Neutral Citation Number: [2020] EWCA Civ 1002

Case No: B4/2020/0793

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
HH Judge Wright
ZC18C00759

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2020

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE BAKER
and
LORD JUSTICE PHILLIPS

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF COUNCIL REGULATION (EC) 2201/2003
AND IN THE MATTER OF KN (A CHILD) (ARTICLE 15 TRANSFER)

Between :

MK	**Appellant**
- and -	
A LOCAL AUTHORITY (1)	**Respondent**
TN (2)	
KN (by his children's guardian) (3)	

- -
- -

David Sharp (instructed by **Bindmans LLP**) for the **Appellant**
Ann Courtney (instructed by **Local Authority Solicitor**) for the **First Respondent**
The Second and Third Respondents were not present or represented

Hearing date : 14 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 2pm on Thursday 30 July 2020

LORD JUSTICE BAKER :

1. This is an appeal by a mother against a decision in care proceedings concerning her son to request a French family court to assume jurisdiction under Article 15 of Council Regulation (EC) 2201/2003 ("BIIa").

2. At the conclusion of the hearing before us, we informed the parties that the appeal would be allowed and the order authorising the request set aside. This judgment sets out the reasons for our decision.

Background

3. I am grateful to the legal representatives for their helpful chronologies which set out the lengthy history of these proceedings.

4. The child ("K"), now aged 13, was born and raised in France and is a French national. His mother is French and continues to reside in Paris. His father is of Nigerian origin and now lives in England.

5. After the parents' relationship broke down, the father moved to England and K remained living with his mother in France. Over time, the mother found it increasingly difficult to look after K. He displayed increasing emotional and behavioural difficulties at home, in school and with his friends. The mother received help from French children's services and mental health services but there was no improvement.

6. In September 2018, it was agreed between the parents and French children's services that K would move to live with the father in England. A few weeks after K arrived in this country, the father took the child to hospital because he had become so concerned about his behaviour and had started to notice symptoms of emerging psychosis. The local authority in England became involved with the family and in November 2018 issued care proceedings. K was placed with foster carers under an interim care order, but his behaviour continued to cause concern and he was admitted to a child psychiatric unit.

7. At the first interim hearing, HH Judge Wright had included in the order a request to the French court to assume jurisdiction under Article 15 of Brussels IIA, but at the next hearing in December 2018, following the deterioration in K's mental health, the Article 15 request was stayed. The proceedings were listed for an issues resolution hearing in April 2019 and a final hearing in the following month.

8. The mother underwent psychiatric and parenting assessments in France and K was assessed by a child and adolescent psychiatrist which was completed in March 2019. At the issues resolution hearing on 12 April 2019, the listing of the final hearing in May was retained. The order made following the hearing included a direction to the local authority to send a letter to the International Child Abduction and Contact Unit ("ICACU") and the French Central authority agreed between the parties raising the following issues:

    (1) What French agency would be responsible for commissioning, funding and finding a residential placement in France for K were these proceedings to be

transferred under Article 15 or in the event that the local authority sought to place K in France under Article 56.

(2) What the procedure is for a child to be placed in a residential placement in France, including what, if any, agencies, courts or bodies need to approve any such placement either before or after the placement begins and how, if at all, the procedure differs if the child is placed there by the French courts/authorities or by the English authorities under Article 56.

(3) Information about what placements there are in France which might be able to meet K's needs and in respect of any such placements information about the placement generally (to include the therapeutic and education services offered to the child in that placement), the location of the placement and whether the placement is capable of being a long-term placement and how quickly K could move to such placement.

The French Central Authority was asked to respond to this request for information within 14 days (an, at best, optimistic expectation for the reasons given by Moylan LJ below). In passing, it should be noted that the order also included, amongst other provisions, a recital that the court and all parties accepted that any further Article 15 request "would need to be by way of fresh application".

9. The French Central Authority replied on 9 May 2019, the first day of the listed final hearing (the official having been on leave when the request for information had been received). In the response, the French Central Authority sought clarification of the meaning of "residential placement"; recorded that if the *English judge* (I emphasise) was contemplating the placement of the child in institutional care or with a foster family in France, the procedure to be followed was laid down in Article 56; but added that, if the *English judge* was considering a placement of the child with a family member in France, the appropriate procedure was to issue a certificate under Article 39. It was also made clear that a different French Central Authority to that competent to deal with requests under Article 55 was competent to deal with requests under Article 56 for consent to proposed placements (i.e. in institutional care or with a foster family), namely the *Direction de la protection judiciaire de la jeunesse, Bureau des affaires juridiques et de la legislation* (hereafter "the French child protection agency").

10. The "final" hearing on 9 May 2019 was listed before a different judge, Recorder Cooper. On this occasion, the court found the threshold criteria under s.31 to be satisfied on the basis of an agreed threshold document but the court concluded that it was not possible to make a final order and the hearing was adjourned part heard. Directions were given facilitating an assessment of the option of placing K with a maternal uncle in France (which turned out to be negative). Further directions were given for the translation and disclosure to the French authorities of certain documents from the proceedings, "pursuant to Article 56 Brussels IIA". The order also recorded by way of recital that the local authority intended to seek legal advice from a French qualified lawyer on the issue of placement of the child in France. It seems, however, that no such advice was obtained. The hearing was relisted in June but in the event adjourned.

