Easter Term

[2016] UKSC 15

On appeal from: [2015] EWCA Civ 1112

JUDGMENT

In the matter of N (Children)

before

Lord Neuberger, President

Lady Hale, Deputy President

Lord Kerr

Lord Wilson

Lord Carnwath

JUDGMENT GIVEN ON

13 April 2016

Heard on 17 March 2016

Appellants (JN and EN)	Respondent (London Borough of Hounslow)
Henry Setright QC	Roger McCarthy QC
Martha Cover	Mark Twomey
Michael Gration	
(Instructed by Hanne & Co)	(Instructed by London Borough of Hounslow)

Respondent

Mother

William Tyle

Malcoln

MacDona

(Instructed

Lawrence &

Solicitor

Respondent

Father)

Frank Feeha

Dorian D
(Instructed
Hecht Montg

Interveners (Written Submissions Only)

1st Interve
(AIRE Cen
Deirdre Fott
Lucy Spri
Michael Edv
(Instructed
Herbert Sn
Freehills L
2nd Interve
(Family Rig
Group)
John Vater
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Goodman Ra
3rd Intervene
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David Willia
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Kingsley Na

LADY HALE: (with whom Lord Neuberger, Lord Kerr, Lord Wilson and Lord Carnwath agree)

1.
The issue in this case is whether the future of two little girls, one now aged four years and two months and the other now aged two years and 11 months, should be decided by the courts of this country or by the authorities in Hungary. Both children were born in England and have lived all their lives here. But their parents are Hungarian and the children are nationals of Hungary, not the United Kingdom. Under article 8.1 of Council Regulation (EC) No 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, known as the Brussels II revised Regulation ("the Regulation"), the primary rule is that jurisdiction lies with the courts of the member state where the child is habitually resident. That would be England in this case. However, an exception is made by article 15, under which those courts can transfer the case to a court in another member state with which the child has a particular connection, if that court would be "better placed" to hear the case, or part of it, and the transfer is in the best interests of the child. These children have a particular connection with Hungary, as it is the place of their nationality. The issue, therefore, is the proper approach to deciding whether a Hungarian court would be better placed to hear the case and to whether transferring it would be in the best interests of the children.

2.

The context in which these questions arise is important. Free movement of workers and their families within the European Union has led to many children living, permanently or temporarily, in countries of which they are not nationals. Inevitably, some of them will come to the attention of the child protection authorities, because of ill-treatment or neglect or the risk of it. In the past, the courts in this country might assume that they had jurisdiction simply because of the child's presence here. It is now clear, however, that public law proceedings fall within the scope of the Regulation (see In re C (Case C-435/06) [2008] Fam 27), so that in every case with a European dimension (more properly, a Regulation dimension) the courts of this country have to ask themselves whether they have jurisdiction. Even if they do have jurisdiction, Sir James Munby P has said that in every case they will need to consider whether the case should be transferred to another member state: see In re E (A Child) (Care Proceedings: European Dimension): Practice Note [2014] EWHC 6 (Fam); [2014] 1 WLR 2670, para 31; also Merton London Borough Council v B (Central Authority of the Republic of Latvia intervening) [2015] EWCA Civ 888; [2016] 2 WLR 410, para 84(ii). As the Family Rights Group observe in their helpful intervention, this has led to a "remarkable proliferation" of case law over the last three years. Hitherto, courts would manage cases with a foreign element by evaluating foreign placement options and deciding upon the best outcome for the child themselves. Now, they may be more inclined to transfer the decision-making abroad.

3.

One reason for this change in approach may be "the concerns voiced in many parts of Europe about the law and practice in England and Wales in relation to what is sometimes referred to as 'forced adoption'" (referred to by the President in his judgment in this case: [2015] EWCA Civ 1112; [2016] 2 WLR 713, para 8). Research compiled by the Council of Europe (O Borzova, Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member states, Report to the Parliamentary Assembly, 2015, Doc 13730) and commissioned by the European Union (C Fenton-Glynn, Adoption without Consent, Directorate General for Internal Policies of the EU Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, 2015) shows that other member states do permit adoption without parental consent. However, England and Wales is unusual in permitting parental consent to be dispensed with where the welfare of the child requires this (Adoption and Children Act 2002, section 52(1)(b)) rather than on more precise grounds of parental absence or misconduct. This country is also unusual in the speed and frequency with which it resorts to adoption as the way to provide a permanent home for children who for one reason or another cannot live with their families. The European Court of Human Rights has, however, held our law to be compatible with the right to respect for private and family life, protected by article 8 of the European Convention on Human Rights: YC v United Kingdom (2012) 55 EHRR 967.

4.

It goes without saying that the provisions of the Regulation are based upon mutual respect and trust between the member states. It is not for the courts of this or any other country to question the "competence, diligence, resources or efficacy of either the child protection services or the courts" of another state (see In re M (Brussels II Revised: Article 15) [2014] EWCA Civ 152; [2014] 2 FLR 1372, para 54(v), per Munby P). As the Practice Guide for the application of the Brussels IIa Regulation puts it, the assessment of whether a transfer would be in the best interests of the child "should be based on the principle of mutual trust and on the assumption that the courts of all member states are in principle competent to deal with a case" (p 35, para 3.3.3). This principle goes both ways. Just as we must respect and trust the competence of other member states, so must they respect and trust ours.

