Welcome to the 4PB International Family Law Newsletter!

3rd Edition – January 2015

The International Child Law Group at 4PB consists of:

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Welcome to the first 4PB International Family Law Newsletter of 2015!

There has been something of a hiatus in the production of the newsletter as two members of the team have spent a period of time away from practice on the Pegasus Scholarship. You can read more about Michael and Rachael's time in Sarajevo, where they worked with Trial, an NGO engaged with war crimes and human rights cases, later in this newsletter.

Back on English soil, the closing quarter of 2014 continued to be extremely busy for all concerned with the field of international family law. As this newsletter is the first for a considerable period, and to welcome everyone back to work with this 'New Year' edition, we have included a greater number of case summaries than would normally appear within the newsletter, which serve to demonstrate the volume of case law that continues to be generated within the field.

As a new feature, we are launching the first of a series of quick reference guides to key cases over different areas of international family law. Within this issue we intend to start at the beginning, with cases concerning the interpretation of the fundamental concept of habitual residence. It is our hope that this guide will be a useful and easily accessible resource to assist you in finding the right authority for any case that you are dealing with. The series will continue over the course of the year, and can, of course, be supplemented by our ongoing updates within each newsletter.

So with no more ado, let us welcome you to our latest newsletter. 2014 was an excellent year for all at 4PB, and we hope that it was for you as well. We all hope that 2015 is equally successful for all.

If you have any thoughts on this newsletter or any feedback generally, please get in touch at **mg@4pb.com/me@4pb.com**

Recent Authorities

Re K (A Child) [2014] EWCA Civ 905

http://www.bailii.org/ew/cases/EWCA/Civ/2014/905.html

Members of chambers involved:

A couple in the UK decided to send their son to Singapore to live with his paternal grandparents. The parents later travelled to Singapore to collect their son. While in Singapore M was served by F with divorce and custody proceedings issued in Singapore. In response, the M issued an emergency application in the English High Court. Russell J made the child to a ward and ordered F to return the child to England. F failed to comply. M brought committal proceedings. F applied for Russell J to recuse herself from the committal hearing on the basis of apparent bias. Russell J refused, heard the committal hearing and sentenced F to 18 months' imprisonment.

F's appeal allowed. The judge was entitled to find that the child's habitual residence remained in England as the child was not sufficiently integrated in Singapore. But there were various procedural breaches during the committal proceedings which meant that the appeal had to be allowed: (i) the court had attempted to coerce F, through recitals to the order, into taking steps in Singapore which the court was not prepared to order; (ii) F's failure to comply with the recitals was then used to support the finding of contempt; (iii) the judge did not explain to F that he was not required to give evidence; (iv) she did not explain to F the criminal nature of the proceedings; (v) the judge's reasoning did not support the conclusion that he was in contempt, beyond reasonable doubt; and (vi) she did not give F the opportunity to mitigate.

This is a useful case to have available if you have a client that is faced with committal proceedings.

Tomas Palacin Cambra v (1) Jennifer Marie Jones (2) Jessica Maria Palacin Jones [2014] EWHC 2264 (Fam)

http://www.bailii.org/ew/cases/EWHC/Fam/2014/2264.html

M failed to comply with numerous orders for her to return the children to Spain. She also failed to comply with the order that she bring the children to London to meet a Cafcass officer. F brought committal proceedings.

The Judge considered that the M's efforts to bring about the return of the children (as had been ordered by the court during the course of 1980 Hague Convention proceedings) were superficial, minimal and utterly inadequate. However, it was for F to disprove beyond reasonable doubt M's case that it was impossible for her to comply. He was unable to do this. Accordingly the application for the M's committal to prison was refused. One of the children (by then aged 16) was joined and it was her oral evidence that persuaded Munby P that she and her brother were adamant in refusing to return and there was nothing the mother could have done to alter that.

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Recent Authorities

Re M (A Child) [2014] EWCA Civ 1519
http://www.bailii.org/ew/cases/EWCA/Civ/2014/1519.html

Members of chambers involved:

M and F were Hungarian. F moved to the UK in 2013 and the child followed him soon afterwards. M brought proceedings under the Hague Convention, claiming the F was unlawfully retaining the child in England. The child was seen by a Cafcass Officer. The judge found that the child had been unlawfully retained, but refused to order the child's return on the basis of her objections.

The CofA allowed M's appeal. The child had expressed a preference to remaining in England, not an objection to return in Convention terms. The child had been unclear in the interview about whether a return would mean separation from his father. As such, an objection to *Hungary* could not be inferred from the interview. The case was remitted for urgent directions.

Re H (Jurisdiction) [2014] EWCA Civ 1101
http://www.bailii.org/ew/cases/EWCA/Civ/2014/1101.html

Members of chambers involved:

F and M were from Bangladesh. Children born in the UK. M, F and children returned to Bangladesh in 2008 for a 3 month holiday. M refused to return and proceedings were brought in Bangladesh by F. He then brought return proceedings in London, which were dismissed at first instance by Mr Justice Peter Jackson on the basis that the English court lacked jurisdiction as the child was no longer habitually resident in England and Wales. The F appealed. His appeal was dismissed.

It was held that the child was no longer habitually resident in England and Wales. There was no rule that habitual residence could only change with the consent of both parents. Habitual residence was to be assessed on the facts of every case, but this raised the problem of one parent circumventing the purpose of the Hague Convention. The way around this is to assess wrongful retention at the point when the parent engaged in unilateral acts designed to make permanent the child's stay in the new country (see **In the Matter of A (Children) (AP) [2013] UKSC 60**).The Court of Appeal held, however, that Article 10 of BIIR does apply between a Member State and a Non-Member State, and that, as jurisdiction can never be acquired by the courts of another Member State, the Article 10 jurisdiction is vested in perpetuity.

