International considerations in public law cases

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Family analysis: Considering the rapid increase of public law cases with an international element, Carolina Marín Pedreños, a partner at Dawson Cornwell, says the decision in Re CB highlights the importance of taking into consideration the nationality of the parties in family cases.

Original news

Re CB (a child) (placement order: Brussels II Regulation) (Central Authority of the Republic of Latvia intervening) [2015] EWCA Civ 888, [2015] All ER (D) 72 (Aug)

The Court of Appeal dismissed a mother's appeal against the rejection of applications made by her in the present proceedings by which she sought to challenge the care and placement orders made in respect of her daughter who had been placed with prospective adopters. The court decided that the judge who had made the orders had been justified in doing so for the reasons he had given.

What were the key issues in this case?

The appeal concerned a young Latvian child, habitually resident in this jurisdiction since her birth, placed in the care of the local authority since March 2010 and with prospective adopters in May 2013.

Moylan J had refused the mother's applications for:

- transfer of the proceedings to Latvia pursuant to Council Regulation (EC) 2201/2003, art 15 (Brussels II bis)
- permission to oppose the adoption order under section 47(5) of the Adoption and Children Act 2002 (ACA 2002)
- contact with the child

Permission to appeal may have been granted to the appellant mother as a result of the representations made by the Republic of Latvia to the House of Commons (a letter from the Republic of Latvia to the Speaker of the House of Commons is annexed to the judgment) and to the European Parliament about our domestic adoption law.

The key issue is the guidance provided by Sir James Munby, President of the Family Division, on the interaction between domestic public law legislation and international private and public legislation in the form of Brussels II bis, the Vienna Convention on Diplomatic Relations of 1961 (the Vienna Convention) and the European Convention on Human Rights (ECHR).

How did the court address the intervention of the Republic of Latvia?

The Republic of Latvia first showed an interest in the case in 2012, two years after care proceedings had commenced. The head of the Consular Section of the Embassy of Latvia wrote to the local authority asking, among other things, why they had not been informed about the case. The unfortunate reply from the local authority was that they were not aware of their obligation to do so.

In summer 2014, in reply to a further letter, on that occasion from the Ambassador, the local authority apologised for not having complied with their obligations under the Vienna Convention.

Consequently a representative of the Republic of Latvia attended the first directions hearing relating to the prospective adopters' application to adopt and permission was granted for appropriate disclosure. Moylan J invited Latvia to attend the hearing and their written submissions were taken into consideration and their oral representations allowed. At that point there had been four years of litigation in this jurisdiction. Care and placement orders had been made and the mother had not sought to argue that the threshold criteria in section 31 of the Children Act 1989 were not satisfied. The outcome was that the mother's:

- appeal was dismissed
- application to revoke the placement order was dismissed
- application for permission to judicially review the order was refused
- renewed application for permission was dismissed
- application to the Court of Appeal was dismissed
- application for contact was refused, and
- the mother failed in her application for permission to appeal from the Court of Appeal to the Supreme Court and in her application to the European Court of Human Rights for interim measures

The mother's appeal was refused by Moylan J and referred to the Court of Appeal. With the appellant notice, the appellant lodged a report dated January 2015 from the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of the Council of Europe (Rapporteur: Ms Olga Borzova) titled, 'Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member states' (the Council of Europe report) along with a letter dated 16 February 2015 from the Saeima of the Republic of Latvia to the Speaker of the House of Commons.

The order of the President of the Family Division granted permission to appeal and invited representatives of the Republic of Latvia to appear and make representations at the appeal hearing. Consequently the Latvian central authority made an application to intervene and such application was granted.

From the chronology it can be noted that at all instances, international public law was applied by way of disclosure of the relevant documents to the foreign states and by allowing the representatives of the foreign state to attend hearings in person and to make written and oral representations.

The order of the President granting permission to the appeal could be clearly interpreted as an invitation to the Republic of Latvia to intervene in the proceedings. His detailed and careful judgment dealt with all the complaints and criticism made of our domestic legislation and our applicability of international public law.

How did the court approach the grounds of appeal?

The court addressed all four grounds widely and generously including the issue of contact which was not challenged by the appellant in the skeleton argument. The court further considered the ground that 'nothing else will do' with sensible care and clarity in response to repeated criticism from other foreign states and even nationals, of our adoption system post-ACA 2002.

The court made the following findings.

Change of circumstances under ACA 2002, s 47(5)

The involvement of a foreign state after a placement order has been made, even if it is due to late notification, does not automatically constitute a change in circumstances for the purposes of ACA 2002, s 47(5).

The theoretical ability by a foreign state to identify a cultural match for a child is not necessarily a change of circumstances for the purposes of ACA 2002, s 47(5).

Error of law

Brussels II bis, art 1(3)(b) clearly excludes the application of the Regulation from proceedings concerning moves preparatory to adoption, consequently Brussels II bis, art 15 was not applicable to this case. Applications for permission to oppose an adoption application under the ACA 2002, s 47(5) are moves preparatory to adoption for the purposes of Brussels II bis.

Additionally, as pointed out by leading counsel for the local authority, Henry Setright QC, the transfer argument was not made by anyone in the original care and placement proceedings.

Updating information

Guidance was given that the inevitable loss of cultural heritage by a foreign national child through adoption is not a reason to decline to make an adoption order when nothing else will do.

