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 their 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 Number: [2019] EWFC 12

IN THE FAMILY COURT

IN THE MATTER OF ARTICLE 15, COUNCIL REGULATION (EC) NO. 2201/2003

Date: 27th February 2019

Before :

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

- -

Between :

A Local Authority	**Applicant**
- and -	
M	
F	
The Foster Carers of S, FC1 and FC2	
S (A Minor)	**Respondents**

- -

Re S (No. 2) (Care Proceedings) (Article 15: Second Application for Second Transfer)

- -

Hearing date: 22nd January 2019

- -

APPROVED JUDGMENT

Mr. Dorian Day of counsel (instructed by Hecht Montgomery Solicitors) for the mother, M

Mr. Stephen Abberley of counsel (instructed by Morrison Spowart Solicitors) for the father, F

Mr. Alex Taylor of counsel (instructed by the legal department) for the local authority

Ms Whitehead of JWP Solicitors for the foster carers

Ms Evelyn Norman of Jones Myers Solicitors for the child, S

Introduction

1. On 22nd January 2019, within ongoing care proceedings, I heard and rejected an application made by the mother ("M") of a then 16-month old child ("S") that I request the courts of the Republic of Ireland ("RoI") to assume jurisdiction, pursuant to Article 15 of Council Regulation (EC) No. 2201/2003 ("BIIa"). This judgment sets out my reasons for having done so.

2. M's application was supported by the father ("F") but opposed by the relevant local authority ("the LA") and the children's guardian ("the CG"). The Irish Child and Family Agency ("the CFA") indicated in a letter sent by its lawyers that it *'remain[s] of the belief that the UK remains the jurisdiction better placed to hear care proceedings in respect of [S]'*. S's foster carers ("FC1 and FC2"), who have been joined as parties, expressed no strong view, although indicated a distinct desire to avoid any further delay.

3. My decision and this judgment represent the latest in an unusually long series of court decisions relating to the appropriate jurisdiction in which questions of S's future welfare are to be determined:

   a. 8th January 2018: the District Court in the Republic of Ireland granted an application that the Irish court request the English courts to assume jurisdiction;

   b. 6th February 2018: that decision was upheld on appeal in the Republic of Ireland by HHJ Donnabhain; the request was made of the English courts;

   c. 27th February 2018: MacDonald J, sitting in the Family Division of the High Court of England and Wales, made an order nisi accepting the transfer of jurisdiction;

   d. 12th April 2018: Francis J, having heard the parents' objections to the same, made a final order accepting jurisdiction – reported as [2018] EWHC 939 (Fam);

   e. 29th October 2018: Mr Damian Garrido QC, sitting as a Deputy High Court Judge, gave a judgment arising out of a hearing on 10th and 11th October 2018, rejecting the parents' application that the English court request the Irish court to assume jurisdiction, in short, to take their case back again – reported as *Re S (Care Proceedings: Article 15 Second Transfer)* [2018] EWHC 3054 (Fam);

f. 3rd December 2018: Baker LJ refused M's application to appeal the judgment of Mr Garrido QC;

g. 15th January 2019: M issued a further application that this court ask the Irish court to assume jurisdiction.

4. It seems to me that the above series of applications and appeals, on both sides of the Irish Sea, sits uncomfortably with the relative simplicity for which Munby P was advocating in *Re M (Brussels II Revised: Article 15)* [2014] 2 FLR 1372 at para 54:

> *Article 15 contemplates a relatively simple and straight forward process. Unnecessary satellite litigation in such cases is a great evil. Proper regard for the requirements of BIIR and a proper adherence to the essential philosophy underlying it, requires an appropriately summary process. Too ready a willingness on the part of the court to go into the full merits of the case can only be destructive of the system enshrined in BIIR and lead to the protracted and costly battles over jurisdiction which it is the very purpose of BIIR to avoid. Submissions should be measured in hours and not days.*

5. The most recent application was made in the context of the care proceedings relating to S having been listed for a final hearing before me beginning on 18th March 2019, so within almost exactly two months from the date of the application.

