UK Supreme Court Rules on Return of British Children

On 9 September 2013, the UK Supreme Court delivered its judgment In the matter of A (Children) (AP).

The Court issued the following press summary.

BACKGROUND TO THE APPEAL

The issue in this appeal is whether the High Court of England and Wales has jurisdiction to order the 'return' to this country of a small child who has never been present here on the basis that he is habitually resident here or that he has British nationality.

The child, called Haroon in the judgment, was born on 20 October 2010 in Pakistan. His father was born in England and his mother in Pakistan. They married in Pakistan in 1999 and lived in England from 2000. They have four children: two daughters, born in 2001 and 2002, and two sons, one born in 2005 and Haroon. The father and the first three children, who were born in England, have dual British and Pakistani nationality and the mother has indefinite leave to remain in the United Kingdom.

From 2006 the father began to spend a lot of time in Pakistan. The marriage was unhappy and in 2008 the mother moved into a refuge with her three children complaining of abuse. The mother arranged a three week trip to Pakistan in October 2009, in order to visit her father with the children. When she was there she was put under pressure by her father, her husband and his family to reconcile with her husband and was forced to give up the children's passports. She strongly wished to return to England and telephoned the refuge asking for their help to return from February 2010, when she became pregnant with Haroon. Eventually in May 2011 her family helped her to return to England without the children and she began proceedings for their return in the High Court. On 20 June 2011 all four children were made wards of court and the father was ordered to return them forthwith.

The father challenged the jurisdiction of the court to make orders for the return

of the children. The judge found that all four children were habitually resident in England and Wales as the mother had not agreed that the children should live in Pakistan. The older children had retained their habitual residence in England. Haroon had habitual residence because he was born to a mother who was being kept in Pakistan against her will. The Court of Appeal by a majority allowed the father's appeal in relation to Haroon only, on the ground that habitual residence was a question of fact (rather than deriving from the habitual residence of the parents) and required physical presence in the country.

JUDGMENT

The Supreme Court unanimously allows the mother's appeal and holds that the court had inherent jurisdiction to make the orders in this case on the basis of Haroon's British nationality. The case is however remitted to the judge to consider as a matter of urgency whether it is appropriate to exercise this exceptional jurisdiction. Lady Hale gives the main judgment, with which Lord Wilson, Lord Reed, and Lord Toulson agree. Lord Hughes gives an additional judgment explaining why he would have held that Haroon was habitually resident in the circumstances of this case.

REASONS FOR THE JUDGMENT

The orders exercising the court's wardship jurisdiction in this case did not fall within Part 1 of the Family Law Act 1986 ('the 1986 Act') [26-28]. They did relate to parental responsibility within the scope of Council Regulation (EC) No 2201/2003 (the Brussels II revised Regulation)('the Regulation') [29], which applied regardless of whether there was alternative jurisdiction in a non-member state [33]. The question was whether there was jurisdiction under article 8 of the Regulation, which depended on where the child was habitually resident [34].

Habitual residence is a question of fact and not a legal concept such as domicile. It is desirable that the test for habitual residence be the same for the purposes of the 1986 Act, the Hague Child Abduction Convention and the Regulation, namely that adopted by the Court of Justice of the European Union ('CJEU')for the purposes of the Regulation [35-39]. The CJEU has ruled that habitual residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. This depends on numerous factors including the reasons for the family's stay in the country in question [54].

Four of the justices held that presence was a necessary precursor to residence. A child could not be integrated into the social environment of a place to which his primary carer had never taken him. Lord Hughes, by contrast, would have held that in these circumstances the child acquired the habitual residence of his mother. The CJEU had not had to consider a case with facts as stark as this, where the only reason that the child had been born in a particular place was because the mother had been deprived of her autonomy to choose where to give birth, and if it had been necessary to decide the appeal under the Regulation, the Supreme Court would have made a reference to it [58].

