Neutral Citation Number: [2021] EWHC 1970 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2021

Before:

Mrs Justice Knowles

- -

Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request)

- -

Mr Henry Setright QC and Mr Chris Barnes for the Applicant local authority
Mr Mark Twomey QC and Mr Alex Laing for the child, D, by his Children's Guardian
The mother was neither present nor represented

Hearing dates: 23 and 24 June 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Knowles:

Introduction

1. This application concerns a little boy, D, now aged two years and six months. He has been living in Switzerland in a foster home since November 2019, this being the time when his mother was arrested and remanded in custody pursuant to a European Arrest Warrant. His mother was extradited to this jurisdiction in June 2020 to face serious criminal charges arising out of the care she gave to her elder child, a boy called F. Following her extradition, the mother was remanded in custody and was due to stand trial in April 2021. However, on 13 April 2021, the Crown Prosecution Service determined that the mother's prosecution should be discontinued, and she was subsequently released from custody, the Crown Court certifying that it had entered a verdict of not guilty in respect of each count on the indictment.

2. The issue before the court is whether I should, as D's Children's Guardian submitted, make a request to the Swiss authorities pursuant to Article 9 of the 1996 Hague Convention ["the 1996 Convention"], for the transfer to this jurisdiction of all matters relating to D's contact with F. That application was opposed by the local authority though I observe that, in autumn 2020, the local authority had originally invited a transfer of jurisdiction relating to all aspects of D's welfare pursuant to Article 9 of the 1996 Convention. Though neither present nor represented at this hearing, the mother made plain, in emails sent to the parties, her opposition to this court either requesting a transfer of jurisdiction from Switzerland or having authority to determine any matters relating to D's welfare. If I decline to make the Article 9 request sought on behalf of D, both the local authority and D were agreed that I should give permission to the local authority to withdraw both its original application for an Article 9 request and its application for a public law order with respect to D.

3. The local authority is represented by Mr Setright QC leading Mr Barnes and D is represented by Mr Twomey QC leading Mr Laing. I am very grateful to them for their comprehensive written and oral submissions. Though the mother was previously present and represented at earlier hearings, this was not so for the purposes of this hearing. I have read several recent email communications sent by the mother and will consider her position in further detail later in this judgment.

4. I have read a bundle of papers in the proceedings concerning D and been provided with a bundle of law and case-law relevant to the issues before the court.

5. Mr Setright QC informed me that this case may be one of the first occasions in which the courts of England and Wales have been invited to consider the provisions of Articles 8 and 9 of the 1996 Convention in the context of public law proceedings. Given that these provisions are likely to take on a greater degree of prominence as the United Kingdom has exited the transitional arrangements with the European Union, it is possible that this decision may assist future decision-makers.

Background

Proceedings concerning F

6. The background to the present proceedings is set out in the judgment of Mr Recorder Samuels QC dated 28 April 2017 in care and placement order proceedings concerning D's older sibling, F. In summary:

a) F was born in October 2014 and was understood to have been conceived following IVF treatment for the mother in Denmark. His paternity was, therefore, unknown;

b) Proceedings concerning F were commenced in the USA and came before the New York Family Court which resulted in a finding of neglect against the mother;

c) Following the dismissal of criminal proceedings brought against the mother in New York, she returned to this jurisdiction and sought the return of F to her care;

d) F returned to this jurisdiction, and public law proceedings were brought by a local authority (not the local authority presently involved). Pending a final determination, F was returned to the care of his mother pursuant to an interim supervision order with a number of conditions;

e) Within the care proceedings, the mother sought, and was given, permission to remove F temporarily to Denmark so as to pursue further IVF treatment;

f) A final hearing was due to take place in January 2017 with a plan for F to remain in the care of his mother, but this did not proceed following a referral to the police after the discovery of bruising on F in January 2017. F was subsequently placed under police protection, and then made the subject of an interim care order. It is understood that these events took place following the mother and F moving to reside in the area of the local authority presently bringing the proceedings concerning D;