Background

6. The relevant background as at last October was set out in the judgment of Mr Garrido QC:

> *[3] M (31) and F (44) were both born in England and until recently had lived their whole lives here. On 7 July 2013, M was delivered of their daughter who was subsequently removed from their care and finally made subject to care and placement orders on 23 September 2014. She was adopted in 2016.*
>
> *[4] In May 2017 when pregnant with S, M relocated to RoI ostensibly to avoid the inevitable interest of children's services here. However, she attracted the attention of the relevant social work department there, so that when S was born on 11 September 2017 in RoI, the CFA commenced proceedings under the Child Care Act 1991 removing S into foster care. On 8 January 2018, the District Court granted an application for the transfer of jurisdiction from RoI to E&W, a decision that was upheld in the Circuit Court by HH Judge Donnabhain on appeal on 6 February.*
>
> *[5] On 27 February, the transfer request came before Mr Justice MacDonald sitting in the Family Division of the High Court of Justice in E&W and an order nisi was made accepting the transfer of jurisdiction. Thereafter Mr Justice Francis, having heard the parents' representations, made a*

final order on 12 April accepting jurisdiction. Subsequently, LA issued an application pursuant to part IV Children Act 1989 that was transferred to the Family Court sitting in the area where the orders were made for S's sister, but not before Francis J made an interim care order approving the plan for S to remain in the care of her foster carers in RoI pending final determination. Furthermore, Francis J declared that "the transfer of jurisdiction to this court under Article 15 is emphatically conclusive and this court now exercises jurisdiction as if by Art 8 of Council Regulation (EC) No. 2201/2003".

[6] At a case management hearing in the Family Court before Mrs Justice Parker on 19 June, directions were given for a psychological assessment and social work assessment of the parents together with a declaration that the parents could not go behind the opinion of a psychiatrist whose evidence was accepted by the court in the sibling's proceedings in 2014. At the same time, a final hearing was fixed to commence on 14 January 2019 preceded by an issues resolution/early final hearing on 14 December 2018, both allocated to the same Circuit Judge. Although there has been some slippage in the timetable, the proceedings remain on course for resolution in January, if not before.

[7] Meantime, M disclosed that she is pregnant with her third child "X" and I am told that the expected date of delivery is 21 November. It is common ground that in respect of X, if proceedings are issued in RoI as seems likely, the CFA does not intend to request transfer of jurisdiction to E&W, although clearly that does not prevent the Irish court making a request of its own motion.

[8] Both parents are now settled in RoI and together wish to care there for S and X.

7. Since last October, there have been a number of relevant developments:

    a. the parents have remained living in the RoI;

    b. M has given birth to her third child, X;

    c. X was made the subject of ongoing care proceedings in Ireland, brought by the CFA;

    d. X was removed from the parents' care pursuant to an interim court order and has been placed by the CFA with the same foster carers who look after S;

    e. the CFA has not sought to persuade the Irish court to request that the English court assume jurisdiction in X's case; nor has the Irish court introduced such a request of its own motion;

    f. the LA within the English proceedings has finalised its care plan, which is that S should remain living in the RoI with her current foster carers, pursuant to an English special guardianship order; importantly, so far as the parents' case is concerned, the LA is no

longer contemplating even the possibility of an adoptive placement of S together with her older sibling in England;

g. on 15th November 2018, S's foster carers ("FC1" and "FC2") were joined as parties to the English care proceedings: they seek a special guardianship order in relation to S in their favour.

8. As to the care proceedings underway in the RoI in relation to X, the update I received from the CFA, via its solicitor, at the hearing on 22nd January was this:

> *'Our section 18 care proceedings are listed for case management on Wednesday 23rd January 2019 and I hope to be in a position to fix a hearing date for the section 18 care order application thereafter. I remain unclear at this time whether or not the parents intend to contest the s.18 application but it is safe to assume they will.'*

9. I was not provided with the detail of the evidence or the type and number of the assessments in the Irish proceedings. I note that there has been disclosure into those proceedings of evidence obtained in the English proceedings and that the psychologist instructed in the English proceedings has given oral evidence at an interim hearing in the Irish proceedings.

10. The parents' position, then, is that they remain living in the RoI. M has done so since December 2017, F since January 2018. They continue to be in a relationship and seek the return of both S and X to their care, to live together as a family unit. They have no intention of returning to live in England.

11. As for S, she remains living in foster care with the carers with whom she was placed shortly after her birth.

The Law

12. BIIa establishes the default proposition that jurisdiction in cases involving parental responsibility for a child vests in the courts of the state of the child's habitual residence:

> *Article 8*
>
> ***General jurisdiction***

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.

