Neutral Citation Number: [2015] EWCA Civ 1112

Case No: B4/2014/3844 and 3846

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
His Honour Judge BELLAMY (sitting as a Deputy High Court Judge)
[2014] EWFC 45

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 November 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE BLACK
and
SIR RICHARD AIKENS

- -

In the matter of N (Children) (Adoption: Jurisdiction)

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- -

Mr Roger McCarthy QC and Mr Mark Twomey (instructed by the local authority) for the local authority
Mr Iain Goldrein QC and Ms Martha Cover (instructed by Hanne and Co) for the children's guardian
Mr William Tyler QC and Mr Malcolm MacDonald (instructed by Lawrence and Co) for the mother
Mr Alistair MacDonald QC and Mr Dorian Day (instructed by Hecht Montgomery Solicitors) for the father

Hearing dates : 25-27 March 2015

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Approved Judgment

Sir James Munby, President of the Family Division :

1. These are appeals, pursuant to permission granted by my Lady, Black LJ, on 3 December 2014, from a decision of His Honour Judge Bellamy, sitting as a Deputy High Court Judge. His judgment, handed down on 11 November 2014, has been published and can be found, available to all, on the free, open-access, BAILII website: *Re J and E (Children: Brussels II Revised: Article 15)* [2014] EWFC 45.

Introduction

2. Judge Bellamy was conducting the final hearing of care and placement order proceedings in relation to two Hungarian children, J born in January 2012 and E born on 6 May 2013. He directed that the proceedings were to be transferred to Hungary in accordance with Article 15 of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, commonly referred to in this country as Brussels II Revised, BIIR or, as I shall refer to it here, BIIA.

3. The essential issue is whether Judge Bellamy was right to proceed as he did under Article 15. The local authority, represented by Mr Roger McCarthy QC and Mr Mark Twomey, supported by the children's guardian, represented by Mr Iain Goldrein QC and Ms Martha Cover, submit that Judge Bellamy was wrong. The mother, represented by Mr William Tyler QC and Mr Malcolm MacDonald, and the father, represented by Mr Alistair MacDonald QC and Mr Dorian Day, submit that he was right and that the appeals should accordingly be dismissed. My conclusion is that, subject only to one matter which does not affect the substance, Judge Bellamy was right, essentially for the reasons he gave, and that the appeals should accordingly be dismissed.

4. During the hearing of these appeals, the issues have broadened, and we have necessarily had to consider a number of very basic but nonetheless fundamentally important issues to do with the application of our domestic adoption law in cases with a foreign element. This judgment is therefore both wide-ranging and in consequence lengthy, as has been its preparation. This has, most unfortunately, led to even more delays in a case that has already been unduly delayed. I am very sorry.

5. Since our judgments may be read by those not familiar with our domestic constitutional arrangements, I should explain at the outset that within the United Kingdom of Great Britain and Northern Ireland (what for ease of reference I shall call 'the United Kingdom') there are three quite separate legal jurisdictions: England and Wales (which for ease of reference I shall call 'England'), Scotland and Northern Ireland. We are sitting as judges of the Court of Appeal in England, applying, in addition to the relevant international obligations of the United Kingdom, the domestic law of England.

6. I should also explain that, as President of the Family Division, I am Head of Family Justice for England and Wales. Black LJ in addition to being a judge of the Court of Appeal is also Head of International Family Justice for England and Wales. The third member of the court, Aikens LJ is a judge of the Court of Appeal whose primary experience and expertise lies in other areas of law but who, in those fields, has great

experience of cross-border jurisdictional issues of the kind that arise here. We are glad to have him sitting with us: it is important in cases such as this that we, and the litigants, have the benefit of a judge who is not primarily a family lawyer and who can bring to bear a non-family law perspective.

The wider context

7. The background to these appeals is the fact that England is unusual in Europe in even permitting adoption without parental consent, indeed in the teeth of parental opposition – what I shall refer to as 'non-consensual adoption' – and even more unusual in the degree to which it has recourse to non-consensual adoption, both domestically and in the case of children who are foreign nationals.[1] The key provision in English law is section 52(1) of the Adoption and Children Act 2002, which provides that:

> "The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that –
>
> (a) the parent or guardian cannot be found or lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent, or
>
> (b) the welfare of the child requires the consent to be dispensed with."

In the present case, as in most such cases, we are concerned with section 52(1)(b).

8. I am acutely conscious of 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' but which I prefer, and I think more accurately, to refer to as non-consensual adoption. There is no shirking the fact that our approach in these matters has given rise to controversy abroad and particularly in Europe. I make no apology for repeating what I said, sitting at first instance, in *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FLR 151, paras 13-15, a case involving a child from Slovakia:

> "13 Leaving on one side altogether the circumstances of this particular case, there is a wider context that cannot be ignored. It is one of frequently voiced complaints that the courts of England and Wales are exorbitant in their exercise of the care jurisdiction over children from other European countries. There are specific complaints that the courts of England and Wales do not pay adequate heed to BIIR and that

[1] An illuminating survey of the domestic law of a large number of European countries is to be found in Fenton-Glynn, *Children's Rights in Intercountry Adoption*, Intersentia 2014, Chapter 6, Compulsory Adoption: Adoption without Consent. More recently, the Directorate General for Internal Policies of the EU Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, has published a study for the Peti committee, *Adoption without consent*, PE 519.236, by the same author. Annex III contains a valuable Comparison of Grounds for Adoption without Consent in EU Member States.

> public authorities do not pay adequate heed to the Vienna Convention [on Consular Relations of 24 April 1963].
>
> 14 In the nature of things it is difficult to know to what extent such complaints are justified. What is clear, however, is that the number of care cases involving children from other European countries has risen sharply in recent years and that significant numbers of care cases now involve such children. It is timely therefore to draw the attention of practitioners, and indeed the courts, to certain steps which can, and I suggest from now on should, be taken with a view to ameliorating such concerns.
>
> 15 It would be idle to ignore the fact that these concerns are only exacerbated by the fact that the United Kingdom is unusual in Europe in permitting the total severance of family ties without parental consent … Thus the outcome of care proceedings in England and Wales may be that a child who is a national of another European country is adopted by an English family notwithstanding the vigorous protests of the child's non-English parents. No doubt, from our perspective that is in the best interests of the child – indeed, unless a judge is satisfied that it really is in the child's best interests no such order can be made. But we need to recognise that the judicial and other State authorities in some countries that are members of the European Union and parties to the BIIR regime may take a very different view and may indeed look askance at our whole approach to such cases."

9. In *Re D (A Child)* [2014] EWHC 3388 (Fam), para 35, speaking of practice in this country, Mostyn J commented:

> "The proposition of the merits of adoption is advanced almost as a truism but if it is a truism it is interesting to speculate why only three out of 28 European Union countries allow forced or non-consensual adoption. One might ask: why are we so out of step with the rest of Europe? One might have thought if it was obvious that forced adoption was the gold standard the rest of Europe would have hastened to have adopted it. The relevance of this aspect of the case is surely obvious. This case, as I have demonstrated, could very easily have been tried in the Czech Republic. It was a fortuity that it was not. Had it been so tried there the orders sought by the Local Authority could not have been made. I accept, of course, that I must apply the law of England exclusively but in so doing the unique irrevocability of the orders sought has to play a prominent part in my judgment."

10. Earlier in his judgment he had described in powerful words (para 1) the reality of what the English court is doing in such cases:

> "If any case illustrates the momentous and very difficult nature of the decisions that have to be made in the Family Division it is this one. My decision will determine whether ED grows up in the Czech Republic, where full respect will be paid to his Czech Roma ethnicity and where it is likely that the parental link will be maintained, or whether he grows up in the United Kingdom as an English boy to become, in adulthood, an Englishman. On this latter footing, being realistic, his Czech Roma heritage will either be extinguished or reduced to insignificance."

In the context of care and adoption we rightly disavow 'social engineering' as something which has no place in our law or practice (see for a recent example *Re A (A Child), Darlington Borough Council v M* [2015] EWFC 11, para 96). But it might be said that we are prepared to contemplate with equanimity in a case with a foreign element what many would say is a much greater degree of social engineering than we would be prepared to tolerate in a purely domestic case.

11. Further prominence has been given to these concerns by the publication in January 2015 of the Report (Rapporteur, Ms Olga Borzova) of the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of the Council of Europe, *Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States* (the Borsova Report). So far as I am aware there has been no public official response by the United Kingdom to the Borsova Report.

The wider context: some key considerations

12. I do not resile from a word of what I said in *Re E*. But there are four important matters to be borne in mind, to which I need to draw attention.

13. The first is that non-consensual adoption has been part of English law ever since we first had adoption. Adoption[2] in its legal sense has in England always been regulated by statute. There was and is no adoption at common law. Adoption was introduced in England by the Adoption of Children Act 1926. Section 2(3) provided that the court might dispense with parental consent:

> "if satisfied that the [parent] has abandoned or deserted the infant or cannot be found or is incapable of giving such consent or … either has persistently neglected or refused to contribute to [the support of the infant] or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with."

14. Section 3(1) of the Adoption Act 1949 introduced, in place of the final words of section 2(3) of the 1926 Act, the power to dispense with consent if it was "unreasonably withheld." That was carried forward in section 3(1)(c) of the Adoption Act 1950, section 5(1)(b) of the Adoption Act 1958, and section 16(2)(b) of the

[2] For the history, see *Cretney*, Family Law in the Twentieth Century: A History, OUP 2003, Chapter 17, Legal Adoption of Children, 1900-1973.

Adoption Act 1976. Section 52(1) of the Adoption and Children Act 2002, as we have seen, substitutes the rule that consent can be dispensed with if that is what "the welfare of the child requires."

15. So, although the precise criteria have changed from time to time, the English court has always had power to dispense with parental consent in certain defined circumstances.

16. It is important to acknowledge, however, that, whatever the legal theory, practice has changed dramatically over the 89 years we have had adoption in England. Non-consensual adoption used to be rare, but the position has changed radically. Initially, the courts took a very narrow view indeed of the final limb of section 2(3) of the 1926 Act: see *Re JM Caroll* [1931] 1 KB 317 and contrast *H v H* [1947] KB 463. Much more important, the entire focus of adoption has changed dramatically in recent decades. Until the late 1960s, the typical adoption was of an illegitimate child born to a single mother who, however reluctantly, consented to the adoption of her child. Non-consensual adoption was comparatively rare. A combination of dramatic changes in the 1960s – the ready availability of the contraceptive pill, the legalisation of abortion, the relaxation of the divorce laws and a sea-change in society's attitudes to illegitimacy – led to a drastic reduction in the number of adoptions of the traditional type. The result of various changes in the system of public childcare, culminating in the implementation in October 1991 of the 1989 Act, has led in recent decades to a correspondingly dramatic increase in the number of non-consensual adoptions. The typical adoption today is of a child who has been made the subject of a care order under the 1989 Act and where parental consent has been dispensed with in accordance with section 52(1)(b) of the 2002 Act.

17. The second important matter is the English court's understanding of what is meant by the word "requires" in section 52(1)(b) of the 2002 Act. The definitive statement is to be found in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, paras 125-126:

> "[125] … It is a word which was plainly chosen as best conveying, as in our judgment it does, the essence of the Strasbourg jurisprudence. And viewed from that perspective 'requires' does indeed have the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable.
>
> [126] What is also important to appreciate is the statutory context in which the word 'requires' is here being used, for, like all words, it will take its colour from the particular context. Section 52(1) is concerned with adoption – the making of either a placement order or an adoption order – and what therefore has to be shown is that the child's welfare 'requires' adoption as opposed to something short of adoption. A child's circumstances may 'require' statutory intervention, perhaps may even 'require' the indefinite or long-term removal of the child from the family and his or her placement with strangers, but that is not to say that the same circumstances will necessarily 'require' that the child be adopted. They may or

> they may not. The question, at the end of the day, is whether what is 'required' is adoption."

The court had earlier commented (para 120) that the word "necessary", as in the familiar Convention phrase "necessary in a democratic society":

> "takes its colour from the context but in the Strasbourg jurisprudence has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand. It implies the existence of what the Strasbourg jurisprudence calls a 'pressing social need.'"

18. The third important point, which must not be forgotten in all the rhetoric about 'forced adoption', is that, whatever the concerns expressed elsewhere in Europe, there can be no suggestion that, in this regard, the domestic law of England and Wales is incompatible with the United Kingdom's international obligations or, specifically, with its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. There is nothing in the Strasbourg jurisprudence to suggest that our domestic law is, in this regard, incompatible with the Convention. For example, there have been no non-consensual adoption cases in which a successful challenge has been mounted at Strasbourg to the effect that the English system is, as such, Convention non-compliant.

19. The fourth point is the one I made in *In re R (A Child) (Adoption: Judicial Approach)* [2014] EWCA Civ 1625, [2015] 1 WLR 3273, para 45:

> "The fact that the law in this country permits adoption in circumstances where it would not be permitted in many European countries is neither here nor there … The Adoption and Children Act 2002 permits, in the circumstances there specified, what can conveniently be referred to as non-consensual adoption. And so long as that remains the law as laid down by Parliament, local authorities and courts, like everyone else, must loyally follow and apply it. Parliamentary democracy, indeed the very rule of law itself, demands no less."

I added (para 44):

> "Where adoption is in the child's *best* interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family at all costs."

Judicial comity

20. Before going any further I need to make another general point the importance of which, in my judgment, cannot be over-stressed. Again, I make no apologies for quoting what I said in *Re E*, paras 17-19:

> "17 The English family justice system is now part of a much wider system of international family justice exemplified by such instruments as the various Hague Conventions and, in the purely European context, by BIIR. Looking no further afield, we are part of the European family of nations. We share common values. In particular in this context we share the values enshrined in BIIR.
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> 18 In *Re T (A Child) (Care Proceeding: Request to Assume Jurisdiction)* [2013] EWHC 521 (Fam), [2013] Fam 253, sub nom *Re T (A Child: Art 15, Brussels II Revised)* [2013] 2 FLR 909, para [37], Mostyn J expressed his complete disagreement with an approach which he characterised as 'a chauvinistic argument which says that the authorities of the Republic of Slovakia have got it all wrong and that we know better how to deal with the best interests of this Slovakian citizen'. He added that the court 'should not descend to some kind of divisive value judgment about the laws and procedures of our European neighbours'. I profoundly and emphatically agree. That was a case which, as it happened, also involved Slovakia. But the point applies with equal force in relation to every country which is a member of the European Union.
>
> 19 On appeal in the same case, *Re T (Brussels II Revised, Art 15)* [2013] EWCA Civ 895, [2014] 1 FLR 749, para [24], Thorpe LJ said that:
>
> > 'there is a fundamental flaw in [counsel's] submission since it essentially seeks to elevate the professional view of experts in this jurisdiction over the professional view of experts in the jurisdiction of another Member State. That is, in my view, impermissible. We must take it that the child protection services and the judicial services in Slovakia are no less competent than the social and judicial services in this jurisdiction.'
>
> Again I emphatically agree."

21. I went on (para 20) to counsel against what I called "the sins of insularity" and to point out that exposure to what our colleagues are doing elsewhere in Europe has:

> "taught us that there are other equally effective ways of doing things which once upon a time we assumed could only be done as we were accustomed to doing them [and] taught that we can, as we must, both respect and trust our judicial colleagues abroad."

22. We returned to the same point in *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para 19, where Ryder LJ said:

> "the judicial and social care arrangements in Member States are to be treated by the courts in England and Wales as being equally competent."

Agreeing, I said this (para 54):

> "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 Vienna Convention

23. In *Re E* I also drew attention (paras 38-41) to the provisions of Articles 36 and 37 of the Vienna Convention on Consular Relations of 24 April 1963. I set out (paras 45-48) what good practice would in future require. I emphasised (para 46) that:

> "In cases involving foreign nationals there must be transparency and openness as between the English family courts and the consular and other authorities of the relevant foreign state. This is vitally important, both as a matter of principle and, not least, in order to maintain the confidence of foreign nationals and foreign states in our family justice system."

