mexican Hague Case (Court of Queen’s Bench of Alberta May 2013) – unreported*

In another recent Hague Case, involving a mother who fled from Mexico with her three daughters (aged 11, 13 and 17) and was admitted to Canada as a refugee, the language barrier made our job as counsel for the mother extremely challenging. From collecting relevant evidence to understanding the mother’s account of what had happened, we were often left with two to three versions of the same story or were not given significantly relevant evidence until the eve of the hearing. Even when it came to her daughters, the mother was convinced that they were not fluent in English, or so she explained to us through an interpreter. No counsel was appointed for the children, however, as counsel for the mother, we were satisfied that the 11 and 13-year-old daughters

were old enough to have their maturity assessed and their views considered. The opposing party contested a psychologist’s report on the ‘voice of the child’ stating it was unnecessary and would delay the Hague proceedings, which are meant to be expedited. Given the direction taken by the Alberta courts, it was expected that if the report suggested the girls wanted to remain in Alberta, it might be the deciding factor, which would not be favourable to their father, who was left alone in Mexico and applying to have them returned.

Even though the two girls (the 17-year-old was not part of the Hague case) had been in Calgary for over a year, and had been in the primary care of the mother since before that (thus an opportunity for an unbalanced view against the father), the Justice of the Court of Queen’s Bench had no difficulty in ordering a ‘voice of the child’ report to be conducted prior to the hearing. In addition to assessing the girls’ maturity and any potential coaching by either parent, the psychologist was also asked to explain to the girls what a return order meant, and the difference between a custody and a Hague hearing. The psychologist had no issue understanding them, contrary to the mother’s claim, and was confident there were no language barriers with either of them. When the psychologist submitted her report however, to our surprise, the daughters had expressed their desire to return to Mexico. In reading the report, we realised the psychologist had not told the girls a return to Mexico would mean being separated from the mother, whose life was threatened should she return. Given this significant fact missing in the psychologist’s discussion with the girls, we made another application to the Court of Queen’s Bench to have the report amended so that the psychologist could tell the girls a return would mean being separated from their mother. The application was granted. The new report resulted in the psychologist being more convinced that the girls wanted to return; however, they were being pressured by their mother to stay. This report significantly weakened the mother’s defence and made the father’s application even stronger. The hearing still proceeded.

As counsel for the mother, we argued the girls should not be returned because of the grave risk of harm under Article 13(b) and the risk to their fundamental freedoms and human rights (particularly as Convention Refugees) under Article 20. Their mother had

been threatened by the father and his family with firearms and had narrowly escaped death at their hands on two occasions. Because of the father's political connections, he was not prosecuted on either occasion. Despite the evidence presented to the court, based on the girls' desire to return to Mexico, the father's application under the Hague Convention was granted and the girls were ordered to be returned to Mexico. While the court was convinced that the mother's life would be at risk should she return, the court did not find the girls were at risk.

While preparing for the trial, and even after the granting of the decision, we wondered how the case would have played out had the girls been represented by counsel. Would our work have been reduced because we weren't required to advocate for the girls' rights, or would counsel have made our case even weaker by advocating the girls had no life-threatening risks and should be returned? Irrespective of the direction counsel for the girls would have taken, we believe the hearing may have been more balanced in terms of representing the daughters. Our advocacy to find an exception to the return was as counsel for the mother, and thus somewhat biased. Lastly and perhaps most importantly, we believe a child's counsel may have done a better job explaining the Hague Convention to the girls and providing them with all the information they needed before they stated their objection. What the psychologist did in two attempts, counsel for the child *may* have accomplished in one meeting.

### Challenges

Through our own experience and those of our colleagues, it has become obvious that representing children requires much more than advocacy and knowledge of the law. Counsel for children play a critical role in ensuring children's views are presented to the court and their interests are well protected, especially in Hague Convention cases. Below are a few of the challenges that we believe require the immediate attention of law-makers to ensure children continue being fairly represented and counsel for the children do not fall short in their role of advocating for children:

- In seeking instructions from children/adolescents, how does counsel ensure the opinions are the child's exclusive opinion and not influenced by their parents?
- When there is more than one child involved

and each child has a different opinion regarding a return, which view does counsel advocate for the children? Should each child be represented by separate counsel?

- How does counsel for the child ensure the child is mature enough for his or her views to be heard? What questions are to be asked and what answers guarantee sufficient maturity to satisfy the exception under the Hague Convention?
- If the child has misconceptions about a particular country, or life with a particular parent, how does counsel ensure those misconceptions are corrected? Or is counsel not required to correct those misconceptions?
- In deciding what role counsel takes (friend of the court, best-interests guardian, traditional advocate or hybrid), what process does counsel go through to ensure consistency and fairness for each child?