11. Meanwhile, in May 2019, K had moved to a specialist residential placement in the south of England where he remains. He was diagnosed with a psychotic illness and was placed on medication which helped to alleviate his symptoms. Until the Covid pandemic, the

mother travelled from France to have regular staying contact at the residential unit, with her expenses paid by the local authority. The father, however, has had no contact with K for several months and has now disengaged from the court proceedings.

12. At the next hearing in July, the final hearing was adjourned again until September. Further case management directions were given, including directions to the local authority (1) to "confirm [by] 11 August 2019 whether they are seeking an Article 15 transfer or to place him in France under Article 56 or any other application" and (2) to "make a written request to the UK Central Authority to liaise with the Central Authority in France to request information and assistance under Article 55 in order to apply Article 56 (information as to identifying potential placement in France and the procedure to follow)". On 9 August, the local authority submitted to ICACU a "Request for Co-Operation Form" (described in the index to the supplementary bundle filed for this appeal as "Article 56 transfer request") in which it stated that "the local authority seeks information as to suitable placements for K in France, and for assistance in planning a move for K to a suitable unit or resource in France, pursuant to Article 56".

13. There followed further email correspondence between ICACU and the local authority, and between ICACU and the French Central Authority. In emails to the local authority, ICACU reiterated the observation of the French Central Authority that, if the English judge was contemplating the placement of the child in institutional care or with a foster family in France, the procedure to be followed was laid down in Article 56 but that, if the English judge was considering the placement of the child with a family member in France, the appropriate procedure was to issue a certificate under Article 39. Importantly, ICACU also informed the local authority, in response to their requests for information from the French authorities, that additional information was required, namely "a referral detailing who you are looking to place the child with …, as this isn't stated and, if it is, it isn't clear".

14. In September 2019, the local authority filed a final care plan proposing that K remain at his current placement under a full care order with a view to either transferring to a placement in France or a foster carer in England at some time in the future. This course was opposed by the mother and the children's guardian, both of whom wanted to pursue a placement in France within the currency of the proceedings before a final order was made. At the adjourned hearing, the recorder made an order transferring the proceedings back to Judge Wright. In the event, they were next listed before a different circuit judge, HH Judge Brasse, on 2 October. She directed that the final hearing should be re-listed back before the recorder in December. The recitals to the order made on 2 October include a record that no party was seeking the transfer of the proceedings under Article 15. It was further recorded that, had an application under Article 15 been made, the court would have dismissed it for the following reasons:

> "(a) the court had heard considerable evidence and made findings about threshold and started part of the welfare hearing;
>
> (b) all the evidence and information which would go to the child's mental well-being is in this country and so this is the more convenient court;
>
> (c) it is the court's view that this would be against the child's best interests for there to be significant delay that would flow from transfer;

(d) this court has the best possible information to conclude decisions on the child's welfare, notwithstanding the best placement for him might be in France."

It is recorded that the court also expressed the view that what was currently needed was "information to be obtained via Articles 55 and 56 Brussels IIA so that the court is in the best position to determine the child's welfare and it is not necessary for there to be an Article 15 application for the court to obtain the same".

15. The order made on 2 October 2019 also recorded that the local authority and children's guardian considered that they were having difficulties obtaining information via ICACU and from different agencies. The court agreed to "progress a request through the Office of the Head of International Family Justice to obtain information from the relevant French authorities, the terms of that request being the same as that in relation to ICACU that is set out below". The order included a direction to the local authority to send to ICACU and the French child protection agency a series of questions and requests for information set out in the order, including:

(a) whether it was expected that the Central Authority in the UK should identify a suitable placement for the child in France in either institutional care or a foster family or whether that was the role of the French child protection agency;

(b) in the event that the French child protection agency was responsible for identifying such a placement, how long would the search take and whether the placement would be funded;

(c) what places were available for K and would they meet K's needs;

(d) detailed information about each possible placement (therapeutic services, education, number of children present, staffing levels, activities, location etc);

(e) whether the competent authority in France would accept a placement in the event that the English court decides that it would be in K's best interests;

(f) in the event that the Central Authority in the UK is responsible, information as to the appropriate procedure to identify a placement and how such a placement could be secured.

16. On 17 October, the French child protection agency replied via email to ICACU stating that it was expected that the UK Central Authority would identify an appropriate placement; that the French Agency would provide assistance; that no timescale could be given, given the thorough search that would be required for an appropriate institution; and that as the case was not being transferred under Article 15, the place would be funded by the UK authority. The agency said that it was impossible to provide details of possible placements at that point, adding that "the child protection service in Paris is currently searching for a suitable placement". Subsequently, ICACU was informed that a meeting had been arranged to consider placement options in Paris on 4 December. On being informed about the meeting, the court adjourned the final hearing

listed before the recorder and instead listed the matter for an issues resolution hearing on 6 December.

