



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 5 March 2019

Session 5



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JUSTICE COMMITTEE

8th Meeting 2019, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*John Finnie (Highlands and Islands) (Green)

*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)

*Daniel Johnson (Edinburgh Southern) (Lab)

Liam Kerr (North East Scotland) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Liam McArthur (Orkney Islands) (LD)

*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ash Denham (Minister for Community Safety)

Simon Stockwell (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 5 March 2019

[The Convener opened the meeting at 10:00]

Subordinate Legislation

Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc) Regulations 2019 [Draft]

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's eighth meeting in 2019. There are no apologies.

Agenda item 1 is an evidence session on the draft Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc) Regulations 2019, which is an affirmative instrument. I welcome the Minister for Community Safety, Ash Denham, and her officials from the Scottish Government: Simon Stockwell, from the civil law division; and Rosemary Lindsay, from the directorate for legal services.

This is a chance for members to put to the minister and her officials any points seeking clarification before we formally dispose of the motion on the draft instrument. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

Do you wish to make an opening statement, minister?

The Minister for Community Safety (Ash Denham): I do. Thank you, convener.

This draft Scottish statutory instrument relates to family law and Brexit. European Union provision has not generally impacted on the substance of family law; instead, the EU has made provision on matters such as which courts would have jurisdiction in EU cross-border cases and the mutual recognition of judgments.

The SSI relates in particular to EU regulation EC 2201/2003, which is commonly known as Brussels 2a. Brussels 2a makes provision on issues such as jurisdiction of the courts in divorce cases and mutual recognition of family judgments in areas of parental responsibility, such as contact and residence cases.

The SSI makes provision for a no-deal Brexit. Obviously, a no-deal Brexit is not the Scottish Government's preferred position. We regret the decision to leave the EU, and we would regret a

no-deal Brexit, but we have to prepare for all potential outcomes, and we have had to consider the best approach in the area if the United Kingdom should leave the EU without a deal.

As I indicated in a letter that I sent to the convener last week following comments by Mary Fee at the Delegated Powers and Law Reform Committee, we think that the best general approach in the area is to fall back on international Hague conventions. Relying on the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children helps to provide the necessary reciprocity that, unfortunately, will be lacking in EU measures if the United Kingdom leaves without a deal. It is clear that there are some downsides, but they are inevitable if the UK is to leave the EU.

Some stakeholders have suggested that the enforcement of judgments under Hague may be slower and more expensive than under Brussels 2a, but it is very hard to quantify that at the moment.

Brussels 2a currently provides certainty that divorces are recognised across the EU, but that will be lost when we leave the EU. However, there is a Hague convention on divorce from 1970, which has been implemented in the UK by the Family Law Act 1986. In Scotland, we will continue to give wide recognition to overseas divorces, whether they are from the EU or elsewhere.

On the jurisdiction of the courts in divorce and similar cases, we propose to go back to jurisdiction as it was before EU provision was made. In relation to divorce, that means that the Scottish courts would have jurisdiction if at least one of the parties had been habitually resident in Scotland for a year or more or is domiciled here. Those rules are based on a Scottish Law Commission report from 1972. We recognise that 1972 is quite a long time ago and that the work is quite old. In due course, we will review jurisdictional rules for this area, but the exact timing will depend on what type of Brexit takes place.

It is generally accepted that Brussels 2a does not extend to same-sex relationships, given the varied views about their recognition across EU member states. As a result, we made domestic provision to mirror Brussels 2a when civil partnership and same-sex marriage were introduced. The SSI revokes that domestic provision and puts the jurisdiction of the Scottish courts for same-sex cases on the same footing as for mixed-sex cases. The one exception is that we have retained a jurisdiction of last resort for cases in which the couple have registered their relationship here and it appears to the court to be

in the interests of justice to assume jurisdiction in the case.

We recognise the need to provide guidance to legal practitioners and the public, but providing guidance in this area will not be straightforward. We do not know what sort of Brexit we will get and we do not want to cause any unnecessary alarm. However, we will issue guidance to practitioners and the public to provide as much clarity and certainty as we can.

