JUSTICE 1 COMMITTEE

Wednesday 9 March 2005

Session 2

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JUSTICE 1 COMMITTEE
† 7th Meeting 2005, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

THE FOLLOWING ALSO ATTENDED:

Louise Miller (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 1

† 5th and 6th Meetings 2005, Session 2—held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 9 March 2005

[THE CONVENER *opened the meeting at 10:06*]

Item in Private

The Convener (Pauline McNeill): Good morning and welcome to the seventh meeting in 2005 of the Justice 1 Committee. I ask everyone to make sure that they have switched off their mobile phones. We have received apologies from Jamie Stone.

I invite members to agree to take item 3, which is a briefing from the Scottish Parliament information centre on the Family Law (Scotland) Bill, in private. Is that agreed?

Members *indicated agreement*.

Subordinate Legislation

European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgements) (Scotland) Regulations 2005 (SSI 2005/42)

10:07

The Convener: Item 2 is subordinate legislation. I refer members to a note that the clerk has prepared on the European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgements) (Scotland) Regulations 2005. This negative instrument seeks to amend various domestic legislation provisions that are to be read subject to Council regulation 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters—I will not read out the full title because it goes on for ever.

The Justice 1 Committee has been following the progress of the regulation as part of its scrutiny of European justice and home affairs. I say at the outset that I am sure that I am not alone in thinking that the regulation, which came into force on 1 March, is quite complex. We are required to consider the related Scottish statutory instrument under the negative procedure, and no motion to annul has been lodged.

To brief us on the regulation, I am delighted to welcome Louise Miller, Claire Newton and Anne Cairns from the Scottish Executive. They are available to clarify the many questions that I am sure the committee will have. Is there anything that you would like to say to the committee about the regulation, perhaps to give us a summary of where we are?

Louise Miller (Scottish Executive Justice Department): Although Council regulation 2201/2003—or Brussels 2a—is a complex regulation, in a nutshell it is about preventing conflicts of jurisdiction in family law cases between the courts of different member states by setting out rules about which country's courts should hear particular cases. It is also about how the correct court's judgment can be recognised and enforced in all the other member states of the European Union. There are also some provisions that supplement and strengthen the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

The European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgements) (Scotland) Regulations 2005—that is a bit of a mouthful—are designed to insert references to Brussels 2a in primary legislation in situations in which the terms of Brussels 2a and

the terms of the primary legislation might conflict. The regulations are not an attempt to set out in domestic law the provisions of the European regulation in detail. The regulation is not a directive and does not need to be transposed; it automatically forms part of Scots law from 1 March. We really want to highlight to anyone who is looking at primary legislation the fact that this EU regulation exists and might be relevant. We are looking for publicity as much as anything else.

Stewart Stevenson (Banff and Buchan) (SNP): Although the regulations came into force on 1 March, the provisions will come into force over a period of time. Is that correct?

Louise Miller: Brussels 2a contains different dates. The first of March is the key date because that is when the regulation itself came into force. However, some of the provisions in the regulation, such as those that deal with notifying the Commission and with member state courts and procedures, went live earlier. Obviously, if those provisions had not gone live at an earlier date, the Commission would not have had that information in time for 1 March. Therefore, there was a staggered entry into force in that sense, but 1 March was the key date from the point of view of the regulation going live in the member states.

Stewart Stevenson: Are there any provisions within this set of changes that have still to come into force?

Louise Miller: No. There are transitional provisions at the end of the regulations that are designed to make provision for proceedings that might already be under way as of 1 March, but 1 March was the date on which the regulations came into force and there are no provisions that come into force on a later date.

Stewart Stevenson: The United Kingdom is unusual in that it has more than one central authority. Has the fact that it has three central authorities caused difficulties for other states in identifying which central authority they should deal with under previous instruments?

Louise Miller: Not really. Our experience has been that member states generally work out which is the right central authority to contact. When they get it wrong, they normally send cases to London, I am afraid to say. However, our colleagues in the Department for Constitutional Affairs know perfectly well that those cases should be forwarded to us and they always do that. As you say, there are different central authorities under different instruments already, particularly the Hague convention on international child abduction and the Hague maintenance convention. Therefore, we are quite used to handling such legislation in the United Kingdom. Other countries that deal with us under those instruments have some experience of the system by now as well.