In our practice, we have tried to overcome some of the challenges by consulting with experienced child psychologists who specialise in the area of family litigation. By taking instructions from these experts and following their guidelines we hope to minimise the shortcomings in seeking instructions from children/adolescents. Until a proper mechanism is put in place for representing children, or until counsel are required to go through specific training for representing children, involvement of a child psychologist seems almost essential to ensure counsel for children are able to accurately understand the children's voices and advocate for them.

### Conclusion

There are no longer any doubts about the importance of including the voice of children in custody and Hague Convention cases. The challenges for the family law Bar now concern how to include children and how to voice their wishes to the court. The Law Society of Alberta directs that 'When a child is able to articulate a preference, opinion, or position a lawyer must, as far as reasonably possible, maintain a normal lawyer client relationship with a child client'. How does counsel determine whether a child is articulating their preference without any pressure from either parent? Or that their views are independently their own? Consulting with an experienced child psychologist who specialises in dealing with children from

separating/divorcing families often provides counsel with most of the information they need to conduct a thorough interview with a child/adolescent. Having a list of questions to follow or behavioural signs to look for can provide counsel with the necessary skills to take instructions from children and advocate for them.

Children today are much more informed than they were ten years ago. Ensuring children are fairly represented in court and their opinions and objections are adequately voiced can make a significant difference in the decision-making process for the judge. Further, when a child knows his or her opinions are being heard, the damage resulting from litigation can often be minimised. While researchers study the best methods to include children in litigation and what processes to undergo when determining what method to choose in each case, counsel for children should consult with child psychologists to ensure they can avoid problems inherent in representing children.

#### Notes

1 Hague Convention on the Civil Aspects of International

- Child Abduction, 25 October 1980, Can TS 1983, No 35.
- 2 *BJG v DLG* [2010] YJ No 119 at paras 2 and 3.
- 3 Law Society of Alberta; Practice Advisors: Ethics. Available at [www.lawsociety.ab.ca/lawyers/practice\\_advisors/practice\\_ethics/practice\\_advice\\_representing\\_children.aspx](http://www.lawsociety.ab.ca/lawyers/practice_advisors/practice_ethics/practice_advice_representing_children.aspx).
- 4 Government of Alberta: Legal Representation for Child and Youth. October 2012. Policy Manual. Available at [http://advocate.gov.ab.ca/home/documents/2012\\_October\\_Policy\\_Manual\\_Final.pdf](http://advocate.gov.ab.ca/home/documents/2012_October_Policy_Manual_Final.pdf), at 15. LRCY or 'Legal Say' is a service that is provided to young people through the Office of the Child and Youth Advocate (an independent officer to the Alberta Legislature under the new Child and Youth Advocate Act of Alberta). The services LRCY provides are available at <http://advocate.gov.ab.ca/home/Background.cfm>.
- 5 Rachel Birnbaum and Nicholas Bala, 'The Child's Perspective on Legal Representation: Young Adults Report on their Experiences with Child Lawyers' (2009) 25 Rev Can D Fam 11–71 at para 37.
- 6 Nicholas Bala, Victoria Talwar and Joanna Harris, 'The Voice of Children in Canadian Family Law Cases' (2005) 24(3) Can Fam LQ 221, cited in Birnbaum and Bala, at para 14.
- 7 See above, n 6.
- 8 Merle H Weiner, 'Intolerable situations and counsel for children: Following Switzerland's Example in Hague Abduction Cases' (2009) 58 American University Law Review 335 at 380.
- 9 *Ibid* at 383.
- 10 *RM v JS* [2012] AJ No 1148.

## Custodial tussles and the unilateral religious conversion of children in Malaysia

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**M**alaysian marriages are subject to a dual legal system. Non-Muslims are governed by the Law Reform (Marriage & Divorce) Act 1976 whereas Sharia law governs Muslim marriages.

The existence of these two parallel systems enables a spouse who had contracted a civil marriage to convert to the Islamic faith using this as a platform for 'jurisdiction shopping'.

What is frequently done is the Muslim spouse unilaterally converts the children of the marriage under a shroud of secrecy without the knowledge of his non-Muslim spouse. The Muslim spouse then refers custody issues (via a *hadanah* or custody application) to the Sharia court as a means of wresting custody of the children, in addition

to evading financial responsibilities imposed upon him under the civil law. Unsurprisingly, this violates the rights of the non-Muslim parent, the child(ren) and is clearly unconstitutional.