Article 15

5.
So far as relevant, article 15 of the Regulation reads as follows:

“1. By way of exception, the courts of a member state having jurisdiction as to the substance of the matter may, if they consider that a court of another member state, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other member state in accordance with paragraph 4; or

(b) request a court of another member state to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court’s own motion; or

(c) upon application from a court of another member state with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court’s own motion or by application of a court of another member state must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a member state as mentioned in paragraph 1, if that member state: …

(c) is the place of the child’s nationality; …

4. The court of the member state having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other member state shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with articles 8 to 14.

5. The courts of that other member state may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with articles 8 to 14.

6. The courts shall cooperate for the purposes of this article, either directly or through the central authorities designated pursuant to article 53.”

This case

6.
The parents are in their 20s. The father is of Hungarian Roma descent, the mother of mixed Hungarian and Roma descent. The father has two older children, a girl now aged seven and a boy now aged five, half-siblings of the children with whom we are concerned. These parents met and began their relationship in 2010. In July 2011, when the mother was pregnant with the older of the two

children in this case, whom I shall call Janetta, they travelled to this country. Janetta was born here in January 2012. The family had some contact with the local authority in April and May 2012, because of their accommodation problems, and both the local authority and the Hungarian embassy offered to support their return to Hungary, but in fact they stayed here.

7.

Their second child, whom I shall call Ella, was born here in May 2013. The mother had had no ante-natal care. The baby was born in the room in which the family were living without any medical assistance. The London Ambulance Service arrived after the baby was born but before the placenta was delivered. They called the police, as the father was reported to be resisting the mother and baby receiving medical attention or being taken to hospital. The family were living in circumstances of extreme squalor, with no food, clothing or bedding seen for either child.

8.

Janetta was removed from her parents that same day. Ella was discharged from hospital into foster care when she was eight days old. They were initially placed separately but since 28 May 2013 they have both been living with the same foster carers. The local authority originally applied for an emergency protection order, but this was not pursued because the parents agreed to the children being accommodated by the local authority under section 20 of the Children Act 1989 while an assessment was carried out. The local authority originally arranged for the children to have contact with their parents three times a week; this was reduced to twice a week because the parents often failed to attend or left early; and in February 2014, it was reduced to once a week.

9.

Care proceedings were not issued until January 2014 and the first interim care order was made in February. Before beginning the proceedings, the local authority had commissioned assessments of the children's maternal grandmother and great-grandmother in Hungary from Children and Families Across Borders (CFAB). The maternal grandmother was unable to offer a home but the great-grandmother had suitable accommodation and was willing to offer the mother and children a home, provided that the father played no part in their lives. At that stage the father did not want his own mother to be assessed as a possible carer. The local authority had also been in touch with the Hungarian Central Authority ("HCA"), which had, in January 2014, suggested that the solution was for the Hungarian authorities to bring the children back to Hungary, as they were Hungarian citizens and their relatives could keep in contact with them there. Also, if they were to be adopted, "only the Hungarian authorities have the right to adopt Hungarian citizen minors". That has been the consistent position of the HCA throughout.

10.

At the first hearing in the High Court, the mother, then pregnant with the couple's third child, indicated her intention to return to Hungary to have the baby and also to apply for the transfer of the proceedings under article 15. This she duly did and gave birth to a baby boy in March 2014 (she later accepted that her return was in order to avoid care proceedings here in respect of him). At a hearing on 18 March 2014, Holman J declared that the girls were habitually resident here and that is not now in dispute. He adjourned the article 15 application so that there could be "some clearer understanding of what arrangements might exist for the transfer of the children themselves to live, whether long term or even during the course of the proceedings, under suitable arrangements in Hungary" ([2014] EWHC 999 (Fam), para 12).

11.

Accordingly, the allocated social worker visited Hungary in April 2014. She met the mother and the new baby, who were then living with the maternal great-grandmother. The great-grandmother was adamant that the father would not be allowed near her home, whereas the mother intended to reunite with the father as soon as they could find accommodation in Hungary. The social worker also met with representatives of the HCA and with social care professionals.

12.

The mother's application under article 15 came before Sir Peter Singer, sitting as a Deputy Judge of the High Court, on 9 May 2014. At that stage, both the local authority and the children's guardian were supporting a transfer to Hungary, but only once the requisite assessments had been completed there and a clear recommendation made about the appropriate placement for the girls. By a judgment delivered on 12 May 2014, Sir Peter Singer refused the transfer application, but provided that a further application could be considered after the "fact finding" hearing listed for 25 June 2014.

13.

The purpose of that hearing was to establish whether the facts were such as to meet the threshold for compulsory state intervention in family life, set out in section 31(2) of the Children Act 1989:

"A court may only make a care order … if it is satisfied -

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to -

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control."

Only if that threshold is crossed can the court go on to consider whether making the order that the local authority seek will best promote the welfare of the child, which is the court's paramount consideration (1989 Act, section 1(1)).

14.

Neither parent attended the hearing on 25 June 2014, although both were legally represented. The father's whereabouts were unknown but the mother had been in touch with her solicitor by telephone. At that stage she accepted 11 of the findings sought by the local authority. Five of these related to the circumstances in which the family were living and the lack of medical attention when Ella was born. Two related to the risk of harm stemming from domestic abuse in the parents' relationship and the father's aggressive and volatile personality. Two related to the parents' inconsistent and unsatisfactory contact with, and effective abandonment of, the girls: by the time of the hearing, the mother had not seen them since February and the father had not seen them since March 2014. The last finding was the parents' lack of insight into the local authority's concerns and failure to co-operate with attempts to assess them. Hogg J made findings accordingly, which all agreed were sufficient to satisfy the threshold in section 31(2).

15.

