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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 1989

Royal Courts of Justice
Strand, London, WC2A 2LL
03/03/2016

B e f o r e :

THE HONOURABLE MR JUSTICE BAKER

IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 1989

AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

AND IN THE MATTERS OF JL AND AO (BABIES RELINQUISHED FOR ADOPTION)

Between:

A LONDON BOROUGH COUNCIL	**Applicant**
- and -	
JL (by his children's guardian)	**Respondent**

Isabelle Watson (instructed by local authority solicitor) for the local authority in the case of JL
Henry Setright QC and Chris Barnes (instructed by FMW Law) for JL, by his children's guardian
Stuart Fuller (instructed by local authority solicitor) for the local authority in the case of AO
Frank Feehan QC and Grainne Mellon (instructed by Powells Law) for AO's mother
Frank Feehan QC and Katherine Dunseath (instructed by Berry Redmond Gordon and Penney LLP) for AO's father
Stephen Roberts (instructed by Lyons Davidson) for AO, by his children's guardian
Hearing dates: 21st December 2015 and 21st January 2016

HTML VERSION OF JUDGMENT

The Honourable Mr Justice Baker :

1. This judgment concerns two cases involving babies born to mothers from Eastern Europe but relinquished at birth for adoption. I am told that there are a number of other similar cases pending across the country. The case of AO came to my attention at an early stage on the Western Circuit. The case of JL was transferred to me, with the approval of the President, so that common issues could be considered together.

JL: Summary of Facts

2. JL's mother and putative father are Estonian. His mother, now aged 23, was brought up in Southern Estonia, but in December 2012 moved to work in Finland. In 2014, she returned to Estonia with plans to work in the UK, but while in Estonia that year met the putative father and became pregnant. In November 2014, the mother arrived in the UK and started working for a catering company in London, supplementing her income by part time agency working at weekends. She received no antenatal care and concealed her pregnancy from her employers, taking two weeks leave at the time of JL's birth. Her first contact with the medical services concerning the pregnancy was when she presented at St. George's hospital, Tooting after her waters had broken on 23rd March 2015. JL was born later that day.

3. JL and his mother were referred to social services and in conversations with the social worker the mother indicated that she did not wish to look after the baby. On 31st March, JL was voluntarily accommodated by the local authority, a London Borough Council, and placed in foster care. The mother expressed a clear wish that he should not be placed with a family member but, rather, should be adopted in this country. On 28th April, the mother registered the birth, giving an address in London as her "usual address". No father was named on the birth certificate. On 5th May, a meeting of the local authority permanency panel identified three parallel plans: (a) returning JL to his mother's care; (b) that JL be cared for by family members or (c) adoption. Following a further meeting of the panel, JL's contact with his mother was reduced to five times a week.

4. In the following weeks, the local authority social worker communicated with family members in Estonia on several occasions by telephone and email. On 3rd June, the social worker spoke by telephone to the putative father who indicated that he was not prepared to undergo DNA testing and did not want to care for the baby and, also, that neither he nor any other member of his family could provide a home. He agreed to JL's adoption in this country. It had been proposed that a family group conference be convened by telephone but, in the event, the social worker spoke to and emailed JL's maternal aunt, who initially confirmed that the maternal family were unable to offer the baby a home and that they supported his adoption in this country.

5. On 15th June, the local authority referred the case to CAFCASS for an officer of the service to be appointed pursuant to regulation 20 of the Adoption Agencies Regulations 2005 for the purposes of obtaining the mother's formal consent. On 1st July, CAFCASS duly appointed an officer. On 16th July, JL's mother signed an advance consent to adoption, pursuant to section 19 of the Adoption and Children Act 2002, in the presence of the CAFCASS officer and two witnesses. She has not had contact with JL since that date.

6. At a further meeting on 17th July, the social worker with JL's mother discussed how to obtain the views of the baby's maternal grandparents. The mother indicated that she did not want the social worker to contact the grandparents direct but said she would inform them via her sister, JL's aunt. She agreed that the social worker could email the aunt to confirm this arrangement. On 20th July, the aunt sent an email to the social worker putting herself forward as a possible carer for JL. The local authority thereupon contacted the Estonian Consulate to obtain information concerning children's services in Estonia in the event that a family assessment was required. The mother reiterated that she did not want any family member caring for the baby, nor did she agree to the Estonian children's services becoming involved with her family. The social worker warned her of the risks that, if JL was placed for adoption without notice to members of the birth family, they might subsequently challenge the placement. She therefore agreed to contact her family in Estonia. On 13th August, the social worker received an email from the maternal grandmother stating that the family was not able to care for JL and

supported his adoption. The following day, the local authority received a further email from the maternal aunt withdrawing her previous tentative proposal to care for JL, stating that she would not go against the mother's wishes, but providing information for JL's life story book.

7. On 23rd September, JL was presented to the adoption and permanence panel who recommended he be placed for adoption. On 12th October, the local authority filed an application for a placement order under section 21 of the 2002 Act. Prospective adopters were identified and it was arranged that matching would be considered by the adoption panel on 9th December.

8. However, at this point, concerns were raised about the implications for this case, and similar cases, following recent reported decisions. Following discussions, the case was transferred and listed for directions before me on 27th November, jointly with the case of AO. At that hearing, I listed the matter for a joint hearing in Bristol on 21st December. Amongst other directions, I ordered the local authority to contact the Estonian Consulate, informing them of the hearing, and putting certain questions about the jurisdiction of Estonia and the arrangements for the transfer of care of the baby to that country, should the court conclude that this was a lawful course and in the interests of the child. As a result of this development, consideration of matching by the adoption panel was postponed.

9. That day, the local authority duly emailed the embassy. On 2nd December, Ly Ruus, Chief Specialist in International Adoption Cases and Head of the Committee of International Adoption in the Department of Children and Families in Estonia, replied to the local authority's email, stating that it would be impossible to arrange an adoption of JL in Estonia in a timescale that would meet the baby's needs, adding:

> "we are very happy for the baby for finding new parents. For child for growing up and being responsible and good person, it does not matter where have you born and where do you live – all what matters is love and care you get from your parents who will be around you."

10. In answer to a further enquiry from the local authority, Ms Ruus confirmed that the Estonian authorities are pleased for JL to be adopted in the UK and that they wished to play no further part in these, or any other proceedings, relating to him.

AO: Summary of Facts

11. AO's mother and father, aged respectively 21 and 37, are Hungarian citizens. The father has resided in this jurisdiction for over two years and works at a hotel. The mother came to this country in August 2014 to join her partner, the father, and now also works at the same hotel as a chamber maid. Neither parent has plans to return to Hungary in the foreseeable future. As set out below, however, the Hungarian authorities assert that they only left Hungary shortly before the birth of the baby. They first came to the attention of the social services on 1st June 2015 when a referral was made by a midwife whom the mother had consulted because she was pregnant. The mother had requested a termination of the pregnancy, but this was not possible as she was already at 25 weeks gestation.

12. Because of concerns for the welfare of the unborn baby, the local authority started the pre-proceedings process under the public law outline. The parents were found to be working in a hotel and living in premises adjacent to their work. The pregnancy had been kept secret from their employers and co-workers. At a pre-proceedings meeting on 16th August, with an interpreter present and both parents legally represented, the mother and father stated that they had come to England to better themselves, that they were not in a position to bring up the baby themselves, that they wanted the baby adopted in England, that they did not want relatives in Hungary to know about the baby, and that they did not want the baby to have information about her origins and history. At a further meeting at the hospital on 10th September, shortly before the baby was born, it was agreed that, although the father would return to hospital when the mother gave birth, he would not enter the delivery suite. The mother said that she did not want skin to skin contact with the baby after birth. The parents said they did not even want to know the gender of the baby, and neither wanted any form of involvement after birth.

13. Meanwhile, in accordance with departmental guidance, and having regard to recent court decisions, the local authority wrote to the Hungarian authorities. On 15th September, a letter was sent in reply by Dr Csilla Lantai, Head of the Department of Child Protection and Guardianship Affairs at the Ministry of Human Resources in Budapest (which also acts as the Hungarian Central Authority) stating inter alia:

> "The expectant are Hungarian citizens so according to our national law the baby will be also Hungarian citizen. According to the Hungarian national law only Hungarian authorities have the right to decide the adoption [of] a Hungarian citizen baby. First of all we have to try to adopt the baby in Hungary and in case it would be unsuccessful we try to find a family for the baby abroad. Hungary is a member state of the Hague Convention of 29th May 1993 on Protection of Children and Cooperation and Respect of Inter-country Adoption we have to follow its rules. As Hungarian citizen's adoption by English authorities is not allowed by our national law, we plan to bring him/her into Hungary by child protection colleagues and place the baby in Hungary. So please inform us about the born of the baby and we should know the mother's Hungarian address too."

14. In reply to this letter, the local authority on 22nd September filed an application under the inherent jurisdiction of the High Court, prior to the birth of the baby, seeking a determination from the court as to the child's habitual residence following birth. The matter was referred to me and I listed the application for a preliminary hearing on 28th September, inviting the Hungarian embassy to send a consular official to that hearing. In the event, the Hungarian Central Authority informed the local authority that neither that authority nor the consulate would be able to attend the hearing, but that they stood by the opinions set out in the letter of 15th September. At the hearing, I ordered inter alia that the child upon birth should become a ward of court. I further gave permission to the local authority to place the child with foster carers on discharge from hospital, also recording that I was satisfied that in doing so I was not "requiring" the local authority so to place the child. I listed the matter for a further hearing on 23rd October and gave further directions for that hearing, including inviting the Hungarian Embassy and/or Central Authority to attend the hearing, by video link if they so wished.

