HANDS ACROSS THE BORDER: CROSS-BORDER COOPERATION IN THE MAKING AND ENFORCEMENT OF SECURE ACCOMMODATION ORDERS

In the Matter of X (A Child), In the Matter of Y (A Child) [1] *

Introduction

There arose in conjoined cases before Sir James Munby, President of the Family Division of the English High Court of Justice, important cross-border issues in the matter of the making of secure accommodation orders for teenage children. The cases, *In the Matter of X (A Child), In the Matter of Y (A Child)*, raised the same issues, namely, first, the jurisdiction of an English court to make a secure accommodation order for the purpose of placing in a secure unit in Scotland a young person resident in England; and, secondly, the question of recognition and enforcement in Scotland of such an English order. Sir James summarised the issues thus:

> "Can the court in country A (in the present case, England) make an order to take effect in country B (in this case, Scotland)? If so, will such an order be recognised and enforced in country B (Scotland)? The first question is to be determined by the law of country A (England); the second is one to be determined by the law of country B (Scotland)."[2]

The case of X concerned a girl, then aged 16 years, living in the area of Cumbria County Council, and that of Y concerned a boy, then aged 15 years, resident within the authority of Blackpool Borough Council. Each party was the subject of care proceedings in England, and the Councils, respectively, sought authority under section 25 of the Children Act 1989 to place the young person in secure accommodation in Scotland, there being no available unit in England. A judicial order was made in proceedings relating to each party, giving the relevant Council permission to invoke for this purpose the inherent jurisdiction of the High Court, and authorising the placing of each child in a secure accommodation unit in Scotland until 29 July 2016. Both matters having been listed for further consideration, the two cases came before Sir James Munby on 28 July 2016. The High Court decision, handed down on 12 September 2016, provides a noteworthy commentary on lacunae in the intra-UK legislative framework pertaining to secure accommodation orders.

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[1] [2016] EWHC 2271 (Fam).
[2] Ibid., para 12.

The legislative framework

Part III of the Children Act 1989 ("Support for Children and Families provided by Local Authorities in England") (hereinafter "1989 Act") narrates in section 25 ("Use of accommodation for restricting liberty") the circumstances in which a child who is being looked after by a local authority may be placed, and, if placed, may be kept, in secure accommodation *in England* (emphasis added). A child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in secure accommodation unless it appears, "(a) that—(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and (ii) if he absconds, he is likely to suffer significant harm; or (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons."[3] *Ex facie* the terms of section 25 do not authorise an English judge to make a section 25 order placing a child in Scotland.[4]

By Schedule 2 to the 1989 Act, paragraph 19 ("Arrangements to assist children to live abroad"), a local authority may arrange for, or assist in arranging for, any child in their care to live *outside* England and Wales only with approval of the court.[5] Such approval will be granted only if the court is satisfied that:[6]

> (a) living outside England and Wales would be in the child's best interests;
> (b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
> (c) the child has consented to living in that country; and
> (d) every person who has parental responsibility for the child has consented to his living in that country.

As Sir James explained in the instant case, "It is difficult to see how the requirements of paragraph 19 of Schedule 2 to the 1989 Act will ever be satisfied where the child is to be sent out of the jurisdiction for the purpose of being placed in secure accommodation; and in the present cases they certainly are not."[7]

[3] Section 25(1), 1989 Act. cf. Social Services and Well-being (Wales) Act 2014, s 119.
[4] Section 25(1), as amended by Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016 (2016/413), reg 86(a)(ii). See also *In the Matter of X (A Child), In the Matter of Y (A Child), per* Sir James, para 28.
[5] The High Court or the family court (s 92(7), 1989 Act).
[6] Para 19(3), Sch 2, 1989 Act.
[7] Para 29.

