1GC *newsletter*

ISSUE 19

WELCOME

TO THE SPRING 2015 EDITION OF THE 1GC NEWSLETTER

I am very pleased to introduce the latest 1 Garden Court Family Law Chambers newsletter, which focusses on international issues. 2014 saw Chambers celebrate our 25th Anniversary with over 250 members, former members and guests toasting this significant achievement at a memorable reception at the Victoria and Albert museum last June. The event was a chance to recognise our success since foundation by Alison Ball QC and others, and to thank those who have been instrumental in our growth and rise to prominence.

As we look to the future, we recognise the impact of an ever more mobile and connected global population, and the increasing international dimension this brings to all areas of Family Law. This is reflected in the knowledge and expertise of our various practice groups, and hence forms the theme of this edition of the Newsletter. I very much hope you enjoy the enclosed articles from Julien Foster on International Care, from Elizabeth Szwed on Care Proceedings and Brussels II revised, from Deirdre Fottrell QC on Revisiting Habitual Residence, and from Eleri Jones who has written about EU Maintenance Regulations. Julien attended the International Bar Association Conference in Tokyo, as did Charles Geekie QC whose brief report will also be of interest. A real highlight of 2014 was seeing Marlene Cayoun awarded the Family Law Young Barrister of the Year prize at the Jordans Family Law Awards in October; this newsletter includes a short interview with Marlene.

We received fantastic news in January 2015 of no fewer than 4 Silk appointments, which we believe is a record for a specialist Family Law set. Our sincere congratulations go to Andrew Bagchi QC, Darren Howe QC, Francesca Wiley QC and Deirdre Fottrell QC. Over the last 12 months or so Chambers has been very pleased to welcome Nasstassia Hylton, Gemma Kelly, Deirdre Fottrell, Daisy Hughes, Jeni Kavanagh, Duncan Watson, Louise MacLynn, Pamela Warner and Susan George – all of whom bring strong, established practices. In addition, we welcomed Jessica Bernstein and Marlene Cayoun, and Oliver Woolley and Patrick Paisley, on completion of their respective pupillages.

Members of Chambers have continued to appear in leading cases over the past few months and a list is provided in illustration and for research purposes. I do hope you welcome this newsletter as a timely update from us, and find it beneficial to your practice; I look forward to working with you throughout the remaining year.

JOE TURNER
Chief Executive

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REVISITING HABITUAL RESIDENCE – THE COURT OF APPEAL DECISION IN RE H

By Deirdre Fottrell QC

"the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce"

Over the past 18 months the Supreme Court has considered the issue of habitual residence in three cases **Re A (Children) [2013] UKSC 60; Re L (a Child; Custody; Habitual Residence) [2013] UKSC 75 and Re LC (Children) [2014] UKSC 1**. It was assumed that the trilogy of cases had settled the test of habitual residence in respect of children and most notably the Supreme Court have emphasised that the question of habitual residence is essentially one of fact rather than being a legal test. At the beginning of 2014 it appeared therefore that each case in which the issue arose would fall to be determined according to the particular circumstances of the parents and the child.

However the Court of Appeal was required to refine the parameters of the test again in the case of Re H (Jurisdiction) [2014] EWCA 1101. In particular the case required it to decide whether in light of trilogy of cases determined by the Supreme Court there continues to be a rule in English law that a parent cannot unilaterally change the habitual residence of a child. A second question which the Court revisited was the application of the Brussels II Regulation (BIIR) provisions in respect of jurisdiction to countries outside of the European Union. In respect of both questions the Court provided further guidance as to the development of these rapidly evolving areas.

As noted above in the UKSC decisions that Court laid out clear guidance for other courts and practitioners in the field of international child law. In particular in Re A Baroness Hale noted in considering how the court should determine a child's habitual residence that '*the factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce*' [see Black LJ paragraph 27 quoting from Re A paragraph 54 and Re L paragraph 20]. It was against this backdrop that the Court of Appeal considered whether the decisions of the UKSC required any refinement or clarification. The decision in Re H is therefore of some interest and significance to those practicing in the area of private international law generally and abduction in particular.

BACKGROUND

The factual history was unusual. The appellant was the father of two young children who were born in the UK but at the time of the application to the High Court they had been living with their mother in Bangladesh for some five years. The children had left the jurisdiction of England and Wales in 2008 when they were aged 14 months old and 6 weeks old. The father had returned to the UK alone. Between 2008 and 2012 he made three visits to Bangladesh spending about two years in that jurisdiction during that time. A significant feature of the case was that the father had only issued an application in the English Court for the children's return in February 2013 and the time lapse between his return without the children and the application to the English Court featured heavily in the judicial analysis at first instance and before the Court of Appeal.