15. On 16th October, the mother gave birth to her baby, who, as agreed, was removed immediately from her care. The local authority gave the baby the name "A" and placed her with foster carers. Further directions hearings took place and the case was listed for joint hearing with the proceedings concerning JL at the hearing in Bristol on 21st December. The parents adhered to their position as set out above. The Hungarian authorities were again invited to attend the hearing but did not do so. Instead, Dr Lantai set out their position in detail in a letter dated 11th December, stating inter alia:

> "It is our position that the United Kingdom cannot be considered to be the habitual residence of the child just because he/she was born there. The parents of the child were not habitually resident in the United Kingdom, since they left Hungary shortly before the birth of the baby."

Having referred to European case law, she continued:

> "Based on our national laws…the personal law of a person is the law of the state of citizenship, moreover, if someone has more than one citizenship, and one of these citizenships is Hungarian, his personal law is Hungarian."

Having referred to the UN Convention on the Rights of the Child, she continued:

> "It is our position that in case of a Hungarian citizen child born abroad, adoption authorised by the authorities at the place of birth, does not satisfy the criteria prescribed by the UN convention on the right to the child. Since the mother normally returns to Hungary after giving birth to the child and the father as well as the wider family, grand parent and other relatives of the child also live in Hungary, only the competent Hungarian guardianship authority can inspect their living conditions and their relationship to the child, and on this basis made the decision according to the best interests

of the child.

According to the legislation of Hungary, apart from adoption by a spouse or relative, a Hungarian citizen child may only be adopted in another foreign state or by the competent authorities of that state if the parent(s) and the child are habitually resident in that particular state.

Based on the above, if the parents intend to consent to the adoption of the child, it is the right of the Hungarian guardianship authority to decide which Hungarian family can adopt the child, which (also in accordance with permission of the the local authority) would best serve the cultural needs of A.

If the English court would transfer jurisdiction to the Hungarian party, the Hungarian guardianship authority would immediately make a decision to place the child at foster parents, appoint a guardian for him/her and we would organise to bring the child back to Hungary. As the parents consented to the adoption, the adoption procedure in Hungary can start immediately."

The parties' arguments

16. The two proceedings were listed for a joint hearing on 21st December 2015. As I was sitting in Bristol, it was arranged that some counsel would participate by video link. In the event, the hearing was not satisfactory. A power cut interrupted the link, and other cases in the list limited the time available. Furthermore, after I had adjourned the hearing with the intention of delivering judgment at the start of the following term, I concluded on reflection that there were several legal issues that had not been canvassed. I therefore convened a further telephone hearing on 21st January 2016 and sent a note to counsel identifying the matters on which I required further submissions. That hearing took place on 21st January 2016, following which I reserved judgment. In the case of JL, however, I was able to reach an immediate decision and duly made the order set out later in this judgment.

17. I am very grateful to all counsel and solicitors for their diligent and insightful work in this case. In particular, I would like to thank those representing the parents in the AO case, all of whom acted *pro bono*.

18. In the case of JL, the local authority and guardian (who were the only parties to appear before me) were agreed that the child should be placed for adoption in this country as quickly as possible. The local authority invited the court to make a placement order. The guardian, perhaps mindful of the issues concerning the interpretation of sections 19 and 20 of the 2002 Act discussed below, did not go so far as to make a recommendation for a placement order, but rather supported the requisite steps being taken to proceed towards matching so that JL can be placed with the prospective adopters as soon as possible.

19. In the case of AO, however, there is a sharp disagreement between the parties as to the right outcome.

20. The original intention of the local authority by starting proceedings under the inherent jurisdiction was simply to seek the court's determination as to the baby's habitual residence. The purpose of the proceedings now, however, is to facilitate the adoption of the child, either in this jurisdiction or in Hungary. On behalf of the local authority, Mr. Fuller concedes that the proceedings fall outside Council Regulation (EC) 2201/2003 ("Brussels IIA") so that the power to transfer proceedings under Article 15 of that regulation is not available. He states, however, that the local authority can see no legal (as opposed to welfare) impediment to the court, in the exercise of its inherent jurisdiction, sanctioning arrangements for AO to be taken to Hungary in accordance with the suggestion of the Hungarian authorities. He says that the issue can be starkly put – AO will be adopted either in this country or in Hungary. She will be brought up in England either as an English or possibly Anglo-Hungarian child, or in Hungary as a Hungarian child. The local authority has come to the conclusion that the right course having regard to the child's welfare is to place her with the Hungarian authorities. If she is adopted in this country, it is inevitable that she will at the appropriate time learn of her Hungarian origins and may at that time find it difficult to understand why, by being adopted in England, she has grown up outside her inherited culture. Furthermore, were she in due course to attempt to trace birth family members in Hungary, she is highly unlikely to have the necessary language or cultural background to enable her to form any kind of relationship with them. In short, for

the local authority, the child's national, cultural, linguistic, ethnic and religious background outweighs the parents' wishes and tips the balance in favour of a Hungarian future for her. Mr Fuller submits that, if the court orders that AO be placed in the care of the appropriate Hungarian authorities, it will be a matter for them whether attempts are made to trace extended family members. The local authority foresees difficulty if AO remains in this country, and the local authority and the court embark upon a process of investigating the option of placement with a family member in Hungary. Mr. Fuller contends that the Hungarian authorities would not look kindly upon such a course when their domestic law allows placement with anonymous adopters if that is what the parents wish to happen.

21. The parents' position is very different. They are not married and moved to England in order to obtain better paid work and hoping for a better life. They wish the same for their daughter. They both wish her to be placed with prospective adopters in this country without delay. They do not want their respective family members being notified of her birth, nor for any of them to care for the child in the long term. They say that all family members are facing financial difficulties and would therefore be unable to care for the baby. It is also argued on their behalf that there is a significant risk that A will suffer psychological harm if placed within the extended family in circumstances where she is likely to know that her parents wanted her to be adopted and where she is likely to continue to come into direct contact with them in the long term. There is also the further risk of damage to the parents' relationships with their extended family and potential harm which the parents may suffer as a result of the child being placed within the family in circumstances where they want her adopted. It is therefore submitted by Mr. Feehan QC and his juniors on behalf of the parents that it cannot be said that this would be in the best interests of either the child or the parents.

22. Furthermore, it is the parents' wish for the child to be adopted in this jurisdiction. They do not consent to an adoption in Hungary. Although the parents want the child to be adopted there are no adoption or placement applications currently before the court. Contrary to the interpretation favoured by the local authority, it is contended on behalf of the parents that the current proceedings fall within the ambit of Brussels IIA and could therefore be transferred under Article 15 of that regulation, were the court to find that the provisions of that article are satisfied. The parents submit, however, that the provisions of Article 15 are not satisfied, that AO does not have a particular connection with Hungary and, furthermore, that Hungary is not better placed to hear the case because any transfer is likely to lead to a delay in a final decision as to her future. Furthermore, applying the legal principles concerning forum non conveniens, it is submitted that the balance of convenience firmly lies in this court retaining jurisdiction.

23. On behalf of the guardian, Mr Roberts also proceeds on the basis that these proceedings do fall within the Brussels IIA regulation. He submits that the local authority is neither seeking a placement order nor taking any steps preparatory to an adoption placement which would take the proceedings outside the regulation. The guardian, however, advances a different case on the application of Article 15 from that advanced on behalf of the parents. He submits that AO, as a Hungarian national, plainly has a "particular connection" with that country and submits that the child's cultural heritage is vitally important. She does not yet have any sufficient connection with the UK to weigh in the balance. She has no close ties with this country so there are no gravitational factors to tend to favour her remaining here (for example, the presence of siblings or extended family or the establishment of other ties to social, educational or cultural life). The guardian is satisfied with the responses from the Hungarian authorities as to the arrangements which will be put in place to ensure her future care and welfare. The guardian therefore concludes that she is a Hungarian child whose future should lie in Hungary and in all the circumstances supports an invitation to the appropriate Hungarian court to assume jurisdiction. He further supports the local authority's case that the court should order that AO be taken to Hungary.

The issues

24. These two cases raise several issues, some common to both, others arising in respect of one or the other. The common issues are: (1) In cases involving babies "relinquished" for adoption by their parents, what jurisdiction does the court have to make orders facilitating such placements? (2) What factors must be taken into account when making decisions about relinquished babies, what are the possible outcomes, and what procedures should be followed? (3) Where a child born to nationals of a foreign country has been placed voluntarily in the care of

a local authority, whether with a view to adoption or otherwise, is the authority under an obligation under the Vienna Convention on Consular Relations 1963 to inform the consular officials of that country about the placement? In the case of JL, the further issues are: (1) Does the court have jurisdiction to make a placement order? (2) What order, if any, should be made in this case? In the case of AO, the further issues are: (1) Is it open to the court to transfer jurisdiction to Hungary? (2) Is it open to the court to make an order permitting the local authority to send AO to Hungary? (3) In the light of its answers to the two previous questions, what order, if any, should the court make?

Statutory Framework

25. The statutory provisions governing adoption are set out in the Adoption and Children Act 2002. A number of those provisions are relevant to one or both of these cases and it is convenient to set them out at this point.

