



**THE IMPACT OF BREXIT ON CHILDREN  
AND YOUNG PEOPLE IN SCOTLAND**  
CASE STUDY ON CROSS-BORDER FAMILY LAW

**October 2017**

Together (Scottish Alliance for Children's Rights)  
Rosebery House, 9 Haymarket Terrace, Edinburgh, EH12 5EZ  
Web: [www.togetherscotland.org.uk](http://www.togetherscotland.org.uk) Email: [info@togetherscotland.org.uk](mailto:info@togetherscotland.org.uk) Twitter: @together\_sacr  
Phone: 0131 337 9015

Charity registration no: SCO29403

Registered company no: SC199725

## ABOUT TOGETHER (SCOTTISH ALLIANCE FOR CHILDREN'S RIGHTS)

Together (Scottish Alliance for Children's Rights) is an alliance of over 370 children's organisations, academics and interested professionals. Our vision is that the rights of all children in Scotland are protected, respected and fulfilled, as enshrined in the UNCRC and other human rights conventions. To achieve this, we work with our membership, stakeholders and duty bearers to progress and achieve the realisation of children's rights in all areas of society.

## AUTHOR

Maria Doyle

## PEER REVIEWED BY

Professor Helen Stalford, Professor of Law, School of Law and Social Justice, University of Liverpool

## ACKNOWLEDGEMENTS

We would like to thank the following individuals for their interest in this project, and for sharing their vital insight and experiences:

- Jen Ang (Just Right Scotland)
- Maria Fletcher (University of Glasgow)
- Swee Leng Harris (Legal Education Foundation)
- Dr Kirsty Hood QC (Faculty of Advocates)
- Fiona Jones (Clan Childlaw)
- Rachael Kelsey (SKO Solicitors)
- Louise King (Children's Rights Alliance for England)
- Dawn Livingstone (Scottish Central Authority)
- Dr Kasey McCall-Smith (University of Edinburgh)
- Liz Millership (Together: Scottish Alliance for Children's Rights)
- Nina Miller-Westoby (University of Glasgow)
- Joanna Shepherd (Together: Scottish Alliance for Children's Rights)
- Professor Helen Stalford (University of Liverpool)

## OVERVIEW

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 the UK's membership of the European Union impacts on children and young people's rights. As the UK now 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 report is a culmination of this work.

The research began with an initial mapping of the EU legislation, regulations and directives that support children's rights, from family law, child protection and immigration through to the environment and data protection. Wider research<sup>1</sup> now shows that the EU has enacted over 80 legal instruments that confer direct entitlement for children.<sup>2</sup> As such, it was necessary to narrow the scope of Together's research to focus on an in-depth case study in one area: cross-border family law in relation to parental responsibility, child abduction and maintenance payments.

### HOW MANY CHILDREN AND FAMILIES COULD THIS AFFECT?

The case study brought to light the number of children and families living in Scotland whose rights could be adversely affected in relation to cross border family law as a result of Brexit. An estimated 181,000 EU citizens currently live in Scotland<sup>3</sup> and a further 120,000 Scottish citizens live in other Member States.<sup>4</sup> Many have formed 'international families', with people from Scotland and the UK parenting children with people across the EU. Indeed, over 10% (5604) babies born in Scotland in 2016 were to a parent born in another EU Member State. Of these, 1613 also have a parent born in the UK.<sup>5</sup>

Sadly, but inevitably, a certain proportion of these families will face contentious breakdowns. In extreme cases, this can result in parental child abduction. In 2016, there were twelve recorded child abductions from Scotland to another EU Member State, and eight abductions to Scotland from another EU Member State.<sup>6</sup> Given the cross-border nature of such family cases, it is vital that families have access to clear rules

---

<sup>1</sup> Making Brexit work for children - A Discussion Paper (September 2017).

<sup>2</sup> For full details of the legal and policy instruments enacted at EU level in relation to children, see [http://ec.europa.eu/justice/fundamental-rights/files/acquis\\_rights\\_of\\_child.pdf](http://ec.europa.eu/justice/fundamental-rights/files/acquis_rights_of_child.pdf)

<sup>3</sup> i.e. 3.4% of the current Scottish population, see Scottish Parliament: Culture, Tourism, Europe and External Relations Committee, *EU Migration and EU Citizens' Rights* (SP Paper 84.1, 6 February 2017)

<sup>4</sup> See Chris McCall, 'EU referendum: Scots living abroad share their views' *The Scotsman* (Edinburgh, 1 June 2016)

<sup>5</sup> Of the 54,448 live births, 5604 of these were to mothers and/or fathers born in other EU Member States. Of these 5604 births: 478 were to Scottish mothers, 824 were to Scottish fathers, 102 were to mothers from elsewhere in the UK, 209 were to fathers from elsewhere in the UK, 2890 were to both mothers and fathers from another EU Member State and the remaining births were to mothers or fathers from non-EU countries. See 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, 30

<sup>6</sup> Figures gratefully obtained from the Scottish Central Authority. In the same period, there were five return requests received for children abducted to Scotland from a *non-EU* country, and eight outgoing return requests for children removed from Scotland to a *non-EU* country.

determining which country's courts shall have jurisdiction and under what conditions decisions from one state may be recognised and enforced in another. This is even more pertinent given the potential impact Brexit may have on EU nationals' residence rights. Changes to immigration requirements could affect the ability of some cross-border families to stay together.

#### WHAT EU PROTECTIONS ARE PROVIDED FOR CHILDREN'S RIGHTS IN CROSS BORDER FAMILY LAW?

Procedural matters in relation to cross-border disputes across EU member states are dealt with under the Brussels II *bis* Regulation ("BIIR").<sup>7</sup> This covers issues such as child custody, contact, child abduction child maintenance. The EU framework ensures that children have the opportunity to have their opinion heard during abduction return proceedings<sup>8</sup> and will soon allow children's opinions to be heard in all proceedings within the scope of BIIR<sup>9</sup> and ensure that the best interests of the child is a mediating principle.<sup>10</sup> The EU regulations also ensures that decisions are reached within eighteen weeks "except where exceptional circumstances make this impossible".<sup>11</sup> New proposals include additional safeguards to speed up proceedings, including limiting the number of appeals,<sup>12</sup> as well as fast-tracking the enforcement of access rights<sup>13</sup> to save time and costs for families.

#### HOW MIGHT THESE PROTECTIONS BE LOST?

The EU Withdrawal Bill mean that EU instruments lose much of their effectiveness. UK courts would be under a unilateral obligation to respect and enforce incoming judgements from remaining Member States but these states would no longer be bound to treat UK orders in the same manner.<sup>14</sup> The Withdrawal Bill makes provision for the repeal of EU-derived law which is based on reciprocal arrangements<sup>15</sup> and so the UK may seek to fall back on existing international agreements (in this case, the Hague Conventions) to regulate cross-border family cases between the UK and remaining EU Member States post-Brexit. This raises several concerns:

- The EU has positively influenced family law in furthering children's human rights protections, particularly in the context of the right of the child to have an opportunity to express their views,<sup>16</sup> the

---

<sup>7</sup> The EU has no competence to determine the *substantive* family law of its Member States, it may only lay down common rules of procedure such as which Member State's courts shall have jurisdiction, and under which conditions orders from one country may be recognised and enforced in another.

<sup>8</sup> BIIR Article 11(2) . In abduction return proceedings, BIIR provides "it shall be ensured that the child is given an opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity".<sup>8</sup>

<sup>9</sup> The proposed Recast of the Brussels II *bis* Regulation (to which the UK has opted in but it is not clear when it will enter into force) offers even stronger protection of this right by providing that children must be given an opportunity to be heard in *all* proceedings falling within the scope of the new Regulation (not just abduction return proceedings) (See Recast BIIR Proposal, Article 20)

<sup>10</sup> The proposed Recast recognises a greater linkage between the best interests of the child and ensuring the child has an opportunity to be heard (Recital 13)

<sup>11</sup> Whilst BIIR Article 11(3) states 'six weeks', the proposed Recast clarifies that this limit pertains to each stage of proceedings (maximum of 6+6+6 weeks) Explanatory Memorandum to Recast Proposal, 13 (the three stages being: first instance, appeal, enforcement).

<sup>12</sup> Recast BIIR Proposal art 25(4)

<sup>13</sup> BIIR Article 41 which by abolishes the requirement of *exequatur* so access orders are directly enforceable in another Member State provided they are accompanied by the appropriate certificate.

<sup>14</sup> see comments of Professor Lowe, noting that the BIIR and MR would lose their effectiveness due to this loss of reciprocity – Nigel Lowe, 'Some reflections on the options for dealing with international family law following Brexit' (2017) *Family Law* 399, 405

<sup>15</sup> European Union (Withdrawal) Bill, s.7(2)(c)

<sup>16</sup> CRC art 12

requirement for a balance between the depth of an individualised assessment into the child’s best interests<sup>17</sup> and the speed of proceedings<sup>18</sup> and the right of the child to maintain regular and direct contact with their parents.<sup>19</sup> Reliance on the Hague Conventions may result in a watering down of protection for children.

- The UK acceded to the 2007 Hague Maintenance Convention through its membership of the EU, and to 1996 Hague Convention on Parental Responsibility “as if it was an EU instrument”. This means that the UK will not be bound by the 2007 Convention post-Brexit, and that there may need to be primary legislation to clarify the status of the 1996 Convention.<sup>20</sup> Further concerns have been raised regarding the application of the 1980 Hague Abduction Convention between the UK and remaining EU Member States after Brexit.<sup>21</sup> There is an urgent need for the UK Government to address these issues to ensure there is no “gap” in the application of these Conventions upon Brexit resulting in no protections whatsoever.
- Brexit has the potential to result in more hostile immigration measures which could make it more difficult to enter and reside in the UK for the sake of family contact or reunification. In the absence of EU protections, families would have to rely more on Article 8 ECHR (right to family life). However, judges have not always been consistent in interpreting this right in favour of children, which has led to many children having to relocate or have “skype” relationships with their families abroad.

## CONCLUSION

In summary, this case study demonstrates that children’s human rights are being increasingly embedded into EU legislation and policy. This is helping to ensure that children’s human rights are protected, respected and fulfilled across the EU in line with the Charter of Fundamental Rights. This research highlights that there is a significant number of children born to families in Scotland who are at risk of losing significant protections of their rights in relation to cross-border family law (over 10% of all babies born in 2016). It brings to light the fact that children’s human rights have not been adequately considered so far in discussions around Brexit.

Children and young people’s rights are at risk, and it is imperative that politicians and decision-makers across Scotland, the UK and the wider EU take the time to fully understand the impact of their decisions on the lives of children and young people. In publishing this research, Together (Scottish Alliance for Children’s Rights) hopes to bring attention to the urgent need to put children’s and young people’s human rights at the heart of all discussions and decisions as the UK moves towards leaving the EU.

---

<sup>17</sup> CRC art 3

<sup>18</sup> Again see General Comment 14 (n 16), para 93 (explaining that a child’s perception of time differs from that of adults, prolonged proceedings can have an adverse impact upon children and, accordingly, proceedings involving children should be completed in as short a time as possible)

<sup>19</sup> CRC art 9(3)

<sup>20</sup> Lowe (n 15), 404

<sup>21</sup> AIRE Centre, ‘The UK’s Continued Participation in Hague Instruments Following Brexit’ (“Brexit – Does Brexit really mean Brexit for Family Law?” Conference, London, 26 June 2017)

# THE IMPACT OF BREXIT ON CHILDREN AND YOUNG PEOPLE IN SCOTLAND

## CASE STUDY ON CROSS-BORDER FAMILY LAW

<b>EXECUTIVE SUMMARY</b>	6
<b>1. INTRODUCTION</b>	11
<b>2. THE INTERNATIONAL FAMILY LAW SYSTEM</b>	13
2.1 HAGUE AND EU SYSTEMS	13
2.2 UN CONVENTION ON THE RIGHTS OF THE CHILD	16
2.3 THE WITHDRAWAL BILL	17
<b>3. PARENTAL RESPONSIBILITY AND ABDUCTION</b>	18
3.1. LISTENING TO THE CHILD AND THE BEST INTERESTS PRINCIPLE	19
3.1.1 <i>Current system</i>	20
3.1.2 <i>Under the Recast BIIR</i>	24
3.2 SPEED OF PROCEEDINGS	26
3.2.1 <i>Current system</i>	26
3.2.2 <i>Under the RECAST BIIR</i>	27
3.3 EASE OF ENFORCEMENT	28
3.3.1 <i>Current system</i>	28
3.3.2 <i>Under the Recast BIIR</i>	28
3.4 CONCLUSION: A LOSS OF EU'S "ADDED VALUE"?	29
<b>4. MAINTENANCE DISPUTES</b>	29
4.1 CURRENT SYSTEM	29
4.2 IMPACT OF BREXIT	30
4.3 CONCLUSION: A JURISDICTIONAL GAP?	30
<b>5. IMPACT OF BREXIT ON UK MEMBERSHIP OF THE HAGUE CONVENTIONS</b>	31
5.1 2007 HAGUE MAINTENANCE CONVENTION	31
5.2 1996 HAGUE CONVENTION ON PARENTAL RESPONSIBILITY	32
5.3 1980 HAGUE ABDUCTION CONVENTION	32
<b>6. POST-BREXIT FUTURE: RISK OF DIVERGENCE</b>	32
6.1 UNIFORMITY OF INTERPRETATION	32
6.2 RESOURCES AND DEVELOPMENT POTENTIAL	34
<b>7. THE WAY FORWARD</b>	35
<b>8. CONCLUSION</b>	36

ANNEX A – COMPARISON TABLE FOR PARENTAL RESPONSIBILITY DISPUTES AND CHILD ABDUCTION CASES  
38

ANNEX B – COMPARISON TABLE FOR MAINTENANCE CASES 51

ANNEX C – IMPACT OF BREXIT IN OTHER AREAS RELEVANT TO CHILDREN 53

## LIST OF ABBREVIATIONS

<b>BIIR</b>	Brussels II <i>bis</i> Regulation
<b>CA</b>	Central Authority
<b>CJEU</b>	Court of Justice of the European Union
<b>CFR</b>	Charter of Fundamental Rights of the European Union
<b>CRC</b>	United Nations Convention on the Rights of the Child
<b>ECHR</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>FRA</b>	EU Fundamental Rights Agency
<b>HC1980</b>	Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
<b>HC1996</b>	Hague 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
<b>HC2007</b>	Hague Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance
<b>MR</b>	Maintenance Regulation
<b>MS</b>	EU Member State
<b>TCN</b>	Third country national (non-EU citizen)
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union

## EXECUTIVE SUMMARY

### CONTEXT

A significant proportion of the estimated 3.2 million EU citizens currently residing in the UK have formed families. In 2016 alone, 15,878 births (2.3% of total births in England and Wales) were to mothers born in another EU state and a UK-born father. A further 9,150 births (1.3%) were to a UK-born mother and an EU-born father, and 44,449 births (6.4%) were to parents both born elsewhere in the EU.<sup>22</sup> Scottish and Northern Irish figures display a similar distribution.<sup>23</sup> Approximately 13% of these “international families” will face contentious breakdowns and disputes over child maintenance, residence and care. In such cases, it is vital that citizens have access to clear rules determining which country’s courts shall have jurisdiction and under what conditions decisions from one state may be recognised and enforced in another.

For intra-EU disputes, these procedural matters are dealt with under the [EU Brussels IIbis Regulation](#) (IIbis) (which regulates child custody, contact and parental child abduction) and the [Maintenance Regulation](#). These EU Regulations are based upon and supplement existing international law, including conventions of the Hague Conference on Private International Law.<sup>24</sup> The EU framework facilitates cross-border family relationships and is necessary for the free movement of persons.

The current EU framework offers procedural protection for children’s rights in several ways<sup>25</sup>:

1. **Automatic recognition and enforcement of decisions:** EU law ensures that decisions around child custody, access and maintenance reached in one Member States can be automatically recognised and enforced in any other Member State to which any of the parties move. This provides children with certainty and security around contact, care and financial support and avoids the delays and costs associated with securing new orders in other countries. It also prevents parents from evading their obligations by moving to another country.

---

<sup>22</sup> Office for National Statistics, ‘Dataset: Parents’ Country of Birth: 2016’ (ONS, 24 August 2017) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/datasets/parentscountryofbirth>> accessed 1 October 2017 (see in particular Table 3, additionally also of interest are Tables 1 and 2)

<sup>23</sup> For Scottish figures see: 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; for Northern Irish figures see: NISRA, ‘Registrar General Annual Report 2015: Tables and full report’ (NISRA, 31 August 2016) <<https://www.nisra.gov.uk/publications/registrar-general-annual-report-2015-tables-and-full-report>> accessed 1 October 2017 (see “Births” section, most relevant tables being 3.15, 3.16 and 3.22)

<sup>24</sup> Namely The Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980; The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996; The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 23 November 2007

<sup>25</sup> The EU has no competence to determine the *substantive* family law of its Member States. It may only lay down common rules of procedure such as which Member State’s courts shall have jurisdiction, and under which conditions orders from one country may be recognised and enforced in another.



2. **Best interests of the child as a mediating principle:** All decisions reached under the *Brussels IIbis* Regulation have to be in the best interests of the child, in accordance with Article 24 of the EU Charter of Fundamental Rights, and Article 3 of the UN Convention on the Rights of the Child.
3. ***Brussels IIbis* reinforces children’s right to participate in cross-border family proceedings;** a decision around custody, access and return following child abduction may not be enforced if there is evidence that the child has not been given the opportunity to be heard.
4. **Fast-track decisions:** in abduction return proceedings, *Brussels IIbis* provides that a decision must be reached within six weeks “except where exceptional circumstances make this impossible” (Article 11(3)). [Proposals to amend \*Brussels IIbis\*](#), which the UK has expressed a desire to opt into, clarifies that this limit pertains to each stage of proceedings (first instance, appeal, enforcement - 6+6+6 weeks). However, it also includes additional safeguards aimed at expediting proceedings such as limiting the number of appeals<sup>26</sup> and concentrating such cases within the judicial systems of Member States.<sup>27</sup>

## CONCERNS

EU Family law, and particularly the proposed revised *Brussels IIbis* Regulation makes more explicit provision for children’s rights than alternative cross-border family law instruments, but there is, as yet, no clear vision of how to protect these rights following Brexit. Three possible options for regulating cross-border family law are currently being considered:

1. **Negotiating with the EU to remain party to EU family law with full reciprocity.** This will require some role for the CJEU. Leaving the jurisdiction of the CJEU is a red-line issue of the Withdrawal Bill<sup>28</sup> yet some commentators have suggested that an alternative arrangement may be possible whereby the CJEU would have an *advisory* role but not a binding one.<sup>29</sup> Moreover, it is not yet clear when the proposed recast Regulation, with its enhanced protection for children’s rights, shall enter into force before Brexit and therefore be transposed into domestic law under the terms of the Withdrawal Bill.
2. **Remaining party to EU family law *unilaterally*, without reciprocity.** This is the approach taken by the Withdrawal Bill. However, without reciprocity the above EU instruments lose much of their effectiveness: UK courts would be under a unilateral obligation to respect and enforce incoming judgements from remaining Member States but these states would no longer be bound to treat UK

---

<sup>26</sup> Recast *Brussels IIbis* Proposal art 25(4)

<sup>27</sup> Recast *Brussels IIbis* Proposal art 22, see also preamble para. 26

<sup>28</sup> European Union (Withdrawal) Bill, s.1

<sup>29</sup> see comments of Rebecca Bailey-Harris, House of Lords Select Committee on the European Union, Justice Sub-Committee, ‘Corrected oral evidence: Brexit: civil justice cooperation and the CJEU’ (Evidence Session No. 2, 6 December 2016) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/44261.pdf> accessed 20 June 2017, 8

orders in the same way.<sup>30</sup> Those states with less robust provision for children than the UK may not enforce the decisions of the UK courts.

3. The Withdrawal Bill makes provision for the repeal of EU-derived law which is based on reciprocal arrangements<sup>31</sup> and so **the UK may seek to fall back on existing international agreements** (most likely the Hague Conventions supplemented by bilateral agreements with individual states) to regulate cross-border family cases between the UK and remaining EU Member States post-Brexit. Reliance on the Hague Conventions alone may result in a watering down of protection for children.

A further concern relates to the application of the Hague Conventions between the UK and remaining EU Member States after Brexit. In relation to maintenance disputes, the EU acceded to the 2007 Hague Maintenance Convention on behalf of its Member States. The UK shall accordingly cease to be bound by this Convention once it leaves the EU unless prior action is taken by the UK Government to accede in its own right. Furthermore, the UK acceded to the 1996 Hague Convention on Parental Responsibility “as if it was an EU instrument” within the meaning of Article 1(2) European Communities Act 1972. The repeal of this Act shall therefore affect the internal legal status of the 1996 Convention and may require further primary legislation.<sup>32</sup> Further concerns have been raised by the AIRE Centre regarding the application of the 1980 Hague Abduction Convention between the UK and remaining EU Member States after Brexit.<sup>33</sup> These technical issues all require clarification by the UK Government so that there is no “gap” in the application of these Conventions upon Brexit.

A final concern relates to the UK Government’s post-Brexit immigration strategy. EU family law is a corollary to EU free movement law. The free movement of citizens is facilitated by the fact that family disputes can be dealt with easily across EU borders. Brexit has the potential to result in more hostile immigration measures which could make it more difficult to enter and reside in the UK for the sake of family contact or reunification. Individuals would have to rely more on Article 8 ECHR (right to family life). The problem, however, is that judges have not always been consistent in interpreting this right in favour of children, which has led to many children having to relocate or settle for “skype” relationships with their families abroad.<sup>34</sup>

---

<sup>30</sup> see comments of Professor Lowe, noting that the BIIR and MR would lose their effectiveness due to this loss of reciprocity – Nigel Lowe, ‘Some reflections on the options for dealing with international family law following Brexit’ (2017) *Family Law* 399, 405

<sup>31</sup> European Union (Withdrawal) Bill, s.7(2)(c)

<sup>32</sup> Lowe (n 10), 404

<sup>33</sup> AIRE Centre, ‘The UK’s Continued Participation in Hague Instruments Following Brexit’ (“Brexit – Does Brexit really mean Brexit for Family Law?” Conference, London, 26 June 2017)

<sup>34</sup> [Research by the Children’s Commissioner for England](#) has revealed that up to 15,000 British children are growing up in ‘Skype’ families because the UK Immigration Rules introduced in July 2012 do not allow both of their parents to live together in the UK. This number is likely to increase without special arrangements to sustain the measures put in place by EU family law.

## RECOMMENDATIONS

- Remaining part of the EU family framework, with the CJEU acting in an advisory capacity, offers the best protection for children’s rights.
- The UK Government should adopt the terms of the Recast *Brussels IIbis* Regulation which includes enhanced protections for children’s rights in cross-border family cases.
- If, alternatively, the UK Government intends to fall back on the Hague Conventions, then clear statements must be given on how these Conventions shall apply upon Brexit so that there is no “gap” in family law protection. Additional guidance should also be put in place to ensure that children’s rights protection is at least comparable to that currently operating under the *Brussels IIbis* regime
- A fast track process should be available for all cross-border cases involving children to expedite decision-making.

# THE IMPACT OF BREXIT ON CHILDREN AND YOUNG PEOPLE IN SCOTLAND

## 1. INTRODUCTION

On 23rd June 2017 adults voted narrowly to leave the EU.<sup>35</sup> However, it is young people who shall face the full brunt of Brexit,<sup>36</sup> and who strongly backed “remain”.<sup>37</sup> Unfortunately, children and young people’s issues were largely excluded from the referendum debates.<sup>38</sup> These focused on the more “important” issues of trade, the economy and immigration.<sup>39</sup> As current developments suggest this focus remains unchanged,<sup>40</sup> this study aims to address this imbalance and help establish a child rights-based approach for moving forward in the Brexit negotiations.

Although not one of the original aims of the EU Treaties, children’s rights protection has become a central focus of the EU. The Lisbon Treaty saw the EU introduce an objective of promoting and protecting the rights of children<sup>41</sup> and the EU Charter (‘CFR’) contains a dedicated provision in this respect.<sup>42</sup> Furthermore, the UN

---

<sup>35</sup> Whilst proposals were made to extend the vote to 16-17 year olds, this was ultimately blocked in December 2015 following a lengthy dispute between the House of Commons and the House of Lords, see discussion in Robert Wragg, ‘Votes at 16 and 17 on the EU Referendum’ (*European Youth Parliament: United Kingdom*, 17 December 2015) <<http://www.eypuk.co.uk/votes-at-16-and-17-on-the-eu-referendum/>> accessed 5 May 2017; The results of the referendum were 51.9% in favour of leave and 48.1% in favour of remain, see Electoral Commission, ‘EU Referendum Results’ (*The Electoral Commission*, June 2016) <<https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>> accessed 5 May 2017

<sup>36</sup> In terms of Brexit’s long-term effects.

