THE HIGH COURT

[2015 No. 1000 2P.]

IN THE MATTER OF E.L., A MINOR, BORN ON 29TH SEPTEMBER 2015

AND

IN THE MATTER OF CHILD CARE ACT 1991 (AS AMENDED)

AND

IN THE MATTER OF COUNCIL REGULATION (E.C.) NO. 2201/2003 OF 27TH NOVEMBER 2003 CONCERNING THE JURISDICTION AND THE RECOGNITION AND ENFORCEMENTS OF JUDGMENTS IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY

BETWEEN

CHILD AND FAMILY AGENCY

PLAINTIFF

AND

S.L.

DEFENDANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 4th day of October, 2017

Nature of the case

1. This is a case in which the Child and Family Agency (hereinafter "the CFA") seeks an order pursuant to Article 15(1)(b) of Council Regulation (EC) No. 2201/2003 (hereinafter "the Regulation") requesting the High Court of England and Wales to assume jurisdiction in relation to care proceedings concerning the placing of a two-year old child. The child was born in Ireland to an English mother and is currently in foster care with a family in the north west of Ireland. Her mother, the defendant, opposes the application.

2. Such cases are usually dealt with quickly under the Regulation, but there has been a considerable delay in this case because of the fact that an outcome was awaited in another case, *CFA v. J.D.* [2017] IESC 56, which went to the European Court of Justice on a reference from the Supreme Court, concerning the interpretation of Article 15 of the Regulation. The application by the CFA in the present case was originally made around December 2015. The matter had been part heard by O'Hanlon J. but given the lapse of time since then, it was decided that the matter would be fully re-heard before me. The hearing took place in June 2017. The Supreme Court decision finalising matters in the *J.D.* case was delivered on the 19th July, 2017.

Facts/Chronology

3. I will refer to the mother of the child in this case as S.L. and the child in question by the initials B.M. The child reached her second birthday last week.

4. S.L. was born in 1990 and is 27 years of age. B.M. is her third child. Her other two children are currently living with their paternal uncle and his wife/partner in the United Kingdom pursuant to a special guardianship order and are aged 5 and 4 years old. The father of the three children is a Mr. D.H., her former partner. It seems that S.L. had suffered abuse in her own childhood and that this has resulted in certain difficulties concerning her ability to care for her children. There had been concerns on the part of the UK social services in relation to her capacity to supervise the children appropriately, and, according to documents before the Court, it was their view that the two older children had been placed at significant risk as a result of poor parenting, neglect, and various types of abuse, and that S.L. was unable to recognise the risk to which the children were subject. Many of the concerns for the safety of the children concerned the conduct of S.L's partner and father of the children, D.H., including the fact that he had apparently searched the internet for sexual content in relation to father-daughter sex. The brother of S.L., a Mr. S.B., was also a cause of some concern to the authorities. There was a hearsay objection on behalf of S.L. in the proceedings before me regarding the information provided by way of UK social services' reports. However, it seems to me that it is not necessary for this Court to accept or rule upon the truth of what is contained in those reports insofar as assertions are made about neglect or abuse of the children, but I consider that the Court is entitled to conclude from those reports that, as a matter of historical fact, the social services in the UK had concerns of a particular nature and placed the older two children into care as a result of those concerns. I do not need to rule or rely any further on the truth of the contents of those reports for present purposes.

5. In June 2015, S.L.'s two older children were taken into care in England and Wales. Prior to this, and while S.L. was pregnant with her third child, a pre-birth risk assessment had been undertaken by a social worker with the relevant local council in England on the 13th May, 2015. On the 6th September, 2015, a child protection plan was made in respect of the as yet unborn baby at a pre-birth conference and a decision was taken that on the birth of the baby, the local authority would make an application for an interim care order, with a view to placing the baby in care. It was alleged that when this was made known to S.L., she made certain threats to harm or flee with the baby.

6. A short time later, also in the month of September 2015, Ms. S.L. left England and came to Ireland, with a new partner, Mr. J.C. She came to the attention of the Irish authorities on the 25th September, 2015, following a referral from a public health nurse in the northwest of Ireland. The nurse outlined concerns in relation to her presentation and indicated that S.L. had told her that her other two children were in the care of the local authority in the United Kingdom. As a result of S.L.'s presentation, she was taken to hospital by ambulance and admitted for assessment, but discharged herself the following day. On the 28th September, 2015, S.L. was re-admitted to the hospital where she remained until the birth of B.M. on the 29th September, 2015.

7. On the day after B.M.'s birth, the 30th September, 2015, an ex parte application for an emergency care order was made to the District Court for the area in which S.L. was living. On the 6th October, 2015, an application was made for an interim care order, which was granted. The order has been extended on a number of occasions by the District Court. The baby B.M. was placed with a foster family in the north-west and has remained there since. She has supervised twice-weekly access with her mother and mother's partner for two hours per visit. She has had one visit from her two siblings located in the United Kingdom. S.L. is currently receiving psychological assistance for what has been diagnosed as "emotional personality disorder". At the time of the hearing before me, S.L. and her partner had moved to Northern Ireland.

Relevant legal parameters
8. Article 8 of the Regulation provides as follows:

> "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."

This sets out the general rule, and there is no doubt but that B.M.'s habitual residence for the two years of her life has been Ireland.

