REDACTED JUDGMENT

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of the family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation: [2021] EWFC 107 **Case No: LS18C00571**

IN THE FAMILY COURT **Leeds Civil Hearing Centre**

SITTING AT LEEDS, REMOTELY **Coverdale House, Leeds**

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF COUNCIL REGULATION (EC) 2201/2003

AND IN THE MATTER OF THE 1996 HAGUE CONVENTION ON THE PROTECTION OF CHILDREN

AND IN THE MATTER OF Y (A MINOR)

Before :

Mr. William Tyler QC, sitting as a Deputy High Court Judge

RE Y (A MINOR) (BRUSSELS II REVISED: JURISDICTION AFTER ARTICLE 15 TRANSFER)

- -

Between :

A LOCAL AUTHORITY **Applicant**
- and -
THE MOTHER
THE FATHER
Y (A MINOR)
THE AUNT **Respondents**

Hearing date: 30 September & 1 October 2021
Judgment circulated in draft on 14 December 2021
Final judgment handed down on 16 December 2021

FINAL JUDGMENT

Richard Harrison QC and **Elle Tait** (instructed by the legal department) for the local authority

Christopher Hames QC and **Lisa Phillips** (instructed by Switalskis) for the mother

Henry Setright QC and **Harry Langford** (instructed by Ramsdens) for the father

Aidan Vine QC and **Louise McCallum** (instructed by Ridley and Hall) for the child

John Vater QC and **Andrew Leong** (instructed by Wilkinson Woodward) for the aunt

Parties, applications

1. This judgment sets out my decision in relation to a jurisdictional issue of some difficulty. Shortly put, the questions for determination have been:

   a. Were care proceedings validly transferred from England to Hungary pursuant to Article 15 of Council Regulation (EC) 2201/2033 ("**BIIa**")?

   b. Are there any ongoing proceedings in Hungary, so as to preclude the English court now from exercising jurisdiction?

   c. Does this court have jurisdiction to entertain (i) the original care proceedings, (ii) fresh care proceedings, and/or (iii) an application for a special guardianship order?

2. The underlying care proceedings are brought by a local authority in the North of England (**"the local authority"**) pursuant to Part IV of the Children Act 1989 (**"CA 1989"**), in relation to a child (**"Y"**), the third respondent. Y was born in August 2018, in England. Y's mother (**"the mother"**) is the first respondent. Her father ("**the father**") is the second respondent. Y's aunt (**"the aunt"**) is the fourth respondent.

3. Y, her parents and the aunt are all Hungarian. Y lives with foster carers in England. The mother also lives in England. The aunt lives in Hungary. The father currently lives in another EU state.

4. Before me at this hearing, the representation has been as follows:

   - the local authority has been represented by Richard Harrison QC and Elle Tait;
   - the mother has been represented by Christopher Hames QC and Lisa Phillips through the Official Solicitor (the mother lacking capacity);
   - the father has been represented by Henry Setright QC and Harry Langford;
   - Y has been represented by Aidan Vine QC and Louise McCallum;
   - the aunt has been represented by John Vater QC and Andrew Leong.

   Although the question of their status is somewhat complicated, as I shall explain below, I have also heard directly from Y's current foster carers (**"the foster carers"**), who have

made applications for joinder in the care proceedings and for leave to apply for a special guardianship order in relation to Y. Those applications were dismissed by HHJ Hillier on 9 March 2021 on the basis that the English court did not have jurisdiction to entertain the application; HHJ Hillier gave the foster carers permission *'to apply to reinstate their applications'*.

Factual background

5. The factual background so far as it is relevant to the issues currently before me can be succinctly summarized.

6. The mother and the father are both Hungarian. The mother has lived in England since moving to the country, aged 13, with her mother. The father also came to England as a child, moving to the country with his aunt and uncle. The parents commenced a relationship in or around 2015. Both were living in England at the point of Y's conception and birth.

7. At the point the local authority learned of the mother's pregnancy, significant concerns for the unborn child were apparent, these relating to the mother's mental health (which has led, in this country, to at least three periods of compulsory detention under the Mental Health Act 1983), both parents' drug misuse (including, at least in the mother's case, a history of the use of crack cocaine) and domestic abuse. Beginning in mid-April 2018, the local authority undertook an assessment of the parents' ability safely and appropriately to care for the then unborn Y, whether either of them individually or both together. The assessment, with which the mother refused meaningfully to participate, was negative. This negative assessment has not been challenged either on behalf of the mother (who is represented through the Official Solicitor) or by the father.

8. In the circumstances, the local authority was bound to issue care proceedings. It did so the day after Y's birth. Within a few days an interim care order was granted. At the end of August 2018, Y was placed with the foster carers, in whose care she has remained these past three years, and where she remains, by all accounts settled and thriving.

9. The father latterly served a period of imprisonment in England due to his commission of offences involving domestic abuse of the mother. He was subsequently deported to Hungary, and now lives in another Member State of the European Union.

10. For a period during the proceedings, the mother's whereabouts were unknown to the local authority. Since October 2019, however, the local authority has known where the mother is living in England. There has been sporadic contact with the mother by social workers. Her situation has not markedly improved.

11. In these circumstances, there is no challenge to the inevitable conclusion that Y cannot live with either or both of her parents.

Forensic background

12. It is a matter of considerable regret that the history of the passage of this case through the English court cannot be summarized with anything even approaching the brevity of the foregoing section.

Leading up to Article 15, BIIa decision

13. Wholly appropriately (and in line with the guidance of Sir James Munby P in *Re E (A Child) (Care Proceedings: European Dimension)* [2014] 1 WLR 2670), the local authority notified the Hungarian Consulate of its intention to issue proceedings relating to Hungarian parents and a Hungarian child.

14. During the care proceedings, and notwithstanding the negative pre-birth assessment, a social work assessment was undertaken by the local authority between November 2018 and March 2019. The conclusion of the assessment was that Y's parents could not provide appropriate care for her whether individually or together. The conclusions of this assessment have not been challenged.

15. The local authority (in common with all other parties) has been alive to the facts both of Y's heritage and nationality being entirely Hungarian and of her having a number of close relatives on both her mother's and her father's side of the family.

16. Viability assessments were undertaken of both Y's maternal grandmother and her paternal grandmother. These were negative.

17. In 2019, the aunt was also assessed, both by Hungarian authorities and by the allocated social worker in England. The latter was undertaken in circumstances in which the local authority did not consider the positive Hungarian assessment to have been *'sufficiently robust'*. The English local authority assessment, however, was also positive. This process, including as it did a fair degree of back and forth between English and Hungarian professionals and authorities (largely via the English Central Authority, the International Child Abduction and Contact Unit ("**ICACU**") and the Hungarian Central Authority ("**the HCA**")), and sequential assessments by the professionals of the two countries, occupied the period from mid-March 2019 until mid-October 2019.

18. Even before the positive English assessment, thought had clearly been given by the parties and the court to the question of the country in which Y's future welfare would best be investigated and, if the answer was not agreed by the protagonists, litigated. On 13th May 2019, at a point when the court and parties were chasing the Hungarian authorities for assessment information, the recitals to HHJ Anderson's order (the 9th Case Management Order) included this:

> *UPON the court inviting the parents to consider their position on Article 15 transfer and provide an indication as outlined below.*

And the order provided, inter alia:

> *[1] The LA file a statement setting out its plan for [Y] by 4pm on 24th May 2019 as to whether the LA consider further assessment of family members is essential or whether a transfer under article 15 is appropriate.*
>
> *[2] The parents file position statements setting out their view on the plan of the LA by 4pm on 4th June 2019 and as to whether they are inviting an Article 15 transfer.*
>
> *[3] […]*
>
> *[4] The CG file a position statement setting out her view by 4pm on 6th June 2019.*

> *[5] The matter be listed for directions on 10th June at 10 am for 30 mins parties to attend at 9am. The purpose of the hearing is to*
>
> *a. consider the timetabling of any application to transfer under Article 15 and/or*
>
> *b. any other orders necessary to progress this matter.*
>
> *[6] Upon the court again inviting the Hungarian Embassy to attend the hearing of this case, the next occasion being 10 am on 10th June 2019 – with parties to attend at 9am. The reason for the invitation is the lack of progress in this case and the delay in the Hungarian Authorities responding to matters put to them.*

19. The next hearing in fact took place on 14th June (not 10th June, *per* the order). The recitals to the order from this hearing record the father's stated intention *'that an application to transfer the matter to Hungary under Article 15 is to be lodged'*. Notwithstanding the imminent Article 15 application, final evidence was directed, and the case was listed through to an *'issues resolution / early final hearing'* on 7th October 2019 and, provisional on that hearing not finally determining the proceedings, a 3-day final hearing on 5th November 2019.

20. On 27th June 2019, the father duly issued an application *'to transfer proceedings to the jurisdiction of Hungary'*.

21. On 1st July 2019 (the 11th case management hearing), the transfer application was considered. It was directed that the application would be determined at a one-day hearing on 16th August 2019, skeleton arguments being directed from all parties.

22. The application was not determined on 16th August 2019 (resulting in the 13th case management order). It seems that the court was updated in relation to the local authority's ongoing assessment of the aunt. The recitals include:

> *AND UPON it being noted on behalf of the father that his position with regards to whether or not he pursues the Art 15 transfer to Hungary will be influenced by the outcome of any assessment of paternal aunt.*

The case was listed for *'directions'* on 30th August 2019, the local authority being directed to file updates in relation to its assessment of extended family members in the meantime.

23. The next substantive hearing took place on 3rd October 2019 (resulting in the 16th case management order). By this stage, the local authority was able to confirm its position and presumptive care plan:

> *UPON the local authority informing the court that the assessment of the paternal aunt and her partner is positive, subject to checks being provided in connection with criminal history and information relating to their children from nursery and kindergarten.*
>
> *[…]*
>
> *UPON the local authority indicating that in the event that the assessment is positive that it would support an Article 15 transfer.*
>
> *[…]*
>
> *UPON the local authority confirming that it will contact the Hungarian Authorities and the Hungarian Consul […] to notify them of the Article 15 hearing on 5 – 7 November 2019.*

The IRH on 7th October 2019 was vacated, final evidence was again timetabled, and the listing on 5th – 7th November 2019 was confirmed, this being described as *'to be used as either a hearing under Article 15 Brussels IIA or a final hearing of this matter'*.

24. The final evidence included the local authority's positive assessment, which in turn led to the local authority confirming a care plan involving Y's being placed with the aunt and her partner in Hungary.

25. The case was brought back to court on 31st October 2019. For reasons not entirely clear from the face of the order, the three-day hearing was vacated (save that the last half-day was preserved for judicial reading) and the 'final hearing' was listed for a half-day on 11th November 2019. The recitals to HHJ Anderson's order included:

> *[3] The LA has been in communication with the Hungarian Authorities regarding the arrangements for [Y] to travel to Hungary, this is not yet finalised;*
>
> *[4] Social Worker confirms that a transition plan is being put together with plans already being made for [the aunt] to come to the UK and the foster carers to go to Hungary as part of the transition work prior to [Y]'s move to Hungary;*

And the order included:

> *[10] The LA will file and serve a further witness statement by 12.00pm 06.11.19 setting out the following:*
>
> *a. Transition plan for Y including confirmation of discussions already had with Paternal Aunt and travel arrangements- where known;*
>
> *[…]*
>
> *[11] LA will write to ICACU and the Hungarian embassy and/or the Hungarian authorities already in contact to enquire as to the range of orders available to the Paternal Aunt upon the proceedings transferring to Hungary […] and ask for any response to be made by 4.00pm on 08.11.19;*

26. By the point of the case first coming back to court after this decision to place Y in Hungary with the aunt and her partner was finally made, at a hearing before HHJ Anderson on 31st October 2019, the proceedings were some 14 months old. The order emanating from that hearing was the 17th Case Management Order made during that period. Making all due allowance for the complicated nature of the process of undertaking assessments of extended family members overseas certainly is, it is worth noting that by this point, Y had been waiting for a decision in relation to her permanent home and family for well over double the statutory period allowed (see s.32, CA 1989).

27. The substantive Article 15 hearing, then, took place before HHJ Anderson on 11th November 2019. The order from that hearing records, for the first time, that the s.31 CA 1989 jurisdictional threshold was adjudged by the court to be satisfied; previously, orders had recorded only that this was so to the interim standard of s.38; accordingly, the court had the jurisdiction from this point (subject to its having appropriate information) to make a final order including (if necessary and proportionate) a final care order.

28. The order includes these recitals in relation to the Article 15 question:

> *[2] The court determined on 6th September 2019 that it has jurisdiction over the child pursuant to Article 8 of BIIR, it having determined that the child was habitually resident in England and Wales at the time these proceedings were commenced and that no other Member State had jurisdiction pursuant to Article 12 of BIIR.*

[3] The court determined that the provisions of Article 15 of BIIR are now met in this case, in that:

a. *The child has a particular connection with Hungary in that it is the place of their nationality and the nationality of her parents; and*

b. *The courts of Hungary are best placed to hear the remaining part of these proceedings; and*

c. *It is in best interests of the child for these proceedings to be transferred to Hungary and that accordingly this court should request the courts of Hungary to accept a transfer of this court's jurisdiction pursuant to Article 15(1)(b) of BIIR.*

[4] The court sets the time limit required by Article 15(4) of BIIR at 24th December 2019.

[5] The court requests that the courts of Hungary do now accept the request for a transfer, the court observing that, although Article 15(5) of BIIR allows a period of 6 weeks from the date the court is seized in accordance with Article 15(1)(b) for the courts of Hungary to accept the request, the best interests of the child would be better promoted by an immediate acceptance of the request.

[6] This court requests that the Office of the International Liaison Judge and the Central Authority for England and Wales do co-operate and liaise with the European Judicial Network Liaison Judge and the Hungarian Central Authority to ensure that the request for the Hungarian courts to accept a transfer of jurisdiction pursuant to Article 15 of BIIR by 24th December 2019.

[7] The court records that the interim care order made below will be automatically recognised in Hungary by operation of Article 21 of BIIR.

[8] The Local Authority have outlined to the court and the parties their commitment to funding travel arrangements for [the aunt] to come to the UK for introductions with [Y]. The commitment includes the funding of flights, other travel costs, accommodation and an interpreter. The LA is willing to consider other reasonable expenses. In addition the LA has indicated that it would be flexible about arrangements and would consider funding the whole family travelling to the UK should this be necessary.