There was however another basis of jurisdiction which was open to the court to exercise in this case. By Article 14 of the Regulation, the common law rules as to the inherent jurisdiction of the High Court continue to apply if the child is not habitually resident in a Member State. The Crown retained the ancient power as parens patriae over those who owe it allegiance as British nationals. For most types of order this jurisdiction was removed by the 1986 Act but not for the order for return made in this case [60]. The judge below did not address herself to this basis of jurisdiction and whether it would be appropriate to exercise it. The case should be remitted to the High Court for it to be considered, in the light of the particular circumstances of this case [64-65]. If the court declined to exercise this jurisdiction, it would remain open to the mother to seek a reference to the CJEU on the issue of habitual residence [67].

Lord Hughes in an additional judgment did not accept that it was a minimum legal requirement of habitual residence that there had at some time been physical presence. This was tantamount to a rule when a purely factual enquiry was required. With a very young child the important environment was essentially a family one. Haroon’s family unit had its habitual residence in England. He therefore would have held that Haroon was habitually resident in England and Wales [93].

French Supreme Court follows ECJ judgment on jurisdiction clauses in Refcomp

Vincent Richard is a Research Fellow at the Max Planck Institute Luxembourg.

On September 11th, 2013, the French Supreme Court for private and criminal matters (*Cour de Cassation*) rendered its final decision in Refcomp SPA v. Axa Corporate solutions assurances (*in French*).

This case on the possible transmission of a jurisdiction clause in a succession of contracts transferring ownership gave rise to a preliminary ruling of the ECJ which was reported on this blog.

In its decision the ECJ ruled that a jurisdiction clause could not be relied against a sub-buyer unless it is established that he has actually consented to the clause under the conditions of article 23 Brussels I. According to the ECJ, the application of the French rule whereby a sub-buyer can bring a contractual action against the manufacturer and thus be bound by a jurisdiction clause, would have infringed the uniform application of the Brussels I regulation.

Unsurprisingly, the French Supreme Court acknowledged and complied with this decision by confirming the French courts' jurisdiction against *Refcomp SPA.* The court expressly mentions the ECJ ruling and then applies it in the present situation thus denying any effect to the jurisdiction clause against a sub-buyer (*Doumer SNC insured by Axa*) who has not agreed to it.

Refcomp will thus have to defend himself before French courts despite having concluded a jurisdiction clause in favour of an Italian court when he sold his product to his Italian client (Climaveneta).

Call for Papers: Boundaries of European Private International Law

Boundaries of European Private International Law

Lyon – Barcelone – Louvain-la-Neuve

Jean Monnet Life Long Learning Programme

The European Union is undertaking a vast, complex process to standardise the rules of private international law among the Member States (rules on conflict of law, jurisdiction, recognition and enforcement of foreign court orders). For legal experts in this discipline, who have historically been trained in private international law primarily on a national basis, and secondarily on an international basis, the changes will be considerable. The adoption of a large number of European regulations and the overhaul of the existing regulations also represent challenges to the training and education of legal experts.

Against this highly changeable backdrop, the Research Centre of Private International Law (CREDIP), at the University Jean Moulin – Lyon 3, has commenced a European research program on the theme of the **boundaries of European private international law.** Where does European private international law begin and end?

A demonstration of the existence of European private international law is no longer necessary. However, the question of the place of European private international law in a more globalised legal order, i.e. the difficult but crucial theme of reconciling European private international law to the legal frameworks that preceded it at national, international and European level, has been largely neglected to date.

The aim of this research program is to remedy this situation by holding discussions in different locations in Europe (Lyon – Barcelona – Louvain), bringing together European specialists in private international law or European law and doctoral or post-doctoral students.

Four main themes will be tackled:

1. Reconciling European private international law with (substantial and procedural) national and international frameworks;

2. Reconciling European private international law with private international law applicable in relationships with countries outside the EU;

3. Reconciling European private international law with other European law frameworks (internal market: free circulation of goods and reconciliation of private national legislations) and other areas of freedom security and justice (immigration and cooperation in criminal matters);

4. Reconciling the various European instruments of private international law.

Themes 1 and 2 will be the subject of an international workshop at the **Autonomous University of Barcelona** (March/April 2014).

