**Cross-Border Public Care and Adoption Proceedings in the European Union\***

Ruth Lamont

School of Law, University of Manchester

Claire Fenton-Glynn

Faculty of Law, University of Cambridge

*Abstract*

*The free movement of persons within the EU has meant that children at risk of harm from family members may be living in State of which they are not a national. The child may be made subject to legal measures under the national law of the host State for the protection of their welfare. This article explores the competence of the EU to protect children in these circumstances, and the scope of the Brussels II Revised Regulation in governing jurisdiction over child protection proceedings. It discuses the difference between national child protection systems and the political controversy surrounding English law on adoption following care proceedings issued over a child who is a national of a different Member State. It suggests that further information sharing on national systems and cooperation between courts is necessary for the effectiveness of the law and to encourage understanding of legitimate variation in Member State national family law.*

*Keywords*

Child protection; adoption; jurisdiction; international family law; EU competence

*Introduction*

States have an important and necessary responsibility to intervene to protect children at risk of harm and abuse in the family home, irrespective of the nationality or origins of the child. This aspect of the State’s obligation towards all children has assumed importance in the European Union (EU) when a child is deemed at risk of harm in a host Member State of which he/she is not a national. Whilst the EU has encouraged the free movement of persons and of families, it has helped to create a situation where children vulnerable to the risk of harm within the family may be living in a foreign State. The responsibility to protect these children, and the effectiveness of that protection, is just as important as for national children. The effectiveness and methods of child protection for children at risk outside their home Member State has recently become a more pressing issue, causing controversy over the perceived differences in national legal systems in intervening and addressing both the protection and eventual adoption of children, particularly in England.

In this article, we will examine the circumstances giving rise to cross-border care proceedings, the competence of the EU to address child protection and the limits of EU intervention through the Brussels II*a* Regulation.[[1]](#footnote-1) We will then turn to the specific issue of adoption, and the recent concerns raised regarding the English system of dispensing with parental consent to adoption. It will be suggested that the limits on EU competence in cross-border child protection are clear, but further work needs to be undertaken nationally and European-wide to promote proper understanding of the legal framework at EU level, and of English domestic law and it’s operation in this context.

*EU Competence to Protect Children at Risk*

Discussion regarding the role of the EU in protecting children from harm and abuse has, in the main, focused on the obviously cross-border issues of child trafficking, child sexual exploitation and children at risk in online environments (Stalford 2012: 175). Given the focus of EU competence under Title V, Area of Freedom, Security and Justice on forms of irregular exploitative migration and associated cross-border crime, this is the context where the EU is most directly engaged with children at risk. Family-based abuse is normally regarded as part of the domestic legal and policy order where the EU has limited competence to intervene. Soft measures such as the Daphne Programmes,[[2]](#footnote-2) now part of the Rights, Equality and Citizenship Programme 2014-2020, have engaged in funding research and knowledge exchange activities relating to all aspects of violence against children and women, including violence occurring in the home. The relationship between EU and domestic law and policies designed to protect children from harm caused by members of their family has not been an explicit focus of activity or debate until more recently.

It has become more apparent that children migrating with family members, or born in a host Member State to foreign parents, may pose particular difficulties for effective child protection. The interaction of the free movement of persons under Article 20 TFEU with the realities of family life in the Member States has meant that child protection now has a cross-national dimension. It is not always the case that migration between the Member States has a positive outcome for children of the family. Migration may place pressures on family relationships (Stalford 2004: 114), potentially providing an environment where abuse may occur, or the migration of a child may itself form an aspect of an abusive migratory arrangement. For example, in *Bristol CC v HA* ([2014] EWHC 1022 (Fam); [2015] EWHC 1310 (Fam)), there was evidence that the mother of a boy aged eight had been trafficked to the UK from Lithuania and was involved in a series of abusive relationships. The child, who was a Lithuanian national, suffered neglect due to the mother’s alcoholism and care proceedings were instituted in England to protect the child from further harm.