17. At the meeting in Paris on 4 December, which was attended by the social worker and the children's guardian but not K's mother, the French child protection agency requested a meeting with K and his mother in early 2020 to assist with the identification of an appropriate placement. At the hearing on 6 December, the recorder again transferred the case to be listed before a circuit judge so that consideration could be given to whether any directions were required from the court in France to facilitate the proposed assessment of K in Paris.

18. The local authority approached the International Family Justice Office ("the IFJO") proposing communication between the respective Network judges to facilitate any protective orders that might be required while K was visiting France. The Office initially responded that, because the respective Central Authorities were already involved in the case, it was appropriate that information should continue to be sought via ICACU rather than involve the Network judges. It was further suggested that the local authority should obtain legal advice on what steps were required in order to expedite matters. In response, the local authority repeated its request, leading to the IFJO sending a request for assistance to the French Network Judge. This, not unexpectedly, led to the French Network Judge transferring the request to the French Central Authority which, in response, gave the contact information which had already been provided earlier in the proceedings.

19. At the next hearing on 14 February 2020, HH Judge Hughes QC made an order transferring the proceedings to the Family Division of the High Court. In the event, however, the Family Division concluded that the case should not be transferred and directed that it should remain at the Central Family Court.

20. Later in February 2020, K, accompanied by his mother and the key worker from his residential unit in England, attended a specialist hospital in Paris for an assessment with a view to identifying an appropriate placement for him in France. He also had staying contact with his mother in France over half term.

21. On 1 April, the case was listed for a further hearing before Judge Wright. By this point, the lockdown following the Covid-19 outbreak was in force and the hearing took place remotely. On this occasion, the proceedings were once again adjourned as the outcome of K's assessment in Paris was not known. At that hearing, the possibility of making an Article 15 transfer request was raised again, although there is some uncertainty about what precisely was said – nothing was recorded about that aspect on the court order. The judge listed the case for an issues resolution hearing on 28 May and gave consequential case management directions. The order included a recital that the court requested "that the French authorities should provide the parties with as much information as possible as to a potential long-term placement in France by 15 May even if the child is unable to travel to France until the current restrictions have been lifted"

22. On 7 May 2020, the local authority received an email via ICACU from a social worker in the Paris social services department stating that she did not favour a placement for K in France. She pointed out that, due to the quarantine restrictions imposed because of the pandemic, K would be required to stay in an emergency placement in an unsafe environment until an appropriate placement could be found. She also expressed the

view that K was better placed in his current residential placement. The mother was critical of this recommendation and the reasons and continued to press for the return of K to France.

23. The next hearing took place by telephone on 28 May 2020. The order made at the conclusion of that hearing is the subject of this appeal. We had the benefit of reading a transcript of the hearing. The local authority, mother and guardian were represented. The father was neither present nor represented, his solicitors having come off the record some months earlier. In the course of the hearing, the judge decided, of her own motion, to make an order authorising a request under Article 15 BIIa for the French Court to assume jurisdiction. This was accepted by children's guardian but opposed by the mother. The local authority remained neutral on the issue. No judgment was delivered, but in the course of the hearing, the judge identified the reasons why the request was being made, by reference to the provisions of Article 15 itself, and subsequently summarised those reasons in the court order. Subsequently, following the grant of permission to appeal, the judge drafted a document dated 8 July setting out her reasons for her decision. I shall consider the reasons given for the Article 15 request later in this judgment. Following the order, a request was duly sent to the French Central Authority. At the date of the hearing of this appeal, no reply had been received.

24. On 4 June 2020, the mother filed a notice of appeal against the order authorising a request under Article 15, together with an application for a stay of the order pending appeal. The following day, my Lord Moylan LJ refused the application for a stay, observing that there would be no prejudice to the mother to justify the stay because, if the Article 15 request were ultimately set aside on appeal, jurisdiction would remain with the courts of this country even if the French court had, in the meantime, accepted the jurisdiction. Conversely, if the Article 15 request were not set aside on appeal, the imposition of a stay would have caused an additional delay to the detriment of the child. On 23 June, Moylan LJ granted permission to appeal and gave permission to the mother to file amended grounds of appeal and a skeleton argument. The appeal was opposed by the local authority. The children's guardian did not participate in the appeal but indicated through her solicitor that she agreed with the local authority's position.

25. Shortly before the hearing of the appeal, the Paris children services department sent a report which, by agreement between the parties, we admitted as fresh evidence. The writer recorded that, following the discussion in December 2019, the French professionals who were consulted about the case had expressed concern about the proposal to place K in France. It was pointed out that he already benefits from his placement in England where he has become more stable, a factor described as an important element in his treatment. It was further pointed out that in France there were no structures similar to those available for K in England – "the organisation of the homes does not allow for a professional to oversee the child, as is the case in England." It also seems that the French professionals have concluded that the relationship between K and his mother is not as positive as it seems to those in England. The Paris social services were unable to guarantee that a placement would be available or a specific timeframe. It was possible that, upon arrival in France, K would be placed in emergency housing in Paris while his needs were assessed. Overall, the report raised a number of potential difficulties about the proposal to place K in France.

The law

26. Under Article 8 of Brussels IIa, jurisdiction lies with the courts of the Member State in which the child is habitually resident. It is agreed by all parties that the Family Court of England and Wales has jurisdiction for K's case.