[9] In addition the Local Authority have outlined its commitment to funding the LA foster carer to take [Y] to Hungary to settle her into her new home in Hungary. The commitment includes the funding of flights, other travel costs, accommodation and an interpreter.

[10] This afternoon the Social Worker and Children's Guardian have spoken to [the aunt] prior to this hearing who has confirmed her commitment to [Y] living with her and her family.

[11] [The aunt] indicated that she could not travel to the UK until December as she is learning to drive and has a driving test. [The aunt] has indicated that she could and was willing to travel to the UK for a period of around five days, but would wish to come with her [own young child].

The order, insofar as relevant, was in the following terms:

[1] The case is to be transferred to the courts in Hungary and this court will decline jurisdiction pursuant to Article 15 once it is accepted.

[2] The court approves transfer of these proceedings under Article 15 Brussels II Revised Regulations.

[3] That the Interim Care Order will continue until the cessation of the proceedings and will be reviewed on day 2 of the final hearing on the 19th December 2019.

[4] Upon the courts of Hungary accepting the request that these proceedings shall be transferred to Hungary and this court will decline jurisdiction in accordance with Article 15(5) of BIIR.

[5] In the event that the courts of Hungary have not accepted the request for a transfer of these proceedings by 24th December 2019 these proceedings shall be listed for directions by 31st December, time estimate one hour. The applicant shall be responsible for re-listing the matter with the court.

29. HHJ Anderson delivered an *ex tempore* oral judgment which set out the essential factual history, including the reasons why Y's own parents could not care for her. The Official Solicitor was recorded as agreeing, on the mother's behalf, the document containing the specific basis on which the s.31 CA 1989 jurisdictional threshold criteria were satisfied. The judgment went on to say this:

That threshold document is agreed and is the factual basis for the Local Authority's involvement in this child's life. It is an agreed document and will go with the documents to the Hungarian authorities.

Although the threshold is agreed I take the view now that the Hungarian authorities should take over jurisdiction of this case and these proceedings. […]

[…]

All agree that the law in relation to transfer of proceedings is as set out in the skeleton argument filed on behalf of the father as supplemented by a later document prepared for today's hearing. The law is agreed. I have to decide how the law will be applied.

The child clearly has a connection with Hungary. Her parents are from Hungary and she is a Hungarian national. The child has family in Hungary. It would be in her interests to be cared for in Hungary if this is possible. The Hungarian Authorities I find are now in a better position to deal with the welfare aspects of this case.

I transfer the case now in the knowledge that the Hungarian authorities and the court there will have the benefit of the assessments completed of the parents, the assessment of the paternal aunt and her partner and all the other relevant documents.

The most significant reason to transfer the proceedings is that this little girl has relatives in Hungary who have been positively assessed as carers for her and are ready able and willing to care for her. If she stayed in the UK the plan of the Local Authority would likely be permanence through adoption and it is clear this child should be cared for by her family in Hungary where her carers can provide care, knowing the Hungarian culture and her family and, if it is felt safe, for her to have contact with her mother and her father at the determination of the Hungarian courts.

Therefore applying the law to this case it is clear that the case should be transferred to Hungary and the Hungarian Authorities have the opportunity to accept that invitation.

I have fixed a hearing in 5 weeks' time when we will be clear whether the Hungarian Authorities have accepted the case (they have already indicated they will accept the case) and at that next hearing this court can be confident that transition can take place.

30. It is a curious feature of that judgment that it seems to have been assumed that, were *'the proceedings'* not to transfer to Hungary, then Y would remain in England and the options for her long-term placement would also be solely domestic rather than including possible placement in Hungary. Clearly the English court could have made final decisions and orders in England making provision for the placement of Y with her aunt in Hungary, perhaps ensuring either that the English orders would be appropriately recognised in Hungary or that mirror orders were available and would be obtained, as the case may be (see, e.g. BIIa, Arts. 21, 28-31, 39 and Annex II; or BIIa, Art. 56; or CA 1989, Sch. 2, para

19; etc.). That said, although a final welfare determination does not seem formally to have been made, the Art. 15 decision explicitly relies on the judge's finding that *'it is clear that this child should be cared for by her family in Hungary'* and that, reading the judgment and assessing the state of the proceedings as a whole, that can only have meant that the judge had decided – the parties all agreeing the same – that placement, in Hungary, and with the aunt, was at that stage the appropriate welfare outcome for Y.

Following BIIa, Art. 15 decision

31. Thus it was that, on 11th November 2019, the English court made the decision to make an Article 15 request of Hungary that it accept transfer.

32. The next hearing took place on 19th December 2019. The recitals to HHJ Anderson's order included:

> *[2] The court notes that Hungary has accepted the Article 15 Transfer and that a temporary Guardianship Order has been made in favour of [the aunt] for the care of [Y].*
>
> *[3] The court notes that the LA plan is for [the aunt] and her [child] to visit between 13 – 17 January and then the following week the foster carer will take [Y] to Hungary.*
>
> *[4] Upon the LA confirming that upon [Y] arriving in Hungary that correspondence will be sent to court confirming this and forwarding a draft order inviting the court to:*
>
> *i. Discharge proceedings*
>
> *ii. Make the public funding direction for legally aided parties.*

And the order simply listed the matter for a further hearing on 23rd January 2020, to be vacated *'in the event that the LA has written to the court requesting discharge'*.

Strangely, the order also recorded that *'[the court] is satisfied it has jurisdiction in relation to the child based on habitual residence'*, whereas, if, as the court seems to have thought at that point, the proceedings (including the entire responsibility for making welfare decisions for Y) had transferred to Hungary, its jurisdiction (at least in relation to this particular case) would presumably derive only from the residual Art. 20, BIIa jurisdiction, secondary to

Y's presence within England rather than from the primary Art. 8, BIIa jurisdiction deriving from her habitual residence.

33. The case was next before HHJ Anderson on 17th January 2020. It was noted in the recitals that *'there has been a delay in [the aunt] coming to the UK for introductions and [Y] moving to Hungary'* and that *'the LA plan is now for [the aunt] and [her child] to visit between 27 and 31 January and then the following week the foster carer will take [Y] to Hungary'*. The 23rd January 2020 hearing was duly vacated, and the case was listed for a further hearing on 10th February 2020.

34. The 10th February 2020 hearing was vacated a few days beforehand, as, due to *'personal matters over which the foster carer has no control'*, there had been further delay in the aunt coming over to England for introductions with a view to Y's move to Hungary. The case was listed on 23rd March 2020. Exactly the same fate befell the 23rd March hearing, it being vacated on 17th March 2020 at a hearing, the order from which records the court noting *'that matters are proceeding as planned, save that the LA proposes that [the aunt] have time to reflect upon the commitment of her and [her partner] on her return to Hungary'*, presumably after having had the period of introduction to Y. The case was listed for a further hearing on 1st April 2020.

35. Of course, the proceedings at this stage coincided with the outbreak and spread in Western Europe of the coronavirus pandemic and, in particular, with the lockdown in and of the UK. On 16th March 2020, the nation was advised against all but essential travel; on 23rd March, the first lockdown was announced; on 25th March, the Coronavirus Act 2020 received Royal Assent; on 26th March, the lockdown measures came legally into force. Whatever reasons had stood in the way of the aunt travelling to England to see Y before the end of March 2020, thereafter the chaos of Covid-19 became a further potent contributory factor.

36. The 1st April 2020 hearing was vacated amidst the absence of clarity as to how pandemic or lockdown restrictions would progress in either England or Hungary. It was relisted for 2nd June 2020, in the hope that this hearing could be vacated *'in the event that the move to Hungary was a smooth transition'*. In fact, it was vacated as international travel remained impossible. The hearing was relisted on 7th September 2020 on the same terms as the other hearings. This hearing was not effective. However, by this stage, the local authority was *'informing the court that they intend to undertake an updated needs assessment of [Y] and to review*

the assessment of the proposed carers for [Y]'. The case was relisted on 26th October 2020. By the point of this hearing, while international travel remained impossible, the local authority had *'provided an updated needs assessment of [Y] and an updated assessment of the carers and it continues to be the plan to place [Y] in Hungary when this becomes possible'.* The case was put over until a hearing on 8th February 2021.

37. On 18th December 2020, the children's guardian's legal team issued an application in Form C2, requesting a hearing, she, the guardian, being very much less than impressed with the local authority's efforts in relation to familiarising Y with and beginning to enable her to develop some ability in the Hungarian language. The rider to the application included this:

> *The Guardian is concerned that should [Y] move to Hungary that the proposed plans to develop Ys language prior to this occurring remain insufficient.*
>
> *The Local Authority have also provided parties with an email on the 14th December 2020 stating that "further to previous correspondence, the current position of the Local Authority is that it is reviewing the plan in connection with [Y] – I will keep you informed as to the progress of matters". Following receipt of this email those representing the Father sought further clarity as to what this meant and urged the Local Authority if there was a significant change to return the matter to Court.*
>
> *The solicitor for the child spoke to the Local Authority solicitor on the 14th December 2020 and again urged that the Local Authority return the matter to Court and that if they did not that the Guardian would. No further response has been received from the LA and they have not lodged any C2 seeking a hearing.*
>
> *This matter is currently before the Court next on the 8th February 2021 and on behalf of [Y] it is felt that an earlier hearing is required in order for there to be clarity as to the Local Authority's position and to address what language provisions are being put in to place for [Y].*

I note the *'if'* in relation to Y's placement in Hungary and the suggestion that the local authority was *'reviewing the plan in connection with [Y]'.*

38. The case was listed, presumably on the strength of this application, before HHJ Anderson on 13th January 2021. Again at that hearing, the local authority's continued intention *'to*

place [Y] in Hungary when this becomes possible' was recorded in the recitals to the order. Perhaps curiously in light of this, the subsequent recitals included:

> *[8] Upon the LA having outlined to the court that it continues to have issues with [the aunt]'s erratic attendance at contact and a lack of interest in [Y].*
>
> *[9] Upon the LA having outlined to the court that it intended:*
>
> *a. To provide funding for [the aunt] to receive legal advice at legal aid rates at an initial limit of £,750 plus disbursements (interpretation costs)*
>
> *b. To contact the paternal grandparents to ascertain the support that they can provide for [the aunt].*
>
> *c. To discuss further with [the aunt]*
>
> *i. The importance of regular contact*
>
> *ii. The importance of engaging with the foster carer so that [Y] can become more familiar with her Hungarian culture.*
>
> *iii. The information provided by the paternal grandfather as to her knowledge of the dispute between him and [the father].*
>
> *[…]*
>
> *[14] Upon it being recorded that the Local Authority has already obtained specialist legal advice that in the event that the plan of the Local Authority changes to one where [Y] remains in the UK, that there is a mechanism available to the court to rescind the Article 15 transfer.*

39. The case next came before the court when it was heard by Mr. Rec. Howe QC on 8th February 2021. By that point the difficulties of which the previous order was suggestive were clearly rather more pronounced. The order recorded as the sole *'Key Issue in the Case'*:

> *Whether the needs of the child or the position of the carers has changed to the extent that the LA (or any of the parties) will invite Hungary to transfer jurisdiction back to the UK.*

and included these recitals:

[6] Upon the court noting that the plan for [Y] continues to be that she is placed with her paternal aunt and her husband, but this is under ongoing review given concerns identified by the Local Authority.

[7] Upon the court being informed that the paternal aunt now has legal representation.

[…]

[12] AND UPON the Court indicating:

(a) that the continuing delay in achieving a permanent placement for [Y] is contrary to her best interests,

[…]

(d) if the local authority is to pursue its plan to place [Y] with her Aunt in Hungary it must file a transfer of care plan that sets out the practical steps the Local Authority will take to achieve that transfer of care, and/or the support it will provide to the Aunt in practical steps she could take, within the restrictions that are in force and the possible relief from Hungarian restrictions that might be agreed were the local authority to seek support and advice from the Hungarian Consultant/Authorities.

[13] AND UPON the Court directing the Local Authority make enquiries of the Hungarian Consulate to ascertain what steps, if any, can be taken to arrange for [Y]'s transfer of care to Hungary without further delay.

and these orders:

[1] The Local Authority shall by 10 February 2021, provide to [the paternal aunt and her husband] a summary of its expectations concerning [their] contact with [Y].

[…]

[4] The Local Authority shall notify the foster carers that if they intend to make any applications in connection with [Y] that they must do so by 4pm on 22nd February 2021. Any application issued by the foster carers shall be listed for directions before HHJ Hillier on 23 March 2021.

[7] The Local Authority shall by 4pm 17 March 2021 file its final evidence, care plan and a proposed transition of care plan, should the court determine that [Y] be placed in Hungary.

Recorder Howe QC listed the case before HHJ Hillier on 23rd March 2021.

40. On 17th February 2021, the foster carers, with whom Y had been placed continuously since the end of August 2018 (so, by then, some 2½ years), applied for joinder in the care proceedings and for leave to apply for a special guardianship order.

41. The orders on 17th January 2020, 6th February 2020, 17th March 2020, 1st June 2020, 7th September 2020, 26th October 2020, 13th January 2021 and 8th February 2021 had all recorded that the court on each occasion was *'satisfied'* that it had jurisdiction *'based on habitual residence'* occasionally *'declaring'* this to be so. In the order of HHJ Hiller of 9th March 2021, however, the part of the order dealing with jurisdiction instead read:

> *Her Honour Judge Anderson invited the Hungarian Authorities to accept jurisdiction pursuant to Article 15, Brussels II Revised on 11th November 2019. This invitation was accepted by the Hungarian Authorities on 6th December 2019 when [the aunt] was appointed Guardian for [Y] by the Hungarian Guardianship Authority.*
>
> *The Court exercises its residual jurisdiction today pursuant to Article 20, Brussels II Revised. The court is not exercising jurisdiction in any other capacity.*

42. Having recorded the jurisdictional position in that way, HHJ Hillier dismissed both of the foster carers' applications, *viz.* for joinder and permission to apply for a special guardianship order, *'for lack of jurisdiction'*. The foster carers were given *'liberty to reinstate their applications […] in the event that they are able to demonstrate a change in circumstances in respect of the Hungarian position'*. The judge, expressly confining her actions to those *'appropriate under the residual jurisdiction'*, directed explanations from the local authority and the guardian in relation to what had been done in relation to orders it was known had been made in Hungary, what arrangements had been made to effect the move of Y to Hungary, and why there had been such enormous delay (the case – and so the child at its heart – being, by then, more than two and a half years old).