24. I went on (para 47) to make two points to which I need to draw attention. First, in every care or other public law case involving a child who is a foreign national,

> "the court should ascertain whether that fact has been brought to the attention of the relevant consular officials and, if it has not, the court should normally do so itself without delay."

Secondly:

> "the court … should normally accede to any request, whether from the foreign national or from the consular authorities of the relevant foreign state, for … permission for an accredited consular official to be present at the hearing as an observer in a non-participatory capacity."

In *Re CB (A Child)* [2015] EWCA Civ 888, para 79, we made clear that:

> "local authorities should be appropriately pro-active in bringing to the attention of the relevant consular authorities *at the earliest possible opportunity* the fact that care proceedings involving foreign nationals are on foot or in contemplation."

The statutory framework

25. Having thus set out the wider context in which these appeals fall to be determined, I need, before proceeding any further, to set out an explanatory account, for the benefit in particular of those reading this judgment who may not be familiar with it, of the English law and practice in relation to care orders, placement orders and adoption orders.

26. The law in relation to care orders is set out in the Children Act 1989, the law in relation to placement orders and adoption orders in the Adoption and Children Act 2002.

The statutory framework: care orders

27. In relation to the making of a care order (that is, an order placing a child in the care of a local authority), the fundamental provision is 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."

In the present case, as in most care cases, the application was brought under section 31(2)(b)(i).

28. There is no statutory elaboration of what is meant by the word "significant" in section 31(2)(a). Its meaning was considered by the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075, paras 23-31, 56, 108, 179-193.

29. "Harm" is defined as follows in section 31(9):

> ""harm" means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another;
>
> "development" means physical, intellectual, emotional, social or behavioural development;
>
> "health" means physical or mental health; and
>
> "ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical."

30. Section 31(2) defines the statutory 'threshold' that has to be met if the court is to have jurisdiction to make a care order. If the 'threshold' is *not* established, the court dismisses the application. If the 'threshold' *is* established, the court must then proceed to consider what, if any, order to make.

31. Section 1(1) of the 1989 Act provides that at this stage:

> "the child's welfare shall be the court's paramount consideration."

The court is also required to have regard to the 'welfare checklist' set out in section 1(3) of the 1989 Act:

> "a court shall have regard in particular to –
>
> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
>
> (b) his physical, emotional and educational needs;
>
> (c) the likely effect on him of any change in his circumstances;
>
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
>
> (e) any harm which he has suffered or is at risk of suffering;
>
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
>
> (g) the range of powers available to the court under this Act in the proceedings in question."

32. If the local authority's plan is for the adoption of the child, the court must also at this stage comply with the more stringent requirements of section 1 of the Adoption and Children Act 2002: *In re C (A Child) (Placement for Adoption: Judicial Approach) Practice Note* [2013] EWCA Civ 1257, [2014] 1 WLR 2247, para 29, *In re R (A Child) (Adoption: Judicial Approach)* [2014] EWCA Civ 1625, [2015] 1 WLR 3273, para 51.

33. Section 1(2) of the 2002 Act provides that:

> "The paramount consideration of the court … must be the child's welfare, *throughout his life*" (emphasis added).

Section 1(4) of the 2002 Act provides that:

> "The court … must have regard to the following matters (among others) –
>
> (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
>
> (b) the child's particular needs,
>
> (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*,
>
> (d) *the child's* age, sex, *background* and any of the child's characteristics which the court … considers relevant,
>
> (e) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering,
>
> (f) the relationship which the child has with relatives, and with any other person in relation to whom the court … considers the relationship to be relevant, including –
>
> (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
>
> (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
>
> (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child" (emphasis added).

I draw attention in particular to the phrases I have emphasised. I shall return below to their implications.

34. This is not the occasion for any elaborate analysis of how the court should exercise its powers under the 1989 Act, but there are some absolutely fundamental points to which I need to draw attention.

35. First, it is for the local authority to establish the 'threshold' in accordance with section 31(2) of the 1989 Act. This requires the local authority (a) to prove the facts upon which it seeks to rely, (b) to establish that the facts so proved meet the "significant harm" test and (c) to establish that the "significant harm" thus established meets the "reasonable parent" test, that is, that the care given to the child was not what it would be reasonable to expect a parent to give: see *Re A (A Child)* [2015] EWFC 11, approved by this court in *Re J (A Child)* [2015] EWCA Civ 222. In particular, the local authority must prove that there is the necessary link between the facts upon which it relies and its case on 'threshold'; it must demonstrate why certain facts, if

proved, justify the conclusion that the child has suffered or is at risk of suffering significant harm of the type asserted by the local authority.

36. In relation to the 'reasonable parent' criterion, it is vital always to bear in mind in these cases the wise and powerful words of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, para 50:

> "society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."

37. That approach was endorsed by the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075. I draw attention, without quoting, to what Lord Wilson of Culworth said (para 28). Baroness Hale of Richmond said (para 143):

> "We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities, or who espouse antisocial political or religious beliefs."

38. I add that, as pointed out in *Re K; A Local Authority v N and Others* [2005] EWHC 2956 (Fam), [2007] 1 FLR 399, para 26, in a passage approved by Baroness Hale of Richmond in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075, para 178:

> "the court must always be sensitive to the cultural, social and religious circumstances of the particular child and family."

39. The second fundamental point to which I need to draw attention is that, if it is seeking to have a child adopted, the local authority must establish that "nothing else will do": see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075, and *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035. See also *In re R (A Child) (Adoption: Judicial Approach)* [2014] EWCA Civ 1625, [2015] 1 WLR 3273. As Baroness Hale of Richmond said in *In re B*, para 198:

> "the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where

> motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do."

This echoes what the Strasbourg court said in *Y v United Kingdom* (2012) 55 EHRR 33, [2012] 2 FLR 332, para 134:

> "family ties may only be severed in very exceptional circumstances and … everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained."

40. The third fundamental point relates to practice and procedure: see *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035, and *In re R (A Child) (Adoption: Judicial Approach)* [2014] EWCA Civ 1625, [2015] 1 WLR 3273. It suffices for present purposes to quote what was said in *Re R*, para 57, referring back to *Re B-S*:

> "The core requirements were identified as follows (paras 33-44):
>
> > "33 Two things are essential – we use that word deliberately and advisedly – both when the court is being asked to approve a care plan for adoption and when it is being asked to make a non-consensual placement order or adoption order.
> >
> > 34 First, there must be proper evidence both from the local authority and from the guardian. The evidence must address *all* the options which are realistically possible and must contain an analysis of the arguments *for* and *against* each option …
> >
> > 41 The second thing that is essential, and again we emphasise that word, is an adequately reasoned judgment by the judge …
> >
> > 44 … The judicial task is to evaluate *all* the options, undertaking a global, holistic and … multi-faceted evaluation of the child's welfare which takes into account *all* the negatives and the positives, *all* the pros and cons, of *each* option."

41. I shall return below to consider how these principles apply to cases involving the proposed adoption of a foreign national.

The statutory framework: placement orders

42. A placement order is defined in section 21(1) of the Adoption and Children Act 2002 as:

> "an order made by the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority."

The court's power to make a placement order is constrained by sections 21(2) and (3):

> "(2) The court may not make a placement order in respect of a child 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.
>
> (3) The court may only make a placement order if, in the case of each parent or guardian of the child, the court is satisfied –
>
> (a) that the parent or guardian has consented to the child being placed for adoption with any prospective adopters who may be chosen by the local authority and has not withdrawn the consent, or
>
> (b) that the parent's or guardian's consent should be dispensed with."

The last is, of course, a reference to section 52(1) of the 2002 Act.

43. A parent may not apply to revoke a placement order except in accordance with section 24 of the 2002 Act. Section 24(2) provides that a parent cannot apply:

> "unless –
>
> (a) the court has given leave to apply, and
>
> (b) the child is not placed for adoption by the authority."

Section 24(3) provides that:

> "The court cannot give leave under subsection (2)(a) unless satisfied that there has been a change in circumstances since the order was made."

The effect of section 24(2)(b) is that, once the child has been placed for adoption with prospective adopters, the parental right to apply under section 24(2) of the 2002 Act for leave to apply to revoke the placement order comes to an end. There is thereafter no opportunity for a parent to challenge the process until an application for an adoption order is issued and even then only if the parent can obtain leave to do so in accordance with section 47 of the 2002 Act (see below): *In re B-S (Children)*

(Adoption Order: Leave to Oppose) [2013] EWCA Civ 1146, [2014] 1 WLR 563, para 9.

The statutory framework: adoption orders

44. Section 46(1) of the Adoption and Children Act 2002 defines an adoption order as:

> "an order made by the court on an application under section 50 or 51 giving parental responsibility for a child to the adopters or adopter."

Section 50 provides for adoption by a couple, section 51 for adoption by one person. An adoption order operates, in accordance with section 46(2)(a) of the 2002 Act, to extinguish the parent's parental responsibility.

45. Section 49 of the 2002 Act provides as follows:

> "(1) An application for an adoption order may be made by –
>
> (a) a couple, or
>
> (b) one person,
>
> but only if it is made under section 50 or 51 and one of the following conditions is met.
>
> (2) The first condition is that at least one of the couple (in the case of an application under section 50) or the applicant (in the case of an application under section 51) is domiciled in a part of the British Islands.
>
> (3) The second condition is that both of the couple (in the case of an application under section 50) or the applicant (in the case of an application under section 51) have been habitually resident in a part of the British Islands for a period of not less than one year ending with the date of the application.
>
> (4) An application for an adoption order may only be made if the person to be adopted has not attained the age of 18 years on the date of the application."

46. Section 42 of the 2002 Act prescribes certain conditions which have to be met before an adoption order can be made. There is no need for me to go through this in detail. The relevant point for present purposes is that "the child must have had had his home" with the applicant or applicants, as the case may be, for one or other of the periods specified in section 42. In addition, section 42(7)(b) provides that:

> "An adoption order may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant or, in the case of an application by a couple, both of them together in the home environment have been given –

> … to the local authority within whose area the home is."

47. Section 47 of the 2002 Act deals with parental consent to the making of an adoption order. The effect of sections 47(1), 47(4) and 47(5) is that where the child has been placed for adoption under a placement order, a parent cannot oppose the making of the adoption order "without the court's leave". And section 47(7) provides that:

> "The court cannot give leave under subsection (3) … unless satisfied that there has been a change in circumstances since … the placement order was made."

If the parent is given leave, the adoption application proceeds in accordance with section 47(2) of the 2002 Act, with the consequence that no adoption order can be made unless the court dispenses with the parent's consent in accordance with section 52(1) of the 2002 Act.

The proceedings in the present case

48. Having thus set out the wider context and statutory provisions, I need, before proceeding further, to summarise the forensic background to the appeals in the present case. Although I shall need to elaborate some parts of this in due course, the essentials can be outlined quite briefly. The full details are available in Judge Bellamy's published judgment.

49. J, as I have said, was born in January 2012. Her parents are not married. Her mother is Hungarian, her father Hungarian / Roma. Accordingly, although she was born in this country J is not a British citizen; she is a citizen of Hungary. E was born, also in this country, on 6 May 2013. The police exercised their powers of protection under section 46 of the Children Act 1989. J was placed with emergency foster carers. On 9 May 2013 the local authority applied for emergency protection orders in accordance with section 44 of the 1989 Act. Because the parents agreed to both children being accommodated by the local authority in accordance with section 20 of the 1989 Act, no orders were made by the court on the local authority's application under section 44. On 14 June 2013, E was discharged from hospital and placed in foster care, initially separately from J but after two weeks in the same placement, where J and E have remained together ever since.

50. The foster placement is with an English family. The unhappy consequence was noted by Judge Bellamy (*Re J and E*, para 17):

> "Although the placement has proved to be a very positive placement for J and E as the guardian noted in her initial analysis the placement is not a cultural match and the children 'are therefore learning and understanding only English with their current carers'. One of the most concerning consequences of this is that mother and daughters are unable to converse with each other during contact save through an interpreter."

Whatever the circumstances which brought about the need for state intervention in the life of this family, and whatever the level of her engagement with the process since, it

is almost unbearable trying to imagine the feelings of a mother unable to speak to her own small children in her own tongue.

51. The local authority did not issue care proceedings in accordance with section 31 of the 1989 Act until 24 January 2014. I shall need to return to this in due course, but at this stage merely note what Judge Bellamy said (*Re J and E*, para 30):

> "By then the children had been in foster care for eight months. The guardian is critical of the local authority for this delay. Her criticism is fully justified. In his closing submissions on behalf of the local authority, [counsel] accepted that there had been unacceptable delay in issuing these proceedings."

At our request the local authority provided us with a narrative of relevant events and an accompanying document seeking to explain the delay. We are grateful to the local authority for doing this, but I do not, for my part, see any advantage in going through it in any detail. Whilst it provides a detailed account of what was, or was not, happening, it does not, in my judgment, provide any ultimately convincing justification for the unacceptable delay.

52. The proceedings were, of course, commenced shortly before the coming into existence of the Family Court. So the proceedings were issued, as at that time they had to be, in the South West London Family Proceedings Court. They were promptly transferred to the Care Centre, where they came before Her Honour Judge Williams on 31 January 2014. Judge Williams directed that information was to be disclosed to the Hungarian Central Authority (the HCA) and invited the HCA to attend the next hearing and consider intervening. At a further hearing before her on 11 February 2014, Judge Williams made interim care orders, transferred the proceedings to the High Court and repeated the invitation to the HCA.

53. Thus far the proceedings in court had proceeded as they should. The same, I regret to have to say, cannot be said of the proceedings after the transfer to the High Court. Judge Bellamy was the *seventh* judge who heard the matter in the High Court, previous hearings having taken place before Moor J (on 26 February 2014), Holman J (on 18 March 2014), Sir Peter Singer (on 9 and 12 May 2014), Hogg J (on 25 June 2014), Russell J (on 4 September 2014) and His Honour Judge Mark Rogers who, like Judge Bellamy subsequently, was sitting as a Deputy High Court Judge (on 22-23 September 2014).

54. The mother's application under Article 15 of BIIA had been issued on 14 March 2014, shortly before the hearing on 18 March 2014 before Holman J. Correctly, and no-one has sought to challenge this, Holman J held that both J and E were habitually resident in this country and, accordingly, that the English court had jurisdiction under BIIA Article 8: *London Borough of Hounslow v AM & Ors* [2014] EWHC 999 (Fam), para 4. Holman J explained (paras 10-12) why he was adjourning the mother's application:

> "10 The fact of the matter is that, although they were born here as a matter almost of accident, and although they are currently habitually resident here, these children are Hungarian

> children by citizenship and not British children, and their ethnicity is clearly that of the Hungarian Romany group …
>
> 11 Very serious consideration must therefore be given to whether or not in the longer term the future of these children lies in Hungary, whether that be living with one or both of their parents and/or with other members of their extended family, or with long-term 'foster' parents or by 'adoption' … It seems to me, however, that full consideration of transfer of the proceedings under Article 15 cannot be given without some concurrent consideration also of what arrangements might be made for the physical transfer of the children themselves to Hungary.
>
> 12 … the present application is one for the transfer of the proceedings themselves, and, as I have said, it does not seem to me, at any rate on the facts and in the circumstances of this case, that that can sensibly be considered without 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."

55. When the matter came before Sir Peter Singer in May 2014, he refused the mother's application, though providing that it might be re-opened. In his judgment he said (paras 24-25):

> "24 … I do not propose to make an order inviting the Hungarian court to take the case over. There is an issue as to whether I should adjourn the application so that it can be raised more conveniently at a later stage or whether I should dismiss it …
>
> 25 … it seemed to me that if the outcome is that the threshold criteria are established so that the Local Authority is able to advance the case for an order [under s.31 of the Children Act 1989] that it would not be perhaps unreasonable to reopen the art 15 application".

His order, which was not appealed, provided that "The Mother's application is today refused. The application may be reconsidered following the fact finding hearing."

56. The fact-finding hearing took place before Hogg J on 25 June 2014 in the circumstances and with the outcome recorded by Judge Bellamy (*Re J and E*, paras 40-41). The facts as found by Hogg J were correctly accepted by all parties as sufficient to establish the 'threshold' in accordance with section 31(2) of the 1989 Act. Her order provided that any renewed application by the mother for transfer under Article 15 was to be notified to the parties by 22 August 2014.

