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Recognition of adoption orders – a problem for the courts of England and Wales?

Introduction

This article examines concerns expressed recently by family judges about the recognition in other countries of (domestic) adoption orders made in England and Wales in respect of children, who are not UK nationals but are habitually resident here. Concerns have been expressed both in cases where the parents have relinquished children for adoption to adoption agencies in England and where local authorities have proposed an adoption plan against parents' wishes for children subject to child protection proceedings. The article concludes that, for both legal and practical reasons, these concerns are overstated, and that the court's focus should be children's welfare and rights to permanent care that meets their needs.

Although there are many common features in adoption laws across the globe, adoption practice varies widely. A key distinction is between domestic and international (inter-country) adoptions. Domestic adoptions create legal status and relationships where the order is made, where the adoptive family live. In contrast, the prospective adopters in international adoptions look outside their home country for a child to adopt. They intend that the child will relocate to their country of origin and live with them there. It is essential for this arrangement that the adoption is recognised in both States. The Hague Convention, which provides the framework for the majority of these adoptions, ensures that they are recognised in all Hague states subject to very limited exceptions. Where adoptions do not fit within this simple dichotomy issues of recognition can arise: where (domestic) adopters emigrate or international adoptions are arranged in non-Hague States. In such cases, the family's (new) country of residence has to determine what effect the foreign adoption order has. There is no universal approach to these cases. A range of considerations: the similarity of adoption regimes; the need to protection of children from trafficking or other abusive processes; rights to respect for family life; and the welfare of individual children, may all assist courts to decide whether a foreign adoption order should be recognised.

Setting a hare running

The jurisdiction of courts in the U.K. to grant an adoption order depends on the domicile or residence for 1 year of the *applicants*, Adoption and Children Act 2002, s.49(1),(2). The legislation does not, and never has, imposed any requirements about the child's domicile. Until the requirement was removed by the Adoption Act 1949, s.1(2) the child had to be a 'British subject'. Children adopted by a British citizen in the U.K (or via a Hague Convention adoption) automatically become British citizens.

The issue of domicile was raised by the Court of Appeal in *Re B(S) (No 1)* (unreported) in an appeal in 1963 against refusal of adoption in England of a child who had a Spanish domicile of dependence from her father. The child had been born in England after the married parents' separation and the mother had placed her for adoption. The adoption was refused because the father had not consented and the court did not accept that he was refusing his consent unreasonably. The father's domicile, which was not a consideration in the legislation, was irrelevant. However, presumably because of the Court of Appeal's comments, domicile was again discussed in *Re B(S) (No 2)* [1968] Ch 204, a second application (by the same applicants) to adopt the child. Again, issues of the father's domicile formed no part of the reasoning for the decisions made.

By the time of the second application, the birth parents were divorced and the mother had obtained sole custody; the adopters' lawyer argued that this meant the child had English domicile from her mother. Goff J refused to decide the point on the basis that he could make the order even if the girl was domiciled in Spain: the child's domicile was not relevant (p 208). Nevertheless, Goff J went on to provide an account of the differing views of academic writers on the impact of the *child's domicile* on adoption decisions. Citing Cross J in *Re A* [1961] 1 W.L.R. 231 at 234, he supported the view that the court's obligation to include welfare included the effect of the adoption in the child's original domicile, commenting that the court could not 'shut its eyes to' the possibility of making an order which was not recognised in other jurisdictions. Moreover, he stated (again obiter) that 'evidence should be furnished to show that the order ... will be recognised by the foreign court' although he added confusingly 'that it was not necessary to prove what the child's domicile actually is, or to go into the laws of the relevant foreign country...' Fortunately, (although probably expensively) evidence was presented that the English order would be recognised in Spain and the father's rights would be ended under the Spanish Civil Code. There appears to have been no consideration of the reality of the decision: whether the father would be able to recognise the child he had never seen; how the Spanish authorities would identify the child now adopted as having originally had a Spanish father if she travelled to Spain using a British passport in her adoptive name.

Children's welfare in adoption decisions

In *re B(S)(No 2)* the issue of recognition was introduced as an aspect of welfare; it might not be in the interests of a child to be adopted if the adoption were not recognised outside this jurisdiction. However, this was a matter of balance; Goff J accepted that there could be adoptions that were so clearly in the child's interests that lack of recognition should not prevent them. The example cited was *Re R (Adoption)* [1967] 1 W.L.R. 34, where adoption was used to facilitate the escape of a young woman from E. Germany. Once recognition overseas is only a matter of welfare, issues of *relative* risk, the balance of the harm of not being adopted against the (illusory) harm of the order not being recognised somewhere have to be considered.