43. HHJ Hillier heard the case again on 23rd March 2021. The *'key issue in the case'* was described by the judge in her order as being, *'The timetable for placing [Y] in the care of her paternal aunt in Hungary'*. The judge directed the local authority to serve a *'transition plan outlining the transfer of care from her foster carers to her paternal aunt'*.

44. It is not entirely clear to me from the papers before me what then happened in the case during the next three and a half months.

45. On 14th July 2021, however, the local authority applied in Form C2 (in the Family Court) for a *'Declaration of the court as to best interests of [Y]'*. The application set out a series of asserted facts which cast some doubt on the ongoing suitability of the proposed placement of Y with the aunt. It seems that, acting in good faith in furtherance of HHJ Hillier's instruction to give effect to the transfer of the case (or, more particularly, the child) from England to Hungary, a plan was developed which would have seen the aunt travelling to England to meet Y on 10th May, to return with her to Hungary after *'a period of introductions'*. During the course of the planning, and only via the interpreter having somehow discerned this, it transpired that the aunt, who had failed to attend a number of virtual contact sessions, had endured the recent death of her husband, leaving her a single carer for their two children. The English social worker then struggled to engage with the aunt who was reluctant first to speak to her, later to give any detailed information. Details subsequently received suggested that there was a likelihood that a number of significant domestic and safeguarding issues, had been kept from the local authority during the assessment process and subsequently.

46. On learning of these issues, the Children's Guardian's legal team had instructed Mr Aidan Vine QC to provide an Advice in relation principally to jurisdictional matters. That advice was shared with all parties to the care proceedings. The local authority sought – fruitlessly by the point of the C2 application – assistance both from its Hungarian counterpart and from the Hungarian Central Authority.

47. The court was invited in the application to consider whether *'a family placement no longer continues to be in [Y]s best interests'*, and, in the event of a negative conclusion, the local authority sought *'a declaration in those terms'*, which would then lead *'the local authority […] then [to] consider all the alternatives available for [Y].*

48. Whether or not the relief sought in the Family Court was even potentially available need not at this stage be considered. HHJ Hillier, as Designated Family Judge for West Yorkshire, listed the case and the application before me, to sit in the Family Court as a Deputy High Court Judge, on 12th August 2021. This was the 31st case management order in the case since its inception in August 2018.

49. By this stage, the advice received from Mr Vine QC and subsequently distributed to the parties and the court questioned both whether there had ever, in fact and law, been an effective Article 15 transfer, and, if there had been, whether there were any ongoing proceedings in the family courts of Hungary. It was known by this stage, if not before that the foster carers sought to reinstate their application for (permission to apply for) a special guardianship order.

50. Given the chaotic and confused state which the case had acquired, in combination with the fact that it was approaching its third anniversary, on 12th August 2021 I expressed my strongly held view that each of the parties would benefit from instructing specialist leading counsel, with, of course, the corollary advantage for the court, and I listed the case before me on 30th September and 1st October 2021. I urged the local authority to provide at least some limited funding for the foster carers to seek legal advice. I redrafted a series of questions which were then sent on my behalf by ICACU to the Hungarian Central Authority. The Office of the Head of International Family Justice ("**IFJO**") was also kind enough to send, again on my behalf, an inquiry to the Hungarian Network Judge asking for that judge's assistance with understanding various matters in Hungary about which there remained a distinct absence of clarity. I also joined the aunt to the proceedings and directed that she provide to her solicitors, for onward filing in the proceedings, a copy of the temporary and final Hungarian guardianship orders and any other administrative or judicial documents in her possession which might assist the court in determining any outstanding jurisdictional issues.

51. On 27th September 2021, the local authority issued a further and fresh application for a care order in relation to Y. The rationale for the second proceedings was expressed in the application form C110A thus:

> *'The court is currently considering in the related proceedings whether:*
>
> *i. this matter has transferred under Article 15 Brussels 2*
>
> *ii. if so whether proceedings have concluded in Hungary*
>
> *The court may conclude that the related proceedings were transferred and have concluded in Hungary. If this is the case then there is no bar to the English Court considering a fresh application for Care Proceedings.'*

52. My request for the instruction of expert leading counsel was fruitful indeed. By the point of the hearing on 30th September and 1st October, the 'virtual' front bench was peopled by advocates of the very highest calibre, the industry of whom, no doubt much assisted by their juniors, has been of the greatest assistance in this difficult case.

Communication with the Hungarian Central Authority

53. In the earlier part of the case there were many communications back and forth between the local authority and the HCA, often assisted by the good offices of ICACU.

54. Picking up the chronology of such communications at the point of HHJ Anderson's Art. 15, BIIa request of 11th November 2019, this was notified to the HCA on 12th November. On 5th December 2019, the local authority emailed the HCA with all relevant documents, translated into Hungarian.

55. On 6th December 2019, the HCA wrote to HHJ Anderson indicated that:

> *THE stated Hungarian CENTRAL AUTHORITY accepts jurisdiction.*
>
> *[…]*
>
> *AND takes action for the repatriation and placing of minor [Y] as this is her best interest.*
>
> *Our authority informs the competent local guardianship authority to take all the necessary steps on behalf of placing the child, to make a decree in which the authority appoints [the aunt] to be guardian of [the] minor and places [Y] into the care of her.*

56. On 13th December 2019, Dr A of the HCA emailed the local authority solicitor in indicating that there was a *'decision'* in the case of Y, and attaching *'our document and the decree'* of 12th December. The letter indicated that in the decree *'the guardianship authority places [Y] temporarily into the care of [the aunt]'*, that *'the guardianship authority also appoints [the aunt] as a guardian of [Y]'* and that *'the decision is enforceable immediately'*. It was also stated that, *'the guardianship authority initiates child custody proceedings in Court aiming to place the child permanently in the care of [the aunt] according [to] the Court's decision. The temporary placing lasts until the Court makes its decision.'* That temporary decree has been provided to the parties and the court in both the original Hungarian and English translation.

57. On 8th January 2020, Dr A emailed the local authority solicitor, reminding her of the decree previously sent. Dr A went on to inform the solicitor that *'on 6 January 2020 the decree has become final'*. The email went on to suggest arrangements for the aunt to travel to the UK in order to bring Y to Hungary and requesting further information from the local authority as to the proposed logistics. It should be noted that despite repeated requests, the *'final'* decree of 6th January 2020 has never been made available to the parties or to the court.

58. Communications flowed in both directions between the local authority and the HCA working to a plan by which Y would travel with the aunt back to Hungary on 23rd March 2020. As set out above, this plan was comprehensively scuppered by the invasion of these shores of Covid-19. Throughout 2020 and into 2021, enquiries were made and answered about the various travel and entry regulations and restrictions in the two countries.

59. Following the receipt and dissemination of the written advice of Mr Vine QC, the local authority sought answers to some of the questions raised. On 18th June 2021, the local authority solicitor asked Dr A (via a translated email) a series of questions (which I set out, together with the answers eventually rendered below):

1. *In the letter dated 6th December 2019 the Hungarian Central Authority communicated that the transfer request had been accepted in these terms "The Hungarian Central Authority accepts Jurisdiction"*

    a. *Was this by an administrative act or by a Court Decision in Hungary*

    b. *Was this an acceptance of the transfer of the proceedings (as opposed to a fresh acceptance of jurisdiction, for example under the provisional, protective measures, jurisdiction provided by Art 20 of Brussels II Revised).*

2. *Was the interim guardianship order the result of an administrative act or of a court decision?*

3. *If the interim guardianship was the result of a court decision whether the decision was made in proceedings following an effective acceptance of transfer or in separate Hungarian proceedings?*

4. *It is noted that in correspondence dated 8th January 2020 that there was reference to a final Guardianship decree being made in favour of [the aunt].*

Can you confirm:

a. *Whether any final Guardianship decree in favour of [the aunt] had been made by an administrative act or a court decision and*

b. *Whether the decision was made in proceedings following an effective transfer or in separate Hungarian proceedings jurisdictionally unrelated to the transfer.*

5. *Have any care proceedings (or other proceedings) commenced in Hungary?*

6. *If care proceedings (or other proceedings) have commenced, have they now concluded?*

60. No reply having been received, on 14th July 2021, the local authority chased up answers to the questions, posed three further questions, dealing with the possibility of further assessment of, and the types of orders available in Hungary to, the paternal grandparents, and notified the HCA of the local authority's application to the English court.

61. On 23rd July 2021, the local authority requested answers from the HCA to the outstanding questions in time for the first hearing listed before me on 12th August 2021 and extending the court's invitation to both the HCA and the Hungarian Consulate to attend the hearing.

62. On 3rd August 2021, Dr A replied, indicating that there would be a response before the *'deadline'* of 12th August 2021.

63. On 6th August 2021, Dr A duly wrote to the local authority stating that the aunt remained willing to care for Y, confirming both the recent death of her husband and that she had not notified the local authority during its assessment of the various difficulties and issues with which her husband had struggled. The other questions (relating to the administrative and judicial process) were not answered. The local authority sent those questions again.

64. As I have indicated earlier, arising from the hearing before me on 12th August 2021 I redrafted the questions; I caused them to be sent by ICACU to the HCA; and I caused the IFJO to make relevant enquiries of the Hungarian Network Judge with a view to the English court obtaining an understanding of just what had taken place in Hungary. The local authority chased again on 9th September 2021.

65. On 10th September 2021, a response was received from the HCA. Dr A explained that he had spoken with *'our competent local authority'* (which I take to be the Guardianship Authority) and explained:

> *'On 06 December 2019 we accepts the jurisdiction (1st attachment), that's why our competent local authority had the right to appoint a guardian for [Y] and place her temporarily into the care of [the aunt] on 12 December 2019 (2nd attachment, moreover the plan was that [the aunt] travels to the UK to bring [Y] to Hungary, so she had to be the legal representative of the small girl during the journey.'*

66. The questions previously asked, and the replies received are as follows:

1. *In the letter dated 6th December 2019 the Hungarian Central Authority communicated that the transfer request had been accepted in these terms "The Hungarian Central Authority accepts Jurisdiction"*

a. *Was this by an administrative act or by a Court Decision in Hungary?*

Answer: Administrative act – according to our national legislation.

b. *Was this an acceptance of the transfer of the proceedings (as opposed to a fresh acceptance of jurisdiction, for example under the provisional, protective measures, jurisdiction provided by Art 20 of Brussels II Revised).*

Answer: Article 15 (1st attachment)

2. *Was the interim guardianship order the result of an administrative act or of a court decision?*

Answer: Administrative act

3. *If the interim guardianship was the result of a court decision whether the decision was made in proceedings following an effective acceptance of transfer or in separate Hungarian proceedings?*

No answer was recorded against this question

4. *It is noted that in correspondence dated 8th January 2020 that there was reference to a final Guardianship decree being made in favour of [the aunt].*

Answer: [The aunt] is still the guardian of [Y], the minor's temporary placement is need to be supervised.

Can you confirm:

a. Whether any final Guardianship decree in favour of [the aunt] had been made by an administrative act or a court decision?

Answer: Administrative act

b. Whether the decision was made in proceedings following an effective transfer or in separate Hungarian proceedings jurisdictionally unrelated to the transfer.

Answer: After we had accepted the jurisdiction we informed our local authority that Hungary has jurisdiction, so Guardianship Authority of [X place] has the right to make decision on placing [Y] and appoint a guardian for her.

5. Have any care proceedings (or other proceedings) commenced in Hungary?

6. If care proceedings (or other proceedings) have commenced, have they now concluded?

Answer: 5-6: I should discuss it with the local authority, I am waiting for their response.

Three further questions were asked in relation to the paternal grandparents, possible assessment of them and the types of orders available to them in Hungary, to which Dr A's reply was, '***I also asked it, I am waiting for their response.'***

67. On 24th September 2021, a further letter was sent to the HCA informing them of the hearing on 30th September and requesting replies to the outstanding questions. By the point of the hearing before me, and during the few weeks it has taken me to produce this judgment, there has been no reply to the outstanding questions. In particular, despite many requests, the English court has not been told whether any proceedings have ever been initiated in Hungary in relation to Y and, if so, whether they are currently ongoing or concluded.

The questions for the court and the parties' respective positions on them

68. By the time the case came before me on 30th September and 1st October 2021, the essential questions had been distilled as follows:

a. Did a valid Art. 15 transfer take place? Is further evidence required to decide this point?

b. What is the status of Hungarian proceedings relating to Y, if any? Is further evidence required to decide this point?

c. What is the status of the foster carers' application for a special guardianship order? Does the court have jurisdiction to deal with it?

d. Does the English court have jurisdiction? Can it assume it? Should it?

69. I am grateful to Mr Harrison QC and Ms Tait for having so carefully and succinctly summarised the parties' answers to these various questions in tabular form, which I reproduce, differently formatted, below:

a. Did a valid Art. 15 transfer take place? Is further evidence required to decide this point?	
LA	A valid Article 15 transfer took place – the Hungarian 'court', within the meaning of Article 2(1), accepted jurisdiction. No further evidence is required and the Part 25 application is opposed.
M	A valid Article 15 transfer took place. No further evidence is required.
F	A valid Article 15 transfer took place, even if there were some procedural defects. No further evidence is required.
CG	It is not clear whether the Article 15 transfer was accepted by a Hungarian 'court' in the requisite 6-week period and further evidence is needed to determine the point – a Part 25 application has been made for this purpose.
Aunt	A valid Article 15 transfer took place. No further evidence is required.
b. What is the status of Hungarian proceedings relating to Y, if any? Is further evidence required to decide this point?	
LA	Hungarian proceedings have concluded with the making of a final decree in favour of the aunt. The court should make the decision on the basis of the information and evidence before it today. The Part 25 application is opposed.
M	It is more likely than not that Hungarian proceedings have concluded with the making of a final decree in favour of the aunt. The Official Solicitor does not seek to adjourn the hearing for further evidence.
F	There is insufficient evidence to decide the point. Evidence on Hungarian law would be required to do so.