9. There are a number of exceptions to this general rule that the courts of habitual residence shall have jurisdiction, of which Article 15 is one. Article 15 provides as follows:

> "Transfer to a court better placed to hear the case.
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> 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 interest of the child:
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> (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
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> (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5."

10. Sub para. 3 provides as follows:

> "the child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:
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> (a) has become the habitual residence of the child after the court referred to in para. 1 was seised; or
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> (b) is the former habitual residence of the child; or
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> (c) is the place of the child's nationality; or
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> (d) is the habitual residence of a holder of parental responsibility; or
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> (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."

11. Accordingly, there are a number of criteria to be met before a court may make a request that the court of another Member State assume jurisdiction, which are as follows:

> 1. that the child has a "particular connection" with the other Member State;
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> 2. that the court of the other Member State would be "better placed" to hear the case or a specific part of it;
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> 3. that it is in the best interests of the child that the case be transferred.

Further, it is clear that the court has a discretion as to whether to exercise the power, even if those conditions are met.

12. After the hearing of the case before me, the Supreme Court delivered judgment in a case in which the interpretation of Article 15 of the Regulation was scrutinised in light of a recent ECJ decision. In *Child and Family Agency v. J.D.* [2017] IESC 56, (judgment delivered by MacMenamin J.) the underlying facts were somewhat similar to the present case. The mother was a UK national who arrived in Ireland while expecting her second child, and the child was born here. The mother's other child had been placed in institutional care in the United Kingdom as a result of medical findings that the mother had an anti-social behaviour personality disorder and had engaged in physical violence towards the child. Those events had involved significant involvement with the health and child authorities, social workers, and health professionals in the United Kingdom. While the mother was still living in the United Kingdom, she had been subject to a pre-natal assessment by the child protection services and it had been decided that her second child should also be placed with a foster family. As a result of their taking this view, the mother moved to Ireland with the intention of settling here and her second child was born a month after her arrival. The child was provisionally placed in a foster family as a result of a court order and the mother had regular access to the child. The CFA decided to make application to the High Court to have the case transferred to the High Court of Justice in England and Wales under Article 15 of the Regulation, which application was supported by the child's *guardian ad litem*. In March 2015, the High Court authorised the Child and Family Agency to request that the High Court in England and Wales assume jurisdiction in the case but decided that the child should not actually be removed from the foster family pending final determinations. The Supreme Court granted an application to hear an appeal directly because matters of general public importance arose and because the matter concerned the welfare of a young child. The grounds on which leave to appeal were granted were as follows:

> 1. "Whether, and to what extent, the High Court, when making a decision under Article 15 of Regulation 2201/2003/EC should consider, as part of that exercise, its effect on the exercise by the mother of her E.U. right to move from one member state to another, and
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> 2. Whether the High Court, in following a previous judgment of the Supreme Court, was correct that the assessment of the child's interests, for the purpose of the decision under Article 15, was not a substantial welfare question, but was, instead, a question of forum."

13. The Supreme Court then came to the opinion that there were certain matters concerning the interpretation of the Regulation which required further clarification and decided to refer these to the Court of Justice of the European Union pursuant to Article 267 TFEU. These questions were:

> 1. "Does Article 15 of Regulation 2201/2003 apply to public law care applications by a local authority in a member state when, if the court of another Member State assumes jurisdiction, it will necessitate the commencement of separate proceedings by a different body pursuant to a different legal code and possibly, if not probably, relating to different

factual circumstances?

2. If so, to what extent, if any, should a court consider the likely impact of any request under Article 15, if accepted, upon the right of freedom of movement of the individuals affected?

3. If the 'best interests of the child' in Article 15(1) of Regulation 2201/2003 refers only to the decision as to forum, what factors may a court consider under this heading which have not already been considered in determining whether another court is 'better placed'?

4. May a court, for the purposes of Article 15 of Regulation 2201/2003 have regard to the substantive law, procedural provisions, or practice, of the courts of the relevant member state?

5. To what extent should a national court, in considering Article 15 of Regulation 2201/2003, have regard to the specific circumstances of the case, including the desire of a mother to move beyond the reaches of social services of her home state, and thereafter give birth to her child in another jurisdiction, with a social services system she considers more favourable?

6. Precisely what matters are to be considered by a national court in determining which court is best placed to determine the matter?"

14. The Court of Justice delivered its judgment on 27th October 2016, *Child and Family Agency v. J.D* (case C-428/15) (27th October 2016). First, it held that Article 15 did apply in public law care proceedings, where separate proceedings might be necessitated in the courts of another Member State. Secondly, it reformulated the second and fifth questions as a single question concerning the extent which the court to which the application is made should take account of either the effect on the right of freedom of movement, or the reasons why the mother of the child has exercised that right. The court emphasised that the provisions of Article 15 para. (1) were designed in the best interests of the child and accordingly held that, if it was possible that a transfer of the case was liable to be detrimental to those interests, that would be one of the factors to be taken into consideration in applying the Regulation. Considerations relating to other persons concerned in the case ought not, as a general rule, be taken into account, unless those considerations also had a relevance to the assessment of the risk with respect to the child. It was held that "the court having jurisdiction in a member state must not take into account, when applying that provision in a given case relating to parental responsibility, either the effect of a possible transfer of the case on the right of freedom of movement of persons other than the child in question, or the reason why the mother of that child exercised that right, prior to the court being seised, unless those considerations were such that there may be adverse repercussions on the situation of the child" (at para. 67).