Stewart Stevenson: In effect, the EU has legislated for us previously without regulations coming before us directly, but has that caused any difficulties in practice in the courts? Do you foresee any particular issues that might arise with this regulation?

Louise Miller: No, I do not think so. It is hard to say what might happen in the future. To be honest, our experience with EU regulations is that there is not a great amount of Scottish case law. I am aware of only one case under Brussels 2 that went through the Court of Session. Brussels 2a should generate more case law because it applies to a wider range of cases involving children, but those cases do not happen every week—they do not happen very frequently. It will probably take time to build up a picture of how the legislation pans out.

In general, anything that the Scottish Parliament can do to track the measures through the Brussels process is a useful added layer of scrutiny. The Scottish members of the UK negotiating team would certainly feed in anything that emerged from that scrutiny. However, at this stage, I do not envisage any particular problems with the regulation.

Stewart Stevenson: Were lawyers qualified in Scots law among the Scottish members of the negotiating team?

Louise Miller: For Brussels 2a, my former head of division, Peter Beaton, was part of the team. He attended the Brussels working group meetings regularly.

10:15

The Convener: Have you replaced Peter Beaton on the team? Do we have a replacement?

Louise Miller: Peter Beaton does not really have a direct replacement. After he left the Scottish Executive, for a while we had Colin Imrie, who headed up a cross-cutting team of people with an interest in EU issues within the Justice Department. The nature of the Justice Department's involvement was restructured and we created a cross-cutting team that brought in people from different divisions who all had some interest in European justice and home affairs issues. Colin Imrie has now left to set up his own business. For the moment, the EU team is being led by the head of group, who is Valerie McNiven. That is the interim arrangement; it may change in the future.

You are right that the technical work that Peter Beaton did is largely being done by me because he is a solicitor and so am I. Other administrators

in the group do not have the same technical legal background. Their focus has been much more on profile raising and developing a common strategy.

The Convener: If there were to be further discussions—on the proposed EU white paper on divorce, for example—would Valerie McNiven represent the position of Scots law in those discussions?

Louise Miller: If there were working groups, it is likely that I, or whoever was doing my job at that time—I might have moved on by then—

The Convener: Do not say that.

Louise Miller: In Brussels, things can take a long time to happen, so you never know.

The head of the private international law branch would probably be responsible for that work. The leader of the EU JHA team is performing a much more strategic role that involves liaison with Whitehall departments and the European Commission and the development of strategy. The technical work is being done largely at branch level.

The Convener: In that case, I will ask you a few technical questions. My concern about the Brussels 2a regulation has always been that, as you said earlier, it may apply to a wider group of people in Scotland in the future. Most ordinary citizens will not even know that the law has changed until they are affected by it.

Let me give as an example a Scottish national who lived abroad—in France, say—but who moved back to Scotland following a separation or a divorce. Their partner, who lived in France, would apply to the French court for a decision to be made about their children. What if the French court had a tendency to grant access or custody rights to French nationals? Is there anything to prevent that from happening?

Louise Miller: Under Brussels 2a, the jurisdictional laws for cases that relate to children are focused primarily on the residence of the child rather than on the residence of the adults. Although in certain circumstances it is possible for a case involving parental responsibility to be held in the context of on-going divorce proceedings, such a case would usually be heard where the child lived rather than where the adults lived.

It is possible to overstate the differences between the approaches of different member states to cases of child custody. To a large extent, EU instruments are founded on mutual trust and on a recognition of the fact that member states share many common values on the issue. When making their decisions, member states' courts all focus on the welfare principle and on the best interests of the child. I am certainly not aware that there have been any great problems.

The Convener: If that is all true, why did certain member states push for a regulation? Surely the courts always have the welfare of child in mind, and there is also the Hague convention. Let us say that a French child was taken to Scotland by the child's Scottish mother. I assume that the regulation allows the person who is habitually resident in France to go to the French court in the first instance and ask for a judgment.