The appeal itself arose from an application which the father made under the inherent jurisdiction for an order requiring the mother to return the children to England. He asserted that the English Court had jurisdiction on the basis that either the children were habitually resident in England at the time he issued proceedings in February 2013 or that they were British citizens.

At first instance Peter Jackson J determined the application and concluded that the children were not habitually resident in England and that on a factual analysis they had acquired habitual residence in Bangladesh. Peter Jackson J dismissed the father's applications. In his analysis of the facts he

considered that the children were very young at the time they left England and that the majority of their lives had been spent in the care of their mother in Bangladesh. He noted that even if the father was correct in his assertion that the children had been unlawfully detained in Bangladesh by the mother they had long ceased to be habitually resident in England.

He did however accept that following the UKSC decision in **A (Children) [2013] UKSC 60** the children's British Citizenship provided a theorectical basis on which the court could exercise jurisdiction but he declined to exercise it given the factual history and further he noted the Court's of Bangladesh had been seised of the case for some time.

"disinclination to encumber the factual concept of habitual residence with supplementary rules and in particular to perpetuate the 'rule'"

"tendency in the English courts to overlay the concept of habitual residence with legal constructs"

Unusually at the permission hearing Black LJ joined the children as parties to the appeal primarily because the case raised important legal issues and the mother had not participated in or been represented at first instance. But the court was also of the view that the children's welfare required that they be independently and separately represented at the appeal hearing. Reunite were permitted to intervene given the potentially wide implications for international child abduction cases of the legal issues which arose in the appeal.

IS THERE A 'RULE' WHICH PREVENTS A PARENT UNILATERALLY CHANGING A CHILD'S HABITUAL RESIDENCE?

In his first ground of appeal the father challenged the conclusion reached by Peter Jackson J that the children were no longer habitually resident in the UK. In particular he asserted that there was an established 'rule' in English law that where both parents had parental responsibility for a child the habitual residence could not be unilaterally changed by one parent. The father's case was that this rule was left undisturbed by the Supreme Court in the 'trilogy' of cases in which it had settled the parameters of habitual residence. The rule had been most clearly articulated by the Court of Appeal in **Re J (A Minor) (Abduction; Custody Rights) [1009] 2 AC at 572C**. However Black LJ queried whether it had ever been accepted as a rule of law and she noted that *'it is worth remembering that no authority has been found in which the 'rule' is articulated as part of the ratio; it has simply been taken for granted for many years'* [Re H paragraph 26].

Given the significance of the UKSC trilogy which the Court of Appeal characterised as a *'new departure for habitual residence'* it considered it appropriate to review the continued existence of the 'rule' in light of those decisions [Re H paragraph 26]. In the trilogy the Supreme Court had not been directly concerned with the application of the 'rule but its status and relevance had been considered by Baroness Hale LJ and Hughes LJ in both Re A and Re L. In Re A Baroness Hale noted that while there had been a *'tendency in the English courts to overlay the concept of habitual residence with legal constructs'* including the 'rule' itself, it had not been recognized in other jurisdictions such as the US or in Europe (Re A paragraphs 39 and 40). Similarly Lord Hughes expressed the view that rather than treat the rule as legally binding it was better regarded as a *'helpful generalization of fact'* but he acknowledged that it was close to a rule of law (Re L paragraphs 73 and 76).

In Re H both CAFCASS and Reunite argued that the continued existence of the rule was incompatible with the recent UKSC decisions and that it could no longer be considered good law. Black LJ noted that what emerged from the UKSC cases was a disinclination to *'encumber the factual concept of habitual residence with supplementary rules and in particular to perpetuate the 'rule'*, provided an approach could be found which prevented a parent from acting in a way which undermined the purpose of Hague Convention and the jurisdictional provisions of the Brussels Regulation [paragraph 30]. She considered that the solution the UKSC had in mind was to treat the act of wrongful removal as having occurred earlier than is sometimes assumed so as to prevent a parent from establishing a new habitual residence and thereby achieving a unilateral change.

Black LJ was clear however that the UKSC had avoided any attempts to permit legal glosses on the factual concept of habitual residence and as such she did not consider that this 'rule' was itself to be treated as having survived those decisions. Further Black LJ accepted that given that parental intention was identified by Baroness Hale in Re A as one of the relevant factors which any court had to consider as part of the factual determination of where a child is habitually resident, a parent's ability to change a child's habitual residence unilaterally will continue to be limited. She consigned the 'rule' to history noting that it may in any event have been no more than a well established method of approaching cases [paragraph 34].

"the father asserted a wrongful retention of children who had been habitually resident in England"

DOES ARTICLE 10 OF BRUSSELS IIR APPLY WHERE THE CHILD IS REMOVED OUTSIDE OF THE EU?