26. S.1 headed "Considerations applying to the exercise of powers" provides inter alia as follows

> (1) Subsections (2) to (4) apply whenever a court or adoption agency is coming to a decision relating to the adoption of a child.
>
> (2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.
>
> (3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.
>
> (4) The court or adoption agency must have regard to the following matters (among others) –
>
> (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
>
> (b) the child's particular needs,
>
> (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
>
> (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
>
> (e) any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering,
>
> (f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including –
>
> > i. the likelihood of any such relationship continuing and the value to the child of doing so,
> >
> > ii. the ability and willingness, of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
> >
> > iii. the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.
>
> (5) In placing a child for adoption, an adoption agency in Wales must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.

(6) In coming to a decision relating to the adoption of a child, a court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989): and the court must not make any orders under this Act unless it considers that making the order would be better for the child than not doing so.

It should be noted that the Children and Families Act 2014 repealed the so-called "ethnicity requirement" in s.1(5) insofar as it applied to England. With effect from 14th April 2014, it only applies in Wales. Notwithstanding that amendment, matters such as the child's nationality, ethnicity, linguistic and cultural heritage remain potentially relevant matters under s.1(4)(d): per Sir James Munby P in *Re CB (A Child)* [2015] EWCA Civ 888 para 84 and *Re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 at para 105.

27. S.18, headed "Placement for adoption by agencies" provides inter alia

(1) An adoption agency may –

(a) place a child for adoption with prospective adopters, or

(b) where it has placed a child with any persons (whether under this Part or not), leave the child with them as prospective adopters,

but, except in the case of a child who is less than six weeks old, may only do so under section 19 or a placement order.

(2) An adoption agency may only place a child for adoption with prospective adopters if the agency is satisfied that the child ought to be placed for adoption.

(3) A child who is placed or authorised to be placed for adoption with prospective adopters by a local authority is looked after by the authority.

(4) …

(5) …

(6) References in this Chapter to an adoption agency being, or not being, authorised to place a child for adoption are to the agency being or (as the case may be) not bring authorised to do so under s.19 or a placement order.

28. S.19, headed "Placing children with parental consent" provides inter alia

(1) Where an adoption agency is satisfied that each parent or guardian of a child has consented to the child –

(a) being placed for adoption with prospective adopters identified in the consent, or

(b) being placed for adoption with any prospective adopters who may be chosen by the agency.

and has not withdrawn the consent, the agency is authorised to placed the child for adoption accordingly.

(2) …

(3) Subsection (1) does not apply where –

(a) an application has been made on which a care order might be made and the application has not been disposed of, or

(b) a care order or placement order has been made after the consent order was given.

(4) …

(5) This section is subject to s.52 (parental etc consent)"

S.20, headed "Advance consent to adoption", makes provision for parents to give advance consent to the making of an adoption order at the same time as consent to the child being placed for adoption.

29. S.21, entitled "Placement orders", provides

(1) A placement order is an order made by the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the authority.

(2) A court may not make a placement order in respect of a child unless –

(a) the child is subject to a care order,

(b) the court is satisfied that the conditions in section 31(2) of the 1989 Act (conditions for making a care order) are met, or

(c) the child has no parent or guardian.

(3) The court may only make a placement order if, in the case of each parent or guardian of the child, the court is satisfied –

(a) that the parent or guardian has consented to the child being placed for adoption with any prospective adopters who may be chosen by the local authority and has not withdrawn the consent, or

(b) that the parent's or guardian's consent should be dispensed with.

(4) …

(5) This section is subject to section 52 (parental etc consent)."

30. S.22, headed "Applications for placement orders", provides inter alia

(1) A local authority must apply to the court for a placement order in respect of a child if –

(a) the child is placed for adoption by them or is being provided with accommodation by them,

(b) no adoption agency is authorised to placed the child for adoption,

(c) the child has no parent or guardian or the authority consider that the conditions in section 31(2) of the 1989 Act are met, and

(d) the authority are satisfied that the child ought to be placed for adoption.

(2) If –

(a) an application has been made (and has not been disposed of) on which a care order might be made in respect of a child, or

(b) a child is subject to a care order and the appropriate local authority are not authorised to place a child for adoption,

the appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption.

(3) If –

(a) a child is subject to a care order, and

(b) the appropriate local authority are authorised to place the child for adoption under section 19,

the authority may apply to the court for a placement order.

31. S.25, headed "Parental Responsibility", provides

(1) This section applies while –

(a) a child is placed for adoption under section 19 or an adoption agency is authorised to place a child for adoption under that section, or

(b) a placement order is in force in respect of a child

(2) Parental responsibility for the child is given to the agency concerned.

(3) While the child is placed with prospective adopters, parental responsibility is given to them.

(4) The agency may determine that the parental responsibility of any parent or guardian, or of a prospective adopters, it to be restricted to the extent specified in the determination.

32. S.46, headed "Adoption Orders", provides inter alia

(1) An adoption order is an order made by the court on an application under section 50 or 51 giving parental responsibility for a child to the adopters or adopter.

(2) The making of an adoption order operates to extinguish –

(a) the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the order ……"

S.47, headed "Conditions for making adoption orders", includes inter alia provisions the effect of which are that, where a parent has consented under s.20 and not with a parent may only oppose the making of an adoption order with th court's leave

33. S.49, headed "Applications for adoption", provides inter alia:

"(1) An application for an adoption order may be made by (a) a couple or (b) one person, but only if it is made under s. 50 [relating to adoption by a couple] or s.51 [relating to adoption by one person] and one of the following conditions is met.

(2) The first condition is that at least one of the couple (in the case of an application under s.50) or the applicant (in the case of an application under s.51) is domiciled in a part of the British Islands.

(3) The second condition is that both of the couple (in the case of an application under s.50) or the applicant (in the case of an application under s.51) have been habitually resident in a part of the

British Islands for a period of not less than one year ending with the date of the application.

…."

34. S.52, headed "Parental etc. consent", provides inter alia

> (1) The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that –
>
> (a) the parent or guardian cannot be found or lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent, or
>
> (b) the welfare of the child requires the consent to be dispensed with.
>
> (2) The following provisions apply to references in this Chapter to any parent or guardian of a child giving or withdrawing
>
> (a) consent to the placement of child for adoption, or
>
> (b) consent to the making of an adoption order (including a future adoption order).
>
> (3) Any consent given by the mother to the making of an adoption order is ineffective if it is given less than six weeks after the child's birth.
>
> (4) The withdrawal of any consent to the placement of a child for adoption, or of any consent given under s.20, is ineffective if it is given after an application for an adoption order is made.
>
> (5) "Consent" means consent given unconditionally and with full understanding of what is involved; but a person may consent to adoption without knowing the identity of the persons in whose favour the order will be made.
>
> (6) "Parent" … means a parent having parental responsibility.
>
> (7) Consent under s.19 or 20 must be given in the form prescribed by rules, and the rules may prescribe forms in which a person giving consent under any other provision of this part may do so (if he wishes).

….

35. S.84, headed "Giving parental responsibility prior to adoption abroad" provides under subsection (1)

> "The High Court may, on an application by person who the court is satisfied intend to adopt a child under the law of a country or territory outside the British Islands, make an order giving parental responsibility for the child to them."

The subsequent subsections in s.84, and rules set out in the Adoption with a Foreign Element Regulations 2005, make provision for such applications, including under rule 10 that certain provisions of the Act which refer to adoption orders shall apply to orders under s.84 as is the words "order under s.84" were substituted for the words "adoption orders".

36. S.85, headed "Restriction on taking children out", provides inter alia:

> "(1) A child who—
>
> (a) is a Commonwealth citizen, or

(b) is habitually resident in the United Kingdom,

must not be removed from the United Kingdom to a place outside the British Islands for the purpose of adoption unless the condition in subsection (2) is met.

(2) The condition is that—

(a) the prospective adopters have parental responsibility for the child by virtue of an order under section 84, or

(b) …. [applies in Scotland or Northern Ireland only]

(3) Removing a child from the United Kingdom includes arranging to do so; and the circumstances in which a person arranges to remove a child from the United Kingdom include those where he—

(a) enters into an arrangement for the purpose of facilitating such a removal of the child,

(b) initiates or takes part in any negotiations of which the purpose is the conclusion of an arrangement within paragraph (a), or

(c) causes another person to take any step mentioned in paragraph (a) or (b).

An arrangement includes an agreement (whether or not enforceable).

(4) A person who removes a child from the United Kingdom in contravention of subsection (1) is guilty of an offence.

(5) A person is not guilty of an offence under subsection (4) of causing a person to take any step mentioned in paragraph (a) or (b) of subsection (3) unless it is proved that he knew or had reason to suspect that the step taken would contravene subsection (1).

But this subsection only applies if sufficient evidence is adduced to raise an issue as to whether the person had the knowledge or reason mentioned.

(6) A person guilty of an offence under this section is liable—

(a) on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both,

(b) on conviction on indictment, to imprisonment for a term not exceeding twelve months, or a fine, or both.

The prohibition against sending a child abroad for the purposes of adoption applies to local authorities: *Re A (Adopition: Placement outside the Jurisduction)* [2004] EWCA Civ 515.