The Malaysian Federal Constitution provides:

Article 12(3): 'No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than *his* own'; and

Article 12(4): 'For the purposes of Clause (3), the religion of a person under the age of eighteen years shall be decided by *his* parent or guardian.' (Emphasis added.)

These two articles are read with Article 160

(Interpretation provision) and the Eleventh Schedule, which states, inter alia, that ‘words importing the masculine gender include females’; and ‘words in the singular include the plural, and words in the plural include the singular’.

Further, section 5 of the Guardianship of Infants Act 1961 gives both parents equal parental rights and authority in relation to the custody or upbringing of the infant children.

It is trite that the Sharia court has no jurisdiction to determine issues relating to non-Muslims who, in turn, cannot be compelled to submit to the jurisdiction of the Sharia court. State Islamic law enactments, such as section 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993, stipulate that a Sharia High Court’s civil jurisdiction relates to ‘actions and proceedings in which all the parties are Muslims’.

However, in recent years, non-Muslim spouses have faced an uphill battle to have an equal voice particularly in the area of custody and guardianship of children, including the determination of their religion and upbringing.

This is reflected in a string of unfortunate court decisions, which have seen judges interpreting Article 12(4) literally to mean only one parent may convert a child. This encourages the exploitation of the judicial system by the Muslim parent.

One such decision is that of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2004] 3 CLJ 516 High Court. The brief facts of that case are as follows:

Shamala is a Hindu mother whose husband converted to Islam in 2002. They had been married for four years and they had two infant children. Unbeknown to her, he had converted their children to Islam. She filed for a custody order from the civil High Court. The husband had appeared in the High Court and sought an adjournment, failing to disclose that he had applied to the Sharia court for a *hadanah* (custody) order.

In May 2003, Shamala’s husband obtained an ex parte *hadanah* (custody) order from the Sharia court, when custody proceedings were already under way in the civil court.

In July 2004, the civil High Court granted day-to-day custody of the children to their mother, on condition that she raise her children as Muslims and not expose them to her own Hindu faith.

The judge dismissed Shamala’s application for a declaration that the conversion of her

two children to Islam had violated her equal right, as their parent, to determine their religious upbringing.

As the children were now Muslims, the High Court held that a Sharia court was the only forum to determine the validity of their conversion. However, the Sharia court lacked the jurisdiction to hear Shamala, a non-Muslim. This left her with no legal redress and she has since left the country with the children.

The Court of Appeal pursuant to Article 128(1) of the Federal Constitution, referred by the consent of all parties, five constitutional questions for deliberation by the Federal Court:

- the validity of the conversion;
- the conflict between Sharia and civil laws governing conversion and family matters;
- whether the Administration of Islamic Law (Federal Territories) Act 1993 runs contrary to the Federal Constitution when a parent converts a minor;
- whether the High Court or the Sharia Court has the authority to make conflicting orders; and
- where would the non-Muslim parent seek remedy when the Muslim spouse had converted their child from a civil marriage.

However, on 12 November 2010, the Federal Court (as reported in *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2011] 1 CLJ 568), struck out the reference on the basis that Shamala was in contempt of court by remaining out of the country and had failed to give her husband access to the children pursuant to prior court orders.<sup>1</sup>

### Recent landmark decision

The latest in the series of conversion cases culminated in a landmark decision delivered by the Malaysian High Court at Ipoh on 25 July 2013 in the case of *Indira Gandhi v Mohd Ridzuan Abdullah*.

In 2009, Indira’s estranged husband had unilaterally converted their three children (then aged 12 years, 13 years and 18 months) to the Islamic faith, but the said application was made in the children’s absence. In 2010, the Court granted custody of the children to Indira. Thereafter, the matter proceeded to full trial on the children’s conversion to Islam. Recently, the court nullified the religious conversion of their three children in 2009. The judge had declared the conversion ‘unlawful and unconstitutional’ as it was done

without the mother's consent, breaching the following Articles 3, 5 and 11 of the Federal Constitution:

- Article 3 states while Islam is the religion of the Federation of Malaysia, other religions may be practised in peace and harmony in any part of the Federation;
- Article 5 states no person shall be deprived of his life or personal liberty, save in accordance with the law; and
- Article 11 states that every person has the right to profess and practise his or her religion.

The Court also applied the *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832 on Malaysia's ratification of the UN Convention on the Rights of the Child, and the UN Convention on the Elimination of All Forms of Discrimination Against Women, imposed on Malaysia a legal obligation to give effect to the rights set out in those Conventions.

