



The Impact of Brexit on Children & Young People

A Case Study on Cross-Border Family Law

Even before the June 2016 EU Referendum, Together (Scottish Alliance for Children's Rights) has been working with its members to raise awareness and understanding of how the UK's membership of the European Union impacts on children and young people's rights. As the UK prepares to leave the EU, Together is taking part in a range of activities to highlight the importance of ensuring children's rights are considered in Brexit discussions at a European, UK, Scottish and local level. As part of this work, Together has worked with Maria Doyle, an LLM student from Edinburgh University to explore the impact Brexit may have on the legal protections of children's human rights.

This briefing summarizes the resulting report:

[The Impact of Brexit on Children and Young People – A Case Study on Cross Border Family Law.](#)

Mapping exercise

Although not one of the original aims of the EU treaties, children's rights protections now form a core part of EU law.¹ A vast array of EU legislation affects children ranging from issues such as family law, child protection and immigration through to the environment and consumer protection. This report stemmed from an initial mapping exercise of EU legislation in these areas, and the rights and interests protected. The EU has enacted over 80 legal instruments that confer direct entitlement for children. Accordingly, it was necessary to restrict the scope of the final report to a case study in one area: cross-border family law. Whilst the report is limited to one topic, its findings are illustrative of the complex issues which Brexit may raise in relation to the other areas identified by the mapping exercise.

Key findings of report

The report considers the protection of children's rights in the context of cross-border disputes relating to custody, child contact, child abduction and maintenance payments.

Prevalence of "international" families in the UK/Scotland:

EU free movement law has resulted in a significant number of "international families" being formed in the UK. Figures from 2016 show that approximately 10% of births in Scotland were to families with at least one parent born in another EU Member State.² Inevitably a proportion of these families will face contentious breakdowns. For "international families" this often prompts at least one of the parents to move back to their country of birth.³ This, in turn, leads to disputes over where any children should live and, in extreme cases, may result in one parent abducting children to live in another country with them, without the approval of the other parent. It is crucial that such families have access to clear rules that set out which country's courts shall have authority to resolve these disputes and under what conditions

¹ The Treaty of Lisbon 2009 saw the EU introduce an objective of promoting and protecting the rights of children, see Article 3(3) TFEU; furthermore the EU Charter of Fundamental Rights contains a dedicated provision in this respect, see Article 24 CFR.

² National Records of Scotland, 'Table 3.10: Live births, country of birth of mother by country of birth of father, Scotland, 2016' (National Records of Scotland, 2016) <<https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.10.pdf>> accessed 1 August 2017; see also National Records of Scotland, 'Scotland's Population: The Registrar General's Annual Review of Demographic Trends 2016' (National Records of Scotland, 2016) available at <<https://www.nrscotland.gov.uk/files//statistics/rgar/16/16rgar.pdf>> accessed 1 August 2017

³ Helen Stalford, *Children and the European Union: Rights, Welfare and Accountability* (1st edn. Hart Publishing 2012), 91

decisions granted in one country may be recognised and enforced in another. This is particularly relevant in the context of Brexit, given that changes to immigration rules for EU nationals may affect the ability of some families to stay together.

Current children's rights protections under EU law

In disputes involving two EU countries, the above procedural matters are dealt with by the Brussels II *bis* Regulation and the EU Maintenance Regulation. These Regulations are based upon existing international law, including the conventions of the Hague Conference on Private International Law.⁴ However, EU law makes certain modifications and enhancements which are relevant from a children's rights perspective.

Over time, EU family law has increasingly sought to embed the provisions of the UN Convention on the Rights of the Child (UNCRC). The current EU framework offers procedural protections for children's rights in various ways. Firstly, it reinforces the right of the child to participate in abduction return proceedings and have their voice heard. It also emphasises that the best interests of the child is a key principle in decision-making. Furthermore, it sets strict timescales within which abduction return decisions must be made. Importantly, EU law provides for the automatic recognition and enforcement of decisions made in other EU countries. This provides children and their families with certainty and security around contact and care should they or their family members move to live in another EU country. It also helps avoid the costs and delays associated with securing new orders in other countries and prevents parents from evading their obligations by moving to another country.