The hearing to decide what orders to make was planned for September 2014. In August, the social worker discovered that the mother, father and the new baby were all living with the paternal grandmother. The social worker's assessment of the paternal grandmother (over the telephone) was negative. There being no viable family placement in Hungary, the local authority's final care plan,

supported by the Children's Guardian, was that the girls should be adopted. Their current foster parents were being given active consideration as their adopters (and have since been approved as such). Accordingly the local authority issued a further application for a placement order under section 21 of the Adoption and Children Act 2002. This authorises the authority to place a child for adoption without parental consent (it is a separate question whether parental consent to the actual adoption order should be dispensed with). Under section 21(2), a court may not make a placement order unless:

"(a) the child is subject to a care order,

(b) the court is satisfied that the conditions in section 31(2) of the 1989 Act (conditions for making a care order) are met, or

(c) the child has no parent or guardian."

Thus, unless the child has no parent or guardian, the "threshold conditions" for state intervention must be met, but they can be met **either** by the prior making of a care order, **or** by making the requisite findings in the placement order proceedings, which may (but need not) be contemporaneous with the care proceedings.

16.
The hearing listed for September could not proceed because interpreters failed to attend. It was relisted for November 2014. The mother's position was that she wanted to look after the children in Hungary; failing that, she wanted them to live with the paternal grandmother in Hungary; failing that, she wanted them to live with the maternal great-grandmother in Hungary; and failing that, for them to be placed in a children's home in Hungary. The father wanted to look after them with the mother in the paternal grandmother's home; if the parents' cohabitation was not acceptable, the children should live with the mother in the maternal great-grandmother's home and he would stay in England; in his oral evidence he said that he would stay and work in England, but spend holidays living with the mother and children at the maternal great-grandmother's home. The HCA now took the view, apparently based on the CFAB and English social worker's assessments, that there was no suitable family member in Hungary; so the children should be placed with a foster parent there, so that they could keep the connection with their parents. The local competent authority would make a decree appointing a guardian and foster parent for them. Two professional colleagues would come to England to escort the children to their foster placement in Hungary. Only the Hungarian authorities had the right to adopt them.

The High Court decision

17.
The case was tried over five days, from 3 to 7 November 2014, by His Honour Judge Bellamy, sitting as a Deputy High Court Judge. The mother renewed her application for an article 15 transfer on the first day, but the judge postponed deciding this until the end of the hearing, because the father's counsel was unprepared for it and further submissions were expected from the HCA. He proceeded to hear evidence and submissions on all aspects of the case. On 11 November 2014 he delivered judgment only on the article 15 application, which he granted: In re J (Children: Brussels II Revised: Article 15) [2014] EWFC 45.

18.

The judge directed himself (at para 70) in accordance with the guidance given by Sir James Munby P, in In re M (Brussels II Revised: Article 15) [2014] EWCA Civ 152; [2014] 2 FLR 1372, at para 54: "The language of article 15 is clear and simple. It requires no gloss." The court had to ask itself the three questions set out in article 15.1. Unless they were answered in the affirmative there was no power to seek a transfer. If they were, there was still a discretion, but "it is not easy to envisage circumstances in where, those … conditions having been met, it would nonetheless be appropriate not to transfer the case". In answering those questions, "it is not permissible for the court to enter into a comparison of such matters as the competence, diligence, resources or efficacy of either the child protection services or the courts of the other state". The judge cited two further important passages from Sir James' judgment:

"I wish to emphasise that the question of whether the other court will have available to it the full list of options available to the English court - for example, the ability to order a non-consensual adoption - is simply not relevant to either the second or the third question. As Ryder LJ has explained, by reference to the decisions of the Supreme Court in In re I (A Child) (Contact Application: Jurisdiction) [2009] UKSC 10; [2010] 1 AC 319 and of this court in In re T (A Child) (Care Proceedings: Request to Assume Jurisdiction) [2013] EWCA Civ 895, [2014] Fam 130, the question asked by article 15 is whether it is in the child's best interests for the case to be determined in another jurisdiction, and that is quite different from the substantive question in the proceedings, 'what outcome to these proceedings will be in the best interests of the child?'."

Article 15 contemplated a relatively simple and straightforward process:

"As Lady Hale observed in Re I, para 36, … the task for the judge under article 15, 'will not depend upon a profound investigation of the child's situation and upbringing but upon the sort of considerations which come into play when deciding upon the most appropriate forum'."

19.
So the judge proceeded to ask himself the three questions. It was common ground that, because of their nationality, the children had a particular connection with Hungary (para 80).

20.
In considering whether a Hungarian court was better placed to hear the case, he set out the following factors in favour (para 82): (i) the mother's only language is Hungarian; the father speaks only a little English; in England they require the support of an interpreter; (ii) one full sibling and two half-siblings are habitually resident in Hungary; the Hungarian court could promote contact between them in ways not open to an English court and is likely to be better placed to assess whether the girls should establish a relationship with their baby brother; (iii) any further assessment required (given that he had already expressed concern about the brevity of the CFAB assessment of the maternal great-grandmother and the social worker's telephone assessment of the paternal grandmother) would be better undertaken in Hungary than in England; (iv) the Hungarian authorities would have access to background information about the family (the mother's step-father's conviction for physically abusing her; the father's time in foster care; the removal of the two half-siblings from their mother and placement in foster care); (v) the limits to what the English court could do to ensure that the children's cultural and linguistic needs are met (the final care plan being silent about what the authority intended to do to promote this); (vi) a change of placement might be necessary, should the current foster carers not be approved as adopters for them and not be willing to become their special guardians; and (vii) there was good reason to believe that force of circumstances might compel both parents to return to Hungary.

