



# Brexit and children's human rights – implications for cross-border family law

## Context

Even before the June 2016 EU Referendum, Together (Scottish Alliance for Children's Rights) has been working with its members to raise awareness and understanding of how the UK's membership of the European Union impacts on children and young people's rights. As the UK now prepares to leave the EU, Together is taking part in a range of activities to highlight the importance of ensuring that children's rights are considered in Brexit discussions at European, UK, Scottish and local level. As part of this work, Together has worked with an LLM student from the University of Edinburgh to explore the impact Brexit may have on the legal protections of children's human rights.

## Brexit and children's rights

An initial mapping exercise of EU legislation, regulations and directives looked at the many EU protections that support children's rights; from family law, child protection and immigration through to the environment and data protection. Wider research<sup>i</sup> shows that the EU has enacted over 80 legal instruments that confer direct entitlement for children.<sup>ii</sup> As such, it was necessary to narrow the scope of the research to focus on an in-depth case study in one area: cross-border family law in relation to parental responsibility, child abduction and maintenance payments.

## Key findings

In summary, the research demonstrates:

- There is a significant number of children born to families in Scotland who are at risk of losing important protections of their rights in relation to cross-border family law (over 10% of all babies born in 2016).
- Children's rights are being increasingly embedded into EU Instruments. This ensures children's human rights are protected, respected and fulfilled across EU member states in line with the Charter of Fundamental Rights. This is clearly evidenced in developments in relation to cross-border family law.
- Children's human rights have not been adequately considered in discussions around Brexit, resulting in a serious risk that many families with both UK and EU parents could be left with little legal protection in custody disputes.

## Summary

### How many children and families could this affect?

An estimated 181,000 EU citizens currently live in Scotland<sup>iii</sup> and a further 120,000 Scottish citizens live in other Member States.<sup>iv</sup> Many have formed ‘international families’, with people from Scotland and the UK parenting children with people across the EU. Indeed, over 10% (5604) of babies born in Scotland in 2016 were to a parent born in another EU Member State. Of these, 1613 also have a parent born in the UK.<sup>v</sup>

Sadly, but inevitably, a certain proportion of these families will face contentious breakdowns. In extreme cases, this can result in parental child abduction. In 2016, there were twelve recorded child abductions from Scotland to another EU Member State, and eight abductions to Scotland from another EU Member State.<sup>vi</sup> Given the cross-border nature of such family cases, it is vital that families have access to clear rules determining which country’s courts shall have jurisdiction and under what conditions decisions from one state may be recognised and enforced in another. This is even more pertinent given the potential impact Brexit may have on EU nationals’ residence rights. Changes to immigration requirements could affect the ability of some cross-border families to stay together.

### What EU protections are provided for children’s rights in cross-border family law?

Procedural matters in relation to cross-border disputes across EU member states are dealt with under the Brussels II *bis* Regulation (“BIIR”).<sup>vii</sup> This covers issues such as child custody, contact, child abduction child maintenance. The EU framework ensures that children get the opportunity to have their opinion heard during abduction return proceedings<sup>viii</sup> and will soon allow children’s opinions to be heard in all proceedings within the scope of BIIR<sup>ix</sup> and ensure that the best interests of the child is a mediating principle.<sup>x</sup> The EU regulations also ensure that decisions are reached within eighteen weeks “except where exceptional circumstances make this impossible”.<sup>xi</sup> New proposals include additional safeguards to speed up proceedings, including limiting the number of appeals,<sup>xii</sup> as well as fast-tracking the enforcement of access rights<sup>xiii</sup> to save time and costs for families.

### How might these protections be lost?

The EU Withdrawal Bill means that EU instruments lose much of their effectiveness. UK courts would be under a unilateral obligation to respect and enforce incoming judgements from remaining Member States but these states would no longer be bound to treat UK orders in the same manner.<sup>xiv</sup> The Withdrawal Bill makes provision for the repeal of EU-derived law, which is based on reciprocal arrangements<sup>xv</sup> and so the UK may seek to fall back on existing international agreements (in this case, the Hague Conventions) to regulate cross-border family cases between the UK and remaining EU Member States post-Brexit. This raises several concerns:

- The EU has positively influenced family law in furthering children’s human rights protections, particularly in the context of the right of the child to have an opportunity to express their views,<sup>xvi</sup> the requirement for a balance between the depth of an individualised assessment into the child’s best interests<sup>xvii</sup> and the speed of proceedings<sup>xviii</sup> and the right of the child to maintain regular and direct contact with their parents.<sup>xix</sup> Reliance on the Hague Conventions may result in a watering down of protection for children.
- The UK acceded to the 2007 Hague Maintenance Convention through its membership of the EU, and to 1996 Hague Convention on Parental Responsibility “as if it was an EU instrument”. This means that the UK will not be bound by the 2007 Convention post-Brexit, and that there may need to be primary legislation to clarify the status of the 1996 Convention. Further concerns have been raised regarding the application of the 1980 Hague

Abduction Convention between the UK and remaining EU Member States after Brexit.<sup>xx</sup>

There is an urgent need for the UK Government to address these issues to ensure there is no “gap” in the application of these Conventions upon Brexit that results in no protections whatsoever.

