May2021

Family Law Week

NEWS

Domestic Abuse Bill becomes law

On 29 April 2021, four years after it was included in the Queen's Speech, the Domestic Abuse Bill received Royal Assent and was signed into law.

For the first time there will be a wide-ranging legal definition of domestic abuse which incorporates a range of abuses beyond physical violence, including emotional, coercive or controlling behaviour, and economic abuse.

The measures include new protections and support for victims ensuring that abusers will no longer be allowed to directly cross-examine their victims in the family and civil courts, and giving victims better access to special measures in the courtroom to help prevent intimidation, such as protective screens and giving evidence via video link.

Police will also be given new powers including Domestic Abuse Protection Notices providing victims with immediate protection from abusers, while courts will be able to hand out new Domestic Abuse Protection Orders to help prevent offending by forcing perpetrators to take steps to change their behaviour, including seeking mental health support or drug and alcohol rehabilitation.

In recent weeks, new measures have been added to the bill to strengthen the law, including creating a new offence of non-fatal strangulation, extending an offence to cover the threat to disclose intimate images, and clarifying the law to further clamp down on claims of "rough sex gone wrong" in cases involving death or serious injury.

Other measures included in **the Act** include:

- extending the controlling or coercive behaviour offence to cover post-separation abuse
- explicitly recognise children as victims if they see, hear or experience the effects of abuse
- establish in law the office of Domestic Abuse Commissioner and set out the Commissioner's functions and powers
- placing a duty on local authorities in England to provide support to victims of domestic abuse and

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Corsham
SN13 9BY

their children in refuges and other safe accommodation

- provide that all eligible homeless victims of domestic abuse automatically have 'priority need' for homelessness assistance

- place the guidance supporting the Domestic Violence Disclosure Scheme ("Clare's law") on a statutory footing.

However, the Act does not include a specific stalkers' register, despite briefings from the government after the death of Sarah Everard that **it was likely to support such a measure**.

Farah Nazeer, Chief Executive of **Women's Aid Federation of England**, said:

> "The Domestic Abuse Bill has been long-awaited, and could not be more needed, following the impact of the pandemic on survivors and our national network of domestic abuse services.
>
> "Thanks to the bravery of survivors in campaigning for change, we now have an act that will strengthen protection in the family courts, improve housing law in cases of domestic abuse, and require councils to fund support in safe accommodation.
>
> "We continue to urge for the law to address the significant gaps it leaves and?protect every survivor, ensuring that all women and children are able to access support regardless of immigration status, and for us to see guaranteed long-term funding for specialist women's domestic abuse services, including refuge services around the country that are saving lives every day."

For the Act, **click here**.

9.5.21

Family Court (Composition and Distribution of Business) (Amendment) Rules 2021

These Rules, which come into force on 24 May 2021, amend the **Family Court (Composition and Distribution of Business) Rules 2014** (the 2014 Rules).

Rule 3 omits from the 2014 Rules the provision which routes appeals from decisions in financial remedy proceedings made by a district judge of the Principal Registry of the Family Division, or of a person appointed to act as a deputy or as a temporary additional office for such a district judge, to a judge of High Court level in the family court. Such appeals will instead be allocated under rule 6 or 7(2) of the 2014 Rules.

Rule 4 amends Schedule 1 to the 2014 Rules to make provision for all proceedings under section 12 or 13 of the Matrimonial and Family Proceedings Act 1984, or under Schedule 7 to the Civil Partnership Act 2004 (c. 33) to be allocated to a judge of district judge level in the family court, subject to the provisions of rule 15(2) of the 2014 Rules.

For the Amendment Rules, **click here**.

9/5/21

New pilot Practice Direction 36W: communicating forced marriage and FGM protection orders to the police

Pilot Practice Direction 36W brings in a new provision for communicating forced marriage and female genital mutilation protection orders to the police. It came into force on 26 April 2021.

It replaces previous Practice Direction 36H to bring in new provision for communicating Forced Marriage and Female Genital Mutilation Protection Orders (FMPOs and FGMPOs) to the police.

It includes:

- details of the centralised police email address

- a template for sending key details to the email address.

It requires:

- the court to send notification of the existence of a FMPO or FGMPO once made and sealed by the court

- applicants, or the court where the court is to effect service of a FMPO or FGMPO, to email the mailbox once the order has been served on the respondent, or the respondent has otherwise been made aware of the terms of the order.

When an email is received at the centralised email address, an automated system will forward the FGMPO or FMPO (or the notification of service/ the respondent having been made aware of the terms of the order) to the local and regional police lead for the address of the person to be protected by the FGMPO or FMPO. If the court has directed that the local and regional police lead for the address of the respondent to the FGMPO or FMPO also be notified, then the automated system will do so.

This process applies only where the address of the applicant (or the respondent, where applicable) is in England and Wales. Further guidance is available, and applicants can obtain the template for notification of service of an order from court staff.

For Pilot Practice Direction 36W, **click here**.

9/5/21

New suite of Judicial Review Practice Directions issued

The Civil Procedure Rules **131st Practice Direction Update** includes a suite of Practice Directions supplementing CPR Part 54 (Judicial Review) which have been revised in consequence of developments in caselaw and practice. The Practice Directions come into force on 31 May 2021.

CPR Part 54 is supplemented by four PDs (54A, 54C, 54D and 54E (PD 54B having previously been revoked)). The amendments provide for the addition of a new Practice Direction 54B to make provision in relation to urgent cases, and the revocation of PD 54C (which is now obsolete), with consequential renumbering of Practice Directions 54D and 54E as 54C and 54D, together with some modernisation and "tidying up" of drafting in what become 54C and 54D. The main changes lie in a recasting of PD54A, prompted by concerns expressed by the Court of Appeal in a number of cases (most recently, ***R (Dolan and others) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605**, in particular at §§116 – 121) that pleadings and Skeleton Arguments in public law cases have become too lengthy and too complex.

A revised suite of Judicial Review forms in consequence of the reformed PDs supplementing CPR Part 54 will be published online (**gov.uk**) in due course.

For the new Practice Directions, **click here**.

9/5/21

Experts and the Family Justice System: Widening the Pool

The Experts Sub-Committee held its inaugural event on 25 March 2021.
Hosted by Mr Justice Williams, the event was aimed at medical and allied health professions, family lawyers and judiciary. It set out some of the recommendations from the final report of the President's Working Group on Medical Experts (***The President of the Family Division Working Group on Medical Experts in the Family Courts – Final Report***) and focused on encouraging medical and allied health experts to offer their services to the family justice system. The event explored the role of the expert witness, the court process, report-writing and what to expect when giving evidence. It also promoted the eight Regional Experts Committees, being set up to help address the shortage of expert witnesses in the family court and to implement, at regional level, the recommendations for training and interdisciplinary collaboration.

For a video recording of the event and speakers' presentation slides, **click here**.

9/5/21

Government responds to inquiry into child sexual abuse in secure children's homes

The government has responded to the Independent Inquiry into Child Sexual Abuse (IICSA) custodial institutions report about placement in secure children's homes (SCHs).

The government is of the view that, in light of the research findings, the practice of placing children in mixed justice and welfare homes does not create or exacerbate systemic risk and is therefore not proposing to explore alternative models. It says that there is no conclusive evidence to show that there is an increased risk of sexual abuse to children as a result of being placed in a mixed SCH, and the government is of the view that there are robust safeguarding measures in place to protect children from harm. Ofsted judgements show that SCHs generally provide a higher quality of care than other youth justice secure settings, as recognised by the Children's Commissioner, and government's ambition for the youth secure estate is that all children are accommodated in smaller units that provide child-focussed integrated services.

For the response document, **click here**. For the inquiry report, **click here**.

9/5/21

Domestic Abuse Act 2021 commencement schedule

The Home Office has issued a schedule of the commencement dates of the provisions of each section of the Domestic Abuse Act 2021. For the schedule, **click here**.

16/5/21

Mr Justice Cohen retires

Mr Justice Cohen retired from the High Court (Family Division) with effect from 9 May 2021, but will be authorised to act as Judge of the High Court until up to and including 2 January 2024 and will therefore continue to sit effectively full time.

Sir Jonathan Cohen was called to the Bar (L) in 1974, took Silk in 1997 and was elected a Bencher in 2004. He was appointed an Assistant Recorder in 1993, a Recorder in 1997, a Member of the Mental Health Review Tribunal in 2000 and authorised to sit as a Deputy High Court Judge in 2005. He was appointed a High Court Judge (Family Division) in 2017.

16/5/21

Current provision of Domestic Abuse Perpetrator Programmes

Cafcass has issued with immediate effect, temporary guidance to support Family Court Advisers when making recommendations progressing cases in the current context where Domestic Abuse Perpetrator Programme (DAPP) provision is severely limited.

Prior to the pandemic, Cafcass says, the family justice system was under enormous pressure with increases in numbers across all areas of public and private family law. After over a year of working with the constraints of the pandemic, the system finds itself with significant backlogs, in certain types of work. The provision of DAPPs in England has been adversely affected due to the necessary face-to-face delivery model and a number of DAPP providers have had to reduce or suspend their offer.

Careful consideration has been given to the possible development of remote DAPPs using another safe alternative, however, there is not yet sufficient evidence to support the adoption of a remote model. Unfortunately, a backlog of several hundred cases has accrued. Cafcass appreciates that this backlog has a considerable impact on parents and their children who need certainty about their contact arrangements.

Leaders across the family justice system agree that there must be collective action to address this and consider alternative options where safe and in the interests of the child and a temporary process has been agreed. This applies in England only as DAPPs are not available in Wales.

The temporary process is outlined below:

> 1. Cafcass has issued with immediate effect, temporary guidance to support Family Court Advisers when making recommendations progressing cases in the current context where DAPP provision is severely limited.
>
> 2. Cafcass is establishing a small, dedicated team to review the circumstances of families for whom a DAPP has been ordered, but not yet completed, prioritising first those for whom a DAPP has not yet commenced. These case reviews will involve a Family Court Adviser reviewing the child's file, speaking with adults and children to re-assess the current risks and options, taking account of the new guidance. The child will be given the opportunity to write to the court explaining the impact for them and their wishes and feelings.
>
> 3. For cases that have been reviewed, Cafcass will request the court's permission to file a further report, and there may need to be a further hearing to consider this. These reports may recommend either:
>
> > (a) that the case remains on the waiting list as no safe and beneficial arrangements for time with the child are possible without this provision, with appropriate ongoing oversight including a process of monthly review; or
> >
> > (b) that the application to court for the existing order for a DAPP can be discharged and an alternative plan (informed by the reassessment) can be put in place: this could be a final order of no contact, a final order for contact with a safety plan and other provision, or an interim order for 'a step-by-step approach to the progression of contact arrangements', with a further review and an addendum ordered. From 1 May 2021, Child Contact Interventions commissioned by Cafcass on behalf of the Ministry of Justice were replaced with the new Improving Child and Family Arrangements (ICFA) service. The ICFA service is designed to be a more tailored and less prescriptive approach to meet the needs of individual children and their families.
>
> 4. In areas where there is capacity to commence new individuals in face-to-face DAPP programmes, families identified at 3a above will take priority, under new arrangements for oversight, which are currently being developed. Cafcass will only start making referral recommendations in reports for new cases once those families with delayed proceedings have been able to progress, unless a DAPP is seen to be the most suitable option. In this situation, the family will be added to the DAPP waiting list.

