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The way ahead

Teertha Gupta QC theorises as to potential scenarios for international children law cases post-Brexit

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'It seems obvious that there will be a relatively hard Brexit as far as family law is concerned, followed by a re-drafting of international child law treaties over time.'

At the end of last year, from an international child lawyer's perspective, there were two interesting developments, one well known, one not so well known. First, the Government was given 'a powerful new mandate to get Brexit done' – so, if there were any illusions that the referendum result of 23 June 2016 was merely a snapshot of the population's preference at the time, they have been dispelled. The electorate has spoken again. Brexit has happened and it will work, because it has to. Secondly, on a more mundane level, the Court of Appeal reached a decision in *Gray v Hurley* [2019] that showed that as far as the senior judiciary is concerned, the organs of the EU, notably the Court of Justice of the European Union (CJEU), still play a vital and continuing role in dispensing justice in the UK.

Preliminary rulings

In *Gray v Hurley*, the trial judge had refused to grant an anti-suit injunction preventing the respondent from suing the appellant in New Zealand under art 4(1) of Regulation (EU) No 1215/2012 (the Judgments Regulation). The question was whether the meaning of art 4(1) was *acte clair*, ie clear enough. The Court of Appeal referred the matter to the CJEU for an urgent preliminary ruling, thus the *procédure préjudicielle d'urgence* (PPU) used in *Mercredi v Chaffe* [2010], and more recently in *UD v XB* [2018] for defining habitual residence, is alive and kicking.

Senior judges obviously continue to respect the opinions of the judges who sit in the CJEU and turn to them, when necessary. The Supreme Court often refers to past PPU decisions, admittedly it has to, but one does not get the impression that it does so reluctantly, with one eye on when Brexit will free it of this legal obligation. For example, in *A v A (Children) (Habitual Residence)* [2013] Lady Hale said (at para 58):

> ... I would not feel able to dispose of this case on the basis that [the child] was not habitually resident in England and Wales... without making a reference to the Court of Justice. But we can only refer a question to the court if it is necessary for us to determine the case before us. For the reasons which will appear below, it is not at present so necessary.

She then went on to consider the basis on which the court would potentially be able to deal with the case under the inherent jurisdiction and remitted the matter to the High Court, but added (at para 67) that:

> Should [the High Court judge] decide not to exercise jurisdiction on the basis of [the child's] nationality and allegiance, it will become necessary to decide whether [the child] is indeed habitually resident here. As already explained, this court cannot resolve that question without referring it to the Court of Justice. The parties should therefore have liberty to apply to this court for a reference to be made in the event that a decision on the point becomes necessary.

Potential scenarios

One way that the Brexit negotiations, such as they currently are, could go I would call a 'cosmetic Brexit', ie the UK could simply keep the European judicial framework that has been erected over the years via a mass of automatically binding regulations (interpreted in equally binding CJEU decisions), by incorporating that referral system into our domestic legislation. Some argue that 46 years of

'European symbiosis' (or depending on your view 'knotweed') cannot simply be burnt down or hacked through and that much of the legislation (for example, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II bis)) has provided much needed certainty in cross-border disputes, which should not be, and practically speaking cannot simply be, cut like some Gordian knot.

If however there is no deal struck which preserves the current CJEU referral and appeal system (and as this was one of the main reasons why the 'Brexiteers' voted the way they did and beat the 'Remaniacs', this seems highly likely), two further scenarios come to mind:

- a 'hard' Brexit where no deal is struck at the end of the transition period and we spiral out (or depending on your view, elevate away) from our erstwhile European chums; or
- a more nuanced approach which involves an exhaustive series of treaties with the EU over specific issues and the phasing out of certain unpopular legal constructs, such as *lis pendens* and the promotion of others such as *forum conveniens*.

The no deal scenario

The end of the transition period will result in a loss of hitherto useful international tools such as Brussels II bis, and its soon to be 17-year evolution, Brussels II bis recast, and of course the EU Service Regulation (Council Regulation (EC) 1393/2007). The ability for the UK courts to make referrals to the CJEU for final or provisional (ie, PPU) decisions will be more limited and the exact nature of that ability remains unclear. Brussels II bis of course provides for the recognition and enforcement of family law decisions across European borders and if that is simply cast adrift then we shall fall back on pre-existing treaties and a word that has not been used regularly for the last few decades, 'comity'. These pre-existing treaties are, in the international children law domain, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention) which only came into force 1 November 2012 but was written before Brussels II bis (and on which a useful analysis may be found in *Re J (Morocco)* [2015]). The 1996 Hague Convention is already almost 25 years old and regrettably does not allow for an *automatic* recognition of foreign orders or of orders made in England and Wales in other signatory states, but instead relies on the old *ex equator* (or recognition and then enforcement) process. It is open to interpretation and allows the responding party a number of ways of avoiding enforcement of a foreign court order, which could lead to an emotional and financial cost for the parties involved. Transition provisions are still up for grabs at the moment, but surely a dual process whereby Brussels II bis is available for old orders to be enforced, but only the 1996 Hague Convention is available for new ones, would be unfair and unworkable.

A further pre-Brexit treaty that will have to be dusted off and used again (which, along with the 1980 Hague Convention on child abduction, is appended in a schedule to the Child Abduction and Custody Act 1985) is the Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (the 1980 Luxembourg convention), but again this allows for more defences to enforcement than, for example, an Annexe III certificated order for paternal contact under Brussels II bis.

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More defences mean more legal and factual argument, and the net result of all of this will be more litigation at a time when litigants are increasingly representing themselves and there have been more family court sitting days than criminal court sitting days in recent months.

And layered on top of the substantive arguments will be contention as to in which country the arguments should be heard and that means the concept of *forum conveniens* will be regularly back on the agenda. *Re S (Residence Order: Forum Conveniens)* [1995] is a classic example of the courts extending their jurisdictional reach in pre-Brexit days (a further example of which is *Re I (a child)* [2009]). In *Re S*, the judge, when granting leave to the mother to relocate to Holland, had also provided for contact after the removal. After the relocation had taken place, but when things started to go wrong, the father issued an application for a residence order. However, by amendment, and in the alternative, the father sought a definition or determination of the specific contact dates under the original order. Thorpe J (as he then was) considered the original application to be a free-standing application for an order under s8 Children Act 1989 and, therefore, the court had no jurisdiction to entertain it. On the other hand, Thorpe J considered the amended application to fall within the exception provided for in s1(1) Family Law Act 1996 and observed (at 321) that:

> The reality is that Parliament has intended this court to retain jurisdiction in respect of continuing orders the terms of which require variation or discharge. If jurisdiction to vary those terms remains, a fortiori remains the jurisdiction to further specify or define those terms without variation

The new treaties scenario

This would involve a more nuanced approach, by cherry picking the useful bits of 47 years of regulations and decisions and tip-toeing around the ones that are offensive to UK eyes. But to my mind this will take a great deal of time and effort and will not reach completion any time soon. Therefore, unless we suddenly discover that for the last three years a bevy of specialist family lawyers have been busy drafting