13. The jurisdictional scheme of the Regulation allows for the possibility of transfer of a case from the court of the child's habitual residence to a court *'better placed to hear the case'*:

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.

[…]

14. Thus, the discretion to request an assumption by the RoI of jurisdiction arises if I am satisfied of three facts:

    a. that S has a *'particular connection'* with the RoI, as defined;

    b. that the courts of the RoI are *'better placed'* to hear the case; and

    c. that transfer to the courts of the RoI is in the *'best interests'* of S.

    In the present case, it is common ground that S has a *'particular connection'* with the RoI; the controversy relates to the second and third limbs: *'better placed'* and *'best interests'*.

15. When the last application was made to Mr Garrido QC, the question arose, seemingly for the first time in the courts of England and Wales, as to the meaning of recital 13, BIIa, which reads:

    > *(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.*

    Does the prohibition on transfer *'to a third court'* prevent transfer <u>back</u> to the first court, or simply transfer <u>on</u> to a new, third court? In his judgment, Mr Garrido QC answered the question in this way:

    > *[17] In my judgment, the meaning of "a third court" in recital 13 can only sensibly be "a court of a third Member State" and does not therefore preclude transfer back to the court first seised. If Recital 13 is intended to prevent more than one transfers in all circumstances, it is expressed in a rather clumsy and ambiguous choice of words to give effect to that intention. Whereas, if it is intended only to prevent the onward transfer to a third Member State, then the turn of phrase makes much more sense to my mind.*
    >
    > *[18] Once Recital 13 is set aside in this way, there is […] no other provision preventing transfer back to the court first seised. I have therefore come to the conclusion that it is open to me to request a transfer back to the RoI if the tripartite conditions in Art 15 (summarised at paragraph 9 above) are satisfied.*

    Accordingly, there is no automatic bar, whether arising by virtue of recital 13, BIIa or otherwise, to a return of jurisdiction back to the original requesting state.

16. Is there any bar on making a second Article 15 application, a first having been rejected? I can see no reason in principle to impose any such restriction.

17. What of the test in a second application? It was suggested during argument that there may be some place in the current exercise for a test akin to that set out by Munby J in *AB v JLB (Brussels II Revised: Article 15)* [2009] 1 FLR 517:

> *[44] It is not, in my judgment, enough to demonstrate that the changed circumstances might persuade the foreign court to relinquish jurisdiction under Art 15. What has to be shown, as it seems to me, is that the circumstances now are such as so entirely to change the aspect of the case as to make it highly probable that the court seised of the case will, despite having already refused an application under Art 15, now come to a different decision and relinquish the case to the court which has made the request under Art 15(2)(c). In my judgment, it must be shown that the change in circumstances is likely to be decisive.*

AB, of course, saw Munby J summarily dismissing the mother's application to the English court that it request that a court in The Netherlands transfer to England a case of which it was already seised and in relation to which the court in The Netherlands had already refused the mother's Article 15 application. In those circumstances, it is not surprising that a high bar would need to be overcome.

18. The current circumstances are somewhat different, however.

19. Whether the second Article 15 application proceeds before the same judge as heard the first application, or a different judge, as a matter of common sense, demonstration of changed circumstances will be necessary in order for the application to be seriously entertained or for the result to differ. Absent some relevant and significant change in circumstances, it would be improper identically to repeat a previously unsuccessful application, and a rather more summary approach would be likely to be taken.

20. In the current case, given that there has been some change in circumstances, rather than seeking to impose some specific test in relation to the requisite 'degree' of change in those prevailing circumstances, I have approached my task simply by considering whether the circumstances as they now present themselves cause me to evaluate any of the three relevant questions differently to Mr Garrido QC.

