

In the matter of N (Children) [2016]

[2016] UKSC 15

13/04/2016

Barristers

Henry Setright QC
Michael Gration
Private: David Williams QC
Jacqueline Renton
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Court

Supreme Court

Practice Areas

International Children Law

Supreme Court judgment concerning the applicability of Article 15 of Brussels IIa to applications for care orders and the proper approach to the assessment of the children's best interests on applications for transfer of the proceedings.

Background to the appeal

This question in this appeal is whether the courts of England or Hungary should have jurisdiction to determine proceedings concerning the future welfare of two young girls. They are Hungarian nationals but were born and have been resident in England all their lives. Under article 8(1) of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (known as 'Brussels II Revised') the primary rule is that jurisdiction lies with the courts of the member state where the child is habitually resident. The issue is whether the exception to this rule, found in article 15, permitting the transfer of certain proceedings to a court in another member state if it is 'better placed' to hear the case and this would be in the best interests of the child, should apply in this case.

The parents of the girls are Hungarian nationals, who moved to England in 2011. The older girl ('Janetta') was born in January 2012. She came to the attention of the UK authorities when the mother gave birth to the younger girl ('Ella') in May 2013. Due to the conditions of extreme squalor in which Janetta was found to be living, and the absence of medical attention for Ella's birth, both girls were removed from their parents that day and have been living with foster carers ever since. Care proceedings were issued in January 2014 and the local authority made enquiries regarding the availability and suitability of family members in Hungary to care for the girls. It was in touch with the Hungarian Central Authority ('HCA') which proposed the transfer of the girls to Hungary and maintained that only the Hungarian authorities had the right to adopt Hungarian citizen minors. The mother returned to Hungary in 2014 and has since given birth to a third child. She applied for the care proceedings in respect of the girls to be transferred

to Hungary pursuant to article 15 of Brussels II Revised. The local authority concluded that there was no viable family placement in Hungary and applied for a placement order for the adoption of the girls, possibly by their foster parents in England, without parental consent.

The High Court granted the mother's application (supported by the HCA) to request the transfer of the proceedings under article 15. The Court of Appeal dismissed the appeal brought by the Children's Guardian and local authority. The Children's Guardian appealed to the Supreme Court. The issues were the proper approach to the assessment of the child's best interests for the purposes of article 15 and the correctness of the decision to transfer in this case.

Judgment

The Supreme Court unanimously allows the appeal, setting aside the request for a transfer of the proceedings to Hungary and returning the case to the High Court. Lady Hale gives the only judgment.

Reasons for the judgment

The context in which the question of jurisdiction arises is important. Free movement of workers and their families within the EU has led to many children residing in states of which they are not nationals. Inevitably some of them require protection from ill-treatment or neglect, or the risk of it. In every case it is necessary for the court to consider whether the case should be transferred to another state [2]. It is particularly important where the English court might exercise its power to place children for adoption without parental consent, on the basis that the welfare of the child requires this, as this power is unavailable in many other member states [3].

Although the question of the applicability of article 15 to public law care proceedings is currently the subject of a pending reference to the Court of Justice of the European Union in a case from Ireland, the Supreme Court proceeds on the assumption that article 15 is capable of applying and reviews the decisions of the courts below on their merits, rather than making a further reference. The best interests of the girls requires a decision on their future without yet further delay [35, 54]. As for the correct approach to article 15, the language is simple and clear and the court can apply it to the facts of this case without awaiting the outcome of the reference [57].

The principal issue is the nature of the 'best interests' assessment in article 15 and whether it is limited to questions relevant to the choice of forum, as the judge had found. The addition of the best interests test is intended to be an additional safeguard for the child, consistent with the rights of children found in article 24 of the Charter of Fundamental Rights of the European Union [41-42]. While a number of factors will be relevant both to the question of whether a court is 'better placed' to hear the proceedings and of whether transfer is in the 'best interests' of the child, these are separate questions and must be addressed separately. The answer to the second does not inexorably follow from the first [43]. The question is whether the transfer (rather than the eventual outcome) is in the child's best interests but the impact of the transfer on the welfare of the child and on the choices available to the court deciding the eventual outcome must be considered [44].

In the present case, the short term effect of the transfer would be to remove the girls from the home where Ella had lived for virtually her whole life and Janetta for most of hers, where they were happy and settled, to an unfamiliar foster placement in Hungary; and the long term effect would be to rule out one possible option for their future care and upbringing, which was to remain in their present home either through adoption, or a special guardianship order or ordinary residence order. This is not necessarily the outcome which the court should eventually decide, as questions of maintaining links with the girls' extended family in Hungary and ethnic background will also be important factors [45- 46]. But the judge failed to consider whether the English court could achieve the same outcomes in Hungary as the

Hungarian courts, without the need to transfer the case, which would also preserve the options to keep the girls in their present home [48-49]. The English court was also better placed to decide the outcome as it had already heard all the evidence that those involved wished to put before it [50]. These were crucial factors which had been left out of account [51].

The judge had been wrong to apply article 15 to the placement order proceedings but this did not in itself vitiate his decision to transfer the care proceedings. He had the power to stay the placement order proceedings under the wide case management powers of the court and, if it had been right to uphold the transfer, then it would clearly have been right to stay the placement order proceedings [53].

The case is therefore returned to the High Court to determine the future arrangements for the girls, with updated evidence. The full range of outcomes will be open to the court, not simply the stark choice between closed adoption and a foster placement in Hungary, and the judge will apply the extended guidance given by the Court of Appeal in this case [61].

Permission

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