The risks of adverse consequences if the adoptive family travel to the child's home state must be regarded as minimal. Rather than highlighting these risks, expanding the technical matters to be explored in adoption and adding to the cost and complexity of proceedings, the courts should be focusing on the reality of the child's position. Evidence about recognition of an order in a country the adopters have no plans to live in cannot be 'necessary' (Children and Families Act 2014, s.13(6)) to establish whether it is in a child's best interests for an adoption order to be made. A British passport (which will not identify the child as adopted) in the child's new legal identity should be sufficient to allow the child to travel even to their birth parent's country.

In 1967, there was no alternative form of legal arrangement open to the adopters to protect their relationship with the child, who had been part of their family for 5 years. They could have made her a ward of court, but that would have given the court power to make decisions and left them and the child without a legal relationship. In a similar case today, the relationship with the birth father could be preserved and a new legal relationship with the carers created by a special guardianship order. However, neither wardship nor special guardianship make a child a British citizen; the carers cannot acquire a British passport for the child, at least until they can apply for her to be naturalized. Thus not only are the risks of 'unrecognised' adoption illusory, the disadvantages of making only a special guardianship order are very real.

Still limping?

This issue of 'limping' ie potentially unrecognised adoptions was resurrected by Munby P in the Court of Appeal decision in *Re N* [2015] EWCA Civ 1112, repeated by Baroness Hale in the Supreme Court decision on that case [2016] UKSC 15, para 62, and then re-iterated in three cases relating to foreign parents living in England, who sought to relinquish their infants for adoption: *Re JL and AO* [2016] EWHC 440 (Fam) and *RA (Baby Relinquished for Adoption - Case Management)* [2016] EWFC 25.

Whilst Munby P accepted the decision in *Re B(S) (No 2)*, he decided to put 'the contrary arguments' because 'this point has been rumbling around and needs to be put to rest' (para 93). Munby P asked rhetorically, '*What system of Law should the English court apply when considering whether to dispense with the parents' consent to adoption?*' He made clear his concern: irrespective of the jurisdiction of the domestic courts over adoption orders made in England and Wales, they cannot necessarily extinguish rights, recognised elsewhere, of parents who are domiciled overseas.

The first case cited by Munby P *In re Goodman's Trusts* (1881) 17 Ch D 266 was not a case about the recognition of an English order, rather it was about the recognition, in England, of legitimation effected by the marriage of Dutch parents in Holland (nearly 50 years before legitimation was available in England). Munby P cited at length *dicta* by James LJ to the effect that personal status was determined by the law of the country of domicile. The second case was a tax case, *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130 where Lord Scarman accepted that English law applied only to English nationals and residents unless the contrary was expressly stated. Consequently, because there was nothing explicit in the Adoption and Children Act 2002, it does not affect the rights outside of English law of birth parents domiciled overseas.

It can hardly be a surprise to any lawyer educated in the UK since the end of the British Empire, (and particularly since Devolution) that the statutes of the Westminster Parliament generally apply only within limited geographic areas, and that courts applying those statutes do not make orders that will be recognised universally. However, this cannot mean that adoption is ruled out for children in England, who need permanent alternative care, but have parents domiciled overseas. The domicile of the *birth parents* is not a condition for making an adoption order under the Adoption and Children Act 2002. Indeed, the legalism of the concept of domicile makes it particularly unsuited to decisions about children, hence the use of 'habitual residence' in international instruments concerning children.

The international recognition of domestic adoptions

There is no system for the recognition of domestic adoptions outside the jurisdiction where they were made; each country applies its own rules of private international law. Although the Council of Europe Convention on Adoption (2008) sought to create standards beyond the minimum standards in the Hague Adoption Convention, and applies to both domestic and international adoptions, it does not contain rules about recognition. Adoption remains a matter within the competence of member states of the EU therefore there is a possibility of EU legislation for aspects of family law with 'cross-border implications' (Baker and Groff, 170; TFEU, art 81(3)). A study for the European Parliament in 2008 considered the potential for EU wide rules on adoption. It suggested that where those involved are EU citizens there should be direct recognition of adoption decisions made in one EU country in other EU counties, providing the best interests of the child have been ascertained and respected. Effectively domestic adoption orders would be European (EU) adoption orders even

though domestic adoption would continue to be regulated by national laws (*International Adoption in the EU* 2008, 164-5). Despite support for this suggestion in both the European Commission and the Council of Europe, it has not yet been taken forward.