57. The final welfare hearing was fixed for 22 September 2014. On 27 August 2014 the mother renewed her application under Article 15. It was listed for directions before Russell J on 4 September 2014. Russell J's order contained a recital that:

> "subject to the contrary view of the trial Judge, the Mother's application should be dealt with as a preliminary issue on submissions at the start of the final hearing".

58. The final hearing was due to commence on 22 September 2014 before Judge Mark Rogers. The hearing was abortive. Judge Bellamy explained why (*Re J and E*, para 49):

> "On the first day of the hearing no interpreters were present. On the second day only one interpreter attended. The hearing could not proceed. A new hearing date was set for 3rd November".

By then, I note, some sixteen months had elapsed since the children were first placed in foster care in May 2013 and some eight months since the commencement of the care proceedings in January 2014.

59. When the matter came on for final hearing before Judge Bellamy on 3 November 2014, it proved impossible, without a further adjournment, to proceed in the way envisaged by Russell J. Judge Bellamy decided to proceed nonetheless. He explained why (*Re J and E*, para 72):

> "I decided to determine the Article 15 point after hearing the evidence. There were two reasons for this:
>
> (1) On the first day of this hearing counsel for the father told me that she was unaware of the recital [in Russell J's order] and was unprepared to present her submissions that day. She requested that I hear submissions on the Article 15 point at the conclusion of the evidence. She was supported by the mother. The local authority and the guardian were content for me to proceed in that way though it is right to record that the local authority's agreement was more reluctantly given.
>
> (2) In the HCA's letter dated 21st October, it had indicated an intention to make written submissions to this hearing. They had not arrived by the first day of this hearing. It would have been disproportionate and inappropriate to have adjourned the hearing. At the same time, given the level of engagement and co-operation from the HCA over the last fourteen months, it seemed to me to be discourteous to proceed to determine the Article 15 point on the first day of a five day hearing without giving the HCA further opportunity to file its submissions."

60. The hearing before Judge Bellamy lasted 5 days, from 3 to 7 November 2014. He circulated his judgment in draft on 9 November 2014. At a further hearing on 11 November 2014 he directed that the judgment would be handed down on 19 November 2014. In fact, as I have said, it is dated 11 November 2014. Judge Bellamy

decided to transfer the case in accordance with Article 15. I shall return below to consider his reasons for doing so. He concluded his judgment as follows (*J and E*, para 102):

> "I have already heard the evidence and submissions relating to the welfare decisions contended for by the local authority. I do not need to hear further evidence or further submissions. If this court should find itself continuing to exercise jurisdiction I will hand down a written judgment on welfare issues without delay."

For reasons which have not been satisfactorily explained, it seems that no order has ever been drawn giving effect to Judge Bellamy's judgment. However, the HCA has accepted the Article 15 request.

The appeals

61. Both the local authority and the children's guardian sought permission to appeal. The father and the mother each served a Respondent's Notice. Permission to appeal was granted by my Lady, Black LJ, on 3 December 2014.

62. The appeals initially came on for hearing before my Lord and my Lady, Aikens and Black LJJ, sitting with Underhill LJ, on 4 February 2015. During the course of the hearing an entirely new point was raised by the local authority which had not been taken before Judge Bellamy: the effect of Article 1.3(b) of BIIA. This point, with others which arguably followed in its train, made it inappropriate to continue the hearing. The local authority was given permission to amend its grounds of appeal. The hearing of the appeals was re-fixed. They came on for hearing before us on 25 March 2015. In the meantime, on 15 March 2015, we had invited counsel to prepare submissions on a number of additional matters. The hearing of the appeals extended well into a third day. The arguments, as we had anticipated, ranged far and wide. We are immensely grateful for the very helpful and detailed submissions, both written and oral, which counsel have put before us. They will, I hope, forgive me if I pass some of their arguments by in silence, though I make clear that I have had all of them very much in mind throughout.

The issues in the appeals

63. As matters have developed, the following issues arise for determination:

    i) Does the 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?

    ii) If the English court has 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, how should it exercise that jurisdiction?

    iii) What is the scope or ambit of BIIA? In particular, what is included within its scope by virtue of Article 1(1)(b) and excluded from its scope by virtue of Article 1(3)(b)? Specifically, are care proceedings within the scope of Article

1(1)(b) even if the local authority's care plan is for adoption? Are proceedings for a placement order within the scope of Article 1(3)(b)?

iv) What, upon the true construction of Article 15 of BIIA, are the requirements before the English court can make a request for a transfer to the other Member State?

v) Leaving on one side any question arising in relation to Article 1(3)(b), was Judge Bellamy justified in deciding as he did to exercise jurisdiction under Article 15? Can it be said that he was "wrong" to do so?

vi) Was Judge Bellamy's decision vitiated by his failure to address Article 1(3)(b)? What are the consequences of his omission to do so?

64. Issues (ii) and (iv) of their nature do not admit of a simple yes/no answer. But before proceeding further it will be convenient for me to set out my answers in relation to issues (i), (iii), (v) and (vi):

i) The English court has 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.

ii) …

iii) Care proceedings are within the scope of Article 1(1)(b) even if the local authority's care plan is for adoption. Proceedings for a placement order are within the scope of Article 1(3)(b). It follows that Article 15 applies to care proceedings, even if the local authority's care plan is for adoption, but does *not* apply to proceedings for a placement order.

iv) …

v) Leaving on one side the impact of Article 1(3)(b), Judge Bellamy was justified in deciding as he did, and for the reasons he gave, to exercise jurisdiction under Article 15. It cannot be said that he was "wrong" to do so. As will be seen, he undertook a very careful evaluation 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. He did not misdirect himself in law or err in principle. Looked at overall, his conclusion was not perverse and was not wrong.

vi) The fact that Judge Bellamy did not appreciate the effect of Article 1(3)(b) does not vitiate his decision. His decision under Article 15 in relation to the care proceedings can, and should, stand. His decision in relation to the placement proceedings, which are within the ambit of Article 1(3)(b), cannot stand. The consequence is that (a) the care proceedings are stayed in consequence of the transfer under Article 15 and (b) the placement order proceedings, which are of their nature consequential upon the care proceedings, are stayed in consequence of the stay of the care proceedings.

Questions of law

65. I come therefore to the questions of law (issues (i), (ii), (iii) and (iv)) which lie at the heart of these appeals .

The scope and applicability of BIIA

66. It is convenient to start with the question of the scope and applicability of BIIA. I consider the question first in relation to care proceedings, then in relation to adoption proceedings.

The scope and applicability of BIIA: care proceedings

67. Article 1 of BIIA defines the types of proceedings to which BIIA applies. I need not set it out. It is well established by both European and domestic case-law that BIIA applies to care proceedings: see, in particular, *Re C (Case C-435/06)* [2008] Fam 27, [2008] 1 FLR 490. It follows from this, and from the provisions of Article 8 (which provides, so far as material, that "The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised") that, where BIIA applies, the courts of England and Wales do not have jurisdiction to make a care order, as would otherwise be the case (see *Re E*, para 23) merely because the child is present within England and Wales. The question is one of habitual residence. In every care case where there is a European dimension, the starting point is, therefore, an inquiry as to where the child is habitually resident. That is an inquiry which, because it goes to jurisdiction, must be undertaken by the court at the very outset of the proceedings and, I emphasise, *whether or not the point has been raised by the parties.*

The scope and applicability of BIIA: adoption proceedings

68. Article 1(3)(b) of BIIA provides that BIIA:

> "shall not apply to … decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption."

Plainly this applies to an application for an adoption order under the 2002 Act, but how much further does the exception reach? What is meant by "measures preparatory to adoption"?

69. This is a question which we recently considered in *Re CB (A Child)* [2015] EWCA Civ 888. There the question was whether a parent's application under section 47(5) of the 2002 Act for permission to oppose the making of an adoption order was a "measure preparatory" to adoption within the meaning of Article 1(3)(b). Approving my earlier decision at first instance in *Re J and S (Children)* [2014] EWFC 4 in preference to the dicta of Ryder LJ in *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para 12, we held that an application under section 47(5) was a "measure preparatory." In the present case, we are concerned with two rather different questions. First, is an application for a placement order in accordance with section 21 of the 2002 Act a "measure preparatory"? Secondly, is an application for a care order in accordance with section 31 of the 1989 Act a "measure preparatory" in a case where the local authority's plan which it invites the court to

approve is for adoption? In my judgment, the answer to the first question is Yes; the answer to the second question is No.

70. In *Re CB*, as in this case, we were referred to the commentary in paragraph 28 of the *Lagarde Report*, explaining the materially identical language of Article 4(b) of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children:

> "The exclusion of adoption, which was the subject of the recent Convention of 29 May 1993, was a matter of course. It was formulated in a very broad way and, in order to avoid any misunderstanding, the text specifies that it extends to cancellation and revocation of adoption, even though the revocation would be decided for the purpose of protecting the child.
>
> The exclusion extends also to measures which prepare the adoption, and particularly to a placement with a view to adoption. The Special Commission, sensitive to the fact that the placement is in itself a measure of protection which often will subsist even in the case where the adoption were not to be granted, provided that this measure ought at least to be recognised in the other Contracting States if it had been taken by an authority which had jurisdiction under Chapter II of the Convention, which in most cases would be the State of the child's habitual residence. The solution, which had its logic, ran the risk, however, of being difficult to apply, and the complete exclusion of measures preparatory to adoption was retained by the Conference out of concern for clarity and simplicity."

Two aspects of that are noteworthy: the reference to "placement" and the concern for "clarity and simplicity".

71. I agree with the observation of Theis J in *A and B v P Council* [2014] EWHC 1128 (Fam), para 29 (a case on Article 4 of the 1996 Convention) that the Article "is to be interpreted widely and includes all aspects of the adoption process, including the placement of children for adoption."

72. In my judgment, on the plain language of Article 1(3)(b), which like all other provisions of BIIA must be given an autonomous meaning, and having regard to the *Lagarde Report*, it is clear that an application for a placement order is a "measure preparatory" to adoption within the meaning of Article 1(3)(b). It forms part of the process of adoption as set out in the 2002 Act; it is a precursor to the making in due course of an adoption order, and it has to do, as its name indicates, with the "placement" of the child, specifically with a view to adoption. In contrast, care proceedings, even if the plan is for adoption, are not, as such, part of the process of adoption. A care order, even if the court has approved a plan for adoption, does not of itself authorise a placement with a view to adoption. It may be a step along the way of implementing the local authority's plans for the child, but it is not a "measure preparatory" to adoption. There are many illustrations of this in the case-law: see, for

example, *Leicester City Council v S and others* [2014] EWHC 1575 (Fam) and *Re J (A Child: Brussels II Revised: Article 5: Practice and Procedure)* [2014] EWFC 41.

73. In the course of argument before us it was suggested that the crucial stage in the process at which Article 1(3)(b) begins to operate is when the child is placed for adoption. Thus it was submitted that an application for a placement order is not a "measure preparatory" to adoption, in contrast to an actual placement of a child for adoption pursuant to an order of the court, which is. With all respect to those propounding this argument, it is, in my judgment, plainly wrong. It elevates the placement – a concept which is not even referred to in Article 1(3)(b) – to a determinative role. No doubt, the placement of a child following the making of a placement order is a "measure preparatory" to adoption, but there is nothing, either in Article 1(3)(b) or in the *Lagarde Report*, to prevent some earlier step being such a "measure". The application for a placement order, the inevitable precursor to the actual placement of the child for adoption, is, in my judgment, as much a "measure preparatory" as the placement itself.

Adoption: the jurisdiction of the court

74. As will be appreciated, the effect of Articles 1, 1(3)(b) and 8 of BIIA is that whereas, in the case of care proceedings, the jurisdiction of the court to entertain the proceedings is determined by the provisions of BIIA, specifically Article 8, this is not so in the case of adoption or placement order proceedings under the 2002 Act. What, then, determines the jurisdiction of the court to make orders under the 2002 Act, specifically, jurisdiction to make an adoption order in accordance with the 2002 Act? And related to this, in cases involving a foreign child or a foreign parent, by reference to what system of law is the case to be decided?

75. Of its nature, an adoption involves three different parties: the child, the natural parent(s) and the adoptive parent(s). In principle, therefore, the jurisdiction of the court could be defined by reference to the circumstances (for example, nationality, domicile, habitual residence, presence within the jurisdiction) of the child, and/or the circumstances (nationality, domicile, habitual residence, presence) of the natural parent(s), and/or the circumstances (nationality, domicile, habitual residence, presence) of the adoptive parent(s).

76. Now it is true that section 42(7)(b) of the 2002 Act requires the presence of the child within the jurisdiction at some point either before or during the adoption process, a requirement that goes to the practical ability of the court to make an adoption order. Moreover, although the English courts sometimes make orders affecting the status of a person outside the jurisdiction, this is rare. However, it is clear from section 49 of the 2002 Act that the fundamental foundation of the *jurisdiction* of the court to entertain the application for an adoption order at all is determined by the circumstances, crucially for present purposes the domicile or habitual residence, of the adoptive parent(s) *and no-one else*. Moreover, and assuming that the jurisdictional requirements of section 49 are met, the 2002 Act contains no limitation, whether by reference to nationality, domicile or habitual residence, upon the children who can be adopted or the natural parent(s) whose consent can be dispensed with pursuant to the 2002 Act.

77. In other words, if the sole basis of the court's jurisdiction is by reference to the domicile or habitual residence of the adoptive parent(s), it must follow that it has jurisdiction to make an adoption order in relation to a child irrespective of the child's nationality, domicile or habitual residence, and likewise has jurisdiction to dispense with the consent of the natural parent(s) irrespective of their nationality, domicile or habitual residence. That is what, in my judgment, one derives from a simple reading of the 2002 Act.

Adoption: the jurisdiction of the court – the child

78. I need, however, to explore this in a little more detail, to see whether there is any reason to go beyond this simple reading. I turn first to deal with the *child*.

79. The law was not always as it is now laid down in the 2002 Act. Section 2(5) of the Adoption of Children Act 1926 provided that:

> "An adoption order shall not be made … in respect of any infant who is not a British subject …"

That remained the law, being carried forward, notwithstanding the amendment of other parts of section 2(5), by the Adoption of Children (Regulation) Act 1939, until the enactment of section 1(2) of the Adoption of Children Act 1949, which provided that:

> "An adoption order may be made in respect of an infant resident in England or Wales who is not a British subject …"

So the nationality requirement disappeared, though the requirement that the child be resident in the jurisdiction, which had been a part of section 2(5) of the 1926 Act, was carried forward, as it was again by section 2(5) of the Adoption Act 1950. However, as has been seen, it is not one of the requirements of the 2002 Act.[3] So, as matters stand today, the English court has jurisdiction to make an adoption order irrespective of the nationality or residence of the child.[4]

80. What in due course became section 1(2) of the 1949 Act (removing the nationality qualification) received much attention during the second reading debate in the House of Commons on 18 February 1949 (Hansard, Vol 461, cols 1477-1534). It is clear that much of the thinking that underlay the removal of the nationality requirement was prompted by the many children who had been orphaned, displaced or become refugees following the Spanish Civil War and the Second World War.

81. Mr Basil Nield (later Nield J), member for the City of Chester, moving the second reading, said (col 1480):

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[3] Where, as in the kind of case we are considering here, the adoption proceedings follow as a consequence of previous care proceedings, the child will in fact, of course, be resident in this country, for otherwise the court would not have been able to hear the care proceedings.

[4] Where the child is habitually resident in another country, the Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption, concluded at the Hague on 29 May 1993, implemented in England by the Adoption (Intercountry Aspects) Act 1999 and The Adoptions with a Foreign Element Regulations 2005, SI 2005/392, will apply. There is no need for us to explore this aspect of the matter any further, for the children in the present case are, as is common ground, habitually resident in England.

> "Subsection (2) is a new provision proposing that a child living in this country may be adopted here even though it is not of British birth. This is a new proposal for the consideration of the House. Thus, there may be French people living in England who desire to adopt a French child who is also in this country, or there may be illegitimate children born to foreign women overseas, perhaps during the war, who have been brought here, who may be desired to be adopted by people in this country."