15. As regards the third, fourth and sixth questions, which the Court of Justice linked together, it responded as follows:

> "In order to determine that a court of another member state with which the child has a particular connection is better placed, the court having jurisdiction in a member state must be satisfied that the transfer of the case to that other court is such as to provide genuine and specific added value to the examination of that case, taking into account, inter alia, the rules of procedure applicable in that other Member State;
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> In order to determine that such a transfer is in the best interests of the child, the court having jurisdiction in a member state must be satisfied, in particular, that the transfer is not liable to be detrimental to the situation of the child." (para. 61).

16. In the Supreme Court judgment upon the return of the case to Ireland, McMenamin J. said that it was clear that the ECJ had distinguished between the questions of "best interest" and that of "forum". He went on to say as follows:

> "30. The CJEU has held, therefore, that the question of potential detriment to a child should be treated as a discrete matter for the court hearing the application to determine. Thus, the effect of the judgment is that a trial judge, in addressing this case, should consider the situation of the child; the situation of the foster parents; whether they were willing to look after the child on a long-term basis; the attachment of the child to the foster parents; whether the mother had a viable plan to remain in Ireland; the attachment of the child to the mother; and the effect of the transfer on those relationships. Consequently, the CJEU concluded, a court hearing the matter should not limit the evaluation of the child's best interests to the question of forum. The duty of the Member State court is to assess any negative effects such a transfer might have on the familial, social and emotional attachments of the child concerned. (para. 59)."

17. Time had elapsed while the J.D. case went to the European Court of Justice and then returned to the Supreme Court. By that stage, the child had bonded with the foster parents and they had indicated that they were willing to care for the child on a long-term basis. The mother had undergone a number of courses and accepted her failings with regard to her parenting in the past. Given those particular circumstances, the Court decided to allow the appeal, noting that in such cases, the lapse of time in court proceedings could itself have a significant bearing on the potential outcome of what it described as "these particularly sensitive cases".

18. At para. 33 of his judgment, McMenamin J. listed a number of practical consequences which appeared to flow from the ruling of the Court of Justice. Among these were the following:

> • The question of "best interests" is to be dealt with in a manner apart from the consideration of "forum".
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> • Motivation for parental movement from one jurisdiction to another is to be excluded from the assessment, unless those considerations might have adverse repercussions on the situation of the child. The corollary of this, however, is that, if it is concluded that there may be adverse repercussions on the situation of the child, this is a factor which must be taken into account.
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> • A court must assess the issues underlying the question of proximity. In general, it is in the interests of the child that his or her case be dealt with in the court of their habitual residence, because this will be the jurisdiction with which the child has the greatest proximity. This strong presumption can be rebutted, however, if there is evidence of a sufficient degree of proximity between the child and another Member State so as to render the exercise of jurisdiction, pursuant to Article 8, inappropriate, and contrary to the best interests of the child.
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> • In order to ascertain whether there is a sufficient degree of proximity between a child and another Member State to justify a transfer pursuant to Article 15, a court should apply the following factors set out in the Article: Whether

there is a particular connection with another Member State which is a gateway to the power to seek a transfer; the degree and extent of the proximity to the other Member State; whether the other court is better placed, in respect of which it must be proved that the transfer of the case to that court would provide genuine and specific added value with respect to the decision to be taken; although the court may not have regard to the nature of the substantive law of the other state, but may have regard to the rules of procedure; and the court must be satisfied that the transfer of the case will not have a detrimental effect on the child.

• With regard to the last factor he said:

"The desirability of the case being determined by the court best able to do so may, therefore, be overridden by some negative effect on the transfer of a case on the circumstances or situation of the child. The court may, in the context of having assessed the negative effects on the situation of the child, decide to request the transfer of part of the case, as opposed to the entire case. This may, in particular, be appropriate where the factor of proximity with another Member State relates not to the child directly, but to one of the holders of parental responsibility."

19. Bearing in mind the approach to Article 15 as explained by the ECJ and the Supreme Court in the J.D. case, I turn now to consider the evidence in the present case.

The evidence of the CFA social worker, Mr. Paul McLaughlin

20. Mr. Paul McLaughlin, Social Work Team Leader at the CFA, who had been allocated as social worker for B.M. since her birth, swore a number of affidavits in the proceedings and also gave oral evidence. In his first affidavit, sworn on the 1st December, 2015 he said that he believed the courts in England were better placed to hear the balance of the proceedings in respect of B.M. for a number of reasons. He said that social services in the U.K. had an in-depth knowledge of the family in the context of care proceedings and child protection and had already secured special guardianship orders in respect of B.M.'s two siblings. He said that they had a vast amount of knowledge and experience of the case and the many parties involved in it, which put them in a better position to make informed decisions in relation to the long-term care of B.M. which would properly safeguard her interests and rights. Indeed, he said, had it not been for the fact that S.L. came to Ireland to avoid an application that was going to be made by the U.K. Social Services, proceedings would have been issued in the U.K. In addition to the social services, the English courts also had knowledge and experience of the family by reason of the fact that the two siblings had already been the subject of care proceedings in that jurisdiction. The majority of witnesses relevant to those child care proceedings were all in the U.K. He said that B.M. had no immediate or extended family in Ireland and that transferring the proceedings to the U.K. would allow her a more a realistic opportunity to access and form a natural bond with her siblings. He said that it was the social work team's assessment that it was unequivocally in her interests that the child care proceedings be transferred to the jurisdiction of England and Wales.