21. In relation to the *'best interests'* question, I note the helpful analysis of Baroness Hale in *Re N (Children) (Adoption: Jurisdiction)* [2017] AC 167, [2016] 1 FLR 1082:

> *[44] The question remains, what is encompassed in the "best interests" requirement? The distinction drawn in* In re I *[2010] 1 AC 319 remains valid. The court is deciding whether to request a transfer of the case. The question is whether the transfer is in the child's best interests. This is a different question from what eventual outcome to the case will be in the child's best interests. The focus of the inquiry is different, but it is wrong to call it "attenuated". The factors relevant to deciding the question will vary according to the circumstances. It is impossible to be definitive. But there is no reason at all to exclude the impact upon the child's welfare, in the short or the longer term, of the transfer itself. What will be its immediate consequences? What impact will it have on the choices available to the court deciding upon the eventual outcome? This is not the same as deciding what outcome will be in the child's best interests. It is deciding whether it is in the child's best interests for the court currently seised of the case to retain it or whether it is in the child's best interests for the case to be transferred to the requested court.*

The Parties' Submissions

Better placed

22. In his comprehensive and helpful written submissions on behalf of M, Mr Day sets out a long list of factors which, he says, combine to make the courts of RoI *'better placed'* than those of England and Wales to make final decisions as to S's welfare. These I summarise as follows:

    a. all of the *'assessed work'* has been conducted in Ireland; conversely, there is no ongoing nexus between the family and Leeds;

    b. the majority of the witnesses (including the parents) are in Ireland;

    c. M cannot easily travel from England for reasons of health and as she is breast-feeding X;

    d. F is employed in Ireland;

    e. the parents both live in Ireland and have engaged with Irish social services;

    f. the child lives (and has always lived) in Ireland; she has a sibling born in and living in Ireland;

    g. the current local authority proposal making English orders as a means of securing S's ongoing placement with carers in Ireland, followed by efforts to achieve recognition and/or mirror orders in Ireland is *'fraught with legal difficulty and complexity'*.

23. Mr Day also points out a number of factors which in some cases militate against transfer, but which are absent from the current case:

    a. there has been no judicial continuity in England: the case has passed through the hands of six different judges to date;

    b. the court in England has heard no evidence to date;

    c. the final hearing (at the point of the argument before me and my initial decision) was still some two months away;

    d. transfer would be unlikely to inject further delay:

        - in forensic terms, as *'the concurrent sibling proceedings in RoI are so advanced'*; or

        - in welfare terms: the child remains placed with the carers whom the LA contend should look after her in the long term.

24. Mr Abberley, for F, agrees with and adopts all of Mr Day's arguments. He also points out that there is a clear benefit in the closely-related cases in relation to both S and X proceeding in the same court.

25. Mr Taylor for the LA does not accept that the courts of the RoI are better placed to hear the case in relation to S. He points out that:

    a. the assessment work has been completed by an English LA, in English proceedings, and in accordance with English rules;

    b. a final hearing is listed and imminent;

    c. the English court has at its disposal an arsenal of possible orders which can achieve any of the realistic outcomes of the final hearing.

26. Ms Norman for the CG contends that very little of substance has changed since the decision of Mr Garrido QC. X's then imminent birth was fully in the judge's contemplation; now it has happened. The parents were always reluctant to come to England to engage in litigation; the judge concluded that their participation could be effectively ensured and protected even if they choose not to travel physically to England.

Best interests

27. Mr Day contends that many of the factors he marshals in support of his *'better placed'* argument apply with equal force to the question of *'best interests'*.

28. Mr Abberley adds to these arguments the following contentions:

   a. one of the factors which bore on the decision of Mr Garrido QC was the availability to the English court of a placement with her elder, adopted sibling among the options possible for S; this is now no longer contended for by any party, so no longer represents a reason for the case remaining in England; and

   b. FC1 and FC2 are forced by circumstances to play a part in the English proceedings relating to S (and via an English lawyer, *'at arm's length'*); it is likely that they will have to do so, at least to some extent, in the Irish proceedings relating to X; it would be very much easier if there were one set of proceedings, in one jurisdiction.

29. In relation to S's best interests referable to the question of the appropriate jurisdiction, Mr Taylor for the LA makes the forceful point that S's welfare requires speedy determination of her future.

30. Ms Norman for the CG agrees, pointing out that there is nothing to suggest that the courts of the RoI will be able achieve finality any quicker than the English courts. Ms Norman reminded me that the CFA do not consider that the Irish courts are better placed to hear S's case. The outcome of any request I make that jurisdiction is transferred might simply be a prolongation of the proceedings in this country in the event that the Irish courts do not accept the request.