- Brexit has the potential to result in more hostile immigration measures, which could make it more difficult to enter and reside in the UK for the sake of family contact or reunification. In the absence of EU protections, families would have to rely more on Article 8 ECHR (right to family life). However, judges have not always been consistent in interpreting this right in favour of children, which has led to many children having to relocate or have “Skype” relationships with their families abroad.<sup>xxi</sup>

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<sup>i</sup> Making Brexit work for children - A Discussion Paper (September 2017).

<sup>ii</sup> For full details of the legal and policy instruments enacted at EU level in relation to children, see [http://ec.europa.eu/justice/fundamental-rights/files/acquis\\_rights\\_of\\_child.pdf](http://ec.europa.eu/justice/fundamental-rights/files/acquis_rights_of_child.pdf)

<sup>iii</sup> i.e. 3.4% of the current Scottish population, see Scottish Parliament: Culture, Tourism, Europe and External Relations Committee, *EU Migration and EU Citizens' Rights* (SP Paper 84.1, 6 February 2017)

<sup>iv</sup> See Chris McCall, 'EU referendum: Scots living abroad share their views' *The Scotsman* (Edinburgh, 1 June 2016)

<sup>v</sup> Of the 54,448 live births, 5604 of these were to mothers and/or fathers born in other EU Member States. Of these 5604 births: 478 were to Scottish mothers, 824 were to Scottish fathers, 102 were to mothers from elsewhere in the UK, 209 were to fathers from elsewhere in the UK, 2890 were to both mothers and fathers from another EU Member State and the remaining births were to mothers or fathers from non-EU countries. See National Records of Scotland, 'Table 3.10: Live births, country of birth of mother by country of birth of father, Scotland, 2016' (*National Records of Scotland*, 2016) <<https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.10.pdf>> accessed 1 August 2017; see also National Records of Scotland, 'Scotland's Population: The Registrar General's Annual Review of Demographic Trends 2016' (*National Records of Scotland*, 2016) available at <<https://www.nrscotland.gov.uk/files//statistics/rgar/16/16rgar.pdf>> accessed 1 August 2017, 30

<sup>vi</sup> Figures gratefully obtained from the Scottish Central Authority. In the same period, there were five return requests received for children abducted to Scotland from a *non-EU* country, and eight outgoing return requests for children removed from Scotland to a *non-EU* country.

<sup>vii</sup> The EU has no competence to determine the *substantive* family law of its Member States, it may only lay down common rules of procedure such as which Member State's courts shall have jurisdiction, and under which conditions orders from one country may be recognised and enforced in another.

<sup>viii</sup> BIIR Article 11(2). In abduction return proceedings, BIIR provides “it shall be ensured that the child is given an opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity”.<sup>viii</sup>

<sup>ix</sup> The proposed Recast of the Brussels II *bis* Regulation (to which the UK has opted in but it is not clear when it will enter into force) offers even stronger protection of this right by providing that children must be given an opportunity to be heard in *all* proceedings falling within the scope of the new Regulation (not just abduction return proceedings) (See Recast BIIR Proposal, Article 20)

<sup>x</sup> The proposed Recast recognises a greater linkage between the best interests of the child and ensuring the child has an opportunity to be heard (Recital 13)

<sup>xi</sup> Whilst BIIR Article 11(3) states ‘six weeks’, the proposed Recast clarifies that this limit pertains to each stage of proceedings (maximum of 6+6+6 weeks) Explanatory Memorandum to Recast Proposal, 13 (the three stages being: first instance, appeal, enforcement).

<sup>xii</sup> Recast BIIR Proposal art 25(4)

<sup>xiii</sup> BIIR Article 41 which abolishes the requirement of *exequatur* so access orders are directly enforceable in another Member State provided they are accompanied by the appropriate certificate.

<sup>xiv</sup> see comments of Professor Lowe, noting that the BIIR and MR would lose their effectiveness due to this loss of reciprocity – Nigel Lowe, ‘Some reflections on the options for dealing with international family law following Brexit’ (2017) *Family Law* 399, 405

<sup>xv</sup> European Union (Withdrawal) Bill, s.7(2)(c)

<sup>xvi</sup> CRC art 12

<sup>xvii</sup> CRC art 3

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<sup>xviii</sup> Again see General Comment 14 (n 16), para 93 (explaining that a child’s perception of time differs from that of adults, prolonged proceedings can have an adverse impact upon children and, accordingly, proceedings involving children should be completed in as short a time as possible)

<sup>xix</sup> CRC art 9(3)

<sup>xx</sup> AIRE Centre, ‘The UK’s Continued Participation in Hague Instruments Following Brexit’ (“Brexit – Does Brexit really mean Brexit for Family Law?” Conference, London, 26 June 2017)