27. Article 15 provides:

"**Transfer to a court better placed to hear the case**

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

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

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

2. Paragraph 1 shall apply;

   (a) Upon application from a party; or

   (b) Of the court's own motion; or

   (c) Upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

   A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

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

   (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.

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

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

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

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

28. Article 55 of Brussels IIa, headed "Cooperation on cases specific to parental responsibility", provides:

> "The central authorities shall, upon request from a central authority of another Member State or from a hold of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:
>
> (a) collect and exchange information
>
> (i) on the situation of the child;
>
> (ii) on any proceedings underway; or
>
> (iii) on decisions taken concerning the child;
>
> (b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;
>
> (c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;
>
> (d) provide such information and assistance as is needed by courts to apply Article 56; and
>
> (e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border co-operation to this end."

29. Article 56, headed "Placement of a child in another Member State", provides, so far as relevant to this appeal:

> "(1) Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of the child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.
>
> (2) The judgement on placement referred to in paragraph (1) may be made in the requesting State only if the competent authority of the requested State has consented to the placement.
>
> (3) The procedures for consultation or consent referred to in paragraphs (1) and (2) shall be governed by the national law of the requested State …."

30. In *AB v JLB (Brussels II Revised; Article 15)* [2009] 1 FLR 517 at paragraph 35, Munby J (as he then was) identified the three questions to be considered by a court when deciding whether to make a request under Article 15:

> "First, it must determine whether the child has, within the meaning of Article 15(3), 'a particular connection' with the relevant other Member State. . . . .Given the various matters set out in Article 15(3) as bearing on this question, this is, in essence, a simple question of fact. For example, is the other Member State the former habitual residence of the child (see Article 15(3)(b)) or the place of the child's nationality (see Article 15(3)(c)).
>
> Secondly, it must determine whether the court of that other Member State 'would be better placed to hear the case, or a specific part thereof'. This involves an exercise in evaluation, to be undertaken in the light of all the circumstances of the particular case.
>
> Thirdly, it must determine if a transfer to the other court 'is in the best interests of the child.' This again involves an evaluation undertaken in the light of all the circumstances of the particular child."

31. In this case it is not disputed that K has a particular connection with France. The issue focuses on the second and third questions. These questions are interrelated, but separate. As Baroness Hale of Richmond observed in *Re N (Children) (Adoption: Jurisdiction)* [2016] UKSC 16 at para 43:

> "It is the case … that the "better placed" and "best interests" questions are inter-related. Some of the same factors may be relevant to both. But it is clear that they are separate questions and must be addressed separately. The second one does not inexorably follow from the first".

32. In respect of the second question, "the court having jurisdiction must determine whether the transfer of the case to that other court is such as to provide genuine and specific

added value, with respect to the decision to be taken in relation to the child, as compared with the possibility of the case remaining before that court": per CJEU in *Child and Family Agency v D* [2016] EUECJ C-428/15, [2017] 1 FLR 223 para 57. The approach to the third question was described in these terms by Baroness Hale in *Re N*, supra, at para 43:

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

In that case, the Supreme Court, in holding that the judge at first instance had been wrong to make an Article 15 request for the transfer of the proceedings to Hungary, observed that he ought to have addressed his mind to both the short-term and the long-term consequences for the children of doing so and of not doing so. A transfer of the proceedings would have ruled out consideration of the placement options available to the children in this country.

33. The scope of Article 56 was considered by Sir Stephen Sedley, with whom Thorpe and Black LJJ agreed, in *Re AB (BIIR: Care Proceedings)* [2013] 1 FLR 168 and by the CJEU in *Health Service Executive -v- SC and AC* (Case C-92/12); [2012] 2 FLR 1040. In *Re AB* Sir Stephen Sedley, at [8], described Article 56 as imposing a consultative obligation on the English court: its function was:

> "not [one] which ties the hands of the English court or excludes or reduces its obligation to arrive at its own judgment as to the child's best interests."

In the *Health Service Executive* case, the CJEU held that the consent required by Article 56(2) had to be given, prior to the making of the judgement on placement of a child, by a competent authority governed by public law, not merely by the institution with whom the child was going to be placed.

The decision

34. In considering the judge's decision to make a request to the French court under Article 15, it is important to note the problems which she faced in trying to find the right way of resolving the difficult issues in the case. She described the difficulties in the course of the hearing in these terms:

> "I am faced with a care plan that has no details of when and how K will go back to France. So, my difficulty in concluding the case on that basis in August, is either I accept the local authority's care plan - in which case that's it, I make a care order;

or I don't accept the local authority's care plan and potentially I adjourn the case which causes further delay; or I make no order and K goes back to France with his mum but there is no support, nothing there because I can't do anything about it. So, I'm not -- it's not an easy position to be in, to say, "Well, the case should go ahead at the end of August and those are the options". The local authority's care plan, care order, K is in the UK, but at some point he might go to France; secondly, if I adjourn it, which I don't think anyone wants given that K's been in the UK for so long; or thirdly, I make no order. Obviously that would mean that [the mother] would be free to take K back to France, but there's no support plan there. There's nothing. That's -- those are the three options I have."