Themes 3 and 4 will be the subject of an international workshop at the **Catholic University of Louvain** (May/June 2014).

If you are interested in one of these four themes, please submit your proposal before **1rst December 2013 (a 5-line summary, your title and presentation of 1-2 pages in Word format)** and send it to credip@univ-lyon3.fr. Please also attach a CV and letter of recommendation from your thesis director or your research centre director.

The papers will be published in English, French or Spanish in one volume by Editions Bruylant/Larcier. During the workshops, the presentations will be made in a working language understood by everyone. The discussion will continue in several languages, so that everyone can express themselves in their mother tongue. During the discussion, where necessary, participants will provide a translation from Spanish or French into English.

For candidates whose papers are accepted, all the costs of participating in the workshops related to their theme will be covered.

Scientific Committee : **Rafael ARENAS GARCÍA**, Catedrático, **Universitat Autònoma de Barcelona**, España – **Louis D'AVOUT**, Professeur de droit, Université Panthéon-Assas Paris II, France – **Jean-Sylvestre BERGÉ,** Professeur

de droit, Université Jean Moulin Lyon 3, France – **Christine BIDAUD-GARON,** Maître de conférences HDR, Université Jean Moulin Lyon 3, France – **Blandine de CLAVIÈRE,** Maître de conférences en droit, Université Jean Moulin Lyon 3, France – **Pedro A. DE MIGUEL ASENSIO,** Catedrático, Université Complutense de Madrid, España – **Alain DEVERS,** Maître de conférences HDR en droit, Université Jean Moulin Lyon 3, France – **Marc FALLON,** Professeur de droit, Université catholique de Louvain, Louvain-la-Neuve, Belgique – **José Carlos FERNÁNDEZ ROZAS,** Catedrático, Universidad Complutense de Madrid, España – **Éric FONGARO,** Maître de conférences en droit, Université Montesquieu Bordeaux IV, France – **Stéphanie FRANCQ,** Professeur de droit, Université catholique de Louvain, Louvain-la-Neuve, Belgique – **Hugues FULCHIRON,** Professeur de droit, Université Jean Moulin Lyon 3, France – **Estelle GALLANT-BUSNEL,** Maître de conférences HDR en droit, Université Paris 1, France – **Miguel GARDEÑES Santiago,** Profesor Titular, **Universitat Autònoma de Barcelona**, España – **Hélène Gaudemet-tallon,** Professeur de droit, Université Panthéon-Assas Paris II, France – **Patrick KINSCH,** Professeur de droit invité, Université du Luxembourg – **Malik LAAZOUZI**, Professeur de droit, Université de Saint-Étienne, France – **Paul LAGARDE,** Professeur de droit, Université Panthéon-Sorbonne – Paris I, France – **Cyril NOURISSAT,** Professeur de droit, Université Jean Moulin Lyon 3, France – **Étienne PATAUT,** Professeur de droit, Université Panthéon-Sorbonne – Paris I, France – **Sylvaine POILLOT PERUZZETTO,** Professeur de droit, Université de Toulouse 1 Capitole, France – **Gian Paolo ROMANO,** Professeur de droit, Université de Lausanne, Suisse – ***Sixto SÁnchez Lorenzo***, Catedrática, Universidad de Granada, España – **Laurence SINOPOLI,** Maître de conférences HDR en droit, Université Paris Ouest Nanterre, France – La Défense, France – **Edouard TREPPOZ,** Professeur de droit, Université Jean Moulin Lyon 3, France – **Patrick WAUTELET,** Professeur de droit, Université de Liège, Belgique – **Blanca VILÀ COSTA**, Catedrática, Université autonome de Barcelone, , España.

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Administrative Manager : **Véronique Gervasoni**, Équipe de Droit International, Européen et Comparé (EA n° 4185).

5th Journal of Private International Law Conference

This piece of news has been provided by Céline Camara and Polina Pavlova, research fellows at the Max Planck Institute Luxembourg.