In Scotland, the placing of a child in secure accommodation[8] pursuant to a compulsory supervision order[9] is regulated by the Children's Hearings (Scotland) Act 2011 (hereinafter "2011 Act"), sections 151–153.[10] By section 190 of the 2011 Act ("Effect of orders made outwith Scotland"), the Scottish Ministers may by regulations make provision for a specified non-Scottish order (i.e. an order made by a court in England and Wales, or in Northern Ireland), which appears to them to correspond to a compulsory supervision order, to have effect as if it were such an order. The relevant statutory instrument with regard to the recognition and enforcement in Scotland of orders in family matters made by courts in England is The Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013[11] (hereinafter "2013 Regulations"). The 2013 Regulations, made in exercise of the powers conferred by section 190 of the 2011 Act, apply where a child is transferred to Scotland from England and Wales or Northern Ireland, in circumstances where the child is subject to an order made in the remitting jurisdiction giving an authority care or supervisory responsibility for the child. The 2013 Regulations provide for the orders to have effect in Scotland as if they were compulsory supervision orders. Despite the apparent usefulness of the 2013 Regulations, there is a difficulty as regards the recognition and enforcement in Scotland of a secure accommodation order made in England. The scope of application of the 2013 Regulations is strictly limited to the circumstances prescribed by regulation 3 ("Effect of care orders made in England and Wales" [12]), which, importantly in the instant case, do not cover secure accommodation orders.[13]

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[8] Children's Hearings (Scotland) Act 2011, s 85 defines "secure accommodation authorisation" as meaning an authorisation enabling the child to be placed and kept in secure accommodation within a residential establishment.

[9] A compulsory supervision order means an order including any of the measures available under s 83(2) of the 2011 Act, comprising, inter alia, "(2) …(a) a requirement that the child reside at a specified place, (b) a direction authorising the person who is in charge of a place specified under paragraph (a) to restrict the child's liberty to the extent that the person considers appropriate having regard to the measures included in the order,…(d) a movement restriction condition, (e) a secure accommodation authorisation, …".

[10] See also the Secure Accommodation (Scotland) Regulations 2013 (SSI 2013/205).

[11] SSI 2013/99. With regard to the recognition and enforcement in England of orders in family matters made by courts in Scotland, see The Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013 (SI 2013/1465). See also *In the matter of X, In the matter of Y, per* Sir James Munby at para 58.

[12] Namely:
(a) a child is subject to a ["full" – *per* Sir James, para 64] care order made under section 31(1)(a) of the 1989 Act [on the application of any local authority or authorised person, the court may make an order placing the child with respect to whom the application is made in the care of a designated local authority];
(b) the court has given approval under paragraph 19(1) of Schedule 2 to the 1989 Act to the local authority ("the home local authority") to arrange, or assist in arranging, for the child to live in Scotland;
(c) the local authority for the area in which the child is to reside, or has moved to, in Scotland ("the receiving local authority") has, through the Principal Reporter, notified the court in writing that it agrees to take over the care of the child; and
(d) the home local authority has notified the court that it agrees to the receiving local authority taking over the care of the child.
See also regulation 4 re. effect of supervision order and education supervision orders made in England.

[13] Sir James Munby, para 64. See, conversely, art 7 of the Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013 (SI 2013/1465). By art 7(1), where a compulsory supervision order or interim compulsory supervision order made by a court in Scotland contains a

The inherent *parens patriae* jurisdiction of the High Court

The President of the Family Division, having found that an English judge has no power to make a secure accommodation order under section 25 of the 1989 Act to have a child placed in a secure unit in Scotland, proceeded to consider if the desired outcome could be achieved by means of the inherent *parens patriae* jurisdiction of the High Court.

The origins of the *parens patriae* jurisdiction lie in the protective duty of the Sovereign to "look to the maintenance and education (as far as it has the means of judging) of all his subjects".[14] Lord Denning in the English Court of Appeal recognised the continued existence of this basis of jurisdiction in *In re P(GE) (An Infant).*[15] A modern example of its use in a cross-border child law matter is the UK Supreme Court decision in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening).*[16] In the instant case, Sir James found supportive authority, in the particular matter of placement in secure accommodation in circumstances where jurisdiction under section 25 of the 1989 Act was not available, in the cases of *In Re B (Secure accommodation: Inherent jurisdiction) (No 1)*[17] and *Re B (Secure accommodation: Inherent jurisdiction) (No 2).*[18]