Since the UKSC decision of Re I (A Child) (Contact Application; Jurisdictio) [2009] UKSC 10 it is clear that the application of the jurisdictional scheme in BIIR is not geographically limited to the EU. The extent to which the scheme can be expanded to third states has been incrementally developed. In particular in Re A (above) the jurisdictional provisions of the Regulation were considered by Baroness Hale to apply regardless of whether there is an alternative jurisdiction in a non-member state (paragraph 33).

In Re A it appeared that both Baroness Hale and Lord Hughes contemplated the application of Article 10 BIIR to cases where the removal or retention of a child was to a country outside of the EU. In Re H the Court of Appeal had to diretctly consider that question in the context of the relevant facts of the case given that the father asserted a wrongful retention of children who had been habitually resident in England immediately before that had occurred. Black LJ took the opportunity to clarify the position and concluded that Article 10 of BIIR applied to any case where a child was habitually resident in England immediately before an unlawful removal or retention regardless of whether the removal was to a non EU state. That approach permits the English Court to assert jurisdiction regardless of whether the state to which the child is removed is not an EU member or a party to the Hague Convention on Child Abduction.

When read in its entirety Article 10 provides a scheme for retention of jurisdiction but also includes provision for the retained jurisdiction to come to an end where the child has acquired a new habitual residence in another Member State. In Re H the Court confined the application of Article 10 to those provisions which asserted jurisdiction and it reached the view that that part of the Article which governed the circumstances in which jurisdiction was lost could only be read as applying to another EU Member State. The Court of Appeal rejected an argument from Cafcass that the Article should be constructed purposively to allow for jurisdiction to be lost in the circumstances contemplated by the Regulation, if a child acquired a new habitual residence, even if that occurred in a non member state. Black LJ considered that such an interpretation would strain the language of the Regulation in a way which went further than the Member States had intended at the time of drafting. The Court considered that such an approach would have to be expressly provided for in the Regulation itself but it declined to read it into the Regulation otherwise.

Having concluded that Article 10 applied in Re H the Court then considered whether to exercise that jurisdiction. Black LJ did not consider that the Court at first instance erred in deciding to dismiss the case or that it should have adjourned the case to obtain for itself more information about the children's welfare from Bangladesh. In doing so she reminded parties to family litigation including international cases that there is an obligation on parties to gather their own evidence and to present it to the Court (paragraph 64). She concluded that no English Court would be inclined to intervene in the circumstances which appeared to exist on the evidence, namely that the children had lived abroad for such a long time, to order their return to a country of which they were unlikely to have any recollection. The appeal was dismissed.

Re H is an interesting and useful decision which confirms that the approach of any court in determining the habitual residence of children should be limited to an analysis of the relevant facts. It is significant also that the appellate courts continue to broaden the scope of BIIR in an attempt to ensure that the protective reach of the English Courts is as wide as possible in cases of wrongful removal or retention of children overseas. In practice this may have the effect of ameliorating some of the difficult challenges which arise where children are removed to non-Hague Convention cases.

"determining the habitual residence of children should be limited to an analysis of the relevant facts"

Deirdre Fottrell and Eleri Jones and Mike Hinchliffe appeared on behalf of CAFCASS Legal in the case of Re H. A version of this article appeared in Family Law Week in July 2014.

RELOCATION CASES AND FORUM SHOPPING

By Julien Foster

Relocation cases and forum shopping: these have tended in the past to be part and parcel of "big money" divorce cases. By contrast, the notion of an international element to care cases has been, in the past, relatively unknown to family practitioners. I have been more used to dealing in care cases with occasional debates between different local authorities as to which of them should be the "designated" authority when, say, a parent moves from one part of the country to the other than with any foreign element.

But change is afoot. The most recent application form for a care order has a section headed "Cases with an international element" and requires the applicant, among other things to state whether the applicant has "any reason to believe that there may be an issue as to jurisdiction in this case (for example under Brussels 2 revised)". This arises from the decision of the President in RE E (BRUSSELS II REVISED: VIENNA CONVENTION: REPORTING RESTRICTIONS) [2014] EWHC 6 (Fam) [2014] 2 FLR 151 which has significant practice implications for all care cases involving families from EU countries. As the President observes, the starting point in every such case where there is a European dimension is, therefore, an inquiry as to where the child is habitually resident.

Re E addresses cases where the child is present in this jurisdiction but where the courts may not have jurisdiction. On the other hand, there are an increasing number of cases where the child has been removed from England to a different jurisidiction, often, it would seem, as a result of the activities of various campaigning groups. Cobb J observed in Re L-M (Transfer of Irish Proceedings) [2013] EWHC 646 (Fam) [2013] 2 FLR 708, that he had been advised that there were other parents who had considered leaving this jurisdiction to avoid public authority intervention in their lives, and to achieve some juridical advantage through process in the Irish Courts. In Re L-M, the parents who had done so concluded that they had gained no such advantage. Forum shopping is perhaps the wrong terminology in these kinds of cases. The hope of the parents in such cases appears to be that the public authorities will not show the kind of interest shown by the authorities in England and Wales.