21.

He then turned to the factors pointing the other way (para 83): (i) the English court had heard all the evidence and it was possible that a final determination could be made immediately; further delay would be avoided; (ii) social work assessments had been completed of the parents, the maternal grandmother and great-grandmother, and the paternal grandmother, and of the children’s best interests by a very experienced Children’s Guardian; no detailed assessments had been undertaken by the Hungarian authorities although they had had time to do so; (iii) the parents had had full legal representation and interpretation before the English court; (iv) the allocated social worker had a relationship with the children and a thorough knowledge of the case and had travelled to Hungary to make her own inquiries; (v) retaining the proceedings in England would retain judicial continuity in the sense of having access to all the case papers and a picture of the development of the case over time (including the frequent changes in the parents’ positions); and (vi) the children had lived here all their short lives; their ethnic, cultural and linguistic needs must be weighed against the importance of growing up in a safe, stable, secure and risk-free environment.

22.

He discussed the issue of delay (paras 84 to 92). He concluded that, although it was inevitable that there would be some further delay in settling the children’s future if the case were transferred, and he did not know what the extent of that would be, it had to been seen in the context of the significant delay so far, much of which was attributable to the local authority. He was not therefore persuaded that significant weight should be attached to it.

23.

He concluded (para 93) that the Hungarian court was better placed to hear the case. He attached particular weight to the point made at para 20(ii) above (the potential for contact with siblings), a factor which had tipped the balance for Pauffley J in In re J (A Child: Brussels II revised: Article 15: Practice and Procedure) [2014] EWFC 41.

24.

The judge then turned to consider whether transfer of the proceedings to Hungary would be in the children’s best interests. The local authority argued that “the stark choice now facing the court on the article 15 application is for the children to keep their long term carers and preserve the status quo or be removed to foster care in Hungary”. The judge however did

“not accept that this is a point which the court may take into account in determining ‘best interests’ in this context. It is relevant to the determination of the question ‘what outcome to these proceedings will be in the best interests of these children?’; it is not relevant to the determination of the question ‘is transfer of these proceedings to the Hungarian court in these children’s best interests?’.” (para 94)

Having found that the Hungarian court was better placed to hear the case, it followed that it would be in their best interests to transfer it (para 95).

25.

Finally, he considered the exercise of his discretion under article 15. Having answered all three of the questions in article 15.1 in the affirmative, there were no features which would properly entitle him to exercise his discretion against requesting the Hungarian court to assume jurisdiction (para 98).

26.

Accordingly, his order asked the courts of Hungary to accept the request for a transfer of the case; the request would be transmitted by the local authority to the HCA for onward transmission to the

Hungarian court; in the event that the Hungarian courts accepted the request within the six week time limit laid down in article 15, the case would be urgently re-listed before him for consequential orders, including the transfer of the children to Hungary; in the event that the request was not accepted within that time, it would be relisted for further directions. It would appear that by “the case” he had in mind, not only the care proceedings, but also the placement order proceedings.

The Court of Appeal decision

27.

The local authority and the Children’s Guardian appealed to the Court of Appeal with the permission of Black LJ. The hearing took place in March 2015, before Sir James Munby P, Black LJ and Sir Richard Aikens, but judgment was not delivered until November (this time adopting the initial of the children’s surname): In re N (Children) (Adoption: Jurisdiction) [2015] EWCA Civ 1112; [2016] 2 WLR 713. A great deal of the President’s leading judgment is devoted to some very important questions relating to jurisdiction in adoption generally, which are not before this court on this appeal. In summary, these are (para 63):

(i)

Does an English court have jurisdiction (a) to make an adoption order in relation to a child who is a foreign national, and (b) to dispense with the consent of a parent who is a foreign national? This was a difficult question, given that the Brussels II revised Regulation does not cover adoption or measures preparatory to adoption, nor is there any other international instrument covering the matter. The Court of Appeal answered both (a) and (b) in the affirmative and this issue is not before this court.

(ii)

If the English court does have such jurisdiction, how should that be exercised? The President gave guidance on this issue (paras 104 to 111). Once again, this guidance is not before this Court on this appeal, but it does have some relevance to the issue which is before us, as we shall see.

(iii)

What is the scope of the Brussels II revised Regulation? It is well-established that the Regulation applies to care proceedings, as well as to proceedings between private parties: see In re C (Case C-435/06) [2008] Fam 27. However, by excluding “decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption” from the scope of the Regulation, does article 1.3.b also exclude (a) care proceedings where the care plan is adoption, or (b) placement order proceedings? The court concluded that (a) was within the scope of the Regulation, but (b) was not. This is not under appeal to this court.

28.

That leaves the remaining three issues, which related to article 15 (para 63):

(i)

What, upon the true construction of article 15 of the Regulation, are the requirements before the English court can make a request for a transfer to another member state? The President observed that “there is much English learning on the meaning and application” of article 15.1 (para 113). He repeated the guidance he had given in In re M (Brussels II Revised: Article 15) [2014] EWCA Civ 152; [2014] 2 FLR 1372, para 54 (see para 18 above), on which the judge had also relied. He went on to emphasise how important it is that article 15 is considered at the earliest possible opportunity (para 114), although it could be considered at any stage of the proceedings (para 117); that repeat applications were to be deprecated and would usually fail unless there had been a change of

circumstances, although they might sometimes be appropriate (para 118); that a transfer could be considered after a fact-finding hearing, but only in exceptional circumstances (para 120); and that the process should be summary, measured in hours not days and not dependent on a profound investigation of the evidence (para 122).