The failure to develop a mechanism to recognise domestic adoptions does not mean that states are free to ignore adoptive relationships established outside their jurisdiction. The European Convention on Human Rights imposes obligations on States to respect family life: interference with family life must be founded in law and proportionate (art 8). Refusal to recognise an adoptive relationship on the basis of the nationality of the child (before, or as a result, of adoption) would amount to a breach of art. 8 and art. 14.

The case of *Wagner v Luxemburg* raised a similar issue. Luxemburg refused to recognise the adoptive relationship between Ms Wagner, a Luxemburg national) and the daughter she had adopted in Peru because it did not accept adoption by unmarried persons. As a consequence, Ms Wagner had repeatedly to apply for residence permits for her daughter, could not have her included on her passport and needed to obtain visas for her daughter's overseas travel. Although single parent adoption was not universally accepted in Europe and States applied different approaches to recognising foreign adoptions, Luxemburg was held to be in breach of art 8. It had 'failed to take account of the social reality of the situation.' (132) Paramountcy of the welfare of the child meant it could not reasonably disregard the 'legal status validly created abroad and corresponding to family life' under art 8 (133). The justification of the strict application of Luxemburg law, which allowed only adoption by married couples, was 'not sufficient' to satisfy art 8(2) (135). The court was prepared to accept the legitimacy of difference in treatment between children depending on whether or not their foreign adoption was recognised if it were proportionate and appropriate to the aim pursued (para 154) but found that this was not the case. Other adoptions, made in similar circumstances, had been recognised (156-7). Moreover, the lack of recognition had a major and disproportionate impact on the girl, who could not be blamed for her circumstances (158).

A State that allows inter-country adoption of its citizens and domestic adoption by foreign nationals within its territory will find it difficult to justify non-recognition of adoptions completed overseas. Any justifications claimed will need to be particularly persuasive where the adoption has been conducted according to rigorous processes in a State that is party to the ECHR and where the relationship between its (former) citizen and the adoptive parents is long established.

Inter-country adoptions

Nationality (of any of the parties) is only a minor concern in inter-country adoptions under the Hague Convention. The nationality of the child and the adopters may be considered in decisions about suitability, however the Convention applies to those *habitually resident* in Contracting States, 'because the State of Nationality would not be able to comply with many of the obligations imposed by the Convention's rules.' (Explanatory Report, para 71). An attempt to exclude the adoption of citizens of countries which consider adoption to be against public policy, proposed by Egypt during the drafting process, was also rejected. The argument for such a provision was based on non-recognition; children subject to such adoptions would be held accountable by their (original) State of Nationality for violating its laws and would also be liable to tax etc. (Explanatory Report, para 72). However, this proposal lacked sufficient support and was not taken forward. Egypt is not a party to the Convention.

Recognition of inter-country adoptions was a major issue for the drafters of the Hague Convention, which has as one of its objects to secure the recognition in Contracting States of adoptions made in accordance with the Convention (Art. 1(c)). Contracting States must recognise all adoptions certified as having been made in compliance with the Convention (Art 23), and recognition can only be refused on public policy grounds (Art 24). However, if a state refuses to accept a country's accession the Convention does not apply between them. For this reason, adoptions in Guatemala and Cambodia are not recognised in the U.K. Article 26 states that recognition includes (a) the legal parent child relationship between the child and the adopters; (b) parental responsibility of the adoptive parents for the child; and (c) termination of a pre-existing legal relationship between the child and the mother and father 'if the adoption has the effect in the Contracting State where it was made.' An attempt to secure automatic termination of birth parents' rights in *all* cases was thwarted by the inclusion of 'simple adoptions' which exist in some jurisdictions, notably France, and allow the creation of a new parental relationship without permanently ending the original one.

Adoption in Hungary, Latvia and Slovakia

Hungary, Latvia and Slovakia have each objected in recent cases to the adoption of their nationals in England. Each is party to the Hague Convention. Substantial numbers of inter-country adoption orders have been made in these states over the last 10 years, exceeding the number of domestic adoptions made there. Contracting Parties cannot make reservations when ratifying the Hague Convention on Inter-country Adoption, however, the State's power to determine the suitability of a child and to agree the match between the adopter and the child, enables it to control the adoption of its nationals by nationals (or others) resident overseas. For example, Romania limits inter-country adoptions to the child's relatives.