<sup>37</sup> YouGov data shows that 72% of voters aged 18-25 backed remain, whilst voters aged 50-64 voted 60% in favour of withdrawal, the figure for voters aged 65 and over was 64% in favour of withdrawal, see Peter Moore, ‘How Britain Voted’ (*YouGov*, 27 June 2016) <<https://yougov.co.uk/news/2016/06/27/how-britain-voted/>> accessed 22 June 2017; In Scotland see further the responses to the 2016 Scottish Youth Parliament’s “Lead the Way” Manifesto, of over 70,000 responses received from young people, only 11% of young people would have voted leave, see Scottish Youth Parliament, ‘Lead the Way: Scottish Youth Parliament Manifesto 2016-2021’ (*Scottish Youth Parliament*, 12 March 2016) <[https://d3n8a8pro7vhmx.cloudfront.net/scottishyouthparliament/pages/283/attachments/original/1457781662/Lead\\_The\\_Way\\_Manifesto.pdf?1457781662](https://d3n8a8pro7vhmx.cloudfront.net/scottishyouthparliament/pages/283/attachments/original/1457781662/Lead_The_Way_Manifesto.pdf?1457781662)> accessed 22 June 2017

<sup>38</sup> see Helen Stalford, ‘Silent Witness’ (2016) 177 *Children in Scotland* 8, 8

<sup>39</sup> see Helen Stalford, ‘Not seen, not heard: the implications of Brexit for children’ (*Open Democracy*, 8 June 2016) <<https://www.opendemocracy.net/brexitdivisions/helen-stalford/not-seen-not-heard-implications-of-brexit-for-children>> accessed 5 May 2017

<sup>40</sup> Current developments remain trade-focused, see for example the recent publication: HM Government, ‘Future Customs Arrangements: A Future Partnership Paper’ (August 2017), available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/637748/Future\\_customs\\_arrangements\\_-\\_a\\_future\\_partnership\\_paper.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf)> accessed 10 August 2017; Whilst the UK Government has issued a *proposal* relating to citizen’s rights, children are only mentioned in one paragraph to state that the children of EU migrants eligible for settled status shall likewise be eligible to apply for settled status, see HM Government, ‘The United Kingdom’s Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU’ (June 2017), available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621848/60093\\_Cm9464\\_NSS\\_SDR\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621848/60093_Cm9464_NSS_SDR_Web.pdf)> accessed 10 August 2017, para. 31

<sup>41</sup> See Article 3(3), Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C/115 [hereinafter ‘TFEU’]

<sup>42</sup> See Article 24 CFR which sets out the right of children to such protection and care as is necessary for their wellbeing (Article 24(1)), the right to express their views freely in matters which concern them and to have these views taken into account in accordance with the child’s age and maturity (Article 24(1)), the right to have the child’s best interests taken as a primary consideration in all actions relating to children (Article 24(2)), and the right of every child to maintain direct and regular contact with both parents except where this is not in their best interests (Article 24(3)); the rights and principles contained within the CFR must be respected by EU institutions and EU Member States when they are implementing EU law (Article 51(1) CFR). Therefore, when Member States apply the Brussels II *bis* or Maintenance Regulations, they are under a duty to do so in a manner which respects the rights of children as set out in Article 24.

Convention on the Rights of the Child ('CRC')<sup>43</sup> holds special significance at EU level, with all Member States having ratified it and certain provisions now incorporated into EU legislation.<sup>44</sup> EU membership has significantly impacted children's lives across a broad range of areas.<sup>45</sup> An analysis of Brexit's impact in each of these is outwith the scope of this study. However, an initial overview of each can be found in Annex C.<sup>46</sup> The purpose of this report, therefore, is to provide a case study in *one* of these areas: cross-border family law. It is intended that the information in Annex C serves as a starting point for research into the remaining topics.

The report adopts a Scottish perspective, but it is relevant to the rest of the UK (and indeed the wider EU). It shall begin by providing an overview of the two central regimes in cross-border family cases: the Hague Convention system, and EU law which builds upon this in intra-EU cases. This section shall consider the approach of the UK Withdrawal Bill<sup>47</sup> to incorporating EU family law and how the Hague Conventions may become a post-Brexit "backstop". Section 3 shall compare the two regimes' approaches to parental responsibility and child abduction cases from a child rights-based perspective. It shall consider their relative degrees of compatibility with CRC provisions relating to the best interests of the child,<sup>48</sup> the right of the child to express their views,<sup>49</sup> the obligation on authorities to process cases quickly<sup>50</sup> and the right of every child to maintain regular contact with both parents.<sup>51</sup> Particularly relevant is the recent proposal<sup>52</sup> for a recast of the current EU Brussels II *bis* regulation ('Recast Proposal') which seeks closer CRC alignment.<sup>53</sup> The aim of this section is to determine whether there is "added value" to the EU intervention in family law and, accordingly, whether the Hague Conventions *alone* could provide an equally child-focused "backstop" upon Brexit. Section 4 shall compare the current EU and Hague systems for maintenance disputes in a similar manner.<sup>54</sup>

---

<sup>43</sup> Convention on the Rights of the Child, U.N. GAOR, 45<sup>th</sup> Sess., 61<sup>st</sup> Plen. Mtg., U.N. Doc. A/RES/44/25 (1989) [hereinafter 'UNCRC']

<sup>44</sup> see for example the closer alignment between the proposed BIIR Recast and the UNCRC, discussed below.

<sup>45</sup> See generally: Stalford (n 5), Stalford (n 4), DLA Piper, 'The Impact of Brexit on Child Rights' (*The Children's Society*, September 2016) <<https://www.childrensociety.org.uk/sites/default/files/research-note-on-the-impact-of-brexit-on-child-rights.pdf>> accessed 5 May 2017

<sup>46</sup> These areas being: (1) protection of fundamental rights generally; (2) economic, social and cultural rights; (3) cross-border family law; (4) child protection; (5) employment; (6) intra-EU migration; (7) immigration and asylum; (8) consumer rights; (9) data protection; (10) environmental protection

<sup>47</sup> European Union (Withdrawal) Bill 2017

<sup>48</sup> CRC art 3(1); see also CFR art 24(2)

<sup>49</sup> CRC art 12 specifically provides that the child be provided with an opportunity to be heard in judicial and administrative proceedings; CRC art 9(2) requires that the child's views be known in any proceedings relating to separation from one or both parents; see also CFR art 24(1)

<sup>50</sup> see UN Committee on the Rights of the Child, 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)' (2013) UN Doc CRC/C/GC/14, para. 93 (setting out that a child's perception of the passing of time is different to that of an adult, the negative effect of delays and prolonged decision making on children and, accordingly, that decisions relating to children should be prioritised and completed in the "shortest time possible")

<sup>51</sup> This right is subject to an exception where such contact would not be in the best interests of the child – see CRC art 9(3); see also CFR art 24(3)

<sup>52</sup> European Commission, 'Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' COM(2016) 411 final, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF> accessed 20 May 2017 [hereinafter 'Recast Proposal' or 'Proposed Recast']

<sup>53</sup> see generally Rachael Kelsey, 'EU law, a family affair' (*The Journal of the Law Society of Scotland*, December 2016) <<http://www.journalonline.co.uk/Magazine/61-12/1022601.aspx>> accessed 10 June 2017

<sup>54</sup> This includes disputes over child support payments

Thereafter, Section 5 considers how secure the Hague “backstop” is and what technical issues may arise regarding the future application of these Conventions between the UK and the remaining EU Member States. Section 6 shall discuss the general benefits of the UK’s participation in EU family law, including the uniformity of interpretation ensured by the CJEU, sanctions for non-compliance and the EU’s greater resources which may increase the likelihood of future developments beneficial to children. Finally, Section 7 considers suggestions for the UK moving forward. Here, attention shall be paid to how children’s rights and interests may be protected in cross-border family cases beyond Brexit.

In all of the above, it must be noted that whilst the international private law aspects of family law are devolved,<sup>55</sup> “foreign affairs” remains reserved.<sup>56</sup> This includes any negotiations with the EU, and the accession of the UK (or Scotland alone) to any international children’s rights treaties.<sup>57</sup> Lobbying efforts in this field should, accordingly, be directed at the UK Government.

## 2. THE INTERNATIONAL FAMILY LAW SYSTEM

### 2.1 HAGUE AND EU SYSTEMS

An estimated 3.2 million EU citizens currently live in the UK,<sup>58</sup> around 181,000 of whom reside in Scotland.<sup>59</sup> A further 1.23 million UK citizens live in other Member States,<sup>60</sup> an estimated 120,000 of them Scottish.<sup>61</sup> Many of these individuals have formed ‘international families’.<sup>62</sup> Indeed, in 2016, 9% of births in Scotland were to mothers born in other EU Member States.<sup>63</sup> A further 1.5% of Scottish births were to UK-born mothers and EU-

---

<sup>55</sup> Scotland Act 1998 does not reserve family law; therefore, it is devolved. The international private law aspects of devolved matters are similarly devolved, see Scotland Act 1998, s.126(4)(a). However, the international private law aspects of reserved matters are likewise reserved, see Scotland Act 1998, s.29(4)(b)

<sup>56</sup> Scotland Act 1998, schedule 5, part 1, para. 7

<sup>57</sup> or indeed, accession to human rights treaties more generally.

<sup>58</sup> Office for National Statistics, ‘Population of the UK by Country of Birth and Nationality: 2015’ (ONS, 25 August 2016) <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/august2016#1-in-8-of-the-uk-population-was-born-abroad-and-1-in-12-has-non-british-nationality>> accessed 24 June 2017

<sup>59</sup> i.e. 3.4% of the current Scottish population, see Scottish Parliament: Culture, Tourism, Europe and External Relations Committee, *EU Migration and EU Citizens’ Rights* (SP Paper 84.1, 6 February 2017)

<sup>60</sup> Office for National Statistics (n 24)

<sup>61</sup> See Chris McCall, ‘EU referendum: Scots living abroad share their views’ *The Scotsman* (Edinburgh, 1 June 2016)

<sup>62</sup> In this sense “international family” means a family which has ties to two or more EU member states, either through nationality or residence. The UKSC has acknowledged the growth in the number of such international families, in part as a result of cheaper and easier international travel and free movement rights, see *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, para. 6; this has similarly been acknowledged in the Juncker Commission’s Political Guidelines as a reason why further judicial cooperation between EU Member States is essential, see Jean-Claude Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change: Political Guidelines for the next European Commission* (Strasbourg, 15 July 2014)

<sup>63</sup> Of the 54’448 live births, 4636 of these were to mothers born in other EU Member States. Of these 4636 births: 824 were to Scottish fathers, 209 were to fathers from elsewhere in the UK, 2890 were to fathers from another EU Member State, and the remaining births were to fathers from non-EU countries. Note that the overall 9% figure shows an increase on 2012 figures, in which only 7% of births were to mothers born in another EU country, see 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, 30

born fathers.<sup>64</sup> Sadly, a certain proportion of these international families will face contentious breakdowns and, in extreme cases, may result in parental child abduction. In 2016, the Scottish Central Authority recorded twelve child abductions *from* Scotland to another EU Member State, and eight abductions *to* Scotland from another EU Member State.<sup>65</sup> In 2015, these figures were eleven and sixteen respectively.<sup>66</sup> Given the cross-border nature of such family cases, it is vital that citizens have access to clear rules determining which country's courts shall have jurisdiction and under what conditions decisions from one state may be recognised and enforced in another. This is even more pertinent given the potential impact Brexit may have on EU nationals' residence rights. Changes to immigration requirements could affect the ability of some cross-border families to stay together.<sup>67</sup> For example, the minimum income threshold which applies to *third country* partner visas does not currently apply to partners from EU Member States.<sup>68</sup> If a similar income requirement was to be introduced for EU nationals post-Brexit, this may mean that some EU-national partners are no longer eligible to remain in the UK.<sup>69</sup> If one parent must return home, where shall any children of the relationship reside? In this manner, Brexit has the potential to increase the number of cross-border disputes relating to children.

In intra-EU cases, the above procedural matters are dealt with by the Brussels II *bis* Regulation ('BIIR').<sup>70</sup> The EU has no competence to determine the *substantive* family law of its Member States.<sup>71</sup> Accordingly, EU law involves protecting children's rights in a *procedural* sense. The key issues relate to the child's right to participate in proceedings, consideration of the child's best interests, time limits within which cases must be

---

<sup>64</sup> National Records of Scotland Statistics (n 29)

<sup>65</sup> My thanks to Dawn Livingstone at the Scottish Central Authority for these figures. In the same period, there were five return requests received for children abducted to Scotland from a *non-EU* country, and eight outgoing return requests for children removed from Scotland to a *non-EU* country.

<sup>66</sup> In the same period, there were nine incoming return requests received for children abducted to Scotland from a non-EU country, and five outgoing return requests for children removed from Scotland to a non-EU country, again my thanks to Dawn Livingstone at the Scottish Central Authority for these figures

<sup>67</sup> For media reports on the issue see: Siobhan Fenton, 'My family is being broken': EU migrant parents of British children demand clarity on right to stay after Brexit' *The Independent* (London, 20 February 2017), available at: <<http://www.independent.co.uk/news/uk/politics/brexit-latest-news-eu-right-to-stay-migrant-parents-british-children-uk-citizens-a7590131.html>> accessed 16 August 2017; Sarah Marsh, 'It's not EU...it's Brexit: the couples in turmoil after the referendum result' *The Guardian* (London, 7 February 2017), available at <<https://www.theguardian.com/commentisfree/2017/feb/07/eu-brexit-couples-turmoil-referendum-relationship>> accessed at 16 August 2017

<sup>68</sup> Since 2012, the minimum income threshold for sponsoring a non-EU spouse's visa has been an annual income of £18'600 (or equivalent in savings). This figure rises when visas are sought for non-EU national dependent children (additional £3'800 for the first child, further £2'400 for each child thereafter). It is the income of the *sponsor* and not their non-EU partner which is relevant, see Home Office, Immigration Rules Appendix FM: Family Members, Section E-ECP.3.1, available at: <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members>> accessed 16 August 2017; In February 2017, the UK Supreme Court upheld the minimum income threshold in principle. However, it held that where the minimum income threshold is not met the best interests of the child should be a primary consideration and, further, that the rules should take other sources of income and support into account, see *MM and Others -v- Secretary of State for the Home Department* [2017] UKSC 10; currently, EU national partners are not subject to a minimum income threshold under the current free movement rules, see TFEU art 21, see also Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 ['Citizens' Rights Directive], arts 6-7

<sup>69</sup> My thanks to Jen Ang of JustRight Scotland for raising this issue.

<sup>70</sup> Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1 [hereinafter 'BIIR']

<sup>71</sup> see BIIR Preamble Recital 19 stating that BIIR does not intend to modify substantive rules of national family law systems. Accordingly, the substantive rules on issues such as the granting of parental rights and responsibilities, contact and residence are determined at national level.



determined, and rules making it easier for the cross-border enforcement of access rights. The EU's Maintenance Regulation<sup>72</sup> deals with procedural matters in intra-EU disputes relating to child maintenance.<sup>73</sup>

EU family law is based upon, *and supplements*, several Conventions of the Hague Conference on Private International Law.<sup>74</sup> These Conventions apply between Contracting States<sup>75</sup> but in intra-EU cases BIIR and MR have priority.<sup>76</sup> Thus, for example, a dispute involving the parental abduction of a child from Scotland to the USA will be governed by the 1980 Hague Abduction Convention. However, if the child was abducted from Scotland to France, then BIIR applies.<sup>77</sup> The applicable instruments are set out in Table 1.

---

<sup>72</sup> Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2008] OJ L7/1 [hereinafter 'MR']

<sup>73</sup> MR also governs such matters relating to other forms of familial maintenance, such as spousal support, but these are outwith the scope of the current report.

<sup>74</sup> Namely The Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980 [hereinafter 'HC1980']; The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996, [hereinafter 'HC1996']; The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 23 November 2007 [hereinafter 'HC2007']. Note the UN Committee on the Rights of the Child encourages the ratification and implementation of these Conventions— see General Comment 14 (n 16), para. 68

<sup>75</sup> Tables of Contracting States can be found on the Hague Conference website, for HC1980 see: < <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> > accessed at 1 June 2017; for HC1996 see: < <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> > accessed 1 June 2017; for HC2007 see: < <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> > accessed 1 June 2017; Tables of acceptances of new accessions to HC1980 (i.e. showing between which states the Convention shall apply) can also be found on the Hague Conference website, available at: < <https://assets.hcch.net/docs/62b28229-4cec-4a93-a7d0-241b9ef3507e.pdf> > accessed at 1 June 2017

<sup>76</sup> BIIR art 60(e) (relating to HC1980), and art 61(relating to HC1996)

<sup>77</sup> Note that the BIIR applies the HC1980 rules to intra-EU abductions, but subject to additional rules, see BIIR art 11. Note that in disputes involving a non-EU state which is *not* party to the relevant Hague Convention, then determination of these procedural issues shall fall to the national law of the states involved (conflict of law rules). The EU and Hague rules do not apply to procedural aspects of intra-UK abductions, these are governed by national law, namely the Family Law Act 1986 c.55



TABLE 1: APPLICABLE INSTRUMENTS

Nature of issue	EU Instruments	Hague Instruments
Parental Responsibility	Brussels II Bis Regulation (2201/2003)	1996 Hague Convention on Parental Responsibility
Child Protection	['BIIR']	['HC1996']
Cross-border placement in care		
Child Abduction	Brussels II Bis Regulation (2201/2003) ['BIIR']	1980 Hague Abduction Convention ['HC1980']
Maintenance Payments	Maintenance Regulation (4/2009) ['MR']	2007 Hague Maintenance Convention ['HC2007']

## 2.2 UN CONVENTION ON THE RIGHTS OF THE CHILD

The CRC contains several provisions illustrating how children’s rights should be integrated into family law systems. These can be found in the CRC itself and the Committee’s General Comments.<sup>78</sup> It is against these that the above Hague and EU instruments shall be assessed.

Firstly, CRC Article 12(1) provides every child capable of forming a view the right to express those views freely in all matters affecting them.<sup>79</sup> The “gatekeeper criterion” is that the child is *capable of holding their own view*. The starting point is a presumption that the child has such capacity<sup>80</sup> and it is not necessary that the child has a comprehensive knowledge of all aspects of the matter.<sup>81</sup> Article 12(1) contains a further right that these views shall be given due weight in accordance with the child’s age and maturity.<sup>82</sup> ‘Due weight’ should be assessed on a case-by-case basis. If the child is capable of forming their views in a reasonable and independent manner,<sup>83</sup> their views should be seen as a significant factor in the settlement of the issue.<sup>84</sup> The Committee

<sup>78</sup> particularly relevant are: Committee on the Rights of the Child, ‘General Comment No. 12 (2009) The right of the child to be heard’(1 July 2009) CRC/C/GC/12 (hereinafter ‘General Comment 12’); and Committee on the Rights of the Child, ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)’ (n 16) (hereinafter ‘General Comment 14’)

<sup>79</sup> “all matters affecting the child” is to be interpreted broadly, see General Comment 12 (n 44), paras. 26-27

<sup>80</sup> see General Comment 12 (n 44), para. 20; and further para 21 (stating that children may have the capacity to form views from a young age despite not being able to *verbally* articulate such views. Therefore, full implementation of Article 12 CRC requires recognition of non-verbal expression - such as through play, body language, drawings and paintings)

<sup>81</sup> General Comment 12 (n 44), para. 21

<sup>82</sup> see General Comment 12 (n 44), para. 28 (clarifying that merely listening to the child is insufficient, the views of the child must be *seriously considered* when the child is capable of forming her or his own views).

<sup>83</sup> The Committee has recognized the risk of parents seeking to influence child’s views in cross-border separation and relocation cases – see General Comment 12 (n 44), paras. 22-23.

<sup>84</sup> see General Comment 12 (n 44), para. 44 (stating that if the child is capable of forming a view in a “reasonable and independent manner”, that the decision maker must consider the views of the child as a “significant factor in the settlement of the issue”)

emphasises that Article 12 applies to all relevant judicial proceedings affecting the child, including separation of parents, custody, care and adoption.<sup>85</sup>

CRC Article 3 provides that the best interests of the child shall be a primary consideration in all decisions affecting them.<sup>86</sup> Both the individual and collective interests of children are relevant.<sup>87</sup> However, the Committee has made clear that what is in the child's best interests requires a case-by-case and individualised assessment of the particular child's circumstances.<sup>88</sup> The inter-related nature of CRC rights means that, when considering the best interests of a child, their views should be heard and given due weight.<sup>89</sup>

The CRC has significantly influenced the development of international and regional family law instruments. The Council of Europe's guidelines on child-friendly justice<sup>90</sup> draw extensively from the CRC and are designed to guarantee children's effective access to, and adequate treatment within, the justice system.<sup>91</sup> In 2011, as part of the EU Agenda for Children, the European Commission committed to making the EU justice systems more child-friendly, including by promoting the Council of Europe's guidelines and taking them into account in future EU legislation.<sup>92</sup>

### 2.3 THE WITHDRAWAL BILL

The UK Government's Withdrawal Bill seeks to incorporate EU law into domestic law.<sup>93</sup> For cross-border family law this approach is problematic, however, as BIIR and MR are founded upon the principles of reciprocity and mutual trust.<sup>94</sup> Accordingly, if the UK were to "domesticate" EU family law, it would lose this reciprocity. UK courts would be under a *unilateral* obligation to respect and enforce incoming judgements from remaining Member States but these states would not be under the obligation to treat UK orders in the same manner.<sup>95</sup>

---

<sup>85</sup> See CRC art 12(2), and further General Comment 12 (n 44), para. 32

<sup>86</sup> The best interests principle is not a creation of the CRC, however, and can be found in earlier documents such as: UN General Assembly, Declaration of the Rights of the Child [1959] A/RES/1386 (XIV), principle 2

<sup>87</sup> General Comment 12 (n 44), paras. 72 and 82

<sup>88</sup> General Comment 14 (n 16), para. 32 (stating that what is in the best interests of the child "should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child"); see further para. 49 (stating that "determining what is in the best interests of the child should start with an assessment of the specific circumstances that make the child unique")

<sup>89</sup> General Comment 12 (n 44), paras. 1(2), 68, and 70-74, in particular para. 74: "there can be no correct application of article 3 if the components of article 12 are not respected"; see also General Comment 14 (n 16), paras. 43-45, and 89-91

<sup>90</sup> Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice' [adopted 17 November 2010], available at: <<https://rm.coe.int/16804b2cf3>> accessed 1 June 2017

<sup>91</sup> This includes the criminal, civil and administrative justice systems

<sup>92</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions: An EU Agenda for the Rights of the Child', COM(2011) 60 final, available at: <[http://ec.europa.eu/justice/policies/children/docs/com\\_2011\\_60\\_en.pdf](http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf)> accessed 2 August 2017, p.8

<sup>93</sup> European Union (Withdrawal) Bill, s.3

<sup>94</sup> see BIIR Preamble, para. 21; MR Preamble, para. 5

<sup>95</sup> see comments of Professor Lowe, noting that the BIIR and MR would lose their effectiveness due to this loss of reciprocity – Nigel Lowe, 'Some reflections on the options for dealing with international family law following Brexit' (2017) *Family Law* 399, 405

This has led to heavy criticism of the Withdrawal Bill’s approach by both family law practitioners and academics alike.<sup>96</sup>

Currently, the majority of practitioners support the UK remaining part of the EU family law regime by means of a “bespoke” EU-UK agreement which would preserve full reciprocity.<sup>97</sup> By contrast, others have argued that this approach is not required as the Hague Conventions will fill the gap left behind by EU family law.<sup>98</sup> This latter approach, however, raises two critical issues. The first relates to substance. Whilst the EU Regulations are indeed based upon their Hague counterparts, EU law has made certain enhancements which are relevant from a children’s rights perspective.<sup>99</sup> Falling back on the Hague Conventions would mean losing this “gloss” or “added value” of EU law.<sup>100</sup> Secondly, there are reasons to doubt how smooth a transition to the Hague system would be. This is due to technical issues relating to the UK’s accession to the relevant Conventions. These issues shall be considered in turn below. It must be noted that this report shall consider only the provisions relating to parental responsibility, child abduction and maintenance disputes.<sup>101</sup> However, general themes emerge which are applicable to other areas.<sup>102</sup>

### 3. PARENTAL RESPONSIBILITY AND ABDUCTION

In disputes relating to parental responsibility, both HC1996 and BIIR provide that the state in which the child is “habitually resident” shall have jurisdiction.<sup>103</sup> The aim here is to ensure proximity between the child and the

---

<sup>96</sup> see for example: The Law Society, ‘Family Law and Brexit Meeting’ (18 July 2017), point 4; see further the transcripts of the House of Lords Justice Sub-committee evidence sessions: House of Lords Select Committee on the European Union, Justice Sub-Committee, ‘Corrected oral evidence: Brexit: civil justice cooperation and the CJEU’ (Evidence Session No. 2, 6 December 2016) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/44261.pdf>> accessed 20 June 2017; House of Lords Select Committee on the European Union, Justice Sub-Committee, ‘Corrected oral evidence: Brexit: civil justice cooperation and the CJEU’ (Evidence Session No.4, 10 December 2017) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/45378.pdf>> accessed 21 June 2017; House of Lords Select Committee on the European Union, Justice Sub-Committee, ‘Corrected oral evidence: Brexit: civil justice cooperation and the CJEU’ (Evidence Session No.5, 17 December 2017) available at: <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/45460.pdf>> accessed 21 June 2017

<sup>97</sup> Law Society Meeting Paper 18 July 2017 (n 62), point 4

<sup>98</sup> Paul Beaumont, “Private international law concerning children in the UK after Brexit: comparing Hague Treaty Law with EU Regulations”, (2017) 29(3) Child and Family Law Quarterly, 18 (note: this journal has not yet been published, but advance version of this article can be found at <[https://www.abdn.ac.uk/law/documents/CPIL%20Working%20Paper%20No%202017\\_2.pdf](https://www.abdn.ac.uk/law/documents/CPIL%20Working%20Paper%20No%202017_2.pdf)> accessed 19 July 2017, page references accordingly relate to this *advance version*)

<sup>99</sup> note, for example, the positive language of “enhancement” used to refer to the additional BIIR rules relating to the voice of the child, see Nigel Lowe, ‘EU Family Law and Children’s Rights: A better alternative to the Hague conference or Council of Europe?’ (The Children and the European Union: Legal, Political and Research Perspectives Conference, University of Liverpool, 21 April 2009), 4; see also James Garbolino, ‘The Impact of the Brussels II Regulation on Hague Convention Proceedings in the European Union’ (Federal Judicial Centre, March 2016), <[https://www.fjc.gov/sites/default/files/2016/Impact%20of%20Brussels%20II\\_0.pdf](https://www.fjc.gov/sites/default/files/2016/Impact%20of%20Brussels%20II_0.pdf)> accessed 29 July 2017, 2

<sup>100</sup> For a side by side comparison of the relevant Hague and EU instruments see Annex A (parental responsibility and child abduction cases) and Annex B (maintenance disputes)

<sup>101</sup> It shall not, therefore, consider the provisions of these instruments which relate to divorce and cross-border placements of a child in care.