35. In the course of the hearing, the judge indicated that she had received an email from the liaison judge at the French Embassy but had not had time to respond. She added, however:

> "whatever the French liaison judge says or does, if an Article 15 request is made, there has to be a response within six weeks. That's the law. So, if there is an application made for welfare to be determined in France, then the French authorities have to decide whether or not they're prepared to do that. It doesn't mean that K necessarily needs to move straightaway. He can stay where he is. But at least the French authorities then take responsibility for sorting out his welfare, which is what everyone I think wants, don't they?"

Counsel for the mother agreed that his client wanted K returned to France but expressed concern that an Article 15 request would cause further delay. The judge responded:

> "if the French authorities accepted - and they have to give a decision within six weeks … they accept it and they sort out welfare and they find a place for K, whether that's with his mum now that he's stabilised and he's on these drugs and it looks like things are getting better, or they find a place in care and then they have a plan, but they sort it out because it's their problem."

The judge referred to previous discussions about using Article 56, but said that that proposal had been abandoned because "it determined that K should be in state care" and on the evidence it was unclear whether he should be in state care or not.

36. The judge then considered the terms of Article 15. She observed that the child had "a particular connection" with France because "it's the place of the child's nationality, is the habitual residence of the mother who holds parental responsibility, and it's the former habitual residence of the child." She then established that the guardian supported the transfer of proceedings to the French court so that the requirement in Article 15(2) that a transfer of the court's own motion had to be accepted by at least one of the parties was satisfied, notwithstanding the opposition of the mother.

37. There was no further analysis of the detailed provisions of Article 15 in the course of the hearing, but the order recorded that the "criteria are met for the French court and authorities to determine K's long-term welfare interests on the following basis:

> (1) The child has a particular connection with France (former habitual residence, nationality, mother's habitual residence).

(2) The transfer request, of the Court's own motion (opposed by the Mother, LA neutral) is accepted by the child's Guardian.

(3) It is in the child's best interests that the French court determines the long-term welfare interests of the child given the following:

a) Consensus between the parties that the child should eventually return to live in France,

b) English court has very little information as to support services and placement options for the child in France,

c) Local authority care plan unclear as to how child will return to France,

d) Child has expressed wish to return to France,

e) Child's mother and maternal uncle in France, child's father in England has disengaged, child has little connection to England,

f) Child appears to be responding well to medication, has stabilised, longer term placement for child will require detailed knowledge of child's history, and welfare needs,

g) No clear plan as to how child can return to France, Article 56 requests not acknowledged,

h) Child can remain in current placement in England whilst welfare assessments and decisions are taken in France (no need for child to move to emergency placement in France), child can visit France if necessary during assessment process (as he did in February 2020),

i) Substantial delay already incurred, child needs resolution of placement and welfare needs."

38. In addition to the Article 15 request, the order also contained the direction to the local authority to make further urgent enquiries of ICACU, asking the French Central Authority *inter alia* to:

(a) explain what steps have been taken and were currently being taken by the French children's services and mental health experts in France to find a placement for K in France "pursuant to the request made under Article 56";

(b) outline the process involved in finding such a placement and the timetable for each step in that process - "where are we in that process now, and what are the next steps?"

(c) state whether it is envisaged that there should be any further meetings between those investigating a placement in France and K, his mother and/or [his current residential placement], and if so what are the proposals as to where and when this should occur;

(d) provide a list of the documents which have been provided to prospective placement providers in France;

(e) answer supplementary questions arising from emails copied to ICACU from French professionals;

(f) identify the educational, mental health and therapeutic services and support which would be made available in France in the event that K returned to live with his mother.

39. As I have mentioned, shortly before the hearing of the appeal the judge produced a document headed "Decision and Reasons concerning Article 15 BIIA request authorised on 28 May 2020 approved 3 June 2020". We are grateful to the judge for taking the trouble to prepare this detailed document. During the hearing before us, Mr David Sharp on behalf of the mother pointed out that the document includes reference to information which was not before the court at the hearing on 28 May and on which the judge appeared to have made findings about matters contested by the mother and on which she has not had an opportunity to make representations. In those circumstances, the "Decision and Reasons" document must be treated with a degree of caution. I notice, however, that the reasons given for the judge's decision to authorise a request under Article 15 substantially reflect those contained in the order which I have set out above.

40. On behalf of the mother, Mr Sharp put forward the following grounds of appeal.

41. First, it was contended that the judge was wrong to authorise the Article 15 request before first clarifying the progress of the Article 56 process. It was submitted that it was essential for the court to have this information before deciding whether or not to ask the French court to assume jurisdiction. Having agreed to put further questions through ICACU, the court ought to have refrained from making the Article 15 request until those questions were answered. It was possible that the French authorities were in the process of deciding whether or not to offer K a placement. There was therefore a risk that, were the French court to assume jurisdiction, the case might be delayed unnecessarily. The court needed the further information before deciding which course would involve the minimum delay.

42. Secondly, it was submitted that the judge was wrong to make the Article 15 request at a point where neither she nor the parties had a clear picture of how the French courts were functioning in the Covid-19 pandemic and were therefore unable to evaluate where and how those courts might be able to determine the issues in the child's best interests. Without knowing whether the French court would be sitting at all, and, if it was, whether its processes would be truncated (for example, conducted on the basis of written material alone without an oral hearing), it was impossible for the judge to conclude that the French court would be better placed to hear the case.

