Children (Custody/Access)

12.30 pm

Mr. Frank Doran (Aberdeen, North) (Lab): I shall raise specific circumstances in my speech, but I will give those concerned anonymity. I shall make as little reference as possible to facts and dates.

Hugh Bayley (in the Chair): Order. I caution the hon. Gentleman that the prescription must be anonymity. If there is any prospect of identifying an individual case that is before the courts from what he says I shall have to interrupt him; I think that he understands that.

Mr. Doran: I understand, and am fully aware of the requirements.

My constituent and his wife are a mixed-race couple. They married outside the UK but moved to my constituent's home city of Aberdeen some years ago and were habitually resident there. Some time ago, they had a child with a disability. The child was cared for by both parents. The mother left the matrimonial home, taking the child with her, without the father's consent. The father's view is that the child was abducted, and some six years later he still has no knowledge of the child's whereabouts.

Some months after the separation, the father received notice of an order made in an English court. He did not at that point become involved in the case, but made efforts to contact his wife and child, and at the same time sought advice on his position from Scottish solicitors. That process took some time. He was not able to contact his wife and it was clear to him that the Scottish solicitors were not really aware of the English legal position. He subsequently instructed solicitors in England and Wales, and applied successfully for legal aid.

My constituent was very specific in his instructions to his solicitors. He had done some legal research and become something of an expert in the law in this respect. In his view, his wife and child were domiciled in Scotland and his wife abducted the child of the marriage and took her to England without his permission as a guardian of the child. The information that he received from the English courts was that an interim order had been made. His first challenge was that it was made without his being given the opportunity to answer, and he instructed his solicitors accordingly. Secondly, he was of the view that the proper jurisdiction to deal with any dispute between him and his wife was the Scottish courts. The solicitors were instructed to challenge the jurisdiction of the English court and the vires of the order that had been made.

Several months were spent on the legal aid process, but eventually legal aid was granted, but only for involvement in residence and contact. It appears that the solicitors whom my constituent instructed did not raise the jurisdiction issues, and ignored them completely. Those matters are being dealt with separately by my constituent, but in the meantime he attempted to employ other solicitors. It is a common fact of life that solicitors do not want to take on a case that someone else has started, so it is difficult to find a new solicitor. That is exactly the situation in which my constituent found himself, so he decided to represent himself in the courts. From that time he has pursued the issue through the

English courts. My constituent was recently advised—I heard this morning—that he has been refused leave to appeal to the House of Lords, so he has exhausted all his remedies in the English courts, and the case will probably go to the European Court of Human Rights.

While he was challenging the issue in the English courts my constituent began proceedings in the Scottish courts for divorce and for a residence order in respect of the child, or, failing that, a contact

order. Initially, jurisdiction was not accepted by the Scottish courts because of the English proceedings, but that decision was overturned on appeal. However, the case was later sisted—a Scottish term meaning "suspended" or "put to sleep"—to allow the English court procedure to continue. The legal position in Scotland is that the courts cannot make an order for divorce unless they are satisfied as to the welfare of any child of the marriage. Clearly that was not possible for the Scottish courts in the circumstances and they effectively ceded jurisdiction to the English court, even though that jurisdiction was not fully tested in the Scottish court. The whole case, therefore, including the divorce, cannot be determined until the matter is resolved in the English court.

I want to pursue three issues with the Minister. They might seem technical, but they are extremely important to my constituent, and to the wider context as well. The first relates to an issue raised by my constituent—jurisdiction. The law is very clear. Section 41(2)(a) and (b) of the Family Law Act 1986 sets out the rules for court jurisdiction in relation to child custody:

> "Where a child who—
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> (a) has not attained the age of sixteen, and
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> (b) is habitually resident in a part of the United Kingdom,
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> becomes habitually resident outside that part of the United Kingdom in consequence of circumstances of the kind specified in subsection (2) below, he shall be treated for the purposes of this Part as continuing to be habitually resident in that part of the United Kingdom for the period of one year beginning with the date on which those circumstances arise."

