

International children: Across the seas

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Dorothea Gartland and Maria Wright provide a guide to inter-country placements of children and the assessment of potential long-term carers

4PB and Children and Families Across Borders



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In this article we consider the placement of children internationally with family members in kinship placements. These placements are often looked at potentially as adoptive placements, in circumstances where the application is governed by the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (the 1993 Hague Convention). Sometimes, and increasingly, placements are sought with applicable legal frameworks to a special guardianship order.

It remains an important feature of care proceedings that, as early as possible, family members and friends living overseas can be identified and properly assessed as potential long-term carers for children who are unable to continue to live with their parents or other family members. In these cases the court in England and Wales will have determined that it has jurisdiction based on the child's habitual residence. What is clear from case law is that these applications and placements often involve considerable delay and that delay can result in challenges to the court's ongoing jurisdiction in situations where the child has moved abroad before conclusion of the proceedings.

The charity Children and Families Across Borders (CFAB) supports children on their move between countries and reunifies children that have become separated from their families in another country. A key element in the work of CFAB is assessing placement options with family overseas to ensure children are placed in the best setting.

In November 2020, the Cross Border Child Safeguarding (CBCS) working group published the *International Kinship Care Guide* (the CBCS kinship guide), setting out the process, difficulties and case studies in relation to placements with family members that live overseas. We are grateful for the guide, which motivated this article.

What is gleaned from the CBCS kinship guide (which is going to be regularly updated) is the need to effectively identify and assess at as early a stage as possible the potential placement. A further significant issue which needs to be grappled with is the support for those placements following the placement of children abroad.

There is a statutory requirement for care proceedings to end in 26 weeks, per s32(1)(a)(ii), Children Act 1989 (ChA 1989), albeit qualified by the best practice guidance on special guardianship issued by the Public Law Working Group (PLWG) (see below) and the amendments made to ChA 1989 by s14(3),(5)-(6), Children and Families Act 2014 (as set out at sub-appendix A of the guidance, which specifically refers to the work of CFAB at para 6b). Given this requirement, the focus at the outset upon the identification of an international placement will be on four matters in particular:

- an effective viability assessment process in relation to the prospective carers;
- the provision of notification to the relevant embassy or consulate of the ongoing proceedings;
- the obtaining of both UK and the relevant country immigration advice; and
- advice in respect of the recognition of guardianship orders/mirror orders or alternatively an adoption process.

Case law

The case law identified for this article is particularly relevant to the issue of adoptive placements.

Section 42(2), Adoption and Children Act 2002 (ACA 2002) states that before an application for an adoption order can be made, the child must have had their home with the applicant (or with one or both of the applicants if a couple) at all times during the period of ten weeks preceding the application. This condition is mirrored in s84, ACA 2002, which provides for parental responsibility to be given to a carer who intends to adopt a child outside of the UK. The clear safeguard for the child with this provision is that the assessing social worker(s) have sufficient opportunities to see the child with the applicant(s). The Court of Appeal held in *Re A (A Child)* [2009] that the word 'home' in s84(4), ACA 2002 is not geographically defined (para 60), and Wall LJ (as he then was) said (at para 61) that:

... as a matter of construction, the phrase 'child's home was with the applicant' in my judgment fits far more readily with a home outside the jurisdiction if, indeed, that is where the prospective adopters' home truly is. Thus, in the instant case, [the child's uncle and aunt] undoubtedly have their home in the [US]. Quite clearly the statute envisages that it is possible for one or both of them to create a 'home' for 10 weeks with [the child] in this country; but to my mind at least, it is both easier and more natural to think of [the uncle and aunt's] 'home' as being in America.

Thus, Wall LJ added (at para 62) that:

... to take the instant case as a paradigm example, if [the child] cannot spend time with her uncle and aunt in America she cannot be adopted within her wider family and will have to be found prospective adopters within the [UK] who are strangers.

Schedule 2, para 19, ChA 1989 permits a local authority to make arrangements to assist a child in its care to live outside England and Wales with the approval of the court. The court in *Re A* accepted the submissions of the local authority in that case that it was entitled to use this provision to place the child in the US with her potential adopters for an assessment that might or might not lead to adoption. This was key to the Court of Appeal's decision at this interim stage of assessment and the proceedings, as was the court's view of Sch 2, para 19(6), ChA 1989, which provides that:

Section 85, ACA 2002 (which imposes restrictions on taking children out of the United Kingdom) shall not apply in the case of any child who is to live outside England and Wales with the approval of the court given under this paragraph.