CG	There is insufficient evidence to decide the point. It does not appear that the local authority or Y were heard in any such proceedings, if they have taken or are taking place. Evidence on Hungarian law would be required to decide the issue – a Part 25 application has been made for this purpose.
Aunt	There is insufficient evidence to decide the point and the court would be wrong to try to do so without evidence on Hungarian law.
c. What is the status of the foster carers' application for a special guardianship order? Does the court have jurisdiction to deal with it?	
LA	It remains live as an issue to be addressed at this hearing, as stated in the order of 12 August. If the court agrees with the conclusions on the issues above, the English court has jurisdiction on the basis of Y's habitual residence. If not, there is a possible issue with *lis pendens*.
M	The application should not have been dismissed for want of jurisdiction and should be reinstated. There is no impediment to the application proceeding here.
F	The application was properly dismissed, as a collateral application within care proceedings. If it is not, there is a risk of conflicting decisions if it proceeds in England. The court may need further evidence as to whether it can proceed in Hungary.
CG	Whether or not it remains a live application, the foster carers wish to pursue it and the English court has, and has always had, jurisdiction on the basis of Y's habitual residence. Directions should be made to progress the application and the aunt should be joined as a party to those proceedings.
Aunt	It has been dismissed and there is no application to be reinstated. It should not be dealt with by the English court until a decision has been made as to who has jurisdiction over the care proceedings.
d. Does the English court have jurisdiction? Can it assume it? Should it?	
LA	The English court does have jurisdiction on the basis of Y's habitual residence and following the end of proceedings in Hungary. If there is concern about proceedings in Hungary, an Article 15 (Brussels IIa) or Article 8/9 (HC96) request should be made to transfer back. Decisions about Y should be made by the English court and matters should not be further delayed today.
M	The English court does have jurisdiction, following the end of proceedings in Hungary. The English court should consider what outcome serves Y's best

	interests. If the court is unclear, an Article 15 (Brussels IIa) or Article 8/9 (HC96) request should be made to transfer proceedings back.
F	The court cannot make a decision on this either way on the present state of the evidence and should not do so without further evidence.
CG	The court does not have the information required to make this decision – a Part 25 application has been made for this purpose. The Guardian remains concerned about the placement of Y with the aunt given the events that have taken place and her lack of Hungarian knowledge.
Aunt	If the court seeks to assume primary jurisdiction, the proper approach is for a request to be made to Hungary to transfer the case back.

70. In addition to the four headline issues set out above, each subdivided into more than one question, it also falls to me to set out my reasoning and decisions in relation to:

a. depending on other decisions, the foster carers' application for party status;

b. the preliminary question (which comprises part of questions (1) and (2), above), which in fact took up most of the first day of the two-day fixture, as to whether the hearing should have been vacated to allow for the Part 25 FPR 2010 application to instruct of an expert in Hungarian law, which application I dismissed, with full reasons to follow.

The law

Jurisdiction

71. These proceedings were issued in August 2018, at which point the question of jurisdiction was governed by Chapter II of BIIa, Art. 8 of which sets the rule of general jurisdiction in matters of parental responsibility:

> *Art. 8.1. 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.*

72. Since the United Kingdom's exit from the EU, jurisdiction to entertain children proceedings issued after the end of the transition period (i.e. since 31st December 2020) derives from Art. 5 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children ("**Hague 1996**"):

> *Art. 5(1). The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.*

Transfer of jurisdiction

73. Chapter II, BIIa contains various exceptions to the general rule that jurisdiction vests in the Member State of the habitual residence of the subject child. Among these is the procedure by which jurisdiction to hear a case, or part of a case, may be transferred to a Member State whose court is better placed to hear it:

> *Article 15*
>
> ***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 other Member State in accordance with paragraph 4; or*
>
> *(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.*
>
> *2. Paragraph 1 shall apply:*
>
> *(a) upon application from a party; or*
>
> *(b) of the court's own motion; or*

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

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

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

(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.

74. Art. 15 then, operates such that a transfer may only be requested if:

a. the child has *'a particular connection'* with another Member State (Art. 15.1) (the term *'particular connection'* is further defined (Art. 15.3));

b. the other Member State is *'better placed'* to hear *'the case, a specific part thereof'* (Art. 15.1); and

c. the transfer is in the best interests of the child (Art. 15.1) (note: it is the transfer which must benefit the child, not the fact of placement in the other Member State).

75. As to what exactly is being transferred, it is when the Member State with primary jurisdiction *'as to the substance of the matter'* considers that another court would be better placed to hear *'the case, or a specific part thereof'*, that it may stay *'the case'*, to allow the parties to introduce a request of the other Member State *'to assume jurisdiction'*, or it may itself request the other court *'to assume jurisdiction'*, after the confirmation of which assumption of jurisdiction (by either route), the original state *'shall decline jurisdiction'*.

76. It follows from the wording of Art. 15 that it is jurisdiction in relation to *'the case'* or the *'specific part thereof'* which is transferred, rather than a general jurisdiction in relation to the child. If this was ever in issue, it ceased to be so following the decisions of Cobb J in *Re S (Jurisdiction: Prorogation)* [2013] EWHC 647 (Fam), [2013] 2 FLR 1584 and of Baker J in *Re HA (A Child: BIIA, Art 15) (No 2)* [2015] EWHC 1310 (Fam), [2016] 1 FLR 966.

77. In *Re S*, Cobb J came to this conclusion:

> *'[36] There was discussion in the hearing as to whether Art 15 applies to a general 'territorial jurisdiction' or to 'jurisdiction established by the institution of proceedings'. I have considered the language of the Article with care, and believe it to be the latter. The Article refers to a court of a Member State hearing 'the case or a specific part thereof' (Art 15(1)); there is further reference in Art 15(1)(a) to 'staying' the 'case'. In my judgment, the transfer arrangements described in Art 15 have been designed to apply to specific current (ie 'live') proceedings before a court of a Member State, not to its territorial jurisdiction generally. The judgments in Re I (A Child) (Contact Application: Jurisdiction) [2009] UKSC 10, [2009] 3 WLR 1299, [2010] 1 FLR 361 are, in my view, consistent with this ruling.'*

78. In *Re HA*, Baker J endorsed that approach:

> *'[51] In my judgment, however, Cobb J's analysis is correct. I accept the submissions of Mr Scott-Manderson and Mr Samuels and their juniors that the jurisdiction transfer under Art 15 is confined to the specific case, or part of case, before the court, and not the general jurisdiction in*

respect of the exercise of parental responsibility for the child. I have reached this conclusion for the following reasons:

(1) The general basis for jurisdiction is set out in Art 8. The policy justifying this general rule is summarised in recital 12 of the preamble to the regulation. Article 15 makes it clear, in its opening words, that its provisions are 'by way of exception' to the general rule.

(2) As Cobb J observed in Re S, the words used in Art 15 demonstrate that the request and transfer are in respect of a case or part thereof. The power to make a request arises if the court of the Member State having jurisdiction considers that the court of another Member State 'would be better placed to hear the case or a specific part thereof [my emphasis] and whether this is in the best interests of the child'. In these circumstances, the court having jurisdiction may 'stay the case or the part thereof in question'.

[…]'

79. Presumably this is the reason why, in the current case, HHJ Anderson's judgment at the point of transmitting the request to Hungary to assume jurisdiction stated the decision thus:

> *'Therefore applying the law to this case it is clear that the case should be transferred to Hungary and the Hungarian Authorities have the opportunity to accept that invitation.'* (emphasis added)

And the order was drafted thus:

> *'[1] The case is to be transferred to the courts in Hungary and this court will decline jurisdiction pursuant to Article 15 once it is accepted.*
>
> *[2] The court approves transfer of these proceedings under Article 15 Brussels II Revised Regulations.'* (emphasis added)

80. Art. 15 provides that the courts of the requesting state *'shall set a time limit by which the courts of that other Member State shall be seised'*; if not seised in that period, the requesting state *'shall continue to exercise jurisdiction'*. Separately, the courts of the requested state may *'accept jurisdiction within six weeks of their seisure'*. In the event of seisure within the *'time limit'*, and

acceptance of jurisdiction within six weeks thereafter, the requesting court *'shall decline jurisdiction'*: the transfer will be complete.

81. The term *'court'*, used in Art. 15 to describe both the transferring and the receiving institutions in the respective Member States, has an autonomous meaning, pursuant to Art. 2(1):

> *'the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1.'*

82. In relation to a virtually identical definition of *'court'* in Art. 1(2) of Council Regulation 1347/2000 (Brussels II), Dr Alegría Borrás, the eponymous author of the well-known report, said:

> *'In addition to civil judicial proceedings, the scope of the Convention also includes other non-judicial proceedings occurring in matrimonial matters in certain States. Administrative procedures officially recognised in a Member State are therefore included. In Denmark, for instance, there is, in addition to the judicial course of action, an administrative procedure before the Statsamt (District Council) or before the Kobenhavns Overprsidium (which performs the same functions as the Statsamt for Copenhagen). For that procedure to apply, there must be grounds for divorce and agreement between the spouses both on the divorce and on matters connected with it (custody, maintenance, etc.). Appeals against the judgments given by the Statsamt and the Kobenhavns Overprsidium lie to the Ministry of Justice (Civil Law Directorate) and may then be subject to judicial review through the normal procedure. In the same way, it may be noted that in 1983 Finland adopted a system under which matters relating to custody, residence and visiting may be settled outwith the legal proceedings by agreement that must be approved by the 'kunnan sosiaalilautakunta/kommunal socialnamnd' (communal social (welfare) board): 'Laki lapsen huollosta ja tapaamisoikeudesta'/'Lag angende vardnad om barn och umgangesratt', Law 361 of 8 April 1983, Sections 7, 8, 10, 11and 12).*
>
> ***For that reason, the text stipulates, as did Article 1 of the 1970 Hague Convention on the recognition of divorces and legal separations, that the term 'court' shall cover all the authorities, judicial or otherwise, with jurisdiction in matrimonial matters in the Member States.'*** [emphasis added]

83. Domestically, this question was dealt with by Sir James Munby P in the Court of Appeal judgment in Re N (Children) (Adoption: Jurisdiction) [2015] EWCA Civ 1112, [2016] 1 All ER

1086, [2016] 1 FLR 621. Among other challenges in the Court of Appeal to a first instance Art. 15 transfer was the complaint that the judge had:

> *'[140] […] 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 European 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.'*

Sir James gave the argument short shrift:

> *'[146] […] 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 BIIR defines the term "court" "as: "[covering] 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 "[meaning] 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 European Convention cuts across the fundamental principle (In re M [2014] 2 FLR 1372, 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.'*

(While the Supreme Court allowed the guardian's appeal against the judgment of the Court of Appeal, this was on the separate issue of the meaning of the 'best interests' requirement of Art. 15.1, BIIa.)

Lis alibi pendens

84. BIIa contains a mechanism aimed at preventing overlapping cases before courts of more than one Member State proceeding concurrently, with, of course, the danger of irreconcilable judgments:

> *Article 19*
>
> ***Lis pendens and dependent actions***

[…]

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

85. Hague 1996 contains a similar provision:

Article 13

(1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.

(2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

86. The Borrás Report, in relation, as above, to Brussels II, described the purpose of the *lis pendens* provisions of that Regulation thus:

'The lis pendens mechanism is designed to avoid parallel actions and consequently the possibility of irreconcilable judgments on the same issues and the objective was to provide a rule which, on the basis of the basic principle of prior temporis, could provide a solution for the various possibilities in family law, which differ from those in property law. The traditional lis pendens arrangement did not solve all the problems and there was therefore a need to find a new wording which would achieve the objective desired. After lengthy discussion, it was the Luxembourg Presidency which proposed the text finally accepted by the Member States.'

87. The CJEU considered the breadth of the term *'cause of action'* in Art. 19, BIIa in *Purrucker v Vallés Perez (Case C-296/10)* [2011] Fam 312:

> *'The term 'the same cause of action'… must be defined by taking into account of the objective of Article 19(2) of Regulation No 2201/2003, which is to prevent decisions which are incompatible."*
>
> *The court has previously ruled, in the context of the Brussels Convention, that the 'object of the action'… is the end the action has in view…To ascertain whether the two actions have the same object, account must be taken of the applicants' respective claims in each of the sets of proceedings… Further, the Court has interpreted the concept of the 'cause of the action' as comprising the facts and the rule of law relied on as the basis of the action.'*

88. As discussed in greater detail below, if the proceedings in Hungary are ongoing, there may be an operable *lis pendens*, with the attendant impact on the possibility of this court appropriately exercising a contemporaneous jurisdiction in relation to Y. If, however, the proceedings in Hungary have concluded, the potential (there being no current application before the English courts) impediment, would derive instead from the provisions in relation to Recognition and Enforcement, as provided for, variously, by Chapter III, BIIa, and Chapter IV, Hague 1996, and general principles of comity.

Parties' arguments

a. Did a valid Art. 15 transfer take place? Is further evidence required to decide this point?

89. The suggestion that a valid transfer may not have taken place, despite the court and all parties having proceeded on the basis that there was a valid transfer for many months, comes from Mr Vine QC and Miss McCallum for the child through her guardian. They question first whether the HCA itself could, as a matter of law, accept the transfer request (i.e. whether it is itself a court, as defined), and second whether the local guardianship authority did, as a matter of fact, do so either in time or at all.

90. As to the former question, Mr Vine and Miss McCallum point to the European Judicial Network information sheet on national law (on parental responsibility) for Hungary which suggests that either a guardianship authority or a court can make decisions of

parental responsibility in Hungary, but that the HCA itself is not identified as having decision-making jurisdiction in such matters.

91. As to the latter, they note that the local Hungarian temporary guardianship and placement ruling in favour of the aunt, dated 12th December 2019, does not expressly identify the jurisdiction exercised as deriving from BIIa and does not make any reference to Art. 15 BIIa generally or to the English court's Art. 15(1)(b) request specifically. Accordingly, they assert that it is unclear whether (a) the guardianship authority should be considered by this court, perhaps adopting a purposive approach, to have been exercising a requested-and-accepted Art. 15 BIIa jurisdiction, or (b) the Hungarian ruling was as part of some separate process, for which the jurisdictional basis is unclear, although it may have derived from Art. 20 BIIa (the *'provisional, including protective, measures'* jurisdiction).

92. In the absence, they say, of clarity on these issues, Mr Vine QC and Miss McCallum argued that further evidence is required, in the form of expert evidence from an expert in Hungarian law, for the purposes of the obtaining of which a Part 25 application was issued on 27th September 2021. The proposed questions to be answered would be:

a. What is the Hungarian domestic law procedure for receiving in an Art 15 transfer request?

b. Is that what happened in this case?

c. If not, what has happened in this case?