<sup>102</sup> These general themes including the loss of the EU’s “added value” achieved by the closer alignment of EU law to CRC, and the uniformity of interpretation ensured by the CJEU.

<sup>103</sup> HC1996 art 5; BIIR art 8

judge hearing the case.<sup>104</sup> Under BIIR, the case may be transferred to another member state where the courts in that country are “better placed” to hear the case, but this transfer must be in the child’s best interests.<sup>105</sup> HC1996 makes similar provision.<sup>106</sup> Likewise, both provide that where a child has been abducted, jurisdiction shall remain with the state where the child was habitually resident immediately prior to their wrongful removal to, or retention in, another state.<sup>107</sup> The UK Supreme Court has confirmed that this approach is in line with the best interests of the child under Article 3(1) CRC.<sup>108</sup> Whilst the *interpretation* of these provisions may differ between national courts,<sup>109</sup> their texts show duplication of the Hague rules in the EU system. However, in other areas EU law has made clear additions to the Hague regime.<sup>110</sup>

### 3.1. LISTENING TO THE CHILD AND THE BEST INTERESTS PRINCIPLE

Perhaps the clearest EU modifications relate to child abduction cases.<sup>111</sup> BIIR applies the HC1980 system to intra-EU cases but subject to certain *additional* rules which are relevant from a children’s rights perspective.<sup>112</sup> The first is the strengthened obligation to hear the child<sup>113</sup> and the second is the more stringent obligations of speed.<sup>114</sup> The latter ultimately serves the best interests of the child by ensuring proceedings are dealt with swiftly.<sup>115</sup> It must be noted that these interests reflect the “key tension” underlying children’s cases. This is the conflict between: (1) the need to act quickly; and (2) the depth of review into the child’s best interests

---

<sup>104</sup> BIIR Preamble para. 12

<sup>105</sup> BIIR art 15

<sup>106</sup> HC1996 arts. 8-9

<sup>107</sup> HC1996 art 7(1); BIIR art 10

<sup>108</sup> Re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27, paras. 7 and 15

<sup>109</sup> See Section 6.1 below

<sup>110</sup> see comments in David Williams and David Hodson, ‘Leave or Remain? What the EU referendum means for family lawyers’ (Lexis Nexis, 24 November 2015), <<http://www.halsburyslawexchange.co.uk/wp-content/uploads/sites/12/2016/05/EUREF-Family.pdf>> accessed 22 June 2017 (David Williams QC explaining that BIIR and the Hague Conventions are “not identical and there are significant additions to Brussels II *bis* which are simply not present in the 1996 Hague Convention”, 33)

<sup>111</sup> Accordingly, David Williams QC noted before the House of Lords’ Justice Sub-committee that “one of the most significant deficits that we will lose with [BIIR] and the recast Regulation is the abduction protections”, see House of Lords, Justice Sub-committee Evidence Session No.4 (n 62), 6

<sup>112</sup> See Mario Tenreiro and Monika Ekström, ‘Unification of Private International Law in Family Law Matters Within the European Union’, 190, in Katharina Boele-Woelki K, *Perspectives for the Unification of Family Law in Europe* (1st edn, Intertentia 2003) (arguing that whilst HC1980 functioned “well” as between EU Member States, that it was still possible and indeed desirable to create *even more ambitious rules on child abduction* within the European Union)

<sup>113</sup> BIIR art 11(2)

<sup>114</sup> BIIR art 11(3)

<sup>115</sup> see General Comment 14 (n 16), para. 93 (setting out that a child’s perception of the passing of time is different to that of adults, the negative effect of delays and prolonged decision making on children and, accordingly, that decisions relating to children should be prioritised and completed in the “shortest time possible”); see further Council of Europe Guidelines on Child-Friendly Justice (n 56), principle 50 (Avoiding Undue Delay)

(involving hearing the child).<sup>116</sup> What is important, therefore, is how successfully the EU and Hague regimes find a *balance* between the two.<sup>117</sup>

### 3.1.1 CURRENT SYSTEM

As outlined in Section 2.2, Article 12 CRC establishes a two-stage approach under which a child capable of forming their own view must be given the opportunity to freely express that view (this is the “gatekeeper” criterion). The age and maturity of the child is relevant at the second stage, when determining the relative degree of *weight* to be attached to that view. Giving children an opportunity<sup>118</sup> to express their view is an integral part of the best interests principle under Article 3(1) CRC.<sup>119</sup> Indeed, social science studies demonstrate that failing to listen to a child in family proceedings can be more harmful than giving them the opportunity to express a view, even though this opportunity may mean that the child feels they are choosing between their parents or are exposed to parental pressure.<sup>120</sup>

The 1980 Hague Abduction Convention has been criticised as being overly focused on ensuring immediate return at the expense of listening to the voice of the child and considering their *individual* best interests.<sup>121</sup> General Comment 12 makes clear that the best interests of the child (Article 3 CRC) is to be determined by reference to both the *individual* child and children as a *collective group*.<sup>122</sup> HC1980 is based on a strong presumption that the interests of children *generally*<sup>123</sup> are best served by their swift return to the country of habitual residence.<sup>124</sup> The 1980 Convention has been criticised as providing only limited scope for

---

<sup>116</sup> This tension is the main area of debate regarding both HC1980 and BIIR. Those from a children’s rights background advocate for more liberal interpretation of relevant legislation to enable a more in-depth assessment of the child’s best interests. By contrast, others favour a stricter interpretation of the relevant legislation as they consider that an in-depth analysis of children’s views and interests may slow proceedings and frustrate the central aim of prompt return. See Anastacia Greene, ‘Seen and Not Heard? Children’s Objections Under the Hague Convention on International Child Abduction’ (2005-2006) 13 *University Miami International and Comparative Law Review* 105, 139-153; see further Peter McEleavy, ‘The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return of Reflection’ (2015) *Netherlands International Law Review* 365, 367

<sup>117</sup> See Linda Elrod, ‘“Please Let Me Stay”: Hearing the Voice of the Child in Hague Abduction Cases’ (2011) 63 *Oklahoma Law Review* 663, 690 (arguing that giving the child a voice does not necessarily conflict with the HC1980 purpose of returning the child. The key is to add the child’s voice to the voices of parents and others which are already being heard in these processes. Therefore, there is a balance to be achieved)

<sup>118</sup> It must be emphasised that CRC art 12 establishes a right to an “opportunity” to express a view. It does not, however, place any *obligation* on the child to express a view if they do not wish to do so, their participation must be voluntary – see General Comment 12 (n 44), para. 134(b)

<sup>119</sup> General Comment 12 (n 44), paras. 1(2), 68 and 70-74. Note esp. para 74: “there can be no correct application of article 3 if the components of article 12 are not respected”; see also General Comment 14 (n 16) paras. 43-45 and 89-91

<sup>120</sup> See Joan Kelly, ‘Listening to Children’s Views in Disputed Custody and Access Cases’ (2008) *AFCC Compendium* 179; Joan Kelly, ‘Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice’ (2002) 10 *Virginia Journal of Social Policy and the Law* 129; note also that the exposure to parental pressure and the child feeling like they are ‘choosing between their parents’ are commonly cited arguments by those who believe that the child should have limited participatory rights – see discussion in Greene (n 82) 140

<sup>121</sup> see discussion in Trynie Boezaart, ‘Listening to the Child’s Objection’ (2013) 3 *New Zealand Law Review* 357, 358

<sup>122</sup> General Comment 12 (n 44), para. 72

<sup>123</sup> i.e. as a collective group

<sup>124</sup> HC1980 Preamble (“The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence...”)

consideration of the best interests of the *individual* child.<sup>125</sup> Indeed, HC1980 contains no express obligation that national courts consider the best interests of the individual child as a *primary consideration*.<sup>126</sup> That is not to say, however, that the interests of individual children are irrelevant in HC1980 proceedings.<sup>127</sup> Rather the presumption on *collective* best interests can only be rebutted, and the interests of the individual child considered, when an affirmative defence under Article 13 or 20 is raised.<sup>128</sup> By contrast, General Comment 14 appears to advocate a more individualised focus from the outset, stating that “determining what is in the best interests of the child should *start with* an assessment of the specific circumstances that make the child unique”.<sup>129</sup> In terms of the child’s right to express a view under Article 12 CRC, the HC1980 drafters only reluctantly included a small window for this to be heard: Article 13 on the child’s objection to return.<sup>130</sup> Their fear was that being overly deferential to the views of the child would frustrate the overarching aim of the Convention, ensuring immediate return.<sup>131</sup>

What must be borne in mind, however, is that the *nature* of abduction today is markedly different from what was envisaged by the drafters.<sup>132</sup> Initially, the perceived threat was the removal of a child by the parent who did *not* have care of the child (typically the father).<sup>133</sup> Thus, the abduction constituted not only a removal from

---

<sup>125</sup> By ensuring the prompt return of the child, HC1980 aims to avoid a situation where the abductor is “rewarded” (e.g. if the child was allowed to remain in the country of abduction then this could bring the abducting parent certain practical and legal advantages over the left behind parent). In this manner, HC1980 also seeks to discourage future abductions, see: Greene (n 82), 148; Boezaart (n 87), 361; Rhona Schuz, ‘The Hague Child Abduction Convention: Family Law and Private International Law’ (1995) *International and Comparative Law Quarterly* 771

<sup>126</sup> see Lowe (n 65), 1; see further discussion in *Re E* (n 74), para. 13; The rationale behind this drafting is that the return of a child is not a “welfare decision”, rather it is a return to a state where such a welfare decision can then be taken by the courts of that country, the individual best interests of the child shall be considered at *that* stage.

<sup>127</sup> See discussion in: *Neulinger and Shuruk v Switzerland*, App. no. 41615/07 (ECtHR, 6 July 2010); See further discussion in *Re E* (n 74), paras. 14-17 (explaining that whilst the overarching aim of the Convention is to serve the best interests of children *generally* by disincentivising parental abduction, there is scope for assessment of the best interests of the individual child achieved by the inclusion of the grounds for refusing return under Articles 12, 13 and 20)

<sup>128</sup> These provide grounds on which the requested court can refuse to order the return of the abducted child. They include where return would expose the child to a “grave risk” of physical or psychological harm, or that the child has objected to return. However, note the narrow interpretation of these exceptions, see Greene (n 82), 125; Elrod (n 83), 675

<sup>129</sup> General Comment 14 (n 16), para. 49

<sup>130</sup> see Rania Nanos, ‘The Views of a Child: Emerging Interpretation and Significance of the Child’s Objection Defense under the Hague Child Abduction Convention’ (1996) 22(2) *Brook Journal of International Law* 437, 444; see in general also Boezaart (n 87)

<sup>131</sup> Other justifications for excluding the voices of children from proceedings have included: (a) the belief that parents shall do what is in their child’s best interests (see Linda Elrod and Milfred Dale, ‘Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance’ (2008) 42 *Family Law Quarterly* 381, 404-405); (b) a desire to protect children from having to “take sides” or “choose between their parents” (see Robert Emery, ‘Children’s Voices: Listening – and Deciding – Is an Adult Responsibility’ (2003) *Arizona Law Review* 621); and (c) arguments that children have “interests” rather than “rights” (see Melissa Breger, ‘Against the Dilution of a Child’s Voice in Court’ (2010) *Indiana International and Comparative Law Review* 175, 192)

<sup>132</sup> See generally: McEleavy (n 82); Greene (n 82), 146-153; Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction* (1st edn, Oxford University Press, 1999), 3; *TB v JB (Abduction: Grave Risk of Harm)* (2001) 2 FLR 515, para. 43; *Re E* (n 74), para. 6

<sup>133</sup> The text of HC1980 itself does not identify a typical “abductor profile” or “paradigm abduction scenario”. However, this can be identified from the Pérez-Vera Explanatory Report to the Convention and the report of Adair Dyer which it references. The Dyer report suggests that abductions are most commonly carried out by the non-custodial parent who abducts the child through frustration with custody proceedings, difficulties in accessing the child and fear of diminished influence. The Perez-Vera Explanatory Report to HC1980 adopts this report and notes that abduction involves a loss of contact with “the parent who has been in charge of his upbringing”. See: Elisa Pérez-Vera, ‘Explanatory Report on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’, available at:

<https://assets.hcch.net/upload/expl28.pdf> accessed 10 August 2017, para. 24; Adair Dyer, ‘Report on International Child Abduction by One Parent (“Legal Kidnapping”)', Prel. Doc. No. 1, Aug. 1978, III Actes et documents de la Quatorzieme Session, October 6-25, 1980; see also Merle Weiner, ‘International Child Abduction and the Escape from Domestic Violence’ (2000) 69 *Fordham Law Review* 593, 608; Greene (n 82), 146-



their ordinary environment but also a removal from the parent with care.<sup>134</sup> In this manner, HC1980 assumes that the child's environment prior to removal was "stable and satisfactory".<sup>135</sup> This may not be the case. Indeed, today the majority of abductors are the parent with care, usually the mother,<sup>136</sup> and domestic abuse is frequently alleged as the motivation.<sup>137</sup> Whilst around 69%<sup>138</sup> of global abductions are carried out by mothers, this figure varies significantly from country to country. In Scotland, one study put this figure at 92%.<sup>139</sup> Immediate return under HC1980 is not, therefore, a return to the status quo *ante*.<sup>140</sup> Given this change in the realities of abduction, the question is whether HC1980's focus on immediate return, at the expense of a more detailed review of the best interests of the *individual* child, is appropriate.<sup>141</sup>

The above context helps cast light on why Article 13 on the child's objection to return was drafted (and subsequently interpreted) so narrowly.<sup>142</sup> Article 13 HC1980 provides a basis upon which a requested state *may* refuse to order the return of an abducted child.<sup>143</sup> However, in contrast to Article 12 CRC, the "gatekeeper" criterion is that the child is of "sufficient age and maturity". As we have seen above, the

---

147; McElevy (n 82); Nigel Lowe and Katarina Horosova, 'The Operation of the 1980 Hague Abduction Convention – A Global View' (2007) 41(1) *Family Law Quarterly* 59, 69-70.

<sup>134</sup> McElevy (n 82), 370

<sup>135</sup> John Caldwell, 'Child welfare defences in child abduction cases – some recent developments' (2001) 13(2) *Child and Family Law Quarterly* 121, 122; Nanos (n 96), 459; note HC1980 art.13 "grave risk" defence.

<sup>136</sup> See Nigel Lowe, 'A statistical analysis of applications made in 2008 under The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' Prel Doc No 8A (HCCH, November 2011) <<http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>> accessed 10 August 2017, para. 43; see further discussion of this result in McElevy (n 82), 375; this appears to be a settled pattern with a global 2003 study showing that 68% of abductors were mothers, and a 1999 study putting this figure at 69%, see Lowe and Horosova (n 99), 67

<sup>137</sup> Merle Wiener, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 593, 599 (discussing how drafters failed to adequately consider the possibility that the abducting parent may be a mother with care fleeing domestic violence); see also Carol Bruch, 'The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 529; see further Miranda Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and Family* 191

<sup>138</sup> Lowe (n 102), para. 43

<sup>139</sup> Lowe & Horosova (n 99), 67

<sup>140</sup> In the sense that it is not a return to the parent with care following a removal from them, rather it is a return *following* an abduction by the parent with care.

<sup>141</sup> Marilyn Freeman, 'In the Best Interests of Internationally Abducted Children? – Plural, Singular, Neither or Both?' (2002) *International Family Law* 77, 82; McElevy (n 82); Schuz (n 91); for an alternative view see Lowe & Horosova (n 99), 70-71 (arguing that HC1980 is no less valid despite the change in profile of abductors. They argue this on basis HC1980 is not a "return away from the primary carer" because the child usually returns accompanied by the abducting parent. Even if the motivation for abduction was domestic abuse, the authors say that this is no excuse for the abduction, and that the best option in that situation is for the child and potential abducting parent to remain in the child's home country and national authorities ensure there are sufficient methods of protecting them from abuser within that country)

<sup>142</sup> Nanos (n 96), 444; see generally also Greene (n 82), Boezaart (n 87), McElevy (n 82); see further Pérez-Vera Explanatory Report (n 99) at para 34 (stating that the exceptions to duty to return must be interpreted narrowly so as to ensure that the overarching purposes of HC1980 are not defeated)

<sup>143</sup> The language "may return" is significant, as the requested Court still has the discretion to return the child even if the child objects. National courts have shown clearly divergent approaches here, for example US Courts routinely deny the child's objection, whereas Germany routinely pays deference to the child's objection and refuses return. Both approaches have been criticised as frustrating achievement of the object and purposes of the 1980 Convention and it is considered that the best approach lies somewhere between these two extremes – see Greene (n 82), 120, 138; Boezaart (n 87) 364; Brian Kenworthy, 'Note: The Un-Common Law: Emerging Differences Between the United States and the United Kingdom on the Children's Rights Aspects of the Hague Convention on International Child Abduction' 12 *Indiana International and Comparative Law Review* 329, 363.

“gatekeeper” required by Article 12 CRC is that the child is *capable of forming their own view*.<sup>144</sup> Article 13 HC1980 therefore falls short of the standard required by the CRC. This may simply be due to the fact that HC1980 predates the CRC.<sup>145</sup> Nevertheless, Article 13 HC1980 remains limited in several other ways. Importantly, it is only a child’s “objection” to return that is relevant.<sup>146</sup> A mere “view” or “preference” shall not suffice and there is no duty on the court to consider such views.<sup>147</sup> This raises problems in domestic abuse cases where a child may be unable or unwilling to voice their fears fully and may simply express a preference to remain with the non-violent parent.<sup>148</sup> Furthermore, Article 13 HC1980 places no obligation on the court to actively inquire *whether* the child objects.<sup>149</sup> The court’s role is a passive one and it need not ensure that there is an opportunity for the child to express their objection.

By contrast, Article 11(2) BIIR demonstrates a stronger approach.<sup>150</sup> It provides that when a national court is deciding whether to return a child “it shall be ensured that the child is given the opportunity to be heard during the proceedings *unless this appears inappropriate* having regard to his or her age or degree of maturity”. Whilst still falling short of the gatekeeper standard required by Article 12 CRC,<sup>151</sup> Article 11(2) BIIR undoubtedly achieves stronger protection for the child’s right to be heard than Article 13 HC1980.<sup>152</sup> Whilst both Article 13 HC1980 and Article 11(2) BIIR use the same gatekeeper criterion, the differing *emphasis* in BIIR is noteworthy.<sup>153</sup> Article 13 HC1980 merely *permits* the hearing of the child “where appropriate”, whereas BIIR *obliges* a court to hear the child “unless inappropriate”.<sup>154</sup> The burden of proof is therefore shifted away from the parent opposing return as there is now a mandatory positive obligation on the court to provide the child with an opportunity to be heard.<sup>155</sup> Accordingly, Article 11(2) BIIR has been described as “[breaking] new ground” in terms of protecting the child’s right to be heard.<sup>156</sup> Indeed, whilst EU family law is not intended to

---

<sup>144</sup> General Comment 12 (n 44), paras. 20-21

<sup>145</sup> The coming into force of the CRC after HC1980 was drafted has resulted in calls for HC1980 to be interpreted by national judges in light of the growth in children’s rights and the need for children to have a voice in determining their future, see Beaumont and McElevay (n 98), 177; Lowe (n 65) has suggested that HC1980 may have been drafted differently had it come into being after the entry into force of CRC.

<sup>146</sup> Note, there has been debate as to whether the “objection” must be an objection towards the *country* of return, or towards the *parent* seeking return, see Greene (n 82), 137

<sup>147</sup> Views falling short of an “objection” are considered more suitable for assessment at the ultimate custody decision than in the Hague proceedings themselves. See discussion in: *M v B* [2009] EWHC 3477 Fam, para. 51; Nigel Lowe, Mark Everall and Michael Nicholls, *International Movement of Children: Law, Practice and Procedure* (Jordan Publishing Ltd, Bristol, 2004), 355; Greene (n 82), 136; Sarah Vigers, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing, 2011, 80; Nanos (n 96), 450

<sup>148</sup> Accordingly, child’s rights advocates have argued that the mere preferences of children should be taken into account in HC1980 cases, see Jeanine Lewis, ‘The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity’ (2000) 13 *Transnational Law* 391, 664

<sup>149</sup> Garbolino (n 65), 1

<sup>150</sup> Thalia Kruger and Liselot Samyn, ‘Brussels II bis: successes and suggested improvements’ (2016) 12(1) *Journal of Private International Law* 132 (Art 11(2) BIIR as a more strongly worded provision in terms of protecting the child’s right to be heard than included in HC1980, 157); Boezaart (n 87), 364; see generally also Lowe (n 65)

<sup>151</sup> by again using “age and maturity” as the gatekeeper criterion

<sup>152</sup> Kruger and Samyn (n 116), 157; Boezaart (n 87); Vigers (n 113), 157; Lowe (n 65), 4

<sup>153</sup> Kruger and Samyn (n 116), 157 (noting that whilst Art 11(2) BIIR is an improvement on provisions of HC1980, that it may nevertheless still fall short of CRC due to the gatekeeper criterion); see also Vigers (n 113), 83; Boezaart (n 87)

<sup>154</sup> Boezaart (n 87), 364

<sup>155</sup> See Garbolino (n 65), 2; Elrod (n 83), 675 in footnotes

<sup>156</sup> Lowe (n 65), 4



alter national laws and procedures, it has been argued that the introduction of Article 11(2) BIIR has nevertheless contributed to a greater *readiness* to hear the child in national courts than was previously the case under HC1980 alone.<sup>157</sup> Indeed, the House of Lords decision *In Re D*<sup>158</sup> held that the Article 11(2) BIIR approach should be followed not only in intra-EU cases, but also in all Hague Convention cases. Whilst this *mitigates* some of the deficiencies of HC1980 on hearing the child, the decision is only binding on UK courts. Therefore, it does not modify the situation for outgoing return requests determined by foreign courts.

### 3.1.2 UNDER THE RECAST BIIR

Whilst Article 11(2) BIIR makes a clear improvement upon Article 13 HC1980, the Recast Proposal shows an even stronger commitment to protecting the child's right to be heard.<sup>159</sup> Whilst this proposal was introduced only a week after the Brexit vote, the UK nevertheless decided to opt-in.<sup>160</sup> The proposed Recast is in its preliminary stages and it remains unclear when it will enter into force. Current consensus suggests, however, that it will *not* have entered into force before the UK exits the EU.<sup>161</sup> Thus it is unlikely that the Recast shall be "caught" by the Withdrawal Bill's incorporation of EU law.