37. Finally, I set out the provisions of schedule 2 paragraph 19 of the Children Act 1989. As Black J (as she then was) observed in *ECC v M and Others* [2008] EWHC 332 (Fam) at para 76,

"paragraph 19 obviously plays a part in the overseas adoption scheme of the 2002 Act, even though it is to be found in the Children Act and not in the 2002 Act itself."

Schedule 2 para 19 is headed "Arrangements to assist children to live abroad" and reads:

"(1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.

(2) A local authority may, with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for, any other child looked after by them to live outside England and Wales.

(3) The court shall not give its approval under sub-paragraph (1) unless it is satisfied that—

(a) living outside England and Wales would be in the child's best interests;

(b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;

(c) the child has consented to living in that country; and

(d) every person who has parental responsibility for the child has consented to his living in that country.

(4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, special guardian, or other suitable person.

(5) Where a person whose consent is required by sub-paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person—

(a) cannot be found;

(b) is incapable of consenting; or

(c) is withholding his consent unreasonably.

(6) Section 85 of the Adoption and Children Act 2002 (which imposes restrictions on taking children out of the United Kingdom) shall not apply in the case of any child who is to live outside England and Wales with the approval of the court given under this paragraph.

(7) Where a court decides to give its approval under this paragraph it may order that its decision is not to have effect during the appeal period.

(8) In sub-paragraph (7) "the appeal period" means—

(a) where an appeal is made against the decision, the period between the making of the decision and the determination of the appeal; and

(b) otherwise, the period during which an appeal may be made against the decision.

(9) This paragraph does not apply to a local authority placing a child for adoption with prospective adopters."

Jurisdiction

38. Jurisdiction in most cases involving the exercise of parental responsibility over children is determined by the rules in Council Regulation (EC) 2201/2003 (Brussels IIA), specifically Chapter II section 2 (Articles 8 to 15). Article 8 provides the general jurisdiction rule that the courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident there at the time the court is seised. Article 12 (3) provides for the prorogation of jurisdiction if certain conditions are satisfied. Article 13 provides that, where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article

12, the courts of the member state where the child is present shall have jurisdiction. Article 14 provides that, where no court of a member state has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each member state, by the laws of that state (in the case of England and Wales, in Part I of the Family Law Act 1986). Article 15 provides a process for transfer of jurisdiction to a court better placed to hear the case, "by way of exception".

39. Importantly, however, article 1(3) (b) provides that the Regulation shall not apply, inter alia, to decisions on adoption or measures preparatory to adoption.

40. The jurisdictional rules in relation to adoption in England and Wales were considered recently by the Court of Appeal (Sir James Munby P, Black LJ and Sir Richard Aikens) in ***Re N (Children) (Adoption: Jurisdiction)*** [2015] EWCA Civ 1112. The following summary is taken principally from in the judgment of Black LJ at paras 176 to 188.

    (1) "Adoption in this country is governed by statute, now the Adoption and Children Act 2002, and adoption and placement orders can only be granted under that Act." No other statute regulates jurisdiction in relation to applications for adoption or placement orders (***Re N***, para 176).

    (2) "S.49 of the Act lays down the core requirement which must be satisfied if the courts of England and Wales are to have jurisdiction in relation to an adoption application … an application can only be made by a prospective adopter who fulfils one of the conditions as to domicile/habitual residence in the British Islands" (para 177).

    (3) "Nowhere in the Act is there any requirement relating to the nationality or domicile or … presence of the child who is to be the subject of the application. These things may bear upon the court's decision as to whether, in fact, to make the adoption order sought but they do not affect its jurisdiction so to do" (para 178). Thus the courts of this country have jurisdiction under the Act to make adoption orders in respect of children who are not UK citizens (for the full analysis of this issue, see the judgments of the President at paras 78 to 103 and Black LJ at paras 180 to 188).

    (4) "The 2002 Act is also silent as to the nationality or domicile or presence of the child's natural parents. They are a vital part of the adoption process under the Act because no adoption order can be made unless they consent or their consent is dispensed with, but there is nothing in the Act to prevent the court, whether as a matter of jurisdiction or otherwise, from dealing with the case because they are foreign nationals or domiciled abroad" (para 181).

    (5) The jurisdiction to grant a placement order is governed by ss 21 and 22. "The court has jurisdiction to make a placement order on the application of a local authority which fulfils the conditions set out in section 22" (para 183).

    (6) "What the English court cannot do, however, is to assume without more that its determination will bind other jurisdictions. They will make their own determination as to the status of the natural parents vis-à-vis the child and of the child vis-à-vis the adopters and the natural parents and it is for that reason that, although foreign connections do not prevent the English court from having jurisdiction and power to grant an adoption order, they are potentially very material in its determination of how to exercise that power" (para 181).

    (7) Thus, although the foreign nationality of a child does not preclude a court making a placement order or adoption order, "when considering whether or not to make an adoption order, the court should consider what links the child has to other countries … and should consider what risk there is that any adoption order that it makes may not be universally recognised and reflect upon the practical implications of this for the child … This is not to say that an adoption order could not be made if it were to be demonstrated that it would not be recognised in a country which may be of importance for the child in future but it would be a factor that would need to be weighed in the balance, along with all the others, in deciding what order is going to be most conducive to the

child's welfare throughout his life" (para 187).

(8) "As the foreign connections are relevant to the question of the making of an adoption order, so they must also be relevant to an application for a placement order, not least because the court can only dispense with the parent's consent if the welfare of the child requires that and that cannot be determined if a purely insular approach is taken" (para 188).

41. It follows in these cases that the fact that JL and AO are nationals of respectively Estonia and Hungary does not by itself prevent a court in this country making either of them the subject of a placement or adoption order. In AO's case, the Hungarian authorities assert in the correspondence quoted above that the Hungarian court has jurisdiction under Hungarian national law by reason of AO's nationality. It is not, however, a principle of English domestic law that a court in this country has no jurisdiction over the child, or must automatically cede jurisdiction to the courts of the child's nationality. The fact of a child's nationality is, of course, likely to be a matter of relevance – and, in some cases, of considerable importance – when considering an application for a transfer of jurisdiction under Article 15 of Brussels IIA (if applicable) or, if the court in this country retains jurisdiction, when carrying out the welfare analysis, including determining any application for an order authorising the placement of the child abroad. Similarly, when exercising its statutory jurisdiction under the 2002 Act, the court applies English law, as opposed to foreign law (see the President's analysis in ***Re N*** at paras 87 et seq), although the foreign law may be relevant – and, in some cases, of considerable importance – when carrying out the welfare analysis, particularly if there is a danger that the adoption will not be recognised in the country of nationality, creating a so-called "limping adoption". That is something that the court will have to take into account when considering the welfare of the child throughout his or her life.

42. In addition to its statutory jurisdiction, the Family Division of the High Court has an inherent jurisdiction which may be used to supplement its powers available under statute. The extent to which local authorities may invoke the inherent jurisdiction is, however, restricted by s.100 of the Children Act 1989, subsections (2) to (5) of which provide as follows:

> "(2) No court shall exercise the High Court's inherent jurisdiction with respect to children
>
> > (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
> >
> > (b) so as to require a child to be accommodated by or on behalf of a local authority;
> >
> > (c) so as to make a child who is the subject of a care order a ward of court;
> >
> > (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.
>
> (4) The court may only grant leave if it is satisfied that:
>
> > (a) the result which the authority wishes to achieve could not be achieved by the making of any order of a kind to which subsection (5) applies, and
> >
> > (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

(5) This subsection applies to any order

(a) made otherwise than in the exercise of the court's inherent jurisdiction, and

(b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be mad with leave, that leave is granted)."

43. In certain circumstances, therefore, a local authority may seek to invoke, and a court utilise, powers under the inherent jurisdiction alongside those available under statute. But a local authority may not resort to the inherent jurisdiction to achieve an aim which it can achieve under statute. Equally, in my view, it cannot invoke the inherent jurisdiction to achieve an aim which has been expressly forbidden by statute. As Lord Sumption observed in ***Re B*** [2016] UKSC 4 (albeit in a dissenting judgment and in a different context) "the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme".

Relinquished babies – the general approach

44. In the past 50 years, there has been a fundamental and radical change in the use of adoption in this country. It has been described by Sir James Munby P in ***Re N***, supra, at paragraph 15:

> "Until the late 1960s, the typical adoption was of an illegitimate child born to a single mother who, however reluctantly, consented to the adoption of her child. Non-consensual adoption was comparatively rare. A combination of dramatic changes in the 1960s – the ready availability of the contraceptive pill, the legalization of abortion, the relaxation of the divorce laws and a sea-change in society's attitude to illegitimacy – led to dramatic reduction in the number of adoptions of the traditional type. The result of various changes in the system of public childcare, culminating in the implementation in October 1991 of the 1989 Act, has led in recent decades to a correspondingly dramatic increase in the number of non-consensual adoption. The typical adoption today is of a child who has been made the subject of a care order under the 1989 Act and where parental consent has been dispensed with in accordance with section 52(1)(b) of the 2002 Act."

45. The social change described by the President is reflected in the dramatic reduction in the numbers of adoption orders made, as illustrated by Lord Wilson, in a speech to the Denning Society on 13th November 2014 in which he noted:

> "In 1968, 25,000 adoption orders were made. Nothing like that figure has ever since been attained. Last year [2013] for example, only 5,000 adoption orders were made. What has happened? The answer is that the use made of adoption in our society has entirely changed."