21. In a second affidavit sworn on the 13th April, 2017, Mr. McLaughlin said that the two other children continued to remain in a special guardianship arrangement with their paternal uncle, Mr. H. He said that S.L. was not availing of contact with her older children, but said that she reported that the H. family were denying her access. The family apparently wrote to her to suspend her contact due to their concern that she had placed the children in danger due to her social media postings concerning allegations of paedophilia. Mr. McLaughlin said that the CFA had advised S.L. on numerous occasions to contact the relevant English local council in relation to her access to the older children and/ or to seek legal advice. Mr. McLaughlin also said that B.M. had received one visit from her siblings, when they travelled to Ireland with their guardians and engaged in a supervised visit. He says that S.L. did not approve of the sibling contact and initial attempts to discuss this were met with hostility and anger. He says that S.L. did agree to discuss it but was not supportive of it and ultimately the visit went ahead, being in B.M.'s best interests. He says that in the day following the sibling access, the social work team had to ask S.L.'s current partner to leave the building because he became so aggressive and argumentative. Mr. McLaughlin also clarified that S.L. had been referred to a senior forensic psychologist with a view to improving her mental health, and said that she had been diagnosed with "emotional personality disorder."

22. Mr. McLaughlin also averred that due to the protracted length of the High Court proceedings, the relevant English council had said that they had been left with no choice but to consider closing the case. He averred that the family of the paternal uncle were committed to caring for B.M. on a long-term basis if it were deemed to be in her best interest to return to the U.K. and remain in long-term care. Mr. McLaughlin also listed a number of concerns on the part of the social work team with regard to S.L.'s ability to parent B.M.

23. Significantly, as regards the position of the current foster parents of B.M. in Ireland, Mr. McLaughlin averred that B.M. was currently placed with a short-term foster family who had signed a short-term contract to care for B.M. This family had only been approved as a short term foster placement. He said there was "every possibility that should a decision be made for B.M. not to return to the U.K., she may be moved from her current foster carers" in any event. He said that in any care proceedings in this jurisdiction, it is common for children to experience multiple placement moves before a long-term suitable option can be secured. In order to identify a long-term placement for a child, a family needs to be further assessed and approved in a matching process. The family then needs to go before the foster placement committee for approval as a long-term placement.

24. He conveyed that it was the definitive view of the social worker department that it was in B.M.'s best interest for the case to be transferred to the U.K. even after the long delay that had taken place in the court proceedings.

25. When giving oral evidence, Mr. McLaughlin said that the English council were aware of the case proceeding and had always been of a position that they could place the child with the paternal uncle Mr. H. and his wife/partner. It was clearly because of the lapse of time that they had "closed the case"; this simply meant that the file was closed until such time as it becomes active again. He said that there had been ongoing contact between the CFA and the Council up until the month before, but in the last month various people dealing with the file at the English end had been on sick leave.

26. He said, in relation to the current foster arrangement, that they already had a number of children in their care. He said that their current position was that they would not be able to keep B.M. He said that if the order for return were refused, the CFA would go back to them to see what the position was.

27. In cross-examination, he was asked, inter alia, about parenting capacity assessments that had been carried out in respect of S.L. during her supervised visits to B.M. He indicated that the report was not finalised but he agreed that while there were concerns throughout the access, generally it was "well enough managed". He said in general the access was not considered to be negative, but there were some issues in the context of parental capacity assessment. He accepted that the most current evidence regarding S.L's parenting capacity was physically located in Donegal, as was all the evidence regarding the development of B.M. He accepted that it was not a certainty that the child would be placed with the paternal uncle's family if she were transferred back to the U.K. and that there was a possibility that she could end up being placed with people other than relatives. He accepted that if there was a change

of placement to non-relatives, it would make little difference to the child if it was Ireland or the U.K. He accepted that there was a letter from the English council dated the 4th May, 2017 saying that the case was closed due to B.M. residing out of the U.K. since the 15th November, 2016, but he said that there were also emails and other contacts between the CFA and the Council indicating that they would be prepared to deal with B.M. if the Court made the orders sought in the present proceedings. He accepted that B.M. had Irish citizenship and was habitually resident in Ireland for the last two years. When asked about whether the current foster parents had actually said they were unavailable, he said that they were currently unavailable but he could not say that their views would not change if the order sought was not made by the Court. He said that they were prepared to be involved in any bridging plan if the child were moved to the U.K., and that they would also be available if the move was within Ireland.

The evidence of the Guardian ad litem
28. The *guardian ad litem* Mr. Harry Law put a report dated the 12th June, 2017 before the Court. Having set out the background to the birth and fostering of B.M., he said that she was thriving in her foster care arrangement and referred to the supervised visits by her mother. In that regard, he said Ms. Marguerite McDermott, Social Care Leader, supervised the visits and reported that access "remains a positive experience for mother and daughter with no adverse effects noted in terms of B.M.'s emotional presentation prior to or following access."