In invoking the inherent jurisdiction, the conditions set out in section 100 of the 1989 Act ("Restrictions on use of wardship jurisdiction") must be satisfied, including, in particular, the requirement that the result which the local authority wishes to achieve could not be achieved other than by use of the inherent jurisdiction.[19] Sir James found no "jurisdictional obstacle"[20] in the 1989 Act, taking the view that neither the mere existence of the statutory scheme, nor its substantive detail, ousted the common law prerogative. He concluded that,

> "It follows … that, in principle, a judge in exercise of the inherent jurisdiction can make an order directing the placement of a child in secure accommodation in Scotland. So too, in

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requirement of the type mentioned in s 83(2)(a) of the 2011 Act (that is, a requirement that the child reside at a specified place), the place specified in that requirement may be a place in England or Wales. By art 7(2), where a compulsory supervision order or interim compulsory supervision order contains a direction of the type mentioned in section 83(2)(b) of the 2011 Act and the place at which the child is required to reside in accordance with the order is a place in England or Wales, the order is authority for the person in charge of that place to restrict the child's liberty to the extent that the person considers appropriate having regard to the measures included in the order.

[14] *Hope v Hope* (1854) 4 De GM & G 328, *per* Lord Cranworth LC at 344 – 345.

[15] [1965] Ch. 568, at 582.

[16] [2014] A.C. 1.

[17] [2013] EWHC 4654 (Fam).

[18] [2013] EWHC 4655 (Fam). See also *Re AB (A Child: deprivation of liberty)* [2015] EWHC 3125 (Fam), [2016] 1 WLR 1160.

[19] Section 100(4), Children Act 1989.

[20] Para 34.

> principle, a judge in exercise of the inherent jurisdiction can make an order directing the placement of a child in non-secure accommodation in Scotland."[21]

There is a caveat: any judge seeking to exercise the inherent jurisdiction in this particular matter must ensure compliance with the requirements of article 5 ("Right to liberty and security") of the European Convention on Human Rights. The practical implications of a cross-border order engaged the attention of Sir James, who, conscious that any order directing the detention of a child should contain additional directions designed to facilitate easy and regular access between parents and child, was anxious to ensure, in the case of X, that the burden and cost of travelling from Cumbria to the secure unit in Scotland did not fall too heavily on X's mother.[22] Sir James was satisfied that a secure accommodation order for placement of X in Scotland would be article 5-compliant.

The President having concluded that it was competent for the court to exercise its inherent jurisdiction, the question arose whether or not the resulting English order would be recognised and enforced in Scotland.

Non-applicability of Brussels II *bis*[23] intra-UK

Article 66 of Brussels II *bis*, entitled "Member States with two or more legal systems", provides that,

> With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:
> (a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
> (b) any reference to nationality, or in the case of the United Kingdom 'domicile', shall refer to the territorial unit designated by the law of that State;
> (c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;
> (d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

The article differs from those in the Rome I and Rome II regulations[24] entitled "States with more than one legal system", which provide, *mutatis mutandis*, that,

[21] Para 47.
[22] Paras 49 – 50.
[23] Council Regulation (EC) No.2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No.1347/2000.
[24] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art 22; and Regulation (EC) No 864/2007 of the European

> "1. Where a State comprises several territorial units, each of which has its own rules of law in respect of [contractual/non-contractual] obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.
> 2. A Member State where different territorial units have their own rules of law in respect of [contractual/non-contractual] obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units."[25]

There is no explicit provision in Brussels II *bis* stating that a Member State having two or more legal systems shall not be required to apply the regulation to conflicts solely between the laws of such units. The question whether or not Brussels II *bis* operates as between the different legal systems of the UK therefore has been a subject of debate.[26] First instance judges have reached different conclusions on the point.[27] Sir James, in the instant case, referred to various authorities from England,[28] Northern Ireland,[29] and Scotland.[30] Notably, the Scottish authorities cited are shrieval, and the President did not refer to *S v D*,[31] an early case in which Sheriff McPartlin accepted the combined submission of counsel that Brussels II *bis* applied to allocate jurisdiction between the legal systems of the UK. A "preponderant view",[32] however, may be said to have emerged that Brussels II *bis* does not apply as between territories of the United Kingdom, and Sir James stated plainly that Brussels II *bis* did *not* apply to the case, the instrument having no application to issues arising between territorial units within the same Member State.[33]

Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), art 25.