The free movement of persons within the EU increasingly gives rise to the possibility that a child at risk will not be a national of the Member State in which they are resident, but still requires intervention and support from the national child protection framework. There are a number of circumstances in which this may occur. The first is where the child has migrated with parent(s) pursuant to the free movement of persons, or has been born in the host Member State. They are then deemed at risk, in some cases because the parent(s) are either unable to care for the child, or subsequently abandon the child (see for example, *Leicester CC v S* [2014] EWHC 1575 (Fam)). The intervention by the state authority is justified for the protection of the child, but there may be risks posed to the child’s cultural and religious heritage if they are placed with a family without similar tradition. In *London Borough of Barking and Dagenham v C and others,* referring to a ten month old child, born in Britain but of Roma Romanian heritage, the English court identified that a placement in England could be a ‘profound dislocation’ for the child ([2014] EWHC 2472 (Fam), para 8). The nature of migration flows within the EU has made certain Member States, such as the United Kingdom, destination States for economically vulnerable migrants from the more recent accession States (European Commission 2014: 1). Cases where a non-national child is taken into public authority care in the host State often involve children from these States of origin.

Secondly, ease of movement around the Union has encouraged parent(s) to migrate to another State in order to evade the child protection systems of their home State. Information and advice, including material about child protection systems in different countries, is made available online to parent(s) who wish to avoid intervention from local social services – although such information may not always be accurate, nor the advice ethical. The parent(s) sometimes achieve this aim, (see e.g. *In re B (A Child) (Care Proceedings: Jurisdiction* [2013] EWCA Civ 1434 where the mother emigrated to Sweden and settled there with the child once she was born) but more commonly this results in efforts to return the child back to the country of their nationality, particularly if there are siblings in that jurisdiction. In *Re M (A Child) (Foreign Care Proceedings: Transfer*) ([2013] Fam 308), the mother purposefully travelled from England to Ireland to give birth to her fourth child. The three elder children were all in kinship placements in England after the Local Authority had intervened to protect them. Once she had given birth, the Irish authorities instituted care proceedings over the fourth child in Ireland. As a consequence, the mother sought to return to England with the child to better facilitate her access to all her children, having been isolated in Ireland where she had no wider family or support.

Thirdly, it is possible for a judgment issued in one Member State to order the physical movement or placement a child in another Member State with family, or in institutional care (see Case C-92/12 PPU *HSE v C*). This could be regarded as affecting the child’s right of free movement and also the right of any parent(s) if it restricts their ability to have contact with their child. However, this type of movement would be justifiable by reference to the best interests of the child and would normally (though not exclusively) entail the child being moved to the Member State of nationality.

The interaction between the free movement of persons and domestic family law is an increasingly important issue for family lawyers (Lamont 2012: 232) because, as families’ move between the Member States, domestic legal systems are required to take sensitive family decisions, such as public law decisions for the protection of the child, over non-nationals. The EU has competence under Article 81 TFEU (ex Article 65 TEC) to regulate the jurisdiction and the conflict of laws, mutual recognition of judgments and the cross-border taking of evidence in civil matters, including family law. This competence permits the EU to intervene in the private international family law of the Member States and it has done so, primarily through the Brussels II*a* Regulation, currently under review by the European Commission. The Regulation provides rules of jurisdiction over parental responsibility proceedings. It does not provide for the harmonisation of substantive family law rules, or for choice of law rules for proceedings relating to children. These remain within the exclusive competence of the Member State.

The effect of Brussels II*a* Regulation is to regulate and allocate jurisdiction over public law care proceedings. The Court of Justice in Case C-435/06 *C,* para 63)clarified the material scope of the Regulation, stating that the concept of ‘civil matters’ includes public law proceedings for the protection of children. The primary ground of jurisdiction under Article 8 is the habitual residence of the child, giving rise to jurisdiction over child protection proceedings where a foreign national child at risk is habitually resident. If the child is only present in the jurisdiction and not habitually resident, the national court may only adopt provisional, protective measures under Article 20, Brussels II*a* and notify the country with jurisdiction under the information-sharing obligation under Article 55, Brussels II*a* (see Case C-523/07 *A,* para 47)*.* Even if the court has jurisdiction under Article 8, it can consider whether to transfer the case to another court better placed to hear the case with which the child has a particular connection in the child’s best interests under Article 15 Brussels II*a.* The nature of the child’s connection to another State is defined by the terms of Article 15(1) and includes the State of the child’s nationality.