In *Re LA (A Child)* [2013], Pauffley J granted the local authority's application for permission for the child who was subject to a placement order to be removed from the UK to the US, for a period likely to be of a year to live with her prospective adopters. The court retained its jurisdiction and made a declaration that the child's habitual residence remained in England throughout this period. These steps were taken to enable the carers in the US to apply for a 1993 Hague Convention adoption once they had obtained US citizenship.

The importance of identifying the basis upon which a court might retain jurisdiction after an overseas placement was emphasised in the CBCS kinship guide, by the Court of Appeal in *Re A* and more recently in *M and T (Proposed Convention Adoption: Habitual Residence)* [2015]. In this case, Keehan J refused an application by a kinship carer for the discharge of care orders and placement orders in respect of two children who had been living with her for almost two years at the time of the application. The carer argued that the children had lost their habitual residence in England as a result of the length of time out of the jurisdiction (some 23 months). This was to enable the carer (who did go on to obtain a 1993 Hague Convention adoption order almost two years later) to apply for an adoption order in the US. Keehan J found that the children had not lost their habitual residence by focusing on stability and citing Baroness Hale in *Re KL (A Child)* [2013], when she said (at para 26):

... the fact that a child's residence is precarious may prevent it from acquiring the necessary quality of stability...

and Lord Reed in *AR v RN (Scotland)* [2015] when he said (at para 16):

It is therefore the stability of the residence that is important, not whether it is of a permanent character.

Keehan J also referred to the decision of Munby P in *Re S & T (Children)* [2015], when he held that the children in that case remained habitually resident in England, despite living in the US with their relatives for over nine months at the time of the hearing, and said (at para 62):

... the provision [in the orders previously made] requiring the children to be

returned to this country at any time if the court so ordered [and] the presence of the children in the United States of America has been – designedly so – both intermittent and lacking in stability. The children remain habitually resident in this country.

Retaining jurisdiction after an overseas placement may in the future be complicated by more recent case law on habitual residence, as was considered by Judd J in *T (A Child: habitual residence)* [2021]. If children are placed overseas on an interim basis it may assist if such placements occur in a way that is time limited and involves the local authority retaining parental responsibility, which may ensure that a remedy is available should a child be retained overseas beyond any agreed period.

Placement of children in overseas kinship placements

Empirical studies on care proceedings in England and Wales have established that in recent years, there has been a decline in the number of children who are made the subject of placement orders, and a corresponding increase in special guardianship orders. See Professor Judith M Masson and others, *Reforming care proceedings 1: Court Outcomes* (2018) and Professor Judith Harwin and others, *The contribution of supervision orders and special guardianship to children’s lives and family justice* (2019). This trend may in part be attributable to the Court of Appeal and Supreme Court’s judgments in *Re B-S (Children)* [2013] and *Re B (Care Proceedings: Appeal)* [2013], which emphasised that adoption must be a last resort for children, where ‘nothing else will do’. At the same time, however, there have been concerns that children are being placed with kin under special guardianship orders on the basis of insufficiently robust assessments, with carers with whom they have no pre-existing relationship (see the Masson and Harwin studies).

In cross-border cases, where children have kin who live overseas, there are complex legal and evidential issues which require particular attention. At the heart of cases where overseas kinship placements are contemplated is a delicate balance of rights, ensuring that children are afforded the right to live with extended family overseas where this is possible, but in placements which are properly assessed and supported.

A key issue for overseas kinship placements, and special guardianship order placements in particular, relates to the ability to assess a child’s relationship with their prospective carer. In many cases, a geographical distance between the child and their family may mean that the child has not previously lived with the prospective carer, and their relationship may also be impacted by this physical distance. However, there has been a recent focus in best practice guidance on the importance of assessing the relationship between the prospective carer and the child, which may be informed by their existing relationship, but also by the prospective carer’s experience of parenting and family relationships. The PLWG has issued *Recommendations to achieve best practice in the child protection and family justice systems: Special guardianship orders* (June 2020) and *Best practice guidance: special guardianship orders* (March 2021). This is an area which requires further support and consideration and the best practice guidance is particularly useful at setting out different options for placement in sub-appendix B.

While a local professional in the prospective carer’s home country may be able to conduct an assessment of their suitability to care for the child, this assessment will not usually be

informed by a face-to-face observation of their relationship. In many cases, prospective carers may be able to travel to the UK and spend time with the child, and undergo further assessment of their relationship with the child. However, there may be reasons why this is not possible. Immigration restrictions, a prospective carer's work and family commitments in their home country, and, more recently, restrictions on travel as a result of the Covid-19 pandemic have made this process difficult.