46. JL and AO, however, are examples of what the President describes as proposed adoptions of the traditional type. Such cases, although comparatively rare, may still arise in certain circumstances, including where the time period in which a lawful termination of the pregnancy can be sought has passed, or where the pregnancy is concealed from the wider family or employers, and in either case the parents do not wish to keep the baby. It is notable that both cases involve mothers from other countries. I understand from other judges that there have been other examples of babies born to mothers from other countries being relinquished for adoption although there is no information as to the numbers of such cases. Adoptions of the "traditional type" almost always proceed by consent with no contested hearing or judgment. Thus there has been no recent judicial consideration of the legal principles or procedure to be applied.

47. Plainly, the local authority, or other adoption agency, and the court must apply s.1. of the 2002 Act which

applies whenever a court or agency is coming to a decision relating to an adoption. Amongst the factors in s.1(4) are the wishes and feelings of the child's relatives, including the parents. It might be thought that giving up a baby for adoption is a dereliction of responsibility. In many such cases – perhaps most – the truth will be very different. Anyone who has read the accounts of persons who have given up a baby in those circumstances will soon come to see that it is usually a decision taken only after a great deal of thought and anguish, by parents who realise that they cannot look after the baby and wish to give the baby the best opportunity to grow up in a loving home. Where a child has been relinquished for adoption, the wishes and feelings of the parents are therefore likely to be an important consideration, although they must be considered in the context of the other factors in s.1(4) and the child's welfare generally.

48. One important consideration in such cases is the desire of the parents, or sometimes the mother alone, for confidentiality. As Holman J observed in *Z County Council v R* [2001] 1 FLR 365 :

> "Adoption exists to serve many social needs. But high among them has been, historically, the desire or need of some mothers to be able to conceal from their own family and friends, the fact of the pregnancy and birth. So far as I know, it has not previously been suggested, nor judicially determined, that that confidentiality of the mother cannot be respected and maintained. If it is now to be eroded, there is, in my judgment, a real risk that more pregnant women would seek abortions or give birth secretly, to the risk of both themselves and their babies …. There is, in my judgment, a strong social need, if it is lawful, to continue to enable some mothers, such as this mother, to make discreet, dignified and humane arrangements for the birth and subsequent adoption of their babies, without their families knowing anything about it, if the mother, for good reason, so wishes.

49. These observations were endorsed by the Court of Appeal in *Re C v XYZ County Council* [2007] EWCA Civ 1206 [2008] 1 FLR 1294. In that case, a teenage mother who became pregnant after a one-night stand gave up her baby for adoption, refused to identify the father, and indicated that she did not believe that her family could care for the child. At first instance, the judge, on the grounds that the local authority needed to discover as much as possible about the child's background, directed the authority to disclose the fact of the birth to the maternal family and the guardian to take steps to identify the father. The mother appealed and, although the maternal family had meanwhile discovered what had happened, the Court of Appeal reversed the directions to the guardian in order to prevent her taking further steps to identify the father. Arden LJ observed at paras 41-3:

> "41. I accept the submission of the local authority that the court or adoption agency cannot simply act on what the mother says. It has to examine what she says critically. It is a question of judgment whether what the mother says needs to be checked or corroborated.
>
> 42. The local authority goes on to say that the ordinary rule should be that the near family and father should be identified and informed unless the court is satisfied that such inquiries would be inappropriate. The local authority submits that there is a growing trend towards involving the natural family and the father in such cases. It is no doubt true to say that there are a substantial number of cases where a child who would otherwise be placed for adoption is offered long term care by a member of the family.
>
> 43. I do not consider that this court should require a preference to be given as a matter of policy to the natural family of a child. Section 1 does not impose any such policy. Rather, it requires the interests of the child to be considered. That must mean the child as an individual. In some cases, the birth tie will be very important, especially where the child is of an age to understand what is happening or where there are ethnic or cultural or religious reasons for keeping the child in the birth family. Where a child has never lived with her birth family, and is too young to understand what is going on, that argument must be weaker. In my judgment, in a case such as this, it is (absent any application by any member of the family, which succeeds) overtaken by the need to find the child a permanent home as soon as that can be done."

50. These authorities demonstrate that in such cases the wishes and feelings of the parents are likely to carry significant weight in the evaluation of the child's welfare. But they are not invariably decisive. As a result, the local authority cannot give any guarantee that it will keep the existence of the baby confidential. Each case will turn on its own facts. In some cases, an analysis of the circumstances will lead the local authority to conclude that it is unnecessary to inform the natural family, but in other cases the authority will decide that it must consult the extended family in order to carry out the necessary evaluation of the realistic options. Each case turns on its own facts, but the child's welfare will always be the paramount consideration.

51. In *Re B* [2013] UKSC 33, a case which concerned an application for a care order based on a plan for adoption which was opposed by the child's parents, the Supreme Court, having regard to the principles reiterated by the European court of Human Rights in a number of cases, (starting with *Johansen v Norway* (1996) 32 EHRR 33 and, most recently, *YC v United Kingdom* (2012) 55 EHRR 967) that family ties must only be severed in exceptional circumstances, described adoption as the last resort for a child to be preferred only when nothing else will do. Following that decision, the Court of Appeal, in a series of cases culminating in *Re BS (Children) (Adoption: Application of Threshold Criteria)* [2013] EWCA Civ 1146 and *Re R (A Child)* [2014] EWCA Civ 1625, gave guidance emphasising the importance of a rigorous analysis where a court is being asked to approve a care plan for adoption and/or make a non-consensual placement order. In *Re B-S*, Sir James Munby P identified two essential requirements: (1) comprehensive evidence and analysis from the local authority and the children's guardian addressing the realistic options for the child and the arguments for and against each option and (2) an adequately-reasoned judgment that contains a global, holistic evaluation of each of the options leading to the ultimate decision as to which option best meets the duty to afford paramount consideration to the child's welfare.

52. One question arising in the present cases – which I understand has been raised in other cases across the country – is whether the decision in *Re B* and the approach prescribed in *Re B-S* and *Re R* applies in cases where the parents have relinquished a baby for adoption.

53. In addressing this question, it is necessary first to look more carefully at the statements of principle in the judgments of the Supreme Court in *Re B*. As I read the judgments, in particular Lord Neuberger P at paras 74, 77 and 103-4, Lord Clarke at para 135, and Baroness Hale of Richmond at para 198, the focus of the Court was on non-consensual adoption, where the relationship between parents and child was severed contrary to the wishes of the parents. To take two examples, Lord Neuberger observed at para 103:

> "…adoption of a child against her parents' wishes should only be contemplated as a last resort – when all else fails. Although the child's interests in an adoption case are 'paramount' …a court must never lose sight of the fact that those interests include being brought up by her natural family, ideally her natural parents, or at least one of them."

Baroness Hale observed at para 198:

> "… it is quite clear that the test for severing the relationship between the parent and child is very strict: only in exceptional circumstances and where motivated by *overriding requirements* pertaining to the child's welfare, in short where nothing else will do".

54. That this approach does not apply to all adoptions is demonstrated by the decision in *Re P (Step-Parent Adoption)* [2014] EWCA Civ 1174, in which the Court of Appeal considered the approach to be adopted to step-parent adoptions in the light of the Supreme Court's decision in *Re B*. Noting that the European Court of Human Rights in the case of *Söderbäck v Sweden* [1999] 1 FLR 250 had distinguished such cases from those such as *Johansen v Norway* which involved the severance of links between parents and a child taken into public care, McFarlane LJ drew these conclusions (at paras 46 – 47):

> "46. In an adoption application the key to the approach both to evaluating the needs of a child's welfare throughout his or her life and to dispensing with parental consent is proportionality. The

strong statements made by the Justices of the Supreme Court in *Re B* and taken up by judges of the Court of Appeal in subsequent decisions to the effect that adoption will be justified only where 'nothing else will do' are made in the context of an adoption being imposed upon a family against the wishes of the child's parents and where the adoption will totally remove the child from any future contact with, or legal relationship with, any of his natural relatives. Although the statutory provisions applicable to such an adoption (in particular ACA 2002, s 1 regarding welfare and s 52.regarding consent) apply in precisely the same terms to a step-parent adoption, the manner in which those provisions fall to be applied may differ and will depend upon the facts of each case and the judicial assessment of proportionality.

47. By way of example, in a child protection case where it is clear that rehabilitation to the parents is not compatible with their child's welfare, the court may be faced with a choice between adoption by total strangers selected by the local authority acting as an adoption agency or adoption by other family members. There is a qualitative difference between these two options in terms of the degree to which the outcome will interfere with the ECHR, Art 8 rights to family life of the child and his parents; adoption by strangers being at the extreme end of the spectrum of interference and adoption by a family member being at a less extreme point on the scale. The former option is only justified when 'nothing else will do', whereas the latter option, which involves a lower degree of interference, may be more readily justified."

At paragraph 62, he added:

"The reason why context is important is that, in each case, it is necessary to evaluate the proportionality of the intervention in family life that is being proposed. For the child, and for the child's welfare throughout his life, there will be a qualitative difference between adoption by strangers, with no continuing contact or legal relationship with any member of the birth family, on the one hand, and an adoption order which simply reflects in legal terms the reality in which the child's family life and relationships have been conducted for some significant time."

He continued:

"In ECHR terms, no adoption order will be justified in terms of its interference with family life rights unless it is 'necessary' and 'proportionate', but in assessing those factors the degree to which there is an interference will be relevant."