(ii)
Leaving on one side any question arising in relation to article 1.3.b, was the judge justified in deciding as he did? Could it be said that he was wrong to do so? The court concluded that he was justified in deciding to exercise jurisdiction to request transfer under article 15; he undertook a careful examination of all the relevant factors; he did not consider any irrelevant factors; he did not err in the weight he attached to the relevant factors, or misdirect himself in law (para 64(v)).

(iii)
Was the judge's decision vitiated by his failure to address article 1.3.b? What were the consequences of his omission to do so? The court held that the fact that he did not appreciate the effect of article 1.3.b did not vitiate his decision. His decision in relation to the care proceedings could and should stand and they should be stayed. His decision in relation to the placement order proceedings could not stand, but as they were of their nature consequential on the care proceedings, they too were stayed (para 64(vi)).

29.
Black LJ and Sir Richard Aikens delivered short concurring judgments. The appeal was therefore dismissed.

The issues in this appeal

30.
The Children's Guardian, on behalf of the children, and with the support of the local authority, now appeals to this court. The mother and the father resist that appeal. Although not formally represented before this Court, the HCA also supports the decision. Their letter of 3 February 2016 informs the court that the HCA accepted jurisdiction under article 15.5 on 15 January 2015 following the High Court's request; they were notified of the Court of Appeal decision on 2 December 2015; while waiting for the children's social worker to contact them about the details of bringing the children to Hungary, their competent local authority Guardianship Office had ascertained that the parents' living circumstances were not convenient to take care of the children; however they wished to keep the connection with them; and the girls had "two half-sister/brother who are living in the mother's care" (sic?). An English speaking foster parent had been identified for the girls, as had a child protection guardian. The HCA reiterated their consistent view that only the Hungarian authorities have the right to adopt Hungarian citizens and that the children have the possibility of keeping connection with their parents and family members if they live in Hungary. In addition, this court has received valuable written submissions from three interveners: the AIRE Centre, the Family Rights Group and the International Centre for Family Law, Policy and Practice.

31.
The principal issue before this Court is the proper approach to the assessment of the child's best interests in the context of an application for transfer under article 15. In particular, is it limited to questions of forum, and if so, how does it differ from the question of whether the foreign court is better placed to hear the case? Is the court entitled to take into account the consequences for the child of transferring the proceedings where, as here, the transfer will also result in the child's removal from her current placement to a placement in another country? A further issue is whether the judge

was correct to find that the Hungarian court was “better placed” when he had heard all the evidence and was in a position to give a final judgment upon it.

32.
The local authority has raised additional issues relating to the placement order proceedings. As the Regulation does not apply to these, was the Court of Appeal correct to impose a stay upon them in consequence of staying the care proceedings?

33.
As this is the United Kingdom’s court of final instance, the further issue arises as to whether we are obliged to make a reference to the Court of Justice of the European Union on the ground that the interpretation of article 15 is not acte clair. Between the hearing in the Court of Appeal and the handing down of judgment, the CJEU accepted a reference from the Supreme Court of Ireland in the case of Child and Family Agency (CAFA) v JD (Case C-428/15). Four of the six questions referred are relevant to this case:

“(1) Does article 15 of Regulation 2201/2003 apply to public law care applications by a local authority in a member state, when if the court of another member state assumes jurisdiction, it will necessitate the commencement of separate proceedings by a different body pursuant to a different legal code and possibly, if not probably, relating to different factual circumstances?

…

(3) If the ‘best interests of the child’ in article 15.1 of Regulation 2201/2003 refers only to the decision as to forum, what factors may a court consider under this heading, which have not already been considered in determining whether another court is ‘better placed’?

(4) May a court for the purposes of article 15 of Regulation 2201/2003 have regard to the substantive law, procedural provisions, or practice of the courts of the relevant member state?

…

(6) Precisely what matters are to be considered by a national court in determining which court is best placed to determine the matter?”

34.
At the time of writing, the CJEU has not given judgment. The Guardian sought permission to appeal to this court on question (1) above. It is certainly arguable, for the reasons sketched in the question from the Irish court, that article 15 is not applicable to care proceedings. The “case” cannot be transferred in the same way that a case between parents or other private parties can be transferred. The proceedings in the other member state will inevitably be different proceedings, with different parties, different procedures, and possibly different substantive law. Indeed, there may not be proceedings in a court at all, but only within administrative authorities, as in this case. As Black LJ elegantly put it, what is being transferred is not “the case” but “the problem” (para 189(i)). However, given that the Regulation clearly does apply to public law proceedings, the question whether article 15 does not apply in public law proceedings is obviously not acte clair. It must await the determination of the Irish reference.

35.
For that reason, it seemed to this court more convenient to refuse permission to appeal on that ground and proceed on the basis that article 15 can apply to public law proceedings. Whether it is

necessary to await the decision of the CJEU on questions (3), (4) and (6) before deciding this case is another matter, to which I shall return.