The 5th Journal of Private International Law conference was hosted by the Universidad Autónoma de Madrid and the Universidad Complutense de Madrid on 12th-13th September 2013. The programme is available here.

The Editors of the Journal (Professors Jonathan Harris of King's College, London and Paul Beaumont of Aberdeen) and the conference organisers (Professors Pedro de Miguel Asensio and Carmen Otero of UCM and Francisco Garcimartin and Elena Rodriguez of UAM) were successful in providing a comprehensive forum for the private international law community.

Around 80 speakers from all around the world – including young researchers and renowned scholars alike – presented their work. 15 different thematic panel sessions covered all relevant areas of private international law. In addition, a series of plenary sessions gave impetus to lively discussions.

As was to be expected, one of the hot topics of the conference was the Brussels I Recast. The abolition of exequatur, jurisdiction over Third State defendants, consumer protection and collective redress were, inter alia, extensively addressed.

Another significant part of the conference dealt with legal issues resulting from the increased mobility and new trends of modern society as well as new technology developments. For instance, several discussions tackled the PIL aspects of same sex marriage and online contracts.

The interplay between Private and Public International Law was a question underlying several research projects presented at the event.

The interaction between regional and global approaches offered an impetus to rethink principles of PIL as well as regulatory concepts.

The conference was closed by a presentation held by the Advocate General Pedro Cruz Villalón.

Aside from the legal insights provided in the sessions, the venue of the event together with the well-conceived social programme ensured that all participants greatly enjoyed their stay in Madrid.

We are looking forward to the next JPIL Conference which will take place in Cambridge in 2015.

Conference: "La governance di Internet: diritti, regole e territorio" (Rome, 4 October 2013)

An interesting conference on the legal regime of the Internet, dealing with a number of issues related to international law, EU law and private international law has been organized by *Mario Carta* (University "Unitelma Sapienza") and will be hosted on **Friday, 4 October 2013** by the Faculty of Law of the University of Rome "La Sapienza": **"La governance di Internet: diritti, regole, territorio"**. Here's the programme (available as a .pdf file here):

Welcome address

- *F. Avallone* (Rector, University "Unitelma Sapienza")*;*
- *G. Spangher* (Dean of the Faculty of Law, University of Rome "La Sapienza")

I session (h 09:30)

Chair: *M. Caravale* (University "Unitelma Sapienza")

- *K. Benyekhlef* (University of Montreal, CRDP CERIUM): État de droit et virtualité: souveraineté et surveillance;
- *V. Zeno-Zencovich* (UNINT – University of Roma Tre): Internet e sovranità;
- *S. Marchisio* (University of Rome "La Sapienza"): Il ruolo delle organizzazioni internazionali nella governance di Internet;
- *T. E. Frosini* (University "Suor Orsola Benincasa", Naples): Il diritto di accesso a Internet come diritto fondamentale;
- *C. Curti Gialdino* (University of Rome "La Sapienza"): La diplomazia alla prova di Internet;
- *M. Carta* (University "Unitelma Sapienza"): Internet e diritti umani nel diritto europeo ed internazionale.

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II session (h 14:30)

Chair: *A. Davì* (University of Rome "La Sapienza")

- *D.A. Limone* (University "Unitelma Sapienza"): La governance dei dati digitali delle Pubbliche Amministrazioni;
- *A. Zanobetti* (University of Bologna): Il diritto dei contratti e le nuove tecnologie digitali;
- *F. Marongiu Buonaiuti* (University of Macerata): Giurisdizione e legge applicabile in relazione alle violazioni della privacy e dei diritti della personalità commesse per via telematica;
- *E. Baroncini* (University of Bologna): La rivoluzione digitale e il rapporto tra commercio, diritti umani e morale pubblica nel sistema dell'OMC.