55. This last sentence points the way to the correct approach in the present cases. Where parents have relinquished their baby and expressed a wish that he or she be adopted outside the natural family, the degree of interference with family life rights is less than where the parent-child relationship is severed against the parents' wishes. The fact that the parents have taken this decision is an important consideration when determining whether the interference is necessary and proportionate. It follows, therefore, that approval of adoption in such cases does not depend on the local authority or court reaching the conclusion that nothing else will do. Instead, they must approach the case by applying s.1 of the 2002 Act as set out above, making sure that they give paramount consideration to the child's welfare throughout his or her life and allocating such weight as they consider appropriate to the comprehensive list of factors in s.1(4) In such cases, the local authority and the court must consider the parents' wishes that their child be adopted in the context of all of those factors, including the child's background, the likely effect on the child of having ceased to be a member of the original family and the ability and willingness of any of the child's relatives to meet the child's needs. As in the case of step-parent adoptions, the manner in which the statutory provisions are applied will depend upon the facts of each case and the assessment of proportionality.

56. It follows therefore that in all adoption cases – non-consensual and consensual – the local authority is under an obligation to carry out a thorough analysis of the realistic options for the child, as highlighted in *Re B-S.* Indeed, a thorough analysis of all the realistic options should surely be carried out in all cases where a local authority is making plans for a child's future.

57. Having carried out its assessment, the local authority will reach one of the following conclusions.

(1) It may conclude that adoption in this country is in the best interests of the child. In such circumstances, it can proceed formally to obtain the parents' consent. If consent is given in the prescribed way, the local authority becomes "authorised" to place the child for adoption under s.19. As I read s. 22, if the local authority is authorised under s.19, it is not obliged under s.22(1) to apply for a placement order as the condition in s.22(1)(b) is not satisfied and, unless the child is subject to a care order or of ongoing care proceedings, it has no power to apply for an order under s.22(2) or (3). In such circumstances, therefore, it is neither necessary nor possible for the local authority to apply for a placement order.

(2) It may conclude that the child should be placed with family members or fostered in this country. In such circumstances, it may place the child under s.20 provided that the provisions of that section, and the other provisions of Part III of the Children Act 1989 and the associated regulations, are satisfied. In particular, under s.20(7) it may not arrange such accommodation if a parent with parental responsibility is able and willing to accommodate or arrange accommodation for the child themselves objects to the local authority's proposal and in the absence of consent must apply for a care order. S. 20 has been considered in a number of cases, most recently by the Court of Appeal in *Re N*, supra, (see in particular the judgment of Sir James Munby P at paragraphs 157 to 171). Although both JL and AO are at present accommodated under s.20, that jurisprudence does not impinge on the issues in either of the cases before me and need not be considered further in this judgment.

(3) It may decide to place the child with family members in the country of origin. If the parents give their consent, it may proceed to arrange the placement without court approval. If the child is subject to a care order, however, it may only do so with the approval of the court: Children Act 1989, Schedule 2 para 19(1) and (2).

(4) It may decide that the child should be placed with prospective adopters that have been identified in the country of origin. In those circumstances, the procedure under s.84 may be available, and if so schedule 2 para 19 does not apply: schedule 2 para 19(9).

(5) It may decide to send the child to the foreign country so that the authorities there can arrange the adoption. This last course is the option which the local authority considers to be best in AO's case. In those circumstances, s.85 will prevent the local authority sending the child to the foreign country unless the child is subject to a care order and the court makes an order under Schedule 2 para 19.

58. Manifestly the process of seeking the parents' consent to the local authority's plans will be crucial. There are a number of important provisions in the statute and regulations which the local authority must comply with when obtaining parental consent to adoption. First and foremost, there is the overriding principle in section 52(5) – that "consent" means "consent given unconditionally and with full understanding of what is involved." In addition, the local authority as adoption agency must comply with the provisions of the Adoption Agencies Regulations 2005. Rule 14 imposes a requirement to provide the parents with counselling and information and an explanation of the procedure and the legal implications of giving their consent to a placement order and to adoption, and must also ascertain the parents' wishes and feelings about the child, his or her placement for adoption, and future contact. In addition, rule 20 provides:

> "Where the parent…of the child is prepared to consent to the placement of the child for adoption under section 19 of the Act and, as the case may be, to consent to the making of a future adoption order under section 20 of the Act, the adoption agency must request the CAFCASS to appoint an officer of the Service…for the purposes of the signification by that officer of the consent to placement or to adoption by that parent…and send with that request the information specified in schedule 2 [of the rules]."

The information specified in paragraph 3 of Schedule 2 includes a chronology of the actions and decisions taken by the adoption agency with respect to the child, and, under paragraph 4 "confirmation by the adoption agency that it has counselled, and explained to the parent…the legal implications of both consent to placement under section 19 of the Act and, as the case may be, to the making of a future adoption order under section 20 of the Act and provided the parent…with written information about this together with a copy of the written information provided to him."

59. In my judgment, rule 14 obliges the local authority to discuss with the parents the options for adoption, including any proposal or possibility that the child may be placed with prospective adopters who live abroad, to ensure that the parents have a full understanding of the implications, including legal implications, of giving consent and the implications of the adoption, and an opportunity to express their views on those options, including their wishes and feelings about the child's religious and cultural upbringing. Unless these obligations are complied with, any consent forthcoming will not be given with a full understanding of what is involved and will therefore be invalid under s.52.

The Vienna Convention

60. Articles 36 and 37 of the Vienna Convention on Consular Relations 1963 provide as follows:

> "36. Communication and Contact with nationals of the sending State
>
> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending States
>
> > (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
> >
> > (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
> >
> > (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

Article 37, headed "Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents" provides, insofar as relevant, that

> "If the relevant information is available to the competent authorities of the receiving

> State, such authorities shall have the duty:… (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments."

61. The significance of these provisions to family proceedings was not appreciated until the decision of Sir James Munby, President of the Family Division, in *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam). The President (at para 41) identified three points to be borne in mind in the context of care proceedings under Part IV of the Children Act 1989.

> "(i) First, Article 36 enshrines the principle that consular officers of foreign states shall be free to communicate with and have access to their nationals, just as nationals of foreign states shall be free to communicate with and have access to their consular officers.
>
> (ii) Second, the various obligations and rights referred to in paragraphs (b) and (c) of Article 36(1) apply whenever a foreign national is "detained"; and where a foreign national is detained the "competent authorities" in this country have the obligations referred to in paragraph (b).
>
> (iii) Third, Article 37(b) applies whenever a "guardian" is to be appointed for a minor or other foreign national who lacks full capacity. And Article 37(b) imposes a particular "duty" on the "competent authorities" in such a case."

62. At para 47, he gave this guidance:

> "…it is highly desirable, and from now on good practice will require, that in any care or other public law case:
>
> > (i) The court should not impose or permit any obstacle to free communication and access between a party who is a foreign national and the consular authorities of the relevant foreign state ….
> >
> > (ii) Whenever the court is sitting in private it should normally accede to any request, whether from the foreign national or from the consular authorities of the relevant foreign state for (a) permission for an accredited consular official to be present at the hearing as an observer in a non-participatory capacity; and/or (b) permission for an accredited consular official to obtain a transcript of the hearing, a copy of the order and copies of other relevant documents.
> >
> > (iii) Whenever a party, whether an adult or the child, who is a foreign national,
> >
> > (a) is represented in the proceedings by a guardian, guardian ad litem or litigation fiend; and/or
> >
> > (b) is detained
> >
> > the court should ascertain whether that fact has been brought to the attention of the relevant consular officials and, if it has not, the court should normally do so itself without delay."

63. The President returned to this subject in *Re CB (A Child)* [2015] EWCA Civ 888. In a judgment with which the rest of the Court of Appeal agreed, he reiterated and developed the guidance in *Re E*. In particular, he stated at paragraph 84 that:

> "local authorities and the courts must be appropriately pro-active in bringing to the attention of the relevant consular authorities *at the earliest opportunity* the fact that care proceedings involving foreign nationals are on foot or in contemplation."

64. Advice given by the Department for Education in July 2014, entitled "Working with foreign authorities: child protection cases and care orders", includes the following passage at page 5:

> "Social workers need to consider working with foreign authorities at a number of stages during child protection cases, including:
>
> • when carrying out an assessment under section 47 of the Children Act 1989, where the child has links to a foreign country, in order to understand the child's case history and/or to help them to engage with the family;
>
> • when a child with links to a foreign country becomes the subject of a child protection plan, has required immediate protection, or is made subject to care proceedings, the social worker should consider informing the relevant foreign authority; and
>
> • when contacting or assessing potential carers abroad (such as extended family members)" (page 5)

At page 6, it adds:

> "Social workers should inform the relevant Embassy when a child with links to a foreign country has become the subject of a child protection plan, has required immediate protection or has become the subject of care proceedings, unless doing so is likely to place the child or family in danger and provided any necessary consent to disclose information has been obtained. Decisions should be linked to a robust and thorough risk assessment."

It was acting on this advice that the local authority in the case of AO contacted the Hungarian authorities.

65. Although the issue does not now fall to be decided on the facts of this case, the parties have raised the question as to the extent of the obligations on a local authority to follow the President's guidance in *Re E* and *Re CB* in circumstances where a child has been relinquished for adoption. Having regard to the terms of the Vienna Convention, the observations of the President, and the departmental guidance, the position is in my judgment as follows.