g) The final hearing of the local authority's care and placement order applications came before Mr Recorder Samuels QC on 4 April 2017 and concluded with his judgment of 28 April 2017 following evidence and time for written submissions;

h) In the course of the final hearing, Mr Recorder Samuels QC reached a number of conclusions on factual matters, namely: (i) the findings made by the New York Family Court with respect to the mother's care of F's were upheld and found to cross the threshold set out in section 31 of the Children Act 1989; (ii) findings were made in respect of the mother's mental health, including a finding supportive of a diagnosis of hypomania; (iii) the mother was found to have caused a non-accidental injury (bruising and a cut) to F's penis; and (iv) a finding of non-accidental injury was not made in respect of a bruise on F's jaw;

i) The judge undertook a welfare analysis of the competing alternatives - a return to the mother, or adoption - and concluded that adoption was required.

7. An appeal brought by the mother against the decision of Mr Recorder Samuels QC was unsuccessful and F was placed for adoption. The mother sought to oppose the subsequent adoption order application but was, again, unsuccessful. Somehow, the

mother appears to have become aware of details of F's prospective adoptive placement and acted on that knowledge.

D's background

8. Within the adoption proceedings concerning F, the mother filed a statement which noted that she was *"pregnant with another child"* and, from the dates provided, she was then about three months pregnant. She indicated that she may be outside the UK.

9. Information received from the Swiss authorities revealed the following:

a) D has a Barbados passport issued on 6 December 2018 which notes he is a Barbadian national, his place of birth is recorded as Barbados and a date of birth was given in 2018;

b) Investigations undertaken by the Swiss authorities identified that D was born in Barbados and that he was registered under a slightly different name compared to that of the mother. The Swiss authorities were awaiting a birth certificate from the Barbadian authorities;

c) The circumstances in which D came to be born in Barbados were not known but there did not appear to be any pre-existing connection of his mother to that place;

d) The Swiss authorities stated that they were not aware of the circumstances in which D came to be in Switzerland, noting that the mother had no permit or other legal permission to live permanently in Switzerland;

e) D was noted to have been brought to Switzerland by his mother undeclared and unregistered and he also had no residence permit;

f) The Swiss authorities stated that D was born by *"medically assisted reproduction"*, but it is not known whether this was independently corroborated or based solely on information provided by the mother;

g) Whilst in the care of the Swiss authorities, following the mother's arrest, it appears that D had some contact with his mother, but her access rights were suspended in the light of apparent concerns about the quality of D's attachment to her;

h) By way of an email sent to ICACU on 5 August 2020, the Swiss authorities noted that D was *"developing well. However, he has been totally disconnected from his environment in terms of language, education, culture and we are concerned about his future"*. On removal from his mother, D was placed in foster care and has remained in the same placement ever since;

i) On the assumption that D is the mother's natural child, it appears highly likely that D would have acquired British nationality by descent at birth.

Procedures in Switzerland relating to D

10. I have used the phrase *"the Swiss authorities"* to refer to the cantonal authority responsible for D's care in that jurisdiction. I have done so to avoid any identification of D and where he may reside.

11. There has been ongoing correspondence between ICACU, the local authority and the Swiss authorities since August 2020. Child protection procedures are considered by the Swiss authorities rather than forming part of a court-based process. The Swiss authorities confirmed in November 2020 that the withdrawal of custody rights and parental authority from the mother had taken place on a provisional basis and that they would wish to rule on these two aspects in a final decision. They sought details of the mother's legal representative and, failing that, details of the prison address where the mother was being held so that they could contact her.

12. In their initial communication with the local authority, the Swiss authorities, through ICACU, indicated that they considered it would be in D's best interests to be transferred, physically, to this jurisdiction. However, in an email dated 13 October 2020, the Swiss authorities clarified their position in correspondence with ICACU, stating:

"…Indeed, due to the stability and well-being of [D] since his foster care placement in last November 2019, it has become essential to our point of view to avoid any new emotional separation to the child, knowing the consequences this could have on his psychological development. Also, up to now, despite our various requests since we are in charge of [D], we have never received any proper information even less any guarantee about the way he could be returned to England, the care he would receive and his future.