Louise Miller: Well, the—

The Convener: That court may judge that the custody of the French child who is living in Scotland should be given to the person who is living in France. Is there anything to prevent the court from taking that view?

Louise Miller: Such situations should not arise. The primary rule on jurisdiction in cases that involve children is the habitual residence of the child and not where the adults are. Article 12 of Brussels 2a, which is headed "Prorogation of jurisdiction", contains a provision that a member state that is exercising jurisdiction in a divorce case can also have jurisdiction in any matter relating to parental responsibility that is connected to the divorce. However, that provision applies only when the jurisdiction of the court has been expressly accepted by the spouses and by all holders of parental responsibility and is in the best interests of the child. A divorce court in a member state can consider the custody of the child, where the child is not living in that member state, only in pretty restricted circumstances. All parties would have to accept that.

The Convener: I see.

Louise Miller: The regulation does not alter domestic substantive law. It does not change the law of Scotland—or, indeed, the law of France or of Germany—on who should have parental rights. There is a theoretical possibility that other countries might decide those cases in ways that we do not like, and vice versa. However, that possibility exists already, in that member states' national laws differ one from the other. It is also possible for people to settle in other member states, have children with nationals of those states and so on.

All that Brussels 2a does is set out the jurisdictional rules on which court should deal with a case. If two courts have jurisdiction, the court that is seised first should generally take the case and the court that is seised later should give way. There are then provisions on more speedy recognition and enforcement throughout the EU.

The purpose of the regulation is the avoidance of jurisdictional conflicts and to ensure that judgments are recognised and enforced. That is the rationale behind the regulation; it does not

change the differing national laws on parental rights that exist at the moment.

Stewart Stevenson: I will develop the point in two respects. For how long after a child has left its habitual residence is it deemed still to be a resident of the country that it left? Is that a matter for the interpretation of the court?

Louise Miller: It is largely a matter for interpretation. Habitual residence is an expression that is used quite widely in that context. It is used in the Hague child abduction convention and in a plethora of international instruments. It is rare to have a precise definition of habitual residence; indeed, a precise definition is not set out in the instrument. It is a matter of fact and degree as to how quickly a new habitual residence can be acquired. It is a question of looking at all the circumstances. Article 9 of Brussels 2a contains a provision for a court in the country of former habitual residence to retain jurisdiction.

Stewart Stevenson: Is this a practical problem or is it something that simply appears to be a problem from reading the material that is in front of us?

Louise Miller: It could be a practical problem. For example, it would be a problem if someone got a decision that was way out about how quickly a habitual residence could be acquired. Habitual residence can be acquired quite quickly. One would guess from reading article 9 that a new habitual residence can certainly be acquired within a few months. I once read a case that involved another EU state in which a lower court made the rogue decision that children had acquired a new habitual residence in that state within six days of moving there. That decision was overturned further up the court system.

Such rogue decisions could be made, but defining habitual residence is a common problem. Nobody has a precise definition of exactly how long that takes and everyone must consider the facts and the circumstances. That is as much a problem for French or Italian courts as it is for ours.

The Convener: So member states are not required to define habitual residence.

Louise Miller: That is not defined in the regulation.

Stewart Stevenson: I understand that Denmark is not adopting the regulation—you can correct me if I am wrong—but since there is essentially free movement in the European Union and Denmark is part of that, what arrangements exist in relation to Denmark?

Louise Miller: If I remember rightly, Denmark is a party to the European convention of 1980 on the recognition and enforcement of custody decisions, so arrangements are in place to recognise and enforce Scottish court orders that relate to custody.

Stewart Stevenson: Nonetheless, article 2.3 of the regulation says:

> "the term 'Member State' shall mean all Member States with the exception of Denmark".

Another provision in the regulation refers to previous opt-outs under Denmark's treaty of accession.

Louise Miller: Denmark is entirely excluded from EU justice and home affairs activity. It has decided so far not to participate in such EU activity and it has a blanket opt-out not only from family law instruments, but from justice and home affairs instruments full stop. The UK and Ireland also have an opt-out of a sort, but ours is more flexible, because we are allowed to opt in, which is generally what we have done. We simply reserve the right not to participate if we think that something is objectionable.