Despite the fact that my constituent's wife and child were habitually resident in Scotland, within three months of their departure from Scotland, the English courts seized jurisdiction and granted an interim order in contradiction of the 1986 Act. For reasons that I have discussed, I have not given precise dates so as not to identify the parties.

My constituent entered into proceedings in the English courts within the 12-month period, but in any case that is irrelevant, because Section 41(2)(a) of the 1986 Act states that the habitual residence does not change

> "without the agreement of the person or all the persons having, under the law of that part of the United Kingdom"—

in this case, Scotland—

> "the right to determine where he is to reside".

Section 41(1) provides for a 12-month period, and section 41(2) makes the father's, or any guardian's, consent necessary. However, none of those jurisdiction requirements were met when the English courts were allowed to deal with my constituent's case. The English court had no jurisdiction under legislation governing those matters, but it granted the order anyway. Despite that fact, subsequent hearings, all the way to the Court of Appeal, upheld the order. It is clear from the judgments that the provisions of the 1986 Act were not fully considered. As I have said, my constituent acted on his

own behalf and had no expert legal advice, and I would hope that the court would take that into consideration. The assumption seems to have been made at every level that after 12 months' residence, the child automatically assumed habitual resident status in England. Nowhere, in any of the judgments, was section 41(2) considered, and at no point did any judge make it explicit that the court took over the father's rights under section 41(2) by, for example, pleading the paramountcy of the interests of the child's welfare.

My constituent believes that his rights as a father have been taken away from him by the courts. It seems that at no stage in his contact with the legal process, whether with solicitors on both sides of the borders, or with the courts, was there a full understanding of the way in which section 41 should operate. Will the Minister address that issue? I have been intimately involved with this case over the past few years, and it makes me very concerned about the way in which, not only this case, but other similar cases, should be dealt with. Scotland has a completely separate legal system, which is entitled to be recognised.

I should like to raise another issue about the operation of the legislation, and the way in which it can prevent a speedy resolution to often very difficult problems. I spent many years as a solicitor in Scotland specialising in family law, so I have some experience of the issue, and know how sensitive the courts need to be and how difficult the issues are. My constituent's position all along has been that the English courts have no jurisdiction and that the case should be dealt with in Scotland. He was advised on both sides of the border that if he made any plea in the English courts for residency or contact, he would put at risk his position on jurisdiction. He was presented with a dilemma. He feels strongly about the jurisdiction issue, and he has pursued it. Apart from the initial error by his London solicitors, he has made no attempt to apply for a contact or residency order. That has worked against him in several ways. He lost the argument about jurisdiction in the English courts, and the judges have made it clear that they are not sympathetic to his case, because they regard the jurisdiction issue as a distraction. He sees regards jurisdiction as a fundamental issue, and as a Scottish lawyer, so do I.

The 1986 Act exists to regulate processes within the different jurisdictions in the UK, but it seems that it can be ignored at will. That is difficult enough to accept, but if my constituent's advice that he would prejudice his position by presenting a case for residence or contact is correct—I believe that it is—the Government should address the issue. It is in everyone's interests to ensure that family proceedings have "as little bureaucracy"—I put that in inverted commas—as possible. If artificial impediments such as a preliminary plea or jurisdiction can prejudice fundamental issues such as residency or contact with a child, I hope that the Government would want to deal with the matter. I ask the Minister to look at it carefully.

The solicitors initially consulted on both sides of the border and the judge of first instance appears to have acted in complete ignorance of proper jurisdiction in all aspects of the legal process. In such difficult and sensitive issues as residence or contact with a child, the law must be considered and applied meticulously and sensitively.

My own experience dealing with family matters in Scotland is that that is generally done, but the Minister will be well aware of the various concerns raised principally by groups representing fathers in custody cases, some of whom have gone to extreme lengths to make their point. My constituent has avoided that, and he has applied himself to studying the legal issues and presenting his arguments, which is the appropriate way to proceed. However, from my considerable contact with him I know his intense disappointment, frustration and sense of unfairness at how his case has been dealt with in every part of the legal process.