(Many thanks to Prof. Fabrizio Marongiu Buonaiuti for the tip-off)

German Notary Institute

Conference on the Succession Regulation

This is to remind the readers of our blog that the German Notary Institute (DNotI) will host a conference on the European Succession Regulation on 11 October 2013. The conference will take place in Würzburg and celebrate the Institute's 20th anniversary.

The conference programme is available here. Registration is possible via the DNotI website. Admission is free for academic and university staff.

Private International Law in Commonwealth Africa

Published this week is ***Private International Law in Commonwealth Africa*** (Cambridge University Press, 2013) by Prof. Richard Oppong of Thompson Rivers University.

From the book's website:

The book won the 2013 American Society of International Law prize in Private International Law. The prize 'recognizes exceptional work in private international law'. The Secretary General of the Hague Conference on Private International Law, Dr. Christophe Bernasconi, observes in his foreword to the book that: 'The publication of *Private International Law in Commonwealth Africa* marks a significant milestone in the history and development of private international law in Africa. Its encyclopaedic analysis of fifteen national legal systems – which account for over 40 per cent of the continent's population yet over 70 per cent of its economic output – will go a long way to filling a gap in knowledge in respect of this important region of the world'.

The book offers an unrivalled breadth of coverage in its comparative examination

of the laws in Botswana, the Gambia, Ghana, Kenya, Lesotho, Malawi, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. The book draws on nearly 1500 cases decided by courts in these countries (the majority of which have never been cited in any academic work) and numerous national statutes. It covers the areas of jurisdiction, choice of law, foreign judgments and arbitral awards enforcement, and international civil procedure. It also provides an extensive bibliography of the literature on African private international law.

Copies of the book may be obtained from many sources including the Cambridge UK and Amazon websites (link here).

ELI – UNIDROIT Joint Workshop on Civil Procedure

In 2013, the European Law Institute (ELI) and UNIDROIT agreed to work together in order to adapt the 2004 Principles of Transnational Civil Procedure developed by the American Law Institue and UNIDROIT from a European perspective and develop European Rules of Civil Procedure. This project will take the 2004 Principles as its starting point and will develop them in light of: i) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; ii) the wider acquis of binding EU law; iii) the common traditions in European countries; iv) the Storme Commission's work; and v) other pertinent European sources.

The 1st exploratory workshop in Vienna

The 1st exploratory workshop, to be held in Vienna on 18 and 19 October 2013, aims at an initial analysis of a series of different topics, ranging from due notice of proceedings to enforcement, with a view to identifying the most promising issues and the most appropriate methodological approach for the project. The event will be divided into a public conference, scheduled for 18

October, and an in-depth workshop for invited participants following the public discussion, which should lay the foundations for the elaboration of the ultimate project design by the ELI and UNIDROIT.

The workshop will bring together leading experts from academia and legal practice in the field of civil procedural law. It is anticipated that it will both produce an inspiring debate and mark an important first step towards establishing a working group that can carry the project to a successful conclusion.

Programme: Public Conference

Friday 18 October 2013

Venue: Palace of Justice, Schmerlingplatz 11, Vienna, Austria

Chair: **Loïc Cadiet** (University Paris 1, President of the International Association of Procedural Law)

10:30-11:00 Opening and Welcome by the Secretary-General of UNIDROIT and the President of the ELI

11:00-12:00 The 2004 ALI/UNIDROIT Principles: **Geoffrey C. Hazard** and **Antonio Gidi** *(American Law Institute)*

12:00-12:30 General Discussion

12:30-13:30 Lunch break

13:30-14:00 The European Acquis of Civil Procedure: Constitutional Aspects
Alexandra (Sacha) Prechal *(Court of Justice of the European Union)*

14:00-14:30 European Acquis of Civil Procedure: The Existing Body of Rules
Burkhard Hess *(Max Planck Institute Luxembourg)*

14:30-14:45 Procedure: The Agenda of the European Commission
Paraskevi Michou *(European Commission)*

14:45-15:15 General Discussion

Beginning at 15:30 on Friday 18 October, and continuing on the morning of 19 October from 09:00 to 14:00 there will be a closed expert seminar. Friday's session will be chaired by **Thomas Pfeiffer** from Heidelberg University, and will focus on the following topics: Structure of the Proceedings, Provisional and Protective Measures and Access to Information and Evidence. **Marcel Storme** will chair the session on Saturday morning and oversee discussions on: Due Notice of Proceedings, Obligation of the Parties and Lawyers and Multiple Claims and Parties. It will be followed by the afternoon session, chaired by **Verica Trstenjak** where the following topics will be discussed: Costs, Lis Pendens and Res Judicata and Transparency of assets and enforcement.