Mrs Leah Manning (Epping) said (col 1484):

> "That is something which we have all wanted for a very long time. I remember many years ago that the hon. Member for North Cumberland (Mr. W. Roberts) and myself had, so to speak, a very large family of some 4,000 children who were everything that children ought to be: intelligent, high-spirited, good looking and naughty. Many people in this country would have liked to adopt those children, who were brought here during the difficult years of the Spanish civil war. Many of them were orphans, or had parents under sentence of death in political prisons. As the law then existed, they could not be adopted, and the same position exists at the present time. A great impetus has been given to this matter as a result of the war … there are large numbers of refugee children in this country, and others who want to come here from the refugee camps of Europe, who could be adopted legally by families in this country, and will be so adopted if the Bill reaches the Statute Book."

Mrs Nichol (Bradford, North) said (col 1498):

> "Every one who in their public work has had anything to do with adoption will realise that this is a tremendously important addition to this Bill. I heard of an incident only the other day which I found very moving. A friend of mine who has done valuable and important voluntary work in the matter of adoption told me of a case which came before the home with which she works. It was before Christmas and a delightful little boy came for adoption. They found they could not adopt because he was an alien. It was later discovered that his birthplace was Bethlehem. That incident did seem to me to have some poignancy, both because of the time and because of the particular place where the child was born. It is of course, only one of many and the hon. and learned Member for Chester is to be congratulated on having included this subsection which will make it possible for little children who are aliens to become members of a happy English family."

82. The corollary of section 1(2) of the 1949 Act was the provision in section 8 that:

> "Where an adoption order is made in respect of an infant who is not a citizen of the United Kingdom and Colonies, then, if the adopter or, in the case of a joint adoption, the male adopter, is a citizen of the United Kingdom and Colonies, the infant shall be a citizen of the United Kingdom and Colonies as from the date of the order."

83. This was carried forward by section 16(1) of the Adoption Act 1950, section 19(1) of the Adoption Act 1958, and section 40(1) of the Adoption Act 1976. The provisions currently in force are sections 1(5) and 1(5A) of the British Nationality Act 1981, as amended by the 2002 Act:

> "(5) Where –
>
> (a) any court in the United Kingdom … makes an order authorising the adoption of a minor who is not a British citizen; or
>
> (b) …,
>
> that minor shall, if the requirements of subsection (5A) are met, be a British citizen as from the date on which the order is made …
>
> (5A) Those requirements are that on the date on which the order is made … –
>
> (a) the adopter or, in the case of a joint adoption, one of the adopters is a British citizen … "

84. The fact that English law permits the adoption of a child who is a foreign national is entirely compatible with international Conventions and the United Kingdom's treaty obligations. Thus Article 11 of the European Convention on the Adoption of Children of 24 April 1967 provided that "the Contracting Party of which the adopter or adopters are nationals shall facilitate acquisition of its nationality by the child." Article 12 of the European Convention on the Adoption of Children of 27 November 2008 provides that "States Parties shall facilitate the acquisition of their nationality by a child adopted by one of their nationals."

85. The implications of the child being *domiciled* abroad were considered by Goff J (Sir Reginald Goff, later Goff LJ, to be distinguished from Sir Robert Goff, later Robert Goff LJ and then Lord Goff of Chieveley) in an important case, which seems for some reason to have slipped from current awareness: *In Re B(S) (An Infant)* [1968] Ch 204. The question was whether the English court (in those days, before the creation of the Family Division in 1971, the Chancery Division) had jurisdiction to make an adoption order in respect of the child of a Spanish father, domiciled in Spain, and an English mother. The child was living in England and Goff J assumed, without deciding, that the child was domiciled in Spain. The mother consented to the child's adoption but the father did not. The prospective adopters sought an order dispensing with the father's consent in accordance with section 5 of the Adoption Act 1958.

86. Goff J cited a passage from the judgment of Lord Denning MR in *In re Valentine's Settlement, Valentine and others v Valentine and others* [1965] Ch 831, 842, a case where the question for the English court was whether it would recognise a foreign adoption order. What Lord Denning MR said was this:

> "I start with the proposition stated by James LJ in *In re Goodman's Trusts* (1881) 17 ChD 266, 297: "The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations." That was a legitimation case, but the like principle applies to adoption.
>
> But when is the status of adoption duly constituted? Clearly it is so when it is constituted in another country in similar circumstances as we claim for ourselves. Our courts should recognise a jurisdiction which mutatis mutandis they claim for themselves … We claim jurisdiction to make an adoption order when the adopting parents are domiciled in this country and the child is resident here. So also, out of the comity of country when the adopting parents are domiciled there and the child is resident there.
>
> Apart from international comity, we reach the same result on principle. When a court of any country makes an adoption order for an infant child, it does two things: (1) it destroys the legal relationship theretofore existing between the child and its natural parents, be it legitimate or illegitimate; (2) it creates the legal relationship of parent and child between the child and its adopting parents, making it their legitimate child. It creates a new status in both, namely, the status of parent and child. Now it has long been settled that questions affecting status are determined by the law of the domicile. This new status of parent and child, in order to be recognised everywhere, must be validly created by the law of the domicile of the adopting parent. You do not look to the domicile of the child: for that has no separate domicile of its own. It takes its parents' domicile. You look to the parents' domicile only. If you find that a legitimate relationship of parent and child has been validly created by the law of the parents' domicile at the time the relationship is created, then the status so created should be universally recognised throughout the civilised world, provided always that there is nothing contrary to public policy in so recognising it."

87. Goff J expressed his own conclusions as follows (208-210):

> "In my judgment, it is clear that this court has jurisdiction to make an adoption order in respect of an infant domiciled abroad. In this respect, the [1958] Act draws a clear distinction

> between the proposed adopter and the infant. Section 1(1) requires such person to be domiciled in England or Scotland but is silent as to the infant, whereas section 1(5) is in these terms:
>
> > "An adoption order shall not be made in England unless the applicant and the infant reside in England …"
>
> … This conclusion accords with the principles on which this court recognises foreign adopters: see *In re Valentine's* Settlement.
>
> … Further, in my judgment the English court can exercise that jurisdiction, and an adoption order if made will have the consequences, at all events within the jurisdiction provided by the English Act, notwithstanding that by the law of the infant's domicile the court there could not make an order or could only make one having different consequences, for the English Act creates the jurisdiction and provides in detail for the conditions and effect of its exercise.
>
> In some countries adoption is limited in operation; for example, it may operate only as between the adopter and the child, but it seems to me that this circumstance could not prevent an English or Scottish order having in England and Scotland the full operation prescribed by the Act. Whether and to what extent it would be recognised elsewhere is another matter."

88. Having considered the views of various distinguished academic writers, Goff J continued (211):

> "In my judgment, the true impact of the domiciliary law is purely as a factor – albeit an important one – to be taken into account in considering whether the proposed order will be for the welfare of the infant, a matter upon which the Statute expressly provides that the court must be satisfied before making an order."

He added (212-213):

> "It is not necessary … to prove what the child's domicile actually is, or to go into the adoption laws of the relevant foreign country, for in my judgment, as I have said, the problem is not one of jurisdiction or of applying the foreign law, substantive or procedural."

89. I respectfully agree with Goff J's analysis and conclusion.

90. It follows that I also agree with what is said in *Dicey, Morris & Collins on the Conflict of Laws*, ed 15, Vol 2, paras 20-096 – 20-097, 20-107:

> "The jurisdiction of the English courts to make an adoption order … is based on the domicile or the habitual residence for one year of the applicant …
>
> There is not and never has been a jurisdictional requirement that the child must be domiciled in England. There are sound practical reasons for this. It would render adoptions unduly difficult and expensive if proof of domicile were required in the case of children who are waifs or strays or whose natural parents cannot be traced.
>
> … the English courts may have jurisdiction to make an adoption order despite the child being an alien, and despite his being domiciled or habitually resident in a foreign country."

Adoption: the jurisdiction of the court – dispensing with the consent of the natural parent(s)

91. As we have seen, Goff J said, and I agree, that "the English Act creates the jurisdiction and provides in detail for the conditions and effect of its exercise." Accordingly, I agree with what is said in *Dicey, Morris & Collins*, paras 20-106:

> "Whenever an English court has jurisdiction to make an adoption order … it will apply English law."

92. The corollary of this is that the English court has jurisdiction to dispense with the consent of the natural parent(s) and to make an adoption order irrespective of the nationality, domicile, habitual residence or presence within the jurisdiction of the natural parent(s); and that when exercising that jurisdiction the court will apply English law, that is, decide the issue by reference to section 52(1) of the 2002 Act. This, it may be noted, was the course adopted by Goff J in *In re B(S)*, where he dispensed with the consent of the Spanish father, applying the criteria in section 5(2) of the 1958 Act.

Adoption: applicable law – the contrary arguments

93. Appropriately and helpfully, because this point has been rumbling around for years and needs to be put to rest, these propositions have been directly challenged and put in issue before us. Simply put, the question is this: assuming that the English court has *jurisdiction*, what system of domestic law should it apply when deciding whether to dispense with parental consent and whether to make an adoption order? The argument in short is that the status of the child's natural parent(s) and their parental rights cannot be extinguished by the English court dispensing with their consent and making an adoption order except in accordance with and as permitted by the law of the state of the parental domicile. So too, by parity of reasoning, it is argued that the child's status cannot be changed except in accordance with and as permitted by the law of the state of the child's domicile.

94. The starting point of the argument was the judgment of this court in *In re Goodman's Trusts* (1881) 17 Ch D 266. The question there was whether a child, born out of wedlock to parents domiciled in Holland but legitimated according to the law of Holland by the subsequent marriage of her parents, was entitled to share in the

personal estate of an intestate dying domiciled in England. The question arose because, at that time, the doctrine of legitimation of issue by the subsequent marriage of the parents was not recognised in English law. This court by a majority (Cotton and James LJJ, Lush LJ dissenting) held, reversing Sir George Jessel MR, that she was so entitled.

95. It suffices to go to the judgment of James LJ, 296-297:

> "What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin – the law under which he was born."

He added:

> "The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations."

There follows a passage of great eloquence, culminating in this peroration (297-298):

> "suppose [a father] were to come … to this country … would it be possible to hold that he would lose his right to the guardianship of the child in this country because of the historical or mythical legend that the English barons and earls many centuries ago cried out in Latin, *Nolumus leges Angliæ mutare*? Can it be possible that a Dutch father, stepping on board a steamer at *Rotterdam* with his dear and lawful child, should on his arrival at the port of *London* find that the child had become a stranger in blood and in law, and a bastard, *filius nullius*?... I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing."

96. Hence, the basic feature of status as fixed by the law of the domicile is, as was said in *In re Luck's Settlement Trusts, In re Luck's Will Trusts, Walker v Luck and others* [1940] Ch 864, 894, its universality.

97. I need to refer also to the speech of Lord Scarman in *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130. He cited (144) the words of James LJ in *Ex parte Blain* (1879) 12 Ch D 522, 526, referring to the:

> "broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an

> English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction … But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation."

98. Lord Scarman continued (145):

> "the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction. Two points would seem to be clear: first, that the principle is a rule of construction only, and secondly, that it contemplates mere presence within the jurisdiction as sufficient to attract the application of British legislation. Certainly there is no general principle that the legislation of the United Kingdom is applicable only to British subjects or persons resident here. Merely to state such a proposition is to manifest its absurdity. Presence, not residence, is the test."

99. The corollary of this, so the argument goes, is that there is nothing in the 2002 Act, nor in any of its predecessors, to bring Lord Scarman's exception into play. So, it is said, the status of the child's natural parent(s) cannot be extinguished by the English court except in accordance with and as permitted by the law of the state of the parental domicile, nor can the child's status be changed except in accordance with and as permitted by the law of the state of the child's domicile.

100. This argument was around well before Goff J's decision in *In re B(S)*, and survives to an extent in the more recent academic literature.[5] In a case note, English Adoption of Foreign Children, (1968) 31 MLR 219, L J Blom-Cooper questioned whether Goff J had any jurisdiction to dispense with the natural father's consent, doubting whether there was anything in the 1958 Act sufficiently compelling to displace what he called this basic rule of jurisdiction. *Graveson*, Conflict of Laws: Private International Law, 1974, p 381, said that it might be suggested that the English court in exercising jurisdiction should apply the domiciliary law or laws of both the adopter and the child. In his Comparative Conflict of Laws: Selected Essays, 1977, Vol 1, p 110, he commented that "While the Acts are silent on any question of choice of law, it is more probable than desirable that such choice would be in favour of English Law." *Anton's Private International Law*, ed 3, 1990, p 866, asserts as the "principled" view that regard should be paid to the child's personal law, notably the law of his domicile. *Cheshire, North and Fawcett*, Private International Law, ed 14, 2008, p 1158, state

[5] For a recent and very impressive discussion of these issues see *Alex Laing*, Adopting foreign children: Part I: Jurisdiction, [2015] Fam Law 565, Adopting foreign children: Part II: a counter-argument – choice of law, [2015] Fam Law 703.

that "In the absence of an express choice of law rule in the 2002 Act, the law of the forum must be assumed to apply." They go on to say, however, that "The status attributed to a child in his domicile of origin is entitled to universal respect. It is, therefore, undesirable for the English court to make an adoption order which claims to destroy that status and to substitute another that is fundamentally different." Referring to the natural parents, they question (p 1159) whether an order which deprives them in England of the status of parent should be made without consideration of the effect of the adoption order under the law governing their status, adding that not only a child but also a parent can "limp." *Dicey, Morris and Collins*, para 20-107, say "it is arguable that the need for, and the grounds for dispensing with, their agreement should be regulated by the law of their domicile or habitual residence."

101. I refer to these passages not by way of exhaustive analysis but to illustrate a variety of views which, although taking as the starting point the principle of universality I have referred to in paragraph 96 above, come to different conclusions, some pointing to the relevant foreign law as being that of the child, others to the relevant foreign law as being that of the natural parents.

102. With all respect to the views of these very distinguished academic writers, there is nothing in them which persuades me that Goff J's analysis in *In re B(S)* is other than entirely correct. In my judgment, the most convincing academic analysis is that of *Kahn-Freund*, Growth of Internationalism in English Private International Law, 1960, pp 62-66. He pointed out that, according to English law, adoption does not, as in some other countries, result from an act *inter partes*, a private law transaction approved by the state. It results from an administrative act in judicial form. It is the court's order which alters the status of the child. That being so,

> "From the point of view of an English court the structure of the English domestic law of adoption clearly prevents the court from ever applying foreign adoption law … Whatever foreign law may have to say about the conditions of a valid adoption would, in the English view, be an attempt to regulate the procedure of an English court, an attempt which, on the elementary principle that procedure is governed by the *lex fori*, is doomed to fail … Is it not almost axiomatic in English law that where a court acts so as to create rights afresh rather than so as to declare or enforce rights created by the parties, foreign law cannot be applied?"

The statute is silent on the choice of law, he said, because it is regarded as a matter of course that an adoption in England is governed by English law: adoption is statutory and the court, when called upon to make an adoption order, has jurisdiction to so only if the English statutory conditions are fulfilled.

103. Kahn-Freund's analysis, as Goff J pointed out in *In re B(S)*, 210, is too narrow insofar as it asserts that the English court is not concerned with the foreign law at all. As we have seen, Goff J's view, with which I agree, is that the foreign law is an important factor to be taken into account in considering the *welfare* of the child; not, I should add, by virtue of the foreign law but rather because English law requires the court to do so. But subject only to that qualification, Kahn-Freund's analysis is, in my judgment, convincing in explaining why for all other purposes the English court

applies English law and not the foreign law. Goff J, after all, was clear that the foreign law does not go to *jurisdiction* nor is there any question of applying the foreign law, whether substantive or procedural. I agree.