29. He noted the fact that two older siblings were staying with the family of the paternal uncle, referred to their visit to B.M. in January 2017, and also said that they had sent her gifts, cards and photographs of her extended family in the UK. His conclusions were as follows:

> "8.7 It is clear that B.M. has a particular connection to the UK by virtue of her extended family network and in my professional opinion it would be in her best interests, under the above circumstances, to be placed alongside her siblings under the care and supervision under the care of Mr. M.H. and Ms. L.B. Such a placement would provide B.M. with stability and permanence while promoting her sense of identity and culture. Given B.M.'s current placement stability and the strength of her emotional relationship with her current foster carers, a bridging piece would need to be undertaken by the CFA to ensure a smooth transition/ transfer to the aforementioned relative care placement in the UK, further, B.M. has no particular connection to this jurisdiction apart from her mother who resides in Northern Ireland.
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> 8.8 In my respectful submission, the transfer of these proceedings would provide genuine and added value to the examination of the case given the UK courts previous involvement with this family and the wealth of information/assessments collated by Calderdale Children's and Young Person's Service in relation to Ms. L's parenting of her other two children as well as the pre-birth assessment pertaining to B.M.'s case."

30. Mr. Law also gave oral evidence to the Court. He indicated that he had spoken to the current foster carers and they had said that as much as they had become attached to her, they would not be in a position to care for her on a long-term basis. Further, even if they changed their mind, it was not certain they would pass the requirements of the committee on foster care; the foster father is currently 60 years old, and the CFA has to take into account how young the child is at present. He said that he did not foresee that her mother would be able to care for B.M. any time in the near future because of the child protection concerns in relation to the other two children and her current mental health status. He said that if B.M. stayed in Ireland on a long-term basis, one positive would be the maintenance of her relationship with her mother. However, he said that in his experience, if the child then goes into long-term care, access is reduced significantly. He also said that the downside to her staying in Ireland would be that she would be unlikely to see her siblings very frequently. He was of the view that because she was in a secure placement and was securely attached, she would be able to transfer to another family, obviously with appropriate supervision, but he was concerned that the longer this was delayed, the more difficult it would prove to move her. In cross-examination, he said that he had not spoken to the authorities in the UK about the H. family but rather with the social work department in Donegal. He said he had talked to the Irish foster parents about the visit from the H. family and had heard that they were keen to care for B.M. and were hoping to come back to Ireland to develop the relationship with her. He accepted that there was no guarantee that B.M. would be placed with the H. family and that this would be a matter for the English court if the matter were transferred. He accepted that there were a substantial number of reports concerning S.L. and B.M. now existing in Ireland and that certain witnesses including himself, social workers, and expert reports in relation to the mother's parenting capacity, would be located within Ireland, as well as the current foster parents with whom B.M. had been living for two years.

The evidence of S.L.
31. In her first affidavit, S.L. said that from the moment of her birth she felt an instant bond with B.M. and that she loved her very much. She referred to the access she had twice a week and said that she treasured each moment she spent with her daughter. She said that she had come to Ireland in September 2015 in order to make a fresh start for herself and her child. She had found employment and a place to live with her partner (as noted earlier, by the time the hearing was taking place, she had moved to Northern Ireland). She said that she had no intention of leaving Ireland where she had now made her home. She referred to her older two children having been taken into care "on the basis of misplaced concerns by the social work authorities the UK in relation to my care of my children". She disputes many factual aspects of what is contained in the social work reports earlier referred to. She denied making any threats of harm against her unborn baby as had been described in the affidavit of Mr. McLaughlin. She averred that her grandfather was born in Cork and used to talk to her about Ireland all of the time when she was growing up and sang Irish songs. (It later transpired that, in fact, this man was a family friend and not a grandfather.)

32. She disputed that she was opposed in principle to the access visit between B.M. and her siblings; she says that in fact she requested that the social services would organise it and was merely opposed to the manner in which they arranged the access without reference to her. She set out details of certain steps she was taking with a view to improving her mental health and her parenting skills. Regarding the suggestion that she had made certain social media postings and this was why the H. family prevented her from seeing her older children, she said that as soon as she became aware of their objection she deleted the post but was still prevented from seeing the children. She said that she expected to be further frustrated in the future in terms of access to her children and that she was not entitled to legal aid in England in respect of any court application regarding the denial of access to her children. She said that she believed that through the access twice a week she had formed a strong bond with her daughter and that her daughter had formed a strong bond with her also. She said that she truly believed that it was in B.M's best interests to remain in Ireland and for the Irish courts to determine where she should ultimately live.

33. In her oral evidence, she explained why she and her partner had moved to Northern Ireland. She said that they had a twelve-month tenancy when they lived in the jurisdiction but the landlord had decided quite quickly to sell and gave them less than one week's notice. She said her partner had also been doing oyster work, but this came to an end and they decided to go to Northern Ireland where he had also been doing some agency work. She says that she now has a property rented for as long as they want as they have passed the twelve- month review period.

34. She disputed that she had come to Ireland to avoid the UK social services. She said that at the time she had just lost her other two children into care and was not in a good place emotionally. She thought that the only way she could have a fair chance was to come to Ireland. She said she went to the meeting with the UK social services in September 2015 and they gave her the report to read only ten minutes before the meeting and she was still reading it when she went into the meeting, a matter about which she had since made an official complaint. She also said that in coming to Ireland, she had wanted to get away from her ex-partner and to put her family at a distance.

35. She said that she had now been diagnosed with emotional personality disorder. She was taking medication now, whereas she had not been doing so in England. She had completed a six-week action plan in Ireland and she knew what to do if she had a crisis. She said she was in the process of paying privately to attend psychotherapy and was due to start another course in the future.