Therefore, in the best interest of [D], we are thinking of extending his foster care placement on [sic] the long term, until the situation gets clearer for comprehending his future. From this perspective and seeing the current situation, we would approve of a final withdrawal or restriction of [the mother's] parental rights at least in respect of the place of residence and custody of the child."

13. A further email from the Swiss authorities dated 9 November 2020 stated that:

"…In our letter of October 13, 2020, in view of [D's] good development, of his regained stability with a loving family, in order to prevent him from another traumatic breakup in the context of a trip to Great Britain and taking into account the total absence of information and guarantees as to the conditions under which he would be taken care of in your country, we have informed you of our intention to extend [D's] placement in foster care for the time necessary to clarify the situation.

As it stands, assuming that [D's] move to Great Britain is eventually possible, it will require our adherence to a removal project in accordance with the best interests of the child, providing us with all guarantees of necessary security regarding its management, both during the transfer period and in the future. Otherwise, collaboration on our part with the British authorities will not be possible."

The Swiss authorities made plain that they were competent to take the necessary protective measures in accordance with Swiss law, being the place of D's habitual residence.

The Involvement of the Local Authority

14. Prior to August 2020, it appears that the Swiss authorities had attempted to contact the police to seek further information. Via ICACU, the local Safeguarding Children Board was informed and the email from the Swiss authorities was eventually brought to the attention of the local authority. Liaison took place between the local authority and the previous local authority concerned with the welfare of F, but the latter was unwilling to take on D's case. In those circumstances, the local authority sought to provide assistance to the Swiss authorities and ICACU in fulfilment of the positive obligation of cooperation under the 1996 Convention. It issued care proceedings on 2 November 2020 and the matter was transferred to the High Court on 30 November 2020.

15. I observe that some four months had passed since the initial referral to ICACU from the Swiss authorities. This was not a straightforward case because (a) the local authority had limited involvement with the family and the previous care proceedings had involved another local authority; (b) ordinary social work enquiries were hindered by (i) the international dimension, (ii) the fact that no social worker was allocated in Switzerland, (iii) D being outside the jurisdiction, and (iv) the mother's refusal to cooperate with any enquiries; and (c) the experience of transfers relating to public authorities through the framework of the 1996 Convention is limited, such cases arising relatively infrequently.

The Proceedings

16. On 9 December 2020, the local authority made an application for the transfer of matters relating to D pursuant to Article 9 of the 1996 Convention. At a hearing before Macdonald J on 14 December 2020, the matter was listed for hearing before me on 2 March 2021 to determine the Article 9 transfer request. D was made party to the proceedings via his Children's Guardian and directions were given for the filing of evidence. The court gave permission to the local authority to disclose a variety of documents to the Swiss authorities, including the judgment of Mr Recorder Samuels QC. Represented by junior counsel, the mother's position at that hearing was as follows: (a) she stated that D was not a British citizen; (b) she would not confirm the maternity or paternity of D; (c) she would not cooperate with any step to establish maternity or paternity; and (d) D had a legal guardian in Barbados who, she considered, should be joined as a party to these proceedings. I observe that D's Swiss guardian made enquiries of the Barbadian authorities and found no evidence of D having any legal guardian in that jurisdiction. Notwithstanding the mother's position, the court made clear its expectation that she should provide details of D's parentage and any fertility treatment she had received in a statement due to be filed on 5 February 2021. I record that, to date, she has not done so.