Case management and the exercise of discretion in 'foreign' cases

104. As we have seen, section 1(4) of the 2002 Act provides that:

> "The court … must have regard to the following matters (among others) –
>
> (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
>
> (b) the child's particular needs,
>
> (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*,
>
> (d) *the child's* age, sex, *background* and any of the child's characteristics which the court … considers relevant,
>
> (e) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering,
>
> (f) the relationship which the child has with relatives, and with any other person in relation to whom the court … considers the relationship to be relevant, including –
>
> (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
>
> (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
>
> (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child" (emphasis added).

I have emphasised these passages because they are particularly important where the court is concerned with the proposed adoption of a foreign child.

105. It cannot be emphasised too much that the court in such a case must give the most careful consideration, as must the children's guardian and all the other professional witnesses, in particular to those parts of the checklist which focus attention, explicitly or implicitly, on the child's national, cultural, linguistic, ethnic and religious background. Moreover, it must always be remembered that, in the context of such factors, the checklist demands consideration of the likely effect on the child

throughout her life of having ceased to be a member of her original family. Mere lip service to such matters is not enough. The approach, both of the witnesses and of the judge, must be rigorous, analytical and properly reasoned, never forgetting that adoption is permissible only as a "last resort" and only if a comprehensive analysis of the child's circumstances *in every aspect* – including the child's national, cultural, linguistic, ethnic and religious background – leads the court to the conclusion that the overriding requirements of the child's welfare justify adoption.

106. In *Re CB (A Child)* [2015] EWCA Civ 888, a case involving a Latvian child, I said this (para 84):

> "The lessons of this and other cases are clear but bear repetition. We must be understanding of the concerns about our processes voiced by our European colleagues. We must do everything in our power to ensure that our processes are not subject to justifiable criticisms. This means ensuring that:
>
> (i) local authorities and the courts must be appropriately pro-active in bringing to the attention of the relevant consular authorities *at the earliest possible opportunity* the fact that care proceedings involving foreign nationals are on foot or in contemplation;
>
> (ii) the court must, whether or not any of the parties have raised the point, consider *at the outset of the proceedings* whether the case is one for a transfer in accordance with Article 15 of BIIA: see generally *In re E (A Child) (Care Proceedings: European Dimension) Practice Note* [2014] EWHC 6 (Fam), [2014] 1 WLR 2670, [2014] 2 FLR 151, paras 31, 35-36;
>
> (iii) if there is no transfer in accordance with Article 15, the court, if the local authority's plan is for adoption, must rigorously apply the principle that adoption is 'the last resort' and only permissible 'if nothing else will do' and in doing so must make sure that its process is appropriately rigorous: see *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035, and *Re R (A Child)* [2014] EWCA Civ 1625;
>
> (iv) in particular, the court must adopt, and ensure that guardians adopt, an appropriately rigorous approach to the consideration of the 'welfare checklist' in section 1(4) of the 2002 Act, in particular to those parts of the checklist which focus attention, explicitly or implicitly, on the child's national, cultural, linguistic, ethnic and religious background and which, in the context of such factors, demand consideration of the likely effect on the child *throughout her life* of having ceased to be a member of her original family."

107. I went on (para 85) to say that everyone concerned with such a case needs always to remember the powerful point made by Mostyn J in the passage from his judgment in

Re D (Special Guardianship Order) [2014] EWHC 3388 (Fam), [2015] 2 FLR 47, para 1, which I have already quoted. I added:

> "That is not, I wish to make clear, a reason for not making an adoption order where the circumstances *demand* and where *nothing else will do*. But it does serve to underscore the gravity of the decision which the court has to make in such cases and the pressing need for care and rigour in the process."

108. I should also refer in this context to what I said in *Re J and S (Children)* [2014] EWFC 4, para 36:

> "Of course, any judge should have a decent respect to the opinions of those who come here from a foreign land, particularly if they have come from another country within the European Union. As I said in *Re K; A Local Authority v N and Others* [2005] EWHC 2956 (Fam), [2007] 1 FLR 399, para 26, "the court must always be sensitive to the cultural, social and religious circumstances of the particular child and family." But the fact is, the law is, that, at the end of the day, I have to judge matters 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. They have made their life in this country and cannot impose their own views either on the local authority or on the court."

109. As we have seen, in *In re B(S)* Goff J described the domiciliary law as an important factor to be taken into account in considering whether the proposed order will be for the welfare of the infant. He said (212):

> "The court cannot shut its eyes to the possibility of creating the "limping infant" referred to in Cheshire's Private International Law, 7th ed (1965), p 382, and if the child is domiciled in a country where the English order would not be recognised, he may "limp" not only there but in other places, and may find himself faced with a dispute in other countries whether the English order should be recognised or not."

110. He continued:

> "In my judgment therefore, where the child is or may be domiciled abroad or is a foreign national or was until recently ordinarily resident there, the court should consider whether its order will be recognised elsewhere unless the case is one in which it is clearly for the welfare of the infant that an order should be made irrespective of its consequences elsewhere, as in refugee cases … With that exception, in my judgment in all cases where there is such a foreign element as I have described, evidence should be furnished to show that the order, if made,

> will be recognised by the foreign court and, if so, then the English court is free to proceed regardless of any question of foreign law or procedure, but if not, then the court will have to weigh the disadvantages of the child having one status here and another in other countries, or even a doubtful one, against the other considerations there may be in favour of adoption. The disadvantages may of course be serious in such matters as liability for military service, taxation (including death duties) and succession to property.
>
> It is not necessary, however, to prove what the child's domicile actually is, or to go into the adoption laws of the relevant foreign country, for in my judgment, as I have said, the problem is not one of jurisdiction or of applying the foreign law, substantive or procedural, but of considering factually whether, having regard to the foreign element, the English order will have general recognition, and if not whether the order would still be for the welfare of the infant."

111. I agree with Goff J's analysis and conclusion. Unless the foreign country is one which, under international Convention, is bound to recognise an English adoption order, the English court will need to address the issues identified by Goff J, having ensured that it has the necessary evidence to enable it to do so.

BIIA: Article 15

112. Article 15(1) of BIIA provides as follows:

> "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."

Article 15(3) provides that:

> "The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:
>
> (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
>
> (b) is the former habitual residence of the child; or

> (c) is the place of the child's nationality; or
>
> (d) is the habitual residence of a holder of parental responsibility; or
>
> (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property."

113. There is much English learning on the meaning and application of Article 15(1). I can start with the summary I set out in *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para 54:

> "The relevant principles can be summarised as follows:
>
> (i) Article 15 operates 'by way of exception' to the principle, which is the starting point under BIIR, that jurisdiction is vested in the courts of the Member State where the child is habitually resident (Art 8), *not* the courts of the Member State of which the child is a national.
>
> (ii) Article 15 requires the court to address three questions: (1) Does the child have, within the meaning of Article 15(3), 'a particular connection' with another Member State? (2) Would the court of that other Member State 'be better placed to hear the case, or a specific part thereof'? (3) Will a transfer to the other court be 'in the best interests of the child'? The first is, in essence, a simple question of fact which goes to the jurisdiction of the court to consider making an order under Art 15. The other two each involves an exercise in evaluation, to be undertaken in the light of all the circumstances of the particular case and the particular child.
>
> (iii) The court cannot exercise its powers under Art 15 unless all three questions are answered in the affirmative. If they are, then the court has to exercise its discretion in deciding whether or not to make an order. I repeat in this context what I said in *AB v JLB (Brussels II Revised: Article 15)* [2008] EWHC 2965 (Fam), [2009] 1 FLR 517, at para [36]:
>
> > 'Given the use in Article 15(1) of the word "may" rather than the mandatory "shall", the court must exercise its discretion in deciding whether or not to direct a transfer. That said, the ambit of the discretion is likely to be limited in most cases, for the court cannot direct a transfer – see the use in Article 15(1) of the words "if" and "and" – unless all three conditions are met while, on the other hand, since the discretion is exercisable only if the court has satisfied itself both that the other court is "better placed" to deal with the case than it is and that it is in the best interests of the child to

> transfer the case, it is not easy to envisage circumstances where, those two conditions having been met, it would nonetheless be appropriate not to transfer the case.'

(iv) In framing these questions I have deliberately tracked the language of Art 15. The language of Art 15 is clear and simple. It requires no gloss. It is to be read without preconceptions or assumptions imported from our domestic law. In particular, and as this case demonstrates, it is unnecessary and potentially confusing to refer to the paramountcy of the child's interests. Judges should focus on the language of Art 15: will a transfer be 'in the best interests of the child'? That is the relevant question, and that is the question which the judge should ask himself.

(v) In relation to the second and third questions there is one point to be added. In determining whether the other court is 'better placed to hear the case' and whether, if it is, a transfer will be 'in the best interests of the child', 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. As Mostyn J correctly said, that is 'territory into which I must not go.' I refer in this context, though without quotation, to what I said in *Re E*, at paras [17]-[21].

(vi) In particular … 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 … the question asked by Art 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?'

(vii) Article 15 contemplates a relatively simple and straight forward process. Unnecessary satellite litigation in such cases is a great evil. Proper regard for the requirements of BIIR and a proper adherence to the essential philosophy underlying it, requires an appropriately summary process. Too ready a willingness on the part of the court to go into the full merits of the case can only be destructive of the system enshrined in BIIR and lead to the protracted and costly battles over jurisdiction which it is the very purpose of BIIR to avoid. Submissions should be measured in hours and not days. As Lady Hale observed in [*In re I (A Child) (Contact Application: Jurisdiction) (Centre for Family Law and Practice and another intervening)* [2009] UKSC 10, [2010] 1 AC 319, para 36] the task for the judge under Art 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.'"

114. I went on to emphasise (para 58) how vital it is that the Article 15 issue is considered at the earliest opportunity, that is when the proceedings are issued and at the case management hearing. I repeated what I had said in *Re E*, paras 35-36:

> "35 It is highly desirable, and from now on good practice will require, that in any care or other public law case with a European dimension the court should set out quite explicitly, both in its judgment and in its order:
>
> (i) the basis upon which, in accordance with the relevant provisions of BIIR, it is, as the case may be, either accepting or rejecting jurisdiction;
>
> (ii) the basis upon which, in accordance with Article 15, it either has or, as the case may be, has not decided to exercise its powers under Article 15.
>
> 36 This will both demonstrate that the court has actually addressed issues which, one fears, in the past may sometimes have gone unnoticed, and also identify, so there is no room for argument, the precise basis upon which the court has proceeded. Both points, as it seems to me, are vital."

I added: "Judges must be astute to raise these points even if they have been overlooked by the parties."

115. The reason why there is this need for an early consideration of Article 15 was well explained by Moylan J in *Leicester City Council v S and others* [2014] EWHC 1575 (Fam), paras 8-9:

> "8 … the longer the determination of any jurisdictional issue, including under Article 15, is delayed, the more established the child's situation becomes. The more established the child becomes in one jurisdiction, the more that fact in itself will gain in weight and significance. At one extreme, it might, of itself, become determinative. This is in addition to the general principle that delay in the determination of proceedings is likely to prejudice the welfare of the child.
>
> 9 Accordingly, where it appears that jurisdiction (including under Article 15) is likely to be a substantive issue in relation to care proceedings, the local authority, absent very good reasons, should commence proceedings expeditiously so that a forum is available for such issues to be determined as early as possible in the child's life."

I agree entirely with every word of that. As Pauffley J said in *Re J (A Child: Brussels II Revised: Article 5: Practice and Procedure)* [2014] EWFC 41, para 36, "it must be overwhelmingly more efficient and accord with the welfare interests of children, for jurisdictional decision making to occur, as a matter of priority, during the initial stages of the proceedings."

116. There are four points that need to be added to the summary in *Re M*.

117. The first is that, without in any way wishing to erode the imperative need for the Article 15 issue to be considered at the outset of the proceedings, there is no doubt that, as a matter of law, it is open to the court to consider the matter "at any stage of the proceedings" as Thorpe LJ put it in *Bush v Bush* [2008] EWCA Civ 865, [2008] 2 FLR 1437, para 42. See also Pauffley J in *Re J (A Child: Brussels II Revised: Article 5: Practice and Procedure)* [2014] EWFC 41, para 36. In that case, where it is apparent that the matter had not been properly considered earlier, as it should have been, the question of Article 15 was raised as a preliminary issue at what had been intended to be the final hearing of care proceedings. Pauffley J decided to make a request to Hungary in accordance with Article 15. In the course of explaining why she had come to that view, Pauffley J (para 62) identified as "[w]eighing heavily in the balance and contraindicating a decision to retain the case here" a number of factors including "the absolute requirement of achieving the best possible 'welfare' solution rather than striving for speed." In my judgment, Pauffley J was entitled to adopt that approach and to decide as she did.

118. The second point is that, although repeat applications for a request under Article 15 are to be deprecated, and if there has been no material change in the circumstances can expect to be summarily refused (see, for example, *Re J and S (Children)* [2014] EWFC 4, para 22(i)), there may be circumstances in which a renewed application is appropriate.

119. In *Re MP (Fact-finding Hearing: Care Proceedings: Art 15)* [2013] EWHC 2063 (Fam), [2014] 1 FLR 702, Theis J ordered an Article 15 request for transfer *after* the conclusion of a fact-finding hearing and, indeed, having refused such an order at an earlier stage in the proceedings though directing it to be reconsidered at the conclusion of the fact-finding hearing. Her reasoning (para 45) is illuminating and compelling:

> "Whilst at the earlier hearing the balance of the relevant considerations tipped in favour of the proceedings remaining here, that was heavily influenced by the availability of factual witnesses here and the benefits of this court, with substantive jurisdiction, determining the factual foundation of the proceedings without delay. Now that has been done and with the additional information that has helpfully been provided by the Slovakian Central Authority I am satisfied that the balance now tips in favour of the Article 15 request being made. I have reached that conclusion for the following reasons:
>
> (1) The nationality of the child's biological parents and the child is Slovakian.

> (2) Slovakia is where the child was formerly habitually resident and where he lived until just before his fourth birthday.
>
> (3) Slovak is the first language of the child and his parents.
>
> (4) Both the child's biological parents are now in Slovakia. The mother, who has been the child's primary carer, has stated clearly in these proceedings she plans to remain living there long term. This is understood to be irrespective of the stepfather's immigration position …
>
> (5) The child's wider family, including his half sibling, all live in Slovakia.
>
> (6) There are clear benefits that any welfare based assessments regarding what arrangements should be put in place for the future care of the child should take place in the jurisdiction where the child has spent most of his life and the mother and all the wider family live and intend to remain living for the foreseeable future. The central authority has set out the arrangements in the event of the child returning to Slovakia. They consent to the child being placed with professional foster carers, and state the competent court is the District Court Trnava. They confirm the social welfare offices will support and control the realisation of contact between the child and members of his biological family. They also describe the assessments that will be undertaken before any decisions are made about where the child will live."

120. I have no problem with Theis J's approach and decision in the circumstances of that particular case, though it will only be in exceptional circumstances that an Article 15 request will be considered *after* the conclusion of a fact-finding hearing: compare *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372.

121. The third point is this. As was made clear in *Re M* (para 27), the need for judicial continuity will be usually a weighty factor in determining whether or not to make an Article 15 request. But just how weighty will, in the nature of things, depend upon the circumstances of the particular case.

122. The final point is this. Consideration of the issues arising under Article 15, as *Re M* makes clear, requires an appropriately summary process, measured in hours not days and not dependent upon a profound investigation of the evidence. So the evidence must be kept within strict limits. The matter should be dealt with quickly and without oral evidence. Reference to either the burden of proof or the standard of proof is neither necessary nor helpful; as to the first because the matter is one to be considered by the judge whether or not any application has been made, and as to the second because, except in relation to factual matters arising under Article 15(3), which are rarely in dispute and readily capable of ascertainment when they are, the essential exercise under Article 15 is, as I have said, one for judicial evaluation. That said, the judge must, at the end of the day be satisfied that the grounds for making an Article

15 request are made out and that, as a matter of judicial discretion, the request ought to be made. In practice, as the cases we have been taken to well illustrate, this has not given rise to any difficulty. If some touchstone is needed, the question is not one of burden of proof or standard of proof but, rather, which side has the better of the argument.