36. She said she believed that if her child went to the H. family, she would never see her. She described spending STG£300 - £400 going to England for a meeting with her children and that when she arrived she was told that the H. family had pulled out. She gave evidence that there was a recent attempt on her part to try to see them and she admitted she was wrong in trying to do so. She said that as a result, she was arrested and was before the courts on the 6th June, 2017 and that she is due back on a criminal charge for a breach of the order. When asked about her daughter, she said she was:-

> "very independent, very happy, she is not a bother to anybody; if you ask her to do something, she will go and do it, she's perfect. I couldn't ask for a better child. She is my life, same as the other two. She is very clever, she is amazing, I love her to pieces."

37. In cross examination, she accepted, inter alia, that there were no other family members in Ireland and that all her relatives were in England. She said she did not travel to Ireland to avoid the system in the UK but travelled here so that she would get a fair chance in Ireland. She had not concealed her situation, she had told the social services about herself and her situation.

38. She said if her child were transferred, she would visit her in England. She said that she would also assist with any bridging plan that was involved.

39. She was very firm that she wanted her child to stay in Ireland and that she would be able to continue to visit her.

The evidence of the attachment expert

40. Having regard to the clear instruction in the *J.D.* case that the court considering an application pursuant to Article 15 of the Regulation should consider whether a transfer of the proceedings would be detrimental for the child, a report was commissioned from an 'attachment expert' with regard to B.M.'s current attachments and the likely impact of future changes. This report was prepared by Dr. Joanne Kelly-Keogh, a chartered psychologist with training in forensic psychiatry who was worked in the mental health field for over 20 years. Dr. Kelly-Keogh interviewed various people including the foster mother and S.L., and also observed the foster mother with the infant in her foster home, and observed S.L. and the infant during two access visits.

41. Dr. Kelly-Keogh applied a measurement tool called the Development Assessment of Young Children (DAYC) in order to measure B.M.'s general abilities, which apparently is necessary to place the attachment issues in context. She found that the B.M. exceeded her developmental age in the areas of receptive language (i.e. what she appears to understand), physical development, especially growth motor skills and adaptive behaviours. B.M. did not reach her developmental age for expressive language and cognitive skills, although cognitively she was found to fall within the average range. She also measured the infant on the application of the "Child Behaviour Checklist", completed by the foster parents. This also showed that the infant's language development was underdeveloped, but Dr. Kelly-Keogh comments that there is a considerable variation on how many words children acquire before the age of 24 months and that it is too early to say whether she has a significant expressive language delay.

42. Having observed the infant interacting with her current foster parents, Dr. Kelly-Keogh described the relationship between the infant and her foster mother as within the "adequate" range of what is called the Dyadic Synchrony Range. Apparently, the range sets out scores for different levels of sensitivity/co-operation as between the carer and the child. The range goes from the top end which is "sensitive", through "adequate", to lower scores for "intervention range", and the lowest scores falling into the category of "high risk".

43. When Dr. Kelly-Keogh applied the same scale to her observations of the access between S.L. and the infant, she found that it would fall into the "at risk category" because of a "clear lack of empathy". She said that some "some feeble attempt (insufficient) is made to respond to the child" and she commented that there was a "lack of playful quality".

44. In her report, she reached the following conclusions:

> (1) The infant had a secure attachment to her foster mother and saw her as a secure base. The dyadic relationship was within the adequate range overall, with some control and unresponsiveness by the foster mother. The infant also seemed attached to the foster father and frequently asked to be lifted into his arms.
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> (2) The infant did not have a strong attachment to her birth mother and her birth mother was very overwhelming for the child. The birth mother appeared as someone with many needs and when she did not get her child's undivided attention she appeared rejected and became more controlling. The child in turn felt compelled to do as her mother requested. She said: "as with many compulsive children they smile to please the mother but change facial expression once the mother's face is turned away." She added: "however it is evident that S. loves her child very much". She said that the infant did not exhibit attachment behaviour towards J.C., her birth mother's partner.
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> (3) Currently when separated from her foster mother, the infant exhibited behaviour which fell into the realm of difficult behaviour; refusing food, refusing affection, moving away and pushing away. She also behaved compulsively, smiling when her birth mother invaded her space, and tending to sigh a lot. Given that initially there were also sleep problems this might also return. She described a number of symptoms of distress from loss of attachment that can arise in children and said that the impact of the move would best be understood with an assessment carried out six months after the move. She said that if the infant were older, she would be able to make sense of the loss of her foster mother and view this as a grieving rather than abandonment. However, there was a possibility, given her inability to make sense of her experiences at such a young age, that she would experience abandonment. Dr. Kelly-Keogh said that introducing and fortifying the relationship with her uncle and aunt for a period of time before she relocated permanently to England could overcome this. This would allow time to review and address any issues with regard to resolving separation anxiety and building relations with her siblings. She also suggested that an attachment – focussed intervention such as Theraplay could be implemented

during the bridging period.

(4) She said that it was very difficult to comment on the potential benefits to B.M. of a long term placement with her paternal uncle and aunt without an attachment assessment of the relationship they have with B.M.'s older siblings. That said, should the arrangement be assessed as positive, B.M. would have the added value of sharing her early developmental period with siblings and gaining a sense of belonging to her extended family and culture, as her parents are English and not Irish. She would also be in a stable environment in the long term.