43. Thirdly, it was argued that the judge was wrong to authorise the request when there was a potential route available to progress the proceedings by way of judicial liaison. The judge had been contacted by the French liaison judge but had not had an opportunity to respond before the hearing on 28 May. It was submitted that this avenue should have been pursued before requesting a transfer under Article 15 because it might have led to a much speedier resolution of the case.

44. Fourth, it was submitted that, in considering which court was best placed to hear the matter and what was in the best interests of the child, the judge failed to take into account a number of factors which pointed to the English courts retaining jurisdiction. These included the following matters.

(a) A transfer of the proceedings to France would deprive K of the services of the children's guardian, with whom he has built a valuable relationship and who has a detailed knowledge of the case and has been proactive in liaising with the French authorities.

(b) A transfer of the proceedings would also result in the loss of judicial continuity.

(c) The French authorities, who had appeared slow to accommodate K, may well decide that K should remain at his current placement in England thereby creating further complications and delay and ultimately further use of Article 56.

(d) The proceedings were at a late stage and a transfer could cause additional unwarranted delay.

(e) K might be adversely affected if told that the proceedings were being adjourned for an indefinite period. He might also be affected if required to undergo interviews with a series of new professionals if the proceedings were transferred.

(f) If the French court accepted jurisdiction, it may decide to move K from his current placement in the interim to conduct further assessments. Conversely, if he did not move, the French court would have difficulties dealing with the case at a distance.

(g) If the case was transferred, K and his mother would be likely to lose the family therapy that had recently been arranged by the local authority.

Mr Sharp argued that there was little sign from the transcript of the hearing that the judge took any of these factors into account when conducting the necessary balancing exercise before deciding whether to make a request under Article 15.

45. Finally, Mr Sharp drew attention to the provisions of FPR 12.64 which stipulate that, where a court proposes to exercise its powers of its own initiative under Article 15, it should give the parties not less than five days' notice of the hearing. It was submitted that the mother, who was participating at the hearing by telephone, had insufficient notice of the court's intention to make the request and insufficient opportunity to discuss the matter with her legal team.

46. In reply, Ms Ann Courtney for the local authority submitted that the judge was right to adopt the course of an Article 15 request, given the delays and difficulties that had arisen through the attempts to resolve the issues using Article 56. Ms Courtney went so far as to describe the French authorities as having been dilatory and obfuscating in their response to requests for information and assistance. She accused them of an intractable lack of cooperation. She submitted that the arguments raised by the appellant based on difficulties caused by the Covid pandemic were flawed because the difficulties arose in both jurisdictions. She contended that the points relied on by the appellant in support of her case that the English court was better placed to hear the remainder of the proceedings and that a transfer was not in K's best interests were of no real substance

given the ongoing delays in the English proceedings which could not be concluded satisfactorily, given the failure of the French authorities to cooperate.

Discussion and conclusion

47. I acknowledge that this is an extremely difficult case for everyone involved in trying to identify the right placement for a child with very considerable mental health and behavioural problems. The local authority is to be commended for the support it has provided to K and his mother. It is clear, however, that the course adopted by the local authority so far has not yet achieved its stated aim. It does not seem to me to be necessary to apportion blame for this failure. But having read carefully through the email correspondence which has passed between the local authority, ICACU and the French authorities, I emphatically reject Ms Courtney's characterisation of the French authorities' response. It seems to me that the French authorities have responded fairly and reasonably to the request for information. They have tried to help locate a suitable placement for K. They have held meetings with their English counterparts and with K and his mother. The fact that some professionals in France have expressed concern about the proposal to place K in that country is, to my mind, a legitimate exercise of professional judgement and not an example of obfuscation.

48. I well understand the judge's frustrations at the lack of progress in the case. I can see why she thought that, on one view, if the consensus of the parties is that K should move to France, it would be appropriate to transfer the proceedings in the hope that the French courts will succeed where the English court has failed in identifying a suitable placement in that country. It is, however, to my mind plain that the order for the request under Article 15 should not have been made.

49. In my view, a transfer of proceedings at this stage would be contrary to the provisions of Article 15, in that the French court is not better placed to hear the remainder of the case and the transfer would be contrary to K's best interests.

50. The principal reasons for this conclusion are as follows.

    (1) The English proceedings have been continuing for nearly two years. There is a substantial body of professional knowledge about the complexities of this difficult case held by the local authority, the treating clinicians, the expert witnesses, the children's guardian, and the court. It would be impossible for a French court or the French authorities to build up an equivalent body of knowledge quickly. Given the complexities of the case, this would place the French court and authorities, and therefore the parties, at a significant disadvantage.

    (2) A transfer of the proceedings will, almost inevitably, add significant delay, particularly in the current circumstances of the Covid pandemic. The proceedings have already been continuing for far too long. Any unnecessary further delay risks causing further harm to K.

    (3) The transfer of proceedings would be likely to involve a further round of professional assessments for the purposes of which K would be required to undergo interviews with new professionals with whom he is unfamiliar.