"increasing number of cases where the child has been removed from England to a different jurisdiction"

"parents who had considered leaving this jurisdiction to avoid public authority intervention in their lives"

Another area which has grown in prominence in recent years in care proceedings is the need to assess potential alternative carers overseas, sometimes with the assistance of Children and Families Across Borders ("CFAB").

Perhaps above all, the repeated exposure of family practitioners in this jurisdiction to judgments and orders made abroad have, in the words of the President quoted by him in Re E, "taught us that we can, as we must, both respect and trust our judicial colleagues abroad".

PRACTICAL CONSIDERATIONS IN CROSS-BORDER MAINTENANCE DISPUTES

By Eleri Jones

"Procedure for enforcing decisions is governed by the procedure of the Member State where enforcement is sought"

The underlying aim of the Maintenance Regulation EC 4/2009 ('the Regulation') is for a creditor to obtain easily in one Member State a decision that will be automatically enforceable in another Member State without further formalities (such as registration, as was required under Brussels I EC 44/2001). But how has this aim fared in practice and what do practitioners need to look out for?

A REMINDER OF THE BASICS

There is of course a division between Member States that are signatories to the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations ('the Protocol') and those that are not. All Member States save the UK and Denmark signed up to the Protocol and the decisions of those Member States ('Protocol States') are recognised in all other Member States without any special procedure being required (Article 17) and they do not require a declaration of enforceability to be enforceable in the other Member States. There is a possibility of review and an ability to refuse/suspend enforcement but only in very limited circumstances, see Articles 19 and 21 respectively. Decisions from the UK and Denmark must be registered without any special procedure, but a declaration of enforceability is required before the decision can be enforced in another Member State (Article 23). There are grounds for refusing recognition (Article 24) and challenging a declaration of enforcement but these are also limited (Article 34). The aforementioned Articles are set out in Chapter IV of the Regulation. There are further provisions in Chapter VII which set out the assistance available from the central authorities to assist making, varying and enforcing decisions.

IMPORTANT TIME LIMITS

Points to look out for from a practitioner's perspective are the time limits prescribed by the Regulation. There are two scenarios to consider. Firstly imagine a father, Peter, in England receives an application for enforcement of a child maintenance decision obtained by a mother, Helen, in Poland (a Protocol State). Peter wishes to ask for a review of the decision (which can only take place in the original Member State i.e. Poland) on the basis that he was not properly served to enable him to arrange his defence. Peter must do so 'promptly' and in any event within 45 days of being 'effectively acquainted with the contents of the decision and was able to react' (Article 19).

Secondly, imagine Sarah in England (a non-Protocol State) obtains a spousal maintenance order against her former husband Carlos who lives in Spain and she wants to enforce it there. Sarah must apply for a declaration of enforceability. Spain is required to deal with this within 30 days unless there are exceptional circumstances (Article 30) and Carlos cannot interfere with that initial declaration. However if Carlos wishes to appeal that declaration for example on the grounds of irreconcilability, he must do so within 30 days (if he lives in the country where enforcement is sought i.e. Spain, but if he is habitually resident in another Member State, then he has 45 days). That appeal is then due to be determined within 90 days unless there are exceptional circumstances (Article 34).

CONSIDERATIONS FOR THE CREDITOR

Procedure for enforcing decisions is governed by the procedure of the Member State where enforcement is sought (Article 41). In effect, once the decision is registered and is enforceable (whether a declaration of enforceability has been required or not), the court in the Member State of enforcement must treat it as if it were a decision of its own. This means that if a creditor has a choice of jurisdictions for enforcement (e.g. the debtor has assets in more than one Member State), practitioners should consider the means of

enforcement available in each country and which is more beneficial in the circumstances.

Another consideration to bear in mind is where a creditor has a choice of jurisdictions available when considering issuing an application for a decision (or to vary an existing decision). Whilst it may be more convenient for a creditor to litigate where he/she is living, if the creditor lives in England (a non-Protocol State where 'outbound' decisions require the extra step of a declaration of enforceability) it may be worth thinking about instructing lawyers locally in the country of enforcement so that it can be enforced there straight away and can be treated as a local domestic case. This is unfortunately the disadvantage of living in a non-Protocol State: wise and wily debtors elsewhere may take advantage of the additional procedures required for decisions coming from non-Protocol States and create further litigation and thereby delay, which may cause prejudice to a more economically vulnerable creditor. In such circumstances, if they arise, practitioners should remember that even if a declaration of enforceability is required, a party may still apply for provisional, including protective, measures available in the Member State where recognition is sought without needing a declaration of enforceability (Article 36). Note though that MPS (or equivalent) orders are not 'provisional or protective' measures (see Wermuth v Wermuth (No 2) [2003] EWCA Civ 50, albeit this was under Brussels II).