Future children's rights protections under EU cross-border family law:

EU law is constantly in the process of review and development. Proposals have been published for a new Regulation which will replace the current Brussels II *bis* Regulation. It is unclear when the new Regulation will come into force and, therefore, whether it shall be "caught" by the European Union (Withdrawal) Bill's conversion of EU law into domestic law.⁵ Significantly, the new proposals have an even more UNCRC-focused approach. Notable changes are:

1. A broader and strengthened duty on EU countries to give children the opportunity to express a view in *all* cross-border family proceedings falling within the scope of the new Regulation⁶
2. Recognising a closer connection between giving a child an opportunity to express a view and protecting the best interests of that child⁷
3. Further streamlining of the procedure for recognising and enforcing orders granted in another EU country⁸ alongside additional measures aimed at speeding up proceedings.⁹

Implications of Brexit:

EU family law and, in particular the proposed Recast Regulation, make more explicit provision for children's rights than alternative cross-border family law instruments such as the Hague conventions. As yet, however, there is no clear vision of how to protect these rights following Brexit.

⁴ Namely the 1980 Hague Abduction Convention, the 1996 Hague Protection Convention and the 2007 Hague Maintenance Convention

⁵ The European Union (Withdrawal) Bill is a Westminster Bill currently in the process of amendment and debate before the House of Commons. It seeks to incorporate the totality of EU law into domestic law upon the UK's exit from the EU.

⁶ Recast BIIR Proposal, art 20

⁷ Recast BIIR Proposal, recital 13 (noting that any reference to "best interests" should be interpreted in light of the CRC and Article 24 CFR, both of which provide that the child has a right to be heard where they are capable of forming a view)

⁸ Recast BIIR Proposal, art 27 (abolition of exequatur)

⁹ These including limiting the number of appeals possible in abduction cases (Recast BIIR Proposal art 25(4)), and concentrating such cases within the judicial systems of Member States so that the same type of cases come before the same courts enabling the development of expertise which shall help such cases be determined more efficiently (Recast BIIR Proposal art 22, see also preamble para. 26)

It has been suggested that the UK could negotiate to remain part of the full EU family law framework. This would allow the above protections of children's rights to be preserved and enhanced in line with developments at EU level. This would, however, require difficult compromises to be made around the role of the Court of Justice of the EU ('CJEU') in overseeing such a UK-EU agreement. Some commentators have suggested that this may be possible if the UK Government agrees to the CJEU having an *advisory* role, if not a binding one.

The EU (Withdrawal) Bill illustrates the UK Government's current approach. Under the Bill, EU family law will be converted into UK domestic law. However, once domesticated, the EU family law framework loses much of its effectiveness. This is because only the UK will be bound by this domesticated law, and not remaining EU countries. UK courts shall be under a one-sided obligation to continue to respect and enforce incoming orders from remaining EU countries but these countries will no longer be bound to treat UK orders in the same way. This position is undesirable.

Accordingly, the UK Government may seek to repeal the EU family law framework soon after its conversion into domestic law. If this occurs, the UK may seek to "fall back" on existing international agreements (notably the Hague conventions) to regulate future cross-border disputes which arise between the UK and remaining EU countries. Reliance on the Hague conventions alone, however, may result in the watering down of the children's rights protections currently enshrined in EU law. There are also risks that Brexit itself may have technical implications for how easily the UK can fall back on the Hague conventions. For example, the UK's current membership of the 2007 Hague Maintenance Convention is derived from its status as an EU Member State. If the UK Government seeks to follow this option, then clear statements must be given on how these conventions will apply once the UK has left the EU so that there is no "gap" before they come into force. Additional guidance should also be put in place to ensure that children's rights protections are at least comparable to that available under EU law.

Concluding comments:

Whilst this study relates only to one specific area, its findings have broader implications. Firstly, it shows the level of complexity arising in relation to just one area, against a backdrop of over 80 EU instruments which confer direct legal entitlements upon children. It is likely that this level of complexity could arise in relation to all other areas where EU law has an impact on children's lives. Furthermore, it demonstrates how children's rights are being increasingly embedded into EU legislation and policy over time. This is not just the case in relation to cross-border family law but also more broadly. The report illustrates how Brexit may result in the UK falling behind positive developments at EU level. It further highlights that children's human rights have not been adequately considered so far in Brexit discussions despite a significant number of children potentially being affected (1 in 10 in relation to cross-border family law). Accordingly, the study emphasises that in order to protect children's rights, these issues must be at the heart of the Brexit negotiations and decision-making.

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October 2017

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