66. There is to my mind a distinction to be drawn between a child who is taken into care by compulsion, without the consent of their parents, and a child who is taken into care with parental consent. The former is, or may be, "detained", but the latter manifestly is not. Accordingly, a child who is voluntarily given up for adoption by his or her parents, or otherwise voluntarily accommodated, cannot be said to be "detained". It follows that, when a child of nationals of a foreign country is relinquished for adoption, or otherwise voluntarily accommodated by a local authority, there is no obligation under article 36 of the Vienna Convention to notify consular officials of the foreign state.

67. In reaching this conclusion, however, I add three important caveats.

68. First, local authorities must be very careful to ensure that they comply with their statutory obligations and the guidance given by the courts concerning voluntary accommodation in the cases cited above. The President (in *Re N*, supra, at para 171) has warned that the misuse and abuse of s.20

"is not just a matter of bad practice. It is wrong; it is a denial of the fundamental rights of both the parent and the child".

In cases involving children who are foreign nationals, the breach of rights will be compounded if, as a result of the accommodation being under s.20 when it should in reality be under a care order, the local authority avoids the obligations under Article 36 of the Vienna Convention that would arise if the child was in care.

69. Secondly, even where a local authority is under no obligation to notify the embassy because the child is not being detained within the meaning of Article 36, it may conclude, in the exercise of its statutory powers and obligations to carry out assessments of children in need, that it is necessary to contact foreign authorities in order to improve its understanding of those matters to which it must have regard under s.1(4) of the 2002 Act, including the child's background, the effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person, the child's relationship with its relatives, and the ability and willingness of any of the child's relative to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs. Whether or not the local authority needs to make such enquiries of the foreign country will depend on the circumstances of each case.

70. Thirdly, in circumstances where the child is joined as a party to proceedings, as summarised in FPR rule 14.1, a guardian will be appointed under rule 16.3. In practice, this includes all applications for placement orders, all applications for orders under s.84 and certain applications for adoption orders, including cases where a CAFCASS child and family reporter recommends that the child be a party and the court accepts that recommendation. Following the guidance of the President in ***Re E*** reiterated in ***Re CB***, the court is under an obligation under Article 37 to notify the consular authorities when a guardian is appointed even in those cases where no obligation arises under Article 36.

71. Having dealt with the general matters, I turn, at last, to consider the issues arising in each case.

JL

72. As set out above, the issues arising in JL's case are: (1) Does the court have jurisdiction to make a placement order? (2) What order, if any, should be made in this case? In the event, the resolution of those issues in this case is relatively straightforward. All parties, and the Estonian authorities, are agreed as to the outcome, and the only issue has been how to achieve it.

73. I fully understand the local authority's motives in applying for a placement order. It wanted to ensure the safe passage towards the harbour of adoption. But for the reasons set out above, I do not think that a placement order is either necessary or possible. As Black LJ emphasised in ***Re N*** at para 176 in the passage cited above, "adoption in this country is governed by statute, now the Adoption and Children Act 2002, and adoption and placement orders can only be granted under that Act." A placement order is simply a creature of that statute. The only obligations imposed on, and powers granted to, local authorities to apply for a placement order are those set out in s.22 of the 2002 Act. The only power of the court to make a placement order is that provided by s.21. The local authority has no other power to apply for a placement order, and the court has no general power, either under statute or under the inherent jurisdiction, to make such an order.

74. In this case, JL's mother has, in a manner that accords with the Adoption Agencies Regulations, given her consent to adoption in this country which is the course proposed by the local authority. In those circumstances, the local authority is "authorised" under s.19(1) to place the child for adoption. As a result, the obligation under s.22(1) to apply for a placement order does not arise because the condition in s.22(1)(b) (that "no adoption agency is authorised to place the child for adoption") is not satisfied. Further, as there have been no care proceedings under Part IV of the Children Act in JL's case, s.22(2) and (3) of the 2002 Act do not apply. In those circumstances, the local authority cannot apply for a placement order, and the court has no power to make one.

75. This was one of the issues that I put to counsel in the note prior to the further hearing on 21st January. After

reflection, all parties in the JL case accepted this analysis. After further discussion, it was therefore agreed that I should make an order in the following terms:

> "Upon the Court determining that (1) the local authority is (a) authorised to place the child, JL, for adoption pursuant to Section 19(1)(b) of the Adoption and Children Act 2002, and (b) neither obliged nor entitled to apply for a placement order pursuant to Section 22 of the said Act and therefore having no standing to bring the instant application, and (2) the Court has no jurisdiction to make a placement order pursuant to Section 21 of the said Act,
>
> And upon the Court expressing the view, on the basis of the information at present available (1) that there is no need for the local authority to make further enquiries with regard to the placement of JL (a) the country of JL's nationality or (b) JL's extended family; (2) that it is in the best interests of the child, JL, to be placed for adoption in this country
>
> And upon the Court recording that the local authority, child's guardian, child's mother and the Estonian Central Authority have all agreed that it is in JL's best interests to be placed for adoption in this country
>
> And upon the Court having reserved judgment, which will provide reasons for order, but having concluded that this order should be made forthwith to avoid further delay for JL
>
> IT IS ORDERED that (1) the local authority's application in respect of the child, JL, is hereby dismissed; (2) there shall be no order as to costs save for a detailed assessment of the publicly funded costs of the respondent child."

That order has been duly implemented and I understand that the process of matching and placing JL for adoption is now proceeding.

AO

76. The case of AO is more contentious. As set out above, the issues, which to some extent overlap, are: (1) Is it open to the court to transfer jurisdiction to Hungary? (2) Is it open to the court to make an order permitting the local authority to send AO to Hungary? (3) In the light of its answers to the two previous questions, what order, if any, should the court make? The position of the parties in respect of these issues is as follows. The local authority says that the court cannot transfer the proceedings but, exercising its power under the inherent jurisdiction, can and should order that the child be sent to Hungary. The parents say that the court has the power to transfer the proceedings but should not do so in the circumstances of this case. They further say that the court has no power under the inherent jurisdiction to send the child to Hungary. The guardian says that the court has the power to transfer the proceedings and further has the power under the inherent jurisdiction to send the child to Hungary and should exercise both powers in respect of AO.

77. As stated above, jurisdiction in respect of the exercise of parental responsibility for a child (including under the inherent jurisdiction) is now governed by Brussels IIA, save for the exceptions under Article 1(3) which include decisions on adoption and measures preparatory to adoption. The general rule of jurisdiction under Brussels IIA is under Article 8 – 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. It has now been settled by the Supreme Court that the test for determining whether a child was habitually resident in a place is whether there is some degree of integration by the child in a social and family environment in that country: *Re A (Children)* [2013] UKSC 60, applying the test identified in two decisions of the Court of Justice of the European Union, *Proceedings brought by A* (Case C-523/07) [2010] Fam 42 and *Mercredi v Chaffe* (case C-497/10 PPU) [2012] Fam 22. In summarising the law at para 54 of her judgment in *Re A*, Baroness Hale of Richmond stated inter alia that

> "the social and family environment of an infant or young child is shared with those (whether parents or not) upon whom he is dependent. Hence it is necessary to assess the integration of that person or

persons in the social and family environment of the country concerned".

78. In the present case, AO's mother was plainly habitually resident in England when she gave birth. But AO was removed from her mother immediately after birth, so she never had chance to establish a degree of integration with her in a family environment. The position is complicated still further by the fact that the proceedings under the inherent jurisdiction were started before AO was born, so at the point the court was seised she was still *en ventre sa mere*. For these reasons, there may be difficulties in establishing jurisdiction under Article 8. Further debate on these niceties is, however, unnecessary because, on any view, this court would have jurisdiction under Article 13. Plainly AO has never been resident anywhere else, so if she was not in law habitually resident here at the start of the proceedings this court is able, by reason of her presence in England and Wales, to exercise its inherent jurisdiction to make orders in respect of her care and welfare. Crucially, however, that jurisdiction does not extend to those matters excluded by Article 1(3), including decisions on adoption or take measures preparatory to adoption.

79. Article 15 of Brussels IIA provides a mechanism, by way of exception, for the transfer of proceedings to a court of another Member State, with which the child has a particular connection, if that court would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child. As the Court of Appeal has recently confirmed, however, the power to transfer proceedings under Article 15 only arises where the court has jurisdiction under that regulation and, as a result, does not extend to decisions on adoption or measures preparatory to adoption: *Re CB*, supra, and *Re N*, supra. In *Re CB*, the Court of Appeal upheld a first instance decision that an application by a parent for leave to oppose the making of an adoption order was a "measure preparatory to adoption" within the meaning of Article 3(1)(b). In *Re N*, the Court of Appeal held that care proceedings under Part IV of the Children Act 1989 are within the scope of Brussels IIA, even if the local authority's care plan was for adoption, and therefore may be transferred to another court if the conditions in Article 15 are satisfied, but proceedings for a placement order under the Adoption and Children Act 2002 are within the scope of Article 1(3)(b) and consequently cannot be transferred. In that case, the Court of Appeal upheld a decision at first instance to transfer care proceedings to Hungary but overturned the decision to transfer the placement proceedings.

80. In passing, I note that the Supreme Court has now given permission to appeal in the case of *Re N* and understand the ambit of the appeal includes the interpretation of Article 15. (Article 15 is also the subject of an outstanding reference to the CJEU from the Supreme Court of Ireland in *Child and Family Agency v JD* Case number C-428/15).