"even if a declaration of enforceability is required, a party may still apply for provisional, including protective, measures"

A DOMESTIC DILEMMA

The advantage for the Protocol States is that they benefit from their decisions not requiring the additional step of the declaration of enforceability: they are directly enforceable. The Regulation itself is directly effective in all Member States (i.e. it does not require primary legislation to give it force of law, only secondary legislation to implement it within the domestic framework). Therefore a party should be able to apply directly to a court for enforcement. However the implementing legislation for the Regulation (the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, in particular Schedule 1, paragraph 4) requires any application for enforcement to be transmitted to the Family Court by the Lord Chancellor (i.e. REMO, the central authority in England and Wales). It seems to preclude direct application to the court and it also means that payments made following that procedure are paid to the court and then passed on via the relevant central authorities to the creditor abroad. Whilst it has the advantage (for those who need it) of taking the process out of the creditor's hands and perhaps assisting to keep costs down, it is a cumbersome process and clearly builds in delay before funds are received which may result in difficulty for the creditor in the interim.

"we are arguably in breach of our international obligations by preventing applications for direct enforcement"

In EDG v RR [2014] EWHC 816 (Fam) a creditor (a mother who lived in France) decided to try and make a direct application for enforcement against a father (who is French but works in London) after obtaining a child maintenance order in France. She wished to receive funds directly and not use the process set out above. The application was made directly to the (then) Principal Registry for such method of enforcement as the court saw fit under FPR 2010 r33.3. The application came before Mostyn J who highlighted the inconsistency between the aim of the Regulation and the seemingly lengthy and indirect procedure required by domestic legislation. As Article 41 requires Member States to treat enforceable decisions as if they are decisions of their own, it was Mostyn J's conclusion that the mother should be able to apply directly for enforcement and that the steps required under domestic legislation were, in a sense, otiose. As such he invited the Ministry of Justice ('MoJ') to reconsider what appears to be a mistake and amend the secondary legislation. Whilst the Regulations have been updated to take into account the new Family Court, the MoJ has not taken up the invitation to remedy the seeming prohibition on direct application for enforcement as it considers that there is no difficulty with the domestic legislation requiring the application to be made via REMO, which then transmits the application to the Family Court. This country is not alone in requiring this additional step but whether, and if so when, anyone will take the matter further, perhaps to the CJEU, remains to be seen. It might well be argued that we (and others) are in breach of our international obligations by preventing applications for direct enforcement.

A further quandary has arisen as a result of the more recent decision [of Sir Peter Singer in] AB v JJB (EU Maintenance Regulation: Modification Application Procedure) [2015] EWHC 192 (Fam) concerning the correct procedure for applications to modify decisions, which will be discussed in a future article.

CARE PROCEEDINGS AND BRUSSELS 11 REVISED

By Elizabeth Szwed

"B11R has been something of a slow burn in England and Wales and until very recently, seems to have escaped the attention of many family law judges and practitioners."

The Accession Treaty of 2003 expanded EU membership, as from the 1st May 2004, from 15 to 25 States, 8 of these were members of the former Eastern bloc. This resulted in, an apparently unexpected, torrent of migration to England and Wales, in particular from Eastern Europe, that still continues today. Later in that same year, on the 27th November 2003, the Council of the European Union introduced **Council Regulation (EC) No 2001/2003 concerning jurisdiction and the recognition and enforcement of judgements in matters of parental responsibility, repealing Regulation (EC) N0 1347/2000** (Brussels 11 revised i.e. B11R), which came into force on the 1st March 2005 and unlike the repealed Regulation now included;

> *"… all decisions on parental responsibility, including measures for the protection of the child, independently of any link with matrimonial proceedings." Recital 5*

The European ruling **Case C-435/06[2008] I FLR 490** confirmed that B11R applies to all children who are habitually resident or, whose habitual residence cannot be determined, who are, present in a Member State. Nevertheless the development of public law care proceedings in synthesis with the requirements of B11R has been something of a slow burn in England and Wales and until very recently, seems to have escaped the attention of many family law judges and practitioners. Even the very detailed and careful analysis by Charles J in **Re S (Care :Jurisdiction) [2009] 2FLR 550**, of the relevant provisions and scope of B11R on public law (care) proceedings had little impact on awareness of the role of B11R. Meanwhile the number of care cases with an EU dimension coming before the courts of England and Wales was steadily increasing.