Implementation of this temporary process will result in new referrals for DAPPs only being made in cases where it is truly necessary and having due regard to the delay this order will inevitably cause. Cafcass will keep the temporary arrangements under review and share the learning with the National Recovery Group. It is anticipated that DAPP provision will be reinstated when the system has recovered.

Cafcass Chief Executive Jacky Tiotto and Sir Andrew McFarlane, President of the Family Division said:

> "We recognise how incredibly important it is for children and their families to receive the services they need without delay. The consequences of the pandemic and the essential need for the Domestic Abuse Perpetrator Programme to take place in-person has meant this hasn't always been possible.
>
> "We are working with all involved in family justice to ensure that the people currently waiting to take part in the programme are prioritised and that we have measures in place to ensure that waiting times are kept to a minimum and regularly reviewed for children and their families."

For the temporary guidance to support Family Court Advisers when making recommendations, **click here** and follow the link at point 1.

16/5/21

One in four contemplate leaving family law following lockdown: Resolution survey

A quarter of family justice professionals are on the verge of quitting the profession as the toll of lockdown on their mental health becomes clear, **Resolution** has revealed, ahead of the release of a landmark wellbeing report.

Over 1,200 family law practitioners surveyed for the report, which will be published during Resolution's National Conference, say that a combination of long working hours, heavy workloads, client expectations and working in isolation has stretched them to the limit.

More than half (51 per cent) of those surveyed said they had considered leaving the profession at some point in the last three years because of concerns about their wellbeing. At the time of the survey, 26 per cent were actively considering leaving the profession.

It comes after family practitioners helped to successfully cut backlogs in the family court by sitting more days than ever before during the pandemic.

Although this demonstrates practitioners' dedication to supporting clients and commitment to family justice, it does raise significant questions as to whether this additional workload is sustainable or desirable.

The survey found that as many as 57 per cent of practitioners work more than eight extra hours during the week – an additional working day each week. Almost all (88 per cent) needed to work during annual leave and 64 per cent of practitioners said they usually or always feel fatigued during the working day.

Worryingly, of those who are considering leaving the profession, almost half (45 per cent) are junior practitioners highlighting a significant risk of a generational 'brain drain' of young talent leaving the sector. Remote working has presented barriers for younger practitioners, for example their professional development has stalled by not being able to learn from senior practitioners.

Although awareness of wellbeing has grown in recent years the survey found that 43 per cent of practitioners still felt uncomfortable talking to their employers or workplaces about work-related stress and pressures.

Juliet Harvey, National Chair of Resolution, said:

> "It's clear lockdown has taken its toll on the collective wellbeing of family justice professionals and if the profession is to recover, we need to ensure practitioner wellbeing is a top priority.
>
> "The fact that a quarter of family professionals are actively considering leaving the sector should be of concern to everyone. If firms fail to embrace flexible working and better wellbeing support, I fear we could lose the next generation of family practitioners.
>
> "This report is an important first step in acknowledging and addressing this issue, and I'm delighted that Resolution has been joined by LawCare, as well as the FLBA, CILEx, ALC and LAPG in getting the findings in front of as many practitioners (and their firms) as possible, and demonstrating a shared commitment to supporting the wellbeing of our respective members."

Elizabeth Rimmer, Chief Executive at LawCare, said:

> "What comes through loud in clear in these findings is that, as a community of practitioners, educators and regulators, we have work to do. We need to start taking positive steps to change the culture in law.
>
> "This report is a catalyst for action to start creating everyday habits in family law that support wellbeing, such as good supervision, training for managers, and creating a positive work-life balance.
>
> "These changes start with each of us, and with these findings coming during Mental Health Awareness Week, we should all take the opportunity to reflect on how we can better support ourselves – and each other – so that we can in turn better support our clients."

16/5/21

Court of Appeal permits Russian wife to bring billion dollar High Court case

The Court of Appeal has overturned the decision to set aside permission that Natalia Potanina had been granted to make an application against her former husband Vladimir Potanin for financial relief under Part III of the Matrimonial and Family Proceedings Act 1984.

In ***Potanina v Potanin*** **[2021] EWCA Civ 702**, the court heard that the couple met as teenagers and married in Russia in 1983 where they lived throughout their married life. They have three adult children. In the early days of their marriage the couple were not well off, but the opportunities to create wealth in Russia during the 1990s were such that the husband accumulated vast wealth, estimated from published sources to amount to $20 billion.

The family had a lifestyle to match their wealth. Ultimately the marriage foundered. The husband's case was that the separation came in 2007 although, he says, they did not go through any formal legal separation at that time in order to protect their youngest child from the distress of his parents' divorce until he was a little older. The husband says that the fact that they owned a number of properties allowed this fiction to be maintained and they continued to take family holidays together and to celebrate certain festivals as a family.

The wife's case was (and is) that the separation did not come until November 2013 by which time, unbeknown to her, the husband had formed another relationship and had another child. The husband's announcement that the marriage was over was, on her account, a devastating 'bolt out of the blue'.

The Russian courts found the year of separation to be 2007. The pronouncement of divorce in Russia on 25 February 2014 led to what the judge described as a 'blizzard of litigation'. The wife's application for permission to apply for financial relief pursuant to Part III Matrimonial and Family Proceedings Act 1984 was granted an ex parte hearing in January 2019. **Leave was set aside**, on the husband's application, in November 2019 on the grounds that the couple had little connection with this connection. It had

been suggested that the decision would bring an end to 'divorce tourism'.

The Court of Appeal allowed the wife's appeal against that decision on 13 May 2021 and granted her permission to bring the case in the High Court. If the case proceeds, it would be one of the biggest divorce award cases to be heard in the English courts.

For the judgment, **click here**.

16/5/21

New private law cases received by Cafcass in April rose by more than 40 per cent

Cafcass received a total of 3,648 new private law cases in April 2021 which is 1,092 cases (42.7 per cent) more than the same period in 2020. These cases involved 5,541 children, which is 1,645 (42.2 per cent) more children than April 2020.

For the month-by-month figures, **click here**. From that page, a further link shows private law case demand and number of subject children by DFJ area.

21/5/21

New public law cases received by Cafcass fell slightly in April

Cafcass received 1,332 new public law cases in April 2021 featuring 2,099 children; this represents a decrease of 2.3 per cent (31 public law cases) and a decrease of 7.0 per cent (159 children) on the 1,363 new public law cases received and the 2,258 children on those cases in April 2020.

For the month-by-month figures for public law applications, **click here**.

21/5/21

Dramatic rise in child poverty in North East England in the last five years shows the scale of the 'levelling up' challenge

Newly released figures have revealed that even before the pandemic, in some parts of the UK, the majority of children were growing up in poverty, once housing costs are taken into account.

Research, carried out by Loughborough University for the **End Child Poverty Coalition** and published in ***Local indicators of child poverty after housing costs, 2019/20***, shows that the North East of England has seen the most dramatic rise in child poverty in the past five years, fuelled by stagnating family incomes. In London high housing costs are pushing many families to the brink.

Overall, in the North East, the child poverty rate has risen by over a third – from 26 per cent to 37 per cent – over five years, moving from just below the UK average to the second highest of any region, after London. A third of the overall increase happened in the latest year (2019/20) with many low-paid workers pushed below the poverty line by the freeze in their in-work benefits.

Over the years, the proportion of children living in poverty who are in a household with at least one working adult has also increased sharply across the UK, up from two-thirds (67 per cent) five years ago to three-quarters (75 per cent).

The new data also confirm London and Birmingham as having the greatest concentrations of child poverty with a dozen constituencies showing the majority of children living below the poverty line, even before large numbers of people started losing their jobs as a result of the pandemic.

Of the UK nations, Wales has the highest percentage of children living in poverty nationwide (31 per cent), followed by England (30 per cent) then Scotland and Northern Ireland (24 per cent each).

The End Child Poverty Coalition is calling on the UK Government to recognise the scale of the problem and its impact on children's lives and to create a credible plan to end child poverty which must include a commitment to increase child benefits. Given the extent to which families are already struggling, the planned £20 p/w cut to Universal Credit in October should be revoked, says the coalition. The support should also be extended to those still receiving financial assistance from the old benefit system, referred to as 'legacy benefits', before they are switched to Universal Credit.

Anna Feuchtwang, Chair of the End Child Poverty Coalition said:

> "The figures speak for themselves – the situation for children couldn't be starker. We all want to live in a society where children are supported to be the best they can be, but the reality is very different for too many.
>
> "The UK Government can be in no doubt about the challenge it faces if it is serious about 'levelling up' parts of the country hardest hit by poverty. After the year we've all had, they owe it to our children to come up with a plan to tackle child poverty that includes a boost to children's benefits. And they need to scrap plans to cut Universal Credit given parents and children are having a tough enough time as it is."

For the full report, as well as tables with Constituency and Local Authority data, **click here**. For comment by the British Association of Social Workers, **click here**.

21/5/21

Judges must consider interests of child when sentencing mother, urges Committee

The Parliamentary Joint Committee on Human Rights has tabled new clauses to the **Police, Crime, Sentencing and Courts Bil**l to protect right to family life of children when their mother is sentenced.

The new clauses would:

- Require judges to consider pre-sentence reports, including information about children, before sentencing a mother;
- Require judges to take into account the best interests of the child; and
- Require Government to gather and publish data on how many children are born in prison and how many children are separated from their mother in prison.

In a new report – ***Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill*** – the Joint Committee on Human Rights urges the Government to use the passage of the Police, Crime, Sentencing and Courts Bill to put right some of the injustices relating to the sentencing of mothers.

The report contains five amendments which, the Committee says, would ensure the rights of dependent children are properly considered and respected when a primary carer is sentenced. When a criminal court sentences a parent with a dependent child, the Article 8 ECHR rights of the parent and the child are engaged. In upholding these rights, judges should ensure that the child's right to a family life is only interfered with to the extent that is both necessary and proportionate.

The Committee fails to see how the welfare and best interests of children are being sufficiently considered if they are not prioritised when a parent is sentenced. These amendments, when included in statute, should ensure the rights of children are not ignored.

