

Leicester City Council v S [2014]

[2014] EWHC 1575 (Fam)

08/04/2014

Barristers

Robin Barda

Court

High Court (Family Division)

Practice Areas

Public Children Law

Summary

Consideration within public law proceedings of the making of a request under Article 15, Brussels II Revised, for the relevant authority in Hungary to accept jurisdiction. Guidance provided on the role of Embassies / Central Authorities, international communications and Article 55.

Facts

During the course of care and placement proceedings the court, of its own motion, considered whether it should request the relevant authority in Hungary to accept jurisdiction pursuant to Article 15 of Council Regulation 2201/2003, namely Brussels II Revised ("BIIIR"). The mother supported such a request, whilst the local authority and Guardian opposed it.

The child had been accommodated by the local authority since 12 April 2013 after having been abandoned by the mother, who was Hungarian, for reasons which were unclear. It was not until 10 October 2013 that the local authority issued proceedings. The mother had returned to Hungary by this time.

Moylan J commented that had the case been commenced since the decision of Sir James Munby P in *Re E (A Child)* [2014] EWHC 6 (Fam), the court would have considered at a much earlier stage whether to make a request under Article 15. He added:

"...the longer the determination of any jurisdictional issue, including under Article 15, is delayed, the more established the child's situation becomes. The more established the child becomes in one jurisdiction, the more that fact in itself will gain in weight and significance. At one extreme, it might, of itself, become determinative" [para 8].

He emphasised the need for Article 15 to be considered at "the earliest opportunity", in accordance with earlier decisions in the cases of *Nottingham City Council v LM and Others* [2014] EWCA (Civ) 152, *Kent County Council v C and Others* [2014] EWHC 604 (Fam) and *Bristol City Council v AA and HA* [2014] EWHC 1022 (Fam).

Moylan J also stated that enquiries to obtain evidence from other Member States were often not pursued in a structured way. In this case there had been an assessment undertaken by an English social worker in Hungary without consideration of whether this was legal (it being unlawful in some foreign jurisdictions, as highlighted on the Children and Families Across Borders website). The local authority had also made a request by email to the Hungarian Central Authority for, among other things, the mother's medical and social work records, without knowing whether, or how, such evidence could properly be obtained under Hungarian law. Moylan J pointed to the need to have regard to the relevant regulations, the provisions of BIIR, the Evidence Regulation (namely Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters) and the Service Regulation (namely Council Regulation (EC) No 1393/2007 on the service in Member States of judicial and extrajudicial documents in civil or commercial matters).

Moylan J drew attention to the following procedural issues which can arise in care proceedings involving a child who is and/or whose parents/family members are nationals of or resident in another EU Member State [paragraph 14]:

“(a) The need to consider, before they commence such work, whether English social workers are permitted to undertake work directly in another EU Member State;

(b) The agency given primary responsibility for cooperation and communication under Chapter 4 of BIIR is the Central Authority [albeit Central Authorities should not be treated as evidence gatherers or enquiry agents – see paragraph 52];

(c) Central Authorities (or other foreign State Agencies, including Embassies) are under no obligation, and cannot be placed under any obligation, to comment on or become engaged in proceedings in England. This includes “courts” of another Member State, as defined by BIIR, which are under no obligation to make a request under Article 15, the obligation being on the courts of England and Wales as set out in *Re E (A Child)* and *Nottingham City Council v LM and Others*;

(d) Embassies and consular officials are given no role in BIIR (or the 1996 Hague Child Protection Convention) and should not be used as proxies for Central Authorities;

(e) Requests under BIIR for information (under Article 55) must be clearly focused on one or more of its provisions and must be distinguished from requests for evidence which must be made under the Evidence Regulation.”

Moylan J noted that the local authority, and possibly also the court at previous hearings, had “acted as though, in the absence of the relevant Hungarian authorities either raising any issue about this court exercising its jurisdiction or raising any concerns about the nature of the local authority's application, they could be assumed to have accepted that England is the appropriate forum and that determination here is in the best interests of the child. This, with respect, is not the right approach” [paragraph 35]. Although Article 15 does provide that a Member State can request a transfer to its jurisdiction, central Authorities in other jurisdictions may well not make such a request due to the structure of the regulation and for reasons of comity, and in any event there was an obligation on the Court with primary jurisdiction to address Article 15, as referred to in *Re E*.

Coming to consider the facts of this case, Moylan J set out that in order to determine a request under Article 15, the court had to consider three questions:

1. Does the child have a particular connection with Hungary, as defined by Article 15(3)?
2. Are the courts of Hungary better placed to hear the case?

3. Is a transfer to the courts of Hungary in the best interests of DS?

Held

He held that the child clearly had a particular connection with Hungary as he was a Hungarian national and because Hungary was the state in which the mother was habitually resident. He held that a number of important features pointed to Hungary being better placed to hear the case [paragraph 77]. The mother and father and all other extended family members lived in Hungary, spoke Hungarian and not English and indeed the parents had always lived in Hungary, save for a short period of months in England. There was a substantial body of historic evidence in Hungary held by public authorities which would be more readily available to, and more easily understood by, the courts in Hungary. Any further assessments of the mother or any other family members (and the judge's initial view was that a further assessment of the mother was likely to be necessary) would have to take place in Hungary. The Hungarian court was better placed to obtain evidence of, and was better placed to evaluate, the assistance and support which the authorities or others might be able to provide.

Moylan J further concluded that it would be in the child's best interests for the case to be heard in Hungary. He noted that this question was intimately connected with the second question (above). He also considered that the delay involved in a transfer may not be substantial, since in any event, were the proceedings to continue in England, it would be necessary for further evidence to be obtained in England.

The court therefore directed a request to be sent to the Hungarian Central Authority for that court to assume jurisdiction. He added in a postscript that this was accepted within 2/3 weeks with immediate steps being taken for the child to be placed in foster care in Hungary.

Permission

Family Law Week 