More information is available here.

ECHR Upholds Abolition of Exequatur

On 18 June 2013, the European Court of Human Rights delivered its judgment in *Povse v. Austria.*

Readers will recall that the Court of Justice of the European Union had also delivered a judgment in the same case in 2010. Marta Requejo had reported on the case and summarized the facts here.

The case was concerned with a dispute relating to the custody of a child under the Brussels IIa Regulation. A return order had been issued by an Italian court. As the Brussels IIa Regulation has abolished exequatur with respect to return orders, the issue was whether an Austrian court was compelled to enforce an Italian order despite the allegation that the Italian court might have violated human rights.

The Strasbourg court held that the return order could be challenged before the

court of origin, and that it would always be possible to bring proceedings against Italy should such challenge fail. The abolition of exequatur, therefore, was not dysfunctional from the perspective of the European Court of Human Rights.

> *86. The Court is therefore not convinced by the applicants' argument that to accept that the Austrian courts must enforce the return order of 23 November 2011 without any scrutiny as to its merits would deprive them of any protection of their Convention rights. On the contrary, it follows from the considerations set out above that it is open to the applicants to rely on their Convention rights before the Italian Courts. They have thus far failed to do so, as they did not appeal against the Venice Youth Court's judgment of 23 November 2011. Nor did they request the competent Italian court to stay the enforcement of that return order. However, it is clear from the Italian Government's submissions that it is still open to the applicants to raise the question of any changed circumstances in a request for review of the return order under Article 742 of the Italian Code of Civil Procedure, and that legal aid is in principle available. Should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the Court against Italy (see, for instance neersone and Kampanella v. Italy, no. 14737/09, 12 July 2011, concerning complaints under Article 8 of the Convention in respect of a return order issued by the Italian courts under the Brussels IIa Regulation).*
>
> *87. In sum, the Court cannot find any dysfunction in the control mechanisms for the observance of Convention rights. Consequent]y, the presumption that Austria, which did no more in the present case than fulfil its obligations as an EU member State under the Brussels Ila Regulation, has complied with the Convention has not been rebutted.*

H/T: Maja Brkan

Kreuzer on Jurisdiction and Choice Law under the Cape Town Convention

Karl Kreuzer, who is emeritus professor at the University of Wuerzburg, will publish an article on Jurisdiction and Choice of Law under the Cape Town Convention and the Protocols thereto in the second issue of the *Cape Town Convention Journal*. A preliminary draft can be downloaded here.

> *By introducing a new supranational substantive law institution in the form of an 'international interest' the Cape Town Convention and the Protocols thereto eliminate, within their material scope of application, the need for conflict of laws rules. However, as the Convention/Protocol-regime is not a complete codification, recourse to provisions designating the gap-filling substantive rules remains unavoidable. In this respect, with the exception of a provision in the Protocols authorizing the parties to choose the law applicable to their contractual obligations, the Convention and the Protocols refrain from establishing autonomous conflict of laws rules. Instead, Article 5 of the Convention generally refers to the conflict of lawsrules of the forum state for issues not settled under the Convention or the relevant Protocol in order to determine the applicable substantive law provisions. The rare jurisdictional rules of the Convention – choiceofcourt agreement, concurrent jurisdiction in cases of urgency, orders against the Registrar – aim at guaranteeing the enforceability of rights acquired under the Convention.*

The paper was presented in a conference in Oxford earlier this week. The outline and the slides of the presentation can be found on the conference website.