I am grateful for the opportunity to outline the impacts of the SSI, and I am happy to take any questions about it.

The Convener: Thank you.

John Finnie (Highlands and Islands) (Green): Good morning, panel, and thank you, minister, for your comments. I welcome what you said about provision for same-sex relationships and am pleased that the Hague and EU systems both have the best interests of the child as a guiding principle, which is welcome. However, as you noted in your comments, the procedures could be slower and more expensive. If they are slower, that would impact on the child, and if they are more expensive, that may affect access to justice.

I will ask a broader question. We have had a series of SSIs related to Brexit, and no doubt there are more to come. Has the Government done any impact assessment of the cumulative effect of all those SSIs? It does not seem to me that anything will be better. Has an assessment been done of the cumulative effect of all the things that will be worse?

Ash Denham: With regard to the broader situation, the Scottish Government does not want to be in this position. We are talking about civil law this morning, but we could be talking about the wider justice perspective, which includes security and access to European databases. I assume that it is unlikely that we will get the same arrangements as we have at present, given that the UK Government's political declaration states that it wants to maintain on-going judicial co-operation but that the EU considers that to be closely linked to single market co-operation, and I am not sure that the two objectives are compatible. If we cannot get the same arrangements, we will probably end up with dilution across the justice piece. That is not a situation that the Scottish Government wants to be in, but, as a responsible Government, we have to make provision for it.

John Finnie: For the avoidance of doubt, I am not being critical of the Government's position, but I wonder where we are ultimately going. Is there engagement with the Secretary of State for Scotland? He appeared before the committee, but it was not the most informative encounter that the

committee has had. I want to understand the landscape, but it will be a landscape that will be totally different. It is significant that something as compelling as child custody cases—never mind the many other things that we have dealt with and will deal with—will be slower and more expensive.

Ash Denham: We recently looked at the situation covered by this specific SSI, so we know that the numbers involved will be significant but quite small. I will ask Simon Stockwell whether he can give a little more detail.

Simon Stockwell (Scottish Government): We looked at the number of cases under Brussels 2a. The central authority team that works with me deals with about 10 to 15 requests per year for advice and assistance from other central authorities. We do not have hard statistics from the Scottish Courts and Tribunal Service, but it says that it gets a number of requests for certificates. We have tried to quantify the specific point that Mr Finnie has raised about how much slower and more expensive enforcement under Hague will be than under Brussels 2a. The SCTS and the Scottish Legal Aid Board could not spot any significant difference with regard to their interests. Practitioners have said that cases might be slower and more expensive, but when I asked whether they could quantify that point, they said that they could not. Some of that might be down to the generality of the EU measures, or people's familiarity with them—on the whole, people are more familiar with the EU measures and less familiar with Hague.

When we have looked at the impact of Brexit on civil law more generally, our very broad conclusion on family law is as the minister has mentioned: there are good fallbacks in relation to Hague, although there might be gaps in terms of recognition of judgments and so on, where some of the fallbacks might not be so good.

On family law, in very broad terms, there are good fallbacks; on civil law more generally, the fallbacks are possibly not quite so good.

Liam McArthur (Orkney Islands) (LD): I echo much of what John Finnie has said. I thank the minister for outlining the background to the issue, which, in a sense, reinforces what we have heard in our evidence-taking sessions on civil and criminal law. Like John Finnie, I have no problem with the Scottish Government's approach in this context. However, I am concerned that we appear to be in a situation whereby what will be put in place in light of a no-deal Brexit is likely to be slower and more expensive, although I appreciate that that is difficult to quantify. What can the Government do to mitigate those impacts? It has been recognised that cases that progress more slowly impact on the child and on the cost; other potential impacts include access to justice. Have

you or your officials done any work to mitigate those impacts?

Ash Denham: Obviously, extensive preparation has been done across the Scottish Government. Essentially, as I am sure that the committee will understand, we are in uncharted waters. The Scottish Government has to make provision as best we can to ensure that we have legal certainty and access to justice, bearing in mind the situation that we are in with Brexit, which Scotland did not vote for. I ask Simon Stockwell to provide any more detail that he has.