The failure of Government to capture basic data about primary carers in prison and their dependent children, is, in the view of the Committee, a 'blatant disregard' for the rights of the child and their parents' right to family life. Despite repeated calls from the Committee to collect data, the Government still does not know how many mothers of dependent children go to prison, or how many children are separated from their mothers through imprisonment. This lack of basic information prevents essential services from planning for children whose mothers are in prison. It deprives the child from accessing the support that will help them during and after their mother's sentence.

The Committee proposes the insertion of an new clause imposing a requirement on the Secretary of State to collect and publish data on the number of prisoners who are the primary carers of a child and the number of children who have a primary carer in custody.

For the report, **click here**. For more details of the proposed amendments, **click here**.

21/5/21

Fees in the Family and Civil Courts – main fees

HM Courts and Tribunals Service has published a list of revised fees for the Family and Civil Courts came into force on 18 May 2021.

For the list, **click here**.

21/5/21

Domestic Abuse Act 2021: factsheets

On 18 May 2021 the Home Office updated factsheets relating to the Domestic Abuse Act 2021 to reflect that the statute has been enacted.
For the factsheets, **click here.**

For a House of Commons Library briefing about the role of healthcare services in addressing domestic abuse, **click here**.

22/5/21

Homelessness and young people

Homeless Link has published guidance – ***Supporting homeless 16- and 17-year-olds*** – developed with Just for Kids Law. It is designed to equip workers with the information needed to support and advocate for the rights of the young people they work with. Alongside a guide to the legal rights of young people, this resource provides information so that workers and young people can plan and prepare to present their case at local authorities. Research has shown that young people are not always housed under the right legislation. This impacts the support they are entitled to in the short and long term and affects both their experiences of homelessness and risk of future homelessness.

For the guidance, **click here**. For the press announcement of its publication, **click here**.

22/5/21

Anglo-Swiss Divorce Proceedings Post-Brexit, Part II: Recognition and Enforcement of Financial Orders

Roxane Reiser, barrister of **1 Hare Court**, analyses the impact of Brexit on the recognition and enforcement of English financial orders in Switzerland.

This is the second part of a two-part article on Anglo-Swiss Divorce Proceedings in the Post-Brexit world.**The first part of this article** discusses recognition of English divorce decrees in Switzerland.

This part concentrates on the recognition and enforcement of English financial orders in Switzerland.

I. The Lugano Convention no longer applies to Anglo-Swiss civil and commercial proceedings initiated after 31 December 2020

Before the end of the transition period, some financial orders obtained in the UK benefited from a simplified recognition and enforcement regime in Switzerland under the Lugano Convention. By way of reminder, the Lugano Convention only applies to "maintenance", i.e. needs-based awards. It does not apply to divorce and legal separation, nor does it apply to property rights arising out of a matrimonial relationship (i.e. "sharing claims").

The Lugano Convention provisions on jurisdiction, recognition and enforcement are akin to those contained in the 2009 EU Maintenance Regulation ('MR') previously applicable between the UK and EU countries. It differs in a number of important respects, however [1]:

1. The Lugano Convention is not a European law instrument like the MR. It is an international agreement between the EU and four non-EU States, namely Denmark, Norway, Iceland and Switzerland.

2. The Lugano Convention is not a family law specific instrument. It is aligned on the Brussels I Regulation. It applies to civil and commercial matters, and is primarily used in that context.

3. The Lugano Convention contains different, more complex, rules of jurisdiction than the MR. The governing principle of jurisdiction of the Lugano Convention is that persons domiciled in a State bound by the Convention should be sued in the courts of that State.

4. The Lugano Convention allows prorogation clauses both in respect of spousal maintenance and child maintenance, unlike the MR, which prohibits prorogation in respect of child maintenance.

The UK was a party to the Lugano Convention by virtue of its EU membership. The Lugano Convention continued to apply between the UK and Switzerland during the transition period. Specifically, it continued to apply to proceedings initiated in the UK before 11 p.m. on 31 December 2020 by virtue of Regulation 92(1), (2)(d) and (3) of the Civil Jurisdiction and Judgment (Amendment) (EU Exit) Regulations 2019. Similar provisions were made in Swiss law to ensure the reciprocal application of the Convention during that period.

Accordingly, proceedings for recognition and enforcement initiated after 11 p.m. on 31 December 2020, whether in the UK or in Switzerland, do not fall within the "temporal scope" of the Lugano Convention, even if the order to be recognised and/or enforced was obtained before that date.

This has recently been confirmed in a decision of the **Zürich Bezirksgericht dated 24 February 2021**. The court held that the "fast-track" recognition and enforcement regime of the Lugano Convention did not apply to an order of the High Court obtained by the applicant in September 2020 because the UK was no longer a party to the Convention at the time when enforcement was sought. Instead, the applicant had to resort to Swiss national rules.

There was some hope that the UK might re-join the Lugano Convention as a member in its own right. On 8 April 2020, the UK made an application to that effect. On 4 May 2021, the European Commission published **an assessment on the UK's application to accede to the 2007 Lugano Convention** addressed to the European Parliament and the Council.

The European Commission's view is that the EU should not give its consent to the accession of the UK to the Lugano Convention. Although the European Parliament and the Council still have the opportunity to offer their views on the UK's application, an EU-wide rejection of the European Commission's advice is highly unlikely. Therefore, unless and until a bilateral agreement is reached between the UK and Switzerland, reference must be made to Swiss and English national rules on jurisdiction, recognition and enforcement in lieu of the Lugano Convention where it previously applied.

II. Recognition and enforcement of English financial orders in Switzerland

The recognition and the enforcement of UK financial orders in Switzerland are now governed by:

1. Rules of Swiss Private International Law ('SPILA'), and

2. The 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.

Rules of Swiss Private International Law

A foreign decision can only be recognised in Switzerland provided that (Art. 25 SPILA, Art. 27 SPILA):

1. The authorities of the State of origin had jurisdiction according to Swiss rules of indirect jurisdiction, such as Art. 65 SPILA below, – the question is not whether the court of origin had jurisdiction according to its own law;

2. The decision can no longer be appealed or is final;

3. The decision is enforceable in the State of origin; and

4. None of the following grounds of non-recognition applies:

   a. The decision is manifestly incompatible with Swiss public policy;

   b. A party did not receive proper notice of the proceedings under either the law of their domicile or the law of their country of habitual residence, unless they submitted to jurisdiction without reservation;

   c. The decision violates fundamental principles of Swiss procedural law (eg. where a party had no opportunity to present a defence);

   d. A dispute between the same parties, with the same subject matter:

      i. is the subject of proceedings pending in Switzerland, or

      ii. has already been decided in Switzerland, or

      iii. has already been decided in another State.

      provided in each case that the decision can be recognised.

In addition to those general requirements, Art. 65 SPILA, discussed in the first part of this article, contains divorce-specific grounds of non-recognition based on "indirect jurisdictional grounds". The aim of this provision is to ensure a sufficient connection between the parties and the jurisdiction in which the divorce was granted. By way of reminder, Art. 65 SPILA states as follows:

(1) A Foreign decree of divorce or separation shall be recognised in Switzerland if it has been rendered in the State of domicile or habitual residence, or in the national State, of either spouse, or if it is recognised in one of these States.

(2) However, a decree rendered in a State of which neither spouse or only the petitioner spouse is a national shall be recognised in Switzerland only if:

a. At the time of filing the petition, at least one of the spouses was domiciled or had his or her habitual residence in that State and the defendant spouse was not domiciled in Switzerland;

b. The defendant spouse submitted to the jurisdiction of the foreign court without reservation; or

c. The defendant spouse expressly consented to recognition of the decree in Switzerland.

Note that Art. 65 extends to the recognition of financial orders flowing from the divorce such as maintenance and rights in matrimonial property. It does not, however, extend to the recognition of foreign orders made in respect of Swiss pensions. Swiss courts have exclusive jurisdiction over Swiss pensions by virtue of Art. 63(1)bis SPILA. A UK financial order dealing with a Swiss pension will not be recognised in Switzerland. Parties must seek a "complementary judgment" in Switzerland dealing with Swiss pensions only [2].

Readers may be anxious to know whether the Swiss courts would also claim exclusive jurisdiction in relation to real property located in Switzerland, with the consequence that a Swiss court would not recognise a UK financial order dealing with Swiss real property. This is debatable. Article 97 SPILA provides that the courts of the place where real property is located in Switzerland have exclusive jurisdiction to entertain real property claims. Just because real property is involved in a legal dispute does not however mean that the underlying claim is a "real property claim" [3]. Issues relating to real property arise in various contexts including divorce, succession and contractual disputes. Further, times have changed since Art. 97 SPILA came into force in 1987. Forum clauses in respect of maintenance (under the Lugano Convention) but also in respect of matrimonial property (Art. 5 SPILA) are now admissible. As such, there is much to be said for the view that Art. 97 SPILA can be circumvented in most, but perhaps not all divorce cases.

Just like under the Lugano Convention, there can be no review as to the substance of the decision under SPILA. However, the recognition of a foreign decision in Switzerland does not preclude an application for a "complementary judgment" where the original decision is silent on a particular aspect (eg. Swiss pensions).

Those familiar with the Lugano Convention will note the following important differences:

1. The SPILA regime set out above applies to the divorce and all its financial consequences (except pensions), unlike the Lugano Convention, which only applied to maintenance obligations.

2. As such, it is no longer crucial to delineate precisely which part of a UK financial order relates to maintenance for the purposes of recognition and enforcement in Switzerland. Note however, that such delineation remains prudent, should recognition and enforcement be sought in the EU under the MR at a later stage.

3. Under the Lugano Convention, a decision need not be final or incapable of appeal in order to be recognised.

4. The Lugano Convention does not include requirements of "indirect jurisdiction" such as those contained in Art. 65 SPILA.

The primary practical difference between these two regimes is procedural, however. Recognition of a foreign decision under the rules of Swiss Private International Law requires free-standing recognition proceedings. By contrast, decisions to which the Lugano Convention applies benefit from automatic recognition pursuant to Art. 33(1). Note, nevrtheless, that in both contexts, a foreign decision can only be enforced – as opposed to recognised – if it is declared enforceable. An exequatur procedure is necessary (Art. 28 SPILA and Art. 38 CL respectively).

The 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations

The 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (the '1973 Convention') applies reciprocally between Switzerland and the UK. Note that Switzerland is not a party to the 2007 Hague Maintenance Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, unlike all EU countries. Reference must be made to the 1973 Convention and the Maintenance Orders (Reciprocal Enforcement) Act 1972, Part I for recognition of Swiss maintenance decisions in the UK.

