

The Balance of Competences Review Team
Civil Judicial Cooperation
Ministry of Justice
London

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by email

Keywords: Regulation Brussels II, Child Abduction, **maladministration,**
secondary internal legislation,

Dear Sirs

I am writing in response to your call for evidence with regard the review of the Balance of Competence in the area of judicial cooperation (family matters).

I would like to bring to your attention a case involving my tow underage children, myself and the UK national authorities, in particular the Foreign and Commonwealth Office.

In my view this a case of maladministration which shows what are the consequences in a cross-border-child custody dispute in the absence of EU legislation. It is hoped that my children's precedent could lead to a review of the practice of issuing passports to minors, especially to those on dual nationality and for whom custody proceedings have already started in another Member State.

In my view the maladministration is due to a conflict of the secondary internal legislation **"...with the fundamental rights protected by the Community legal order or with the other general principles of Community law"**, see **decision** of the Court –ECJ–, in case C- C-403/09, para 34. The consequences of this maladministration in this case where the scope and objectives of the civil judicial cooperation were compromised, is that **for more than three years my two underage sons and myself were deprived of having any direct contact.**

In the rest of this letter I explain the facts and highlight the relevant EU laws.

Yours, faithfully

Biographic data

- The couple met in : in August 1990. They were married in a civil ceremony in in January 1992 and in a Christian orthodox ceremony in in September 1999.
- I, the Father, , am of origin and a citizen.
- The Mother, is of ethnic origin and holds citizenship. In March 2001 she obtained citizenship.
- was born in in December 2000 and holds dual, citizenships. He lived in London until June 2001.
- was born in in October 2004 and holds citizenships. To my knowledge, never in his life he has been in the UK.
- I, the Father, and the two children are **domiciled** (domicile of origin, see decision on case Udny vs Udny, House of Lords, 3 June 1869).

The facts

- I, , filled proceedings for a divorce and exclusive custody rights on 25 April and 20 May 2009 respectively, in the court of first instance in
- On 29 May 2009, my estranged wife, filed proceedings for a divorce and exclusive custody rights in claiming residual jurisdiction under Regulation (EC) 2201/2003. The petition have not yet been, officially, serviced to me, but remains on file at the county court (Annex 2).
- In middle June 2009 the two lawsuits filed in the courts in were serviced to On 26 June 2009 , acting in bad faith in order to frustrate the existing proceedings and to obstruct the course of justice she filed proceedings for a divorce and custody in courts
- In the first week of July 2009 there was reconciliation and the parties agreed to move and live in where the family owns a property.
- On 8 August 2009 brought the two children to where the father was already living. Three days later returned to the At the end of August informed me that she would not return to and she wanted the two children to travel to

- On 28 August 2009 I applied to the [redacted] family court for a) prohibit steps order restricting the children from living the country until [redacted] courts make a final judgment on their custody. On the same day the court issued an ex-parte court order prohibiting the two children living [redacted] without my or the court's consent.
- In August, September and November 2009 the [redacted] national authorities [redacted] were informed about the on going legal dispute on custody rights and that as a custody rights holder I object the issuing of new passports for the two children. It was not possible to obtain a court order from a [redacted] court since the children were not present in the [redacted] territory.
- In March 2010 [redacted] presented to the [redacted] national authorities a divorce certificate, issued by the [redacted] authorities, who also awarded to her exclusive custody rights, without trial (by *de facto*), of our two children.
- At the custody rights trial in [redacted] s in January 2011 [redacted] asked the court to recognize [redacted] decision which grants her exclusive custody rights. in In August 2011 the court in [redacted] issued an interim decision where declined the recognition on the [redacted] court decision on the ground that breaches the provisions of the [redacted] law as well article 6 of the ECHR. [redacted] court decision remains an non authentic instrument, see article 46 of Regulation, and cannot be taken into consideration (Annex 1)

The relevant EU Laws:

- i. This is a cross border custody rights dispute and is dealt under BIIR (see Appendix section A). Article 2(9) states that 'rights of custody' are covering 'rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence', see also Court decision on case C-400/10-para 8.
- ii. The place of habitual residence is a technical term used to determine which court has exclusive international jurisdiction to deal with any dispute arising on the rights determined by the BIIR, such as the award of exclusive rights of custody. The courts in [redacted] were seized in May 2009 instantly uphold international jurisdiction. It is both unnecessary and in a breach of the EU laws (*Lis Pendens*, art 19 in BIIR) the national authorities of another Member State to examine articles 3-14 of BIIR (
- iii. In this case, who holds custody rights, a posteriori of May 2009, is determined by the national laws of [redacted] and any decision made by the [redacted] courts. As

for the laws, for any children born within a wedlock, both parents share rights of custody unless there a court has decided otherwise.

- iv. In August 2011 the court of first instance in confirmed that has exclusive international jurisdiction to try my application for custody rights and the applicable law is the one (see article 14, residual jurisdiction in BIIR). No decision has yet been made on the custody rights.
- v. The rights and duties of the custody holder, as defined in BIIR, are applicable across all the Member States. The Court decided since 'rights of custody' is defined by Regulation No 2201/2003, it is an autonomous concept which is independent of the law of Member States", see case C-400/10 para 41.
- vi. The Regulation defines as wrongful the removal of the child from his place of residence when occurs without the consent of all those exercising rights of custody because represent a breach of their rights of custody.
- vii. The court of first instance in declined to recognise court decision on the ground that it breaches article 6 of the ECHR. decision was and remains a non-authentic instrument and could never have been taken into consideration . The decision issued by the court , in August 2011, is recognisable and enforceable across all Member States. Only the courts in can review this decision
- viii. Article 6 of ECHR protects the right to fair trial. The judgement was based in law which awarded custody of the two children without a trial (by de facto) to the mother. The has recognised court decision.
- ix. The in recognising judgment, has probably considered the ECJ, C-129/92 and concluded that the BIIR is not applicable in my case. Yet, the Owens case law ECJ, C-129/92, is not applicable here. The Court never answered the question on whether in recognising third states judgments, Member States must have regard to pending proceedings in other Member States.
- x. Passports are issued to British Citizens under the Royal Prerogative. That prerogative is rarely fettered. However, it can be fettered if the child is going to be taken out of the jurisdiction illegally or contrary to the wishes of the other parents. It is, for this reason, that the passport renewal application that has to be

completed by a parent for a child under 16 includes a declaration that “my rights in respect of the above named child have not been limited in any way by the order of any court having jurisdiction over him.” It is a criminal offence to give a false declaration. In this case, I, as a custody right holder, made it clear I do not consent to the issue of the passports. The [redacted] have been told this and pending the determination of a children case in [redacted] have been asked to refrain from renewing the children’s [redacted] passports.