Guidance has indicated that in many cases it will be appropriate for a child to be placed with a prospective carer on an interim basis before a special guardianship order is made (see the PLWG guidance). This is not a requirement, and will not be appropriate in every case. However, CFAB has encountered cases where local authorities are anxious to achieve an interim placement of a child overseas pending the making of a final special guardianship order. How can this be achieved in a cross-border case?

A child can be placed overseas under an interim care order pursuant to Sch 2, para 19, ChA 1989. An assessment under Reg 24 and compliance with Reg 22 of the Care Planning, Placement and Case Review (England) Regulations 2010, SI 2010/959 are necessary if this route is to be taken. This course may permit the child and their prospective carer to build a relationship, which can be assessed by a professional in the relevant state, before a final order is made.

However, matters to consider include whether consent to the placement will be required from the competent authorities in the relevant state where that state is a contracting state to the Convention of 19 October 1996 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). Such consent is required pursuant to the 1996 Hague Convention, Art 33, and although the provision refers to placements in 'foster family or institutional care, or the provision of care by *kafala* or an analogous institution', there has been an inconsistent approach to interpretation, at least in relation to the corresponding provision under Council Regulation (EC) No 2201/2003 (Brussels II bis) within the EU (ie Brussels II bis, Art 56, in relation to which see the EU Committee on Legal Affairs, *Cross border placement of children in the European Union* (2016), 27 and the *1996 Hague Convention Practical Handbook* at para 13.37). Many states require that consent be sought for placements with family members or unrelated kinship carers (see *A Local Authority v M* [2019]).

A further consideration will be how the local authority will exercise its statutory duties in relation to the child while they are in the placement. A local authority must, so far as is practicable, take corresponding steps to ensure that the placement is monitored in the same way as a domestic placement (SI 2010/959, Reg 12).

Finally, consideration should be given to what will happen if the interim placement breaks down and/or the child is exposed to harm, or the prospective carers refuse to return the child at the end of any agreed period overseas. This issue engages jurisdictional considerations and the availability of a remedy to secure the child's return in the relevant state, eg by the recognition and enforcement of a return order under the 1996 Hague Convention, or an order for return under the Hague Convention on the Civil Aspects of International Child Abduction 1980. It also engages ethical considerations and the risk to the child of being exposed to harm overseas or becoming the subject of extensive cross-border litigation. The PLWG's guidance on special guardianship orders suggests that alternative legal frameworks for interim placements prior to making special guardianship

orders might include child arrangements orders or placements for assessment under s38(6), ChA 1989, as considered in *K, T and U (Placement of children with Kinship Carers Abroad)* [2019]. However, an overseas placement under a child arrangements order may cause difficulties if the interim placement breaks down, as the local authority would not have parental responsibility for the child.

Each case is different and an interim overseas placement will not be the best approach for the child in every case where an overseas placement is contemplated. It may be possible to build a 'robust evidence base' about the potential placement by other methods, particularly through co-operative and creative collaboration between professionals across borders.

Post-placement support for overseas kinship placements

Multiple research studies have identified that poorly supported and planned kinship placements can present risks for children. As summarised by the PLWG in its June 2020 recommendations (at para 32), these may include:

... carers and children struggling to manage in the face of inadequate preparation and inadequate short and longer-term support; the breakdown of special guardianship placements; and in extreme cases, the risks to the child in a proposed placement being unassessed leading to the injury or, exceptionally, the death of a child.

Despite this, CFAB through its own research has found that there are worrying discrepancies in the approach to post-placement support where children are placed overseas with kin. On occasion, CFAB has encountered a perception that local authorities do not have an obligation to support placements overseas (*Cross-border child safeguarding: Challenges, effective social work practice and outcomes for children*, CFAB (2018)).

In *K, T and U*, which concerned a potential placement of a child under a special guardianship order with grandparents in Bermuda, Recorder Samuels QC, sitting as a deputy High Court judge, identified a number of omissions in the assessment and planning process, including a vague special guardianship support plan with no assessment of the child's need for support in the placement and an arbitrary approach to financial support. The judgment emphasises the importance of a robust assessment and support plan for overseas kinship placements.

Fundamentally, statutory guidance confirms that support should be based on a child's needs, rather than their legal status, and this is the case irrespective of the geographical location of the child's placement (*Family and Friends Care: Statutory Guidance for Local Authorities*, Department for Education (2010), at para 4.8). The CBCS kinship guide contains further information about matters to consider when planning support for an overseas kinship placement.

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