

International Family Justice Office:
Family Courts Informing Consular Authorities of Proceedings

In Re E (A Child) [2014] EWHC 6 (Fam), [2014] 2 FLR 151 Sir James Munby P issued guidance in public law proceedings involving foreign nationals. In particular, he said, at [47], that it was highly desirable and good practice for the court:

- (i) in general, to facilitate free communication and access between a party who was a foreign national and the consular officials of the relevant foreign state;
- (ii) normally, to accede to requests, either from the foreign national or the relevant consular authorities, for the proceedings to be observed by an accredited consular official and for that person to obtain copies of orders, relevant documents and transcripts;
- (iii) to be proactive in informing the relevant consular officials about the involvement of their nationals in public law proceedings (see also Sir James Munby P’s comments about courts and local authorities in Re CB (A Child) [2015] EWCA Civ 888, [2016] 1 FLR 1286, at [73]).

This Note is directed principally to the guidance referred to in (iii) above.

Recently, the International Family Justice Office has become aware of concerns being raised that compliance with the above guidance may potentially imperil the well-being of foreign nationals and members of their family who remain in the country of origin. These concerns have arisen in the context either:

- (a) where foreign national parents have made a claim for asylum or for humanitarian protection to the Home Office or,
- (b) more broadly, because the circumstances in which they left or have not returned to the country of origin will not be viewed “favourably” by that state.

In the former situation, the risk arises from the fact that they have made such a claim. In some cases, judges have been advised that alerting the relevant consular officials may not only prejudice the claim but may imperil family members in the country of origin.

In the latter case, the circumstances in which foreign national parents left or have not returned to their country of origin may create significant risks for them and for family members in the country of origin, again once consular authorities are alerted to their situation through being informed of public law proceedings. We appreciate that we have expressed the manner in which risks may arise in this context in very general terms. This is because it is difficult to be specific about those risks and about the circumstances which might lead to their creation, beyond the general comment above.

The above concerns are likely to arise in only a very few cases. However, to address them, in cases where the child(ren) and/or one or both of the parents are foreign nationals, the following steps should be considered:

1. The judge, as in every case concerning foreign nationals, should ascertain at the earliest opportunity the precise immigration status of foreign national parents and children involved in care proceedings. Using the Protocol on Communicating with UK Visas and Immigration and form EX660 should resolve any uncertainty if the adults are either unclear or unwilling to clarify their status in this jurisdiction.
2. Prior to contacting or notifying the relevant consular officials, the judge should ask the parties' representatives if there is any reason why this should not occur, for example, because they have made a claim for asylum/humanitarian protection. It should be noted that neither the parties themselves nor their legal advisors in the children proceedings may understand the potentially adverse consequences of informing the relevant consular authorities of the existence of care proceedings. If there is sufficient uncertainty about this, for example where no claim for asylum or humanitarian protection has yet been made, the court may wish to consider directing the parties to obtain advice from an experienced immigration lawyer.
3. There will be cases where informing the consular authorities about the existence of care proceedings will not affect a claim for asylum or humanitarian protection, for example, where the alleged fear is of family members. Clearly, there will also be cases where such notification might either prejudice such a claim and/or have other detrimental consequences for the family and any relatives in the country of origin.
4. Once the court is in possession of the relevant information, it will be in a better position to assess when, or indeed if, the relevant consular authorities should be informed. This matter should be kept under review during the currency of proceedings.
5. Designated Family Judges are requested to bring the contents of this Note to the attention of his/her judges and the local authorities serving her/his area.

Moylan LJ

MacDonald J

18 April 2019