93. Mr Harrison QC and Ms Tait, for the local authority, urge me to reject these challenges and the suggestion that further evidence, still less expert evidence, is needed. They argue that the evidence currently available clearly, if at times inferentially, establishes that the Art. 15 transfer was accepted by the Hungarian 'court' (which term includes administrative authorities under BIIa, see above). They note that the English court made the request on 11th November 2019, setting a time limit for seisin of 24th December 2019 and providing that, although six weeks is the limit for the purposes of acceptance of jurisdiction (Art.15(5)), Y's best interests would be served by an immediate acceptance. The communications from Hungary, they say, support the proposition that the request was accepted as:

a. the letter of 6th December 2019 from the HCA states that the HCA accepts jurisdiction and that the relevant guardianship authority will make a decree appointing the aunt as guardian;

b. the HCA was acting as a 'court' in accepting the request, applying a purposive meaning to that expression, as already widely defined by Art. 2(1), BIIa and noting that, in any event, Art. 15(6) specifies that, for the purposes of the article, 'courts' may co-operate either directly or through Central Authorities;

c. alternatively, the guardianship authority falls within the definition of a 'court', that it became seised when it was requested by the HCA to take appropriate action, and that its acceptance of jurisdiction is a necessary inference from the fact that it went on to make a decree on 13th December 2019; it is pointed out that BIIa does not require any particular form of words when accepting jurisdiction, that taking appropriate action is sufficient.

94. To bolster their argument, Mr Harrison and Ms Tait point to the consistency of the procedure in Hungary in this case with that reported in *Re N (Adoption: Jurisdiction)* [2016] UKSC 15, [2017] AC 167, in which there are references to the Hungarian Central Authority accepting jurisdiction by way of a letter, with no suggestion in the UKSC that this was or might be ineffective.

95. Messrs. Setright QC and Langford, on behalf of the father, point to the fact that the communication confirming the acceptance of jurisdiction came from the HCA, rather than, for instance, the IFJO or direct judicial liaison, noting that communication via the Central Authority is plainly in keeping with the overall tenor of the Regulation and is *'explicitly endorsed as being appropriate for the purposes of effecting a transfer, and, it is submitted, must be taken at face value'*. Support is derived from the combination of (a) the HCA having said, repeatedly, and before HHJ Anderson made the request, that Hungary would accept jurisdiction, (b) explicit confirmation after the request that Hungary had accepted jurisdiction, and (c) by dint of the temporary guardianship ruling of 12th December 2019 the fact that Hungary went on to exercise that jurisdiction. The sort of *'intensive assessment into the Hungarian authorities' actions, given their clear statements […], is likely to be exactly the kind of investigation which BIIa is intended to avoid'*, in particular when the investigation is undertaken by the courts of the requesting State into the actions of the court of the

requested State. Relying on a good deal of domestic and European jurisprudence, which I need not set out for present purposes, Messrs. Setright QC and Langford conclude:

> *'It is therefore submitted that, in accordance with the responses received from the Hungarian Central Authority, that the Hungarian procedure should and must be treated as following the requirements of Art. 15 and that an effective transfer of the case, as it stood at the time that the request was made, has occurred in full.'*

96. In oral submissions, Mr Setright explained that his *'reluctant view'* was that, on the strict 'is it necessary?' test for expert instruction, in relation to determining whether or not there had been an effective transfer, the answer is 'no'. Mr Setright noted that, while Mr Vine QC represented a lone voice in calling for expert instruction in relation to the Art. 15 question, even Mr Vine did not positively assert that there had been no such transfer.

97. Messrs. Vater QC and Leong, on behalf of the aunt, agree with the interpretation urged on behalf of the local authority and the father, although they express themselves in more forthright terms. The question of whether there was an effective Art. 15 transfer cannot, they argue, *'be answered in a sort of academic legal vacuum, divorced from reality'*. Everyone involved in the case, they point out, including the court, the lawyers, the parties and the Hungarian authorities have all been proceeding on the basis of an effective transfer from November 2019 until March 2021, and that this fact can be discerned, among other places, from the series of English court orders in which the fact of effective transfer is recited without any suggestion of demur from any party, in particular from the guardian, who has been represented at all times.

98. Strong evidence for the proposition that Hungary did in fact and law accept the transfer request, they assert, is derived from the fact that the Hungarian authorities themselves (and including the Hungarian Central Authority itself) clearly and explicitly considered that Hungary had accepted jurisdiction.

99. In such circumstances, it is argued on the aunt's behalf, it would be *'wrong in principle for this court to attempt to 'unpick' what was, for 18 months, the common understanding of both domestic jurisdictions, namely that the Hungarian authorities had validly, and properly, accepted jurisdiction and transfer of the proceedings'*.

100. Mr Hames QC and Miss Phillips for the mother, through the Official Solicitor, for the same reasons I have attributed to the parties with whom they join in common cause on this issue, contend that the English court *'has transferred 'the case' to Hungary pursuant to Art. 15 of BIIA'*, and that *'the Hungarian authorities have accepted the jurisdiction for the case'*.

101. Plainly, given my descriptions of their positions above, the Official Solicitor (for the mother) and those acting for the father and the aunt, in common with the local authority, oppose the suggestion that expert evidence is needed in order to resolve the question of the fact and validity of an Art. 15 BIIa transfer.

b. What is the status of Hungarian proceedings relating to Y, if any? Is further evidence required to decide this point?

102. In relation to this issue, Mr Harrison QC and Ms Tait note first of all that the relevance of a decision in relation to any Hungarian proceedings is far-reaching in the context of this case. They assert, as set out below, that any <u>new</u> proceedings (including an application for a special guardianship order) will be governed by the ordinary rules of jurisdiction, and, as Y is plainly habitually resident in this country, this will result in the clear <u>existence</u> of jurisdiction (applying Art. 5, Hague 1996); however, they also assert that the English court can only <u>exercise</u> any such jurisdiction if the proceedings in Hungary have concluded as, otherwise, the English proceedings will be caught by the *lis pendens* provisions of BIIa (being the operative instrument given that the transferred care proceedings were initiated before the end of the Brexit transition period).

103. Notwithstanding the importance of the issue, Mr Harrison and Ms Tait urge me to adopt a simple approach. In relation to arguments about the lack of evidence, they remind me that many requests for information from the HCA have been made by the local authority directly, by ICACU on the parties' behalf and on mine, over a period of months, and definitive answers to careful and specific questions have simply not been provided. Pointing instead to the evidence which the court <u>does</u> have, they assert that, cumulatively and purposively assessed, this strongly supports the suggestion that the proceedings in Hungary have concluded as:

a. the information received from Hungary demonstrates that there is no ongoing activity in the courts, nor any investigative process on the part of the GA;

b. the nature of the placement set up by the decree in Hungary suggests that it is a long-term order and placement;

c. the guardianship decree and placement with the aunt was made final.

104. Drawing on provisions of the Hungarian Civil Code, Mr Harrison and Ms Tait argue that the adjective 'temporary' applied to the placement with the aunt is to be interpreted not as meaning 'interim' or 'short-term', but rather as contrasting with the status conferred by it being 'permanent'. By way of analogy, they point to a permanent status-changing English order, such as adoption, in contrast to a long-term but non-permanent order, such as a final child arrangements order. That the HCA confirmed that the decree was made 'final' on 6 January 2020, suggested, it is argued, an end to ongoing investigation and proceedings. Nor have any updates received since that date, they contend, suggested any ongoing 'court' involvement. Rather, the repeated requests made by and via the HCA have focussed rather on giving effect to the final decree than on any ongoing judicial or quasi-judicial process.

105. Finally, Mr Harrison and Ms Tait remind me that jurisdictional issues are to be dealt with swiftly, often, if possible, summarily. The fundamental goal of the Regulation, after all, is to further the best interests of the child.

106. Mr Hames QC and Ms Phillips, for the Official Solicitor, agree with this analysis. Noting the importance of the state of the Hungarian proceedings to the *lis pendens* provisions of Art. 19(2), BIIa, their ultimate conclusion on this question is:

> *'The Official Solicitor accepts that the position is not a clear as it might have been despite the constant requests for assistance made to date. Nonetheless the Official Solicitor considers it is tolerably clear that the decree of 12 December 2019 was the last meaningful act of the Hungarian court (as defined by Article 2(1) and, apart from providing further evidence to the English court, there is no evidence that the Hungarian court was still exercising its jurisdiction over 'the case.' The court is invited to proceed to determine the issue and find that proceedings in Hungary have concluded and that accordingly therefore nothing in Article 19 prevents the court considering the*

application for special guardianship of any other further application the local authority wishes to make.'

107. In support of her urging me to determine this issue now, and so in opposition to the Part 25 application for expert opinion on this topic, the Official Solicitor contends that the question of the status of foreign proceedings, when it arises during English proceedings, is *'a question of fact to be determined on the totality of the evidence'*, reliance being made, by way of example to the judgment of Sir Mark Potter P in Re K (Rights of Custody: Spain) [2010] 1 FLR 57, in which Sir Mark (perhaps somewhat reluctantly) held that it was for him to determine an issue of Spanish law.

108. I should only contemplate adjourning for the purposes of obtaining further evidence, the Official Solicitor contends, if I am unable to determine that proceedings have concluded in Hungary.

109. The teams for each of the father, the aunt and the child contend that I do not have enough information to decide whether or not any Hungarian proceedings relating to Y have concluded. It is proposed that expert opinion is obtained on the questions, *'broadly'* put in the Part 25 application of:

'How do we establish what, if any, proceedings have begun and been determined [in Hungary]; as well as what proceedings may be ongoing?'

That question was somewhat refined in oral argument before me by the addition of additional putative questions to ascertain exactly what opportunity, if any, Y had to participate in any proceedings in Hungary and what opportunity Y and the foster carers would have to participate in any ongoing or further proceedings in Hungary.

110. Mr Vine QC and Miss McCallum, for the guardian, on whose instructions the Part 25 application was made, assert that it is clear from the extract of the local Hungarian Guardianship Authority minute dated 9th July 2021 that *'some form of local process is still underway in Hungary concerning [the aunt] and [Y]. The nature, and jurisdictional significance of that local process is, again, quite unclear.'* This lack of clarity, in combination with the lack of answers from the HCA despite multiple requests made, via a number of different channels, drove the guardian to contend for adjournment and Part 25 instruction.

111. For the father, Messrs. Setright QC and Langford also suggest that further information should be garnered via *'obtaining fuller information from the HCA and the Hungarian judicial authorities'* and that expert evidence is injected into the case via the proposed Part 25 instruction.

112. In his oral submissions, Mr Setright pointed out that is *'astonishing'* that the court and the parties had still not been provided with the 'final' decree by either the Hungarian authorities or any of the parties directly affected by the decree. Mr Setright pointed me to the decision of Knowles J in *Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request)* [2021] EWHC 1970 (Fam) which, he contended, provided some precedent for the use of an expert in not dissimilar circumstances, in order to answer questions left unanswered by virtue of an absence of assistance from the Central Authority of (in that case) another Hague 1996 signatory. Mr Setright conceded that there is no positive evidence of there being a *lis pendens* in Hungary, but cautioned me that it would be hazardous to proceed simply on the basis of the absence of evidence.

113. Messrs. Vater QC and Leong, for the aunt, contend simply but forcefully that *'this court could not safely determine, on the evidence it has, that proceedings in Hungary have both begun and concluded'*, contrasting the facts of this case with those in *Re HA* (*supra*), in which Baker J was able to find as a fact and *'on clear evidence'* that the Latvian proceedings had, indeed, concluded.

c. What is the status of the foster carers' application for a special guardianship order? Does the court have jurisdiction to deal with it?

114. The local authority, the Official Solicitor and the guardian contend that the application for special guardianship either *'remains live'* or *'should not have been dismissed for want of jurisdiction and should be reinstated'*. They agree that there is no impediment to the English court proceeding to hear the application, there being jurisdiction to do so pursuant to Y's habitual residence in England.

115. Conversely, the father contends that the application was properly dismissed as being a collateral application within care proceedings. The aunt argues that the application has

been dismissed, that there is no application for it to be reinstated and *'it should not be dealt by the English court until a decision has been made as to who has jurisdiction over the care proceedings'*.

116. The basis of the local authority's argument in favour of the court both having jurisdiction and being in a position to exercise it in relation to the special guardianship order is contingent on the court agreeing with the local authority in relation to the care proceedings, validly transferred to Hungary, no longer proceeding in that country. That being the case, and so absent the impediment of a *lis alibi pendens*, the court has jurisdiction, the local authority argues, based simply, but decisively, on Y's habitual residence.

117. The Official Solicitor propounds the same argument, as does the guardian, who adds this refinement: assuming Hungarian proceedings to have concluded, the court has jurisdiction to hear the local authority's fresh care application and any further application for a special guardianship order made by the foster carers, the court always having had jurisdiction to hear such an application, but HHJ Hillier having dismissed that first made on the basis of a determination of there being no such jurisdiction.

118. For the father, Messrs. Setright QC and Langford argue that what was transferred to Hungary by virtue of HHJ Anderson's Art. 15 BIIa decision was *'the case as it then stood'*, viz. the care proceedings. They concede (a) that the case *'as it now stands'* is *'enlarged somewhat'*, in light of the application by the foster carers for party status and permission to apply for a special guardianship order, (b) that no such application was before the court at the time of the transfer on 11th November 2019 or even in contemplation (it having been born of the subsequent delays in placing Y), and (c) that it is *'distinct from the Part IV proceedings'* (although obviously related).

119. Notwithstanding those concessions, it is argued that the application was properly dismissed for want of jurisdiction as it was made via a Form C2 within the existing care proceedings, and is therefore, by definition, a collateral application to the main cause of action. As the application was made within those proceedings, but after their transfer to Hungary, accordingly, it is argued, the court was required to dismiss the application under Art. 17.

120. In the event that the court concludes that the proposed special guardians' application is not bound up with the care proceedings (or, I interpolate, if a fresh application is made, whether freestanding (Form C100) or within the fresh care proceedings (Form C2)), it is

argued that the application should also be transferred to Hungary, in accordance with Art. 15(1) BIIa (or, depending on relevant dates, Art. 8, Hague 1996). To do otherwise, Mr Setright warns, would create *'a real risk of the simultaneous exercise of jurisdiction in relation to the same subject matter by two Member States concurrently, both of which would be considering the appropriate placement for this child'*. In this context, I am referred to the recent decision of Knowles J in *Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request)* [2021] EWHC 1970 (Fam).