Judge Bellamy's judgment

123. I return to Judge Bellamy's judgment.

124. Judge Bellamy began this part of his judgment (*Re J and E*, para 68) by setting out Article 15. He noted (para 69) that recent authorities make clear that applications under Article 15 are fact-sensitive. He observed (para 70) that in terms of elucidation of the underlying principles it was unnecessary to look further than what I had said in *Re M*, para 54, a passage he set out in full. He went on (para 72) to explain why, in the event, he had decided to determine the Article 15 point after hearing the evidence. I have already set this out (see paragraph 59 above).

Judge Bellamy's judgment: a preliminary matter – was the judge correct to entertain the renewed Article 15 application?

125. Judge Bellamy then turned (para 73) to consider the timing of the mother's renewed application under Article 15. He referred to Pauffley J's judgment in *Re J*, para 45, where she had said:

> "In the final analysis, the following might be drawn from the case law, the revised Practice Direction, the Guidance and other related materials. That it is vital to confront Brussels II Revised jurisdictional issues as early as possible. They should be regarded as urgent and requiring of decisions within a matter of days, not weeks. By no stretch of the imagination could it be regarded as acceptable practice to leave the jurisdiction question in 'cold storage' until the final hearing."

He continued (para 74):

> "Notwithstanding that timely reminder, in that case the chronology of events was similar to that which confronts me. The final hearing was listed before Pauffley J beginning with a reading day on 27th October 2014. Upon considering the papers it became clear to the judge that there was an Article 15 point which needed to be addressed. Urgent arrangements were made for the point to be dealt with as a preliminary issue. The point was argued and judgment handed down on 29th October. An order for transfer was made. The welfare hearing, which would have followed on seamlessly had the Article 15 application been refused, did not take place. I refer to that case because it makes it clear that although a determination under Article 15 should normally be made at an early stage the court may determine an Article 15 point even at final hearing."

126. Judge Bellamy then turned (para 74) to consider what he described as "the unusual position in which the court finds itself as a result of the decision by Sir Peter Singer to refuse the mother's earlier application under Article 15 but to leave open the opportunity for her to renew her application later." He continued:

> "There was no appeal against the judge's decision to refuse to order transfer under Article 15 – but, then, there did not need to be an appeal given that the door had been left open to the mother to renew her application. Upon hearing the mother's renewed application, what is the approach that I should take? Should I, as [counsel for the local authority] submits, confine myself to a determination based only upon a consideration of any change in circumstances since the date of Sir Peter Singer's order? Or should I, as counsel for the parents submit, undertake a de novo analysis applying the principles outlined earlier?"

He went on (para 75):

> "I have come to the conclusion that the latter submission is to be preferred. I now have before me hearing bundles comprising five lever arch files. I have a fuller picture than that which was available to Sir Peter Singer. It seems to me right that I should determine the Article 15 point afresh. In so saying, I am very clear that I am not undertaking a review of Sir Peter Singer's decision. That would be for an appellate court."

127. Judge Bellamy's approach to these preliminary matters was criticised before us both by the local authority and by the children's guardian, although as he noted in his judgment (*Re J and E*, para 72) they had both been content for him to proceed as he did. Their complaint is, in substance, that it was far too late in the day for the court to be considering a transfer, at a time when the judge was ready to give judgment on the welfare aspect of the case even though, I emphasise, *he had not in fact done so and had therefore made no findings*. It is also said that it was wrong for Judge Bellamy to re-open a matter concluded by Sir Peter Singer's earlier judgment. The children's guardian goes so far as to submit that the judge's decision was per incuriam.

128. The last point has no basis either in the terms of Article 15 or in the case-law to which I have referred. As a matter of *vires*, an Article 15 request can be made, as we have seen, at *any stage* in the proceedings. The argument based on Sir Peter Singer's judgment founders, in my judgment, on the facts (a) that Sir Peter had explicitly said that the matter could be reconsidered, (b) that Hogg J and Russell J had each made orders contemplating a further application, (c) that none of those orders was ever challenged by way of appeal, and (d) that such a reconsideration is, as Theis J's judgment in *Re MP* shows, not necessarily impermissible. The more general complaint, that it was simply too late to order a transfer, has more plausibility until one remembers the exceedingly unsatisfactory state of affairs in which Judge Bellamy found himself, unable, because of a failure by counsel, to proceed as Russell J had envisaged.

129. In my judgment, Judge Bellamy made the best he could of the circumstances in which he found himself. His reasoning (*Re J and E*, paras 72-75) is compelling. He was

justified in proceeding as he did and for the reasons he gave. There is no substance in these complaints.

Judge Bellamy's judgment: the substantive issues

130. These matters out of the way, Judge Bellamy came at last, as he put it, to the issues arising for determination under Article 15. He addressed each of the three questions in turn. First, *Do these children have a particular connection with Hungary?* The answer was obvious (para 80):

> "Both of these children are Hungarian nationals. For that reason alone it is clear from Article 15(3)(c) that the answer to this first question is 'yes'. No party challenges that proposition."

131. Judge Bellamy then turned to the second question, *Is the Hungarian court better placed to hear this case?* Addressing this question he said (para 81), referring to *Re M*, that the approach must be evaluative, weighing the competing arguments as between the Hungarian court and the English court being better placed and adopting a balance sheet approach.

132. He began by setting out (para 82) the arguments which, he said, supported a finding that the Hungarian court is the better placed. The passage is long, but needs to be set out at some length:

> "(i) Both parents are Hungarian nationals. The mother's only language is Hungarian. The father speaks only a little English. Whereas in proceedings in England they require the support of an interpreter, that would not be so in proceedings in Hungary. In my experience it is invariably the case that when interpreters are used there is a risk of some points being lost in translation …
>
> (ii) X is a full sibling. H and K are half-siblings. All three are Hungarian nationals. All three are habitually resident in Hungary. The Hungarian court has opportunities to promote inter-sibling contact in ways not open to the English court. Furthermore, the Hungarian court is likely to be better placed to assess whether the relationship between J and E and their baby brother can and should be established and maintained. In making this point I note the observations made by Pauffley J in *Re J (A Child: Brussels II Revised: Article 15: Practice and Procedure)* who, faced with a not dissimilar situation, said that
>
> > "55 If, by contrast, the English court were to retain jurisdiction and accede to the local authority's application to place J with adopters, the strong likelihood is that J would be denied, for all time, the prospect of any relationship with her siblings. During the course of argument, I speculated as to the probable impact upon J of such an outcome and how she might view such a decision in the years to come. Mr Larizadeh characterised the likely scenario as a "time

> bomb," an assessment which does not strike me as unduly alarmist.
>
> 56 The importance for J of sibling relationships cannot be overstated. This court would be impotent in securing their establishment and continuation. The Hungarian court would have no such problem. On its own, this factor tips the balance, decisively so, in favour of a transfer request."

(iii) If any further assessments are required they would be better undertaken in Hungary than in England. The Hungarian court is better placed to commission and evaluate professional assessments of family members. The children's maternal great grandmother is Hungarian and their paternal grandmother is Hungarian Roma. There is evidence of willingness of both of them to care for or play a significant role in the care of J and E …

(iv) When she was a child the mother was physically abused by her step-father. He was eventually convicted and imprisoned. The father spent time in foster care. H and K have been removed from the care of their mother and placed in foster care. The Hungarian authorities will have, and have access to, important background evidence concerning this family. All of that material will be in Hungarian.

(v) The promotion of these children's cultural and linguistic needs is important. There is a limit to the steps which this court can take to ensure that those needs are met – a limit which would not exist if the proceedings were conducted in Hungary.

The final care plans for these children gave no indication of what, if anything, is to be done by this local authority to promote the children's cultural heritage, including their ability to speak in and understand their native tongue … In this case the local authority has accepted the appropriateness of the court's concerns about the inadequate way in which the final care plan's addressed this issue. After final submissions the local authority produced addendum care plans which state that,

> 'The Local Authority recognises that [the children's] identity needs are of significant importance and in promoting [their] heritage and cultural needs within a UK adoptive placement the Local Authority will encourage any adoptive placement to…'

The addendum plans go on to set out the steps the local authority proposes to take. Whilst that movement by the local authority is to be welcomed, it remains the case that once these

> children are adopted there will be no duty on anyone to monitor compliance and no mechanism for enforcing compliance …
>
> (vi) There may need to be a change of placement for these children. The local authority's plan is that J and E should be adopted by their present foster carers. The foster carers must first surmount two hurdles. Firstly, they need to be approved by the local authority's Adoption Panel. Secondly, they need to be matched to these children by the Adoption Panel. It would be inappropriate for me to speculate on their prospects. Should they be unsuccessful, the guardian suggests that Special Guardianship would be appropriate in order to maintain this placement. It is unclear whether Special Guardianship would be acceptable to these foster carers. If it would not then a change of placement may be necessary.
>
> (vii) Although the parents have spent much of the last three years living in England it is clear that they have not been able to establish themselves here. They were living in squalor when E was born. Over the course of the last eight months they have spent a significant amount of time in Hungary. Although both have been inconsistent in setting out their intentions and it is clear that the father, in particular, has a strong wish to remain in this country, there is good reason to believe that force of circumstances may compel them to return to Hungary. Indeed, I note that although the local authority has paid for the parents to stay in bed and breakfast accommodation until this judgment is handed down, thereafter their immediate destination appears to be Hungary. The local authority has agreed to pay their coach fares."

133. Judge Bellamy then turned (para 83) to consider the arguments against a finding that the Hungarian court would be better placed. Again, the passage is long but needs to be set out at some length:

> "(i) For the reasons explained earlier in this judgment, the court has now heard the evidence on welfare issues. Depending upon the court's evaluation of that evidence it is possible that the court may be able to make a final determination immediately. Further delay would be avoided, a matter of particular importance in this case given that these children have been in their present placement for some eighteen months.
>
> (ii) Assessments have been completed of the parents (by an ISW), of the maternal grandmother and great grandmother (by CFAB) and of the paternal grandmother (by the allocated social worker). The court also has the benefit of the assessment of a very experienced Children's Guardian. No detailed assessments have been undertaken by the Hungarian authorities even though they have had the time to do so.

> (iii) Although the parents' first language is Hungarian, they have available to them full legal representation in these proceedings including the services of interpreters.
>
> (iv) The present allocated social worker has been the allocated social worker for more than fifteen months. She has had the advantage of travelling to Hungary to make her own enquiries. She has a relationship with the children and a thorough knowledge of the background to the case.
>
> (v) To retain these proceedings in England would have the advantage of maintaining judicial continuity, not in the narrow sense (in this case there has been no judicial continuity in the narrow sense in that there have been 9 hearings conducted by 8 different judges) but in the broader sense of having access to all of the case papers (as I noted earlier, five lever arch files have been lodged for this hearing) and of having a full and complete picture of the development of the case over time (including the frequent changes in the parents' position).
>
> (vi) The children were born in England, are habitually resident in England and have lived here all their short lives. Furthermore, although their ethnic, cultural and linguistic needs are of great importance, they must be weighed against the importance of these children growing up in an environment which is safe, stable and secure and free of the risks inherent in the threshold findings."

134. Judge Bellamy then turned to consider the question of delay. He held (paras 86-87) that although section 1(2) of the 1989 Act did not apply, "that does not mean that delay is not a factor which may be taken into account," adding "depending upon the facts of the case, delay *may* be a relevant factor to be weighed in the balance when determining whether another State is 'better placed to hear the case'. Whether delay is relevant and, if it is, what weight should be accorded to it are issues to be determined on a case by case basis." He identified two components of delay (paras 88-91). First, the delay that had already occurred – delay on the part of the local authority before proceedings were issued and then further delay since the proceedings were issued (as he noted, judgment was being handed down during week 43) – and, secondly, the inevitable further delay in the event of a transfer under Article 15. His conclusion (para 92) was that

> "in this case delay is a relevant factor to weigh in the balance. However, the issue of delay must be seen in the context of the points made from §88 to §91 above. Put in that context, I am not persuaded that significant weight should be accorded to it."

135. His eventual decision (para 93) was as follows:

> "Having set out arguments for and against the proposition that the Hungarian court is better placed to hear this case, where does the balance fall? The point made at paragraph 82(ii) is in

> my judgment a particularly significant factor. In *Re J (A Child: Brussels II Revised: Article 15: Practice and Procedure) Pauffley J* said that 'On its own, this factor tips the balance, decisively so, in favour of a transfer request.' When that point is taken along with the other points to which I have referred I am satisfied that the arguments in support of the proposition that the Hungarian court is better placed to hear this case are persuasive. That is where the balance falls."

136. Judge Bellamy then turned to the third question, *Is a transfer of the proceedings to Hungary in these children's best interests?* Holding that it was, he said (para 95):

> "The principal argument in support of a finding that transfer would be in these children's best interests is that if I were to find (as I have) that the Hungarian court is better placed to hear this case then it must be in their best interests for the case to be determined by that court. That is a very persuasive argument and one which has been accepted in other cases. I, too, accept it. I am satisfied that it is in these children's best interests that these proceedings are determined in the country better placed to hear the case, and that is in Hungary."

137. Finally, Judge Bellamy turned to the question of discretion. He said (paras 97-98):

> "97 In exercising my discretion it is important to have in mind the observation of Munby J (as he then was) in *AB v JLB (Brussels II Revised: Article 15)* [2008] EWHC 2965, that
>
> > 'it is not easy to envisage circumstances where [questions (2) and (3) having been answered affirmatively] it would nonetheless be appropriate not to transfer the case'.
>
> 98 Having answered all three mandatory questions affirmatively, I am satisfied that there are no features of this case which would properly entitle me to exercise my discretion against requesting the Hungarian court to assume jurisdiction."

138. He concluded therefore (para 99) that a request be sent to the HCA for the Hungarian court to assume jurisdiction.

139. The local authority and the children's guardian make common cause in criticising both Judge Bellamy's conclusion and the analysis that underlay it. Because their contentions and the arguments they rely upon cover much the same ground there is no need to consider them separately. I shall deal with them together. Their criticisms are lengthy and of varying degrees of significance. I shall therefore concentrate on the key strands of the argument, though making clear that I have had all their points very much in mind.

140. I can summarise the key strands of the argument as follows:

i) Judge Bellamy improperly elided, indeed conflated, the second and third of the questions he had to address.

ii) He improperly treated the ultimate discretionary issue as largely concluded by his answers to the second and third questions.

iii) In his consideration of the second question, he (a) failed to explain how the foreign court would be "better placed", given that he had heard all the evidence going to welfare, (b) failed adequately to take into account the fact that the Hungarian authorities had no previous knowledge of the family and that the witnesses, and the professionals who have assessed the parents, are all in this country, (c) failed adequately to take into account the advantages of judicial continuity deriving from the fact that he had heard all the evidence, (d) failed adequately to consider whether in fact any further assessments would be required (not least given the stance of the HCA, indicating its view that they were not), (e) failed to address the reality that there is no family member in Hungary who is able and willing to look after the children (who will accordingly pass into foster care), and (f) failed to address the fact that, seemingly, if there were an Article 15 transfer, the decision in Hungary would be taken not by a court but by an administrative body. It was said that the process in Hungary might not comply with Articles 6 and 8 of the Convention and that the mother's argument that it must be assumed that the Hungarian process will be Article 6 and 8 compliant merely assumes what it asserts.

iv) In considering the third question, he failed adequately to address the question of the children's welfare.

v) He failed adequately to take into account the evidence he had heard; his approach to the issue of delay was flawed.

141. In relation to the fourth of these contentions, it is important to see how the point was put by the local authority. It is said that Judge Bellamy: failed "to appreciate … the fact that only by retaining jurisdiction could the current placement … be considered as an option for the children's placement throughout their minority, and that, by declining jurisdiction, that option would immediately be removed as a possible future placement for the children"; that he failed "to consider … the likely profound deleterious effect on the children's welfare of a summary removal from their psychological parents" in what the children's guardian characterised as "a total uprooting … to a completely strange environment"; and that he failed "to consider the immediate and future impact on the children's welfare of the extinguishing of all prospect of being parented throughout their minority by these carers". In its skeleton arguments, the local authority submitted that the "judge could not reasonably ignore the prospects of the foster parents becoming adopters" and complained that the judge "makes no reference to the necessity for (or even the desirability of) adoption." It is further said that Judge Bellamy determined the issue without having adequate information about the foster placement in Hungary being proposed by the HCA.