In its current form, the proposal recognises a greater linkage between the "best interests" of the child and ensuring that the child has an opportunity to be heard. For example, Recital 13 notes 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. Furthermore, the Explanatory Memorandum to the Recast Proposal notes that "if a decision is given without having heard the child, there is a danger that the decision may not take the best interests of the child into account to a sufficient extent".<sup>162</sup> Whilst the Recast maintains that it is up to Member States to determine *how* to hear the child, Recital 23 clarifies that the way the views are obtained must respect children's rights. The underlying message is clear; national authorities can decide *how* a child with a view is to be heard, but not *whether* that child should be heard.<sup>163</sup>

It is against this backdrop that the Recast Proposal introduces its new Article 20. This contains an obligation to ensure that the child is heard in *all* proceedings falling within the scope of the Recast, not just abduction

---

<sup>157</sup> Lowe (n 65), 4

<sup>158</sup> *In Re D (A Child)* [2006] UKHL 51, see judgement of Lady Hale

<sup>159</sup> This may in part be guided by the EU's adoption of the Council of Europe's Guidelines on Child Friendly Justice under the EU's Agenda for Children (see above Section 2.2)

<sup>160</sup> Although the recast falls within the scope of the "Area of Freedom, Security and Justice" (AFSJ) to which the UK has an automatic opt-out (see Article 3 of Protocol 21 to the TEU), the UK Government nevertheless decided to 'opt-in', see discussion in House of Commons Library, 'Brexit: the Brussels IIA regulation – cross-border child contact cases, and child abduction' (House of Commons Library, 11 November 2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7764#fullreport>> accessed 24 July 2017, 4

<sup>161</sup> My thanks to Rachael Kelsey (SKO Solicitors) for her comments here following her recent attendance at the Lexis Nexis and Jordan Publishing Conference: "Brexit – Does Brexit really mean Brexit for Family Law?" (London, 26 June 2017)

<sup>162</sup> European Commission, 'Explanatory Memorandum to Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' COM(2016) 411 final, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF> accessed 20 May 2017 [hereinafter 'Explanatory Memorandum to Recast Proposal'], 4

<sup>163</sup> Paul Beaumont, Lara Walker and Jayne Holliday, 'Parental responsibility and international child abduction in the proposed recast of the Brussels IIA Regulation and the effect of Brexit on future child abduction proceedings' (2016) *International Family Law* 207

proceedings.<sup>164</sup> The new article shows a closer alignment to Article 12 CRC than either BIIR or HC1980. Article 20 Recast places a duty on Member States to ensure that a child “*who is capable of forming his or her own views*” is given the opportunity to express them. The gatekeeper criterion is therefore focused on the child’s capacity to form a view, rather than the judge’s consideration that it is inappropriate to hear the child.<sup>165</sup> Article 20(1) further provides that the opportunity must be both “genuine and effective”; a further improvement on the earlier expression in BIIR. In line with the CRC and CFR, the weight attributed to the child’s views shall be determined in accordance with the child’s age and maturity.<sup>166</sup>

Additionally, a new requirement is introduced whereby the judge must document their *considerations* regarding hearing the child in a certificate attached to the decision.<sup>167</sup> This new duty emphasises that the judge can only issue a certificate if the child has been given a “genuine and effective” opportunity to express their views in accordance with the new Article 20. This is an improvement upon the current BIIR certificates, as it moves away from a “yes/no” approach towards one where the judge must provide more detailed reasoning.<sup>168</sup> This has been praised as encouraging “clarity of thought and clarity in the decision and should lead to an increase in the number of children being heard”.<sup>169</sup> Furthermore, under BIIR a certificate erroneously stating that a child had been heard could remain valid.<sup>170</sup> However, Article 54 of the proposed Recast grants the power to rectify and withdraw a certificate non-compliant with Article 20.<sup>171</sup>

The improvements which the Recast makes here are clear. It may be argued, given the UK’s ratification of the CRC, that our national courts would also make these improvements in time.<sup>172</sup> However, the slow progress made in other areas in the absence of CRC incorporation, casts some doubt here.<sup>173</sup> Accordingly, it would be

---

<sup>164</sup> Accordingly, the child must be given an opportunity to be heard in divorce proceedings, parental responsibility proceedings, custody disputes, access orders etc.

<sup>165</sup> This is in line with CRC art 12

<sup>166</sup> Recast BIIR Proposal, art 20(2)

<sup>167</sup> Recast BIIR Proposal art 53(5), replacing BIIR art 42

<sup>168</sup> This approach was criticised as being too vulnerable to judicial interpretation, see Kruger and Samyn (n 116) (criticism of BIIR certificates, and suggesting that the recast adopts a more detailed approach, such as requiring the judges to include details on *how* the child was heard, 158); for an example of the problems with BIIR certificates see Case C-491/10 PPU *Aguirre Zarraga v Simone Pelz* [2011] ILPr 659

<sup>169</sup> Beaumont, Walker and Holliday (n 129), 7

<sup>170</sup> for an example see *Aguirre Zarraga v Simone Pelz* (n 134)

<sup>171</sup> Albeit that this power lies with the state of origin, rather than the state requested to enforce, see Beaumont, Walker and Holliday (n 129), 8

<sup>172</sup> See for example the words of Baroness Hale in relation to hearing the child in *all* family cases, discussed above at section 3.1.1, *In Re D (A child) (Abduction: Foreign custody rights)* [2006] UKHL 51, para 58: “Although strictly [the Brussels II regulation] only applies to cases within the European Union ... the principle is in my view of universal application and consistent with our international obligations under Article 12 of the United Nations Convention on the Rights of the Child”; and *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, para. 46

<sup>173</sup> See for example, UN Universal Periodic Review, ‘Mid Term Report of the United Kingdom of Great Britain and Northern Ireland, and the British Overseas Territories, and Crown Dependencies’ (UPR, 2014) <[https://www.upr-info.org/sites/default/files/document/united\\_kingdom/session\\_13\\_-\\_may\\_2012/uk\\_mid-term\\_report\\_08\\_14.pdf](https://www.upr-info.org/sites/default/files/document/united_kingdom/session_13_-_may_2012/uk_mid-term_report_08_14.pdf)> accessed 1 August 2017, 17, Slovakia recommended that the UK fully incorporate the CRC into domestic law (rec 110.9). The UK declined this recommendation and made statement that it is fully committed to implementing the CRC and had given a commitment in 2010 to give due consideration to the CRC. Despite this, however, the UK Government has still introduced legislation which has been found in violation of the CRC, see for example the case law relating to the “Benefit Cap”: *R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, paras. 126, 227, 269

disappointing if children party to proceedings between the UK and remaining Member States post-Brexit were to miss out on the Recast’s enhancements.

## 3.2 SPEED OF PROCEEDINGS

### 3.2.1 CURRENT SYSTEM

A further innovation of BIIR is the six-week time limit under Article 11(3). This provision applies to abduction cases where a return order is sought and provides that “*except where exceptional circumstances make this impossible*”, a decision on return should be issued within six weeks of the action being raised. This is a far stronger provision than anything found in HC1980 and has been praised as “undoubtedly a child welfare/rights enhancing provision”.<sup>174</sup> HC1980 merely states an *expectation* that a decision shall be reached within six weeks, but there is no obligation of result. Article 11 HC1980 simply provides that if a decision is *not reached* within six weeks of the date of application, the requesting state has the right to request an explanation. There is, however, no obligation placed on the receiving state to issue a response. Indeed, HC1980 seems to place little faith in receiving one, by later providing that only “if” a reply is received must this be communicated to the parent seeking the return.<sup>175</sup> Whilst Article 11 HC1980 obliges states to “act expeditiously”, again this is weaker than its BIIR counterpart. Under Article 11(3) BIIR, state authorities are obliged to use the ‘*most*’ expeditious procedures available.<sup>176</sup>

In *practice*, it has been acknowledged that the speed of return varies significantly from state to state under both HC1980 and BIIR.<sup>177</sup> In Scotland, it has been argued that BIIR’s introduction did not directly affect the speed of proceedings, as Scottish authorities generally *already* issued decisions within six weeks.<sup>178</sup> Of course, this prior compliance may simply be due to the fact that Scotland is a small jurisdiction. By contrast, the introduction of the six-week rule is thought to have had a greater impact in the larger jurisdictions of other Member States.<sup>179</sup> For example, there is evidence that German Courts have significantly sped up their processes as a result.<sup>180</sup> The fact that *other* Member States’ procedures have sped up is hugely important in terms of *outgoing* requests from Scotland. Overall, it is argued that BIIR’s introduction of this stricter requirement has had a positive effect and courts across the UK certainly take compliance with it very seriously.<sup>181</sup> By this point, it already seems that the EU is achieving a fairer balance between the competing interests of speed and an individualised review of the child’s best interests. As Elrod(2010) stated in relation to HC1980, “giving the child a voice does not necessarily ‘conflict’ with the purpose [of returning] the child. The key is to

---

<sup>174</sup> Lowe (n 65), 4; see also Garbolino (n 65), 2

<sup>175</sup> HC1980 art 11

<sup>176</sup> BIIR as adopting more “stringent” language here than in HC1980, see Garbolino (n 65), 2

<sup>177</sup> In relation to HC1980 cases see McElevy (n 82), 369 (stating that whilst HC1980 is often praised for its simplicity, that it has “not uniformly fulfilled expectations” and that delays are frequent); in relation to BIIR cases see Lowe (n 65), 4

<sup>178</sup> My thanks to Kirsty Hood QC and Rachael Kelsey (SKO Solicitors) for their observations here.

<sup>179</sup> Hood and Kelsey (n 144)

<sup>180</sup> Lowe (n 65), 4

<sup>181</sup> Lowe (n 65), 4

add the child’s voice to the voices of the parents and others” already being heard.<sup>182</sup> The EU appears to have achieved this to a greater extent, whilst simultaneously holding Member States to more stringent time limits. The EU’s adoption of the Council of Europe’s Guidelines on Child Friendly Justice could further increase the potential for positive developments in the EU family law system, as these place an emphasis on ensuring both the speed of proceedings and the child’s best interests.<sup>183</sup>

### 3.2.2 UNDER THE RECAST BIIR

Notwithstanding the above, the introduction of BIIR’s six-week time limit did raise some problems regarding interpretation. Some practitioners were unsure whether the six weeks applied to proceedings at first instance, with a further period permitted for appeal, or whether it applied to the entire process including enforcement. The Recast clarifies this, stating that the six-week rule applies to *each stage* of proceedings.<sup>184</sup> Therefore, the maximum period permitted is “6+6+6” weeks (i.e. first instance, appeal, enforcement).<sup>185</sup> This may seem like a backwards step from the “six weeks” of Article 11(3) BIIR. However, most commentators have welcomed the clarification on a practical basis, believing that it will “actually reduce the average time for the return of the child in the long run” when coupled with other proposed changes.<sup>186</sup>

These changes include the concentration of child abduction cases within the judicial systems of Member States<sup>187</sup> and a limit on the number of appeals permitted.<sup>188</sup> It is hoped that by bringing children’s cases before a more limited group of courts within each Member State that the judges and professionals therein shall become more experienced in handling them. This would allow abduction cases to be dealt with more efficiently.<sup>189</sup> Limiting the number of appeals possible in abduction cases to one, is further aimed at expediting proceedings. In both BIIR and HC1980 cases, it has become evident that some parents attempt to frustrate proceedings by repeatedly abusing their right of appeal.<sup>190</sup> By limiting the number of appeals, the Recast provides welcome support to speeding up return. Where mediation is considered appropriate then this should be used, provided it does not “unduly prolong the return proceedings”.<sup>191</sup> This achieves a balance between the modern-day focus on achieving out of court solutions and the need to resolve matters quickly.

As aforementioned, the changes proposed are a “gloss” which the UK is set to miss out on upon Brexit.<sup>192</sup> Indeed, there are concerns amongst some practitioners that remaining Member States may begin to

---

<sup>182</sup> Elrod (n 83), 690

<sup>183</sup> Council of Europe Guidelines (n 56)

<sup>184</sup> Recast BIIR Proposal art 23(1)

<sup>185</sup> Explanatory Memorandum to Recast Proposal (n 128),13

<sup>186</sup> Nigel Lowe (n 61), 401; Beaumont, Walker and Holliday (n 129), 3

<sup>187</sup> Recast BIIR Proposal art 22, see also preamble para. 26

<sup>188</sup> Recast BIIR Proposal art 25(4)

<sup>189</sup> Beaumont, Walker and Holliday (n 129), 2

<sup>190</sup> Beaumont, Walker and Holliday (n 129), 3

<sup>191</sup> Recast BIIR Proposal art 23(2), see also preamble para. 28

<sup>192</sup> Assuming, as aforementioned, that the recast will not come into force before the date of UK’s withdrawal (see Section 3.1.2)

deprioritise UK cases after Brexit.<sup>193</sup> This is because UK cases will then only be subject to HC1980 which contains less stringent obligations of speed as outlined above.

### 3.3 EASE OF ENFORCEMENT

#### 3.3.1 CURRENT SYSTEM

The right of a child to maintain contact with their parents, except where this is not in their best interests, is protected by Article 9(3) CRC and Article 24(3) CFR. BIIR provides for the fast track enforcement of access rights by abolishing the requirement for exequatur.<sup>194</sup> Provided the appropriate certificate has been issued by the judge granting the access order, that order is directly recognised and enforceable in other Member States, without the need for registration or a declaration of enforceability.<sup>195</sup> BIIR further provides that it is not possible to oppose recognition of the judgement.<sup>196</sup> Professor Lowe has praised BIIR's fast track procedure as one of the Regulation's "principal innovations".<sup>197</sup> Whilst noting some difficulties in its application,<sup>198</sup> he considers overall that the accelerated procedure provides "some important improvements" to safeguard the child's rights under Article 9(3) CRC.<sup>199</sup>

By contrast, neither HC1996 nor HC1980 provide an accelerated procedure for enforcing access rights.<sup>200</sup> The only provision which may be viewed as protecting the child's right to maintain contact is HC1980 Article 21. This obliges the requested Central Authority to take steps to remove any obstacles to the exercise of access rights and to promote their "peaceful enjoyment". However, this remains a weaker provision than under BIIR.

#### 3.3.2 UNDER THE RECAST BIIR

The Recast Proposal seeks to abolish the requirement of exequatur in *all decisions* falling within the scope of the new Regulation (i.e. no longer just access orders).<sup>201</sup> This aims to eradicate the costs and delays associated with the procedure. The Proposal's Explanatory Memorandum details that the average cost of exequatur is €2200 and that the process can take anywhere from days to several months depending on the Member State.<sup>202</sup> If the grant or refusal of exequatur is appealed, this can cause delays of up to two years in some states.<sup>203</sup>

---

<sup>193</sup> My thanks to Rachael Kelsey (SKO solicitors) for sharing her thoughts here

<sup>194</sup> BIIR art 41

<sup>195</sup> BIIR art 41(1)

<sup>196</sup> Provided that the judgement has been certified in accordance with BIIR art 41(2), see discussion in Lowe (n 65), 4

<sup>197</sup> Lowe (n 65), 4

<sup>198</sup> For example, he notes that BIIR makes little provision on how to deal with access orders which are now out of date and do not fit the current needs of the family, see Lowe (n 65), 4-5

<sup>199</sup> Lowe (n 65), 4-5

<sup>200</sup> Lowe (n 65), 403

<sup>201</sup> Proposed BIIR Recast art 27

<sup>202</sup> Explanatory Memorandum to Recast Proposal (n 128), 14

<sup>203</sup> Explanatory Memorandum to Recast Proposal (n 128), 4

Having observed BIIR's successful abolition of exequatur in relation to access orders (above 3.3.1), the Commission has proposed the wholesale abolition of the requirement.<sup>204</sup> This, however, is to be coupled with appropriate safeguards available at the enforcement stage.<sup>205</sup>

### 3.4 CONCLUSION: A LOSS OF EU'S "ADDED VALUE"?

It is apparent that the EU intervention in family law certainly has "added value" in furthering the requirements of the CRC. This is particularly clear in the context of the right of the child to have an opportunity to express their views,<sup>206</sup> the requirement for a balance between the depth of an individualised assessment into the child's best interests<sup>207</sup> and the speed of proceedings<sup>208</sup> and the right of the child to maintain regular and direct contact with their parents.<sup>209</sup> This "gloss" of EU law over and above the Hague Conventions<sup>210</sup> is even more noticeable when one takes into account the changes in the BIIR Recast Proposal. Accordingly, upon Brexit, the UK is set to lose this EU "gloss". As aforementioned, a unilateral incorporation of EU family law under the Withdrawal Bill shall lack effectiveness due to the loss of reciprocity and the obligations of mutual trust.<sup>211</sup>

## 4. MAINTENANCE DISPUTES

### 4.1 CURRENT SYSTEM

Where an intra-EU dispute relates to child maintenance, the rules on jurisdiction, recognition and enforcement are contained within the Maintenance Regulation ('MR').<sup>212</sup> This is an *alternative* instrument to the 2007 Hague Maintenance Convention ('HC2007').<sup>213</sup> The MR allows maintenance creditors to obtain a decision in one Member State which will be automatically enforceable in another Member State without the need for formalities (i.e. exequatur).<sup>214</sup> Whilst the aim of the instrument is to protect free movement rights, it certainly protects children's interests. Indeed, it has been commented that "easily accessed measures for reciprocal enforcement of maintenance orders are just as much about the rights of children as abduction cases."<sup>215</sup> Maintenance cases are often about children who require financial support from the non-resident parent to ensure a satisfactory standard of living in line with Article 27(4) CRC. If that parent tries to evade their

---

<sup>204</sup> Proposed BIIR Recast art 27

<sup>205</sup> Explanatory Memorandum to Recast Proposal (n 128), 10 and 14

<sup>206</sup> CRC art 12

<sup>207</sup> CRC art 3

<sup>208</sup> Again see General Comment 14 (n 16), para 93 (explaining that a child's perception of time differs from that of adults, prolonged proceedings can have an adverse impact upon children and, accordingly, proceedings involving children should be completed in as short a time as possible)

<sup>209</sup> CRC art 9(3)

<sup>210</sup> referring to HC1996 and HC1980 in this context

<sup>211</sup> Lowe (n 61), 405

<sup>212</sup> see above (n 38) for full reference. The UK made a late decision to opt-in to the Regulation, after it had already been adopted, see Commission Decision (2009/451/EC) which gave legal effect to the UK's late opt-in

<sup>213</sup> Lowe (n 61), 404; i.e. to be contrasted from relationship between BIIR and HC1980 whereby BIIR applies HC1980 to intra-EU cases, but subject to additional rules, cf. HC2007 and MR are alternative instruments.

<sup>214</sup> MR Preamble para. 9

<sup>215</sup> Rebecca Bailey Harris, House of Lords, Justice Sub-Committee Evidence Session No.2 (n 62), 12-13

obligations by moving elsewhere in Europe, it can be extremely difficult to enforce maintenance obligations without having the proper systems in place.<sup>216</sup> Accordingly, the evidence before the House of Lords' Justice Sub-Committee was that the UK should continue to participate in MR after Brexit.<sup>217</sup> This is reiterated by the Law Society of England and Wales, which states that such participation should be preserved in the spirit of continuing mechanisms which have "made the life of citizens, often at a trying and delicate time, easier and less stressful."<sup>218</sup>

#### 4.2 IMPACT OF BREXIT

In the absence of agreement with the EU to the contrary, the UK may seek to fall back on the provisions of the 2007 Hague Maintenance Convention ('HC2007') post-Brexit. The main concern is that HC2007 contains no rules on jurisdiction. By contrast, the MR applies the rule of *lis pendens*, which is essentially a 'first in time' rule.<sup>219</sup> Whilst this strict rule has been criticised as causing unfairness in certain cases, it is clear and efficient.<sup>220</sup> The alternative, which is used in HC2007 cases, is the *forum conveniens* approach under which a court has to decide whether or not the foreign court is better placed to hear the case. Whilst this is a very fair system, and some view it as preferable to *lis pendens*,<sup>221</sup> many have noted that it results in protracted and costly proceedings.<sup>222</sup> It is doubtful whether this is in the best interests of the children involved.<sup>223</sup> What is beyond dispute, however, is that whilst practitioners are familiar with the MR, they have little practical experience of HC2007.<sup>224</sup> Some further argue that the HC2007 provisions are even more complicated than those under the MR.<sup>225</sup> Falling back on this shall, therefore, require extensive retraining for practitioners and judges. Under the Council of Europe Guidelines, such training should incorporate child-focused approaches.<sup>226</sup>

#### 4.3 CONCLUSION: A JURISDICTIONAL GAP?

What we face after Brexit is a "jurisdictional gap" under HC2007. This could be largely filled were the UK to become party to the Lugano II Convention.<sup>227</sup> However, for the UK to accede to this instrument, it would need to be an EFTA state.<sup>228</sup> If the UK was to leave the single market, however, then Lugano would not be a viable

---

<sup>216</sup> Rebecca Bailey Harris, House of Lords, Justice Sub-Committee Evidence Session No.2 (n 62), 13

<sup>217</sup> Rebecca Bailey Harris, House of Lords, Justice Sub-Committee Evidence Session No.2 (n 62), 13

<sup>218</sup> Law Society Meeting Paper 18 July 2017 (n 62), point 8

<sup>219</sup> MR art 12 Article, this means that if proceedings are brought before courts in different Member States, the second court must stay proceedings until the first court has decided whether it has jurisdiction

<sup>220</sup> see Bar Council Brexit Working Group, 'The Brexit Papers' (Bar Council, December 2016), 65 <[http://www.barcouncil.org.uk/media/508513/the\\_brexit\\_papers.pdf](http://www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf)> accessed 3 June 2017

<sup>221</sup> see for example Beaumont, Walker and Holliday (n 129), 16

<sup>222</sup> Bar Council Brexit Working Group (n 186)

<sup>223</sup> Bar Council Brexit Working Group (n 186); see further General Comment 14 (n 16), para. 93

<sup>224</sup> Lowe (n 61), 404

<sup>225</sup> Lowe (n 61), 404

<sup>226</sup> Council of Europe Guidelines on Child-Friendly Justice (n 56), paras. 15 and 49

<sup>227</sup> Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2007] L339/3

<sup>228</sup> European Free Trade Agreement



option.<sup>229</sup> The question of single market access is, of course, a highly contested issue which is yet to be fully resolved. Accordingly, the Lugano route can only be considered as an outside possibility at present.

## 5. IMPACT OF BREXIT ON UK MEMBERSHIP OF THE HAGUE CONVENTIONS

If the Hague Conventions are to form a post-Brexit “backstop”, as some have suggested,<sup>230</sup> then we must be sure that they will apply as between the UK and remaining EU Member States without any gaps in their application after Brexit. However, there are technical issues which mean this is not guaranteed. The specific situation for each Hague Convention is discussed below.

### 5.1 2007 HAGUE MAINTENANCE CONVENTION

The clearest problems arise regarding HC2007. The EU acceded to the Convention on behalf of its Member States.<sup>231</sup> Accordingly, once the UK is no longer an EU Member State, HC2007 shall cease to bind the UK unless prior action is taken by the UK Government to accede in its own right.<sup>232</sup> The Family Law Bar Association of England and Wales has voiced concerns that future UK accession here shall require EU approval before the Convention shall apply between the UK and remaining EU Member States.<sup>233</sup> Although arguably there will be no possibility for the EU to object,<sup>234</sup> there is still a risk of a hiatus between Brexit and the UK accession coming into effect. HC2007 comes into force three months after ratification.<sup>235</sup> Therefore, the UK must accede to the Convention three months *prior* to its withdrawal to ensure no hiatus occurs.<sup>236</sup> However, as issues relating to HC2007 are within the EU’s *exclusive* competence, complications arise.<sup>237</sup> The UK Government must therefore act immediately to address these issues and ensure that arrangements are in place to guarantee that HC2007 shall be effective immediately upon the UK’s withdrawal.<sup>238</sup>

---

<sup>229</sup> see Resolution, ‘The implications of Brexit for the justice system – written evidence by Resolution to the Justice Select Committee’ (2017), annexed to The Law Society Meeting Paper 18<sup>th</sup> July 2017 (n 62)

<sup>230</sup> most notably Beaumont (n 64)

<sup>231</sup> HC2007 art 59(3) permits a regional economic integration organisation to accede to the Convention on behalf of its Member States; see also EU Council Decision of 9 June 2011 (2011/432/EU) which ratifies and binds the EU and its Member States (except Denmark) as parties to HC2007; note also the International Recovery of Maintenance (Hague Convention 2007) (Scotland) Regulations 2012 which facilitate the application of HC2007 in Scotland.

<sup>232</sup> See TFEU art 216(2) which states that agreements entered into by the EU on behalf of its Member States shall be binding only upon the institutions of the Union and its Member States.