81. AO is a ward of court. The powers of the court under the inherent jurisdiction in respect of a ward are in theory far reaching and extend to making whatever orders it deems appropriate in the interests of the child's welfare. Insofar as this encompasses the exercise of parental responsibility, such proceedings come within the scope of Brussels IIA. The specific issue in the present proceedings, however, is whether, as her parents wish, the child should be adopted in this country, or alternatively, as proposed by the local authority, guardian and Hungarian authorities, returned to Hungary so that she can be placed for adoption there. As Mr. Fuller put it in his skeleton argument, "no party is suggesting that the outcome for A should be anything other than adoption … A will be adopted either in England or Hungary." In my view, the court's decision on that issue is a measure preparatory to adoption and therefore falls outside Brussels IIA. For that reason, these proceedings cannot be transferred under Article 15 of that regulation.

82. I turn to the next question. Whether or not it is possible to transfer the proceedings under Article 15, is it possible for this court, exercising its inherent jurisdiction, to direct that AO be sent to Hungary, given the plan of the Hungarian authorities, supported by the local authority in this country, that she should be adopted there?

83. As set out above, s.85 of the 2002 Act provides that a child who is habitually resident in the UK must not be removed from the British Isles for the purposes of adoption unless the prospective adopters have parental responsibility for the child by virtue of s. 84. "Habitual residence" on this issue plainly falls to be determined at the point when a decision is taken to remove the child. AO has now been in foster care for five months and has plainly acquired a degree of integration in a family and social environment to satisfy the test for habitual

residence. No party has suggested otherwise.

84. On behalf of the local authority in AO's case, Mr. Fuller submits that removing AO to Hungary would not contravene s.85. He contends that the wording of the exemption in s.85(2) strongly suggests that the purpose of the section is to prevent the removal of children from the jurisdiction to be placed with specific prospective adopters abroad. Further, he argues that, although no party is suggesting any outcome other than adoption, her future will be a matter for the Hungarian authorities who will follow their own procedures. He characterises the move as being for the purpose of enabling her to be brought up in the country of which she is a citizen and from which she derives her culture and heritage, rather than for the purpose of adoption. On behalf of the guardian, Mr Roberts submits that, while the plan is adoption, there are a number of steps which will have to be taken by the Hungarian authorities before the adoption order is made so there are a number of junctures at which the plan may change. He argues that the question whether AO will be adopted "remains comparatively open". On behalf of the parents, however, Mr. Feehan submits that the indications of the Hungarian authorities are clear – family members will not be contacted and no other option will be considered except adoption.

85. I do not accept Mr. Fuller's submission that the words of s.85(2) suggest that the scope of s.85(1) is to prevent the removal of a child for placement with specific adopters abroad and does not amount to a general prohibition on sending a child abroad to be adopted. In my view, s.85 could not be clearer. It creates a *general* prohibition which is excluded in the *specific* circumstances in s.85(2). With respect to Mr. Fuller and Mr. Roberts, it is manifestly obvious, given the clear statements by the Hungarian authorities, that AO's removal would be for the purposes of adoption. Mr. Fuller really acknowledged this when he characterised the "stark" issue in this case as being whether AO was adopted in this country or in Hungary.

86. S.85 prohibits the court making an order authorising the removal of AO to Hungary. That prohibition would not apply if the child was in care under Part IV of the Children Act and the court made an order under Schedule 2 para 19 permitting the local authority to arrange for the child to live in Hungary. But that is not the application before this court. Instead, the local authority seeks an order authorising the move under the inherent jurisdiction. It is only entitled to invoke the inherent jurisdiction if it can bring itself within s. 100 of the Children Act. In particular, it cannot be granted permission to apply for any relief under the inherent jurisdiction if it could achieve its aim by applying for an order which it is entitled to apply for under statute.

87. Mr. Fuller submits that the aim which the local authority wishes to achieve in this case cannot be achieved because (1) AO is not in care but only voluntarily accommodated; (2) in order to obtain a care order, the local authority would have to satisfy the threshold criteria under s.31(2) of the Children Act, and this cannot be achieved because relinquishing a baby for adoption does not by itself satisfy the criteria; (3) in order to obtain an order under schedule 2 para 19 in circumstances where the parents object to the placement abroad, it must be established that the parents are withholding their consent unreasonably.

88. I do not accept this submission. I do not agree that the local authority would necessarily be unable either to satisfy the threshold criteria under s.31(2) or to prove that the parents were withholding their consent to a placement abroad unreasonably. That would depend on the view the court took in all the circumstances. There is, however, a more fundamental objection. I have already cited Black LJ's comment in ***Re N*** more than once, but it is worth repeating – "adoption in this country is governed by statute, now the Adoption and Children Act 2002, and adoption and placement orders can only be granted under that Act." Such orders cannot be made under any other statute or under the inherent jurisdiction. They can only be made if the provisions of the 2002 Act (which, as Black J observed in the earlier ***Essex*** case, includes the provisions of schedule 2 para 19 of the Children Act) are satisfied. The court cannot use the inherent jurisdiction to avoid those provisions – in Lord Sumption's phrase, to cut across the statutory scheme – for example, by facilitating a placement abroad in circumstances where the parents do not consent and without consideration of whether they are acting unreasonably in withholding their consent, or sending the child abroad for the purposes of adoption in circumstances which are unlawful under s.85.

89. I therefore decline to make an order (as sought by AO's guardian) transferring the proceedings to Hungary or make an order (as sought by the local authority and the guardian) under the inherent jurisdiction authorising the

placement of AO in that country.

90. What is now to be done? Plainly in view of the regrettable passage of time urgent steps must now be taken to secure AO's future. The local authority must decide what course it wishes to take. If the local authority after reflection wishes to proceed with its plan to place AO in Hungary, it should issue care proceedings and seek a care order and permission to place her abroad under Schedule 2 paragraph 19.

91. I wish to emphasise that nothing I have said so far goes to the merits of the proposal that AO be placed in Hungary. In stating the legal principles and procedures to be followed in cases involving relinquished babies, I have deliberately refrained from expressing a view as to what is the right outcome for AO. That issue must be argued on another occasion before a court exercising the proper jurisdiction. I would therefore propose that, if the local authority elects to proceed with an application for a care order and an order under schedule 2 para 19, the proceedings should be started and transferred to me as soon as possible. I would hope that space in my list could be found to determine the application within the next three months. I will list the matter for further directions on a date to be fixed by my clerk in consultation with the parties' representatives.

Conclusions

92. I therefore reach the following conclusions:

(1) The jurisdictional rules in Council Regulation (EC) 2201/2003 (Brussels IIA) do not apply to decisions on adoption or measures preparatory to adoption. The jurisdiction to make orders for the placement for adoption and the adoption of children in England and Wales is derived wholly from statute. The statutory scheme is set out in the Adoption and Children Act 2002, but also includes Schedule 2 paragraph 19 of the Children Act 1989. There is no other jurisdiction to make such orders, either under statute or under the inherent jurisdiction. Although the inherent jurisdiction may be invoked to supplement the statute, it cannot be used to make orders that cut across or conflict with the statutory scheme.

(2) The decision of the Supreme Court in *Re B* [2013] UKSC 33 concerned non-consensual adoptions. Where parents have relinquished their baby and expressed a wish that he or she be adopted outside the natural family, the degree of interference with family life rights is less than where the parent-child relationship is severed against the parents' wishes. The fact that the parents have taken this decision is an important consideration when determining whether the interference is necessary and proportionate. It follows, therefore, that approval of adoption in such cases does not depend on the local authority or court reaching the conclusion that nothing else will do. But the parents' wishes, although important, are not decisive. They must be evaluated along with all the other factors in the welfare checklist in s.1(4) of the 2002 Act. In all adoption cases – non-consensual and consensual – the local authority is under an obligation to carry out a thorough analysis of the realistic options for the child, as highlighted in *Re B-S* [2013] EWCA Civ 1146.

(3) Article 36 of the Vienna Convention on Consular Relations 1963 does not apply in cases where a child has been relinquished for adoption because the child in those circumstances is not being "detained". Following the decisions in *Re E* [2014] EWHC 6 (Fam) and *Re CB* [2015] EWCA Civ 888, Article 37 of the Convention applies where a guardian is appointed in placement order or adoption proceedings.

(4) Where parents have given a valid consent to placement for adoption – unconditionally and with full understanding of what is involved – the local authority will be "authorised" to place the child for adoption. In such circumstances, there is no obligation or power to apply for or make a placement order under s.21 of the 2002 Act. Accordingly, the case of JL has been resolved by the order containing declarations as set out above.

(5) In AO's case, where the issue is whether the baby should be adopted here or in Hungary, the proceedings fall outside Brussels IIA and cannot therefore be transferred to Hungary under Article

15 of that regulation. The court cannot use the inherent jurisdiction in a way which cuts across or conflicts with the statutory scheme, by facilitating a placement abroad in circumstances where the parents do not consent and without consideration of whether they are acting unreasonably in withholding their consent, or by sending the child abroad for the purposes of adoption in circumstances which are unlawful under s.85 of the 2002 Act. I therefore decline to make an order (as sought by AO's guardian) transferring the proceedings to Hungary or make an order (as sought by the local authority and the guardian) under the inherent jurisdiction authorising the placement of AO in that country.