Discussion

Particular connection

31. As referred to above, and as was the situation when the case was before Mr Garrido QC, there is no issue that S has *'a particular connection to'* a relevant Member State, viz., the RoI, by virtue, possibly among other factors, of its being *'the habitual residence of a holder of parental responsibility'*.

Changed circumstances

32. Circumstances have undoubtedly changed since Mr Garrido QC heard the parents' first Article 15 application.

33. Some of that change was predicted or, at the least, predictable:

    a. the then heavily pregnant M has given birth to X; thus, S has a full sibling in the RoI;

    b. X is the subject of care proceedings in Ireland; and

    c. X has been removed from her parents' care.

34. Some of the changes are more fundamental, for example:

    a. S is now placed with her full sibling, X;

    b. there is no longer any (current) likelihood of S's being placed with her adopted full sibling in England;

    c. the LA plan is for S to remain in the long-term with her current foster carers;

    d. as things stand, the only two reasonably realistic options for S's welfare now are placement with (one or more of) her parents <u>in the RoI</u> and remaining in the care of FC1 and FC2 <u>in the RoI</u>; and

    e. the LA now fully intends that jurisdiction in relation to S's future welfare transfers to the courts of the RoI, the only question being when this should happen.

Better placed

35. Given the foregoing, is the court in the RoI *'better placed'* to make final decisions about S's future welfare?

36. Militating strongly in favour of such a conclusion are the facts that S's future now seems virtually certain to lie in the RoI and any decisions beyond the final hearing are highly likely

to be made by the courts of the RoI. Further, trial of strikingly similar issues is (at some stage) going to take place in the courts of the RoI in relation to S's baby sibling, X.

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 s.32(1)(a)(ii) of the Children Act 1989 would consider acceptable;

    b. at the point of the hearing before me, more than a year had passed since the Irish court first requested the English courts to accept jurisdiction;

    c. during the intervening period, all of the necessary assessments had been undertaken and evidence obtained in order to inform the English care proceedings;

    d. this, self-evidently, involved the application of English rules of court (e.g. Part 25, FPR 2010) and assessment against the criteria contained in English legislation and jurisprudence;

    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.

39. Conversely, it was not known when the Irish proceedings in relation to the younger sibling, X, might reasonably have been expected to conclude. Nor was it established that, were S's case to be transferred, it would necessarily be able to follow the same timetable as X's or whether the assessments undertaken and evidence obtained in relation to S would be admissible either in their current form or at all within mirror care proceedings in the RoI. It is not even clear that the RoI would, in these rather unusual circumstances, accept a request for the transfer back of the case, especially when this is opposed by the CFA.

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 cooperation 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.

Best interests

43. Having declined to find that the courts of the RoI are *'better placed'* to hear the case in relation to S's future, it is not strictly necessary for me to go on to consider whether or not it would be in S's best interests for the case to be heard in the RoI.

44. Although strongly interlinked with the question of *'better placed'*, it is perhaps useful, however, to consider S's best interests separately.

45. I note that in the current cases the court is happily not obliged to consider the effect on the child of disruption to her placement, or of moving to different carers or to a different country, as a result of a transfer or retention of jurisdiction. The actual impact on S of her future being decided by a judge in England as against a judge in the RoI will be rather less far-reaching.

46. The conclusion to which I have come in the foregoing section that the courts of England and Wales are better placed than those of the RoI to hear S's case bears heavily on the question of her best interests. Self-evidently, it is likely often to be the case that it is in a child's best interests that her future is decided by the courts best placed to do so.

47. As with the previous question, of particular importance in relation to S's best interests is the fact that she has already been the subject of unconscionable delay in determining her future. If she is ultimately to remain in the care of FC1 and FC2, this factor will perhaps affect her rather less. However, it is her parents' primary contention that she can and should return to their joint care. If this can safely and appropriately happen, it should do so without further

delay. Within the currently constituted English care proceedings, all of the evidence and assessments are ready, the legal teams are assembled and court time is available in order to allow for a fair process by which final conclusions are achieved within a short period. This strongly points towards its not being in S's best interests to forego the certainty of this process in favour of the uncertainty of another.

Conclusion

48. In the unusual circumstances of the current case, I consider that the courts of the RoI are not better placed to hear the case relating to S's future welfare. Nor do I consider that it would be in S's best interests to ask the courts of the RoI to assume the jurisdiction to do so.

49. It is for these reasons that I refused the parents' application.