The 1973 Convention applies to maintenance obligation arising from a family relationship, parentage, marriage or affinity (Art. 1). It applies both to spousal maintenance and child maintenance.

Readers should note that the Convention applies not only to decisions, but also settlements made by or before a judicial or administrative authority of a Contracting State. This encompasses maintenance agreements perfected into a court order. It does not extend to authentic instruments, unlike Article 57 of the Lugano Convention.

The 1973 Convention takes precedence over SPILA. However, it permits the application of more generous criteria of recognition and enforcement contained national law. In practice, both instruments are used in tandem. If the criteria for recognition under the 1973 Convention are not met, recognition is sought under SPILA. Free-standing recognition proceedings are required in both contexts in any event.

Article 4 of the 1973 Hague Convention provides that a decision rendered in a Contracting State shall be recognised or enforced in another Contracting State –

(1) if it was rendered by an authority considered to have jurisdiction under Article 7 or 8; and

(2) if it is no longer subject to ordinary forms of review in the State of origin.

Article 7 of the Convention contains rules of indirect jurisdiction based on habitual residence, nationality and submission to jurisdiction. It states:

> "An authority in the State of origin shall be considered to have jurisdiction for the purposes of this Convention -
>
> (1) if either the maintenance debtor or the maintenance creditor had his habitual residence in the State of origin at the time when the proceedings were instituted; or
>
> (2) if the maintenance debtor and the maintenance creditor were nationals of the State of origin at the time when the proceedings were instituted; or
>
> (3) if the defendant had submitted to the jurisdiction of the authority, either expressly or by defending on the merits of the case without objecting to the jurisdiction."

Note that sole nationality of the State of origin is not a ground of indirect jurisdiction under the 1973 Hague Convention. Contrast this with Art. 2(4) of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations ('the 1970 Convention'), which includes as one of its grounds of indirect jurisdiction necessary for the recognition of a foreign divorce the sole nationality of the petitioner, provided that it is coupled with (a) the petitioner's habitual residence in the State of origin, or (b) the petitioner's habitual residence in the State of origin for one year falling at least in part within the two years preceding the institution of the proceedings.

Without prejudice to Art. 7, Art. 8 of the Convention aligns indirect jurisdiction for maintenance with indirect jurisdiction for divorce. If the court of origin fulfils the criteria of indirect jurisdiction for the divorce, then the court of origin is also considered to have had indirect jurisdiction in respect of maintenance. In the example of sole nationality given above, this means that a Swiss court assessing indirect jurisdiction in respect of a UK maintenance order under the 1973 Convention will accept that the grounds of indirect jurisdiction are met if the criteria contained in Art. 2(4) of the 1970 Convention are met. Readers are referred back to the first part of this article for the grounds of indirect jurisdiction applicable to a divorce obtained in the UK and sought to be recognised in Switzerland pursuant to the 1970 Hague Convention.

Once rules of indirect jurisdiction have been assessed, one must turn to the grounds of non-recognition contained in Art. 5 of the Convention, which states:

> "Recognition or enforcement of a decision may, however, be refused –
>
> (1) if recognition or enforcement of the decision is manifestly incompatible with the public policy ("ordre public") of the State addressed; or
>
> (2) if the decision was obtained by fraud in connection with a matter of procedure; or
>
> (3) if proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted; or
>
> (4) if the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed."

Finally, Art. 6 of the Convention provides that "a decision rendered by default shall be recognised or enforced only if notice of the institution of the proceedings, including notice of the substance of the claim, has been served on the defaulting party in accordance with the law of the State of origin and if, having regard to the circumstances, that party has had sufficient time to enable him to defend the proceedings". Note that Art. 5 is expressed in permissive, rather than mandatory terms. By contrast, the word "shall" in Art. 6 indicates that its requirements are mandatory.

Neither the grounds of non-recognition contained in SPILA, nor those contained in the 1973 Convention are dramatically different from those contained in the Lugano Convention (see Art. 34 LC).

A summary of the specific methods of enforcement available in Swiss law is beyond the scope of this article. Suffice it to say that enforcement in Switzerland is governed by Swiss law and procedure. Local advice should be sought.

III. A note on parallel proceedings

With the end of the Lugano regime as between Switzerland and the UK, comes the end of the *lis pendens* rule contained in Art. 27 of the Lugano Convention. Swiss courts faced with parallel proceedings (i.e. proceedings in respect of the same cause of action) initiated in the UK first in time will no longer be subject to a duty to stay proceedings in Switzerland until such time as the jurisdiction of the UK court is established.

Instead, a Swiss court will stay proceedings only if it is to be expected that the UK court first seised will render a decision capable of being recognised in Switzerland within a reasonable time, and if the Swiss court is satisfied that the UK court has jurisdiction in accordance with Swiss criteria of indirect jurisdiction contained in Art. 26 SPILA. This is a significantly more demanding hurdle to overcome than under the Lugano Convention. It requires an assessment of:

1. Whether the UK court is first seised;

2. Whether the UK court has jurisdiction in accordance with Swiss criteria of indirect jurisdiction (i.e. not in accordance with English law).

3. Whether the UK court will deliver a decision within a reasonable time; and

4. Whether the UK court decision can be recognised in Switzerland in the future.

IV. A note on choice of forum clauses

As explained above, prorogation clauses in respect of spousal maintenance and child maintenance are permissible pursuant to Art. 23 of the Lugano Convention, provided that certain formal criteria are met. Now that the Lugano Convention no longer applies between the UK and Switzerland, reference must be made to Art. 5 SPILA, which permits forum clauses in respect of patrimonial – i.e. financial - matters only. The scope of Art. 5 SPILA does not extend to legal status of the parties – i.e. to the divorce – but it does encompass financial obligations flowing from the divorce. A forum clause under Art. 5 SPILA is exclusive unless otherwise provided.

The application of Art. 5 SPILA is not without difficulties. This is because Swiss Private International Law does not permit forum clauses in respect of the divorce itself, and simultaneously provides that a Swiss court with jurisdiction to deal with the divorce also has jurisdiction to deal with all financial aspects flowing from the divorce (Art. 63 SPILA). The better strategy remains to file for divorce and in respect of all financial consequences first in time in one's preferred jurisdiction, rather than wait for the other court to stay or dismiss the proceedings based on a forum clause pointing towards another jurisdiction.

V. Conclusion

In sum, the main change brought about by Brexit when it comes to recognition and enforcement of financial orders between Switzerland and the UK is the end of the application of the Lugano Convention. This change affects the reciprocal recognition and enforcement of maintenance (i.e. needs-based) financial orders between the two countries. Reference must now be made to rules of Swiss Private International Law and/or the 1973 Hague Convention.

While the continued existence of a reciprocal international agreement between the UK and Switzerland in respect of maintenance is pleasing, practitioners should not underestimate the importance of seeking local legal advice before seeking to enforce a UK financial order in Switzerland. In all such cases, the success of a cross-border enforcement crusade will largely depend on (a) the assets against which enforcement is sought, (b) the effectiveness of Swiss enforcement measures having regard to the nature of the assets, and (c) the proportionality of the voyage.

Footnotes

[1].For a more extensive analysis of the Lugano Convention and of the differences between the Lugano Convention and the Maintenance Regulation, see "The Lugano Convention: the UK's European maintenance law from 2021?", David Hodson OBE MICArb, [2020] IFL 211.

[2].Practitioners should note that Swiss law contains mandatory provisions on the sharing of Swiss pensions upon divorce. Seek local advice.

[3].See Commentaire Romand sur la Loi fédérale sur le droit international privé et la Convention de Lugano, 2011, Helbing Lichtenhahn Verlag, ch. 7, §7.

19/05/21

Bell v Tavistock and the Implications for Trans Children, Part 2: the Law after AB v CD and others

Dr Bianca Jackson, Barrister, **Coram Chambers**

Introduction

As set out in **my previous article**, the decision of the High Court in ***Bell & Anor v The Tavistock And Portman NHS Foundation Trust* [2020] EWHC 3274** ("*Bell v Tavistock*") arguably raised more questions than it answered for transitioning children and their families. The principal legal issue for the court to adjudicate in *Bell v Tavistock* was whether a child or young person under the age of 16 could achieve *Gillick* competence in respect of the decision to take puberty blockers [133]. The court specifically declined to address whether parents could consent to the use of puberty blockers on their child's behalf, as this was not the Gender Identity Development Service's ("GIDS") policy; GIDS relied on consent of the child or young adult being treated [47][1].

Whilst it was appropriate in the circumstances of *Bell v Tavistock* for the court to limit its inquiry to *Gillick* competence, it undoubtedly left a lacuna as to whether the administration of puberty blockers to children under 16 based on parental (together with clinical) consent required court oversight. This has led to a number of difficulties for transitioning children and their families, from the inability of trans children to access puberty blockers to referrals to social services.

The recent case of ***AB v CD and others* [2021] EWHC 741** has provided some much needed clarity on this issue. Yet there continues to be confusion amongst professionals and lay persons about what *Bell v Tavistock* and *AB v CD and others* mean in practice. This article will examine the court's decision in AB v CD and others and highlight the main principles of the law relating to the administration of puberty blockers to children and young persons following these two important judgments.

AB v CD and others

AB v CD and others concerned an application by AB, the mother of XY, for a declaration that she and CD (the father of XY) had the ability in law to consent on behalf of XY to the administration of hormone treatment to suppress puberty (i.e. puberty blockers) without the need for a "best interests decision." The Tavistock and Portman Trust ("the Tavistock"), which is home to GIDS, was the respondent to the application, as well as the University College London NHS Foundation Trust, which works with GIDS to provide paediatric and adolescent endocrinology services to treat patients with gender dysphoria and had been intervenors in *Bell v Tavistock*. The child and CAFCASS were also represented.

The central question at the heart of *AB v CD and others*, as set out by Sir James Munby in an interlocutory judgment in the proceedings, can be summarised as follows: do parents have the ability to provide operative consent to the administration of puberty blockers on their child's behalf, or do puberty blockers fall into a "special category" of medical treatment which requires – or good practice demands – court oversight? [34]. As XY's competence had not been recently assessed (albeit she claimed competence), the court looked at the operation of parental consent both where the child was and was not deemed Gillick competent. In respect of the former scenario, the court further examined whether a parent's ability to consent disappeared once the child or young person achieved *Gillick* competence.

The court held that parents could consent to the administration of puberty blockers to their child, both where the child was and was not *Gillick* competent [2]. This is in line with current medical practice: most serious medical treatments, including the withdrawal of life support and experimental interventions, can be undertaken without court intervention where the clinicians and the parents agree [3]. Further, whilst court did not resile from the view taken in *Bell v Tavistock* that the use of puberty blockers is "experimental" and reiterated that they are "controversial" [119], it held that puberty blockers do not fall into a "special category" of medical treatment requiring court authorisation, either as a rule or good practice [4].