121. Messrs. Vater QC and Leong, for the aunt, make a similar argument. *'Even assuming'* (which they do not concede) *'that, by reason of its private law nature, the s.14A CA 1989 application can be treated as a cause of action separate from the transferred care proceedings, this Court should not entertain the application until any request to transfer back the care proceedings has been determined, one way of the other,'* is their position, in the event that care proceedings are still underway in Hungary. While their written argument does not explicitly contemplate the scenario if I conclude that any proceedings in Hungary have now concluded, one can safely infer that Mr Vater would contend that the special guardianship order application could not proceed here in any circumstances in which such a course would give rise to competing and inconsistent judicial decisions about the same child in different jurisdictions.

d. Does the English court have jurisdiction? Can it assume it? Should it?

122. The parties' respective positions on this question can be briefly stated.

123. The local authority and the Official Solicitor contend that the court has jurisdiction to entertain the original special guardianship application (if somehow revived), a new special guardianship application and the new care proceedings by virtue of V's habitual residence in England and urge me both to confirm the existence of and to exercise that jurisdiction. As Mr Hames QC and Miss Phillips put it:

> *'The Official Solicitor agrees with Mr Vine QC that Article 15 was intended to be a swift procedure, not the cause of a jurisdictional quagmire. It was intended as an exception to the primary route to jurisdiction through habitual residence.*

> *While it is unfortunate that the Hungarian authorities have not provided better information, the simplest way out of the quagmire, it is submitted, would be to find that the transferred proceedings in Hungary have concluded and that nothing now prevents the English court considering which placement best meets [Y]'s best interests.'*

124. As to the difficulty inherent in the fact that HHJ Hillier dismissed the special guardianship application *'for want of jurisdiction'*, the guardian, supported by the local authority, suggests that this was plainly wrong. The court clearly had jurisdiction, they argue, deriving from the fact of habitual residence in England. The only real issue was whether there was a *lis pendens* such as to prevent the court from exercising that jurisdiction. The obvious, pragmatic and speediest remedy, they argue, is for me to set aside HHJ Hillier's dismissal of the application pursuant to s.31F(6) of the Matrimonial and Family Proceedings Act 1984.

125. If I continue to harbour concern in relation to the state of the proceedings in Hungary, the local authority and guardian suggest that I make a request to Hungary for the transfer back of the case, pursuant to Art. 15, BIIa.

126. Consistent with their approach to the other questions, described above, Messrs. Setright QC and Langford, for the father, and Mr Vine QC and Miss McCallum, for the guardian, assert that I cannot make this decision without further expert evidence.

127. Messrs. Vater QC and Leong for the aunt propound the simple contention that if the English court seeks to assume primary jurisdiction, it should do so only after a transfer back pursuant to an Article 15, BIIa request.

Discussion

128. This has not been a straightforward case to disentangle. The difficulties have been somewhat compounded by the fact that none of the five expert legal teams before me agrees entirely with any of the others about all four of the principal issues for the court.

129. In cases involving the welfare of children, it is even more important than in other cases that issues relating to jurisdiction and forum are raised early and are dealt with speedily. (See, e.g. Sir James Munby P in *Re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ

1112, [2016] 1 All ER 1086, [2016] 1 FLR 621, at paras. 114-122). Sadly, this case, now in its fourth year, has failed, by a very wide margin, to come even close to that ideal. The imperative of avoiding yet further delay if possible has been at the front of my mind at all points when considering this judgment.

Was there an effective Article 15 transfer?

130. There are a number of important, incontrovertible facts:

a. even before any Art. 15 decision and request was made by the English court, the HCA indicated on several occasions that Hungary would accept jurisdiction in relation to the case involving Y if asked to do so;

b. on 11th November 2019, HHJ Anderson delivered a judgment in which she concluded that *'the case should be transferred to Hungary and the Hungarian authorities have the opportunity to accept that invitation,'* and made an order reciting that *'the court requests that the courts of Hungary do now accept the request for a transfer,'* and ordering that *'the case is to be transferred to the courts in Hungary and this court will decline jurisdiction pursuant to Art. 15 once it is accepted'*;

c. on 6th December 2019, the HCA wrote to HHJ Anderson indicating that *'the stated Hungarian Central Authority accepts jurisdiction,'* and indicating that the competent local guardianship authority will be informed with a view to its taking all necessary steps including the making of a decree appointing the aunt as Y's guardian;

d. on 12th December 2019, the guardianship authority made a decree placing Y temporarily in the care of the aunt;

e. on 13th December 2019, the HCA notified the local authority of this *'decision'*;

f. on 19th December 2019, the English court noted in a recital to an order of that day that *'Hungary has accepted the Art. 15 transfer and that a temporary Guardianship Order has been made'*;

g. at all times between 19th December 2019 and receipt of Mr Vine QC's written advice, which is dated 15th June 2021, the English court, the Hungarian Central Authority and

all parties to the care case in England have proceeded on the explicit basis that the request to accept the case was validly made by England and validly accepted by Hungary.

131. Two important aspects of the Regulation should be noted. First, the jurisdictional scheme of Chapter II of BIIa is designed to operate speedily to establish which member state's courts have jurisdiction over any particular cause of action. Secondly, and interlinked this, one of the underlying purposes of the Regulation (*'in the light of the best interests of the child'*) is self-evidently to avoid a situation in which the courts of two Member States purport actively to exercise jurisdiction over the same cause of action in respect of the same child at the same time (hence the *lis pendens* provisions of Art. 19).

132. Those two facts being so, it is an extraordinary notion that:

- the courts of MS 'A' should request the courts of MS 'B' to accept the transfer of a case pursuant to Art. 15,
- the Central Authority of MS 'B' should indicate unequivocal acceptance of that request, and
- both Member States should proceed for 18 months on the basis of a common understanding that there has been a valid and effective transfer,

only for the courts of the MS 'A' (the requesting state) to conduct, at arm's length, a retrospective investigation as to whether there was, as a matter of fact and/or the law of the other MS, a valid acceptance by and transfer to MS 'B' (the requested state). Such a scenario flies in the face of the overwhelming requirement for speed and clarity in these jurisdictional matters and runs the risk of wholly undermining the inter-State comity which underpins the Regulation (the common agreement to adopt *'measures in the field of judicial cooperation'* is stated in the very first Recital to the Regulation). Yet that is exactly the scenario with which I am faced in this case.

133. In light of my observations and the circumstances described above, it seems to me that I should exercise the greatest circumspection before embarking on any granular review of the lawfulness and effectiveness of the measures which I have been told by the Central Authority of another Member State have been undertaken. I remind myself of the

strictures, in a not dissimilar context, of Sir James Munby P in *Re M (Brussels II Revised: Art 15)* [2014] 2 FLR 1372:

> *'[I]t 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.'*

134. The simple facts are as I have stated: an Art. 15 request was made, acceptance of jurisdiction was notified, and a welfare decision was made, in relation to the child and the case which were transferred.

135. Applying the autonomous BIIa definition contained in Art. 2, BIIa, and as explained in the Borrás report and by Sir James Munby in *Re N* (*supra*), it seems perfectly clear that the local Guardianship Authority amply qualifies as a 'court' for the purposes of Art. 15.

136. What jurisdiction was the Hungarian 'court' exercising? I struggle to see any merit in the argument that, absent any specific affirmation on the face of the temporary guardianship ruling of the source of its jurisdiction deriving from the transfer to it of a case from England pursuant to Art. 15(2), it cannot be assumed that this was in fact the jurisdiction exercised. The facts speak for themselves: the English court made an Art. 15 request, the HCA indicated that it had been accepted and that the local Guardianship Authority would make a ruling, and – within a matter of six days – that is exactly what the Guardianship Authority did. It is fanciful to suppose that the actions and ruling of the Guardianship Authority represented anything other than its exercising jurisdiction in the case which had been transferred. Notably, Y had never set foot in Hungary and there were no pre-existing applications or proceedings underway in Hungary in relation to her. There was no earthly reason for the Guardianship Authority to have any dealings with her except via the transfer of this case. In any event, and decisively in its own right, in my view, given the requirement for respect for and comity with our (once) fellow Member States, Dr A's email of 10th September 2021, as set out above, expressly asserts that the jurisdiction exercised was that which vested in Hungary pursuant to the Art. 15 transfer.

137. Nor can I discern any good reason to question the validity of the process secondary to the fact that communication of the fact of acceptance of the request came from the HCA and with the words, *'the stated Hungarian Central Authority accepts jurisdiction'*. First, this is exactly the process which took place in *Re N* (supra) without exciting any critical comment from either the Court of Appeal or the UKSC. Secondly, given that Art. 15(6) requires

the courts of the Member States to cooperate for the purposes of that Article *'either directly or through the central authorities'*, so the objection looks to be one more of semantics than of substance. Thirdly, even if the HCA is not, strictly, a court (as defined) (on which I cannot reach a view), a purposive interpretation of Art. 15 would in my view necessarily treat that communication as satisfying the requirement. Fourthly, and decisively, even if I am wrong in my reliance on the other three reasons, the point at which the Guardianship Authority made a substantive decision about Y, must have represented (a) its acceptance of the request, (b) its seisin, and (c) by necessary inference from its exercising of jurisdiction, its acceptance of that jurisdiction.

138. Thus, it seems to me wholly clear that the Art. 15 request made by HHJ Anderson on 11th November 2019 led to a timely, valid and effective transfer of the case to Hungary.

139. It is due to the fact that I can so readily reach this conclusion on the facts already known to the court that I dismissed the Part 25 application for expert Hungarian legal evidence on this question.

What is the status of the Hungarian proceedings? Lis alibi pendens?

140. I was urged at the hearing by those acting for the father, the guardian and the aunt to adjourn and to sanction the Part 25 instruction of an expert in Hungarian law to assist with answering this question. I declined to do so. I set out below both my reasons for so declining and my conclusion on this issue.

141. As has been seen, the Art. 15 request of HHJ Anderson led, within a short period, to the local Guardianship Authority, acting as a 'court' (as defined) considering the case and rendering a decision. Dr A has confirmed that, consistent with domestic Hungarian legislation, this was an administrative rather than a judicial act. The *'Ruling'* records that the Guardianship Office appoints the aunt as the guardian of Y, sets out that *'the start date of the temporary placement is 13 December 2019'*, and states that *'the child's place of care'* is with the aunt, at her stated address.

142. On 8th January 2020, Dr A informed the English local authority that *'on 6 January the decree has become final'*. Despite many requests, no copy of any final decree has ever been provided.

143. Of course, neither the 'temporary' nor the 'final' decrees were ultimately able to be given effect, in the sense that Y could not travel to Hungary to be placed in the aunt's care during the Covid-19 travel restrictions and has not done so since their having been lifted or relaxed.

144. In relation to the propounded necessity to instruct an expert in order to advise as to whether or not proceedings are underway in Hungary, Mr Harrison QC pointed me to this comment from one of the proposed experts responding to the initial enquiry:

> *'To find out what is the state of play with the matter in Hungary, what you need first is not an expert, but the Client who is party in the Hungarian court matter giving a poa [power of attorney] or an authorization to a person, who walks into the court and looks into the documents. Even a close relative of the party can do it. It would definitely give you a proper and up-to-date info on the status of the matter.'*

Wryly pointing out that what is needed to undertake this task is not a legal expert but simply *'a sentient human being'*, Mr Harrison added that, in any event, there is *'absolutely zero evidence'* that there is any court file to inspect, that any judicial proceedings have been commenced.

145. Mr Harrison also referred me in his oral submissions to the CJEU judgment in *Purrucker v Vallés Pérez (No 2)* [2011] Fam 312:

> *[81] According to what is permitted by provisions of its national law, the court second seised may, where the opposing parties in two sets of proceedings are the same, seek information from the party relying on the objection of lis pendens on the existence of the alleged proceedings and the content of the action. Moreover, taking into consideration the fact that Regulation No 2201/2003 is based on judicial co-operation and mutual trust, that court may advise the court first seised that an action has been brought before it, alert the court first seised to the possibility of lis pendens, and invite the court first seised to send to it information on the action pending before it and to state its position on its jurisdiction within the meaning of Regulation No 2201/2003 or to notify it of any judgment already delivered in that regard. Lastly, the court second seised will be able to approach the central authority in its member state.*
>
> *[82] If, notwithstanding efforts made by the court second seised, it has no information supporting the existence of an action brought before another court which enables it to determine the cause of*

> *that action and serves, in particular, to demonstrate the jurisdiction of the other court seised in accordance with Regulation No 2201/2003, it is the* ***duty*** *of that court, after a reasonable period of time when answers to questions raised are awaited, to proceed with the consideration of the action brought before it.*
>
> *[83] The duration of that reasonable waiting period must be determined by the court having regard above all to the interests of the child. The fact that a child is very young is one criterion to be taken into consideration in that regard: see, to that effect, Rinau v Rinau (Case C-195/08PPU) [2009] Fam 51, para 81.*
>
> *[84] It must be recalled that an objective of Regulation No 2201/2003 is to ensure, in the best interests of the child, that the court which is nearest the child and which, accordingly, is best informed of the child's situation and state of development, takes the necessary decisions.*
>
> *[85] Lastly, it must be emphasised that, under article 24 of Regulation No 2201/2003, the jurisdiction of the court of the member state of origin may not be reviewed. However, while article 19(2) of that Regulation provides that the court second seised must stay proceedings in the event of lis pendens, the specific purpose of its doing so is to enable the court first seised to rule on its jurisdiction.*

Mr Harrison highlighted the word 'duty', which I have emboldened in the cited paragraph 82 above.

146. The first request made of the HCA for detailed information in relation to the question of whether or not any proceedings were or are underway in Hungary was made on 18th June 2021. The request for that specific information has been repeated many times since, without substantive response. Most recently, on 24th September 2021, now some 10 weeks ago, the HCA indicated that it had raised the question of the local Guardianship Authority and was awaiting a response. I have heard nothing since then to suggest that there has been any further update.

147. In accordance with the *Purrucker* guidance, this court (and the parties to the proceedings) have sought information from the authorities in relation to the possible presence of ongoing proceedings which might constitute a *lis pendens*. More than a *'reasonable waiting period'* has passed. In those circumstances, it seems to me that, rather than seeking 'expert' advice in relation to whether there are ongoing proceedings (and bearing in mind the view

expressed above by one such possible expert as to what exactly that might entail), I should instead simply consider the evidence before me and, if I can do so, reach a conclusion on what is essentially a factual issue.