(5) It was her belief that the child would not be impacted adversely by a disruption in access with her mother or her partner. According to the outcome of the attachment assessment, the mother appeared as a controlling mother who does not place the interest of the child before her own. She said that her observed behavioural traits would justify the diagnosis reported to her that she had a personality disorder. She was not the infant's secure base and indeed the many access visits had contributed to unsettling the infant where she is overwhelmed by her mother. The assessor advised that if she were relocated to England, it was best advised that access with her mother be discontinued for a period of at least two years until she was older and could begin to make sense of the experience in simple terms. She said that if the infant were to remain in Ireland, in an alternative foster placement, she would be "in effect floating emotionally as her birth mother would require at least two years of therapy for personality issues", and "this is on the presumption that the therapy would be beneficial".

(6) Should B.M. remain in Ireland and her family members act in her best interests, there would be value in remaining in contact with family members in the U.K. insofar as she would have a sense of belonging and an understanding of their origins.

(7) In terms of her likelihood of being able to form further attachments with any potential new carers whether family or otherwise, Dr. Kelly-Keogh said that the infant should be able to form other attachments as she now has a solid grounding and experienced a secure base. However, given her young age and inability to make sense of her experiences, any future relocation would have to have a bridging period so as to minimise feelings of abandonment.

(8) The doctor's view was if the current situation was short term and with the assertion that the uncle and aunt in the U.K. could provide a secure base of stable environment, then they would be the current option of choice, but a bridging plan would need to be put in place and supports in the U.K.

45. Dr. Kelly Keogh also gave oral evidence concerning the views expressed in her written report. In cross-examination she was asked, *inter alia*, about her comment relating to the possibility that the infant would experience abandonment if she was taken from her current foster carers. She agreed that the research would suggest that she would experience emotional pain although she would not, at a cognitively level, think of it as "abandonment". It was put to her that if B.M. were to be fostered within the same county in Ireland as where her current foster carers live, and had more constant access to her current foster parents as part of that arrangement, this would be better for the child. Dr. Kelly-Keogh said that B.M. did not have an understanding of time, and that whether her foster mother was gone for one day or one week, she would not understand. She was also asked about the concept of a bridging plan in relation to any such transition, and she approved of the idea. She said that she would normally do therapy with the child as part of a bridging process in a number of sessions, usually for about six months. When asked about her conclusion regarding the suitability of a placement of B.M. with her siblings, she agreed that her answer was essentially that she did not know, that she could not say one way or another, because she did not have any information about that family unit. When it was suggested that her recommendation that the mother would have no access to B.M. for two years was a rather dramatic view, she said that she based her opinion on her experience of seeing children with parents who were controlling. She said that the children become compulsive, in the sense that they feel compelled to act a certain way for their controlling parent, and that this is not good for their mental health. She said that S.L. was very controlling and not at all reflexive; she was not sensitive enough to understand the child's needs at the moment, because she had a lot of her own issues and one could not expect her to be able to do so. She thought that if access continued, it would be more detrimental to the infant. She said that of course she accepted that the best option would be that the child could stay with her current foster parents, but she understood that that was not an option. In re-examination, she agreed that if the infant were transferred to anybody other than the foster mother, there would be a separation and therefore a sense of loss, no matter to whom she was transferred. She said that the therapeutic response was that professionals would help with the bridging process, and in her experience the social services in England were at least equal to and, arguably, more advanced to deal with attachment issues than those in Ireland, based on her experience of the U.K. She said that the fact that the infant had formed a secure attachment to a foster mother meant she was likely to have the capacity to form another secure attachment. She said this concept is reflected the common expression, "Better to have loved and lost than never to have loved at all"; if there is no secure attachment, there is no foundation on which to build anything in the future. However, this child had formed a secure first attachment.

Decision

46. The first issue to which the Court must have regard in an application such as this is whether B.M. has a 'particular connection' with the jurisdiction of England and Wales. At a practical level, all of her relatives are English nationals, and they all live in England, with the exception of her mother who came to Ireland immediately prior to her birth and now lives in Northern Ireland. Curiously, perhaps, such factors do not feature in the list of matters to which should have regard under Article 15 in consider the issue of 'particular connection'. There is a limited list in that regard, which has been set out earlier in this judgment at paragraph 10 above. Strictly speaking, the only condition from that list which has been fulfilled is (c), namely that England is the place of the child's nationality. This child has dual nationality, but it is correct to say that one of those nationalities is English.

47. B.M. does of course also have a particular connection with Ireland, having lived here for two years; but Article 15 does not posit an "either-or" situation, which is hardly surprising, given that the requesting jurisdiction in an Article 15 application will almost always be the jurisdiction of the child's habitual residence. It is not necessary for the Court to reach the conclusion that B.M. does not have a particular connection with Ireland. It is sufficient to reach the conclusion that she also has a 'particular connection' with the jurisdiction of England and Wales.

48. As regards the question of whether the English courts would be "better placed" to deal with care proceedings concerning B.M., it was argued on behalf of the defendant that there were now many witnesses in Ireland who would have relevant evidence to give, including the social work team who had dealt with her, (which also includes Ms. McDermott who was the primary supervisor of the mother's access visits); the foster parents who have cared for her to date; and various doctors/psychologists who have been working with S.L. Further, a particular District Court in Ireland had dealt with the case on a number of occasions. It was argued on behalf of the CFA that the English social services and courts had considerable experience of the family in the years prior the move of S.L. to Ireland, and that there would be a considerable number of witnesses in that jurisdiction who would be required to give evidence. Further, the paternal uncle. Mr. M.H., and his wife, who are currently caring for B.M.'s siblings, are based in England.