<sup>233</sup> Bar Council Brexit Working Group (n 186), 64

<sup>234</sup> see HC2007 arts 58(1)-(2) and discussion in Beaumont (n 64), 1

<sup>235</sup> HC2007 art 60(2)(a) provides that the Convention shall come into force as between Contracting States three months after ratification

<sup>236</sup> see discussion in Beaumont (n 64), 1

<sup>237</sup> Case C-1/13 Opinion pursuant to Article 218(11) TFEU [2014] ECLI:EU:C:2014:2303

<sup>238</sup> Law Society Meeting Paper 18 July 2017 (n 62) (“[w]here the UK is a signatory of a convention as a member of the EU rather than in its own right, a mechanism of succession or accession should be sought early on, to avoid a limbo which could be highly damaging to the welfare of British Citizens, families and particularly children”, point 3)



## 5.2 1996 HAGUE CONVENTION ON PARENTAL RESPONSIBILITY

A slightly different issue faces HC1996. Essentially, the UK acceded to it “as if it was an EU instrument” within the meaning of Article 1(2) of the European Communities Act 1972.<sup>239</sup> This enabled the UK to accede without the need for primary legislation.<sup>240</sup> The repeal of the European Communities Act 1972,<sup>241</sup> through which HC1996 accession was achieved, shall mean that the internal status of HC1996 falls into legal limbo. This issue shall require primary legislation to clarify.<sup>242</sup>

## 5.3 1980 HAGUE ABDUCTION CONVENTION

The issues affecting HC1980 are more nuanced. When a new state accedes to the Convention, its provisions are only binding in relations between that state and the existing Contracting States which have *approved* this new accession.<sup>243</sup> The CJEU has held that, due to the overlap between the areas covered by HC1980 and EU law, approval by EU Member States of accessions to HC1980 is a matter within the *exclusive competence* of the EU.<sup>244</sup> Accordingly, without EU approval, HC1980 shall not apply between new Contracting Parties and EU Member States.

In light of Brexit and the UK’s new status as a “third state”, will the application of HC1980 as between the UK and remaining EU Member States require the approval of the EU? What shall happen if such consent is required, but not given? These questions have been raised by the AIRE Centre but, at present, there are no clear answers.<sup>245</sup> Whilst this issue may be more “political” than legal, it nevertheless has direct consequences for legal certainty and predictability.<sup>246</sup>

## 6. POST-BREXIT FUTURE: RISK OF DIVERGENCE

### 6.1 UNIFORMITY OF INTERPRETATION

One of the advantages of EU rights is that they are subject to interpretation by the CJEU.<sup>247</sup> The CJEU provides a uniform interpretation of family law instruments which is applicable across the Union. Furthermore, since 2008, national courts hearing child abduction cases have been able to make *urgent* preliminary reference

---

<sup>239</sup> see discussion in Lowe (n 61), 404

<sup>240</sup> UK accession was achieved by way of the European Communities (definition of Treaties) (1996 Hague Convention on the Protection of Children etc.) Order 2010

<sup>241</sup> European Union (Withdrawal) Bill, s.1

<sup>242</sup> Lowe (n 61), 404

<sup>243</sup> HC1980 art 58, Note HC1980 uses an “opt-in” approach which requires express acceptance to be given. Contrast HC1996 which follows an opt-out approach, i.e. HC1996 shall apply as between the new and existing state parties unless the latter expressly *objects* to the accession of the new state

<sup>244</sup> Case C-1/13 Opinion pursuant to Article 218(11) TFEU (n 203)

<sup>245</sup> AIRE Centre, ‘The UK’s Continued Participation in Hague Instruments Following Brexit’ (‘Brexit – Does Brexit really mean Brexit for Family Law?’ Conference, London, 26 June 2017)

<sup>246</sup> My thanks to Kirsty Hood QC and Rachael Kelsey for their comments here

<sup>247</sup> See Nigel Lowe (n 65); see also comments of David Williams QC and Professor Bailey Harris in House of Lords, Justice Sub-Committee Evidence Session No.2 (n 62), 7-8

requests to the CJEU.<sup>248</sup> This new procedure is considerably faster than the ordinary preliminary reference system.<sup>249</sup> Accordingly, the CJEU typically hands down its judgement within two months of the request being made.<sup>250</sup>

There is no equivalent Court or reference procedure for ensuring interpretational uniformity in the Hague system. When applying the Hague Conventions, national courts have regard to the decisions of other Contracting Parties' courts via INCADAT.<sup>251</sup> However, such foreign judgements are non-binding.<sup>252</sup> The lack of uniform interpretation is evident in many areas of the Hague system,<sup>253</sup> for example, in relation to key terms such as "habitual residence" or "grave risk".<sup>254</sup> Indeed, in certain cases the interpretation of Hague Convention provisions has varied even between courts within the same Contracting State.<sup>255</sup> Accordingly, there is less predictability for children and their parents involved in Hague cases.

In terms of the proposed BIIR Recast, in the (unlikely) event that this comes into force prior to Brexit, the Withdrawal Bill shall "incorporate" it into domestic law yet there will be no CJEU oversight regarding its interpretation.<sup>256</sup> The situation is no better if the Recast does *not* come into force prior to the UK's withdrawal. There are many provisions of BIIR which remain unchanged in the Recast.<sup>257</sup> Therefore, once the UK leaves the EU, the CJEU's interpretations of these provisions shall not be binding on UK courts applying the domesticated BIIR, despite the fact that these provisions are worded identically to those in the recast. There is, accordingly, a clear risk of divergence between the UK and the EU in the years post-Brexit.<sup>258</sup> With EU institutions bound by Article 24 CFR on children's rights, and no incorporation of the CRC in Scots Law, there is a risk that the EU will

---

<sup>248</sup> Preliminary references are made by national courts to the CJEU where they are unsure of how to interpret or apply a provision of EU law; for introduction of urgent procedure see: See Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice and the amendment to the Rules of Procedure of the Court of Justice on 15 January 2008 (OJEU L240), 29

<sup>249</sup> Lowe (n 65), 6

<sup>250</sup> An example can be seen in Case C-195/08 *Re Rinau* [2008] FLR 1495

<sup>251</sup> This is a database of judgements from Hague Contracting States applying the Conventions, available at: <  
<http://www.incadat.com/index.cfm/index.cfm?act=text.text&lng=1>>

<sup>252</sup> Hague cases from foreign countries do enjoy a degree of persuasive quality, however, see comments of Thorpe LJ in *Re H (Abduction: Rights of Custody)* [2001] 1 FLR 201, 211 (observing that HC1980 case law from courts of other Contracting States should "enjoy a degree of authority in the courts of others")

<sup>253</sup> See McElevy (n. 82), 369-370 (noting that almost every HC1980 provision has given rise to "inordinate amounts of litigation")

<sup>254</sup> in relation to "habitual residence" see McElevy (n. 82), 370; in relation to the "grave risk" criterion under HC1980 art 3 the courts in some countries have taken an objective approach to determining "grave risk", whilst others have taken a subjective approach, see discussion in Caldwell (n .101), 127

<sup>255</sup> McElevy (n. 82), 370 (noting the variation in interpreting "habitual residence" even within the United States)

<sup>256</sup> My thanks to Rachael Kelsey for her comments here, arguing that this is problematic given that the recast system has been *designed* to be subject to a central court.

<sup>257</sup> Following BIIR articles remain unchanged in the meaning of the Recast: 1, 2, 3, 4, 5, 6, 7, 8(2), 9, 10, 11(1), (2), (3), (5), (7), 12(2), (4), 13,14, 15(1)-(5), 16, 17, 18, 19, 20(2), 21(1), (2), (4), 22, 23(a), (c)-(f), 24, 25, 26, 27, 41(2), 42(2), 44, 48, 49, 51, 53, 54, 55(b)-(e), 56 (2), (3), 58, 59(1), 60(a)-(d), 63, 66, 67(a), (b); see Explanatory Memorandum to Recast Proposal (n 128),17

<sup>258</sup> See comments of David Williams QC and Rebecca Bailey Harris, House of Lords, Justice Sub-Committee Evidence Session No.2 (n 62), 7-8 (negative results from loss of autonomous interpretation of CJEU upon Brexit)

continue to take an increasingly CRC-focused approach to interpretation and development, whilst progress in the UK shall be slower.<sup>259</sup>

For many commentators, the loss of the CJEU is highly concerning.<sup>260</sup> However, the reality is that CJEU jurisdiction is a red line issue for the UK Government and the highly politicised nature of the debate means its retention is unlikely even, as has been suggested, in a merely advisory capacity.<sup>261</sup>

## 6.2 RESOURCES AND DEVELOPMENT POTENTIAL

A second issue is the relative resources of the EU and Hague systems and the potential each shows for future children's rights-based developments.

It has been argued that the EU has greater resources than regimes such as the Hague Conference or Council of Europe.<sup>262</sup> Accordingly, the EU may be more capable of making changes not otherwise possible under the Hague system with its more limited resources and personnel.<sup>263</sup> One example is the introduction of Article 11(2) BIIR (Section 3.1.1 above). Professor Lowe states that the introduction of this provision was an "important improvement on the Hague Abduction Convention but...not one that could have been quickly delivered by the Hague Conference, if at all."<sup>264</sup> He further explains that "[g]iven its limited resources and current projected programme, I don't think much can be expected of new child's rights initiatives from the Hague Conference."<sup>265</sup> This appears to have been accepted by Professor McEleavy who notes that whilst the Hague Conference has shared good practices and made certain improvements, as of the early 2000s the real drive for reform was coming from Brussels (CJEU) and from Strasbourg (ECtHR).<sup>266</sup> That said, there *are* currently discussions regarding a new Hague Convention. However, the early recommendations here are only expected in March 2018.<sup>267</sup>

A related issue is the funding of the Central Authorities ('CA') which process both Hague and EU cases. In Scotland, we benefit from a well-funded and efficient CA. An obligation to establish a CA is contained in both

---

<sup>259</sup> For an example of the UK Government's slow progress in the past see UN Universal Periodic Review Mid Term Report 2014 (n 139), 17, and subsequent caselaw of the UK Supreme Court, *R (on the application of SG and others) v Secretary of State for Work and Pensions* (n 139)

<sup>260</sup> see for example: Lowe (n 65), 6; see also the comments of David Williams QC and Rebecca Bailey Harris, House of Lords, Justice Sub-Committee Evidence Session No.2 (n 62), 7-8 (negative results from loss of autonomous interpretation of CJEU upon Brexit)

<sup>261</sup> see comments of Rebecca Bailey-Harris, House of Lords, Justice Sub-Committee Evidence Session No.2 (n 62), 8

<sup>262</sup> Lowe (n 65), 6-7

<sup>263</sup> see, for example, the comments of Sir Matthew Thorpe, House of Lords, Justice Sub-committee Evidence Session No.5 (n 62), 11 (noting that whilst BIIR has been subject to progressive revision and improvement, the Hague Conventions have been "in effect fossilised" from the moment they came into being. For example HC1980 has not been amended or revised since it came into force)

<sup>264</sup> Lowe (n. 92), 6

<sup>265</sup> Lowe (n. 92), 8

<sup>266</sup> McEleavy (n. 82), 371-372

<sup>267</sup> see Maire Connor, 'Expert's Group propose new Hague Convention on the cross-border enforcement of family law agreements' (*Vardags*, 18 July 2017) <<https://vardags.com/family-law/new-hague-convention-enforcement-family-law-agreements/>> accessed 5 August 2017; it is predicted on the basis of work by Professor Beaumont (who chaired the above meeting), that suggestions for improvement may include (1) choice of court regime for parental responsibility cases; and (2) access cases, see Beaumont (n. 64), 18

the Hague and EU regimes.<sup>268</sup> However, due to the lack of sanctions for non-compliance under the Hague system, some believe that the well-funded nature of the UK CAs is a result of its EU obligations, which *are* backed up by such sanctions.<sup>269</sup> Indeed such EU sanctions may become more readily available given the obligation under Article 61 Recast that Member States ensure their CAs have adequate financial and human resources.<sup>270</sup> Given the impacts that Brexit has already had on the UK economy,<sup>271</sup> the loss of EU obligations in this area and falling back on Hague obligations has caused some concerns over the future funding of UK CAs.<sup>272</sup>

## 7. THE WAY FORWARD

As aforementioned (Section 2.3), there are three options facing the UK regarding cross-border family law:

1. Negotiating with the EU to remain party to EU family law with full reciprocity (a “bespoke” EU-UK agreement)
2. Remaining party to EU family law *unilaterally*, without reciprocity (approach of the UK Withdrawal Bill); and
3. Falling back on existing international instruments such as the Hague Conventions, supplemented as necessary with bilateral agreements with individual countries.<sup>273</sup>

For the first option to be viable, this would require UK agreement to the jurisdiction of the CJEU.<sup>274</sup> However, leaving the jurisdiction of the CJEU is a red-line issue for the UK Government.<sup>275</sup> That has not prevented commentators from suggesting that an alternative arrangement could be possible, akin to Denmark, where the CJEU has an advisory role, but not a binding one.<sup>276</sup>

The UK Government currently seeks to implement the second option through its Withdrawal Bill. Whilst this shall preserve the EU system to an extent, it shall be without reciprocity which is what gives EU law much of its “added value”. Accordingly, the majority of practitioners and academics contest that the Bill’s approach is ill-suited to EU family law.<sup>277</sup> The Withdrawal Bill does envisage this problem, however, with Section 7(1) providing that UK Government ministers shall have the power to act “as the minister considers appropriate” to prevent or remedy deficiencies in retained EU law. This includes where the retained EU law makes provision for reciprocal arrangements which “no longer exist or are no longer appropriate”.<sup>278</sup> Accordingly, it is expected that

---

<sup>268</sup> HC1980 art 6; HC1996 art 29; BIIIR art 53

<sup>269</sup> EU sanctions for non-compliance available under TFEU Article 258; my thanks to Rachael Kelsey for her comments here.

<sup>270</sup> Beaumont, Walker and Holliday (n 129), 13

<sup>271</sup> see discussion in John van Reenen, ‘Brexit’s Long-run Effects on the UK Economy’ (*Brookings*, 2016) < <https://www.brookings.edu/wp-content/uploads/2017/02/brexit-long-run-effects-john-van-reenen.pdf> > accessed at 1 August 2017

<sup>272</sup> My thanks to Rachael Kelsey for her comments here

<sup>273</sup> Law Society Meeting Paper 18 July 2017 (n 62)

<sup>274</sup> or an alternative mechanism for resolving disputes – see discussion at Law Society Meeting, 18 July 2017 (n. 62), point 13

<sup>275</sup> European Union (Withdrawal) Bill, s.1

<sup>276</sup> see comments of Rebecca Bailey-Harris, House of Lords, Justice Sub-Committee Evidence Session No.2 (n 62), 8

<sup>277</sup> See for example: Law Society Meeting, 18 July 2017 (n. 62), point 4; Lowe (n. 61), 405; see also the comments of practitioners before the House of Lords’ Justice Sub-Committee (n 62)

<sup>278</sup> European Union (Withdrawal) Bill, s.7(2)(c)

after the BIIR and MR have been “translated” into UK law, they shall later be abolished by way of ministerial order and the UK shall thereafter fall back onto existing international instruments (i.e. option 3).

As demonstrated above, however, falling back on the existing Hague Conventions raises technical issues which the UK Government must address as soon as possible if it is to ensure that these Conventions shall apply between the UK and remaining Member States without any post-Brexit ‘gap’. Regardless, even if such continued application *is* achieved, there are still substantive issues to consider such as the loss of the EU’s “added value” from a children’s rights perspective. If the political will is present, the UK (and indeed Scotland) could seek to exercise a stronger voice at the Hague Conference and call for similar improvements to be made in the Hague system.<sup>279</sup> Additionally, given the political will, the UK could also accede to other international instruments relevant to cross-border family law, which emphasise protecting children’s interests but to which accession has not been possible during the UK’s EU membership. These include the Council of Europe’s Convention on Contact Concerning Children 2003<sup>280</sup> and Convention on Exercise of Children’s Rights 1996.<sup>281</sup>

## 8. CONCLUSION

The main issue in the field of family law, and indeed the Brexit process more generally, is the lack of information from the UK Government. This raises concerns regarding certainty and predictability, which is very worrying for international families, especially given the potential Brexit has to impact upon the residence status of EU nationals.<sup>282</sup>

Whilst the Hague Conventions do protect us from a “cliff edge” upon Brexit,<sup>283</sup> for this “backstop” to be guaranteed, there are technical issues regarding their application which must be dealt with immediately by the UK Government.<sup>284</sup> Again, even if such continued application is ensured, there are still substantive issues where the UK shall be left behind as a result of losing the additional protections of EU law. These include the stronger protection of the child’s right to express a view, a focus on the *individual* best interests of children, the stricter time limit requirements and more efficient enforcement procedures.<sup>285</sup> This is before considering the more CRC-focused approach of the Recast Proposal which, at present, does not appear likely to come into force before the UK’s withdrawal.

---

<sup>279</sup> Carruthers J and Crawford E, ‘International Private Law: Family Law’ (SULNE Brexit Position Paper, 2016), 9, <<https://sulne.files.wordpress.com/2016/11/ipl-and-family-law-sulne-roundtable-oct-2016.pdf>> accessed 30 May 2017

<sup>280</sup> Council of Europe, Convention on Contact concerning Children [2003] ETS No. 192

<sup>281</sup> Council of Europe, Convention on the Exercise of Children’s Rights [1996] ETS 160

<sup>282</sup> See above section 2.1

<sup>283</sup> Beaumont (n. 64), 3

<sup>284</sup> See Section 5 above

<sup>285</sup> see generally the comments of Sir Matthew Thorpe, House of Lords, Justice Sub-Committee Evidence Session No.5 (n 62), 4 (stating “[t]here is the oft-heard argument that if we lose the Brussels Regulation we still have the Hague Convention. That is a fair point, but it does not recognise that when Europe decided to regionalise family law and to put in place a European regime that takes priority over the Hague regime, it had the laudable ambition to achieve better justice for European citizens where the issues cross the border of member states”)

Overall, there is a risk that the UK is about to take a retrograde step in the context of cross-border family law or, at the very least, remain stationary whilst the remaining EU member states continue to make progress.<sup>286</sup> As previously stated, approximately 10% of Scottish births in 2016 were into families with an “EU link”.<sup>287</sup> The EU intervention in family law currently ensures that these children shall benefit from a heightened protection of their rights. The protections provided for in the Hague Conventions are simply not as strong or comprehensive. We must therefore be aware of the very real and negative consequences that Brexit may have on children involved in future cross-border proceedings. Every effort must be made to ensure that the UK Government makes negotiating the best possible deal for cross-border family law a high priority and maintaining the current level of children’s rights protection under EU law a key aim of that process. Despite the devolution of family law, the reservation of “foreign affairs” means the Scottish Government can do little to influence developments in this context.<sup>288</sup>

Whilst this case study reflects just one element of Brexit’s impact on children’s rights, it illustrates the complexities involved in all areas affecting children’s lives. It is essential that further research and awareness raising is conducted in these areas with a view to identifying what can be done to mitigate the negative impacts of Brexit. Only then can we ensure that children’s rights are fully protected moving forward.

---

<sup>286</sup> See, for example, Lowe (n. 61), 404 (“In short, the protection of children and their families would be inferior to the position that would obtain if the UK elects and is able to continue to be bound by Brussels II A as recast”)

<sup>287</sup> Either in terms of the nationality of mother or father, see section 2.1 (above)

<sup>288</sup> See section 1 (above)

# THE IMPACT OF BREXIT ON CHILDREN AND YOUNG PEOPLE IN SCOTLAND

## ANNEX A – COMPARISON TABLE FOR PARENTAL RESPONSIBILITY DISPUTES AND CHILD ABDUCTION CASES

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
Scope	Age	Applies until child turns <b>18</b> (Art. 2)	Applies until child turns <b>16</b> (Art. 4)	“Child” not defined – left to Member States’ national law However, where BIIR applies HC1980 to intra-EU cases then this is subject to HC1980’s age limit of 16.	No change	General rule that “child” is anyone below 18 (Art.1)
Jurisdiction	General rule	Habitual residence of child (Art 5)  “Habitual residence” not defined. No centralised Court to issue authoritative interpretations.	N/A	Habitual residence of the child (Art. 8)  “Habitual residence” not defined, but substantial CJEU case law on interpretation.	Habitual residence of the child (Art. 7)	Best interests (Art. 3) – The proximity ensured between child and judge by “habitual residence” is in the child’s best interests.
	Lawful relocation of child	Where child becomes habitually resident in another contracting state, jurisdiction transfers <i>immediately</i> . (Art 5)  i.e. no continuing jurisdiction unlike BIIR Art. 9	N/A	Where child moves lawfully from one Member State to another, the Courts in the first state have continuing temporary jurisdiction for 3 months after the child moves re. alterations to orders (Art. 9)	Three months continuing jurisdiction of Member State of former residence (Art. 8)	Best interests (Art. 3)

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
	Jurisdiction based on Presence	Where child has <i>no habitual residence</i> then jurisdiction is based on presence. (Art. 6)	N/A	Where habitual residence <i>cannot be determined</i> then jurisdiction is based on presence. (Art. 13)  i.e. slightly different emphasis to HC1996	Where habitual residence <i>cannot be established</i> then jurisdiction is based on presence. (Art. 11)	Best interests (Art. 3)
	Abduction cases (“wrongful removal/retention”)	State in which child was habitually resident immediately prior to the wrongful removal/retention retains jurisdiction (Art. 7(1))  No equivalent of Arts 11(6)-(8) BIIR (“second chance procedure”)	N/A	State in which child was habitually resident immediately prior to the wrongful removal/retention retains jurisdiction (Art 10)  BIIR additionally has Arts 11(6)-(8) (“second chance procedure”) which permits the Courts in the MS of habitual residence to have the final say on return of the child.	State in which child was habitually resident prior to wrongful removal/retention shall retain jurisdiction until child acquires habitual residence in another state (Art. 9)	Best interests (Art. 3)
	Transfer of Jurisdiction (transfer of jurisdiction at Court’s instance)	Transfers possible to courts in another Contracting State which “would be better placed in the particular case to assess the best interests of the child” (Arts.8-9)	N/A	Transfer possible to court “better placed to hear the case” and “where this is in the best interests of the child”. (Art. 15)	Transfer possible to a court “better placed to hear the case” and “where this is in the best interests of the child” (Art.14)	Best interests (Art. 3)



TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
		<p>Transfer out (Art.8)</p> <p>Transfer in (Art.9) – requirement that the requested state “accepts” the transfer of jurisdiction to it (Art.9(3))</p>		<p>No distinction between transfers out jurisdiction inwards or outwards (Art.15)</p> <p>No requirement that the requested state “accepts” the jurisdiction (i.e. unlike BIIR Art. 9(3))</p>		
	<p>Prorogation</p> <p>(transfer of jurisdiction by agreement between parties)</p>	<p>Article 10</p> <p>Additional requirement that one of the parents is habitually resident in the prorogued state (Art. 10)</p> <p>(above requirement not present in BIIR)</p>	N/A	<p>Article 12</p> <p>Additional requirement that there is a “substantial connection” between the child and the prorogued state – such transfers must be in best interests of child (Art 12(3))</p> <p>(above requirement not present in HC1996)</p>	<p>Article 10</p> <p>Maintains BIIR’s additional “substantial connection” ground (Art.10(3))</p>	Best interests (Art. 3)
	<p>Provisional/urgent protective measures by state which does <i>not have jurisdiction</i></p>	<p>Article 11: Necessary protective measures – these can be used in abduction cases.</p>	N/A	<p>“provisional, including protective measures” in <i>urgent cases</i> (Art.20)</p> <p>i.e. insists on urgency</p>	<p>As per BIIR, maintains the requirement of urgency (Art.12)</p> <p>However, adds additional requirement</p>	Best interests (Art. 3)

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
		<p>Article 12: measures of a “provisional character” – no insistence on urgency - cannot be used in abduction cases.</p> <p>i.e. subtle differences with BIIR here as BIIR appears to only allow these measures in cases of urgency, whereas Art 12 HC1996 does not insist on urgency.</p>		“Urgent” not defined	that authority which has taken the protective measures must inform the authority with jurisdiction of these where this is required for protection of child’s best interests (see Art.12 second paragraph)	
Applicable Law	Applicable Law	Chapter III	N/A	N/A	N/A	N/A
Children’s voice	General obligation to give child opportunity to be heard	N/A	N/A	<p>Preamble: importance of hearing the child when applying BIIR. Although BIIR not intended to modify national procedures. (Para. 19)</p> <p>Preamble also emphasises children’s rights and CFR (esp. Art 24 CFR on children’s rights)</p>	New Article 20 – obligation to ensure child has opportunity to be heard in all decisions falling within the scope of the recast Regulation (i.e. no longer just abduction return proceedings but all matters – including divorce, custody, parental responsibility etc.)	<p>Right of child capable of forming a view to express that view and have it taken into account in accordance with the child’s age and maturity (Art.12)</p> <p>Best interests (Art. 3)</p>