Mrs Justice Lieven – who had also presided over *Bell v Tavistock* – did sound two notes of caution: firstly, she expressed concern that the "fixed" positions of the first and second respondents were such that it might make it difficult for a parent to be given a truly independent second opinion [123], and secondly, she highlighted the pressure that gender dysphoric children may place on their parents to consent to the administration of puberty blockers (though the court acknowledged that there was no suggestion of this in the current proceedings and the judge had no evidence before her on this issue). Mrs Justice Lieven concluded that the first issue was a matter for various regulatory bodies, the NHS and the Care Quality Commission, rather than the court. In respect of the second issue, she advised that clinicians should remain live to this and should bring the matter to court if the case was finely balanced or there was disagreement between them. However, she did not view either of these concerns as a reason to resile from the court's decision that parents can consent to the administration of puberty blockers on behalf of their children.

Changes to GIDS

Following the decision of *AB v CD and others*, the NHS altered the clinical approach that it had adopted for GIDS post-*Bell v Tavistock*, which was predicated on the need for court oversight. In short, the NHS held that for children under the age of 16 who are existing patients and already being prescribed puberty blockers, parental consent could be relied upon provided that: (i) the child agreed; (ii) the GIDS team concluded that this was in the child's best interests; and (iii) the process resulting in the recommendation to continue prescribing had been considered and supported by a new and independent multi-professional review group. According to NHS England and Improvement ("NHSEI"), the role of the review group is not to endorse or refuse treatment but "to ensure appropriate decision-making processes have been followed, particularly with regard to assessing and supporting consent to treatment."5 It is only applicable to users under the age of 16. If the review group has any doubts about whether the decision-making process was robust, the Tavistock will have the opportunity to apply for a "best interests" decision from the court. However, it is important to note that treatment will not be withdrawn from existing patients until the outcome of the review group or further consideration by the court – presumably in the *Bell v Tavistock* appeal in June 2021– is known [6].

The Tavistock paused all new referrals to the GIDS' endocrinology service in December 2020, following the decision in *Bell v Tavistock*, while it carried out clinical reviews of existing patients. This remains the position to date, though the NHSEI states that once the Tavistock decides to resume making new referrals into the endocrine clinics, the interim process will follow the new process for existing patients as detailed above. However, the NHSEI advises that until the new review group becomes operational, the absolute requirement to seek a best interests order from the court before treatment is commenced will remain in place.

It is perhaps otiose to add that the above clinical approach applies to the NHS Trust only; there is no requirement for other medical practitioners who rely on parental consent to adopt, for example, a multi-professional review group (which could arguably be construed as contrary to the intention of the court in AB v CD and others). Indeed, as noted in *AB v CD and others*, GPs are not parties to the contracts between the NHSE and NHS Trusts, and are therefore not contractually bound by their terms [27].

The Implications of Bell v Tavistock and AB v CD and others in Practice

Notwithstanding the decisions of the courts in *Bell v Tavistock* and *AB v CD and others*, there continues to be confusion among professionals – from GPs and social workers to legal practitioners– about what the judgments mean in practice for trans children and their families. As such, it may be helpful to outline the main principles that can be derived from both judgments (though pending appeal in B*ell v Tavistock*):

1. There is a presumption that children over the age of 16 have the ability to consent to medical treatment, including the administration of puberty blockers, and it is up to the clinicians whether they want to seek court oversight (i.e. there is no requirement to do so);

2. Children under the age of 16 are unlikely to be able to provide informed consent for the administration of puberty blockers (and in the case of children 13 and under, highly unlikely). As such, if the basis of administration is the consent of the child, court oversight will be needed, in the form of a "best interests" decision.

3. However, if the basis of administration is parental consent, court oversight is not needed save where there is disagreement between the parents, child and clinician(s). In other words, parents can consent to the administration of puberty blockers on behalf of their children.

A Note about Significant Harm and Child Protection

Given the confusion around the implications of *Bell v Tavistock* and *AB v CD and others*, it is perhaps equally important to address what the judgments did not say. As intimated in the introduction to this article, one of the consequences of the *Bell v Tavistock* decision has been an increase in referrals to social services on the sole basis that a parent is seeking puberty blockers for their child. Whilst AB v CD and others elucidated the court's stance on parental consent, these referrals have continued, with professionals interpreting the judgments as criticising or even proscribing the administration of puberty blockers. In some cases, s.47 investigations have been initiated and/or the transgender child has been placed on a Child in Need plan.

As public law practitioners will be aware, the test for the making of public law orders under s.31(2) of the Children Act 1989 is twofold: not only must the court be satisfied that the child is suffering or is likely to suffer significant harm under s.31(2)(a), but also the court must be satisfied pursuant to s.31(2)(b) that the significant harm or risk of significant harm is attributable to care given or likely to be given to the child, that care not being what it would be reasonable to expect a parent to give the child.

Though the court did not deem the administration of puberty blockers as fundamentally "harmful," the subsequent categorisation of them as such may be the result of a misinterpretation or amplification of the concerns that the court raised in *Bell v Tavistock*, and which the court in *AB v CD and others* did not resile from. Reliant on the evidence before them, the court described puberty blockers as "unusual" [134], "complex" [34], and "experimental" [134; 143], with a "limited evidence base" [28] [7]. It is those views, especially as set out in paragraphs 134-139 of the judgment, that form the basis of the reasoning for the court's ultimate decision that children under the age of 16 are unlikely to be able to provide informed consent and court oversight is needed.

However, it is important to note that the court was not being asked to decide whether children under 16 with gender dysphoria should or should not be treated with puberty blockers and the benefits or detriments of said treatment. As the court aptly notes early on in the judgment, that was not a decision for them [9]; the sole legal issue in the case was whether a child or young person under the age of 16 could achieve *Gillick* competence in respect of the decision to take puberty blockers [133]. It follows that, notwithstanding the court's observations, the administration of puberty blockers to children under the age of 16 was not of itself prohibited by the judgment. Indeed, the court's indication that a "best interests" decision should be sought for children under 16 seeking treatment implies that there will be circumstances where accessing puberty blockers safeguards the child's welfare. It is therefore difficult to see how the administration of puberty blockers of itself can be construed as "significant harm" (risk or actual) for the purposes of public law intervention.

Further, the decision in *AB v CD and others* makes it clear that, in line with other medical interventions, parents may consent on their children's behalf for the administration of puberty blockers. It is implicit within that decision that the act of doing so does not constitute harm or the risk of harm to the child in question and that such action will be construed as *prima facie* reasonable. As such, the second limb of s.31(2) is not met. Whilst each case will be fact-specific, it is submitted that the sole fact that a parent has sought puberty blockers for their child and consented to their administration (where in agreement with clinicians) is not a child protection issue and, if brought to court, is unlikely to meet the threshold for any public law orders.

Conclusion

It is clear from the judgments in *Bell v Tavistock* and *AB v CD and others* that the courts remain uneasy about the administration of puberty blockers to children both over and under the age of 16. However, notwithstanding their disquiet, it is integral that the judgments are not interpreted beyond the confines of what is actually addressed. The administration of puberty blockers to children under the age of 16 may be a polemical issue, but the court has been clear about the role of consent – both the child's and the parents' – in the existing case law. Whilst there are still questions to be answered, not least whether *Bell v Tavistock* will remain good law, *AB v CD and others* has provided a route by which trans children can access puberty blockers without the need of court oversight.

Footnotes

[1]. In their article "***What about parental consent in the treatment of trans children and young people? – a view of the Bell v Tavistock case***", Robin White and Nicola Newbegin discuss how GIDS's decision to deal with consent purely based upon

consent by the child is inconsistent with practice in other aspects of children's medicine in the UK. See also: Simona Giordano, Fae Garland and Søren Holm, "*Gender dysphoria in adolescents: can adolescents or parents give valid consent to puberty blockers?*" Journal of Medical Ethics.

2. The court was clear that parents cannot use their parental right to "override" the decision of a Gillick competent child; however, there may be situations where a Gillick competent child cannot or will not make a decision, thus the parents can do so on their behalf, for example, where a child is in a coma or declines to make a decision [68-69; 114].

3.See, for example, the General Medical Council document "*0-18 Years: guidance for doctors*", issued in 2018, which states: "If a child lacks the capacity to consent, you should ask for their parent's consent. It is usually sufficient to have consent from one parent. If parents cannot agree and disputes cannot be resolved informally, you should seek legal advice about whether you should apply to the court." [27]

4.It should be noted that none of the parties was arguing that puberty blockers were a "special category" of medical treatment requiring court oversight [119].

5. *https://www.england.nhs.uk/commissioning/spec-services/npc-crg/gender-dysphoria-clinical-programme/update-following-recent-court-rulings-on-puberty-blockers-and-consent/*

6.Ibid.

7.For a discussion of whether the use of puberty blockers in children under 16 should be considered "experimental", see: Simona Giordano and Søren Holm,"*Is puberty delaying treatment 'experimental treatment'?*" International Journal of Transgender Health (11 April 2020).

25.05.21

CASES

Akhmedova v Akhmedov & Ors. [2021] EWHC 545

The respondents, who included the parties' eldest son Temur Akhmedov (the 10th respondent), had all received assets from H in order to frustrate W's ability to enforce her award. The length and complexity of the proceedings which commenced with an application issued by W for financial remedies in 2013 is reflected in a judgment running to 404 paragraphs over 125 pages including a contents page, a glossary of actors, a glossary of reported decisions and a chronology.

The judgment, though arguably more War and Peace in terms of length, opens quoting the opening line of Leo Tolstoy's novel 'Anna Karenina': *All happy families are alike, each unhappy family is unhappy in its own way*. Mrs Justice Knowles remarking that while this family has access to wealth of which most can only dream, it is one of the unhappiest families to have appeared in her court room. Fortunately for Ms Akhmedova the judgment provides a much happier outcome for a Russian wife seeking to divorce her husband than was provided to Anna Karenina by Leo Tolstoy. There is an irony in quoting Tolstoy who said, 'if a rich man is to be truly charitable, he will give away all his wealth as soon as possible' in the context of a case which records the husband's position as follows: "*Their eldest son, Temur, confirmed in his oral evidence that the Husband would rather have seen the money burnt than for the Wife to receive a penny of it.*" **[6]**. In this case, it seems, only court orders will lead to H and / or his servants, agents and lieutenant parting with his wealth.

In December 2016 at a final hearing in W's application for financial remedies, Haddon-Cave J (as he then was) ordered H to pay W £435,576,152 in settlement of her financial claims against him on their divorce. The claims pursued by W in this case against H and the 10 other respondents flowed from H's schemes to evade compliance with that order. Both in 2016 and before Knowles J, W was litigating against respondents who deliberately failed to comply with their disclosure obligations in contempt of court orders, and in H's case, his duty to do so.