This is a welcome and historic decision which lauds well for multi-ethnic and multi-religious Malaysia. The judge's pronouncing judgment said:

'This decision is not a victory for anyone but a page in the continuing struggle of all citizens to find that dynamic equilibrium in a country of such diverse ethnicities; pursuing peace in less than a homogeneous society, giving space to one another where religious sensitivities are concerned, tolerance and respect to our neighbours in pursuit of the Truth and Reality. Let God be God and let him work sovereignly in the lives of our children; let our children be our children and the adults they will soon become in the fullness of time. Let them take responsibility for their actions in seeking and finding him though as the poets say, he is not far from each one of us. Whilst we may be confident of the journey we have taken, for faith is

the assurance of things hoped for and the conviction of things not seen, yet we must appreciate that others may take a different path. That aside love, peace and harmony should reign supreme in our hearts and in our homes knowing that our differences need not divide us and that in seeking the divine, we must also seek to understand our neighbours better, confident of the fact that there is no compulsion in religion and that whatever faith we belong to, we shall always have the highest regard for another and desire their greatest good.'

Following from this, the Malaysian Bar Council has called upon the various state governments to repeal unconstitutional provisions for unilateral conversion in their respective state enactments. The relevant enactments should clearly state that the Sharia court has no jurisdiction to hear any matters relating to a civil marriage. In Shamala's case, there were conflicting orders issued by the Sharia and civil courts to the respective spouses.

There is also an urgent need for the Law Reform (Marriage and Divorce) Act 1976 to clearly provide for all issues relating to the marriage to be determined under the civil law based on the religion of the parties at the time of solemnisation of the marriage.

Clearly now, with the Indira Gandhi case, if the parents cannot jointly agree on the child's religion, the status quo before the parent's conversion should be maintained. As Malaysia has also ratified Article 8 of the UN Convention on the Rights of the Child, this protects the child's right to preserve his or her identity, until such time that he/she reaches an age to decide.

#### Note

- 1 See also, *Subashini Rajasingam v Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1 Federal Court.

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## Book review

### *Surrogacy in India – A Law in the Making\**

by Anil Malhotra and Ranjit Malhotra

Universal Law Publishers, 2013

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The brothers Anil and Ranjit Malhotra are among the best-known Indian lawyers in the UK. Having studied at the School of Oriental and African Studies in London, they are frequent visitors to our shores, playing a full part in international conferences and seminars and finding time amid their busy legal practice to co-author books on the law affecting non-resident Indians (NRIs) – a diaspora numbering many millions. They have now produced a fourth book, exploring how the law struggles to keep up with technology in an area involving the deepest human instincts and feelings.

Childless couples have long resorted to adoption, but adoption across national boundaries can be extremely difficult. The British immigration rules only recognise overseas adoptions that have taken place in a country on a designated list dating back to 1973, which is badly in need of updating. The custom of inter-family adoption, whereby a childless couple will adopt the child of a close relative who has one to spare is particularly prevalent within the Hindu and Sikh communities, but in *Radhika Sharma v ECO, New Delhi* [2006] EWCA Civ 89, the Court of Appeal in London upheld the refusal of a visa for an Indian couple based in the UK to bring over the niece whom they had adopted in India. As outlined in the Malhotras' book, the matter was taken up at the European Court of Human Rights, and in 2006, the British Government gave in, agreeing to pay all the costs incurred by the family. But that was just one case. The immigration rules themselves remain as inflexible as ever.

Inflexibility over adoption can be seen in India, too. As the Malhotras explain, the Hindu Adoption and Maintenance Act 1956 prevents non-Hindus from adopting Hindu children. In recent years, however, developments in science and technology have enabled people to become biological rather than adoptive parents, despite problems with fertility and conception. Sperm from an anonymous donor can come to the rescue, although a donor who was not anonymous received a shock a few years ago when, having donated his sperm to a lesbian

friend who wanted to bring up a child with her partner, the Child Support Agency subsequently pursued him for child maintenance.

*In vitro* fertilisation (IVF) is a more recent development, the first 'test tube' baby, Louise Brown, having been born only in 1978. But what if the woman who supplies the egg cannot, after it has been fertilised, have the embryo implanted in her own womb? That is where a surrogate mother is needed, and that is the focus of this timely and lively book. It is much cheaper to find a surrogate mother in India than in countries such as the US and the UK, so couples, whether of Indian origin or not, have been coming to India for this purpose in increasing numbers – so much so that the Supreme Court has taken note of the pejorative terms being bandied about, such as 'wombs for rent', 'outsourced pregnancies' and 'baby farms'.