It was unnecessary to determine whether this jurisdiction should be used as the clear outcome would be the dismissal of F's application.

Recent Authorities

Re S (A Child)(Abduction: Hearing the Child) [2014] EWCA Civ 1557

http://www.bailii.org/ew/cases/EWCA/Civ/2014/1557.html

Members of chambers involved:

Re H (A Child) [2014]EWCA Civ 989

http://www.bailii.org/ew/cases/EWCA/Civ/2014/989.html

F and M were Russian nationals. M brought the child to the UK. F applied under the inherent jurisdiction for the child's return. His application was granted. M appealed on the basis that no consideration had been given to whether and if so how the child's voice should be heard, and accordingly to the impact of the child's views on considerations of her welfare.

The appeal was allowed. The principle that there must be consideration as to whether and if so how a child's voice must be heard was not limited to cases within the ambit of the Brussels II revised regulation. Whether or not a child's voice should be heard was not the same question as the weight that should be afforded to any views that the child might express. The weight to be attached to those views was a question of fact, based on her age and maturity. This had not been assessed. The application was remitted to the High Court for urgent consideration by a High Court Judge.

M granted temporary leave to remove the child to Iran. F appealed. In line with previous authority (see K (A Minor) (Removal from Jurisdiction: Practice) [1999] 2 F.L.R. 1084, Re A (Prohibited Steps Order) [2014] 1 FLR 643 and more recently Re R (Children: temporary leave to remove from jurisdiction) [2014] EWHC 643 (Fam), the court should consider three aspects:

(1) the magnitude of the risk of breach of the order,

(2) the magnitude of the consequence of breach if it occurs, and

(3) the level of security that may be achieved by building in safeguards to the arrangements.

The FCO advised that British nationals faced greater risks in Iran than nationals of many other countries. The judge had been wrong in his analysis of the risks of temporary removal.

Applications for temporary leave to non-Hague Convention countries should be dealt with in the High Court. Expert advice is needed in exceptional cases.

See also: **Re AB (A Child: Temporary Leave to Remove from Jurisdiction: Expert Evidence) [2014] EWHC 2758 (Fam)** - It is not open to the LAA to ignore judicial decisions about when an expert is 'necessary'

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Upcoming Events

> The first CALA seminar will be held on 2 March 2015.

Speakers include Cristophe Bernasconi (Secretary General of the Hague Conference) and Dr. Ian Curry-Sumner (Owner and founder of Voorts Legal Services)

Other News

> Launch of the Child Abduction Lawyers Association ("CALA")

On 11 September 2014 the inaugural meeting of CALA was held at Woburn House, London. CALA will provide a formal association for child abduction lawyers through which practitioners can network, exchange ideas and information, come together for events and training and present as a collective voice to the public and government agencies. Details (including of how to join) can be found within the CALA press release at **http://www.familylawweek.co.uk/site.aspx?i=ed136766** The website (which is currently under construction) will be at **www.childabductionlawyers.org.uk**

> New draft precedents published:

The High Court has published draft precedent for use in all child abduction proceedings. Their use will become compulsory from July 2015. The precedents can be found at **http://flba.co.uk/blog/2013/06/28/guidance-locator/** under the 'Abduction Template Orders' section.

> Lady Justice Eleanor King

On 31st July 2014 it was announced that Mrs Justice King had been appointed as a Lady Justice of Appeal.

> Human Rights and Democracy Department at the Foreign and Commonwealth Office.

The above Department acts as an information gathering resource for ministers, government departments and members of the public. It can also be used as a resource by lawyers seeking information on specific jurisdictions – subject to data protection requirements. This may well be a useful resource, particularly in non-Hague or non-EU cases where the Central Authority does not have jurisdiction. **The Department can be contacted at HRDDenquiries@fco.government.uk. They will attempt to reply within 14 days.**

Rachael Chisholm and Michael Edwards on the Pegasus Scholarship

Michael Edwards and Rachel Chisholm have recently returned from three months working in Sarajevo, the capital of Bosnia and Herzegovina. They were working for the NGO TRIAL (Track Impunity Always), funded by a Pegasus Scholarship from the Inns of Court.

Here's their report:

We were working with TRIAL's small team of five staff, who advocate on behalf of the victims of the conflict in Bosnia in the 1990s. TRIAL bring cases before the European Court of Human Rights and UN Human Rights Committee, lobby prosecutors to bring new cases and pursue compensation for victims, which they are entitled to but have not received – all on a shoe-string budget from a one-room office in the centre of Sarajevo.

TRIAL has a particular focus on sexual violence cases. There is a vast gulf between the number of reported cases of sexual violence in war and the number of prosecutions. There are hundreds if not thousands of perpetrators of sexual violence living with impunity in Bosnia today, some in significant positions of power.

We worked primarily on a project to establish trial monitoring of all sexual violence and torture trials arising out of the war in Bosnia. The focus of the project is on the treatment of victims and witnesses in these trials and to respond to any serious breaches of their rights. We will continue to work with TRIAL from London to develop this ongoing project.

Aside from the day job working on war crimes trials, Bosnia was a fascinating place to spend three months. Bosnia has been divided in half since the Dayton Agreement in 1995 which ended the war. The constitutional structure is incredibly complex: there are two entities – Republika Srpska and the Federation - three national presidents, another president of Republika Srpska, but not the Federation, and separate courts and administrative structures. Making any kind of political or economic progress within this Byzantine system is not easy. National elections took place in October. Turnout was low, particularly amongst the young, and the nationalist parties consolidated. Twenty years since the war, the ruling political continues to benefit from entrenching the divisions between ethnic groups.

We were very fortunate to be awarded the Pegasus Scholarship and to have worked with such interesting people.