Vienna Convention

The President quoted his former jurisprudence in this regard from January 2014 when he identified the increase of public law cases when an EU national is involved, hence *Re E (a child) (care proceedings: jurisdiction)* [2014] EWHC 6 (Fam), [2014] 2 FCR 264.

In that case the President set up good practice for the court when dealing with foreign states in family matters and in particular in care cases (at para [47]), ie:

- the court should not generally impose or permit any obstacle to free communication and access between a party who is a foreign national and the consular authorities of the relevant foreign state
- whenever the court is sitting in private it should normally accede to any request, whether from the foreign national or from the consular authorities of the relevant foreign state, for permission for:
  - an accredited consular official to be present at the hearing as an observer in a non-participatory capacity, and/or
  - an accredited consular official to obtain a transcript of the hearing, a copy of the order and copies of other relevant documents

- whenever a party, whether an adult or the child, who is a foreign national is represented in the proceedings by a guardian, guardian ad litem or litigation friend, the court should ascertain whether that fact has been brought to the attention of the relevant consular officials and, if it has not, the court should normally do so itself without delay

'Nothing else will do'

The appellant mother and the intervener invited the court to conclude that the domestic approach to adoption was incompatible with European practice and principles. Findings were made that domestic adoption law is compatible with European legislation and rights protected under the ECHR.

With this decision the President extended the guidance provided by the court in the above mentioned case, to the local authorities (at para [84]), ie:

- local authorities and the courts must be appropriately proactive in bringing to the attention of the relevant consular authorities at the earliest possible opportunity the fact that care proceedings involving foreign nationals are on foot or in contemplation
- the court must, whether or not any of the parties have raised the point, consider at the outset of the proceedings whether the case is one for a transfer in accordance with Brussels II bis, art 15
- if there is no transfer in accordance with art 15, the court, if the local authority's plan is for adoption, must rigorously apply the principle that adoption is 'the last resort' and only permissible 'if nothing else will do' and in doing so must make sure that its process is appropriately rigorous, and
- in particular, the court must adopt, and ensure that guardians adopt, an appropriately rigorous approach to the consideration of the 'welfare checklist' (per ACA 2002, s 1(4)), in particular to those parts of the checklist which focus attention, explicitly or implicitly, on the child's national, cultural, linguistic, ethnic and religious background and which, in the context of such factors, demand consideration of the likely effect on the child throughout their life of having ceased to be a member of their original family

What is the significance of this decision, including its practical implications?

The Court of Appeal examined the interaction between domestic law and public international law in the case of *Re E* (above). In *Re CB* the President provided guidance for the courts when dealing with foreign nationals, particularly in public law proceedings.

The rapid increase in public law cases with an international element, combined with the attention that the media is giving these cases, together with the criticism of the European community in respect of our adoption system, makes it apparent that these cases need to be dealt with carefully. With this decision the President lays out clear guidance to the local authorities when dealing with these cases, stating primarily that they should be proactive in bringing to the attention of the

relevant consular authorities at the earliest opportunity the fact that care proceedings have commenced or that they are considering making such an application.

Does the decision highlight any unresolved issues in this area?

This decision further draws attention to the importance of taking into consideration the nationality of the parties in family cases. As international practitioners, focus is primarily paid to the habitual residence, but as already noted in *Re A (children) (jurisdiction: return of child)* [2013] UKSC 60, [2013] 3 FCR 559, that nationality could be of great significance, not just in public law cases.

Further, this decision addresses the concerns expressed in the Council of Europe report regarding adoption legislation in England and Wales which referred to 'forced adoption'. In some continental jurisdictions adoption can only be effective by consent. The President's judgment could be seen as a message to representatives of foreign governments about the adoption system in England and Wales and compliance with international public law in this respect, ie, he declares in this decision that our domestic legislation in adoption *is* compatible with international public law and that the system is compliant with the ECHR.

What should lawyers take from this case?

The importance of considering our clients' nationality in context and the possibility of considering a Brussels II bis, art 15 transfer at the commencement of proceedings in cases with an international element is evident.

A perhaps unwanted effect of this decision for practitioners is that foreign states may now become more active in making representations to the court, seeking a transfer of proceedings solely because the child subjected to the proceedings is their national, or because their national is a litigant in person as a supplement to the lack of legal representation of the parties. This has been already observed in court.

Any further points of interest?

Another aspect of the procedure in England and Wales criticised by some of our European colleagues is the possibility of the parties litigating in person in family proceedings. Legal aid is still available to parties in public law proceedings, but to contest an application for adoption legal aid is becoming ever more difficult to obtain. Compulsory legal representation should probably be considered in certain family proceedings, such as adoption proceedings, to silence the potential argument that procedures does not satisfy the ECHR, art 6 which protects the right to a fair trial.

Carolina is a dual qualified lawyer, in Spain and in this jurisdiction where she practises, specialising in international children matters. She is a fellow of the International Academy of Matrimonial Lawyers. In 2011 the International Academy of Matrimonial Lawyers awarded Carolina the First European Chapter Award for Young Family Lawyers for her essay entitled 'Brussels II bis Regulation--Five Years On and Proposals for Reform'. She was also The Times Lawyer of the Week in September 2014 for her successful representation of a client in the first case with Russia following their ratification of The Hague 1996 Convention. She has recently been awarded a place by the US Department of State to participate in their multi-regional project, 'Children in the US Justice System', as part of the 2016 International Visitor Leadership Programme. She writes articles about children law for English and foreign legal journals and is a frequent lecturer on family law.

Interviewed by Kate Beaumont.

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