Recently reported case law does however demonstrate the degree of misunderstanding and confusion that decisions at first instance and the Court of Appeal are now clarifying into a cohesive body of jurisprudence and guidance for practitioners at the coal face, in the Family Court. In **Re E (Brussels 11 Revised:Vienna Convention:Reporting Restrictions) [2014] EWHC 6 (Fam)**, where the issue of consular access and the scope of reporting restrictions beyond the jurisdiction, were the prime concern, the President, Sir James Munby seized the opportunity to remind courts and practitioners of that which he described as;

> *"… a more general point … (whose) importance cannot be overstressed.*

The English family justice system is now part of a much wider system of international family justice exemplified by such instruments as the B11R…. we share the values enshrined in B11R … There are specific complaints that the courts in England and Wales do not pay adequate heed to B11R … the jurisdictional reach of the courts of England and Wales in relation to public law (care) proceedings … is not spelt out in any statutory law provision …"

The President then set out the scope and relevant provisions of B11R, focussing (albeit not exclusively), firstly on Arts 8-13 which broadly state that jurisdiction over a child can only be exercised if the child is habitually resident in the particular Member State or if the child's habitual residence cannot be determined but the child is present in a Member State. Then secondly on Art 15 which provides a mechanism for transfer of all or part of existing proceedings to another Member State, adding that;

> *".. I have an uncomfortable feeling that Article 15 has hitherto played far too little part in the daily practice of our courts and that its great importance has not been as widely appreciated as it should be."*

The President further stated that in the future, in cases with an EU dimension, courts should state why they are accepting or rejecting jurisdiction, and the basis upon which in accordance with Art 15 the

court has decided to either exercise or not to exercise its powers under Art 15.

By way of whirlwind tour of the main provisions of B11R applicable to public law (care) cases the following salient points arise. Firstly jurisdiction is founded only on habitual residence of the child in England and Wales, Art. 8 or, if habitual residence cannot be established on the child's presence in England and Wales Art 13. A holiday, short term stay or stopover are unlikely to establish habitual residence. The absence of extant proceedings in the state of origin does not mean that jurisdiction can be exercised in another Member State in which the child is otherwise not habitually resident, **Re E [2014] ibid, Re B (A child)[2013] EWCA Civ 1434, Re A (A child) [2014] EWHC 604 (Fam)**.

The child's habitual residence must be interpreted uniformly throughout the EU, which the Supreme Court stated in **A v A and another (Children:Habitual Residence) (Reunite International Child Abduction Centre and others intervening)[2013] UKSC 60 3 WLR 761** must correspond to the place that reflects some degree of integration by a child in a social and family environment, a definition previously articulated by the European Court in **Re A (Area of Freedom, Security and Justice) (C532/01) [2009]2FLR 1, CJEU.** Analysis of the habitual residence of a child should also take account of the subsequent Supreme Court decision of In the Matter of LC (Children)(No 2)[2014]UKSC1 which examined the perception of the older/more mature child. It must however be noted that the child's perception is a factor that may be taken into account. There is no rule of law that it is decisive.

"A holiday, short term stay or stopover are unlikely to establish habitual residence."

In the event that the court has no jurisdiction, it must make a declaration to that effect Art.17 and is restricted to making only short term temporary/provisional measures to protect the child until arrangements are made for the child with the courts and/or authorities in the Member State of the child's habitual residence Art.20. Any temporary orders made will not be enforceable beyond the jurisdiction of England and Wales. **Deticek v Sguelia [2010]1FLR 1381 ECJ, Re S [2009] ibid, Parrucker v Valles Peres (No1) Case C-256-09 [2012]1FLR 903, CJEU, Re B [2013] ibid.**

"Any temporary orders made will not be enforceable beyond the jurisdiction of England and Wales"

A court seized with substantive jurisdiction may, pursuant to Art.15, request a court in another Member State to accept jurisdiction of a part or all of existing proceedings. A request may be made for transfer out or transfer in but the decision to accept or refuse jurisdiction lies with the requested, not the requesting Member State. **AB v JLB (Brussels 11 Revised:Article 15) [2009]1FLR 517. In Re M (A Child) [2014] EWCA Civ 152**, the leading case on Art.15, the Court of Appeal stressed that no sub texts such as preference for a child's country of origin could be read into B11R, nor was it permissible to contrast or criticise the child protection laws and systems of another Member State. The decision to request transfer could only be pursued if the three criteria of Art15(1) were all answered in the affirmative: whether the child had a connection with the other Member State, whether the courts of the other Member State was better placed to hear the case and whether transfer was in the child's best interests. No factor could be elevated above another so as to transform it into a bar or principle.

The role of the Network Judge was analysed in **In Re B (A child) [2013]ibid**, where the Swedish Network Judge was asked questions that led her to make statements that were taken as authoritative on the particular case. The role of the Network Judge as explained by MacFarlane LJ was a practical one of facilitating the resolution of international cases, including provision of information on the law but it did not extend to providing determinations on matters such as jurisdiction that were taken as binding in another jurisdiction.