142. In my judgment, none of these points, whether taken individually or together, suffices to justify our interfering with Judge Bellamy's decision and I would decline to do so.

143. I shall take the various points in turn

144. So far as contention (i) is concerned, the authorities recognise the reality that the questions of "better placed" and "best interests" are intimately connected. As Ryder LJ said in *Re M*, para 19:

> "The question of whether a court of another relevant Member State would be better placed to hear the case (or a specific part of the case) is an evaluation to be performed on all the circumstances of the case. It is intimately connected with the question of the best interests of the child, given the construction of the regulation and the logical connection between the questions."

In my judgment there was no error of law or approach in the way in which Judge Bellamy addressed the point (*Re J and E*, para 95). He was entitled to accept an argument which, as he correctly said, had been accepted in other cases. He did not elide or conflate the second and third questions but recognised, as he was entitled to, both as a matter of law and on the facts, that his answer to the second question went a long way to providing the proper answer to the third.

145. So far as concerns contention (ii), Judge Bellamy was proceeding on a basis entirely consistent with authority, including the one case to which he made explicit reference (*Re J and E*, para 97). In my judgment, his approach was sound in law and justified in the circumstances as he had evaluated them.

146. Much of contention (iii), on close analysis, amounts to little more than an attempt to reargue the "better placed" issue on the facts. Two of the matters relied on can be disposed of at the outset. In relation to judicial continuity, it will be seen that this was a factor carefully evaluated by Judge Bellamy. In this case there were two factors which plainly made the point less weighty than would often be the case. First, there had been, as Judge Bellamy noted, precious little judicial continuity. Secondly, it must be remembered that the finding of fact hearing before Hogg J concluded without the hearing of any evidence. In my judgment, on this issue Judge Bellamy was entitled to decide as he did. Nor, in my judgment is there any merit in the point that the decision in Hungary will be taken not by a court but by an administrative body. Article 2(1) of BIIA defines the term 'court' as "cover[ing] all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1." Article 2(2) defines the term 'judge' as "mean[ing] the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation." Moreover, the suggestion that the process in Hungary might not comply with Articles 6 and 8 of the Convention cuts across the fundamental principle (*Re M*, para 54(v)) that it is not permissible for the English court to enter into a comparison of such matters as the competence, diligence, resources or efficacy of the courts of the other State.

147. Contention (iv) is, with all respect, based in significant part upon a mis-reading of the authorities, *Re M* in particular, which explain the attenuated ambit of the welfare investigation required under Article 15 and the irrelevance of the fact that a particular option available to the English court (for example, the making of a non-consensual adoption order) is not available to the foreign court. In my judgment, Judge Bellamy, when addressing the issue of "best interests", asked himself the right question, directed himself to the relevant factors and was not required, as the local authority

asserts, to address himself to the "desirability of adoption." What he was required to consider, and what he did consider, was whether it was in the children's best interests for the case to be determined in another jurisdiction. 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?'

148. The remaining contentions in (iii) and (v) do not, in my judgment, provide any adequate justification for our interfering with Judge Bellamy's conclusions. He was entitled to have regard to the various matters to which he drew attention, and the weight to be attached to them was essentially a matter for him in the overall evaluative exercise which it was for him to perform. We would, in my judgment, be going outside the legitimate ambit of our appellate functions were we to interfere.

149. It is clear that Judge Bellamy, because the point was never brought to his attention, overlooked the impact of Article 1(3)(b). The fact is that it was simply not open to him to request a transfer under Article 15 in relation to the placement order proceedings. But that did not, on a proper reading of Article 15, prevent him requesting a transfer under Article 15 in relation to the care proceedings which, procedurally and substantively, were quite distinct from and, logically and legally, antecedent to, the placement order proceedings. There was nothing inappropriate, let alone, as suggested by the local authority, unworkable or unlawful in requesting a transfer in relation to the one set of proceedings (the care proceedings) to Hungary while retaining the other (the placement order proceedings), which would necessarily remain dormant, stayed in England, pending the outcome of the proceedings in Hungary.

150. For the purpose of Article 15, "the case" was the care proceedings, to which alone BIIA applied; and the "substance of the matter" was likewise, in my judgment, the welfare and other issues arising in the care proceedings. That "case" was quite distinct from the "case" in relation to the placement order proceedings, just as the "substance of the matter" in relation to the care proceedings was quite distinct from the "substance of the matter" in relation to the placement order proceedings.

151. The consequence is that (a) the care proceedings are stayed in consequence of the transfer under Article 15 and (b) the placement order proceedings, which are of their nature consequential upon the care proceedings, are stayed in consequence of the stay of the care proceedings.

152. It has been argued that Judge Bellamy's failure to appreciate the impact of Article 1(3)(b) vitiates or undermines his decision to request a transfer under Article 15 in relation to the care proceedings. I do not agree. Neither as a matter of law or proper approach nor on the facts or in the light of his analysis of the issues does this failure in relation to the future of the placement order proceedings impact upon Judge Bellamy's analysis and decision in relation to the future of the care proceedings.

153. There is one final matter which was brought to our attention *after* the hearing: the fact that the local authority decision-maker has now approved the children's foster parents as prospective adopters for children having the children's characteristics. This touches on a matter to which Judge Bellamy drew attention (*Re J and* E, para 82(vi)). But I do not accept the local authority's contention that this reinforces and adds to the factors

which tip the balance towards the continued hearing of the case in this country. It does not.

Other matters

154. Before leaving this case there are two aspects of the proceedings to which I must draw attention for each, in my judgment, merits criticism. Steps must be taken as a matter of urgency to ensure that there is no repetition ever again.

155. By way of introduction, I repeat that J and E have been in foster care since May 2013 and that the proceedings began in January 2014. By the time the final hearing commenced before Judge Bellamy in November 2014, the children had been in foster care for the best part of 18 months and the proceedings themselves had been on foot for a little over 10 months. Recognising that for too much of the time the parents were not engaging with the process – the details, which I need not rehearse, can be found set out in Judge Bellamy's judgment – and acknowledging that cases which, like this, necessitate collaboration with foreign authorities and investigations in foreign countries will almost inevitably take longer than purely domestic cases, this is nonetheless a wholly unacceptable state of affairs. After all, when these proceedings began in January 2014 the expectation as set out in the Pilot Public Law Outline was that care cases would be concluded within a maximum of 26 weeks – a requirement which with effect from 26 April 2014 has been given statutory force by virtue of section 32(1)(a)(ii) of the 1989 Act.

156. Matters were not assisted by the deplorable failure, and not for the first time, of the relevant contractor to provide interpreters for the final hearing arranged for 22 September 2014: compare *Re Capita Translation and Interpreting Ltd* [2015] EWFC 5. But it is two other matters which I need to focus on.

Other matters: section 20 of the 1989 Act

157. The first relates to the use by the local authority – in my judgment the misuse by the local authority – of the procedure under section 20 of the 1989 Act. As we have seen, the children were placed in accordance with section 20 in May 2013, yet it was not until January 2014, over eight months later, that the local authority eventually issued care proceedings. Section 20 may, in an appropriate case, have a proper role to play as a *short-term* measure pending the commencement of care proceedings, but the use of section 20 as a prelude to care proceedings for a period as long as here is wholly unacceptable. It is, in my judgment, and I use the phrase advisedly and deliberately, a misuse by the local authority of its statutory powers.

158. As I said in *Re A (A Child), Darlington Borough Council v M* [2015] EWFC 11, para 100:

> "There is, I fear, far too much misuse and abuse of section 20 and this can no longer be tolerated."

I drew attention there, and I draw attention again, to the extremely critical comments of the Court of Appeal in *Re W (Children)* [2014] EWCA Civ 1065, as also to the decision of Keehan J in *Northamptonshire County Council v AS and Ors* [2015] EWHC 199 (Fam). As Keehan J pointed out in the latter case (para 37), the

accommodation of a child under a section 20 agreement deprives the child of the benefit of having an independent children's guardian to represent and safeguard his interests and deprives the court of the ability to control the planning for the child and prevent or reduce unnecessary and avoidable delay. In that case the local authority ended up having to pay substantial damages.

159. Then there was the decision of Cobb J in *Newcastle City Council v WM and ors* [2015] EWFC 42. He described the local authority (paras 46, 49) as having acted unlawfully and in dereliction of its duty. We had occasion to return to the problem very recently in *Re CB (A Child)* [2015] EWCA Civ 888, para 86, a case involving the London Borough of Merton. Even more recent is the searing judgment of Sir Robert Francis QC, sitting as a Deputy High Court Judge in the Queen's Bench Division in *Williams and anor v London Borough of Hackney* [2015] EWHC 2629 (QB), another case in which the local authority had to pay damages.

160. Moreover, there has in recent months been a litany of judgments in which experienced judges of the Family Court have had occasion to condemn local authorities, often in necessarily strong, on occasions withering, language, for misuse, and in some cases plain abuse, of section 20: see, for example, *Re P (A Child: Use of S.20 CA 1989)* [2014] EWFC 775, a case involving the London Borough of Redbridge, *Re N (Children)* [2015] EWFC 37, a case involving South Tyneside Metropolitan Borough Council, *Medway Council v A and ors (Learning Disability: Foster Placement)* [2015] EWFC B66, *Gloucestershire County Council v M and C* [2015] EWFC B147, *Gloucestershire County Council v S* [2015] EWFC B149, *Re AS (Unlawful Removal of a Child)* [2015] EWFC B150, a case where damages were awarded against the London Borough of Brent, and *Medway Council v M and T (By Her Children's Guardian)* [2015] EWFC B164, another case where substantial damages were awarded against a local authority. I need not yet further lengthen this judgment with an analysis of this melancholy litany but, if I may say so, Directors of Social Services and Local Authority Heads of Legal Services might be well advised to study all these cases, and all the other cases I have mentioned on the point, with a view to considering whether their authority's current practices and procedures are satisfactory.

161. The misuse of section 20 in a case, like this, with an international element, is particularly serious. I have already drawn attention (paragraphs 50-51 above) to the consequences of the delay in this case. In *Leicester City Council v S & Ors* [2014] EWHC 1575 (Fam), a Hungarian child born in this country on 26 March 2013 was accommodated by the local authority under section 20 on 12 April 2013 but the care proceedings were not commenced until 10 October 2013. Moylan J was extremely critical of the local authority. I have already set out (paragraph 115 above) his observations on the wider picture.

162. What the recent case-law illustrates to an alarming degree are four separate problems, all too often seen in combination.

163. The first relates to the failure of the local authority to obtain informed consent from the parent(s) at the outset. A local authority cannot use its powers under section 20 if a parent "objects": see section 20(7). So where, as here, the child's parent is known and in contact with the local authority, the local authority requires the consent of the parent. We dealt with the point in *Re W (Children)* [2014] EWCA Civ 1065, para 34:

> "as Hedley J put it in *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam), [2013] 2 FLR 987, para 27, the use of section 20 "must not be compulsion in disguise". And any such agreement requires genuine consent, not mere "submission in the face of asserted State authority": *R (G) v Nottingham City Council and Nottingham University Hospital* [2008] EWHC 400 (Admin), [2008] 1 FLR 1668, para 61, and *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam), [2013] 2 FLR 987, para 44."

164. In this connection local authorities and their employees *must* heed the guidance set out by Hedley J in *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam), [2013] 2 FLR 987, para 46:

> "(i) Every parent has the right, if capacitous, to exercise their parental responsibility to consent under s 20 to have their child accommodated by the local authority and every local authority has power under s 20(4) so to accommodate provided that it is consistent with the welfare of the child.
>
> (ii) Every social worker obtaining such a consent is under a personal duty (the outcome of which may not be dictated to them by others) to be satisfied that the person giving the consent does not lack the capacity to do so.
>
> (iii) In taking any such consent the social worker must actively address the issue of capacity and take into account all the circumstances prevailing at the time and consider the questions raised by s 3 of the Mental Capacity Act 2005, and in particular the mother's capacity at that time to use and weigh all the relevant information.
>
> (iv) If the social worker has doubts about capacity no further attempt should be made to obtain consent on that occasion and advice should be sought from the social work team leader or management.
>
> (v) If the social worker is satisfied that the person whose consent is sought does not lack capacity, the social worker must be satisfied that the consent is fully informed:
>
> (a) Does the parent fully understand the consequences of giving such a consent?
>
> (b) Does the parent fully appreciate the range of choice available and the consequences of refusal as well as giving consent?
>
> (c) Is the parent in possession of all the facts and issues material to the giving of consent?

> (vi) If not satisfied that the answers to (a)–(c) above are all 'yes', no further attempt should be made to obtain consent on that occasion and advice should be sought as above and the social work team should further consider taking legal advice if thought necessary.
>
> (vii) If the social worker is satisfied that the consent is fully informed then it is necessary to be further satisfied that the giving of such consent and the subsequent removal is both fair and proportionate.
>
> (viii) In considering that it may be necessary to ask:
>
> (a) What is the current physical and psychological state of the parent?
>
> (b) If they have a solicitor, have they been encouraged to seek legal advice and/or advice from family or friends?
>
> (c) Is it necessary for the safety of the child for her to be removed at this time?
>
> (d) Would it be fairer in this case for this matter to be the subject of a court order rather than an agreement?
>
> (ix) If having done all this and, if necessary, having taken further advice (as above and including where necessary legal advice), the social worker then considers that a fully informed consent has been received from a capacitous mother in circumstances where removal is necessary and proportionate, consent may be acted upon.
>
> (x) In the light of the foregoing, local authorities may want to approach with great care the obtaining of s 20 agreements from mothers in the aftermath of birth, especially where there is no immediate danger to the child and where probably no order would be made."

165. I add that in cases where the parent is not fluent in English it is vital to ensure that the parent has a proper understanding of what precisely they are being asked to agree to.

166. The second problem relates to the *form* in which the consent of the parent(s) is recorded. There is, in law, no requirement for the agreement to be in or evidenced by writing: *R (G) v Nottingham City Council and Nottingham University Hospital* [2008] EWHC 400 (Admin), [2008] 1 FLR 1668, para 53. But a prudent local authority will surely always wish to ensure that an alleged parental consent in such a case is properly recorded in writing and evidenced by the parent's signature.

167. A feature of recent cases has been the serious deficiencies apparent in the drafting of too many section 20 agreements. In *Re W (Children)* [2014] EWCA Civ 1065, we expressed some pungent observations about the form of an agreement which in places was barely literate. Tomlinson LJ (para 41) described the agreement as "almost

comical in the manner in which it apparently proclaims that it has been entered into under something approaching duress." In *Williams and anor v London Borough of Hackney* [2015] EWHC 2629 (QB), the Deputy Judge was exceedingly critical (para 65) both of the terms of the agreement and of the circumstances in which the parents' 'consent' had been obtained. There had, he said, been "compulsion in disguise" and "such agreement or acquiescence as took place was not fairly obtained."

168. The third problem relates to the fact that, far too often, the arrangements under section 20 are allowed to continue for far too long. This needs no elaboration.

169. This is related to the fourth problem, the seeming reluctance of local authorities to return the child to the parent(s) immediately upon a withdrawal of parental consent. It is important for local authorities to recognise that, as section 20(8) of the 1989 Act provides:

> "Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section."

This means what it says. A local authority which fails to permit a parent to remove a child in circumstances within section 20(8) acts unlawfully, exposes itself to proceedings at the suit of the parent and may even be guilty of a criminal offence. A parent in that position could bring a claim against the local authority for judicial review or, indeed, seek an immediate writ of habeas corpus against the local authority. I should add that I am exceedingly sceptical as to whether a parent can lawfully contract out of section 20(8) in advance, as by agreeing with the local authority to give a specified period of notice before exercising their section 20(8) right.