As far as my constituent is concerned, the law is explicit about what is intended. He thinks that his rights have been bulldozed in a way that he finds difficult to understand—despite his substantial experience of the law, he is a lay person and not a lawyer. I submit that it is not good for the legal process and not good for the system that that perception should prevail. The case is difficult and the father's choice might not be one that all of us would make, but he feels strongly about the issue. He feels even more strongly that the system is unfair and makes it difficult for people in his position to get the right treatment.

At the end of the day, a young child has been denied contact with her father for several years. The case

is likely to progress to Europe, delaying the matter further. The Government should address the issues, and I am anxious that the Minister should do so. I appreciate that she has not had advance sight of my speech, so it will be difficult for her to respond in detail. I do not expect her to do so, but I would be very pleased if she were to write at a later stage.

12.44 pm

The Parliamentary Under-Secretary of State for Justice (Bridget Prentice): I congratulate my hon. Friend the Member for Aberdeen, North (Mr. Doran) on securing this debate; the subject must be a harrowing and difficult one for him and for his constituent. Any case that involves the relationship of a child with its parents has to be dealt with to the highest possible standards and with the greatest sensitivity. I shall, of course, respond in writing, giving details that I may not be able to provide during our debate.

Although many parents separate amicably and make good parenting arrangements thereafter, we all know that conflicts can arise from separation that are upsetting for all involved, particularly the children. In the vast majority of cases in England and Wales, parents make appropriate and adequate provision for bringing up the children, including making contact arrangements. Usually, they do not need recourse to the courts to achieve that. It can be done in a perfectly amicable, adult and sensible fashion. The Government do their best to give them additional support whenever possible, such as providing better information or promoting alternative dispute resolution services.

In "Parental Separation: Children's Needs and Parents' Responsibilities", which was published two years ago, we set out a range of measures to help yet more separating parents in England and Wales. That document dealt with improved access to quality information, and advice to separating parents that was tailored to their individual needs. It provided an increased focus on delivering

practical assistance and legal help, as well as signposting other appropriate services. It tackled linked problems, to allow parents to find a non-court-based resolution when it was safe to do so, and it proposed the development of alternative dispute resolution services.

Inevitably, some cases come to court. The early identification of harm, with early dispute resolution meetings in appropriate cases, is extremely important. We do everything that we can to encourage the parties to attempt mediation, and, as far as possible, we give greater support to help families make contact work. Section 8 of the Children Act 1989 provides for courts in England and Wales to make four types of orders. A residence order governs where the child will live, and a contact order governs whom the child will see. A specific issue order provides for certain actions to be taken—for example, the child must attend a specified school. A prohibited steps order says what must not happen—for example, that the child's home must not be outside a certain area. Section 11 of the Act provides for certain conditions to be attached to a contact order.

In 2006, more than 90,000 such applications were made, and more than 100,000 orders were made, as many cases result in more than one order being made. For example, a resident parent may apply for a residence order and the non-resident parent may, in response, apply for a contact order. The court may also make an order of its own motion, without an application being made, if existing family proceedings are already before it. A residence order may be shared if the child spends significant periods of time with both parents; and there may be variations in the type of contact for holidays, weekends, overnight stays and so on.

There is a fairly comprehensive package of appropriate contacts for the child. However, it is incumbent on me to say—I know that my hon. Friend agrees—that whatever is decided, it has to be done in the best interests of the child. That is the focus of all our policy on children and contact through the court

system. It is always possible that the court can order contact only by telephone or letter or, indeed, that no contact may be made. That is rare, and such an order would only be made if there was any indication that the child would be placed at significant risk.