Stewart Stevenson: I will leave the legalistic position that we have just covered. In practice, is there an issue? Is Denmark a refuge to which a parent can take children to get away from another parent and to leave the jurisdiction of the European arrangements in the regulation and other instruments?

Louise Miller: Denmark is a party to the European convention and to the Hague convention on international child abduction, so it is not a black hole. It is a party to major treaties in this field. If a child were abducted to Denmark and taken away from a parent who had parental rights, we would expect to get them back under the Hague convention.

The more fast-track recognition and enforcement provisions that are in Brussels 2a do not apply to Denmark. Reliance would be placed on the European convention for recognition and enforcement, and that system may not be as streamlined. The rules about conflicts of jurisdiction in Brussels 2a would not apply, so such situations would be regulated by the national laws of the countries that were involved rather than the common set of rules in Brussels 2a.

In practice, our experience is that Denmark is also a small country and does not tend to be one with which we have major dealings. It is not that we have no dealings with Denmark, but the European countries with which we tend to have the most cases are Germany and Spain, for example. Most child abduction cases do not involve EU states but countries such as the US or Australia. In an average year, we might not see any cases that involve Denmark.

Stewart Stevenson: Does that imply that a parent who wants to remove a child will generally go to an Anglophone country, because of the cultural and linguistic similarities?

10:30

Louise Miller: It is usually to do with where one of the parents came from. Often, when a transnational marriage breaks down, the spouse who has moved to set up the common family does not feel that they want to remain in a foreign country any more. Sometimes, they choose to leg it with the child back to their former country of residence, often to live with their parents or relatives. To a large extent, that is the way in which the cases tend to pan out.

We see an awful lot of people from other English-speaking countries because Scots are not brilliant at languages and tend to marry other English-speaking people. Increasingly, however, we also see people from other European Union states. Of those, we tend to see people from the member states with the biggest populations rather than people from particular smaller states, apart from Ireland, with which we have close linguistic and geographical links. We might see a case involving people from a smaller state only once every few years.

Margaret Mitchell (Central Scotland) (Con): I apologise for arriving late. Perhaps my question has already been asked, but is there any way in which the regulation would affect divorce settlements? Is it possible that there would be a different settlement as a result of the regulation than would otherwise have been secured under our domestic law?

Louise Miller: No. The regulation covers only conflicts of jurisdiction and recognition and enforcement. To the extent that a court other than a Scottish court would hear a case under the jurisdictional rules, its law would apply. However, the regulation certainly does not affect the rules that a Scottish court would apply to resolve a case that was before it. All that it does is regulate whether the Scottish court should take the case or not and how its decision, once issued, can be enforced in other member states.

The Convener: In the case of a Scottish person returning to Scotland with a child, if the general rule is that the country of the child's habitual residence has jurisdiction, it would be the country that they had left that would have jurisdiction. Is that correct?

Louise Miller: No—not if they acquired a new habitual residence in Scotland. There are special provisions on child abduction in the regulation. If the child has been unlawfully removed to Scotland in breach of the Hague convention, a court in the country of the child's former habitual residence would generally continue to have jurisdiction. However, in a case in which a parent and child have left a country quite legally, perhaps with the permission of the courts in that country, and have come to settle in Scotland—

The Convener: Is that likely? If, following the breakdown of a marriage, the mother, who has parental rights in relation to the child, leaves the father and comes back to Scotland, that would not be abduction, would it? She is unlikely to ask the court to give her permission to come back to Scotland.

Louise Miller: It would depend. Under the Hague child abduction convention, a person cannot take a child to another country in breach of the other parent's rights of custody. That would apply if the other parent has custody of the child or if the other parent is entitled to have the child remain in their country of origin. Under Scots law, for example, a person generally cannot take the child abroad without the consent of the other parent.

The Convener: That would force the mother to go to the courts in the country that she wishes to leave.