49. The reality is undoubtedly that, because of the delay that has taken place before this application could be fully made, a considerable amount of evidence is now spread across two jurisdictions, and this it is not a situation where all the relevant witnesses are in one jurisdiction. No matter where this case is ultimately heard, some witnesses will have to travel, or give evidence by way of video-link, or there will have to be agreement reached on the provision of reports. However, it seems to me that given the experience of the services and courts in England with this family, together with the fact that all the extended family are in that jurisdiction, on balance, the English courts are 'better placed' to deal with these proceedings.

50. I am not persuaded by the argument that because the relevant English council has "closed the file" from an administrative point of view, there is no guarantee that the matter would be taken up by the authorities in England. Mr. McLaughlin gave sworn evidence of various types of contact with the council up to as recently as one month ago and their view that the file would be re-opened if it became "live" again. In any event, the Regulation provides for an international framework for dealing with cases of this kind, and the Court is entitled to expect that appropriate steps would be taken if the request is made by this Court and accepted by the English courts

51. This brings me to the third condition set out in Article 15, namely whether the request for transfer would be in the "best interests" of the child. As explained by the CJEU in *CFA v. J.D.*, I must be satisfied that the envisaged transfer is not liable to be detrimental to the situation of the child concerned and I must assess any potential negative effects that such a transfer might have on the familial, social and emotional attachments of the child.

52. In the present case, the starting point is that the child is very young, 2 years old. She is at an age where, in the future, she will remember little if anything of the last two years. She is too young for the question of integration into places such as school or social groupings (sports, clubs, church) to arise. The question of language does not come into the picture because, obviously, English is the language in both jurisdictions. The core issue relates to her attachment(s) with regard to carers. The evidence made it clear that she had formed a strong, secure attachment to her current foster mother. The evidence was that the current foster carers are not in a position to continue caring for B.M. and that even if they changed their mind, there is no guarantee that they would be considered suitable by a foster care committee, given the age of the husband. There is a possibility that they might change their minds, if the Court refused the order sought, and there is a further possibility that they might be approved as long-term carers in that eventuality. But as the evidence currently stands, these are only possibilities, whereas the likelihood is that B.M. will be moved from her current foster parents. The loss of that attachment will inevitably cause some loss to her; but the extent of damage that this would cause depends to an extent on how it is managed. Whether she is placed with an Irish long-term carer or an English long-term carer would make little difference to this, provided the transition is appropriately managed. Counsel on behalf of the defendant made much of the fact that there is no guarantee that, if the case is transferred to England and Wales, B.M. would necessarily be placed in the care of the paternal uncle. and his wife, with the consequent benefit of being raised with her two older siblings. This is true; there is no guarantee. However, if she is kept in Ireland, the chances of that placement are slimmer again, and the chances of frequent interaction between her siblings and B.M. if she is placed with a family in Ireland, are also slimmer. While counsel suggested there could be an "out of State placement", an option which was approved in *Western Health Board v. K.M.* [2002] 2 IR 493., and Mr. McLaughlin gave evidence that he had seen this done, particularly where the placement is across the border between Donegal and Northern Ireland, Mr. McLaughlin also indicated that such a situation would be very difficult for the Irish authorities to supervise and monitor with an English placement for the obvious reasons of geographical distance.

53. A key objection on behalf of S.L. to the transfer was that it would interfere with her access to B.M. It was argued that she was progressing well in dealing with her own problems, and that Ms. McDermott was satisfied with how the access visits had been progressing. The Court did not hear from Ms. McDermott and, unfortunately, the view of Dr. Kelly Keogh was less than positive, as has been seen. Based on the expert evidence before the Court, it would seem that the reduction or temporary loss of access visits would not be psychologically detrimental to the child, although it would undoubtedly be extremely distressing for her mother. I have the utmost sympathy for S.L., and her difficult psychological challenges, which are not of her own making, and indeed have their own tragic causes, and I fully accept the sincerity and depth of her love for B.M.. But it is the child's best interests to which the Court must have regard, and those best interests have to be determined on the evidence laid before the Court.

54. A further objection by S.L. was that she would be denied access to B.M. if she were placed with the family of the paternal uncle in England, given the history of lack of access with her older children to date. There is clearly some form of complicated history regarding the access situation in England, with which the Court is not fully conversant, and the latest chapter of which has involved S.L. being charged with breach of a court order. I do not think it would be appropriate for this Court, in an Article 15 case, to operate on the basis of any assumption that the jurisdiction of England and Wales is not prepared to sufficiently protect S.L.'s legal rights of access to B.M., if granted in due course.

55. Finally, I should perhaps say that in the *J.D.* case, the situation that had evolved by the time the matter came back before the Supreme Court in July 2017 was that the short-term foster parents had indicated that they were prepared to keep the child on a long-term basis. Thus, there was clear evidence that the child could stay with the people with whom the child had formed a strong and secure first attachment. In those circumstances, it would naturally have been detrimental to the child to disrupt that relationship. Unfortunately, the same does not apply in the circumstances of this case; on the contrary, the likelihood is that B.M. will have to be moved from her current foster parents one way or another. In the particular configuration of circumstances in the present case, it seems to me that it would be in B.M.'s best interests if the request for transfer were made and I propose to grant the reliefs sought.