Simon Stockwell: As the minister mentioned in her opening statement, we are thinking about what guidance we can provide. That is quite tricky, because we do not want to alarm everybody unnecessarily; we also do not know what will happen with Brexit, even this late on. We are thinking of putting material on our website, which is public facing, about the implications for people involved in cross-EU cases. We are also thinking about sending out more technical material to legal practitioners, to keep them informed.

We will probably meet some of the legal practitioners sometime this month. One of my colleagues is arranging a meeting with the Law Society of Scotland, and I imagine that I will want to meet the Family Law Association, to talk through some of the implications for the association and to ask whether there is anything else that the Government could do that might help during this period.

Liam McArthur: You have talked about the conversations that you have had with the Scottish Courts and Tribunals Service and the Scottish Legal Aid Board. In the event of applications being made, do you have an agreement with SLAB that those will be expedited, to minimise any delays or cost pressures that would impact on access to justice?

Simon Stockwell: The Scottish Legal Aid Board's view is that things would not be slower or more expensive under our proposed approach; it said that it thought that it would treat such cases in the same way as it would treat cases under the Brussels 2a measures. It was the practitioners who said that there might be delays and more expense, rather than SLAB and the SCTS, which thought that the change would not have much impact on what they do.

The Convener: It has been asserted that we will be worse off. However, the conclusion from a round-table evidence session that we held on family law and, in particular, the issue of child abduction, was that, although there is an override in the EU regulations, it is not used. That is a political decision on the part of the European Commission. From the Commission's perspective,

this area of law is not a priority, so there is no guarantee that abducted children would have their rights under EU law enforced, because nobody ensures that those rights are enforced. The view was expressed that the Hague convention would be a better regime to use because of that. There may not just be downsides to using the Hague convention—there may be some positives. Will you comment on that?

Ash Denham: That is a fair point. When I was talking about our being worse off, I prefaced that by saying that that would be in a general sense with regard to security and other justice issues. It is fair to say that, in some aspects of civil law, particularly those that relate to matters such as the ones that we are discussing this morning and Brussels 2a, the Hague convention provides a reasonable fallback, as we have set out.

Child abduction is being dealt with by a Westminster statutory instrument, which I think the committee looked at. Simon Stockwell will go into more detail on that, if the committee wishes.

10:15

Simon Stockwell: What the minister said is entirely right; there has been a Westminster SI on the matter.

I am familiar with the discussion that the committee had about whether the Hague convention is better than Brussels 2a. To be honest, I think that it depends on the point of view that one takes. Clearly, one of the people who appeared before the committee had a definite view that Hague conventions in general are to be preferred to EU measures; other people took a different view. It is hard to say which view is right and which is wrong.

The Convener: Is there a general feeling that sometimes the EU's aspirations and intentions do not materialise in reality and in practice?

Simon Stockwell: Brussels 2a is used, and the EU maintenance regulation is used. I am aware of some EU measures that are not really used, such as the measure on mutual recognition of civil protection orders but, to be honest, I would have thought that we could also point to some domestic provision in Scotland that is not used. EU measures on family law are used, and people have got used to them over the past 10 to 15 years.

Daniel Johnson (Edinburgh Southern) (Lab): The issue of reciprocity—not an easy word to say at this time in the morning—was flagged up by Mary Fee. So far, we have asked about people using the Hague conventions in Scotland and pursuing matters through the Scottish courts. What analysis has been done of the situation in

which Scots might find themselves if they live in other jurisdictions and want to pursue matters using Hague conventions in those jurisdictions?

Ash Denham: That is a good point. At the moment we have good co-operation with other EU member states, and we have the role of the central authority for Scotland—so we receive requests and put out requests, for example on issues to do with child protection, which is an issue that Mary Fee brought up in another committee meeting. If, after Brexit, a report were to come in from another country—let us say Bulgaria or Poland—that expressed worry about a child who was living in Scotland, we would consider child protection to be crucial and we would still act. If we thought that a child was in danger, we would act. Such a request could come from any Hague convention country.