Louise Miller: Often, that will be the case. Certainly, if a person decides to remove a child without consulting the other parent, there is a good chance that that will be illegal and a breach of the Hague convention. The situation depends on the law of the country of origin. The Hague convention says that child abduction occurs in situations in which the child is removed in breach of the rights of custody that exist under the law of the member state of origin. Anybody who legs it with the child without asking the other parent or without going to the court is definitely taking a risk. In a lot of cases, that will be a breach of the Hague convention, which can be used to get the child back.

The Convener: So, at some point in that scenario, the mother could be in breach of the Hague convention, and the court of the country of origin—say, France—could make a judgment that would force the child to go back to that country. What would happen if the courts disagreed with each other? What would happen if the mother had fled France to escape domestic violence and did not have time to get the consent of the French court and the Scottish court supported her decision?

Louise Miller: All signatories to the Hague convention have undertaken, subject to very limited defences, to return abducted children to their country of origin. In the example that you gave, the French authorities would apply to the Scottish authorities and ask them to go to a

Scottish court to get an order for the return of the child to France. The defences are very limited—for example, that return would be a grave risk to the child or would place them in an intolerable situation. Courts are pretty reluctant to uphold those defences, even in situations in which there has been violence or abuse. Usually, what is necessary is an indication not only that there have been problems but that the courts or national authorities in the country of origin would not adequately protect the family on return. A Scottish court would say, "Yes, there may have been domestic violence, but we are satisfied that the national authorities in France know about it and are putting protective measures in place."

Return of the child to the country of origin does not mean return to the custody of the other parent. It is very important to be clear about that point. An order for the return of the child under the Hague convention is not an order about custody. The whole premise of the Hague convention is that the child should be returned to the country from which it has been abducted. The courts should then decide, after a proper hearing of all the evidence, what the child's future should be. That is an attempt to prevent forum shopping. It is designed to stop people fleeing with children to jurisdictions that they regard as their own jurisdictions and to ensure that the child's future is decided in the country in which the child has been living and in which all the witnesses and evidence will be located.

The Hague convention is not about who gets custody of the child in the long run. It is possible for the child to be returned—the courts in the country of origin might eventually decide that the parent who abducted the child should nonetheless still be given custody, because that would be in the child's best interests. The courts sometimes go on to decide that that parent can leave the country with the child, subject to access arrangements being put in place for the parent who is being left behind. The Hague convention is a mechanism to get the child back to the right jurisdiction: it is nothing more than that.

The Convener: I am aware that the UK delegation argued very hard to try to improve the regulation. There was concern that the regulation would undermine the Hague convention, and I know that the UK delegation won a number of improvements. Are there still areas in which the Hague convention was undermined by the regulation?

Louise Miller: What is in the regulation now does not contradict the Hague convention, as the provisions are bolted on—it is almost the Hague convention plus. The regulation is meant to make it even more difficult than the Hague convention already makes it to abduct children from one member state to another. The provisions are additional to what is already in the Hague convention.

The UK was concerned, when the negotiations took place, about the possibility that the whole Hague convention might be communitarised. At one point a group of member states wanted to do that, which essentially would have meant repeating all the Hague convention's rules in Brussels 2a. One of the main reasons for concern about that was that it would have given the Community external competence over the whole Hague convention. We wanted to retain our ability to go to negotiating sessions in The Hague as a member state and negotiate changes and reviews of the Hague convention. We feel that we have a strong interest in the convention and that we are a good operator of it, so we did not want to lose that competence. Another concern was that if all the Hague convention's rules were put into a European regulation, the European Court of Justice could interpret all of it. The European Court of Justice is a very good court, but that would potentially create another layer of delay in abduction cases that involve children, which need to be resolved very quickly.

The member states were more or less divided down the middle on whether to communitarise the Hague convention, but as there was clearly no consensus in favour of doing so the camp that did not want to do that won out. We now have supplementary rules rather than the whole Hague convention being lumped into Brussels 2a.

The Convener: That concludes our questions. I thank you for that very thorough explanation and for coming along to explain the regulations.

There is no motion to annul. Is the committee content with the regulations?

Members *indicated agreement*.

The Convener: It is therefore agreed to make no recommendation to the Parliament.

We have agreed to move into private session for item 3 on the Family Law (Scotland) Bill.

10:40

Meeting continued in private until 12:57.

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