[25] The UK normally legislates so as to have a Regulation apply intra-UK.

[26] See, for comment, K Beevers and D McClean, 'Intra-UK Jurisdiction in Parental Responsibility Cases: Has Europe Intervened' [2005] International Family Law 129; K J Hood, *Conflict of Laws within the UK* (2007) OUP, 5.38 – 5.49; J M Scott, 'Choice of Forum – Jurisdictional Issues within the UK' (2007), paper delivered at the Advanced Family Law Conference, Law Society of Scotland; 'G Maher, 'Parental responsibility proceedings: intra UK jurisdiction and the European regulation' 2007 S.L.T. (News) 117-121; G Maher, 'Family law proceedings and intra-UK jurisdiction' 2008 J.R. 315-317; and A Inglis, 'A Muckle Midden Cleared' 2009 J.R. 285.

[27] *Re PC, YC and KM (Brussels IIR)* [2013] EWHC 2336 (Fam), *per* Baker J at 11.

[28] *In the Matter of W-B (a Child)* [2012] EWCA Civ 592 – see *per* McFarlane LJ at [12]; *Re PC, YC and KM (Brussels IIR)* [2013] EWHC 2336 (Fam) – see *per* Baker J at 11; and *An English Local Authority v X, Y and Z (English Care Proceedings: Scottish Child)* [2015] EWFC 89.

[29] *Re ESJ A Minor (Residence Order Application; Jurisdiction within United Kingdom; Applicability of Council Regulation (EC) No 2201/2003)* [2008] NI Fam 6, in which Morgan J rejected a submission that art 66 should be interpreted so as to apply Brussels II *bis* to a jurisdictional dispute between Northern Ireland and England.

[30] *G. O. T. v K. J. K.* unreported (Court Ref. No.: F 37/05; Sheriffdom of South Strathclyde, Dumfries and Galloway at Dumfries, 12 December 2012) (– see especially *per* Sheriff Jamieson at [24]); and *B v B* 2009 S.L.T. (Sh.Ct.) 24.

[31] 2007 S.L.T. (Sh.Ct.) 37.

[32] *An English Local Authority v X (Child), Y (Mother), Z (Father)* [2015] EWFC 89, *per* Peter Jackson J at [16]. cf. the "orthodox view" referred to in *Re PC, YC and KM (Brussels IIR)* [2013] EWHC 2336 (Fam), *per* Baker J at [11].

[33] Para 52.

Even if the President had accorded the regulation an expansive rather than a restrictive interpretation, a question yet might have arisen regarding the subject matter scope of Brussels II *bis*.[34] Article 1.1(b) provides that the regulation shall apply to, inter alia, "the delegation, restriction or termination of parental responsibility".[35] Article 1.2(d) specifically includes within the scope of the instrument "the placement of the child in a foster family or in institutional care". Although article 1.3(g) expressly excludes from the scope "measures taken as a result of criminal offences committed by children", the grant of a secure accommodation order is not necessarily based upon evidence of criminality. That being so, orders placing children in secure accommodation *prima facie* are likely to fall (in qualifying, inter-Member State cases) *within* the subject matter scope of Brussels II *bis*, an inference supported by Sir James' citation[36] of Irish cases concerning the applicability of the regulation to Irish/English cases on the secure accommodation of children.

Non-applicability of Family Law Act 1986

The European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005[37] make no mention of sections 27–29 of the Family Law Act 1986 (hereinafter "1986 Act"[38]), covering registration and enforcement of parental responsibility orders intra-UK, and so it is to be assumed that these provisions continue to operate intra-UK, irrespective of the recognition and enforcement provisions in Brussels II *bis* (Ch. III). However, in the same way that Sir James held Brussels II *bis* to be inapplicable to the instant case, so too he held that Part I of the 1986 Act did not apply since it is concerned "essentially"[39] only with private law proceedings. A "Part I order" means, inter alia, a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order;[40] and an order made by a court of civil jurisdiction in Scotland under any enactment or rule of law with respect to the residence, custody, care or control of a child, contact with or access to a child or the education or upbringing of a child, excluding, however, an order committing the care of a child to a local authority or placing a child under the supervision of a local authority.[41] In determining the applicability of the various legislative provisions potentially engaged in this matter, the public/private law distinction must be kept in mind.