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
	Children’s Voice in return proceedings (abduction cases)	N/A	<p>Child’s objection to return is a ground for refusing to grant a return order (Art.13)</p> <p>However, HC1980 does <i>not</i> include an express provision for the child’s voice to otherwise be heard, or indeed ensure that an opportunity is given to the child to express their objection – Court’s role is a passive one.</p>	<p>Authorities shall <i>ensure</i> that children’s voice is heard “unless inappropriate having regard to his or her age or degree of maturity” (Art.11(2))</p> <p>I.e. Stronger expression than in HC1980. Art 11(2) is phrased as rule of “universal application” in comparison to that under Art 13 HC1980.</p>	In return proceedings, court to ensure that child is given opportunity to express their views in line with new Art. 20 (Art.24)	<p>Right of child capable of forming a view to express that view and have it taken into account in accordance with the child’s age and maturity (Art.12)</p> <p>Best interests (Art. 3)</p>
	Grounds for non-recognition of foreign parental responsibility order	Recognition of foreign orders can be refused e.g. where child was not given opportunity to be heard “in violation of fundamental principles of procedure” of the state requested to recognise the order (Art. 23(2)(b))	N/A	Court can refuse to recognise a judgement re. parental responsibility from another Member State e.g. when child not given opportunity to be heard (except in urgent cases) in violation of fundamental principles of procedure of the Member State in which recognition being sought. (Art.23(b))	<p>Removes the former Art.23(b) BIIR ground</p> <p>Removed on the basis that recognition was being refused when children <i>had</i> been heard in the other Member State, but to a different standard. This was ultimately frustrating the free movement of judgements on parental</p>	<p>Right of child capable of forming a view to express that view and have it taken into account in accordance with the child’s age and maturity (Art.12)</p> <p>Best interests (Art. 3)</p>

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
					responsibility. See discussion in Explanatory Memorandum at p.4-5	
Speed of Proceedings (CHILD ABDUCTION CASES)	General obligation	N/A	General duty on states to “act expeditiously” in proceedings for return (Art.11)	Duty on states to use the “most expeditious procedures available in national law” re. return proceedings (Art.11(3))	<p>Duty on states to use the “most expeditious procedures available in national law” re. return proceedings (Art.23(1))</p> <p>Introduction of additional expediency provisions:</p> <ol style="list-style-type: none"> <li>1. Concentration of jurisdiction within the courts systems of Member States (Art.22)</li> <li>2. Limitation of number of appeals in return cases to one (Art.25(4))</li> <li>3. New duty on courts to examine ASAP whether parties willing to engage in mediation, in best interests of child, provided this does not “unduly delay</li> </ol>	<p>Best interests (Art. 3)</p> <p>General Comment 14, para 93 (child’s perception of time)</p>

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
					the proceedings” (Art. 23(2))	
	Six-week expectation/rule for Return Orders	N/A	<p>Article 11</p> <p><i>Expectation</i> that requested state is to reach decision within six weeks.</p> <p>If requested authorities have not reached decision within 6 weeks, then CA of requesting state has <b>right to request explanation</b>.</p> <p><b>“If a reply is received”</b> then CA of requesting state to communicate this to applicant</p> <p>i.e. less stringent provision than under BIIR</p>	<p>Article 11(3)</p> <ul style="list-style-type: none"> <li>Six-week rule. Requested authorities are to issue their decision on return no later than six weeks after making of application. This applies unless there are “exceptional circumstances” which make this “impossible”</li> </ul> <p>i.e. stronger wording than that under Art.11 HC1980</p>	<p>Clarification that BIIR’s six-week rule applies at each instance (Art.23(1))</p> <p>Envisages maximum of 6+6+6 weeks (first instance, single appeal, enforcement)</p>	<p>Best interests (Art. 3)</p> <p>General Comment 14, para 93 (child’s perception of time)</p>
Grounds for refusing to order return of abducted child	N/A	N/A	Four situations in which requested state can refuse to issue a return order (Art.13)	Article 11 applies HC1980 to EU abductions but subject to certain additional rules. So HC1980	Maintains approach of BIIR (application of HC1980 to intra EU cases) – Member States not to refuse return on	<p>Best interests (Art. 3)</p> <p>Right of child capable of forming a view to express that view and</p>

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
			<p>Includes that return would expose child to “grave risk” of physical or psychological harm or would otherwise place the child in an intolerable situation.</p> <p>Includes also that child objects to return, but only where child has “attained an age and degree of maturity at which it is appropriate to take account of its views”</p> <p>[Note the narrow interpretation of these exceptions by national courts]</p>	<p>grounds for refusing return e.g. grave risk and child’s objection also apply in intra-EU cases but subject to additional EU rules.</p> <p>Regarding recognition and enforcement, additional rules include that Member States cannot refuse to order return on the basis of “grave risk” where it is shown that specific measures shall be put in place to ensure the protection of the child upon their return. (Art.11(4))</p>	<p>basis of “grave risk” where it is shown that adequate measures shall be put in place to ensure protection of the child upon their return (Art.25(1))</p>	<p>have it taken into account in accordance with the child’s age and maturity (Art.12)</p>
Recognition and Enforcement of foreign orders	Recognition	<p>General rule is mutual recognition between contracting states (Art.23)</p> <p>However, situations where recognition can be refused (see below)</p>	N/A	<p>Judgements of one Member State to be recognised in other Member States without “any <i>special</i> procedure” being required (Art.21)</p> <p>However, situations where recognition can be refused (see below)</p>	<p>Judgements of one Member State shall be recognised in other Member States without “any procedure” being required (Art.27)</p> <p>I.e. drops the “special” of BIIR Art.21, signifying further streamlining of</p>	<p>Best interests (Art. 3)</p> <p>General Comment 14, para 93 (child’s perception of time)</p>

THE IMPACT OF BREXIT ON CHILDREN AND YOUNG PEOPLE IN SCOTLAND:

CASE STUDY ON CROSS-BORDER FAMILY LAW

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
					procedure in intra-EU cases	
	Mandatory/discretionary refusal of recognition	Discretionary: Art.23 sets out where recognition of parental responsibility orders “may” be refused	N/A	Mandatory: Art.23 sets out grounds where recognition “shall not” be given	Mandatory: Art38(1) sets out situations where recognition for parental responsibility order “shall be refused”	
	Grounds for non-recognition	<p>Article 23</p> <p>Grounds include:</p> <p>1.recognition would be manifestly contrary to public policy of the requested state, taking into account the best interests of the child (Art.23(2)(d))</p> <p>2. child not given opportunity to be heard, in violation of fundamental principles of procedure of the requested state.</p> <p>Some overlaps between HC1996 and BIIR. Differences are: HC1996 includes a “lack of</p>		<p>Article 23</p> <p>Grounds include:</p> <p>1. recognition would be manifestly contrary to public policy in state in which recognition is sought, taking into account the best interests of the child. (Art.23(a))</p> <p>2. child not given opportunity to be heard (except in urgent cases) (Art.23(b)) in violation of fundamental principles of procedure in the Member State in which recognition is sought.</p>	<p>Article 38</p> <p>Removes former Article 23(b) ground on child’s objection (see earlier discussion in section “Children’s Voice”)</p>	<p>Best interests (Art. 3)</p> <p>Right of child capable of forming a view to express that view and have it taken into account in accordance with the child’s age and maturity (Art.12)</p>



TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
		jurisdiction” ground (Art 23(2)(a)) which is not present in BIIR. HC1996 also includes an urgency exception (Art 23(2)(c)) which is not present in BIIR. However, BIIR makes provision for decisions given “in default of appearance” which is not present in HC1996.		Some overlaps between HC1996 and BIIR. Differences are: HC1996 includes a “lack of jurisdiction” ground (Art 23(2)(a)) which is not present in BIIR. HC1996 also includes an urgency exception (Art 23(2)(c)) which is not present in BIIR. However, BIIR makes provision for decisions given “in default of appearance” which is not present in HC1996.		
	Enforcement (including exequatur)	Order made in one Contracting State shall be enforceable in other Contracting states where they have been either (a) <i>registered for enforcement</i> or (b) <i>declared to be enforceable</i> in that other Contracting State (Art.28)  Such process must be “simple and rapid” (Art.26(2)) and refusal	N/A	Orders made and enforceable in one Member State shall be enforceable in other Member States <i>where it has been declared enforceable</i> in that other Member State (Art.28(1))  Art.28 Similar to HC1996, save for an additional reference to the “best interests” of	Orders made and enforceable in one Member State shall be enforceable in other Member States <i>without any need for a declaration of enforceability</i> (Art.30)	Best interests (Art. 3)  General Comment 14, para 93 (child’s perception of time)

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
		<p>only permitted on limited grounds set out in Art 23(2).</p> <p>Article 28 HC1996 is similar to Art.28 BIIR. However, additional reference to “best interests” found in Article 28 which is not present in Art.28 BIIR.</p>		<p>the child which is not present in Art 28 BIIR.</p> <p>Note: accelerated procedure for enforcement of access orders – no declaration of enforceability required (see below)</p>		
	Enforcement of access rights	N/A	<p>No special accelerated procedure for enforcement</p> <p>Applications re. access rights to be made to CAs in same way as applications for return of child. CA under obligation to promote peaceful enjoyment of access rights and remove obstacles to exercise of such rights as far as possible (Art.21)</p>	<p>Accelerated procedure – access orders are enforceable without any need for declaration of enforceability (Arts.40-41)</p>	Wholesale abolition of exequatur	<p>Best interests (Art. 3)</p> <p>Article 9(3) (right of the child to maintain direct and regular contact with both parents unless not in best interests)</p> <p>General Comment 14, para 93 (child’s perception of time)</p>

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
			However, no special accelerated procedure for enforcement of access rights as there is under BIIR.			
Cooperation	Central Authorities	Chapter V	Chapter II  Duty on requested CA to take “all appropriate measures” re. achieving voluntary return of the child. (Art.10)	Chapter IV  To be regular meetings between the CAs of different countries so as to facilitate application of the convention. These meetings to be convened via the European Judicial Network (EJN)(Art 58)	Additional obligation to ensure CAs have adequate funds and human resources (Art.61)	
	Mediation	Express duty on CAs to facilitate mediation (Art 31(6))	N/A	No express duty to promote mediation	Mediation to be promoted so long as will not unduly lengthen proceedings (Art.23(2))	Best interests (Art. 3)
Relationship with other instruments	N/A	Relationship between HC1996 and HC1980:  Nothing in HC1996 to prejudice application of HC1980. (Art.50)  However, nothing to prevent HC1996 from	N/A	Relationship between BIIR, HC1996 and HC1980  BIIR applies HC1980 to intra-EU cases, but subject to certain additional rules (Art 60)	Relationship between Recast and HC1980  In intra-EU child abductions, HC1980 rules apply, but must be applied in accordance with Chapter 3 of the	

TOPIC	SUBTOPIC	HC1996	HC1980	BRUSSELS II BIS	RECAST BIIR	RELEVANT UNCRC PROVISIONS
		being used in abduction cases (relevant here is fact that HC1980 applies up to age 16, whilst HC1996 applies up to age 18)		BIIR to take precedence over HC1996 where child is habitually residence in an EU Member State or issue relates to recognition/enforcement in EU Member State (even if the child is HABRES in a TC which is not party to HC1996) (Art.61)	Recast, containing additional rules (Art.74)  Relationship between Recast and HC1996  Similar to Art 61 BIIR (see Art.75 recast)	
Review/updating			Special Commission to be convened “at regular intervals” for reviewing practical operation of the Convention (Art.56)	Art 65 – BIIR to be reviewed after 5y operation and amendments to be made as required.  Preamble Para 29 – importance of reviewing/improving BIIR over time.	Review of recast’s application in practice within 10 years of its entry into force. This to be accompanied by legislative proposals where necessary (Art.79(1))  New obligations on monitoring and reporting (Art.71(2))	

## ANNEX B – COMPARISON TABLE FOR MAINTENANCE CASES

TOPIC	SUBTOPIC	HC2007	MAINTENANCE REG 2009
Scope	Age	<p>General rule = <b>21</b> (Art 2)</p> <p>However, states can make reservation so that age is limited to <b>18</b> (Art 2)</p>	<p>Not expressly set out. However, Article 46 places obligation on Member States to ensure free legal aid is available in respect of applications for maintenance of a child under the age of 21.</p>
Jurisdiction	General	<p>Lack of rules on jurisdiction.</p> <p>However, note Article 18 - where decision is reached in state where the creditor is habitually resident, then the debtor is barred from bringing new proceedings or trying to have the original order modified in another contracting state.</p>	<p>Chapter II provides full complement of jurisdictional rules.</p> <p>Lis pendens (Art.12)</p>
Applicable Law	N/A	<p>See: 2007 Hague <i>Protocol</i> on applicable law</p>	<p>Chapter III</p> <p>Where Member States involved are party to the 2007 Hague <i>Protocol</i>, then applicable law is to be determined in accordance with that instrument. (Art.15)</p>
Time limits/speed of proceedings	General obligations of speed/efficiency	<p>Duty on CAs to process a case “as quickly as a proper consideration of the issues will allow” (Art.12(6))</p> <p>Duty on CAs to “employ the most rapid and efficient means of communication at their disposal” (Art.12(7))</p> <p>Confirming receipt of application: 6-week rule (Art.12(3))</p> <p>Informing requesting CA of status of application: three-month rule (Art 12(4))</p>	<p>Appeals against declaration of enforceability:</p> <p>First appeals – general rule is Court to give decision within 90 days unless “exceptional circumstances make this impossible. (Art.32)</p> <p>Subsequent appeals – Courts to give decision “without delay” (Art.33)</p> <ul style="list-style-type: none"> <li>•</li> </ul>

THE IMPACT OF BREXIT ON CHILDREN AND YOUNG PEOPLE IN SCOTLAND:

CASE STUDY ON CROSS-BORDER FAMILY LAW

Legal aid/assistance	Specific duty re. child support cases	<p>Duty on requested state to provide free legal assistance in respect of <b>all applications</b> re child support of person <b>under 21</b> (Art 15(1))</p> <p>Such legal aid may, however, be refused if the application is manifestly unfounded (Art 15(2))</p>	Duty on requested Member State to provide free legal aid in respect of all applications for maintenance relating to child under age of 21 (Art.46)
Recognition and enforcement		<ul style="list-style-type: none"> <li>• General rules (Art.20)</li> <li>•</li> <li>• Severability (Art.21)</li> <li>•</li> <li>• Grounds for refusing recognition and enforcement of maintenance decision made in another contracting state (Art 22)</li> <li>•</li> </ul>	Chapter IV – comprehensive chapter on recognition and enforcement
Final provisions	Uniform interpretation	<ul style="list-style-type: none"> <li>• “In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application” (Art 53)</li> <li>•</li> <li>• Note: no central court to ensure such uniformity in interpretation (contrast CJEU for MR)</li> </ul>	Role of CJEU
	Review/improvements	<ul style="list-style-type: none"> <li>• Hague Conference to convene Special Commission at regular intervals for purpose of reviewing the practical operation of HC2007 and to encourage development of good practices under the Convention. (Art.54)</li> </ul>	Review of practical application of MR within 5 years of its entry into force. This review to be accompanied where necessary with legislative proposals (Art 74)

## ANNEX C – IMPACT OF BREXIT IN OTHER AREAS RELEVANT TO CHILDREN

[OUTLINE ONLY: FULL MAPPING NOT POSSIBLE DUE TO SCOPE OF RESEARCH NEEDED AND TIME CONSTRAINTS]

### CONTENTS

<b>1. Protection of Fundamental Rights</b>	<b>54</b>
1.1. General protections	54
<b>2. Economic, Social and Cultural Rights</b>	<b>55</b>
2.1. Right to education	55
2.2. Right to health	56
2.3. Right to adequate standard of living	56
<b>3. Family Law</b>	<b>57</b>
3.1. Cross border family law	57
3.2. Cross-border alternative care (e.g. fostering) and adoption	59
<b>4. Child Protection</b>	<b>60</b>
4.1. Sexual abuse, child pornography	60
4.2. Child Labour	61
4.3. Child Trafficking	61
4.4. Disabled Children	62
4.5. Missing Children Hotline	62
<b>5. Employment</b>	<b>63</b>
5.1. Maternity/Paternity/ Parental Leave	63
5.2. Working Time	64
5.3. Equality/non-discrimination	65
<b>6. EU Migration</b>	<b>67</b>
6.1. Respect for private and family Life	67
6.2. Entry and residence	68
6.3. Family reunification	69
<b>7. Immigration &amp; Asylum</b>	<b>70</b>
7.1. Entry and residence	70
7.2. Age assessment	71
7.3. Family reunification	72
7.4. Detention of children	73
7.5. Expulsion	74
7.6. Access to justice	74
<b>8. Consumer Rights</b>	<b>75</b>
8.1. General protections	75
8.2. Product Safety	76
8.3. Clinical Trials on Children	77
8.4. Paediatric Medicines	78
8.5. Media and Advertising	79
<b>9. Data Protection</b>	<b>80</b>
9.1. Data Protection	80
<b>10. Environment</b>	<b>81</b>
10.1. Air and water pollution	81



# 1. PROTECTION OF FUNDAMENTAL RIGHTS

## 1. GENERAL PROTECTIONS

PRIMARY LAW	
TREATY ON EUROPEAN UNION (TEU)	Art. 2: EU as being founded on values of respect for human dignity, freedom, democracy, human rights, equality etc. Art. 6(1): CFR to have same legal value as the EU Treaties (innovation of Treaty of Lisbon in 2009)
CHARTER OF FUNDAMENTAL RIGHTS OF THE EU (CFR)	Art. 24: rights of the child <ul style="list-style-type: none"><li>- Art. 24(1): right to necessary care and protection; right to express views freely; views to be taken into consideration on matters which affect the child and in accordance with their age and maturity.</li><li>- Art. 24(2): best interests of the child must be "a primary consideration" in all actions relating to children (whether conducted by private or public authorities)</li><li>- Art. 24(3): right to maintain personal relationship and direct contact with both parents, unless contrary to best interests of child.</li></ul> Linkage between CFR rights of child and those under CRC. Benefits of CFR expression in absence of full CRC incorporation.
OTHER EU INSTRUMENTS AND CASE LAW	
	For list of case law re. Art. 24 CFR see Fundamental Rights Agency Website: < <a href="http://fra.europa.eu/en/charterpedia/article/24-rights-child">http://fra.europa.eu/en/charterpedia/article/24-rights-child</a> >

### THE SCOTTISH CONTEXT

"Fundamental rights" are not listed as a reserved matter under the Scotland Act 1998. However, the Act does reserve the power for the UK Government to legislate on equal opportunities (although further powers have been devolved in the Scotland Act 2016). The Scotland Act 1998 also lists the Equality and Human Rights Commission (EHRC) as a 'reserved body'. This means that human rights are 'devolved' subject to exceptions relating to employment/equality rights. However, the Scottish Government is not able to sign up to international human rights treaties in its own right, given that 'foreign affairs' are also a reserved matter (Scotland Act 1998, schedule 5, part 1, para. 7).

### SCOTLAND ACT 1998

The 1998 Act requires that the Scottish Parliament and Scottish Government act in accordance with EU law and the ECHR. This has been said to "form the bedrock of our rights and freedoms." (See Alan Miller, "Brexit and Human Rights in Scotland" 2016 SHRJ 2)

- s.29: an Act of the Scottish Parliament is not law insofar as it is incompatible with EU Law (including the CFR)
- s.57: Similarly acts of the Scottish ministers (i.e. SSIs) must not be incompatible with the EU law (including CFR)

## EFFECTIVENESS

### EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')

There is a distinction in the CFR between 'rights' and 'principles'. Whilst CFR provisions containing 'rights' are directly enforceable by individuals, 'principles' do not give rise to any directly enforceable claims for positive action.

The CFR does not identify which provisions contain 'rights' and which contain mere 'principles'. The justiciability of principles is 'parasitic' upon the existence of EU/MS action which implements that principle. In such cases, the principles in the CFR may only be used to interpret that implementing act/legislation and rule on its legality.

It is not clear whether Art.24 CFR (and rest of that title) are 'rights' or 'principles'. This creates difficulties in achieving practical effectiveness for the CFR, albeit does play an important consolidating role and increases the visibility of these rights/principles. For further information, see SULNE Position Paper on the CFR

<https://sulne.files.wordpress.com/2016/11/charter-of-fundamental-rights-sulne-roundtable-oct-2016.pdf>

## 2. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

### 2.1. RIGHT TO EDUCATION

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.14: right to education, including possibility to receive free compulsory education (although note Art.52(3) and (5) CFR on distinction between rights and principles, see above)
DIRECTIVES	
RECEPTION CONDITIONS DIRECTIVE (2003/9/EC)	Right of access of asylum-seeking children to host state education system on 'similar' conditions as nationals.
OTHER EU INSTRUMENTS AND CASE LAW	
C-413/99 BAUMBAST AND R V. SSHD 2002	Education of migrant children.

### THE SCOTTISH CONTEXT

Education is a devolved matter.

## 2.2. RIGHT TO HEALTH

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.35: right of access to healthcare (although note Art.52(3) and (5) CFR on distinction between rights and principles, see above)
DIRECTIVES	
CITIZEN'S RIGHTS DIRECTIVE (2004/38/EC)	Art.24: children of EU migrants have access to health support on same basis as nationals after 3 months residence
QUALIFICATION DIRECTIVE 2004/83/EC	Art.28: re. asylum seeking children, duty on MS to provide "necessary" social assistance. However, Art.28(2) makes clear that this can be limited to 'core benefits' Art.29: relates to healthcare. However, Art.29(2) again permits MS to limit this to "core benefits".  Note: Recast 2011 Qualification Directive does not apply in UK due to opt-out
OTHER EU INSTRUMENTS AND CASE LAW	
C-413/99 BAUMBAST AND R V. SSHD 2002	Education of migrant children

### THE SCOTTISH CONTEXT

Health is a devolved matter.

## 2.3. RIGHT TO ADEQUATE STANDARD OF LIVING

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.34(1): right to social security and social services for legal residents Art.34(3): reference to housing assistance (although note Art.52(3) and (5) CFR on distinction between rights and principles).

### THE SCOTTISH CONTEXT

Social security and housing may fall into reserved matters depending on to whom these issues relate. For example, the UK Government adopts a wide approach to defining "immigration" (reserved) for the purposes of the devolved/reserved divide. Therefore, housing for refugees and migrants would be a reserved issue.

### 3. FAMILY LAW

#### 3.1. CROSS BORDER FAMILY LAW

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	<p>Art.7: FRA describes Art.7 (right to respect for private and family life) as consisting of several "composite rights", including the right to be cared for by and maintain contact with both parents (except where not in child's best interests) - see FRA Handbook on European law relating to the rights of the child, p.75 &lt;<a href="http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights">http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights</a>&gt;</p> <p>Art.24(2): in all decisions relating to children, best interests of the child "must be a primary consideration."</p> <p>Art.24(3): right to maintain regular and direct contact with both parents, except where this is contrary to child's best interests.</p>
REGULATIONS	
BRUSSELS II BIS REGULATION (2201/2003)	<p>Brussels II Bis provides for applicable jurisdiction in disputes surrounding cross-border family cases (e.g. parental separation). General rule is that jurisdiction is determined by child's habitual residence (Art. 8). Contains additional jurisdictional rules for child abduction cases (Arts 10-11).</p> <p>Brussels II Bis also provides for mutual recognition and enforcement of orders made by MS courts.</p> <p>Does not provide for substantive family law - this is governed at domestic level and differs from state to state.</p> <p>Brussels II Bis contains several provisions referring to the best interests of the child (Arts 12, 15 and 23), and several referring to the child's right to be heard (Art.11, 23, 41 and 42)</p>
MAINTENANCE REGULATION (4/2009)	<p>Maintenance Regulation sets down common rules for recovery of maintenance claims in cross-border family cases, i.e. where debtor lives in another EU MS</p> <p>Art.46: provides for free legal aid re applications through central authorities relating to maintenance of children (under 21 years-old)</p>
DIRECTIVES	
ACCESS TO JUSTICE DIRECTIVE (2002/8/EC)	<p>Requires improvements re. access to justice in cross-border disputes by e.g. establishing common rules re access to legal aid.</p>
MEDIATION DIRECTIVE (2008/52/EC)	<p>Provides for mutual recognition and enforcement of mediated settlement agreements between EU MSs</p> <p>Art.7 (confidentiality of mediation) contains provisions on best interests of children).</p>

OTHER EU INSTRUMENTS AND CASE LAW	
C-491/10 AGUIRRE ZARRAGA CASE 2011	CJEU makes clear that Brussels II <i>bis</i> must be interpreted in accordance with the CFR, esp. Art.24 (children’s rights). In this case CJEU ruled that the child's right to be heard under Art.24 CFR required that legal procedures and conditions be available in MSs to facilitate the child’s views being heard.
COUNCIL DECISION 2003/93/EC	EU authorises MSs to sign the 1996 Hague Convention on Parental Responsibility
COUNCIL DECISION 2011/432/EU	EU approval of the 2007 Hague Maintenance Convention
COMMISSION PROPOSAL FOR RECAST BRUSSELS II BIS (COM(2016) 411 FINAL)	Sets out 2016 proposal for new recast Brussels II <i>bis</i> Regulation. This has improved provisions on the child’s right to express a view, the best interests of the child, closer involvement of child welfare authorities, ease of enforcement of orders obtained in other MSs. The proposed changes are widely accepted as strengthening the rights of the child and bringing EU cross-border family law more closely in line with the CRC.