(4) Once the English court has sufficient information about the options for placement in France, it will be fully equipped to make the difficult decision about his long-term future. The options under consideration will include maintaining the placement in his current residential unit in England as well as options for placement in France. It is by no means clear to me that the French court would have the same range of options available.

(5) If the proceedings were transferred, it might be necessary for K to move to France in the short-term while decisions about his future were taken. The French authorities have identified a number of practical difficulties about this course. A peremptory move to France would deprive him of the resources of his current unit. On the other hand, if K were to remain in this country following the transfer of proceedings, the French court could equally face difficulties making decisions about a child in another jurisdiction.

51. To my mind, the factors identified by the judge in the court order, as repeated subsequently in her "Decision and Reasons" document, do not amount to a substantial argument for transfer of proceedings. The fact that K wishes to move to France, and that there is a consensus amongst the professionals at present involved with K that he should move to live there, do not amount to a significant reason for transferring the proceedings, given the strong reasons for retaining jurisdiction in this country set out above. It is true that, given the unfortunate disengagement of the father, K's connections with this country have been diminished, but he is at present in a secure placement where his complex needs are being well cared for. It is by no means clear that a French placement will be identified that is able to meet his needs to the same extent.

52. It is correct that the English court and local authority have not so far been able to obtain sufficient information about placements in France, but as my Lord Moylan LJ observed in the course of the hearing, that is substantially because of the measures adopted to date. It seems to have been assumed by the parties, and perhaps the court, that Articles 55 and 56 represent a means by which information about possible placements can be obtained. But as a study of the terms of the two articles demonstrates, this is not the case. It is not the role of the French authorities, through a request for information under Article 55, to identify possible placements which could be adopted by the English court. The French authorities have responded as much as they fairly can to the requests made of them to date but, put bluntly, it is not their role to find a placement. The right course, in my view, would be for the local authority to instruct a French professional – either a child psychiatrist or a specialist social worker – to advise as to the type of placement which might be suitable and to identify a specific placement option which would meet K's needs. Armed with this expert opinion, the English court could evaluate that option and, as part of that evaluation, consult the French authorities under Article 56. The approach adopted by the parties and the court hitherto, though well-intentioned, is to my mind flawed. The fact that this approach has not worked is not, therefore, a good reason for seeking the transfer of proceedings under Article 15.

53. It is notable that as long ago as October 2019, the issue of a possible transfer of the proceedings under Article 15 was considered by the court, albeit by a different judge, who concluded that a transfer was not appropriate for reasons clearly recited in the court order. To my mind, the reasons given by the judge on that occasion remain apposite. The family court in this country has already heard a considerable amount of evidence and made findings. All the evidence and information about the child's mental health is

in this country. A transfer under Article 15 would create additional delays. With appropriate directions, the English court ought to be able to obtain all the information necessary to make a decision about K's long-term future, notwithstanding that the best placement for him may be in France. Applying the test proposed by the CJEU in *Child and Family Agency v D* to identify whether the French court would be better placed to hear the case, a transfer of jurisdiction would manifestly not "provide genuine and specific added value". Asking the questions posed by Baroness Hale in the Supreme Court in *Re N* to identify whether a transfer would be in the child's best interests, the short-term consequences would be an extended delay. As to the long-term consequences, the options for a French court deciding the eventual order would certainly not be greater and might in fact be reduced.

54. In addition, it was in my judgment wrong of the court to raise the option of an Article 15 transfer at the hearing without proper notice being given under rule 12.64. In her "Decision and Reasons" document, the judge said that she had indicated at the previous hearing on 1 April that she would consider the issue of an Article 15 transfer at the hearing in May. It is not, however, clear from the other documents exactly how the matter was left after the April hearing. There is no reference to Article 15 in any recital to the order made following the hearing and, in the position statements for the hearing on 28 May, none of the parties referred to Article 15 at all. The transcript of the hearing on 28 May suggests that the parties were to some extent taken by surprise when the issue was raised. In the light of what is said in the "Decision and Reasons" documents, I accept that the judge intended to leave the issue on the table for the hearing in May. I am, however, satisfied that it was insufficiently clear to the parties that it would be considered at that hearing.

55. For these reasons, I concluded that the appeal should be allowed on grounds 4 and 5 and the order for a request under Article 15 set aside.

56. In the order drawn up after the appeal hearing, we included a recital in which we invited the parties, at the next hearing before the judge listed shortly after the appeal, "urgently to consider applying to the court below for an order authorising the instruction of a French mental health or social work expert to advise on (a) the identity of specific placement options for the child in France, (b) the availability of such placements, (c) which placements might best suit K's individual needs, or (d) alternatively if K should be placed with his mother the nature and identity of legal and support structures which might facilitate and strengthen such a placement." We included a further recital inviting the parties "urgently to consider applying to the Court below for an order authorising the instruction of an expert on French Law as to the available legal routes to underpin any such placements and the obtaining of consent from the appropriate body in France pursuant to Article 56." It seems to this Court that the course suggested might represent the best way of obtaining information about the placement options in France. In making those observations, however, I stress that it is ultimately a matter for the judge to determine the best way forward, exercising her case management powers.