Simon Stockwell: Another point that I would make to Mr Johnson is that officials recognise that, if we leave the EU, we will need to do more work on Hague conventions and ensure that Scotland is visible. One of my colleagues is in The Hague this week, along with her Ministry of Justice counterpart—I think that it is the annual meeting of the Hague conference—to talk about issues that are arising. She will discuss where we are at with other parties that are represented at that meeting.

If we leave the EU, whether we do so with or without a deal, we will have to spend a bit more time looking at international conventions and ensuring that Scotland is visible in that regard, and we will have to pick up problems that might arise if a party to an international convention does not respect a Scottish order, for example.

John Finnie: I am concerned about the use of the word “abduction”. That might be construed as the appropriate word in a family dispute, but abduction is a crime in Scots law and the prosecution of those who commit crimes requires judicial co-operation, with the exercise of the European arrest warrant, the sharing of criminal intelligence and so on, all of which will be inferior if the UK leaves the EU. Is that not correct?

Ash Denham: There are certainly extreme question marks over the European arrest warrant, the European criminal records information system and a number of other databases that allow us to share information about criminals.

The draft instrument that we are considering does not deal with child abduction; as I said, that was dealt with in an SI at Westminster. However, you are quite right to say that abduction will still be a criminal offence.

Rona Mackay (Strathkelvin and Bearsden) (SNP): For clarification, how will the Hague convention impact on straightforward custody battles across jurisdictions?

Ash Denham: The intention behind this is to allow us to recognise what is happening in other countries and to be as clear and as certain as possible that things will continue to work in the way that they should. Perhaps Simon Stockwell can give a little bit more detail on that.

Simon Stockwell: The minister is entirely right. Brussels 2a is, to an extent, largely a copy of the Hague convention; indeed, many EU family measures are borrowed from it, so we are, to an extent, falling back on the measures on which the EU regulations were originally based. Brussels 2a is being renegotiated as we speak, with a new version due to come into force in 2022. Clearly, it must be doubtful whether Scotland and the United Kingdom will be party to that but, as it is, we are going back to a convention that Brussels 2a is pretty well based on.

Rona Mackay: In layman’s terms, then, someone involved in the process will notice no difference with this change in the laws.

Simon Stockwell: Yes, that should be the position. We have already talked about the view of certain practitioners that enforcing a custody judgment in such cases in Scotland might be slower and more expensive, because people might be less familiar with Hague convention material than with EU material. Broadly, though, it should make no significant difference.

Rona Mackay: When you say “people”, do you mean lawyers?

Simon Stockwell: Yes. Lawyers have told us that it might be more expensive and slower to enforce such judgments under Hague than under Brussels 2a.

Rona Mackay: Thank you.

The Convener: As members have no more questions, we move to item 2, which is formal consideration of the motion on this affirmative instrument. I note that the Delegated Powers and Law Reform Committee has considered and reported on the instrument and has made no comment on it.

Motion moved,

That the Justice Committee recommends that the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] be approved.—
[Ash Denham]

Motion agreed to.

The Convener: That concludes consideration of the instrument. The committee report will note and confirm the outcome of the debate. Is the committee content to delegate authority to me as convener to clear the final draft report?

Members indicated agreement.

The Convener: I thank the minister and her officials for attending and answering all our questions, and I suspend the meeting to allow them to leave.

10:22

Meeting suspended.

10:23

On resuming—

European Union (Withdrawal) Act 2018

Immigration, Nationality and Asylum (EU Exit) Regulations 2019

The Convener: Item 3 is consideration of a proposal by the Scottish Government to consent to the UK Government legislating using the powers under the European Union (Withdrawal) Act 2018 in relation to a UK statutory instrument. I refer members to paper 3, which is a note by the clerk.

If members have no comments or questions, is the committee content to recommend that the Scottish Parliament give its consent to the UK Parliament to deal with this statutory instrument?

Members *indicated agreement.*

The Convener: Thank you. The clerks will now produce a short report on this item.

That concludes the public part of today's meeting. At our next meeting on Tuesday 12 March, we will have stage 2 consideration of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill. We now move into private session.

10:24

Meeting continued in private until 12:42.

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