148. I note, first of all, that of the three parties before me who raise the spectre of a possible *lis*, one of them (the aunt) lives in Hungary and would have the access to the courts described by the putative expert. She has not produced any positive evidence to support the contention that there are ongoing proceedings of any sort in Hungary. I further note that, although there has been an open and often-used channel of communication between Hungary and England in matters relating to Y, not only has there been no affirmative answer to English questions about ongoing Hungarian proceedings, but there has been no request for any information, evidence or assistance from the English court or authorities to inject into any Hungarian case, as one might expect if there were any such proceedings.

149. Even without the answers to the questions which have repeatedly been posed, the Hungarian documents in the court's possession provide a fair amount of helpful information with which to assist in determining the question.

150. First, I have the *'Ruling'* of the Guardianship Authority *'temporarily'* placing Y in the aunt's care. This ruling contains this passage:

> *'The Guardianship Office informs the parties that that following this Ruling becoming permanent, the Guardianship Office shall take legal action to place the child with a third party. The temporary placement shall be in place until the legally binding finalisation of the child placement legal process.'*

151. We are told by the HCA that on 6th January 2020, *'the decree has become final'*. Of course, I have no reason whatever to question this statement. However, somewhat problematically, despite best and repeated efforts, the final decree has not been forthcoming. Nor, on her instructions, has the aunt ever received a copy of it.

152. What we do know, however, is that some manner of meeting took place on 9th July 2021. The minute of this suggests it to have been a meeting at the local Guardianship Authority office attended by the aunt and Dr B, Guardianship and Child Protection administrator and minute taker.

153. It seems clear, at least inferentially, that the meeting took place as a means of enabling the HCA to answer the English authorities' request for information, rather than its having been of the Guardianship Authority's own motion as part of some ongoing process, quasi-judicial or otherwise. On 24th May 2021, the local authority informed the HCA of the death of the aunt's husband and asked about her new circumstances. This request for information was then chased by further correspondence on 10th June and 18th June. On 9th July 2021, this meeting took place. The aunt was recorded as having been in attendance *'at the summons of the Guardianship Office'*, for the reason of *'the Guardianship Authority carrying out a review in the case of minor [Y] and the facts need to be established in the case'*. The non-proforma portion of the minute comprises simply the aunt's responses to *'the administrator's question'*, and deals with her circumstances, her knowledge of Y's circumstances and her aspirations in relation to Y. The information obtained in the meeting was not immediately passed on, so further chasing emails were sent on 21st July and 2nd August. On 6th August 2021, Dr C of the Guardianship Authority duly wrote to the local authority solicitor conveying the information which had been obtained during the 9th July meeting.

154. Notably, for present purposes, the minute specifically sets out the persons who must be heard *'if the Guardianship Authority entitled to the review of the temporary placement finds it reasonable to start court proceedings regarding child custody, change of child custody or termination of parental responsibility […]'*. Nothing in the minute suggests that Guardianship Authority has taken the decision to start such proceedings or that it will imminently do so.

155. I further note that if there were any proceedings ongoing in Hungary involving Y, they would almost certainly involve, as parties, the aunt and the mother, and very probably, the father (although he and the mother are not and were not married, and I do not know what impact, if any, that would have according to Hungarian law). Neither the mother nor, more importantly, given that she is both capacitous and present in Hungary, the aunt provides any positive evidence or even assertion that any proceedings are underway in Hungary.

156. Thus, I am presented with a situation in which I am told by a Central Authority that an order has become 'final', and where that same Central Authority, despite numerous requests has never confirmed or even suggested that proceedings in Hungary are ongoing. I have before me parties who could reasonably be expected to know if there are ongoing

proceedings, and they do not tell me that there are. And I have formal documents indicating what the process will be *'if'* the relevant authority *'finds it reasonable to start court proceedings'*.

157. In considering that this bank of evidence drives me to the clear view that there are no ongoing proceedings in Hungary, I note that I have undertaken a review more thorough, in fact, than the *Purrucker* guidance would suggest is necessary.

158. Accordingly, on the evidence available, I am amply able to find that there the transferred proceedings are not still ongoing in Hungary and that there are no other ongoing proceedings regarding the same subject matter.

159. In case it makes a difference to the outcome of the various applications, my finding is that there were no ongoing proceedings in Hungary as at 17th February 2021, when the foster carers applied in England for a special guardianship order, as at 27th September 2021, when the local authority issued its second Part IV CA 1989 application, and as at the date of this judgment.

160. I should say that the facts of and issues in this case are very different from those in *Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request)* [2021] EWHC 1970 (Fam) on which Mr Setright QC placed considerable reliance. Knowles J in that case was faced with a situation in which the child in question was present in, looked after by the authorities of, and subject to legal proceedings in the other state, Switzerland. The judge required information as to the detail of the options open to the Swiss court, in order to determine whether the circumstances merited a request by the English court pursuant to Art. 9, Hague 1996 that the Swiss court transfer the case to England. This contrasts with the situation with which I am faced, which is that I need to determine, as a matter of (albeit legal) fact whether or not proceedings are underway in another Member State such as to justify a plea of *lis pendens*.

161. The instruction of an expert in Hungarian law is not necessary to enable me to reach a conclusion on that specific question, hence my rejection of the Part 25 application in that respect.

What is the status of the foster carers' application for a special guardianship order? Does the court have jurisdiction to deal with it?

162. The foster carers applied on 17th February 2021 for joinder in the care proceedings and, by Form C2 for leave to apply for a special guardianship order.

163. On 9th March 2021, HHJ Hillier ordered:

> 1. *[The foster carers'] applications for permission to be joined as parties to the proceedings and for permission to make an application for a Special Guardianship Order are dismissed for lack of jurisdiction.*
>
> 2. *[The foster carers] have liberty to apply to reinstate their applications at the FCMH on 23rd March 2021 in the event that they are able to demonstrate a change in circumstances in respect of the Hungarian position.*

The *'Hungarian position'* was not defined, nor was it clear from the order (although perhaps the judge made this clear at the hearing) what would constitute a relevant *'change in circumstances in respect of'* it.

164. By the point of the case management hearing before me on 12th August 2021, the foster carers had indicated their intention to apply to reinstate their application. This is recorded in the key issues (*'[The foster carers'] application to reinstate their application for permission to apply for a special guardianship order.'*) and in the body of the order (*'[The foster carers'] application to reinstate their application for a special guardianship order is adjourned to be further considered at the FCMH commencing on 20th September 2021'*).

165. Mr Hames QC and Miss Phillips, for the mother, Mr Harrison QC and Ms Tait, for the local authority, and Mr Vine QC and Ms McCallum, for the child, assert that HHJ Hillier fell into error in dismissing the application *'for want of jurisdiction'*. There was always jurisdiction, they argued, pursuant to Y's habitual residence in England; the only question was whether the transfer of the case to Hungary had created an ongoing *lis*, during the investigation of which the English court may have been required to *'stay its proceedings'*, and at such point as *'the jurisdiction of the court first seised is established'*, the English court may have been required to *'decline jurisdiction in favour of [the Hungarian] court'*.

166. Messrs. Setright QC and Langford and Vater QC and Leong, on the other hand, contend that the application was properly dismissed as having been a collateral application within the transferred care proceedings.

167. What was transferred to Hungary? The wording of Art. 15, BIIa refers to *'the substance of the matter'* and *'the case, or a specific part thereof'*. I have set out above the observations of Cobb J in *Re S (Jurisdiction: Prorogation)* [2013] EWHC 647 (Fam), [2013] 2 FLR 1584 and of Baker J in *Re HA (A Child: BIIA, Art 15) (No 2)* [2015] EWHC 1310 (Fam), [2016] 1 FLR 966. The question arose in *Re N* (*supra*) as to whether a care case could be transferred pursuant to Art. 15, given that *'the case'* could not exist in the same way in the requested state (where, by definition, the parties and procedure would differ). Black LJ, in the Court of Appeal judgment, dealt with this issue thus:

> *[189] I need say very little about article 15 as it has been comprehensively covered by Sir James Munby P. 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.*

Baroness Hale picked up this issue and Black LJ's epithet in the UKSC judgment in the same case:

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

The 'Irish reference' referred to was that made by the Supreme Court of Ireland to the CJEU resulting in the judgment *Child and Family Agency v D (R intervening)* [2017] Fam 248. The CJEU determined that Art. 15 can indeed be used in relation to a public law child protection application, notwithstanding that *'it is a necessary consequence of a court of another member state assuming jurisdiction that an authority of that other member state thereafter commence proceedings that are separate from those brought in the first member state, pursuant to its own domestic law and possibly relating to different factual circumstances'*.

168. Whether one contextualises the interaction between England and Hungary in November and December 2019 as involving the transfer of the *'case'* or the *'problem'*, it is clear (a) that neither the *'case'* nor the *'problem'* included any private law aspect, still less any contention by or on behalf of the foster carers that Y's future should remain entwined with theirs, and (b) that, accordingly, the parties to the *'case'* did not include the foster carers, and the component parts of *'the problem'* did not include consideration of their rival claim to the aunt's.

169. Of course, an oddity of this case is that, rather than deciding whether or not to transfer the case at the outset, as the domestic jurisprudence suggests is the optimal solution, the transfer decision came towards the very end of the proceedings, at a point at which the court had determined the satisfaction of the s.31 jurisdictional threshold criteria, the parents had been ruled out as possible carers for the Y, and placement with the aunt had been assessed as not only suitable, but the single best option for Y. Confronted with a similar situation in *Re S (A Child) (No 2)* [2019] EWFC 12, [2019] 1 WLR 5045, I preferred the alternative approach of managing the transfer to an overseas placement from within domestic proceedings:

> *[37] Other things being equal – or perhaps more accurately, if one was considering this question a year ago, but armed with what we now know – the courts of the RoI would probably seem obviously "better placed" to hear the case.*
>
> *[38] However, that is not the current position. Rather: (a) proceedings have been underway for all of S's young life and for far, far longer than good practice or section 32(1)(a)(ii) of the Children Act 1989, as amended, would consider acceptable; […](e) at the point of the hearing before me in January, a final hearing was already listed which would result in final decisions being made by no later than the end of March 2019.*

[…]

[40] The choice, then, is between proceedings in England which are completely trial ready and which will be heard to conclusion with the corollary final decision for S by the end of March 2019, as against uncertainty, if the case is transferred to Ireland, as to when an equivalent position could be achieved.

[41] Faced with that choice, the balance tips decisively, in my view, to an assessment that the courts of England are "better placed" to hear S's case.

[42] The well-made arguments in relation to inconvenience for the parents and the potential legal difficulties involved in achieving recognition in the RoI of decisions and orders made in England do not cause me to waver in this conclusion. The parents' participation can fairly easily be achieved, even if they choose not to come to the country (as I have urged them to consider doing). And questions of recognition and co-operation between two member states (who so regularly deal with each other in cases such as this) are unlikely to cause more than the most transient of difficulty.

As Mr Harrison QC put it, in the current case, what was being transferred was not so much *'the problem'*, but an *'oven-ready solution'*. Unfortunately, and no-one could have predicted this, the pandemic acted to separate the *'oven-ready solution'* from the *'oven'* for a very long period, during which much else has happened.

170. I am not entirely sure why the foster carers applied for permission to apply for a special guardianship order, as, pursuant to s.14A(5)(d), CA 1989, they are entitled to apply as of right. Either way, it seems to me that it is not correct to characterise the application for (permission to apply for) a special guardianship order as a collateral application in the care proceedings. It is a freestanding cause of action, brought, not as a consequence of the existence of care proceedings, but by virtue of the applicants' status as *'local authority foster parent[s] with whom the child has lived for a period of at least one year immediately preceding the application'*. It surely makes little difference if the application is made on Form C2 (which, incidentally, is the correct form for the application actually made, i.e. for permission, whether or not there were separate ongoing care proceedings) or, as may have been appropriate had the application been intended to be freestanding and had it had been recognized that permission was not required, on Forms C1 and C13A.

171. Assuming that the court was not bound to dismiss the application (as a collateral action) nor to stay it (due to an ongoing *lis* – as I have found there not to have been), there was

surely jurisdiction to entertain the application, whether or not it was right to proceed to exercise that jurisdiction in a substantive manner: the child was clearly habitually resident in England.

172. Having made those observations, it is undoubtedly the case that HHJ Hillier did dismiss the application, and that this was *'for want of jurisdiction'*. That order has not been appealed. However, it was qualified by express permission to apply to reinstate the application in the event of *'a change of circumstances in respect of the Hungarian position'*.

173. As to the question of whether jurisdiction should be actively exercised even if it technically exists, Mr Setright QC referred me to these paragraphs in the opinion of Advocate General N Jääskinen in *Purrucker* (*supra*):

> *2. Conflicting proceedings or judgments*
>
> *[79] It seems necessary to me to draw a clear distinction between the three situations which may exist where the issue of conflicting proceedings or judgments arises, and to do so in chronological order.*
>
> *[80] First, a plea of international lis pendens may be raised where a conflict arises between several sets of proceedings pending before the courts of different member states. The present case is one such situation, since the referring court is called upon to determine whether, when the German court was seised, proceedings were already pending before a court in another member state, namely in Spain, before the Juzgado de Primera Instancia. I would point out that lis pendens ends when one set of proceedings is concluded, for whatever reason. That may arise not only if one of the two "rival" courts has given a ruling, but also if the action pending before one of them is terminated for any reason: discontinuance, settlement, dismissal for failure to take action, death of a party where a right of action is inalienable, etc.*
>
> *[81] Secondly, a conflict may exist between ongoing proceedings in one member state and a decision already delivered in another member state. In that case, the authority of res judicata must lead the court before which an action is pending to declare that that action is inadmissible on the ground that it has become devoid of purpose if the foreign judgment is capable of recognition.*
>
> *[82] Thirdly, there may be a conflict between decisions taken in different member states, following, by definition, an overlapping of jurisdictions. Even if common rules on recognition and enforcement make it possible to ensure that the effects of one prevail over those of the other, by respecting the*

> *rights acquired by one party in one of the member states, both the judgments issued will nonetheless continue to exist. It is at that stage of the dispute between the parties to the main proceedings that a question was referred to the Court of Justice in Purrucker I (Case C-256/09) [2011] Fam 254.*

While these issues did not arise before Baker J in *Re HA*, they do, Mr Setright asserts, in the present case.

