

## FE v MR & Ors

**[2017] EWHC 2298 (Fam)**

14/09/2017

### **Barristers**

Alistair G Perkins

### **Court**

Family Division

### **Practice Areas**

International Children Law

Judgment of Baker J in which he made a 'highly unusual' request for transfer of a case under Article 15 of Brussels IIA that had concluded at first instance and was before the appeal court in another Member State. The Spanish parents in this case spent a number of years living with the children in England during their marriage. They returned to Spain in 2013 and separated in the same year. The mother issued divorce proceedings in Spain which included an application for the children to live with her in England. The Spanish court granted that application in the interim only and the mother and children moved to the UK in December 2013 and have lived here at all times since then. (Until 2016 they have, in accordance with the interim order of the Spanish court, spent one month each summer and one week at Christmas with the father in Spain).

A Spanish court-appointed psychologist reported to the Spanish court that both of the children had expressed a wish to live with their father. In June 2016, the Spanish court made final orders that the children should change residence to live with their father in Spain and have holiday contact with their mother.

In September 2016, the mother filed a notice of appeal against this decision and brought the children back to England. An enforcement order was granted in Spain and the father filed an application in the English court for a location order and for registration and enforcement of the Spanish orders.

Eventually, the father's application for registration and enforcement was stayed until further order, and the children were subsequently joined as parties represented through their guardian.

In their discussions with the guardian, the children (now aged 14 and 11 respectively) expressed clear views that they wished to stay in England with their mother. The Guardian reported that both children had told her, individually, that their father had persuaded them to tell the Spanish psychologist that they wanted to live in Spain.

The hearing which resulted in this judgment was listed to determine among other things:

- The jurisdiction of the courts of England and Wales to make orders concerning the children

- The status and continuation of the father's proceedings to recognise and enforce the Spanish orders
- Whether an application should be made under Article 15 of Brussels IIA to request that the Spanish court transfer the proceedings to this jurisdiction

The first two points did not require detailed consideration. It was clear that the UK courts did not have any jurisdiction given that the Spanish courts were 'first seised' within the meaning of Article 19(2) Brussels IIA. The initial divorce/children proceedings continued 'seamlessly' into the appeal now before the Spanish courts. Lifting the stay on recognition and enforcement was not actively pursued by the father and in light of the pending appeal and the children's clear views, Baker J concluded that it would not be appropriate to lift the stay at this stage.

#### Article 15

Baker J went on to consider the law relating to transfer of proceedings from one member state that has jurisdiction to another member state. Article 15 sets out that this is exceptional and can only take place where the child has a particular connection to that member state, it would be better placed to hear the case (or a specific part thereof) and it would be in the best interests of the child to transfer the matter.

His Lordship also considered the leading authority of *AB v JLB Brussels II Revised Article 15* [2009] 1 FLR 517 and the subsequent authorities flowing from that decision and distilled the following points from that case law:

##### (1) An exception

The power to transfer a case to another member state is very much an exception to the general rule that decisions regarding children should be made in member states where the children are habitually resident.

##### (2) When should the request be made?

The case law is clear that a request under Article 15 should be: 'considered alongside other jurisdiction issues at the earliest opportunity' (per Ryder LJ and Munby P in *Re M (Brussels II Revised:Art 15)* [2014] EWCA Civ 152 (at [47] and [58] respectively)). Although a transfer request may be made at any time, it will rarely be the case that another court would be better placed to hear the case when a judge has already heard and considered the evidence (per Baroness Hale of Richmond in *Re N* [2016] UKSC 16 at [50]).

##### (3) The first question - "particular connection"

The 'first question' in the test set out in *AB v JLB* relates to the necessity of establishing a particular connection with reference to the factors that are listed, exhaustively, in Article 15(3)(a) to (e).

##### (4) The second question - "better placed"

In relation to the 'better placed' question Baker J drew attention to the CJEU decision in *Child and Family Agency v D*, at [57]:

'the court having jurisdiction must determine whether the transfer of the case to that other court is such as to provide genuine and specific added value, with respect to the decision to be taken in relation to the child, as compared with the possibility of the case remaining before that court.'

##### (5) The third question - best interests

The best interests question is a separate question which must be satisfied in addition to the other two. The question must be whether the transfer is in the child's best interests not the eventual outcome to the

case (per Baroness Hale of Richmond in *Re N* at [43]).

Baker J set out at [41] of his judgment that the question of whether to transfer a case or a specific part thereof, “is a decision for the court having jurisdiction. It is for that court to evaluate whether the three conditions are satisfied. But before the court of another Member state submits a request for a transfer under Article 15, it should assess for itself whether the conditions are met. It would be wrong for a court of another Member State to submit a request in circumstances where it was not satisfied that the conditions were met.’

#### Conclusion

Baker J considered at [53] that the children: ‘manifestly have a “particular connection” with this country because they and their mother are and have for some time been habitually resident here’.

The other questions posed more difficulty. His Lordship acknowledged at [55] that: ‘at first sight it might seem that it is far too late to transfer this case’ given that it had been concluded finally in another member state and was now before the appeal courts. However, he did consider, at [60], that the courts of England and Wales would be better placed: ‘to evaluate the emotional needs and wishes and feelings of the children and carry out a comprehensive analysis of all the issues impinging on the children’s welfare.’ He noted the advantage of children being joined as parties and having the opportunity to be interviewed by the guardian and he felt that this would provide: ‘genuine and specific added value.’

Baker J concluded that similar reasons justified a finding that a transfer of the case to the courts of England and Wales would be in the best interests of the children.

His Lordship concluded at [62]:

‘I recognise that it is highly unusual for such a request to be submitted after the conclusion of the hearing at first instance and at a point when the case is before the appeal court in the Member State with jurisdiction. For the reasons set above, however, I conclude that the criteria that must be satisfied in order for transfer under Article 15 to take place are indeed satisfied in this case.’

Baker J noted however, that in reality this has only been an academic exercise. The Spanish courts will have to reach the same conclusion in order for the case to actually be transferred to this jurisdiction. To that end, he resolved to send the judgment and order to the Spanish network judge and open up communications between the two courts in line with the spirit of co-operation that Brussels IIA imposes.

To read the judgment, please click [here](#).

#### Permission

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