In **Leicester v S and others [2014] EWHC 1575 (Fam),** Moylan J, the Network Judge for England and Wales, described the respective roles of consular departments, and of the Central Authority for England and Wales acting pursuant to Arts. 55/6 of B11R, demonstrating the limitations of the former and elaborating on the pivotal role of the latter in facilitating cross border exchange of information and facilitating transfers pursuant to Art. 15. When referring to international assessments Moylan J alluded to the current potentially illegal approach of some in England and Wales operating independently of the Central Authority in their enquiries abroad, Moylan J. advised that the Central Authority should for a number of reasons be the first port of call. The huge increase in the number of cases handled by the Central Authority for England and Wales is testament not only to recent awareness of the provisions of B11R

"Family law practitioners must now employ lateral thinking in cases with an EU dimension"

and ongoing increase in such cases but also necessitates that requests for information via Central Authorities are focussed, clear, concise and free of professional jargon if they are to be easily understood and therefore speedily translated and appropriately responded to.

Family law practitioners must now employ lateral thinking in cases with an EU dimension. Not only should they bear in mind the provisions of B11R, but also other EU regulations dealing with requests for provision and transmission of information and evidence. Practitioners also need to be alive to the prospect that the child may have been wrongfully removed from his/her State of habitual residence and that in abduction cases the summary relief under the **1980 Hague Convention** may provide a swift resolution to the child's situation. The facts in the case of **Re A (A child) [2014] ibid** demonstrate how ignorance of the provisions of B1and the **1980 Hague Convention** by the practitioners and judges, had exacerbated and prolonged the emotional and physical harm suffered by the child concerned. In abduction cases Art. 10 B11R preserves as stated by Lord Hughes in **Re A (Children)(Habitual Residence)(Reunite International Child Abduction Centre and others intervening)[2013];**

> *"…the jurisdiction of State A not only until habitual residence has been established in State B but also until all relevant persons have acquiesced in the removal /retention or (broadly) a year has passed, the child is settled and there has been unjustified failure to object, or the courts of State A have reached a determination inconsistent with the continued exercise of jurisdiction."*

European Arrest Warrants that lead on to extradition proceedings and orders, may also result in care proceedings that concern children who are nationals of other EU Member States, especially from Eastern Europe since a huge proportion of these concern EU nationals from Eastern Europe, as just a glance at the lists at Westminster Magistrates Court soon confirms. Unlike deportation orders, extradition orders will not include any children of the person extradited, so that there may be left behind children who qualify as either "in need" or "at risk of significant harm". Arts. 6 and 8 of the European Convention on Fundamental Rights and Freedoms are engaged in extradition cases and the extradition court will not order extradition unless there is a coherent care plan for any children likely to be left behind. The extradition court may therefore turn to a local authority for details of the care plan which may involve the issuing of care proceedings or repatriation of children concerned, hopefully following exchange of information and co-operation between Central Authorities.

"local authority social care departments and the courts are already challenged by the requirements of the Children and Families Act 2014, decreasing resources and funding cutbacks."

Increasing migration and increasing numbers of migrants who settle or are born in England and Wales, some of whom encounter the child protection agencies, has resulted in growing numbers of families with an EU connection becoming the subject of care proceedings. This comes at a time when local authority social care departments and the courts are already challenged by the requirements of the **Children and Families Act 2014**, decreasing resources and funding cutbacks. Within such an environment repatriation of children or the employment of Art.15may seem preferable to the legal and local authority costs of litigation and alternative placement. In which case assiduous understanding and application of the requirements of B11R is necessary whichever route is embarked upon.

Ten years on B11R is about to undergo a review. Some say that the original drafters had never envisaged the explosion and nature of public law care and protection proceedings across Europe and that B11R will therefore now require new and better provisions to meet these challenges.

IBA CONFERENCE – TOKYO

By Julien Foster

Charles Geekie QC and Julien Foster headed to Tokyo in October for the International Bar Association conference. The Japanese Prime Minister's reference during the Opening Ceremony to his country's ratification of The Hague Convention on Child Abduction signalled that children law was firmly on the agenda from the outset. Other sessions included seminars on women and poverty and on the law relating to transgender persons: these and other events highly relevant to our practices in family law.

Various moments stand out from the sessions. We heard a disturbing account from two lawyers in Ghana of judicial behaviour in cases in which they were involved. The Chairman of the Bar, Nicholas Lavender QC, told his audience about legal aid cuts and attempts by the judiciary here to address the problem including a reference to the President's decision in Q v Q and others, in which various members of 1 Garden Court were instructed. And a Japanese attorney explained how practitioners in her country were dealing with the implementation of the Hague Convention.