The proper approach to article 15.1

36.
The argument before us has principally focussed on the nature of the "best interests" evaluation required by article 15.1 and in particular whether it is limited to questions relevant to the choice of forum. This has been described as the "attenuated" welfare test (see In re T (A child: Article 15, Brussels II Revised) [2013] EWHC 521 (Fam); [2013] 2 FLR 909, para 21). Its source appears to be my own observation in In re I, quoted in In re M (see above at para 18). Contrary to the impression given there, In re I was not a case about article 15, but a case about article 12 of the Regulation, which relates to Prorogation of Jurisdiction. Article 12.1 allows a court dealing with divorce, separation or nullity proceedings also to deal with connected parental responsibility matters if the spouses and holders of parental responsibility agree. Article 12.3 gives the courts of a member state jurisdiction in relation to parental responsibility, even though the child is not habitually resident there, where:

"a. the child has a substantial connection with that member state, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that member state or that the child is a national of that member state; and

b. the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child."

It was in that context that I observed (at para 36):

"The final requirement in article 12(3) is that the jurisdiction of the English courts should be in the best interests of the child. Nothing turns, in my view, on the difference between 'the best interests of the child' in article 12(3), 'the superior interests of the child' in article 12(1) and 'the child's interest' in article 12(4). They must mean the same thing, which is that it is in the child's interests for the case to be determined in the courts of this country rather than elsewhere. This question is quite different from the substantive question in the proceedings, which is 'what outcome to these proceedings will be in the best interests of the child?' It will not depend upon a profound investigation of the child's situation and upbringing but upon the sort of considerations which come into play when deciding upon the most appropriate forum. The fact that the parties have submitted to the jurisdiction and are both habitually resident within it is clearly relevant though by no means the only factor."

37.
It appears to have been the Court of Appeal's endorsement of this approach to the best interests test in article 15.1 which led the judge to hold (see para 24 above) that the consequences for these children of being removed from their long term carers and taken to new foster carers in Hungary was completely irrelevant to whether transferring the case would be in their best interests.

38.
The first point made by the appellants is that the requirement in article 12.3 is quite different from the requirement in article 15.1. In article 12.3 (as also in article 12.1) it is the court which is deciding whether to accept jurisdiction, which it would not otherwise have, that has to decide whether to do so is in the best interests of the child. This is roughly equivalent to the requirement in article 15.5 that the court which is requested to take the case (here the Hungarian court) must consider that it is the

best interests of the child to accept jurisdiction. Article 15.1 is directed towards the court which already has jurisdiction in an existing case. It imposes an additional requirement that the transferring court considers this to be in the best interests of the child. Obviously, the considerations applicable when deciding whether to relinquish jurisdiction may be somewhat different from the considerations applicable when deciding whether to accept it.

39.
Secondly, article 12.3 contains no requirement that the court accepting jurisdiction be "better placed" to hear the case than the court which would otherwise have it. Interestingly, the draft of article 15.1 proposed by the EU Commission did not contain this requirement, although the Explanatory Memorandum referred to "situations (albeit exceptional) where the courts of another member state would be better placed to hear the case". The requirement does, however, appear in article 8 of 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, which the Commission described as a "similar mechanism" in their Explanatory Memorandum. That may be why it found its way into the eventual Regulation. The European legislator must have considered that the "better placed" requirement was something different from the "best interests" requirement, otherwise they would not both be there.

40.
Thirdly, as originally drafted, article 15.1 limited transfer to "exceptional circumstances". As finally adopted, it no longer does so, merely introducing the power with the words "by way of exception". An exception does not necessarily require that the circumstances be exceptional. Nevertheless, it is an exception to the general rule, that the future of children should be decided in the courts of the member state where they are habitually resident. In general, it is expected that exceptions will be narrowly construed and applied (see, for example, Somafer SA v Saar-Ferngas AG (Case C-33/78) [1978] ECR 2183; [1979] 1 CMLR 490, para 7), although the text which was eventually adopted is more "open-ended" than that originally proposed.

41.
Fourthly, however, it is clear that the Commission regarded the requirement that the court proposing the transfer, as well as the court accepting it, should evaluate whether the transfer would be in the best interests of the child as "an additional safeguard". By this they must have meant an additional safeguard for the child. In this connection, recital 12 to the Regulation is relevant:

"The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the member state of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility."

Recital 33 is also relevant:

"This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in article 24 of the Charter of Fundamental Rights of the European Union."

42.
Article 24 of the Charter of Fundamental Rights is headed "The rights of the child":

“1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”

As the AIRE Centre point out in their helpful intervention, article 24.2 is clearly modelled on article 3.1 of the United National Convention on the Rights of the Child. They further point out that secondary EU legislation, such as the Regulation, must be interpreted consistently with the Treaties, including the Charter of Fundamental Rights: Criminal proceedings against Lindqvist (Case C-101/01) [2003] ECR I-12971, Ordre des barreaux francophones et germanophone v Conseil des ministres (Case C-305/05) [2007] ECR I-5395. The provisions of the Charter only apply when member states are implementing EU law, but we are clearly doing so in this case. If there were any doubt about the need to interpret and apply the Regulation consistently with article 24 of the Charter, recital 33 puts that beyond doubt. This is a case about children’s rights, and in particular, the right to have their best interests regarded as a primary consideration in all actions relating to them. As the AIRE Centre also point out, the line of case law leading to the “attenuated” welfare test does not appear to have had any explicit regard to the best interests obligation. The test might have looked very different if it had done.

43.
It is the case, as argued on behalf of the mother, that the “better placed” and “best interests” questions are inter-related. Some of the same factors may be relevant to both. But it is clear that they are separate questions and must be addressed separately. The second one does not inexorably follow from the first.