The Malhotras give vivid examples of the problems that can arise. An embryo cultured from a couple in Japan was accepted by a surrogate mother in Ahmedabad, but when the baby was born, the couple had divorced and no longer wanted it. The Japanese grandmother came along, however, wanting to take the baby away and look after it herself. This proved very difficult. The Supreme Court had to direct that an 'identity certificate' be issued for the baby in order for it to be taken out of India, and it is unclear whether the baby has got Japanese nationality. A gay Israeli couple, the sperm from one of whom was used to initiate a surrogate pregnancy in Badra, had great difficulty bringing the baby to Israel, where gay marriage is not recognised and gay couples are not allowed to adopt children. Two children born to surrogate mothers in India had less trouble being issued with British passports in order for them to join their parents in the UK, but a High Court judge still had to grant parental orders in December 2011.

Despite such difficulties, the market for Assisted Reproductive Technology, to use the all-embracing term, is booming in India, and as the Malhotra brothers complain, it is completely unregulated. There are only non-binding

guidelines laid down by the Indian Council of Medical Research. Very recently, however, new visa regulations have come into force, which limit the issue of a medical visa for the purpose of making surrogacy arrangements to married couples, whose marriage has subsisted for at least two years. This will not be available to unmarried couples, gay couples or single people who want to commission surrogacy, and they will not be allowed to use a tourist visa for this purpose. The restrictions emanate from the Ministry of Home Affairs, and are purely an exercise of executive discretion, without any involvement by the democratically elected legislature.

The legislature *is* proposing to get involved, however, with the 2010 publication of the Assisted Reproductive Technology (Regulation) Bill. As the Malhotra brothers acknowledge, the aim is laudable, to regulate the private clinics that have been flourishing unchecked in a way that is wide open to abuse. But the authors subject the Bill to a withering critique, showing up its many weaknesses and lacunae. One hopes that these criticisms will be taken into account when the Bill makes its way through the Indian Parliament. Its passage has not yet started, so the opportunity to make changes is there.

Meanwhile, Anil and Ranjit Malhotra continue to be active in all areas concerning the cross-border welfare of children. As recently as in May this year, they were the instigators of an international symposium in New Delhi, at which eminent jurists and experts from the UK, Australia, the US and elsewhere called upon the Indian Government to sign up to the Hague Convention on International Child Abduction. One suspects that the unflagging energy of the Malhotra brothers will in due course produce another book on children and the law, a hot topic in many countries, including our own, where the Home Office now has a duty to 'safeguard and promote the welfare of children', even if they are here unlawfully. But for now, the reader may turn to *Surrogacy in India* for a fascinating overview and analysis of the situation in the only country in the world that is proposing to legalise commercial surrogacy.

**Note**

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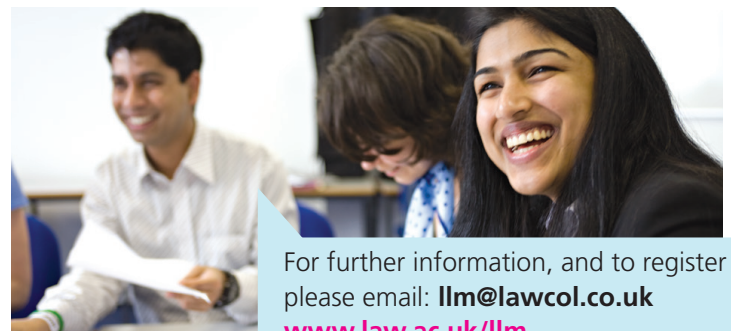
#### S-mode modules

- Start in January or July each year
- Online study with one-to-one online supervision from a University tutor
- Nine units per module
- We supply an extensive suite of user-friendly, practical course material including electronic learning aids

### You choose your pace of learning

- Modular course design enables you to determine your own pace of learning
- S-mode modules start in January and July each year

**Register now and take that step for educational and career development**



For further information, and to register please email: [llm@lawcol.co.uk](mailto:llm@lawcol.co.uk)  
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Module	First available start date
Business, finance and the legal services market	January 2014
International intellectual property practice	January 2014
International commercial legal practice	January 2014
International public companies practice	January 2014
International capital markets and loans practice	January 2014
International mergers and acquisitions practice	January 2014
International antitrust practice	January 2014
International business organisations	January 2014
International arbitration practice	January 2014
International joint ventures	January 2014