[34] Art 1.
[35] The term "parental responsibility" is defined in art 2(7) as meaning "all rights and duties relating to the person or the property of a child which are given to a natural *or legal person* by judgment, by operation of law or by an agreement having legal effect" (emphasis added).
[36] Para 53.
[37] SSI 2005/42.
[38] Recently described as a "legislative thicket": *AS v TH, BC, NC, SH* [2016] EWHC 2825 (Fam), *per* MacDonald J at [25] and [42].
See, however, changes to the 1986 Act made *per* The Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations 2010 (SSI 2010/213), Sch.1, paras 2 – 5.
[39] Para 57.
[40] Section 1(1)(a), 1986 Act.
[41] Section 1(1)(b)(i), 1986 Act.

Recourse to the *nobile officium*

The President observed that, in order to have the English secure accommodation order enforced in Scotland, petition would have to be made by the two local authorities to the *nobile officium* of the Court of Session, that is, the extraordinary equitable power vested in that Court.[42]

> "[The Court of Session] is a court of equity as well as of law; and as such, may and ought to proceed by the rules of conscience, in abating the rigour of the law, and in giving aid, in the actions brought before them, to those who can have no remedy in a court of law."[43]

In searching for a remedy to the problem at hand, it may be noted that the power is utilised in international private law in the enforcement of foreign civil and commercial judgments emanating from legal systems with which the United Kingdom enjoys no reciprocal regime.[44] This inherent jurisdiction of the Scots court is comparable with the inherent jurisdiction of the English court, on which Sir James relied in the instant case in order to supply jurisdiction in England, and it is noteworthy that the equivalent equitable jurisdiction is proposed to be relied upon in Scotland for the enforcement of that English order. However, while it is expedient that such equitable powers exist and exceptionally can supply the lack in appropriate cases – "… the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law"[45] – the *nobile officium* is not an apposite mechanism for the enforcement of an English secure accommodation order which, by its nature, necessitates monitoring and review. As the President recognised, a decision (by whom, and on what basis?) would need to be taken on the question whether the Scots or the English court should discharge that responsibility.[46]

Filling the lacunae

Legislative provision regarding the enforcement in England of a compulsory supervision order or interim compulsory supervision order made by a court in Scotland, on the face of things, is adequate.[47] Conversely, provision for the recognition and enforcement in Scotland of a secure accommodation order made in England, has been shown to be lacking.[48] The number of cases raising

[42] Stair, *The Institutions of the Law of Scotland*, Book IV, Title 3, para 1.
[43] Erskine, *Institute of the Law of Scotland*, Book 1, Title III, para 22.
[44] E B Crawford and J M Carruthers, *International Private Law: A Scots Perspective*, 4th edition (2015) W.Green, para 9-09.
[45] *In Re F (Mental Patient: Sterilisation)* [1989] 2 W.L.R. 1025, [1990] 2 A.C. 1, *per* Lord Donaldson of Lymington M.R., at 13.
[46] Para 71.
[47] Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013 (SI 2013/1465). See n 13, above.
[48] Para 62.

this problem is uncertain, but it is clear that in those cases where it occurs, the matter is of great moment, and the President opined that remedial action is necessary.

While it is appropriate that the lacunae identified by this case should be filled, we suggest that the particular issues raised are merely one manifestation of the many difficulties and legitimate doubts which pertain to jurisdiction allocation and judgment enforcement in family (especially child) law matters as between legal systems of the UK. It is time for the legislative thicket to be pruned, and to make clear the rules which operate intra-UK – a pressing matter in itself, but also in preparation for such changes in the law governing international jurisdiction allocation and judgment enforcement as will be required by the United Kingdom's exit from the European Union.

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