In recognition of the fact that those cases are private proceedings—that is, that a parent has asked the court to intervene—the court may also order that there should be no order. Such orders are not common, but where parents have an agreed arrangement, it might be better for the child for no order to be made. When section 8 residence and contact applications are made, and where the proceedings are contested, the courts must take into consideration the factors listed in section 1(3) of the 1989 Act, which are known as the welfare checklist. The list is not exhaustive, but it is generally regarded as the minimum that the court would be required to consider. Most importantly, it includes the ascertainable wishes and feelings of the child; their physical, emotional and educational needs; the effect that the changes in circumstances might have on them; and their age, sex and background, as well as other characteristics considered relevant. Any harm that they have suffered or are at risk of suffering clearly has to be taken into account, as well as the parents' ability to meet their needs.

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Families end up in court because they cannot agree arrangements between themselves. In some cases, there

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are serious welfare concerns: domestic violence is an obvious example. In January 2005, we changed the application procedure for section 8 cases to ask applicants and respondents about any risks of harm to the child. If there is an indication of risk, the application forms are sent to the Children and Family Court Advisory and Support Service—CAFCASS—which will conduct certain checks, undertake a risk assessment and advise the court accordingly. From 1 October this year, that is a statutory duty for CAFCASS. I hope shortly to publish an evaluation of the effectiveness of that procedure.

In other cases, there may be concerns about parental drug or alcohol abuse, or mental health problems. The courts can order CAFCASS to consider those matters. It can also ask for a medical expert opinion —for example, from a child psychiatrist if it is possible that the child has mental health problems as a result of the conflict. CAFCASS is available to try to help conciliation between the parents. Often, parents reach an agreement in those cases.

We conducted a piece of research, following parents through the two-year process. The evidence that we have received suggests that that was a positive way of trying to move things forward. In most cases, an agreement about contact was reached or the cases were closed. I hope that in ongoing cases we can continue to improve our services, using that method to ensure that appropriate conduct is arranged. My h F mentioned the issue of jurisdiction. He cited the Family Law Act 1986, and the fact that deemed residence is only for a year—after that, the general rules apply. After one year, the child could end up being habitually resident in another part of the United Kingdom.

Mr. Doran: Does the Minister accept my point that parental consent is necessary? If the habitual residence changes, that does not happen automatically.

Bridget Prentice: My hon. Friend is right: parental consent is necessary. He has already mentioned the case of his constituent, who has had to deal with some apparently bad advice that he received early on. That is being dealt with separately, but I am happy to write to my hon. Friend with some views on how he might progress the matter, if appropriate. The problem is that the child may become habitually resident in another part of the United Kingdom, and it would be for the courts to make a decision, still with the interests of the child at heart. My hon. Friend's constituent made the application within the

year, so section 41, as he mentioned, would apply. If he had not done so, section 41 would become irrelevant. However, even where the order is made in the wrong jurisdiction, it has to be obeyed until discharged, and case law ensures that that is so. The individual could apply to the English court to have that order discharged or, indeed, to the original, correct court.

In the short time available, I should like to pick up a couple of other issues raised by my hon. Friend. It is not right to say that the Act is ignored whenever that suits the court. The Act is designed so that the order protects the child at all times. Courts with jurisdiction can make orders that are recognised and enforced in other parts of the United Kingdom. However, a subsequent court can make a new order, which could supersede the earlier one, but only if it has proper jurisdiction and it is

in the child's welfare interests. That would apply on either side of the border. As my hon. Friend pointed out, historically, Scotland has its own legal system, which differs in substantial ways from that of England and Wales. That is why we have made provision to deal with contact and residence cases in which people live on different sides of the border. It is possible for two sets of proceedings—one in each jurisdiction—to be under way at the same time. The legislation applying to contact and residence cases in Scotland is different, but both the Government and the Scottish Executive are united in the view that children should have contact with both parents, as long as it is safe and in the best interests of the child.

Finally, there is no bias against children in the Children Act. Parents with parental responsibility are treated equally. As I said, the welfare of the child is paramount, and that applies in England, Wales, Northern Ireland and Scotland. The Act is designed to support proper decision making for children, by ensuring that the cases are heard in the most appropriate forum. My hon. Friend has given me a number of details that I want to look at more closely. I will write to him, insofar as I can comment on cases before the court. As he knows, I am limited in what I can say, but I will do my best to give him as much information as possible on that particular case.