According to its responses to the Hague Intercountry Adoption Section's 2015 survey, Hungary arranges intercountry adoptions with partners in Italy, the Netherlands, Norway, Spain, Sweden and the USA. These adoptions take place in Hungary with applicants being required to spend a few days there, undertaking the necessary introductions, further assessments and formalities. In addition, foreign nationals resident in Hungary can apply to adopt Hungarian children under Hungarian domestic law. There is nothing in the responses that suggest adoptions of Hungarian children are limited to Hungarian nationals, although Hungarian nationals seem to be given priority. Nor are all these adoptions consensual; there is provision for the guardianship office to declare children adoptable or apply to the court for deprivation of parental rights where the parents fail to visit. The position is similar in Latvia although inter-country adoptions entail 3 visits there by overseas adopters. In keeping with the subsidiarity principle, inter-country adoption is only possible where domestic adoption cannot be arranged, but foreigners resident in Latvia can adopt under domestic law.

The position in Slovakia is similar but inter-country adoptions can take place either in Slovakia or in the prospective adopters' country of residence, following the child's formal placement with them. Slovakia does not have a list of countries with which it arranges adoptions and can accept adoption by applicants from any Hague State. According to the survey response, the children available for inter-country adoption in Slovakia are young, aged 1 to 3 years and mainly of Roma heritage.

Objections to the adoption of their citizens in England appear to reflect a desire to control the adoption process and not any wider rejection of adoption by non-nationals or concerns about adoption practice. The children who have become subject to adoption plans in care proceedings here appear to be similar to those for Hungary, Latvia and inter-country adoptions. In the case of Slovakia, theoretically at least, the adoption could take place in England. Whilst any inter-country adoptions will be recognised in the adoptive parents' home State under the Hague Convention, the position of the domestic adoptions is unclear. Of course the issue of recognition will not arise where the non-nationals remain in the country of adoption. If they return home or relocate elsewhere, the placing states will, no doubt want the children's legal relationships to be recognised. If foreign domestic adopters are nationals of countries that have ratified the Council of Europe Convention of Adoption, they should be able to secure their nationality for the child, avoiding the key immigration difficulties that non-recognition often brings..

Unrecognised adoptions

Lack of recognition remains an issue in England and Wales for adoptions which take place in countries that are not Hague States. For example, an adoption in Russia or the Ukraine, by a person habitually resident in England and Wales will not be recognised here. These are 'limping adoptions' recognised in the state where they were made but not in the U.K. If Russia, Ukraine or Ethiopia ratified The Hague Convention, recognition would be automatic. Until they do, difficulties caused by non-recognition can be resolved by re-adoption under the Adoption and Children Act 2002. There is the possibility of recognition at common law (Adoption and Children Act 2002, s.66(1)(e) *and Re Valentine* [1965] 1 Ch 831). In that case the court refused recognition despite the similarity in adoption practices because the adopter was not domiciled in the state where the adoption took place. Subsequent cases have applied this approach, recognising foreign adoptions with formal procedures and a focus on child welfare if the adopters qualified by domicile (or residence) where the adoption took place and there was no attempt to avoid the protections of the Hague regime. In effect, the court was applying comity, taking a 'do as you would be done by' approach, hoping that the foreign jurisdiction would reciprocate if the issue arose (and see *Travers v Holley* [1953] P. 246)

Where the adoption is not recognised and the child is not re-adopted there is no formal legal relationship between the adopter and the child under English law and, unless naturalised, the child is not British citizen. Whilst the need for re-adoption may seem irksome, it helps to promote acceptable standards in inter-country adoption by discouraging adoptions in non-Hague States and imposing additional checks on them. Adoption practices in many non-Hague States are unacceptably poor and even corrupt, justifying both discouragement and additional safeguards. Indeed, the Special Commission of the Hague Conference recommended this in 2010 alongside encouragement of the ratification of the Convention.

Conclusion

Whilst automatic recognition of all adoptions, not just inter-country adoptions, in States where the child's welfare is central and there are high standards of practice is desirable, it has little relevance to the social reality of most children in the U.K., who need permanent family care. Where a child's welfare demands adoption, both local authorities and the courts must facilitate this, irrespective of the fact that a child and their parents are foreign nationals or domiciled overseas. This is not to put adoption before parental or kin care but to prevent additional hurdles being placed which make

adoption more difficult to plan or take longer to achieve. To treat children differently because of their birth parents' status is contrary to the UNCRC; where children have established relationships with prospective adopters it is also contrary to their (and their carers') rights under the ECHR. Any limitations on the effect of the adoption overseas because it is not recognised in the birth parents' home state are illusory because of the rights created by U.K. citizenship and the obligations under the ECHR to respect their family life. Knowing that an adoption order made in the U.K. is, or is not, recognised in a foreign state is immaterial to the decision to make that order. Consequently, it is not necessary to obtain evidence of the effect of the order overseas to dispose of the proceedings justly (Children and Families Act 2014, s.13(6)). Adding further considerations in adoption decision-making will only obscure the central concern, the welfare of the child.