### THE SCOTTISH CONTEXT

Family law is devolved, as are its international private law aspects. However, “foreign affairs” is reserved (Scotland Act 1998, schedule 5, part 1, para. 7). Foreign affairs would include negotiations with the EU over cross-border family law, or Scottish accession to international convention/instruments relating to cross-border family law (see full dissertation).

### 3.2. CROSS-BORDER ALTERNATIVE CARE (E.G. FOSTERING) AND ADOPTION

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.7: right to respect for private and family life Art.24: rights of the child. Art.24(2) provides that child's best interests must be a primary consideration in all actions relating to him/her - provision expressly provides that this is the case both in relation to actions taken by public and private authorities.
REGULATIONS	
BRUSSELS II BIS REGULATION	Brussels II Bis is applicable to cross-border placements in alternative care. It deals with procedural aspects e.g. jurisdiction, child's right to be heard, recognition of judgements etc. General rule is that jurisdiction is determined by the child's habitual residence. However, may be exceptions where two-limbed test satisfied: (1) foreign court is 'better placed' to hear the case; and (2) best interests of the child favour case being heard in foreign court.
OTHER EU INSTRUMENTS AND CASE LAW	
C-435/06 APPLICANT C 2007	Illustrative of impact of Brussels II Bis in cross-border alternative care cases. This was first CJEU case re. Brussels II Bis, and related to the taking of a child into care.

#### THE SCOTTISH CONTEXT

Family law is devolved, as are its international private law aspects. However, “foreign affairs” is reserved (Scotland Act 1998, schedule 5, part 1, para. 7). Foreign affairs would include negotiations with the EU over cross-border family law, or Scottish accession to international convention/instruments relating to cross-border adoption and placements in care.

## 4. CHILD PROTECTION

### 4.1. SEXUAL ABUSE, CHILD PORNOGRAPHY

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.79(2)(d): sets out EU competence to enact legislation with view to combatting sexual exploitation of children. Arts 82-89: EU competence to enact legislation for facilitating the cross-national exchange of information re. convicted offenders
DIRECTIVES	
DIRECTIVE ON COMBATting THE SEXUAL ABUSE, SEXUAL EXPLOITATION OF CHILDREN AND CHILD PORNOGRAPHY (2011/93/EU)	Sexual Exploitation Directive (2011/93/EU) introduces comprehensive approach to preventing and addressing child sexual abuse, exploitation and child pornography. Art.5: requires harmonisation of criminal law for various child sexual offences Arts.10, 22-24: specific emphasis on preventative measures including education, awareness campaign, regular training for officials. Art.10(3) and 21: cross-border information sharing Arts. 18-20: support for victims Art. 20: child friendly justice
OTHER EU INSTRUMENTS AND CASE LAW	
FRAMEWORK DECISION (2009/315/JHA)	Not child-specific. However, complements Sexual Exploitation Directive by providing for sharing of criminal record information between Member States.

#### THE SCOTTISH CONTEXT

Child protection falls within the legislative competence of the Scottish Parliament. However, post-Brexit challenges may arise regarding negotiating cross-border information sharing with remaining EU Member States, given that “foreign affairs” is reserved (Scotland Act 1998, schedule 5, part 1, para. 7).



## 4.2. CHILD LABOUR

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.5(2): prohibition of forced or compulsory labour. Art.32: prohibition of child labour and protection of young people at work. But note uncertainty as to whether Arts 27-38 CFR (i.e. social provisions) are fully-fledged 'rights' or merely 'principles' (see Section 1, above)
DIRECTIVES	
YOUNG WORKER'S DIRECTIVE (94/33/EC)	Lays down minimum requirements for protection of young people at work. Art.2(2) and Art.5: prohibition on child employment except e.g. for 14y+ to participate in light domestic work or social and cultural activities that are not dangerous. Art.4(2): MSs prohibited from setting minimum employment age lower than school leaving age.

### THE SCOTTISH CONTEXT

“Employment relations” is reserved under Scotland Act 1998 (Schedule 5, Part II, Head H1)

## 4.3. CHILD TRAFFICKING

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.83: legislative competence of EU re. combatting child trafficking and re. approximating procedures for identifying perpetrators and victims. Arts 82-89: EU competence to enact legislation for facilitating the cross-national exchange of information re. convicted offenders.
DIRECTIVES	
ANTI-TRAFFICKING DIRECTIVE (2011/36/EU)	Prohibition on child trafficking. Recognises child labour as a form of exploitation. Child's consent does not legitimise the work/is no defence.

### THE SCOTTISH CONTEXT

Tackling child trafficking is likely to be considered reserved. This is due to the reservation of “immigration and nationality” (Scotland Act, Schedule 5, Part II, Head B, Para B6). The UK Government adopts a wide approach to defining “immigration” for the purposes of the devolved/reserved divide. Therefore, likely that child trafficking shall be considered an issue falling under “immigration”.

#### 4.4. DISABLED CHILDREN

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.10: union aim of combatting discrimination through its policies and activities (including on basis of disability and age) Art.19(1): competence for EU to legislate/take action re combatting discrimination (on grounds which include both disability and age)
OTHER EU INSTRUMENTS AND CASE LAW	
EU COUNCIL DECISION (2010/48/EC)	Relates to EU ratification of UN Convention on the Rights of Persons with Disabilities (UNCRPD).

#### THE SCOTTISH CONTEXT

'Equal opportunities' are now devolved as result of Scotland Act 2016 (amending Schedule 5, PartII, Para L2 of the Scotland Act 1998).

#### 4.5. MISSING CHILDREN HOTLINE

OTHER EU INSTRUMENTS AND CASE LAW	
EU COUNCIL DECISION (2007/698/EC)	Setting up EU Missing Children Hotline. The Missing Children Hotline provides free, professional support 24/7. Data is collected from these calls which enables better understanding of issues affecting missing children and allows for development of projects responsive to these issues.

#### THE SCOTTISH CONTEXT

Child Protection is not reserved by the Scotland Act 1998 (and is thereby devolved). However, negotiating to remain party to the EU Missing Children hotline may stray into "foreign affairs" which is reserved (Scotland Act 1998, schedule 5, part 1, para. 7).

## 5. EMPLOYMENT

### 5.1. MATERNITY/PATERNITY/ PARENTAL LEAVE

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.33(2): contains two rights: (1) protection from dismissal for a reason "connected with maternity"; and (2) right to paid maternity leave and to parental leave following birth/adoption of a child.
DIRECTIVES	
PREGNANT WORKERS DIRECTIVE (92/85/EEC)	Seeks to improve health and safety measures re. pregnant workers or workers who have just given birth. Also grants rights for maternity leave and protection from dismissal. Applicable to both FT and PT workers. Art.8: provides for 14 weeks maternity leave (of which 2 weeks to be prior to birth). Art.9: attendance at ante-natal classes during work hours on full pay. Art.10: protection from dismissal on basis of pregnancy.
PARENTAL LEAVE DIRECTIVE (2010/18/EU)	Implements the "Framework Agreement on Parental Leave" (i.e. additional leave available to either parent after period of maternity/paternity leave has ended). The Framework Agreement (18 June 2009) contains: <ul style="list-style-type: none"> <li>- entitlement of workers to at least 4 months leave on birth/adoption</li> <li>- Right to return to same/similar job upon return from leave</li> <li>- Worker's right to request changes to their working hours for a set period.</li> <li>- increased protection against dismissal and unfavourable treatment</li> </ul> Protections applicable to FT and PT workers.
RECAST GENDER DIRECTIVE (2006/54/EC)	Prohibits direct and indirect discrimination on grounds of sex in employment context. This includes prohibition of less favourable treatment of women related to pregnancy or maternity leave.
OTHER EU INSTRUMENTS AND CASE LAW	
DEKKER, HERTZ AND HABERMANN CASES  (C-177/88 DEKKER, C-179/88 HERTZ, C-421/92 HABERMANN)	Established that discrimination related to pregnancy constitutes direct sex discrimination, regardless of the duration of the employment contract and regardless of the financial impact on the employer/business as a result of employee's pregnancy.
ROCO ALVAREZ AND MAISTRELLIS CASES  (C-104/09 ROCA ALVAREZ, C-222/14 MAISTRELLIS)	Established that father's rights exist in their own right, not to be dependent (parasitic) upon mother's rights.

### THE SCOTTISH CONTEXT

'Employment and industrial relations' are reserved under Schedule 5, Part II, Head H1 of Scotland Act 1998

THE IMPACT OF BREXIT ON CHILDREN AND YOUNG PEOPLE IN SCOTLAND:

CASE STUDY ON CROSS-BORDER FAMILY LAW

## 5.2. WORKING TIME

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.31(2): provides that "every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave". This provision is given further detail and enforceability by Working Time Directive.
DIRECTIVES	
WORKING TIME DIRECTIVE (2003/88/EC) ('WTD')	<p>WTD lays down certain minimum standards for working time and health and safety. These include:</p> <ul style="list-style-type: none"> <li>- Art.3: entitlement to min. 11h consecutive rest within 24h period</li> <li>- Art.5: entitlement to min. 24h uninterrupted time off each week</li> <li>- Art.6: working week must not exceed 48 hours</li> <li>- Art.7: entitlement to 4 weeks paid annual leave</li> </ul> <p>Directive also sets out special rules for e.g. night-shift workers, junior doctors, offshore workers etc.</p> <p>Art.22: "opt-out", this gives MSs the option not to apply the maximum weekly working time as long as the general principles for protection of health and safety are respected and certain protective measures put in place. In such cases the worker's consent is required (i.e. the worker has to "opt-out" from the 48h/week limit). Note: UK permits use of the Art.22 opt out.</p>
OTHER EU INSTRUMENTS AND CASE LAW	
SIMAP, JAEGER AND WILLIAMS (C-303/98 SIMAP, C - 151/02 JAEGER, C-155/10 WILLIAMS)	<p>Examples of progressive extension of CJEU definition of 'working time'.</p> <p>E.g. Simap and Jaeger establish that time required to be spent on the premises, even if the worker is permitted to sleep, still counts as "working time" (this is important e.g. for workers who have to remain on premises whilst 'on call' such as medical staff).</p>

### THE SCOTTISH CONTEXT

'Employment and industrial relations' is reserved under Schedule 5, Part II, Head H1 of Scotland Act 1998.

### 5.3. EQUALITY/NON-DISCRIMINATION

PRIMARY LAW	
TREATY ON EUROPEAN UNION	Art.3(3): EU as being "founded on" values such as equality, rule of law, respect for HR etc.
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Equal treatment: EU legislative competence re. combatting discrimination including: age (Art. 19(1)) and nationality (Art. 18) Art.157: equal pay
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.21: free standing prohibition of discrimination (wider grounds than Art.19 TFEU)
REGULATIONS	
SOCIAL SECURITY REGULATION (883/2004)	Coordinates social security systems across MSs re. application of social security schemes to employed persons and their families moving within the EU. Does not create an 'EU Social Security System'. However, does coordinate common rules re. application of own national laws. By doing this, the regulation ensures that the application of different national legislations does not adversely affect persons exercising their right to move and to stay within EU MSs See p.5 SULNE position paper on Brexit and employment < <a href="https://sulne.files.wordpress.com/2016/11/employment-sulne-roundtable-paper-oct-2016.pdf">https://sulne.files.wordpress.com/2016/11/employment-sulne-roundtable-paper-oct-2016.pdf</a> >
DIRECTIVES	
EMPLOYMENT EQUALITY DIRECTIVE (2000/78/EC)	Prohibits discrimination in context of employment, does allow for some differences in treatment on basis of age, but only where this is appropriate, necessary and justified by 'legitimate aim' (e.g. differential treatment required for protection of young worker's health would be permitted)
RACIAL EQUALITY DIRECTIVE (2000/43/EC)	Implements principle of equal treatment between persons irrespective of racial or ethnic origin.
EQUALITY FRAMEWORK DIRECTIVE (2000/78/EC)	Aims to combat discrimination on grounds of disability, sexual orientation, religion or belief and age in the workplace. It accompanies the Racial Equality Directive 2000 and the Recast Gender Directive 2006. It is implemented in the UK with the Equality Act 2010.
RECAST GENDER DIRECTIVE (2006/54/EC)	Prohibits direct and indirect discrimination on grounds of sex in employment context. This includes prohibition of less favourable treatment of women related to pregnancy or maternity leave.
CITIZEN'S RIGHTS DIRECTIVE	Applies re. EU workers in host state. Art.24 protects such workers from discrimination on grounds of nationality in the host state.
OTHER EU INSTRUMENTS AND CASE LAW	
	For detailed overview of equality/non-discrimination case law of CJEU (with focus on sex discrimination) see EU Commission Case Law Compilation, < <a href="http://ec.europa.eu/justice/gender-equality/files/case-law-Compilation_en.pdf">http://ec.europa.eu/justice/gender-equality/files/case-law-Compilation_en.pdf</a> >

## THE SCOTTISH CONTEXT

'Employment and industrial relations' is reserved under the Scotland Act 1998 (Schedule 5, Part II, Head H1). However, some aspects of 'equal opportunities' are now devolved as result of Scotland Act 2016 (amending Schedule 5, Part II, Para L2 of the Scotland Act 1998). Where these relate to an employment relationship, it is submitted that they shall fall under the "employment and industrial relations" reservation.

## 6. EU MIGRATION

### 6.1. RESPECT FOR PRIVATE AND FAMILY LIFE

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.7: right to respect for private and family life. This is not an absolute right. Art.52(3) makes clear that where a CFR right is based on an ECHR right, that the scope of the CFR right shall be the same as the equivalent right under the ECHR. This means that Art.7 CFR is subject to the same limitations as noted under Art.8 ECHR.
DIRECTIVES	
FAMILY REUNIFICATION DIRECTIVE (2003/86/EC)	Protection of family life mentioned at preambular para. 2 but nowhere in the operative provisions. Note: the right to family life finds expression in preamble to some Directives. However, not in the operative body of them. This arrangement does, however, encourage CJEU to interpret such directives in accordance with the preambular right.
OTHER EU INSTRUMENTS AND CASE LAW	
	EU Fundamental Rights Agency has list of Art.7 CFR case law here: < <a href="http://fra.europa.eu/en/charterpedia/article/7-respect-private-and-family-life">http://fra.europa.eu/en/charterpedia/article/7-respect-private-and-family-life</a> >

## THE SCOTTISH CONTEXT

Protection of the right to private and family life is devolved, except insofar as any measures taken to protect that right stray into reserved matters (e.g. the reservation of "immigration and nationality" under Scotland Act 1998, Schedule 5, Part II, Head B, Para B6)

## 6.2. ENTRY AND RESIDENCE

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art. 21: right of EU citizens (and their family members) to move and reside freely within the territory of any EU MS. Furthermore, once they arrive they have right to be treated equal to national of that state re. access to (and conditions of) work, social and welfare benefits, school, healthcare etc.
EU CHARTER OF FUNDAMENTAL RIGHTS (CFR)	Art. 45: also guarantees right of free movement for EU citizens.
REGULATIONS	
FREE MOVEMENT OF WORKERS REGULATION (492/2011)	Aims to ensure that the principle of free movement of workers, enshrined in Art.45 TFEU, is respected in practice. It prohibits discrimination of EU workers. This includes prohibition on discrimination re. access to employment, working conditions, access to training etc.
DIRECTIVES	
CITIZEN'S RIGHTS DIRECTIVE (2004/38/EC)	<p>Sets out following rights for EU citizens (and their family members):</p> <ul style="list-style-type: none"> <li>- Art.6: Unconditional right of residence for &lt; 3 months: Provides that all EU Citizens can enjoy free movement and residence unconditionally across the EU for a period of up to three months.</li> <li>- Art.7: conditional right of residence for &gt;3 months: For residence of periods longer than 3 months, the individual must be either a worker, a self-employed person, an economically self-sufficient person (i.e. health insurance cover), a student (with health cover), or a jobseeker who has a 'genuine chance' of being employed (although some limits to equal treatment re. access to social assistance before they achieve employment)</li> <li>- Art.16: Permanent residence after 5 years: after 5y legal residence, the EU worker shall obtain 'permanent residence' in the host state.</li> </ul>

### THE SCOTTISH CONTEXT

Entry and residence does not fall within the legislative competence of the Scottish Parliament, due to the reservation of “immigration and nationality” (Scotland Act 1998, Schedule 5, Part II, Head B, Para B6)



### 6.3. FAMILY REUNIFICATION

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Family reunification for TCN relatives of EU citizens is derived from their EU relative's citizenship rights under Art.21 TFEU.
REGULATIONS	
DIRECTIVES	
FAMILY REUNIFICATION DIRECTIVE (2003/86/EC) ('FRD')	FRD governs the conditions under which third-country nationals living legally in the EU are permitted to bring in their families to a Member State in order to preserve family unity Note: FRD DOES NOT APPLY IN UK (OPT-OUT)
OTHER EU INSTRUMENTS AND CASE LAW	
RUIZ ZAMBRANO CASE 2011	TCN parent of EU citizen child. Held that TCN parent had right to work and reside in EU MS. This was on the basis of the child's EU citizenship right under Art.20 TFEU. In order to ensure that child's citizenship rights were effective, the TCN parent had to be permitted to reside and work in the EU MS with the child.

#### THE SCOTTISH CONTEXT

Family reunification is outwith the legislative competence of the Scottish Parliament due to the reservation of "immigration and nationality" matters (Scotland Act 1998, Schedule 5, Part II, Head B, Para B6)

## 7. IMMIGRATION & ASYLUM

### 7.1. ENTRY AND RESIDENCE

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Sets out legal basis in general area of immigration/asylum <ul style="list-style-type: none"><li>- Art.67(2): EU "shall frame a common policy on asylum, immigration and external border control"</li><li>- Art.78: provides that the EU "shall develop a common policy on asylum". This must be in accordance with 1951 Refugee Convention.</li></ul>
EU CHARTER OF FUNDAMENTAL RIGHTS (CFR)	Art.24: on rights of child generally, including that their best interests is to be primary consideration.
DIRECTIVES	
QUALIFICATION DIRECTIVE 2004/83/EC	UK is bound by the 'first phase' Qualification Directive (2004/83/EC), but not the 'recast' Qualification Directive (2011/95/EU).
DUBLIN REGULATION	UK has 'opt-in'. Dublin allows for asylum seekers to be returned to the Member State through which they entered the EU, for assessment of their claims there.

#### THE SCOTTISH CONTEXT

Entry and residence is outwith the legislative competence of the Scottish Parliament due to the reservation of "immigration and nationality" matters (Scotland Act 1998, Schedule 5, Part II, Head B, Para B6)

## 7.2. AGE ASSESSMENT

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Sets out legal basis in general area of immigration/asylum: <ul style="list-style-type: none"> <li>- Art.67(2): EU "shall frame a common policy on asylum, immigration and external border control"</li> <li>- Art.78: provides that the EU "shall develop a common policy on asylum". This must be in accordance with 1951 Refugee Convention.</li> </ul>
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.24: on rights of child generally, including that their best interests is to be primary consideration.
DIRECTIVES	
ASYLUM PROCEDURES DIRECTIVE 2005/85/EC	Art.17: sets out "guarantees for unaccompanied minors". Includes that best interests of the child are to be primary consideration when implementing this provision (Art.17(6)). Art.17(5): allows MSs to carry out medical examinations to determine the age of the applicant. Directive provides that the applicant must be informed prior to examination in a language they understand of procedure and consequences of result (Art.17(5)(a)-(b)) Art.17(5)(c): A refusal to provide consent cannot result in automatic rejection of application for international protection <b>Note: UK BOUND BY ORIGINAL PROCEDURES DIRECTIVE (2005) BUT NOT THE 2013 RECAST (which contains more protective provisions for unaccompanied children).</b>
RECAST ASYLUM PROCEDURES DIRECTIVE (2013/32/EU)	2013 Recast Directive adds additional protections for unaccompanied minors: <ul style="list-style-type: none"> <li>- age assessment only to be used where there is doubt as to applicant's age</li> <li>- if there is still doubt after examination, then applicant to receive benefit of the doubt and presumed to be a minor.</li> <li>- provides that the examination must be performed "with full respect for the individual's dignity, shall be the least invasive examination" and be carried out by qualified medical professional (Art.25(5))</li> </ul>
OTHER EU INSTRUMENTS AND CASE LAW	
	Note controversy re UK acceptance (/reluctance to accept!) unaccompanied child asylum seekers. See for example < <a href="https://www.hrw.org/news/2016/12/21/france/uk-lone-children-calais-left-limbo">https://www.hrw.org/news/2016/12/21/france/uk-lone-children-calais-left-limbo</a> > and < <a href="https://www.theguardian.com/world/2017/feb/09/tory-mps-join-criticism-of-amber-rudd-over-child-refugees">https://www.theguardian.com/world/2017/feb/09/tory-mps-join-criticism-of-amber-rudd-over-child-refugees</a> >

### THE SCOTTISH CONTEXT

Age assessment is outwith the legislative competence of the Scottish Parliament due to the reservation of "immigration and nationality" matters (Scotland Act 1998, Schedule 5, Part II, Head B, Para B6). However, practical implementation of age assessment falls to Scottish local authorities so there is a degree to which

Scotland is able to influence process, aside from legal protections.

### 7.3. FAMILY REUNIFICATION

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Family reunification for TCN relatives of EU citizens is derived from their EU relative's citizenship rights under Art.21 TFEU.
DIRECTIVES	
FAMILY REUNIFICATION DIRECTIVE (2003/86/EC)	Requires MSs to authorise entry of TCN parents of an EU child where it would not be in the child's best interests for them to join their parents abroad instead. Note: FRD DOES NOT APPLY IN UK (OPT-OUT)
OTHER EU INSTRUMENTS AND CASE LAW	
RUIZ ZAMBRANO CASE 2011	TCN parent of EU citizen child. Held that TCN parent had right to work and reside in EU MS. This was on the basis of the child's EU citizenship right under Art.20 TFEU. In order to ensure that the child's citizenship rights were "effective", the TCN parent had to be permitted to reside and work in the EU MS with the child.