44.
The question remains, what is encompassed in the “best interests” requirement? The distinction drawn in In re I remains valid. The court is deciding whether to request a transfer of the case. The question is whether the transfer is in the child’s best interests. This is a different question from what eventual outcome to the case will be in the child’s best interests. The focus of the inquiry is different, but it is wrong to call it “attenuated”. The factors relevant to deciding the question will vary according to the circumstances. It is impossible to be definitive. But there is no reason at all to exclude the impact upon the child’s welfare, in the short or the longer term, of the transfer itself. What will be its immediate consequences? What impact will it have on the choices available to the court deciding upon the eventual outcome? This is not the same as deciding what outcome will be in the child’s best interests. It is deciding whether it is in the child’s best interests for the court currently seised of the case to retain it or whether it is in the child’s best interests for the case to be transferred to the requested court.

Application in this case

45.
It follows that the judge was wrong to accept that it followed from his decision that the Hungarian court was better placed to hear the case that it would be in the best interests of the children to transfer it. He ought to have addressed his mind to the short and long term consequences for them of

doing so and also of not doing so. The short term consequence was that these little girls would be removed from the home where Ella had lived for virtually all her life and Janetta had lived for most of hers, where they were happy and settled, and doing well (Janetta's behaviour having been seriously disturbed when they first arrived). They would be transferred to a foster placement about which the court knew nothing other than that the foster carer spoke English. The country, the language and the surroundings would be completely unfamiliar to them. The long term consequence would be to rule out one possible option for their future care and upbringing, that is, remaining in their present home on a long term legally sanctioned basis, whether through adoption, or through a special guardianship order, or through an ordinary residence order. It would not be in the best interests of these children to transfer a dispute about their future to a court which would be unable to consider one of the possible outcomes, indeed the outcome which those professionals with the closest knowledge of the case and the children now consider would be best for them.

46.

That is not, of course, to say that that is the outcome which the court should eventually decide. There is a very live issue as to whether in the long run these little girls of Hungarian nationality and descent, with mixed Hungarian and Roma ethnicity, and many family members in Hungary, including their parents, grandparents, a sibling and half siblings, would be better living in Hungary. The judge took into account the importance of their siblings and their background when addressing the question of which court was "better placed". But in addressing that question, he did not take into account what the real issues in the case were.

47.

The real issues were that the parents wanted the girls to come to Hungary, preferably to live with them or with members of the extended family. The advantages and disadvantages of this had been explored by the girls' social worker. The underlying problem was that the mother's family would have nothing to do with the father, whom they saw as abusive, while the father's family supported him, and the mother wished to stay with him. The HCA, therefore, apparently relying largely on the assessments carried out by or for the local authority, did not see family placement as viable, and so proposed foster care, but preserving the possibility of some sort of relationship with the parents and siblings. The local authority, with the support of the Children's Guardian, now proposed placement for adoption, preferably with the existing foster carers.

48.

The judge considered the Hungarian authorities better placed to achieve the first two of these outcomes. He did not consider how far it would be open to him to achieve the same outcomes without transferring the case. Yet there clearly would have been ways of securing that the children were placed under the aegis of the relevant Guardianship Office in Hungary. As the Family Rights Group observe, the courts have been arranging foreign placements for years. The mother is right to say that the court cannot dictate the content of a local authority's care plan when it makes a final care order in care proceedings. On the other hand, the local authority may be willing to change its care plan in the light of clear findings as to the children's best interests. In any event, a placement abroad can be achieved without making a care order. If the child is not subject to a care order, the inherent jurisdiction of the High Court may be used in a flexible way to secure the desired outcome. The prohibitions on its use in section 100(2) of the Children Act 1989 would not preclude the court from making orders in favour of the relevant Hungarian authority. A similar result might be achieved through orders under section 8 of the Children Act 1989, which again would not be precluded by

section 9(5) (sections 100(2) and 9(5) preclude the use of such orders in effect to place children in the care of a local authority).

49.
Nor did the judge consider which court would be better placed to achieve the third outcome. There could only be one answer to this. But there would be a variety of ways of achieving that outcome. The local authority did propose a closed adoption, but there are other ways of achieving permanence and stability in this country without cutting off all links with the children's family and background. There are orders in favour of foster parents which fall short of adoption. Whether the children remain in foster care under a care order or under some order in favour of the foster carers, the court is in charge of contact. It could make contact orders which would be recognisable and enforceable in Hungary. Alternatively, it could transfer the contact part of the proceedings to Hungary under article 15. All of these things should have been taken into account in deciding which court was "better placed".

50.
Above all, in this particular case, the judge had heard and read all the evidence that anyone involved wished to put before him. He was in a position to decide the outcome. Although a transfer request can be made and determined at any time, it would be rare indeed that, the case having reached such a point, another court would be better placed to hear it.

51.
Thus, in my view, not only did the judge take the wrong approach to the "best interests" question, he also left out of account some crucial factors in deciding upon the "better placed" question. I shall return to the consequences of that after considering the other issues in the case.

The placement order proceedings

52.
The local authority argue that, as the placement order proceedings are not within the scope of the Regulation, there was no power to stay them with a view to transfer under article 15. The Court of Appeal was correct to recognise that, but wrong to stay them as consequential on the care proceedings. Section 21(2) of the Adoption and Children Act 2002 (para 15 above) makes it clear that the threshold may be determined either in care proceedings or in separate placement order proceedings. Thus they argue that the placement order proceedings should have been left to take their course.