W sought relief under s. 423 of the Insolvency Act 1986 ('IA 1986') and / or under s. 37 of the Matrimonial Causes Act 1973 ('MCA 1973'). Specifically, W asked the court to set aside the transfers H had made to the respondents and to order the immediate recipient to return the assets to her and / or pay to her the value of the original assets received by them to her. The test for relief to be granted under IA 1986 is set out at paragraphs **[79] – [88]** and s. 37 at **[105] – [111]**. A helpful analysis of the differences between the tests and relief available under the two pieces of legislation is set out at paragraph **[113]**.

In respect of both s. 423 IA 1986 and s. 37 MCA 1973, it was argued on behalf of Temur that there was a gateway condition before relief under either piece of legislation could be granted. This was that the grant of relief cannot be satisfied in a situation where, after the impugned transaction, the debtor is left with sufficient assets to meet the liability owed to the claimant. The court rejected those submissions finding them to be misconceived **[103] – [104]** and **[114] – [116]**.

The court found that Ms Akhmedova had been the victim of a series of schemes designed by H, with the knowledge and assistance of Temur, to place every penny of his wealth beyond her reach. H and Temur together had embarked on a careful and concerted strategy to move H's assets into trusts and financial vehicles in jurisdictions where enforcement of an English order was unlikely to be possible. The court was satisfied that H's purpose in transferring assets to the respondents was to put them beyond W's reach and / or to frustrate or impede the enforcement of any order made by the English court. The precise relief granted to the W and to be paid by each of the Lichtenstein Trusts, Temur and Borderedge to her is set out at **[400] – [404]**.

Case summary by **Rachel Cooper**, Barrister, **Coram Chambers**

A County Council v M & H & T [2021] EWFC 35

Due to their young age and an unplanned pregnancy discovered late in the day (amongst other matters), H's parents approached the local authority before the birth of H to arrange an adoption. H was placed with 'foster to adopt' parents. On learning of this, the paternal grandmother told the social worker she wished to care for H. The parents objected on grounds which included that the grandmother was a single parent of limited means who had suffered episodes of depression. The wider paternal family did not support the grandmother's application.

The grandmother then applied for a Special Guardianship Order or a Child Arrangements Order in respect to H, a seven-month-old child. The local authority applied under the inherent jurisdiction for permission not to assess the grandmother as a potential carer. The matter came before Mrs Justice Judd for determination on submissions.

The court considered the local authority's duty, under the Adoption and Children Act 2002, to consider the child's wider family as potential carers. Account was also taken of the Adoption Agencies Regulations 2005 and relevant case law. The judge assessed the Children Act 1989, section 10 in regard to applications for leave to apply for a section 8 order.

The judge noted: parents do not have a right to have their child adopted; family members do not have a right to an assessment nor, without leave, a right to apply for a child arrangements order. She found that to grant the grandmother's application "would risk disruption to such an extent that H would be harmed" and would "lead to delay to a permanent outcome for H with, in my judgment, very little likelihood of the grandmother's application being successful, even though it would be an alternative to adoption." [50]

Due to a careful analysis of H's situation by the Guardian, the judge had sufficient information to determine the grandmother's application without the need for a full enquiry or assessment.

The local authority's application was granted and that of the grandmother was dismissed.

Case summary by **Dr Sara Hunton**, Barrister, **Field Court Chambers**

CHF & ORS, R (On the Application Of) v Newick Church of England Primary School & Anor [2021] EWCA Civ 613

In the summer of 2019 serious and sensitive allegations were made about the behaviour of one of the Appellants' children towards other children in the school. A dispute arose about the way in which the allegations were handled. The Appellants applied for judicial review. In their claim form they sought anonymity for the children and themselves. The Appellants and the children share a distinctive surname.

Linden J granted permission to the Appellants to seek judicial review on one ground and made the following order in respect of anonymity:

> 10. Pursuant to CPR rule 39.2(4) I therefore **direct there shall not be disclosed in any report of the proceedings the name or address of the Claimants' children or any other children referred to in the evidence or any details leading to their identification**. Such children, if referred to, shall only be referred to by letter of the alphabet.
>
> 11. Pursuant to CPR rule 5.4C a person who is not a party to the proceedings may obtain a copy of a statement of case, judgment or order from the court records only if the statement of case, judgment or order has been anonymised such that: (a) the Claimant's children and any other children are referred to in those documents only by letter of the alphabet; and (b) any references to the names of such children have been deleted from those documents.
>
> 12. Any person affected by this Order may apply on notice to all parties to have this Order set aside or varied." (emphasis added by the Court of Appeal)

The Appellants then renewed their substantive application in respect of the unsuccessful grounds. This application came before Mr Tim Smith (sitting as a Deputy High Court Judge). Mr Sam Tobin of PA Media (Interested Party) and a law reporter were in attendance. The Judge referred to the Anonymity Order at the start of the hearing and referred to it as extending to the Appellants' children and any children referred to in the evidence only. In response, the Appellants asked for their names to be anonymised too. Mr Tobin had raised that the Appellants' surname had been published on the publicly available list.

After hearing short submissions, the Judge decided that it was futile to extend the Anonymity Order as the information was already in the public domain, but that the order could continue in respect of the children. He then went on to refuse the substantive renewal application.

The Appellants sought to appeal the whole of the Judge's decision. Warby J granted permission in relation to the Judge's decision about the Anonymity Order only.

The Appellants' case was that they did not apply to extend the Anonymity Order. They believed that it already prevented them from being named as it would lead to the identification of the children. However, the discussion before the Judge threw that into doubt. His order, which purported to refuse their application to extend the order, was in error.

PA Media opposed the appeal and argued in written submissions that the Anonymity Order should not be "extended' and that the children had the effective anonymity sought by the parents – if naming the parents would lead to the identification of the children, that is already covered by the Anonymity Order. If, however, it would not lead to the identification of the children, then it is not necessary to extend the order.

The court considered the law on anonymisation [paras 14-22] and concluded:

- As to the effect of the order, its prohibition on the disclosure of any details leading to the identification of the Appellants' children would inexorably be breached by the naming of the Appellants themselves – the identity of the Respondents localises the case to a county, a village and a school and on top of that, the family surname is a distinctive one.

- Properly understood, the Anonymity Order already provided the Appellants with the protection they sought. However, this was thrown into doubt at the start of the hearing as the Judge asserted more than once that anonymity did not extend beyond the children.

- There was no application, in any real sense, to extend the Anonymity Order. It did not need extending, it needed clarifying.

The court held that the Judge fell into error in two ways: 1) his misconception that the Appellants were seeking to extend an order which, properly understood, already provided the protection to which their children were entitled and 2) his approach to the balancing exercise that he then very briefly conducted. The Judge had given decisive weight to the fact that some information was already in the public domain, leading him to say that it would be futile to extend the order. The fact that information is in the public domain may certainly be a factor that speaks against making a restrictive order, but it is not an absolute barrier. The result of the decision was to leave in place an order whose effect had been placed in doubt. That decision could not stand, and so the court went on to make its own determination.

The court applied the guidance contained in ***JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42** and ***Re S (A Child)* [2004] UKHL 47**; [2005] 1 AC 593 and balanced two significant factors: the privacy rights of the Appellants' children and the importance of the public interest in the identification of litigants. The court held:

> In making the Anonymity Order, the court concluded that the children's right not to be identified must take priority over the publication of information that would have that effect. The naming of the parents would have just that effect. Apart for the important general principle of party transparency, there is no specific countervailing public interest. On the facts of this case, the balance falls in favour of making it explicit that the Appellants cannot be named as to do so would identify the children. I would therefore amend the Anonymity Order to the extent set out below. [para 31].
>
> "1. Paragraphs 10 and 11 of the order of Linden J dated 27 July 2020 are amended to read as follows:
>
> > '10. There shall not be disclosed in any report of the proceedings the name or address of the Claimants' children or any other children referred to in the evidence, or any details (including the name or address of either of the Claimants) that might lead to the identification of the children. The Claimants may be referred to as CHF and CHM. The children, if referred to, shall only be referred to by letters of the alphabet.'
> >
> > 11. Pursuant to CPR rule 5.4C a person who is not a party to the proceedings may obtain a copy of a statement of case, judgment or order from the court records only if the statement of case, judgment or order has been anonymised such that: (a) the Claimants, the Claimant's children and any other children are referred to in those documents only by letters of the alphabet as above; and (b) any references to the names of the Claimants and such children have been deleted from those documents." [para 33].

The court added that the decision does not imply that adult litigants can always expect to be anonymised in public law cases involving children. These are fact-sensitive assessments, and in the majority of cases an order similar to that made by Linden J may be quite sufficient.

Case summary by **Sophie Smith-Holland**, Barrister, **St Johns Chambers**

Re F & G (Discharge of Special Guardianship Order) [2021] EWCA Civ 622

Background

The mother (M) of twin girls born in 2010 formed a relationship with K during the pregnancy and the girls grew up believing him to be their father; they had no contact with their biological father. M and K later married, divorcing in 2017. After M formed a relationship with a violent man, the LA issued care proceedings, placing the children with K under ICOs in April 2019.

K was assessed as having extremely low cognitive ability and although he coped well with the children he needed considerable support. An SGO assessment was positive; despite his learning disability he had evidenced his ability to meet the children's emotional needs. At the final hearing of the care proceedings in April 2020 all parties agreed to the making of an SGO in favour of K and a full care order to the LA. No judgment was delivered giving the reasons for this outcome.

The placement with K broke down a few weeks later and the LA gave notice of their intention to remove the children to foster care. K applied to discharge the care orders and unsuccessfully applied for an injunction preventing the girls' removal. Following the children's placement with foster carers the LA initially sought the discharge of the SGO on the basis that K no longer needed PR. By the final hearing however the LA and guardian thought the SGO should remain in place despite there being no plan for the children to return to K. M had, without the necessary permission, filed an application to discharge the SGO. Rather than considering whether the test for permission was met the judge heard argument about whether the SGO should remain in place on the basis of the court's power pursuant to s14D(2) CA 1989. He refused to discharge the SGO but attached a condition limiting K's power to seek information from third parties while the care order was in force.