As might be expected, the interest did not end when the International Forum closed for the evening. Highlights included dinner in a Japanese-style pub with the UK Trade delegation; sushi in the Sumo Wrestling Arena; a venture on the Bullet Train to Yokohama; and a glorious reception on the lawn of the British Embassy.

New friends, old friends and the broadening of horizons. The sun rose as we began our journey back to London; and at Tokyo International Airport, I walked past "Garden Gourmet Court": how tempting to set up an annexe.

2014 REPORTED CASES

COURT OF APPEAL

- Re P (A child) [2014] EWCA Civ 1648 - Sarah Morgan QC
- M (Children) [2014] EWCA Civ 1753 - Julien Foster
- Re H [2014] EWCA Civ 1101 - Deirdre Fottrell QC & Eleri Jones
- Q (Children) [2014] EWCA Civ 918 - Janet Bazley QC
- Re B [2014] 1 FLR 900

HIGH COURT

- NG v NG [2014] EWHC 4182 Fam - Rachel Gillman
- R. (on the application of C (A Child)) v Buckinghamshire CC [2014] EWHC 4072 (Admin) -Sarah Morgan QC & Matthew Fletcher
- Re E & others [2014] EWHC 3597 - Janet Bazley & Daisy Hughes
- O v P (No 2) (Sch 1 Application: Stay: Forum Conveniens) [2014] EWHC 2225 (Fam) – Susan Jacklin QC & Caroline Willbourne
- SBC v DE (a child) [2014] EWFC 6 – Deirdre Fottrell QC & Lucy Sprinz
- A & B (Children) [2014] EWFC 818 – Deirdre Fottrell & Daisy Hughes
- Surrey CC v ME and others [2014] EWHC 489 – Sarah Morgan QC & Sally Stone
- Re JS (a child) [2014] EWHC B20 – Andrew Bagchi QC & Georgina Cole
- Re X, Y and Z (Payments from Patient's Estate for Children's Maintenance) [2014] 2 FLR 1051 – Peter Horrocks

FAMILY COURT

- Re C (A Child) (No 2) [2014] EWFC 44 – Julien Foster
- Q v Q; Re B; Re C (Private Law: Public Funding) [2014] EWFC 31 [2015] 1 FLR 324 - Janet Bazley QC, Julien Foster & Lucy Sprinz
- O (a child) (fact finding) [2014] EWFC B64 – Rebecca Mitchell

COURT OF PROTECTION

- Re M [2014] EWCOP 33 – Andrew Bagchi QC
- Re X (Deprivation of Liberty) [2014] EWCOP 25 and 44 – Alison Ball QC & Andrew Bagchi QC
- X v A Local Authority & Anor [2014] EWCOP 29 – Malcolm Chisholm
- RC v CC [2014] EWHC 131 (COP) (appeal) – Malcolm Chisholm

For further news and details of forthcoming events please visit www.1gc.com

Q&A:

Marlene Cayoun

Why did you choose to become a Barrister and what drew you to Family Law?

After university I spent a year working in management consultancy. I envied those I met who had knowledge that translated into expertise worth marketing, and wanted to learn something important that could be sold with integrity. Having done a history degree I felt that law was what my brain would lend itself to best. I like flexibility in my working day so was attracted to the bar, and I like people so family law was a draw from the start.

What aspects do you enjoy the most and what do you find challenging?

I love getting to the bottom of what a client really wants to achieve and working out how to best express that to a tribunal. I particularly enjoy this when the stakes are high, in, say, public children law or enforcement of financial remedies orders. I find intractable disputes a real challenge because unreasonable behaviour is difficult to deal with satisfactorily through the courts.

If you had not become a Barrister what career path would you have chosen?

I find the social issues behind family law fascinating, and would probably have been drawn to public policy or third-sector work.

Who has influenced you most in your career and why?

My neighbours in chambers are an everyday influence. It has been invaluable to have the views of experienced colleagues on both specific, case-related questions and on broader issues like what aspects of my practice I should aim to develop.

Do your family have careers in the Legal Sector?

Not at all. My dad is an electrician and thought I had joined a cult when I told him that I had been awarded a scholarship from the Inner Temple. He warned me that nothing good would come of it.

Since becoming a Barrister what has been your proudest achievement?

I felt proud after my first really effective cross-examination. It wasn't anything I hadn't seen others do a hundred times before, but it felt gratifying to think that years of training and mock-advocacy exercises had been worthwhile.

Where do you see your practice in the next 3 years?

Ideally I would like to start to develop a more niche expertise. Like those a few years higher up the ladder than me, I think I will maintain a broad-base but needle out a particular passion or aptitude for something.

What are your hobbies/ interests?

They're pretty mundane! I read a lot of history (my undergrad was mostly focussed on medieval Europe), cook for friends and am still exploring London; pubs, markets and bric-a-brac shops are my favourites.

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