53.
It is, of course, correct that article 15 does not apply to placement order proceedings. The judge was wrong to think that it did. But that, in itself, did not invalidate his decision to transfer the care proceedings. If it was right to transfer the care proceedings, then it made no sense to leave the placement order proceedings to continue as if nothing had happened. The object of the transfer was that the children's future should be decided in Hungary and not in England. As the mother points out, under the Family Procedure Rules 2010, the court has wide case management powers, including, under rule 4.1(3)(g), the power to stay the whole or part of any proceedings either generally or until a specified later date. The Court of Appeal has the same powers as the trial judge. It clearly had the power to do this. If it had been right to uphold the transfer, it would clearly have been right to stay the placement order proceedings.

Reference to the CJEU?

54.
As already noted, there is a live question before the CJEU as to whether article 15 is capable of applying to public law proceedings such as these. This cannot be regarded as acte clair. This court has to decide whether to make its own reference of essentially the same question that the Supreme Court of Ireland has already referred; whether to delay its decision until the outcome of that reference is known; or whether to proceed on the assumption that article 15 is capable of applying to public law proceedings and review the decisions of the courts below on their merits.

55.
In my view, the third course is infinitely preferable to the other two. These proceedings have already taken far too long. Some of the delay is attributable to the local authority, which should have brought proceedings long before they did, rather than relying upon the parents' agreement for the children to be accommodated; some of the delay is attributable to the vacillations of the parents and their failure to co-operate with the authority over assessments and contact with their children; some of it is attributable to the courts. There may be good, or at least understandable, reasons for much of this. But the children are the last people who should be made to suffer for the actions or inaction of others. Janetta is now aged four years and two months. Ella is now aged two years and 11 months. For almost all of Ella's life the girls have lived with their present foster parents. One way or another, their best interests demand that their future should be decided as soon as possible.

56.
But does that leave this court free to decide upon the correct approach to an article 15 application? The Supreme Court of Ireland has referred questions which are essentially the same as the principal issue in this case. However, it has done so in a very different context - a pregnant woman who had deliberately left England and moved to have her baby in Ireland in order to avoid care proceedings here. The transfer question therefore also raised issues about the free movement of workers within the European Union which do not arise in this case.

57.
I share the President's view that the language of article 15.1 is simple and clear. It requires no gloss or explanation. The court has three questions to answer: does the child have a particular connection (as defined in article 15.3) with another member state; would a court in that member state be better placed to hear the case, or a specified part of it; and would this be in the best interests of the child? The "better placed" and "best interests" questions are separate questions and the "best interests" question is intended to be an additional safeguard for the child. The question is not what eventual outcome to the case will be in the best interests of the child but whether the transfer will be in her best interests. Subject to that, the scope of the inquiry will depend upon all the circumstances of the case. I would therefore proceed on the basis that the meaning of article 15.1 is acte clair, albeit not yet éclairé, and we are merely applying it to the facts of the case, which is the task of the national courts.

58.
Furthermore, for the reasons already explained, the judge was, in my view, plainly wrong to conclude that the Hungarian authorities were, on the particular facts of this case, "better placed" to hear the case. He left out of account the vital factor that to transfer the case would preclude one possible outcome which might be in the best interests of the children concerned, whereas retaining jurisdiction would allow all the possible outcomes to be considered. Transfer would also precipitate their removal from their long-standing home without any evaluation of the impact of this upon their psychological well-being.

59.
In my view, therefore, it is not necessary for this court to make a reference to the CJEU or to await the outcome of the reference made by the Supreme Court of Ireland. We should proceed to decide the case.

Conclusion

60.
It follows that the appeal must be allowed and the transfer request set aside. After this period of time, there can be no question of re-opening the transfer application. It is in the best interests of these children for their future to be decided as soon as possible. Unfortunately, it will be necessary for the evidence to be updated. The case should therefore be returned to the Family Division of the High Court, to be heard by a judge of that division, as soon as possible.

61.
As has already been made clear, the range of possible outcomes for these two children is not limited to the primary case presented to the judge: closed adoption here as against foster placement in Hungary. There are several other options in between. The guidance given by the President in this case (paras 104 to 111) is relevant. He emphasised the importance in the checklist of factors to be considered when deciding whether to make an adoption order in section 1(4) of the 2002 Act, "(c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person" and "(d) the child's … background" (para 104). The court and the professionals "must give the most careful consideration … to those parts of the checklist which focus attention, explicitly or implicitly, on the child's national, cultural, linguistic, ethnic and religious background". The court is directed to consider the likely effect, throughout her life, of having ceased to be a member of her original family (para 105). As he had said in Merton London Borough Council v B [2015] EWCA Civ 888; [2016] 2 WLR 410, para 84, "We must be understanding of the concerns about our processes voiced by European colleagues;" and "the court … must rigorously apply the principle that [non-consensual] adoption is 'the last resort' and only permissible 'if nothing else will do'" (para 106). On the other hand, as he had said in In re J (Care Proceeding: Appeal) [2014] EWFC 4; [2015] 1 FLR 850, para 36, at the end of the day matters had to be judged "according to the law of England and by reference to the standards of reasonable men and women in contemporary English society. The parents' views, whether religious, cultural, secular or social, are entitled to respect but cannot be determinative" (para 108). One important factor, in considering the child's welfare, is whether an adoption order would be recognised in the country where the child is domiciled, or a national, or has been habitually resident. If it would not be, the court will have to consider the disadvantages of a "limping" adoption order (see In re B(S) (An Infant) [1968] Ch 204), which might make it difficult for them ever to visit Hungary. This might tell in favour of finding other ways of giving the children the security and stability they need.

62.
Much will, of course, depend upon the evidence before the judge at the rehearing. It will be for him or her to decide upon the outcome which will be in the best interests of these little girls.