174. Of course, my decision in relation to the absence of ongoing proceedings in Hungary deals with AG Jääskinen's first scenario, which does not arise absent a current *lis*. Mr Setright, however, would say that the second scenario is in play: if I entertain special guardianship proceedings in this country, there is a real risk that they will lead to a decision (i.e. long-term placement with the foster carers) which is in conflict with that of Hungary (i.e. long-term placement with the aunt). This is indeed so. Mr Harrison QC points out that the Advocate General's opinion is just that, so of advisory effect only unless and to the extent that it is explicitly absorbed into the judgment of the court, which, notably perhaps, the above observations were not.

175. The local authority and the Official Solicitor consider that if I am of the view that HHJ Hillier's dismissal of the foster carers' application *'for want of jurisdiction'* was erroneous, I am entitled simply to set it aside.

176. This is not, however, an entirely straightforward contention. The power of the Family Court to set aside an order of the Family Court derives from the Matrimonial and Family Proceedings Act 1984 ("**MFPA**"), s.31F(6):

> *(6) The family court has power to vary, suspend, rescind or revive any order made by it, including—*
>
> *(a) power to rescind an order and re-list the application on which it was made,*
>
> *(b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and*
>
> *(c) power to vary an order with effect from when it was originally made.*

Whether granting or creating some further power or, more likely in my view, simply describing pre-existing powers, FPR 2010, r.4.1(6) provides:

> *'A power of the court under these rules to make an order includes a power to vary or revoke the order.'*

177. I note that, in the context of a matrimonial finance proceedings in the Family Court, Sir James Munby P in *CS v ACS (Consent Order: Non-Disclosure: Correct Procedure)* [2015] EWHC 1005 (Fam), [2016] 1 FLR 131 concluded that, although seemingly unconstrained by the words of the statute themselves, *'the power although general is not unbounded'* (at para 11), ruling, effectively, that the jurisprudence limiting the power to set aside orders pursuant to the jurisdiction granted by the Civil Procedure Rules 1998 ("CPR") ought to apply equally to the power to set aside pursuant to MFPA (or, alternatively, Part 4, FPR 2010).

178. That jurisprudence includes *Tibbles v SIG plc (t/a Asphaltic Roofing Supplies)* [2012] EWCA Civ 518, [2012] 1 WLR 2591, in which case Rix LJ, with whom Etherton and Lewison LJJ agreed, set out various conclusions in relation to the set-aside jurisdiction, including:

> *'(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR r 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.*
>
> *(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.'*

179. Further, in *Arif v Zar* [2012] EWCA Civ 986, [2012] BPIR 948, Patten LJ said this:

> *'[27] […][F]ar from being unrestricted, the power of the court to vary or revoke one of its own orders is ordinarily limited to cases where there has been a material change of circumstances since the order was made or the original order can be shown to have been based on misstated facts or*

material non-disclosure. In most other cases the finality of the court's orders has to be respected and the proper way of challenging the order is by way of appeal.'

180. Drawing all of the above together, then, it seems to me that as at 17th February 2021, when the application was made, the English court had jurisdiction to hear it. The transferred care proceedings had, well before that date, in their new guise as the administrative Hungarian Guardianship Authority process, yielded a final ruling and come to an end. The special guardianship application was a separate cause of action, involving different parties, indeed brought by applicants who had not been party to the original proceedings, related to *'matters of parental responsibility'* and involved a child undoubtedly habitually resident in this country. Accordingly, in my judgment, the English court had jurisdiction to hear the application, pursuant to Art. 5, Hague 1996.

181. Given the existence of jurisdiction, whether the court should embark on full adjudication of the application, or, for example, seek its transfer pursuant to Art. 8, Hague 1996, is a separate question, which I consider below.

182. In the event that I conclude that this court should exercise the jurisdiction, the only question is whether I should revive the dismissed proceedings (either by setting aside the order dismissing them or by allowing the application, liberty to pursue which was specifically provided for by HHJ Hillier, *'to reinstate'* them) or require a further, fresh application to be made. I also consider this question below.

Does the English court have jurisdiction? Should the court exercise jurisdiction?

183. According to my findings and other conclusions above, there was a valid and effective Art. 15 transfer of the care proceedings to Hungary in December 2019. Those English proceedings became an administrative process in Hungary, which has concluded to the extent that there is no *lis pendens*. There is, however, a final decree, in relation to Y, placing her in the aunt's guardianship.

184. Given the absence of a *lis*, the English court undoubtedly, in my opinion, had and has jurisdiction in relation to any special guardianship proceedings relating to Y brought after the conclusion of the Hungarian process.

185. The court also has, in my judgment, jurisdiction to entertain the fresh care proceedings. The jurisdictional position in this case is no different to that in *Re HA* (*supra*). In that case, English care proceedings were transferred to the Lithuanian court pursuant to Art. 15, BIIa. The case was accepted by the Lithuanian court and thereafter closed. Baker J noted, as I have set out earlier in this judgment (a) that Art. 15 represents an exception to the general and policy-driven general basis of jurisdiction (habitual residence), and (b) that it is a 'case' which is transferred, not jurisdiction in general. There being no ongoing proceedings in Lithuania at the point of the English local authority's second application for a care order, Baker J concluded that the English court had jurisdiction in respect of that application.

186. Mr Setright QC argues that I should not exercise such jurisdiction as I consider this court to have, the mischief of which, he warns, is the potential for this court to make a decision which is incompatible with the earlier decision of another Member State. This is the second of the AG Jääskinen's potential 'conflict' scenarios. Undoubtedly, if this court now exercises a full jurisdiction in relation to Y, that scenario may very well come to pass: the court may be persuaded to accede to the application by the foster carers for special guardianship, an outcome wholly inconsistent with that mandated by the Hungarian Guardianship Authority's ruling in favour of the aunt. Mr Vater QC agrees. If this court seeks to assume primary jurisdiction, the proper approach is to make a request to Hungary to transfer the case back.

187. While this case, as it has been argued, has become a fascinating (for lawyers) and complicated debate about issues of jurisdiction and the interpretation and application of international instruments, Mr Harrison QC was astute to remind me, more than once, that the case itself is actually about the welfare of a little girl and that, as such, I must bear Recital 12 of BIIa firmly in mind:

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

From this I derive two propositions of importance. First, exceptions to the general ground of jurisdiction (which is habitual residence, founded on the criterion of proximity) should be restrictively interpreted. Second, if the jurisdictional regime in the Regulation is *'shaped in the light of the best interests of the child'*, I must keep those best interests firmly in my gaze as I navigate the Regulation and its implications on this particular case involving, as it does, this particular girl. If authority for this proposition were required, I derive it from the CJEU judgment in *E v B (Case C-436/13)* [2015] Fam 162:

> *'[45] It follows that jurisdiction in matters of parental responsibility must be determined, above all, in the best interests of the child.'*

188. Mr Harrison described his last point as *'blindingly obvious'*: it is manifestly in Y's interests, he said, that decisions about her future are made here. In reality, whatever the technical position as a matter of Hungarian law, the foster carers will not be able to litigate in the Hungarian courts. He reminded me of the words of Baroness Hale in *Re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening)* [2016] UKSC 15, [2017] AC 167:

> *'[45] It follows that the judge was wrong to accept that it followed from his decision that the Hungarian court was better placed to hear the case that it would be in the best interests of the children to transfer it. He ought to have addressed his mind to the short and long-term consequences for them of doing so and also of not doing so. […] The long-term consequence would be to rule out one possible option for their future care and upbringing, that is, remaining in their present home on a long term legally sanctioned basis, whether through adoption, or through a special guardianship order, or through an ordinary residence order. It would not be in the best interests of these children to transfer a dispute about their future to a court which would be unable to consider one of the possible outcomes, indeed the outcome which those professionals with the closest knowledge of the case and the children now consider would be best for them.'*

189. The prospect of this court reaching a conclusion which is inconsistent with that reached by the court of the Member State to which a case involving the same child was validly transferred is a troubling one. Such a situation would sit very uneasily with the very principles underpinning the Regulation.

190. However, this is not a scenario which the Member States did not contemplate when drafting, negotiating and subsequently ratifying BIIa: Art. 23(e) expressly provides for the prospect of irreconcilable judgments as a ground for non-recognition. (Further, if the

scenario does in due course arise where I am faced with an application to recognise the Hungarian order pursuant to Art. 21, BIIa, while I am still in the process of presiding over live welfare proceedings, a route map exists in relation to my deciding how to approach that question in the form of the judgment of Peter Jackson LJ in *Re E (Children)* [2020] EWCA Civ 1030, [2021] Fam 211.)

191. While allowing the existence of conflicting decisions is to be avoided where possible, I am also aware of two no less weighty imperatives. The first is the need to prevent yet further delay, which will compound the unconscionable amount of time it has taken for this case to reach the stage it has. The second is the need for a court to decide Y's future armed with the ability to contemplate and fairly to litigate the validity of all possible outcomes. These two principles go to the heart of the Regulation having been *'shaped in the light of the best interests of the child'* (Art. 19). Both of these factors point towards the English court, rather than the Hungarian court, proceeding to exercise its welfare jurisdiction. A further weighty factor is that the general ground of jurisdiction represents a significant point of principle in its own right: absent the exceptions given expression through the Articles which follow it in Chapter II, Section 2 of the Regulation, Art. 8, establishing habitual residence as the general ground of jurisdiction, recognises that the bests interests of the child incorporate *'in particular […] the criterion of proximity'*.

192. Ultimately, I agree with Mr Harrison QC. There is a real issue as to the best welfare outcome for this young child. She is, and always has been, habitually resident in this country. The courts of this country are already fully aware of the case and its complexities and stand poised to entertain a full, if necessarily speedy, analysis and evaluation of where her best interests lie. And that enquiry can consider all options, in both countries and will include the full participation of all protagonists.

193. For these reasons, I have come to the firm conclusion that this court should assume, maintain and exercise jurisdiction in relation to Y's welfare.

194. That will entail both the continuation of the recent, second care proceedings, and the adjudication of the foster carers' application for special guardianship.

195. As to the latter, however, this has been dismissed.

196. It seems to me clear that it is appropriate simply to rescind HHJ Hillier's order dismissing the application, and instead formally to accept jurisdiction in the foster carers' application for a special guardianship order.

197. HHJ Hillier expressly granted to apply to reinstate either application in the event of *'a change in circumstances in relation to the Hungarian position'*. At the point that HHJ Hillier dismissed the applications *'for want of jurisdiction'*, the judge must have been proceeding on the presumed existence of ongoing proceedings in Hungary: otherwise, there would have been no basis to dismiss (or, as might have been more in keeping both with the wording of the Regulation and with the subsequent grant of permission to apply to reinstate, to adjourn or to stay) the applications. It is now known, pursuant to my finding in this judgment that there was no pending *lis* such as to prevent the court from exercising jurisdiction. Accordingly, I see no reason not to allow the (oral) application to reinstate the application for a special guardianship order.

198. Alternatively, but leading to the same conclusion, HHJ Hillier's order would fall to be set aside on the basis of (a) a material change in circumstances (i.e. my decision in relation to exercising jurisdiction in newly issued care proceedings), and/or (b) HHJ Hillier having proceeded to dismiss on the basis of what it is now known were mistaken facts (as demonstrated by my finding that there was no ongoing *lis* at the time of the dismissal).

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Party status

199. There is no need to consider the reinstatement of the dismissed application by the foster parents for party status in the original care proceedings, since the enquiry in relation to Y's future welfare interests will henceforth be undertaken within the fresh care proceedings and the foster carers' special guardianship application.

200. Whether the foster carers should have party status in the ongoing, new care proceedings is a separate question.

201. I have concluded that they should be joined. This is for a number of reasons:

a. by virtue of this judgment, the foster parents have a live special guardianship application, which must be adjudicated on; it will be artificial to seek to maintain some

sort of separation between the care proceedings and the special guardianship application; this is a consideration of particular weight given the need to ensure that proceedings are conducted henceforth in as streamlined a manner as their essential fairness allows;

b. unlike, for example, *Re T (A Child) (Early Permanence Placement)* [2015] EWCA Civ 983, [2017] 1 FLR 330, this is not a case involving non-consensual adoption outside the family, in which the first question is usually whether, as a matter of principle, the child should be removed from her birth family and placed with prospective adopters (whether or not the child is already living with those prospective adopters), to which question the relative credentials of the adopters and merits of placement with them are not relevant;

c. rather, in this case, the child has lived with the foster carers for a length of time which, in my experience, places the case in an exceptional bracket virtually of its own, rendering very likely just the sort of qualitative comparison normally forbidden, i.e. as between a long-established, non-family placement in which the child has firm and secure attachments and a non-established, family (but not parental) placement, in which she does not; (of course this comparison does not involve value judgments being made about the intrinsic worth of the people or the places, but rather an analysis as to how each of the viable options engages with the various criteria referable to the child's welfare).

202. I will consider separately, having heard further submissions, whether there should be any restriction on the documents or types of information which are provided to the foster carers by virtue of their party status, in order better to ensure the confidentiality of irrelevant but sensitive material about the various family members.

Decision

203. Thus, I have decided that:

a. there was a valid and effective transfer of the care proceedings relating to Y from the courts of England to those of Hungary;

b. there are no proceedings in relation to Y ongoing in Hungary such as to allow a defence of *lis pendens*;

c. there is no jurisdictional impediment to the English court entertaining either the freshly issued care proceedings or the foster carers' special guardianship application;

d. in the highly unusual circumstances of this case, and notwithstanding the possibility of the court making rulings incompatible with those previously issued by another Member State, the English court should exercise jurisdiction in relation to those care proceedings and the special guardianship order application;

e. the two sets of proceedings should be heard alongside each other, the applicants in the special guardianship proceedings to be joined as respondents in the care proceedings.

204. At the hearing at which this judgment is handed down, case management directions will be made to ensure that no further time is lost in determining this little girl's future, the consequence of my decisions being that all competing options will be available to the court.

Postscript

205. It goes without saying that nothing in the above judgment should be taken as suggesting that I have reached any view whatever, provisional or otherwise, as to the placement which will better suit Y's long-term welfare interests. That difficult question is to be the subject of the next part of this case.

206. Finally, I am very grateful to leading and junior counsel, and to those in their teams who have supported them, for their immensely helpful contributions in this difficult stage of the case. I hope that, with this judgment, the case can emerge from the *'jurisdictional quagmire'* (as Mr Vine QC put it) in which it had become enmired and that the collective gaze can be refocussed on Y and her long-term future best interests.