170. It follows, in my judgment, that for the future good practice requires the following, in addition to proper compliance with the guidance given by Hedley J which I have set out above:

i) Wherever possible the agreement of a parent to the accommodation of their child under section 20 should be properly recorded in writing and evidenced by the parent's signature.

ii) The written document should be clear and precise as to its terms, drafted in simple and straight-forward language that the particular parent can readily understand.

iii) The written document should spell out, following the language of section 20(8), that the parent can "remove the child" from the local authority accommodation "at any time".

iv) The written document should not seek to impose any fetters on the exercise of the parent's right under section 20(8).

v) Where the parent is not fluent in English, the written document should be translated into the parent's own language and the parent should sign the foreign language text, adding, in the parent's language, words to the effect that 'I have read this document and I agree to its terms.'

171. The misuse and abuse of section 20 in this context is not just a matter of bad practice. It is wrong; it is a denial of the fundamental rights of both the parent and the child; it will no longer be tolerated; and it must stop. Judges will and must be alert to the problem and pro-active in putting an end to it. From now on, local authorities which use section 20 as a prelude to care proceedings for lengthy periods or which fail to follow the good practice I have identified, can expect to be subjected to probing questioning by the court. If the answers are not satisfactory, the local authority can expect stringent criticism and possible exposure to successful claims for damages.

Other matters: judicial continuity

172. The other matter relates to the need for judicial continuity. I have already referred to the delay in this case even after the proceedings were commenced. I cannot help thinking that this was caused in part by the fact that, once the case arrived in the High Court, there was a complete lack of any judicial continuity. There were *seven* hearings in the Family Division, listed before *seven* different judges. This is wholly unacceptable. Judicial continuity is a core part of the Public Law Outline, not least because, without it, that other key part of the PLO, robust judicial case management, is compromised. This court would rightly not tolerate such disregard of the PLO in a case being heard in the family court by district or circuit judges. Why should we tolerate it, why should we be any less harsh in our criticism, because this state of affairs has been detected in the Family Division? Acknowledging my own responsibility as President for having allowed such practices to occur, it is time to put a stop to it, and I shall.

Conclusion

173. In my judgment the appeals should be dismissed.

174. I have read in draft the judgments of Black LJ and Sir Richard Aikens. I agree with both of them.

Lady Justice Black :

175. I have had the great advantage of reading the President's judgment in draft and I am grateful to him for covering the issues that arise in these appeals so thoroughly. I agree with him that the appeals should be dismissed for the reasons that he has explained. I do not therefore propose to do more than to draw out, from what he has said, the main strands of the reasoning that has persuaded me that the English court has jurisdiction to make an adoption order in relation to a child who is a foreign national or domiciled abroad and to dispense with the consent of a parent who is a foreign national or domiciled abroad. I do this simply in view of the importance of the matters with which we have been concerned. I also want to underline his observations about the need for Article 15 to be considered at the earliest possible stage.

Adoption

176. In this country, adoption is governed by statute, presently the Adoption and Children Act 2002. Adoption orders can only be sought and granted under that Act. The same is true of a placement order, that is an order under section 21 of the Act "authorising a local authority to place a child for adoption with any prospective adopters who may

be chosen by the authority" (section 21(1)). It is to the Act that one must look for the jurisdiction provisions governing applications for such orders. Although the Family Law Act 1986 contains provisions which regulate other applications made under the 2002 Act, it does not regulate jurisdiction in relation to applications for an adoption order or a placement order and nor does any other statute.

177. Section 49 of the Act lays down the core requirement which must be satisfied if the courts of England and Wales are to have jurisdiction in relation to an adoption application. Ignoring, for present purposes, the variations dependent upon whether the application is made by a couple or by one person, it is that an application can only be made by a prospective adopter who fulfils one of the conditions as to domicile/habitual residence in the British Islands.

178. Section 42(1) to (6) of the Act provide that (normally) an application for an adoption order may not be made unless the child has had his home with the applicant(s) during a prescribed period preceding the application and section 42(7) provides that the order itself may not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant(s) in the home environment have been given to the adoption agency which placed the child or, in other cases, the local authority where the home is. This often (but not always) means that the child has to be within the jurisdiction. I do not intend to be diverted by the question of whether, as a matter of legal technicality, it is appropriate to view the requirements of section 42 as additional jurisdictional provisions as it is not necessary to answer that for present purposes. What matters is that nowhere in the Act is there any requirement relating to the nationality or domicile or, subject to section 42, even presence of the child who is to be the subject of the application. These things may bear upon the court's decision as to whether, in fact, to make the adoption order sought but they do not affect its jurisdiction so to do.

179. The Act seems to me to be clear about this on its face but there is reassurance available that this interpretation is correct. Turning first to the nationality of the child, the President has charted the legislative course of the present position, explaining how, and why, the original requirement that the child should be of British nationality was lifted after the Second World War. From this, it can be seen that the absence of reference to the child's nationality in the 2002 Act is no accident but rather the product of a deliberate decision not to restrict adoption to children who are British nationals. The President has also explained that it is compatible with the UK's international obligations that the adoption of children who are foreign nationals should be permitted and that there are other provisions of domestic law which bolster this.

180. Turning then to look at the domicile of the child, *In re B(S) (An Infant)* to which the President has referred in some detail, is important. Goff J there determined that there was jurisdiction to make an adoption order in respect of a child who was assumed to be domiciled in Spain but who was living in England. He relied upon the absence, from the Adoption Act of that time, of any requirement that the child be domiciled here and saw domiciliary law purely as a factor, albeit an important one, in considering whether the proposed order will be for the welfare of the child. Like the President, I agree with his analysis, which is as applicable to the 2002 Act as it was to the 1958 Act.

181. The 2002 Act is also silent as to the nationality or domicile or presence of the child's natural parents. They are a vital part of the adoption process under the Act because no adoption order can be made unless they consent or their consent is dispensed with, but there is nothing in the Act to prevent the court, whether as a matter of jurisdiction or otherwise, from dealing with the case because they are foreign nationals or domiciled abroad. They may protest that they are nationals of/habitually resident in/domiciled in another country and that their status and that of their child can only be changed in accordance with the law of that country, so the English court cannot dispense with their consent and/or remove from them the status of parent. The President has looked at and discussed such arguments in his section entitled Adoption: applicable law - the contrary arguments starting at paragraph 93. The answer to them, to my mind, is that adoption is a creature of the 2002 Act and, if that Act confers the power to do so, then the English court can do so, making an adoption order which is valid within this jurisdiction. Putting it another way, English law is the applicable law in determining the adoption application, and that includes the provisions of section 52 of the 2002 Act as to dispensing with parental consent. What the English court cannot do, however, is to assume without more that its determination will bind other jurisdictions. They will make their own determination as to the status of the natural parents vis-à-vis the child and of the child vis-à-vis the adopters and the natural parents and it is for that reason that, although foreign connections do not prevent the English court from having jurisdiction and power to grant an adoption order, they are potentially very material in its determination of how to exercise that power. I will return to this shortly.

182. So far, I have proceeded upon the basis that the issue of the parents' consent arises at the stage of the making of the adoption order. In this event, the court's jurisdiction is dictated by section 49, section 47 sets out the requirement that either the parents consent or their consent is dispensed with, and section 52 regulates the process of dispensing with consent. It is possible, however, for the issue of consent to arise instead at the earlier stage of an application for a placement order. Section 21 is less obviously a jurisdiction provision than section 49 but I have concluded that it, together with section 22, must nevertheless be what governs the English court's jurisdiction to grant a placement order. There is no other obvious candidate. As material, section 21 provides:

> 21 Placement orders
>
> (1) A placement order is an order made by the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority.
>
> (2) The court may not make a placement order in respect of a child 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.

> (3) The court may only make a placement order if, in the case of each parent or guardian of the child, the court is satisfied –
>
> (a) that the parent or guardian has consented to the child being placed for adoption with any prospective adopters who may be chosen by the local authority and has not withdrawn the consent, or
>
> (b) that the parent's or guardian's consent should be dispensed with.
>
> This subsection is subject to section 52 (parental etc consent).
>
> (4) …..

183. Section 22 is the section which dictates when a local authority must, or may, apply for a placement order in respect of a child. Applications for placement orders are governed by FPR 2010 Part 14, and Rule 14.3 stipulates, referring to section 22, that the applicant for a placement order is "a local authority". What I think emerges from all of this is that the court has jurisdiction to make a placement order on the application of a local authority which fulfils the conditions set out in section 22. A "local authority" is defined in section 144 in terms which appear to confine this to a domestic local authority, which is entirely consistent with the provisions of both section 21 and section 22.

184. Once the jurisdiction to make a placement order is established, the conditions for the making of the placement order are dictated by the 2002 Act, whatever the foreign connections of the parent, and the path leads back, if the parents do not consent, to section 52.

185. It is possible to mount an argument to the effect that the court would not have jurisdiction to make a placement order unless it had jurisdiction to grant a care order by virtue of the provisions of BIIA and therefore that no placement order could be made unless the child was habitually resident here at the time of the application but, for reasons I will explain, I would reject it. To explain this, I return to section 21(2) which sets out three alternative conditions for the making of a placement order. The first situation in which the court can make a placement order is where the child is already subject to a care order (section 21(2)(a)) and, in that event, it is likely that the child, who must have been habitually resident here when the care order was sought, in fact remains habitually resident here when it comes to the placement order. However, section 21(2)(b) permits an order to be made where "the court is satisfied that the conditions in section 31(2) of the 1989 [Children] Act (conditions for making a care order) are met" and it is possible that, in this situation, the child may not be habitually resident here at the relevant time. It could be argued that the "conditions for making a care order" referred to in section 21(2)(b) include the *jurisdictional conditions* for making such an order as well as the *substantive conditions*, thus importing the requirement that the child is habitually resident here when the placement order is under consideration, because only then could the court be satisfied that the conditions for making a care order were satisfied. That would be an odd consequence, given that placement orders are outside the scope of BIIA but would, on this analysis, by an indirect route, be regulated by its provisions. I would not, therefore be inclined to

accept this interpretation and I do not feel constrained to do so, given that it is possible to interpret section 21(2)(b) as requiring only that the substantive conditions for the making of a care order are met. This is, it seems to me, both the more obvious and the more sensible construction of the subsection, particularly as it is to the conditions "in section 31(2)" that reference is made.

186. I said that I would return to the relevance of the parents' foreign connections and I need to do so both in the context of an adoption application and of a placement order application.

187. Goff J said in *In re B(S)*, in a passage quoted by the President at paragraph 88 above, that it was not necessary to prove what the child's domicile actually is or to go into the adoption laws of the relevant foreign country because the child's domicile is not a jurisdictional requirement and nor is the English court applying foreign law in determining the adoption application. I agree with Goff J that strict proof of domicile/domiciliary law may not be necessary for the reasons he gave. However, it seems to me imperative that, when considering whether or not to make an adoption order, the court should consider what links the child has to other countries (perhaps especially, but not necessarily only, in terms of domicile or nationality), and should consider what risk there is that any adoption order that it makes may not be universally recognised and reflect upon the practical implications of this for the child. At paragraph 104 et seq, the President has set out and commented upon the checklist in section 1(4) of the 2002 Act and I would endorse what he has said about it. Quite apart from the express terms of the checklist which focus attention on the child's background, section 1 of the Act is quite wide enough to enable, indeed require, the court to consider and weigh in the equation matters such as the possibility of a "limping" adoption order which, although fully effective in this country, might be ineffective in other countries that the child and his adopters may wish or need to visit. By way of practical example, suppose that the child and his adoptive parents return to the country of which he and his natural parents are/were nationals in order to explore his cultural roots; would the adoption order be recognised there and if not, what consequences could flow? This is not to say that an adoption order could not be made if it were to be demonstrated that it would not be recognised in a country which may be of importance for the child in future but it would be a factor that would need to be weighed in the balance, along with all the others, in deciding what order is going to be most conducive to the child's welfare throughout his life.

188. As the foreign connections are relevant to the question of the making of an adoption order, so they must also be relevant to an application for a placement order, not least because the court can only dispense with the parent's consent if the welfare of the child requires that and that cannot be determined if a purely insular approach is taken.

Article 15

189. I need say very little about Article 15 as it has been comprehensively covered by the President. I think it is worth stressing two things, however:

i) Article 15 is not a provision which facilitates the transfer of particular proceedings, as such, to another jurisdiction. It cannot be, because other jurisdictions do not share our child protection arrangements. What is transferred is, putting it bluntly, the problem, for which the other jurisdiction

will, if the transfer is made, take responsibility, leaving our proceedings either stayed or discontinued.

ii) It is vitally important that if there is going to be a transfer, it happens as soon as possible. Things are only likely to get more difficult if this is not done, as Moylan J so neatly explained in *Leicester City Council v S and others* from which the President quoted at paragraph 115 above.

Sir Richard Aikens :

190. I have read the magisterial judgment of the President and the penetrating comments of Black LJ. I completely agree with both judgments. I have only become re-acquainted with the details of family law since joining the Court of Appeal in 2008 and so it would be presumptuous of me to try and add a supplementary judgment to the full analysis that the President and Black LJ have undertaken in relation to the fundamental and difficult issues that have been raised by this case. However, I will, in a dogmatic and unargued way, give my answers to the principal questions that have to be decided in this case. I will use the abbreviations adopted by the President.

191. The questions and my answers are:

i) Do the courts of England and Wales have jurisdiction to make placement and adoption orders in respect of children who are not UK citizens? Answer: yes, as a matter of construction of the 2002 Act.

ii) What is included in the scope of BIIA Art 1(1)(b) and excluded from it by virtue of Art 1(3)(b)? Answer: BIIA covers care orders for children but excludes applications for placement orders (as being "preparatory to adoption") and adoption orders.

iii) What type of proceedings can be the subject of a "transfer order" under Art 15(1) of BIIA? Answer: care proceedings but not placement/adoption proceedings.

iv) What, upon the correct construction of Art 15(1), are the requirements before an English court (being the court having "jurisdiction as to the substance of the matter") can consider making a "transfer order"? Answer: (a) the child must have a "particular connection" with the other Member State; (b) the court of that Member State has to be better placed to hear the case – that is better placed to determine the issues in hand, viz. the care proceedings relating to the child; and (c) it has to be in the best interests of the child to make the transfer; (what has, in some cases, been referred to as "the attenuated welfare test"). However, even if all three of these requirements are fulfilled, there remains a residual discretion in the English court on whether or not to make the transfer, as per Art 15(1)(a) or (b). The fact that the HCA has already accepted jurisdiction cannot affect the ability of the English Court of Appeal reconsidering the whole matter on appeal.

v) Given the circumstances of the present case, what is the consequence of the fact that Judge Bellamy did not appreciate the effect of Art 1(3)(b) of BIIA, with the result that he did not, in fact, have jurisdiction to transfer the

placement/adoption proceedings? Answer: his conclusion on the transfer of the care proceedings can still stand (unless wrong); but his order in relation to the transfer of the placement/adoption proceedings must be set aside as he had no jurisdiction to make it.

vi) Were the judge's conclusions on any of the three requirements under Art 15(1) wrong? Answer: no. The judge made a very careful evaluation; he did not err in principle; he left out no relevant factors; he did not consider any irrelevant ones and the overall result was not perverse. The new facts set out in the email of 12 May 2015 concerning the carers do not make any difference to that evaluation.

vii) What is the consequence of the decisions above? Answer: The placement/adoption proceedings must be stayed as must the care proceedings. The transfer order per Art 15(1)(a) remains.

192. There is one further comment I wish to make. Both the President and Black LJ have emphasised that when an English court is considering making a placement order or adoption order in respect of a foreign national child, it must consider, as part of the "welfare" exercise under section 1(4) of the 2002 Act, the possibility of the result being a "limping" adoption order. By that they mean an adoption order which, although fully effective in this country, might be ineffective in other countries that the child and his adopters may wish or need to visit. There is a danger that natural parent(s) (or perhaps other parties) who oppose the adoption, will attempt to turn this factor into a major forensic battle by engaging foreign lawyers to give opinions on the effectiveness (or lack of it) of an English adoption order in other countries, in particular the state of the nationality of the natural parent(s). Those legal opinions might then be challenged and there is the danger of that issue becoming expensive and time consuming "satellite litigation". I hope that this can be avoided by a robust application of the Family Procedure Rules relating to expert opinions.