The Court of Justice has not yet decided a preliminary reference on the interpretation of Article 15 of the Regulation, although Case C-428/15 *Child and Family Agency v JD* has recently been referred from Ireland*.* This reference asks whether a court may consider the likely impact of any transfer request under Article 15 on the free movement of the persons affected, in the context of a mother seeking to move beyond the reach of social services in her home State. It also asks what factors should be considered as an aspect of a ‘best interests’ assessment in relation to transfer of jurisdiction under Article 15 of Brussels II*a* and how this relates to whether a court is ‘best placed’ to hear the case, including whether it is legitimate to examine the content and practice of foreign law. English practice on Article 15 in child protection proceedings has adopted a structure considering first whether the foreign court would be ‘better placed’ to hear the case, and subsequently whether this is in the best interests of the child, a factor which is strongly influenced by the decision on which court is deemed best placed (*AB v JLB (Brussels II Revised: Article 15)* [2009] 1 FLR 517). If the court accepts that transfer should take place, it must request the foreign court to assume jurisdiction and the foreign court must decide whether accepting jurisdiction is in the best interests of the child and, if so, assume jurisdiction over proceedings (*In re M (a child) (Foreign Care Proceedings: Transfer)* [2013] Fam 308) (see further, Lamont *forthcoming*).

Transfer of jurisdiction public law child protection cases must be considered as early as possible in the proceedings to try and ensure the best placed jurisdiction hears the full case. Recent cases in England have made clear the limitations on the material scope of Brussels II*a.* In *CB (A Child)* ([2015] EWCA Civ 888), at the conclusion of care proceedings in respect of a Latvian national child living in England, the child was to be adopted. The birth mother attempted to request a transfer of the adoption proceedings to Latvia under Article 15. Article 1(3), Brussels II*a* explicitly states that the Regulation does not apply to adoption decisions so a transfer request must be refused and the adoption remained to be decided by the English courts. Further to this case, in *N (Children: Adoption: Jurisdiction)* ([2015] EWCA Civ 1112, para 74), the English Court of Appeal decided that, whilst jurisdiction over care proceedings is governed by Brussels II*a,* measures preparatory to adoption consequent to the outcome of those proceedings,such as placement proceedings, and adoption proceedings are not within the scope of the Regulation.

Once the court has assumed jurisdiction under Brussels II*a* over public law care proceedings, the court will apply its own domestic law on child protection (i.e. the Children Act 1989 in England and Wales) and domestic law on any adoption proceedings that may follow. Although the case may be decided in one State, it remains possible for that court to eventually order placement of the child in another Member State as an outcome of the proceedings. Brussels II*a* makes provision for this possibility under Article 56, supported by cooperation between the national authorities in the Member States and with the consent of a public authority in the destination State (Case C-92/12 PPU *HSE v C,* para 95). Cooperation between national authorities working with children at risk, the judiciary in each Member State and between Central Authorities charged with responsibility under Brussels II*a* for information-sharing between Member States is necessary for the workability of the Regulation*.* It is now also the practice of the English court to notify the relevant Embassy once care proceedings have been instituted over a foreign national child (*In re E (A Child) (Care Proceedings: European Dimension)* [2014] EWHC 6 (Fam)). Cooperation across different levels and aspects of legal systems across the Member States is required first, to ensure that the individual child is protected during proceedings and to prevent delay, and second, to try and encourage understanding *between* national legal systems regarding both the content and practice of the law on child protection in the individual Member States.