The appeal

The first ground was that SGOs and care orders cannot exist in law. This was rejected because the amendments to the Children Act 1989 made when SGOs were introduced clearly do allow for this situation:

> • S91 makes it crystal clear that an SGO is not automatically discharged by the making of a final care order.
>
> • S33(3)(b)(i), as amended, allows a LA to determine the extent to which a "parent, guardian or special guardian" may exercise PR when a care order is in force. This demonstrates Parliament's intention that an SGO could continue after the making of a care order.
>
> • The provisions of s14D which entitle a LA designated in a care order to apply for the discharge of an SGO would be pointless if a care order operated to discharge a pre-existing SGO. The SGO must continue unless and until discharged.
>
> • SGOs are intended to provide long-term support for the child and it would be contrary to the purpose of special guardianship if SGOs came to an end automatically on the making of a care order; whether or not they should remain in force depends on the circumstances and must be decided in accordance with the child's welfare.

The second ground, that the judge was wrong to refuse to discharge the SGO, raised more complex issues. There were welfare arguments in both directions. The judge had been particularly concerned that the children should maintain links with K, who had been treated as their father and was an important person in their lives. He worried that over time the LA might cease to communicate with him and his relationship with the children could be undermined. His attention was not drawn to an option which emerged during the appeal hearing, namely to make an order for contact under s34(2) and to invite the LA to amend its care plan to contain an express provision that K fell within the category of persons identified in s22(4), namely a person whose wishes and feelings it considered relevant when making decisions about all matters concerning the children's future. A well drafted care plan could have provided substantial protection for the children's relationship with K and his involvement in decision-making.

The CA was uneasy about allowing a decision to stand that had been arrived at "after an unsatisfactory process without full consideration of the options". Accordingly the decision was set aside and the matter remitted to the trial judge for rehearing.

The third ground, that the condition imposed on the SGO was wrong in law and in principle, did not require detailed consideration given the decision on ground 2, but would have been dismissed.

Case summary by **Gill Honeyman**, Barrister, **Coram Chambers**

Re S (A Child) [2021] EWCA Civ 605

> "In my view, the mother has a legitimate sense of grievance that, however sympathetically the judge approached her application, it was not determined properly. The consequences for her, and Z, are far reaching. It is trite to say that, however inevitable it may be, a disappointing result reached without procedural integrity will fuel a sense of injustice"

Z and 4 older siblings were made subject of care orders on 1 February 2019 by order of HHJ Heaton QC. Z was also made the subject of a placement order on the same day. Z's last contact with the mother occurred in March 2019. The mother attempted to appeal the care and placement orders but the application was dismissed for breach of procedural requirements in July 2019. An attempt to reinstate the appeal was dismissed on 22 October 2020.

Z was placed for adoption in September 2019. An application under s24 Adoption and Children Act 2002 for leave to apply to revoke the placement order was dismissed by HHJ Heaton QC in November 2019 (when he also ordered that Z younger sibling by a different father should live with the father, subject to a supervision order).

The adopters gave notice of their application to adopt and the mother's response was to apply for leave to oppose the adoption under s47(5) ACA 2002. HHJ Heaton QC had retired and the matter came before HHJ Jack. The judge refused the mother's application on the basis that although she had made changes some of them predated the hearing in November 2019. The judge did not have the judgment from either the care and placement hearing in March 2019 or the leave to revoke hearing on November 2019. He made assumptions about the way that HHJ Heaton QC had assessed the changes. The local authority consisted of an affidavit from a social worker who had not been involved in the earlier proceedings and the Annexe A report (on the merits of the adoption), which had not been disclosed to the mother.

Macur LJ (with whom the rest of the court agreed) concluded that the failure to ensure that HHJ Jack had transcripts of HHJ Heaton QC's judgements meant that there was no reliable bench-mark against which to measure change. She rejected the local authority's suggestion that the responsibility for that was the mother's (a litigant in person). She noted that the social work affidavit purported to address the different issue and legal test of an application to revoke. She also rejected the suggestion that the amount of redaction necessary would have rendered the disclosure of the Annexe A report unreadable as only one section deals with the adopters. The Court of Appeal could not assess the situation because its orders for key documents from the care proceedings and the transcripts had not been complied with either. Neither the Court of Appeal nor counsel for the local authority had read the Annexe A report. The document could have been disclosed to the mother or at least the parts about her: FPR 14.13.

It is not clear from Macur LJ's judgement why it was assumed by the local authority and HHJ Jack that the application for leave to apply revoke had been dealt with on its merits in November 2019. If the child had already been placed then it was bound to fail: Re F (a child: placement order) [2008] 2 FLR 550, irrespective of any changes the mother had made. The court would have then been considering the argument for the first time on the application under s47(5).

This case read together with ***R (On the Application Of EL) v Essex County Council*** **[2017] EWHC 1041 (Admin)** makes it clear that the profound effects of adoption place significant responsibilities on local authorities to ensure that the requirements of procedural fairness are satisfied. A failure to be proactive has serious ramifications for parents, adopters and most importantly the child as the processes of challenge are worked through. Many authorities will therefore seek to obtain transcripts of judgments from care and placement proceedings when those proceedings are complete where the plan is adoption, thereby speeding up consideration of any appeals and any applications for leave to apply to revoke placement orders or oppose adoption order. The possibility of the disclosure of material from Annexe A reports should also be considered when the s47(5) application is received. Those advising parents and adopters will also need to consider this possibility so that the court can give directions expeditiously.

Case summary by **Nicholas O'Brien**, Barrister, **Coram Chambers**

Barclay v Barclay [2021] EWFC 40

The case concerned financial remedy proceedings between Lady Hiroko Barclay (W) and Sir Frederick Barclay (H). The proceedings were heard in private in accordance with FPR 2010 r 27.10. An interim reporting restrictions order (RRO) was made in the course of those proceedings and judgment was handed down on 30.03.21. This hearing was to determine whether the judgment should be published either in full or in part, and whether the RRO should remain in place. Both parties agreed that the award and the open position of each party should be made public. (these are set out in the judgment).

H opposed any further reporting, while W contended that the public had a right to know of H's behaviour during the course of proceedings and that his behaviour had removed his right to privacy. The media (Bloomberg and The Press Association) contended that the judgment was of general public interest. The wider family opposed publication (although not knowing the content of the judgment) on the basis that it may impinge on their financial affairs and privacy.

The judgment provides a detailed summary of the relevant case law, noting in particular that the starting point is privacy but that in rare cases the conduct of a litigant can disentitle him from protection against publicity (***Lykiardopulov Lykiardopulo*** **[2010] EWCA Civ 1315**). The court also considered other options that lay between full publication, and no publication. Neither party were in favour of the option to publish a summary.

The court considered the matter to be finely balanced between the right to privacy and the right to freedom of expression. The court considered that H's default did not get near to the level of misconduct in *Lykiardopulo.*

On weighing up all the considerations, the Court adopted a proportionate approach and included within this judgment the matters that were considered to be relevant and appropriate for publication and/or in the public interest. The reporting restrictions order remains in place in respect of the financial remedy judgment.

Case summary by **Martina van der Leij**, Barrister, **Field Court Chambers**

AX v BX & Ors (Revocation of Adoption Order) (Rev 1) [2021] EWHC 1121

A (aged 18) and B (aged 16) were adopted by Mr and Mrs X in 2011 following the conclusion of care proceedings which had concluded in 2010 with the making of care and placement orders.

However, since 2018, A and B had returned to live with their natural maternal family, the placement with Mr and Mrs X (the adoptive parents) having permanently broken down.

All parties agreed that the adoption order should be revoked. The Court considers the legislative framework and case law given the lifelong implications of the changes to the legal relationships of the people concerned.

The only statutory ground for the revocation of an adoption order (under Adoption and Children Act 2002, section 55) was not applicable in this case. The applications were therefore brought under the inherent jurisdiction, it being well established that the Court has the power to revoke adoption orders.

The Court observes the characteristic finality of an adoption order but notes that it is well established that it is not immune from challenge and this had not changed with the coming into force of the 2002 Act. However that finality is such that it is only in very limited circumstances that the Court will be persuaded to exercise its discretion to revoke the adoption order, that judicial discretion being "severely curtailed". The circumstances will be "exceptional and very particular".

The Court adopts the key principles as identified by Sir James Munby P in ***Re O (A Child)(Human Fertilisation and Embryology: Adoption Revocation)*** **[2016] 4 WLR 148**

Three issues arose between the parties. First, what limitations, if any, are there in the categories of cases the court can consider whether to exercise its inherent jurisdiction to revoke an adoption order, second, whether welfare can play any part in the exercise of the court's discretion relating to the inherent jurisdiction to revoke an adoption order, and, third, the extent to which the court can exercise jurisdiction in relation to A who is now 18 years, although 17 at the time the proceedings were commenced.

Having reviewed the relevant case law, Theis J sets out the relevant legal principles at paragraph 80 and concludes that the discretion of the Court to revoke an adoption order is severely curtailed "each case will turn on its own facts, the highly exceptional circumstances must comprise more than mistake or misrepresentation or serious injustice and amount to matters such as a fundamental breach of natural justice."

Welfare can, in appropriate cases be taken into account; this will vary depending on the particular circumstances of the case.

The jurisdiction to revoke the order did extend to an adult applicant.

Whilst no single factor was determinative, viewed as a whole the balance came down firmly in favour of revocation.

Case summary by **Kieran Pugh**, Barrister, **Coram Chambers**

Re O (A Child: The Vienna Convention on Consular Relations 1963 [2021] EWHC 908

On the 4th August she was taken into police protection and then placed in local authority foster care. On 14th September the local authority left a message at the Embassy of the DRC in London, notifying them that one of their citizens had been placed in foster care, but received no reply. On 12th November 2020 the court made an interim care order.

O missed her family but did not wish to return to the DRC as she believed she would risk being killed if she returned and was strongly opposed to the authorities in DRC being given any information about her. The court found no reason to doubt her account of 'horrific' experiences. O was doing well in and the care plan was for her to remain in foster care and receive psychological help.

The discrete issue for the court was to decide if the local authority is under a duty to notify the Congolese authorities that O is the subject of public law proceedings. The local authority and the children's guardian, both sought a declaration that such non-notification was lawful and proportionate

The court reserved full judgment until the Issues Resolution Hearing (IRH) but decided on an interim basis that Article 37 of the Vienna Convention on Consular Relations 1963 ('The Vienna Convention') was engaged and that respect for international Conventions would normally impose a duty upon the local authority to inform the relevant authorities in the DRC, but in the circumstances of this case it was 'plainly not in her best interests' to do so. Following the IRH the Judge confirmed this interim decision and provided fuller reasons.

The court examined closely the relevant provisions of the Vienna Convention. Article 36 provides that States should keep other States informed with regard to the nationals of one State who end up detained in the other, and that consular officers shall be free to communicate with and visit those nationals of their State. Article 37 imposes a duty on the State who is dealing with a foreign national to inform that person's consulate without delay if a guardian or trustee has been appointed for a minor or person otherwise lacking capacity. However, this is 'without prejudice' to the operation of laws and regulations of the State concerning such appointments.