#### THE SCOTTISH CONTEXT

Family reunification is outwith the legislative competence of the Scottish Parliament due to the reservation of "immigration and nationality" matters (Scotland Act 1998, Schedule 5, Part II, Head B, Para B6)

## 7.4. DETENTION OF CHILDREN

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Sets out legal basis in general area of immigration/asylum: <ul style="list-style-type: none"> <li>- Art.67(2): EU "shall frame a common policy on asylum, immigration and external border control"</li> <li>- Art.78: provides that the EU "shall develop a common policy on asylum". This must be in accordance with 1951 Refugee Convention.</li> </ul>
EU CHARTER OF FUNDAMENTAL RIGHTS (CFR)	Art.24: on rights of child generally, including that their best interests is to be primary consideration.
DIRECTIVES	
RECEPTION CONDITIONS DIRECTIVE (2003/9/EC)	Reception Conditions Directive - UK OPTED IN Art.11: permits detention of children but only as a measure of last resort, where less coercive measures "cannot be applied effectively". Art.11 provides that detention of children must be for the shortest period possible, that all efforts must be made to release the child to suitable alternative accommodation, that detained children are to have access to leisure facilities and age appropriate accommodation, that children must never be detained in prison accommodation, and that unaccompanied children must be detained separately from adults.
RETURN DIRECTIVE (2008/115/EU)	Returns Directive 2008 - UK HAS OPT OUT Art.17: permits detention of unaccompanied children pending their removal. Art.17 requires that they be detained in age appropriate facilities with specially trained staff

### THE SCOTTISH CONTEXT

Immigration detention is outwith the legislative competence of the Scottish Parliament due to the reservation of "immigration and nationality" matters (Scotland Act 1998, Schedule 5, Part II, Head B, Para B6)

## 7.5. EXPULSION

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Sets out legal basis in general area of immigration/asylum: <ul style="list-style-type: none"> <li>- Art.67(2): EU "shall frame a common policy on asylum, immigration and external border control"</li> <li>- Art.78: provides that the EU "shall develop a common policy on asylum". This must be in accordance with 1951 Refugee Convention.</li> </ul>
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.24: on rights of child generally, including that their best interests is to be primary consideration.
DIRECTIVES	
RETURN DIRECTIVE (2008/115/EU) ('RD')	RD does NOT apply to UK (OPT-OUT)

### THE SCOTTISH CONTEXT

Expulsion of third country nationals is outwith the legislative competence of the Scottish Parliament due to the reservation of "immigration and nationality" matters (Scotland Act 1998, Schedule 5, Part II, Head B, Para B6)

## 7.6. ACCESS TO JUSTICE

PRIMARY LAW	
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.47-48: right to an effective remedy and to a fair trial, presumption of innocence and right of defence.
DIRECTIVES	
ASYLUM PROCEDURES DIRECTIVE (2005/85/EC)	UK is bound by the first phase Procedures Directive (2005/85/EC) but not the 'recast' Procedures Directive (2013/32/EU).
VICTIMS DIRECTIVE (2012/29/EU)	Aims to promote improved standards on the entitlements, support and protection available to victims of crime across the EU UK has opted in

### THE SCOTTISH CONTEXT

Access to justice for third country nationals is outwith the legislative competence of the Scottish Parliament

due to the reservation of “immigration and nationality” matters (Scotland Act 1998, Schedule 5, Part II, Head B, Para B6)

## 8. CONSUMER RIGHTS

### 8.1. GENERAL PROTECTIONS

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.169(1): Union competence re. promotion of consumer protection
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.38: "Union policies shall ensure a high level of consumer protection"
DIRECTIVES	
CONSUMER RIGHTS DIRECTIVE (2011/83/EU)	Harmonisation of MS laws on forms of consumer contracts, concentrates on provision of pre-contractual information so that consumers (including children) can make informed choices.
UNFAIR COMMERCIAL PRACTICES DIRECTIVE (2005/29/EC)	Children included in category of "vulnerable consumers" (Art.5(3)). Prohibition on advertising activities which create confusion, requirement of clear information available to consumers prior to transaction.
UNFAIR TERMS IN CONSUMER CONTRACTS DIRECTIVE (93/13/EC)	Provides that an unfair term in a consumer contract is not binding on the consumer. However, only applies to terms which have not been individually negotiated with the consumer.
OTHER EU INSTRUMENTS AND CASE LAW	
DYNAMIC MEDIEN CASE 2008	CJEU recognises that the best interest of the child can justify limits on free movement of goods (in this case involved prohibition of Japanese cartoons unsuitable for children).

### THE SCOTTISH CONTEXT

Consumer protection is outwith the legislative competence of the Scottish Parliament due to its reservation under the Scotland Act 1998 (Schedule 5, Part II, Head C, Para C7)

## 8.2. PRODUCT SAFETY

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.169(1): Union competence re. promotion of consumer protection.
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.38: "Union policies shall ensure a high level of consumer protection".
DIRECTIVES	
GENERAL PRODUCT SAFETY DIRECTIVE (2001/95/EC)	Recital 8: children classed as "vulnerable consumers". Safety of product needs to be assessed taking into account all relevant factors, including the characteristics of the intended consumer (e.g. products intended for children).
"PRODUCTS APPEARING TO BE OTHER THAN THEY ARE" DIRECTIVE (PAOTTA) (87/357/EEC)	Harmonisation of MS laws relating to products which, by appearing to be other than they are, endanger the health or safety of consumers (e.g. products which appear to be a foodstuff but are not edible). Duty on MSs to conduct checks to ensure no such products are marketed. If MS bans a particular product under the directive then it must inform the EU Commission in order that other MSs can be informed.
TOY SAFETY DIRECTIVE (2009/48/EC),	Art.10: reinforces health and safety standards by limiting the amounts of certain chemicals that may be contained in the material used to make toys.
FOODSTUFFS INTENDED FOR PARTICULAR NUTRITIONAL USES DIRECTIVE (2009/39/EC)	Focusing on nutritional safety and composition of foods specifically manufactured for infants and young children under 12 months (e.g. formula milk, baby food)

### THE SCOTTISH CONTEXT

Product safety is outwith the legislative competence of the Scottish Parliament due to the reservation of "consumer protection" under the Scotland Act 1998 (Schedule 5, Part II, Head C, Para C7)



### 8.3. CLINICAL TRIALS ON CHILDREN

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.169(1): Union competence re. promotion of consumer protection.
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.38: "Union policies shall ensure a high level of consumer protection".
REGULATIONS	
CLINICAL TRIALS AND MEDICINES FOR HUMAN USE REGULATION (536/2014)	Art.10(1): children included in 'vulnerable population' category. Art.32: laying down specific conditions on conducting clinical trials involving children. Applications for use of children in clinical trials to be carefully assessed, requires consent of child's legal representative plus that of child (if capable of forming opinion) Note: aim is that this Regulation will gradually replace the Clinical Trials Directive (2001/20/EC).
DIRECTIVES	
CLINICAL TRIALS DIRECTIVE (2001/20/EC)	Relates to implementation of "good clinical practice" re trials. Children included in category of 'vulnerable persons' unable to consent to clinical trials. However, recital 3 still permits inclusion of children in limited circumstances - but only where they would directly benefit from the trial and that this benefit outweighs any of the risks involved.

#### THE SCOTTISH CONTEXT

Clinical trials are outwith the legislative competence of the Scottish Parliament due to the reservation of "consumer protection" under the Scotland Act 1998 (Schedule 5, Part II, Head C, Para C7)

## 8.4. PAEDIATRIC MEDICINES

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.169(1): Union competence re. promotion of consumer protection.
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.38: "Union policies shall ensure a high level of consumer protection".
REGULATIONS	
REGULATION ON MEDICINAL PRODUCTS FOR PAEDIATRIC USE (1901/2006)	Aims to ensure that medicines intended for use by children are of high quality, ethically researched and authorised appropriately. Also focuses on ensuring information re. medicine use is made available. Regulation aims to achieve above aims without subjecting children to unnecessary trials.

### THE SCOTTISH CONTEXT

The regulation of paediatric medicines is outwith the legislative competence of the Scottish Parliament due to the reservation of "consumer protection" under the Scotland Act 1998 (Schedule 5, Part II, Head C, Para C7)

## 8.5. MEDIA AND ADVERTISING

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.169(1): Union competence re. promotion of consumer protection.
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.38: "Union policies shall ensure a high level of consumer protection".
DIRECTIVES	
AUDIO-VISUAL MEDIA SERVICES DIRECTIVE (2010/13/EU) ('AVMS')	<p>Arts. 20, 24, 27: deal with limiting amount, content and duration of marketing that children may be exposed to</p> <p>Art.10(4): authorises MSs to prohibit display of sponsorship logos during children's programmes.</p> <p>Art.11: Prohibition on product placements in children's programmes.</p> <p>Prohibition on targeting of minors in commercials for alcohol.</p>
OTHER EU INSTRUMENTS AND CASE LAW	
COUNCIL RECOMMENDATION (98/560/EC)	These Council Recommendations supplement the rules in the AVMS directive re. protection of minors and human dignity.
COUNCIL RECOMMENDATION (2006/952/EC)	

### THE SCOTTISH CONTEXT

The regulation of media and advertising is outwith the legislative competence of the Scottish Parliament due to the reservation of "consumer protection" under the Scotland Act 1998 (Schedule 5, Part II, Head C, Para C7)

## 9. DATA PROTECTION

### 9.1. DATA PROTECTION

PRIMARY LAW	
TREATY ON THE FUNCTIONING OF THE EU (TFEU)	Art.16: Union competence re. data protection.
EU CHARTER OF FUNDAMENTAL RIGHTS ('CFR')	Art.7: right to respect for private and family life Art.8: right to protection of personal data, permits processing of personal data but on basis of consent (or some other legitimate basis laid down by law), right to access data held about you, right to have data rectified, requires compliance to be subject to control by independent authority.
REGULATIONS	
GENERAL DATA PROTECTION REGULATION (2016/679)	This is to replace Directive 95/46/EC. It will come into force on 25 May 2018.
DIRECTIVES	
DATA PROTECTION DIRECTIVE (95/46/EC)	Main EU instrument on data protection law. Guarantees data subjects (including children) certain rights, including: <ul style="list-style-type: none"> <li>- right to be informed that their data is being collected;</li> <li>- right to access the stored data and learn about its processing;</li> <li>- right to object in cases of unlawful processing,</li> <li>- right to rectification/erasure/blocking of data</li> </ul> <p>Note: Data Protection Directive will cease to have effect from 25 May 2018 (see Art.94 of Regulation 2016/679)</p>
OTHER EU INSTRUMENTS AND CASE LAW	
GOOGLE SPAIN CASE 2014	CJEU interpreting the right to object to data processing in a case involving adults (has not yet addressed case concerning children). Held that the right to object is not an absolute right and must be balanced against other fundamental rights.

### THE SCOTTISH CONTEXT

Data protection is outwith the legislative competence of the Scottish Parliament due to its reservation under the Scotland Act 1998 (Schedule 5, Part II, HeadB, Para B2)

## 10. ENVIRONMENT

### 10.1. AIR AND WATER POLLUTION

DIRECTIVES	
<p>AIR QUALITY: AMBIENT AIR QUALITY AND CLEAN AIR DIRECTIVE 2008/50/EC NATIONAL EMISSION CEILINGS DIRECTIVE (2001/81/EC)</p>	<p>The directives on air quality impose caps on national emissions.</p>
<p>CLEAN BEACHES/SEAS/WATER BATHING WATER DIRECTIVE (76/160/EEC) URBAN WASTE WATER TREATMENT DIRECTIVE (91/271/EEC). BATHING WATER DIRECTIVE</p>	<p>These directives establish minimum standards for water treatment and pollution. MSs are free to enact more stringent standards if they wish.</p>

#### THE SCOTTISH CONTEXT

Environmental protection is not reserved under the Scotland Act 1998 and is therefore devolved.

## BIBLIOGRAPHY

AIRE Centre, 'The UK's Continued Participation in Hague Instruments Following Brexit' ("Brexit – Does Brexit really mean Brexit for Family Law?") Conference, London, 26 June 2017)

Barbier J, Rogowski R and Colomb F, *Implementation of the EU Working Time Directive in the United Kingdom* (Warwick School of Law Research Paper, 2015)

Bar Council Brexit Working Group, 'The Brexit Papers' (Bar Council, December 2016) <[http://www.barcouncil.org.uk/media/508513/the\\_brexit\\_papers.pdf](http://www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf)> accessed 3 June 2017

Beaumont P, 'Private international law concerning children in the UK after Brexit: comparing Hague Treaty Law with EU Regulations' (2017) 29(3) *Child and Family Law Quarterly* 18

Beaumont P and McEavey P, *The Hague Convention on International Child Abduction* (1<sup>st</sup> edn, Oxford University Press, 1999)

Beaumont P, Walker L, Holliday J, 'Parental responsibility and international child abduction in the proposed recast of the Brussels IIA Regulation and the effect of Brexit on future child abduction proceedings' (2016) *International Family Law* 207

Boele-Woelki K, *Perspectives for the Unification of Family Law in Europe* (1<sup>st</sup> edn, Interealia 2003)

Boezaart T, 'Listening to the Child's Objection' (2013) 3 *New Zealand Law Review* 357

Bullock R, 'What does Brexit, Trump and Le Pen mean for looked-after children?' (2017) *Adoption and Fostering* 3

Burrows D, 'Child's Play: Part 2' (2017) *New Law Journal* 11

Busby N, 'The Charter of Fundamental Rights and Brexit' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/11/charter-of-fundamental-rights-sulne-roundtable-oct-2016.pdf>> accessed 5 May 2017

Breger M, 'Against the Dilution of a Child's Voice in Court' (2010) *Indiana International and Comparative Law Review* 175

Bruch C, 'The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 529

Caldwell J, 'Child welfare defences in child abduction cases – some recent developments' (2001) 13(2) *Child and Family Law Quarterly* 121

-- 'Child Abduction Cases: Evaluating Risks to the Child and the Convention' (2008) 23 *New Zealand Universities Law Review* 161

Cardesa-Salzmann, Combe M, Geelhoed M, McHarg A, Ntona M, Reid C, Roger A, Savaresi A, Sindico F and Switzer S, 'The implications of Brexit for environmental law in Scotland' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/12/environment-paper-sulne-20161214.pdf>> accessed 5 May 2017

Carruthers J and Crawford E, 'International Private Law: Family Law' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/11/ipl-and-family-law-sulne-roundtable-oct-2016.pdf>> accessed 5 May 2017

Cleland A & Sutherland E, *Children's Rights in Scotland* (W Green, 2009)

Clive E, 'Brexit and Family Law' (*Scottish Legal News Today*, 13 May 2016) <<http://www.scottishlegal.com/2016/05/13/eric-clive-brexit-and-family-law/>>

CORAM, *Brexit: Children's Rights at Risk or Future Opportunity in the Global Era?* (2017)

Craig S, 'Asylum Law' (SULNE Brexit Position Papers, 2016) <<https://sulne.files.wordpress.com/2016/11/asylum-law-sulne-roundtable-oct-2016.pdf>> accessed 5 May 2017

DLA Piper, *Research Note: The Impact of Brexit on Child Rights* (DLA Piper, 2016)

THE IMPACT OF BREXIT ON CHILDREN AND YOUNG PEOPLE IN SCOTLAND:  
CASE STUDY ON CROSS-BORDER FAMILY LAW

Donaghy C, 'The Hague Convention and the UNCRC' (Northern Ireland Commissioner for Children and Young People, March 2015) <<http://www.niccy.org/media/1289/niccy-ezine-hague-convention-article-march-15.pdf>> accessed 29 July 2017

Dutta A, 'Brexit and international family law from a continental perspective' (2017) *Family Law*

Elrod L, "' Please Let Me Stay": Hearing the Voice of the Child in Hague Abduction Cases' (2011) 63 *Oklahoma Law Review* 663

Elrod L and Dale M, 'Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance' (2008) 42 *Family Law Quarterly* 381

Emery R, 'Children's Voices: Listening – and Deciding – Is an Adult Responsibility' (2003) *Arizona Law Review* 621

European Union Agency for Fundamental Rights, Handbook on European law relating to the rights of the child (2015, FRA)

Evans A, 'Brexit: Impact on The Justice System in Scotland' (SPICe The Information Centre, Briefing Paper, 27 October 2016) <[http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB\\_16-83\\_Brexit\\_Impact\\_on\\_the\\_Justice\\_System\\_in\\_Scotland.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-83_Brexit_Impact_on_the_Justice_System_in_Scotland.pdf)> accessed 8 June 2017

Fredman S, Bogg A, Young A and Campbell M, *The Human Rights Implications of Brexit*, Submission to the Joint Committee on Human Rights (Oxford Human Rights Hub, 2016)

Freeman M, 'In the Best Interests of Internationally Abducted Children? – Plural, Singular, Neither or Both?' (2002) *International Family Law* 77

Garbolino J, 'The Impact of the Brussels II Regulation on Hague Convention Proceedings in the European Union' (*Federal Judicial Centre*, March 2016) <[https://www.fjc.gov/sites/default/files/2016/Impact%20of%20Brussels%20II\\_0.pdf](https://www.fjc.gov/sites/default/files/2016/Impact%20of%20Brussels%20II_0.pdf)> accessed 29 July 2017

Gillies L, 'Data Protection and Privacy in EU Law' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/11/data-protection-sulne-roundtable-dec-2016.pdf>> accessed 5 May 2017

Greene A, 'Seen and Not Heard? Children's Objections Under the Hague Convention on International Child Abduction' (2005-2006) 13 *University Miami International and Comparative Law Review* 105

Griffiths A, Fotheringham J and McCarthy F, *Family Law* (W Green, 2013)

Harris N, 'Brexit and Society Security' (2016) *Journal of Social Security Law* 113

Hodson D, The International Family Law Group LLP response to the Home Office Justice Committee on the Implications of Brexit for the Justice System (IFLG, 2016)

-- The Great EU Repeal Bill White Paper and family law (IFLG, 2017)

House of Commons Library, 'Brexit: the Brussels IIA regulation – cross-border child contact cases, and child abduction' (*House of Commons Library*, 11 November 2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7764#fullreport>> accessed 24 July 2017

House of Commons Library, 'International Child Abduction' (*House of Commons Library*, 4 October 2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7726>> accessed 24 July 2017

Human Rights Consortium Scotland, Rights at Risk: a collection of Scottish civil society perspectives on the possible impact of Brexit (Human Rights Consortium Scotland, 2017)

Iusmen I and Stalford H (Eds.), *The EU as a Children's Rights Actor: Law, Policy and Structural Dimensions* (Barbara Budrich Publishers 2016)

Jones E, Hutchinson A and Kwan R, 'The 1996 Hague Convention: The Fourth Dimension' (*Family Law Week*, 30 November 2012) <<http://www.familylawweek.co.uk/site.aspx?i=ed105739>> accessed 10 June 2017

Kaye M, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and Family* 191

Kelly J, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 *Virginia Journal of Social Policy and the Law* 129

-- 'Listening to Children's Views in Disputed Custody and Access Cases' (2008) *AFCC Compendium* 179

Kelsey R, 'EU law, a family affair' (*The Journal of the Law Society of Scotland*, 12 December 2016)  
<http://www.journalonline.co.uk/Magazine/61-12/1022601.aspx> accessed 10 June 2017

Kenworthy B, 'Note: The Un-Common Law: Emerging Differences Between the United States and the United Kingdom on the Children's Rights Aspects of the Hague Convention on International Child Abduction' 12 *Indiana International and Comparative Law Review* 329

Klabbers J, 'Continent in Crisis' (2016) *European Journal of International Law* 553

Kruger T and Samyn S, 'Brussels II bis: successes and suggested improvements' (2016) 12(1) *Journal of Private International Law* 132

Lamont R, 'Care proceedings with a European dimension under Brussels IIa: Jurisdiction, mutual trust and the best interests of the child' (2016) 28 *Child and Family Law Quarterly* 67

-- 'European Family Law after Brexit' (*University of Manchester Policy Blogs*, 5 April 2017) <  
<http://blog.policy.manchester.ac.uk/posts/2017/04/family-law-brexite/>>

Lenaerts L, 'The Best Interests of the Child Always Come First: The Brussels II bis Regulation and the European Court of Justice' (2013) 20(4) *Jurisprudence* 1302

Lewis J, 'The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity', (2000) 13 *The Transnational Lawyer* 391

Liefwaard T and Doek J (Eds.), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015)

Lock T, Miller-Westoby N, 'Brexit and rights in EU law' (2017) *Scottish Human Rights Journal* 2

Lock T and Shields K, 'Human Rights and Brexit' (SULNE Brexit Position Paper, 2016)  
<https://sulne.files.wordpress.com/2016/11/sulne-human-rights.pdf> accessed 5 May 2017

Lowe N, 'The Growing Influence of the EU on Family Law – A View from the Boundary' (2003) 56 *Current Legal Problems* 439

-- 'EU Family Law and Children's Rights: A better alternative to the Hague conference or Council of Europe?' (The Children and the European Union: Legal, Political and Research Perspectives Conference, University of Liverpool, 21 April 2009)

-- 'Some reflections on the options for dealing with international family law following Brexit' (2017) *Family Law* 399

Lowe N, Everall M and Nicholls M, *International Movement of Children: Law, Practice and Procedure* (Jordan Publishing Ltd, Bristol, 2004)

Lowe N and Horosova K, 'The Operation of the 1980 Hague Abduction Convention – A Global View' (2007) 41(1) *Family Law Quarterly* 59

McEleavey P, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return of Reflection' (2015) *Netherlands International Law Review* 365

McLean J, 'Maintenance Obligations after Brexit' (2016) *Family Law Bulletin* 1



Miller-Westoby N and Shaw J, 'Free Movement, Immigration and Political Rights' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/11/free-movement-immigration-and-political-rights-sulne-roundtable-oct-2016-4.pdf>> accessed 5 May 2017

Morgera A, Cardesa-Salzman A, McHarg A, Geelhoed M and Ntona M, 'Rights protected under EU law concerning the environment' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/11/environmental-rights-sulne-roundtable-oct-2016-rev2.pdf>> accessed 5 May 2017

Nanos R, 'The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense under the Hague Child Abduction Convention' (1996) 22(2) *Brook Journal of International Law* 437

Nelson S, 'Turning our Backs on Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction' (2001) 20 *University of Illinois Law Review* 669

O'Conneide C, 'Rights under Pressure' (2017) *European Human Rights Law Review* 43

O'Neil J, 'The Great Repeal Bill' (2017) *Family Law* 477

O'Neill J and Nicklin E, 'Brexit and Brussels IIA' (2017) *Family Law* 272

O'Shea N, 'After Brexit: Enforcing European Custody Orders: Re D' (2016) *Family Law* 934

Resolution, 'The Implications of Brexit for the Justice System: Written evidence submitted by Resolution to the Justice Select Committee' (*Resolution*, 2016) <[http://www.resolution.org.uk/site\\_content\\_files/files/resolution\\_evidence\\_to\\_justice\\_select\\_committee\\_implications\\_of\\_brexit\\_for\\_the\\_justice\\_system\\_november\\_2016.pdf](http://www.resolution.org.uk/site_content_files/files/resolution_evidence_to_justice_select_committee_implications_of_brexit_for_the_justice_system_november_2016.pdf)> accessed 10 June 2017

Resolution, *Submission to the Law Commission* (October 2016) <[http://www.resolution.org.uk/site\\_content\\_files/files/law\\_commission\\_no\\_fault\\_divorce\\_oct\\_2016.pdf](http://www.resolution.org.uk/site_content_files/files/law_commission_no_fault_divorce_oct_2016.pdf)> accessed 24 July 2017

Reynolds A, 'Brexit and Family Law Conference' (2017) *Family Law* 681

Richardson L, 'Paper on Consumer Rights' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/11/consumer-rights-sulne-roundtable-oct-2016-final.pdf>> accessed 5 May 2017

Robins J, 'Brexit: What rights do we have?' (2016) *New Law Journal* 8

Robison M, 'Equality and Non-Discrimination and Brexit' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/11/equalities-sulne-roundtable-oct-2016-v2-2-11-16.pdf>> accessed 5 May 2017

Schuz R, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *International and Comparative Law Quarterly* 771

Schuz R, 'The Hague Child Abduction Convention and Children's Rights' (2002) 12 *Transnational Law and Contemporary Problems* 393

Stalford H, 'Are we there yet? The impact of the Lisbon Treaty on the EU Children's Rights Agenda' (2011) 19(3) *International Journal of Children's Rights* 7

-- Children and the European Union: Rights Welfare and Accountability (Oxford, 2012)

-- 'Not seen, not heard: the implications of Brexit for children' (Open Democracy, 8 June 2016) <<https://www.opendemocracy.net/brexitdivisions/helen-stalford/not-seen-not-heard-implications-of-brexit-for-children>> accessed 5 May 2017

-- 'The Potential Implications of Brexit for Child Protection' (*University of Liverpool Children's Rights Unit Blog*, 2016) <[https://www.liverpool.ac.uk/media/livacuk/law/european-childrens-rights-unit/The\\_potential\\_implications\\_of\\_Brexit\\_for\\_Child\\_Protection.pdf](https://www.liverpool.ac.uk/media/livacuk/law/european-childrens-rights-unit/The_potential_implications_of_Brexit_for_Child_Protection.pdf)> accessed 5 May 2017

-- 'Silent Witness' (2016) *Children in Scotland* 8

Staford H and Drywood E (eds.) 'Coming of Age? Children's Rights in the European Union' 46(1) *Common Market Law Review* 143

Starmer K, 'Roosevelt's Legacy: human rights after Brexit' (2017) *European Human Rights Law Review* 103

UN Committee on the Rights of the Child, 'General Comment No. 12 (2009) The right of the child to be heard' (2009) UN Doc CRC/C/GC/12

-- 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)' (2013) UN Doc CRC/C/GC/14

Van Bueren G, *The International Law on the Rights of the Child* (1<sup>st</sup> edn, Martinus Nijhoff, 1995)

Vigers S, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing, 2011)

Wiener M, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 593

Williams D and Hodson D, 'Leave or Remain? What the EU referendum means for family lawyers' (Lexis Nexis, 24 November 2015) <<http://www.halsburyslawexchange.co.uk/wp-content/uploads/sites/12/2016/05/EUREF-Family.pdf>> accessed 22 June 2017

Williams D, Gupta T, Hames C, Gartland D, Gratton M, Renton J, Kumar I and Rustin J, 'The Rights of the Child in Hague Proceedings Seminar' (4 *Paper Buildings*, Conference Papers, 8 December 2016) <<http://www.4pb.com/wp-content/uploads/2016/12/4PB-THE-RIGHTS-OF-THE-CHILD-IN-HAGUE-PROCEEDINGS.pdf>> accessed 29 July 2017

Zahn R, 'Employment Law' (SULNE Brexit Position Paper, 2016) <<https://sulne.files.wordpress.com/2016/11/employment-sulne-roundtable-paper-oct-2016.pdf>>