Domestic law on the family still varies across the Member States in a variety of ways (Antokolskaia 2006). All the Member States are signatories of both the European Convention on Human Rights and Fundamental Freedoms 1950 and the UN Convention on the Rights of the Child 1989. However, the choices made by the legal framework in each Member State has made regarding the protection of, and respect for, rights relating to the family expressed in these instruments remains legitimately diverse (Herring, Choudhry 2012: 128). In the light of this diversity, McGlynn highlighted when the EU first sought to regulate private international family law, the differences between family laws has implications for domestic understandings of their own national processes, and in opening up the law for foreign criticism since cross-border interaction creates potential for comparison (McGlynn 2001: 40). In relation to domestic law and policy on child protection, where the state intervenes to protect a child from harm within the family, and in the law and decision-making on adoption, there are differences in legal structure and approach between the Member States (see Fenton-Glynn 2014, Council of Europe 2015). Particular debate has surrounded perceived differences between English law and the rest of the Member States in this context. These perceived differences have been thrown into sharp relief and highly pressurised as a result of Local Authority intervention to protect the welfare of a number of foreign national children living in England as a consequence of free movement in the EU.

Free movement of persons encourages situations whereby individuals will find themselves regulated by a system of law that is not their own, is unfamiliar and may operate differently. This is an important aspect of understanding the consequences of migration for the individual. Munby P in *Re J and S (Children)* ([2014] EWFC 4, para 36) stated that: ‘The parents have made their life in this country and cannot impose their own views either on the local authority or on the court.’ Although the law may be different in substance, once the English court has correctly assumed jurisdiction under Brussels II*a,* the decisions it takes are properly a matter for national law, with the oversight of the European Court of Human Rights. The competence of the EU is restricted under Article 81 to private international law measures. Harmonisation of substantive national law relating to child protection and adoption is not possible under the current Treaties and, on migration, families submit to the law of their host State.

*Adoption of children with ties to another Member State*

While adoption is explicitly excluded from the scope of Brussels II*a*, it remains a contentious issue in cases of cross-border child protection. In particular, the English system, allowing for an adoption to take place in spite of parental opposition, has been the subject of increasing debate.

Although comprehensive figures are not available on the numbers of adoptions that occur in each European Union Member State – in itself a matter that requires urgent redress – what statistics we do have suggest that far more adoptions take place in England each year that any other European jurisdiction (see Fenton-Glynn, 2015: 27). Furthermore, there have been claims circulating for many years that English law is unique in Europe in permitting adoption without parental consent – pejoratively referred to as “forced adoption” – raising concerns regarding the legitimacy of the system itself. These concerns have come to a head in the context of the growing number of care proceedings concerning children with ties to other EU Member States, where foreign parents have claimed that their parental rights have been breached by their consent to adoption being dispensed with, in a way that they allege could not occur in their own country.

This concern is shared by foreign governments, with Slovakia and Latvia in particular objecting to English practice in this field. In September 2012 in Slovakia, several hundred protesters gathered outside the British Embassy in Bratislava to express their concerns about Slovak children adopted in Britain. A month earlier, the Slovakian Ministry of Justice had published on its website a document concerning the issue of entitled ‘adoption of children without relevant reasons in the UK’, and suggested that a case could be brought before the European Court of Human Rights on the issue (Booker 2012).

In addition, Latvia’s parliament has formally complained to the House of Commons that children of Latvian descent are being adopted by British families, without parental consent. The Chair of the Human Rights Committee and the Deputy Chair of the Social and Employment Committee of the Latvian Saeima signed the letter, sent to the Speaker of the Commons, John Bercow MP. It complained of the failure of the British authorities to examine the option of involving their Latvian counterparts, and consider placing the child in the custody of family members or relatives in Latvia (Bowcott 2015).

At the same time, a number of petitions were made to the EU Parliament’s Petitions Committee regarding the child protection system in England in general, and the practice of adoption in particular. Central among these was again the allegation that England stands alone in Europe in ordering adoption without parental consent. As a result, the Petitions Committee commissioned a report on the adoption system in England, and its comparison with laws in place in other jurisdictions.