The court therefore confirmed that Article 36 was not engaged but Article 37(b) was. The court referred to the judgment of the former President Sir James Munby in the case of ***Re E (A Child) (Care Proceedings: European Dimension)*** **[2014] EWHC 6 (Fam)**. He set out at paras 47-48 the requirements of 'good practice' in this area which was to allow free communication and access between a foreign national and their consular authority. The court should normally accede to any request by the foreign state for an accredited official to attend hearings and obtain relevant documents. The court should make sure that the relevant consular authority has been told about the foreign national child who is represented by a guardian or litigation friend.

If the court wishes to adopt a different approach then it is essential to hear submissions and set out clearly the reasons for its decision.
The court would need to balance the need for local authorities to respect its obligations under the Vienna Convention (see In **Re JL and AO [2016] EWHC 440**) while at the same time considering circumstances where the foreign State ought not to be informed.

An example of this was given at page six of advice given in July 2014 by the Department for Education, "Working with foreign authorities: child protection cases and care orders":

> "Social workers should inform the relevant Embassy when a child with links to a foreign country has become the subject of a child protection plan, has required immediate protection or has become the subject of care proceedings, unless doing so is likely to place the child or family in danger and provided any necessary consent to disclose information has been obtained. Decisions should be linked to a robust and thorough risk assessment."

The Vienna Convention, has not been incorporated it into domestic law by an Act of Parliament and so the court therefore needed to consider what binding force it had. As a general and important principle of public policy, the UK should respect the comity of nations and obey an instrument binding under public international law. Therefore the domestic courts are bound to consider Article 37 of the Vienna Convention as a 'necessary but not sufficient consideration in applying domestic legislative duties'.

In this case, the court found that Article 37(b) did not impose an absolute and binding duty in all circumstances to notify a foreign authority where a court appoints a guardian in respect of one of its nationals. O's case was an example of one of those rare cases where 'it would wholly inimical to the welfare best interests of the child to give the requisite notice to the foreign authority.'

Case summary by S**arah Phillimore**, Barrister, **St John's Chambers**

D v E (termination of parental responsibility) [2021] EWFC 37

G, a girl, was born in 2012. Her father (F) was named on the birth certificate. G's parents separated in 2014 and in subsequent proceedings finalised in 2014, a child arrangements order was made providing for F to have contact progressing to staying contact. F had a significant offending history and in 2015, mother (M) terminated contact on advice from police and the LA because F was being investigated for sexual offences against a child. F was subsequently convicted of offences of causing or inciting a female child under the age of 16 to engage in sexual acts and of further breaches of sexual harm prevention orders. F had no subsequent relationship with G.

M subsequently applied for a child arrangements order that effectively terminated all contact with F, a specific issue order to change G's surname and an application to terminate F's PR. The child's guardian applied for an order pursuant to s 91 (14).

The court considered the law in relation to all of these applications in the course of the judgment and was satisfied that it was in G's best interests to make the orders sought. The court considered it significant that G had no relationship with, and no recollection of her father. The court was satisfied that father continued to pose a risk of serious harm to G which was likely to increase as she reached adolescence.

Case summary by **Martina van der Leij**, Barrister, **Field Court Chambers**

Manchester City Council v D (Application for Permission Withdraw Proceedings after Abduction) [2021] EWHC 1191

Care proceedings were brought because of the serious history of domestic abuse. During assessments the father accepted that he had amongst other matters raped and assaulted the mother on a number of occasions. The children were living at home with the mother under interim care orders supported by exclusion orders under s38A Children Act 1989. The local authority proposed that the children remain with the mother and this plan was supported by the children's guardian who was recommending a care order with the children remaining at home. The parents removed the children to Pakistan via Ireland and Italy. The judge heard evidence from the parents via video-link and ordered the return to England and Wales. The parents refused. The judge considered the Hague Convention and the UK/Pakistan Protocol and concluded that there is no bilateral process which was likely to secure the children's return. [para 38]

In deciding to grant the application for leave to withdraw, MacDonald J reviewed and applied the case law since *London Borough of Southwark v B* [1993] 2 FLR 559 including *GC v A Local Authority (A Child) (Withdrawal of care proceedings)* [2020] 4 WLR 92 in which the court is expected to consider the welfare of the child and the overriding objective, and concluded that as a result of the abduction that "*there is no advantage to any child in being maintained as the subject of proceedings that have become ineffective in result*". [para 41]. However he then went onto make plain that this was not acquiescence to the acts of the parents in fact on the contrary "*parents who abduct children as a means of avoiding local authority involvement with those children or during the course of subsequent care proceedings can expect the court to bring to bear the full weight of the law in seeking the return of those children to this jurisdiction, and to continue in that effort until all legal avenues have been exhausted.*" [Para 47].

Case summary by **Nicholas O'Brien**, Barrister, **Coram Chambers**

London Borough of Barnet v AG & Others [2021] EWHC 1253

LBB applied for EPOs. That application was transferred to Mostyn J given its complexity, and he initially made no order, and listed the application for ICOs for a hearing which would address the issue of diplomatic immunity.

In March 2020 the LA invited Mostyn J to interpret the Vienna Convention on Diplomatic Relations ("the VCDR") (incorporated into English law via the Diplomatic Privileges Act 1964 ("the DPA")) in a way which was compatible with the Human Rights Act s3 (which requires primary legislation to be given effect in a way which is compatible with ECHR rights "so far as it is possible to do so"). He concluded this was not possible, as principles of statutory construction would prevent him from inferring a tacit exception to the Vienna Convention based on safeguarding children at risk. He stayed the proceedings, also noting there had been no application for a declaration of incompatibility pursuant to HRA s4, i.e. a declaration that the DPA was incompatible with the HRA.

On 6 April the Secretary of State informed the sending state that the family were personae non grata and required to leave. On 9 April the twins (aged 18) sought asylum, alleging that they were subjected to physical and verbal abuse. The next two children (aged 17 and 14) also claimed asylum shortly after this. The parents left with the two youngest children on 18 April and an ICO was made in relation to the 14 year old child on 20 April.

The LBB subsequently issued an application for a declaration of incompatibility which was listed for a permission hearing. LBB alleged that the DPA was inconsistent with article 1 (securing the rights defined in ECHR), article 3 (protection from torture or inhuman or degrading treatment or punishment) and article 6 (right to a fair trial). Permission was granted and the full hearing came before the President and Sir Duncan Ouseley.

In summary the VCDR (which has been ratified wholly or in part by all nation states apart from Palau, the Solomon Islands, South Sudan and Vanuatu) states that the premises of the diplomatic mission are inviolable, as is the private diplomatic residence. A diplomatic agent is not to be liable to any form of arrest or detention, and enjoys immunity from the criminal, civil and administrative jurisdictions (save for some limited circumstances relating to property claims, succession claims, etc., which were not relevant). Diplomatic immunity can be waived only by express waiver. The members of a diplomatic agent's family (unless they are nationals of the receiving state) enjoy the same privileges and immunities as the diplomat.

The court noted that the Vienna Convention on the Law of Treaties 1969 requires treaties to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. It was noted that the VCDR contained no express exception to immunity for the protection of child members of the household. Nor does the United Nations Convention on the Rights of the Child address the position of children of those enjoying diplomatic immunity (although the UNCRC is not incorporated into domestic law and so is relevant to the UK's international obligations rather than internal domestic obligations and practices).

The court agreed with the Secretary of State that there were 4 stages when considering the application for a declaration of incompatibility:

> (1) Did the immunities and privileges in the DPA prevent LBB and the court taking steps under the Children Act which it would otherwise have done?

(2) On its natural meaning and effect, are the material provisions of the DPA incompatible with ECHR articles 3 and/or 6?

(3) If they are incompatible, can the conflict be resolved by a 'reading down' interpretation?

(4) If the conflict cannot be resolved by 'reading down', should the court exercise its discretion and make a declaration of incompatibility?

The first question was uncontroversial and answered in the affirmative.

Alleged incompatibility between the Diplomatic Protection Act and articles 3 and 6 of the European Convention on Human Rights

The court concluded that there is no conflict between ECHR article 3 and DPA/VCDR. It was not possible to interpret European Court of Human Rights caselaw, which requires a legal system to be in place to protect children via legislation, investigation and protective measures, to require Council of Europe member states to breach the VCDR. There is no jurisprudence which requires the breach of VCDR in order to avoid a breach of ECHR. If the issue were to be addressed, it would require a separately negotiated protocol [in relation to the VCDR]. The court saw no incompatibility if the reason an investigation (whether police or LA) could not proceed further was because diplomatic immunity was not waived. Similarly, the ECtHR duty under article 3 to take protective measures is to take those measures which are reasonably expected in all the circumstances, and the concept of what is reasonable includes the operation of the VCDR. It is not reasonable, possible or proportionate to require a state to breach the VCDR due to the importance which it has in reciprocal and global international relations.

The court then considered the role of the UNCRC in interpreting the ECHR and Vienna Convention on the Law of Treaties, and noted that when interpreting treaties, where there are specific and general provisions, specific provisions will usually continue to apply, and general provisions will then apply elsewhere. The VCDR is a specific regime for all aspects of diplomatic immunity, including the rights and immunities of diplomats' children, so cannot be interpreted as permitting exceptions either by region or topic. As the ECHR and UNCRC do not purport to cover this specific topic, as a matter of the interpretation of international treaties, the general (ECHR/UNCRC) must yield to the specific (VCDR).

'Reading down'

Whilst strictly obiter given the conclusions on the second question, the court considered the third question in relation to article 3 (whether any conflict could be resolved by 'reading down') and concluded that there is no scope for a reading down interpretation if the provisions of the DPA are incompatible with the ECHR. There are clear, limited exceptions to diplomatic immunity contained within the VCDR and to 'read down' or 'read in' additional provisions relating to the protection of children would stray beyond interpretation. The ECtHR could not require Council of Europe member states to breach their VCDR obligations towards each other, let alone non member states.

When considering the second and third questions in relation to article 6, the court noted that the ECtHR had held that preventing a Kuwaiti national from bringing a claim in damages against his government in the UK courts was justifiable, as it pursued the legitimate aim of complying with international law, and the bar was proportionate to the aim. Member states are permitted a margin of appreciation in conferring immunity. The same points applied in relation to 'reading down' and article 6 as applied in relation to article 3.

Declaration of incompatibility

Similarly, the court went on to consider the fourth question (any potential declaration of incompatibility) and concluded that they would not have exercised their discretion as Parliament could only remedy any incompatibility by breaching international law (i.e. the VCDR), and so the provisions of HRA 1998 s10 (the power to take remedial action in the event of incompatibility) would not be applicable.

Case summary by **Julia Belyavin**, Barrister, **St John's Chambers**