LORD JUSTICE PHILLIPS

57. I agree that the appeal should be allowed for the reasons given by Baker LJ.

LORD JUSTICE MOYLAN

58. I also agree with Baker LJ's judgment and have nothing to add to the reasons he gives for allowing this appeal save that I would also want specifically to commend the local authority for the high quality of the care and support they have provided for K.

59. I propose, however, to add a short judgment dealing with some elements of the requests made by the court of the French authorities. This is not intended to be more than a brief summary, principally to highlight some practical points which need to be taken into account when such requests are being made. More general guidance is available in the Guide published by ICACU (Guide to Completing the Request for Co-Operation Form) and in the President's Guidance of 10 November 2014, *The International Child Abduction and Contact Unit (ICACU)*. Both of these documents refer to other sources of information and guidance.

60. In respect of Article 55, it is, of course, first necessary to ensure that the proposed request to be made through the respective Central Authorities is for information which is within the scope of its provisions. It is not a general provision which caters for every type of request. In saying this, I recognise that there is an element of uncertainty because the authorities in different states can take a different view as to whether a request is or is not within the scope of Article 55. This is why, if there is doubt as to whether a proposed request is within the scope of the Article, ICACU may be able to provide assistance based on their considerable experience of its operation. However, because ICACU's limited resources need to be used carefully, I would first expect that, as far as possible, careful consideration should be given to the terms of Article 55 before this is undertaken.

61. In this context, I would repeat what I said in *Leicester City Council v S* [2015] 1 FLR 1182:

> "[51] Central Authorities are also typically small agencies and are not equipped to deal with a broad range of enquiries. They are not enquiry agents or general evidence gatherers. Any requests made pursuant to the provisions of BIIR must be focused on a specific provision within that Regulation."

62. In respect of Article 56, this provision, as referred to by Baker LJ (in paragraphs 33 and 52 above) requires consultation *and* consent before the proposed placement in the other Member State takes place. I would stress that, as he has said, it does not place any obligation on the authorities of the other Member State to *find* a placement.

63. The understanding appears to have developed in this case that the French authorities would find a placement for K in France. It is not entirely clear how this developed, at least prior to the responses received on 17 October 2019. Prior to this, I would point to the response given in May 2019 that it was for the *English judge* to determine the proposed placement. Although the specific requests were not answered, there was no reference in this response to the French authorities finding a placement. I would also point to ICACU's observation to the local authority in September 2019 that it needed to be made clear "who you are looking to place the child with".

64. Further responses were received from the French Central Authority on 17 October 2019, to the questions set out in paragraph 15 above. In answer to the direct question referred to in paragraph 15(a) (as to which authority was responsible for finding a

placement), it was expressly stated that it was for the English authorities to identify a suitable placement for K in France. No doubt in an attempt to be helpful, it was also said that the French Central Authority could provide ICACU with "assistance in this process". It seems clear that, despite the clear answer given to the question in 15(a), the latter offer to assist, and the subsequent steps taken to seek to assist, encouraged an existing understanding or grew into an understanding that the French authorities would take responsibility for finding (but not funding) a placement.

65. I would also add that, even though the French authorities offered to assist in this way in this case, the difficulties with seeking to make them *responsible* for finding a placement became only too evident. First, the English court had no control over the provision of information which it would have had, at least to a greater extent, if the information (in reality, evidence) was sought more directly. There is no time limit for the provision of information pursuant to either Article 55 or Article 56 (which I deal with further below) and I would doubt whether a Central Authority is able to require any other domestic agency to provide information or undertake any assessment by any specific date. The ability to ensure that the information which was provided was sufficient for the purposes of the proceedings was also more limited. The more complex the request, as in this case, the more scope for the information not to be sufficient. Secondly, the greater the potential reliance placed, indirectly, on an agency in another state to find a placement, the greater the scope for miscommunications or misunderstandings or, even, differences of professional opinion to occur especially, again, in a complex case such as this case.

66. The next point I address is timing. By way of example, the French Central Authority was "respectfully requested" to provide answers to the information sought as set out in the order of 12 April 2019 by 26 April 2019. As referred to above this was, at best, an optimistic expectation. I would, in fact, say that it was unrealistic. As the ICACU Guide makes clear allowance has to be made, first, for it to process the request. The Guide gives the standard response time as 5 working days for initial analysis and a further 10 working days to process the request. In this case ICACU did not receive the request until 16 April 2019.

67. In addition, as referred to above, neither Article 55 nor Article 56 currently stipulate any time by which a response must be provided (the Recast Regulation includes a time limit of, save in exceptional circumstances, 3 months). This is why both the Guide and the President's Guidance emphasise that requests must be made as soon as possible. To quote from the Guide: "It is important that any request for co-operation is made **as soon as** you identify a need for information or assistance from the other country". The President's Guidance similarly states that: "Requests for co-operation should be made as early as practicably possible".

68. Finally, I would simply comment that it is rarely, if ever, appropriate for the *same* request for information to be made through more than one route. I mention this because the order of 2 October 2019 proposed that the same request be made both through the Central Authorities and through the IFJO. This is rarely appropriate because it serves to confuse the process and is an unnecessary duplication.