The report showed emphatically that England is not unique in Europe in permitting adoption without parental consent, and that in fact every one of the 28 Member States had a mechanism for doing so. While the exact mechanism varies from jurisdiction to jurisdiction, they fall broadly into four main categories: where consent is not necessary because of parental misconduct (e.g. Cyprus, Germany, France, Netherlands); where consent is not necessary because individuals have been deprived of parental rights (e.g. Belgium, Croatia, Denmark, Estonia, Greece, Latvia, Lithuania, Luxembourg, Poland, Slovakia, Slovenia, and Spain); where refusal to consent is overridden as unreasonable (e.g. Austria, Cyprus, France, Greece, Malta); and where consent is dispensed with in the child’s best interests (e.g. Denmark, Finland, Poland).

Having said this, even if the English law did indeed stand alone in its adoption practice, this is, in and of itself, largely irrelevant. As stated above, harmonisation of substantive national law relating to child protection and adoption is not possible under the current Treaties. EU competence in the area of family law is restricted to matters of private international law - questions of jurisdiction, not substance.

The better avenue for complaint in this regard is, as the Slovakian authorities identified, the European Court of Human Rights, under the Council of Europe system. This mechanism has the power to declare a violation if indeed dispensing with parental consent to adoption is a breach of the rights of the parents and children. However, as the Fenton-Glynn report to the Petitions Committee also noted, the English adoption system has been examined in detail in two recent cases of *YC v the United Kingdom* ((2012) 55 EHRR 967)and *R and H v the United Kingdom* ((2012) 54 EHRR 2), and found to be in conformity with the requirements of the Convention.

This does not mean that there is no role for the EU to play in this field. Much of the controversy that has arisen relates to a fundamental lack of understanding of the system of child protection and adoption in England, thus hampering the ability of foreign parents to engage with the process, as well as lack of wider understanding concerning different forms of child protection mechanisms throughout Europe. There is a need for greater information to be published concerning different forms of public care used in different jurisdictions – including long-term and short-term options – as well as for statistical data to be collected. The collection of comprehensive and disaggregated data is especially important concerning issues such as the number of adoptions in each country, the reasons for adoption for each child, as well as the characteristics of children adopted (including age, ethnicity, socio-economic status). Outcomes for children who have been adopted should also be presented, in terms of, inter alia, adoption breakdown, educational achievement, and sense of identity. This must be presented in conjunction with the outcomes for children who have been placed in other forms of alternative care. This fostering of a greater understanding of child protection mechanisms throughout Europe is a role that the EU can assume, and one perhaps that only the EU can play. Only with this information can we start to understand the bigger picture of how we can best protect children, while also ensuring appropriate familial ties are maintained.

*Conclusions*

Both the fertile case law on Brussels II*a* and wider public debate surrounding this field of legal practice demonstrate that the rules and approach to the cross-national protection of children at risk from family members are only just starting to be clarified and fully applied. Contributions to our workshop on the law and surrounding issues demonstrated that there remain significant areas of legal and social work practice to be clarified, particularly in the context of the transfer of cases and children between jurisdictions under the Brussels II*a* Regulation. It also highlighted that the often negative and poorly informed debates surrounding English law on adoption has a significant effect on the perception of English law in other European countries, potentially affecting the understanding and cooperation between jurisdictions in circumstances where effective cooperation is highly necessary for the protection of the child concerned.

The review and potential revisions to the Brussels II*a* Regulation have the potential to address the processes of cooperation during proceedings to allocate jurisdiction. However, the scope of EU competence remains restricted to private international law and the EU cannot harmonise the substantive content of domestic family law on child protection or adoption. Although it is important that the EU helps in the processes addressing the more negative aspects of the free movement of persons, harmonisation and allocation of jurisdiction is not the only role the EU can effectively play in this field. Through soft law, statistical analysis, and information sharing, methods previously adopted in similarly political sensitive fields, the EU can encourage greater understanding of different systems, and thus engender greater respect Acknowledging the impact of free movement of persons in this field, and using a broader range of tools may enable more effective cooperation in a field where the focus should be on ensuring the welfare of the individual child is protected, whichever legal system may be engaged.

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   Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000, [2003] OJ L 338/1. [↑](#footnote-ref-1)
2. Decision No 779/2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk OJ [2007] L 173/19. [↑](#footnote-ref-2)