17. On 2 March 2021, the local authority's position had altered, it having made an application in late February 2021 to withdraw its Article 9 transfer request together with the public law proceedings. Represented by both leading and junior counsel, the mother supported the local authority's position whereas Children's Guardian did not. All the parties invited me to adjourn the proceedings and to relist the matter for determination at a future date whilst further enquiries were made of the Swiss authorities via ICACU as to, in summary, (a) their proposals for D's long-term care and (b) whether D's current placement in Switzerland could be maintained in the

event of a transfer to this jurisdiction taking place. I acceded to the relisting of the hearing on 13 May 2021 and to further enquiries being made of ICACU. I note that, prior to the March hearing, the local authority had attempted to explore whether the mother and/or the Swiss authorities would cooperate with DNA testing to establish whether there was a genetic connection between D and F. Neither the mother nor the Swiss authorities were amenable to such a course and the Swiss authorities indicated that they *"do not see by what right we would be entitled to give our agreement against the refusal of [the mother]"*.

18. By the time of the next hearing, there had been a variety of developments. First, the Swiss authorities had made a final determination with respect to D's welfare on 2 March 2021, (a) withdrawing the mother's parental authority; (b) placing D under legal guardianship; (c) confirming D's placement with his foster family; and (d) suspending the mother's contact to D. Second, the mother had been released from prison and her legal representatives had, on her intructions, come off the court record. The mother's whereabouts prior to the hearing were unknown but she had received notice of the hearing through her formerly instructed solicitors. Third, enquiries made via ICACU of the Swiss authorities had resulted in the provision of some but not all the additional information the court requested. For example, the Swiss authorities were unable to comment in full as to whether they had the power to undertake DNA testing of D, and whether they had the power to place D with the adoptive parents of his elder brother if this were to be in his best interests. The incomplete information from the Swiss authorities prompted a late application on behalf of the Children's Guardian for the instruction of a lawyer with expertise in Swiss law to provide the information originally sought by the court. I was unable to determine that application on 13 May 2021 as there was no information about the timescale and estimated costs for the report proposed. I thus adjourned the hearing to 18 May 2021.

19. At the resumed hearing, the mother was once more neither present nor represented though she had received the remote hearing link by email at an email address she had used to communicate with the Swiss authorities on 17 May 2021. I note that the mother had emailed the Swiss authorities on 14 May 2021, demanding a permit to permit her to travel to Switzerland to *"deal with the custody of"* D. She stated that she had booked a flight departing from this jurisdiction on 17 May 2021 and would be seeking the return of D to her care in the immediate future. I was satisfied the mother had proper notice of the hearing and proceeded to grant the Children's Guardian's application for a lawyer to advise on matters of Swiss law relevant to these proceedings. I listed the final hearing on 23 and 24 June 2021 and gave the parties permission to serve the mother with notice of that hearing and with other relevant documents by email.

20. Prior to the hearing in June 2021, the mother made some limited contact with the local authority. This was directed towards the pursuit of civil claims in respect of complaints she had about the family court proceedings concerning F and her extradition from Switzerland.

21. Additionally, on being informed of D's birth, F's adopters had in December 2020 indicated that they would be interested in being considered as adoptive parents for D and wished to know whether the mother had used the same donor as she had done in respect of F's birth. They confirmed a willingness to share F's DNA and said that they would like a DNA test done before they could make a final decision about D. In May

2021, F's adoptive parents enquired as to plans for D's future, stating that they *were "just trying to ensure that we have done everything we can to enable some sort of contact for [F] with, what is possibly, his only full sibling"*.

22. In June 2021, F's adopters contacted the local authority again. They stated that the mother had been seeking to contact them and F via their solicitor and had made what they described as *"strange and unreasonable demands"*. They indicated that they would wish to know whether D and F were full siblings and would wish for that request be put to those presently caring for D. In the event of a sibling connection, F's adopters expressed a readiness to arrange contact if all parties were willing.

Expert Evidence: Swiss Law

23. An expert report dated 15 June 2021 was provided by Magda Kulik, a family law specialist accredited by the Swiss Bar Association. In summary, it details the following:

a) That the Swiss courts could order DNA sampling and that consent for the same could be provided by D's legal guardian;

b) A decision by this court for DNA testing of D was capable of being recognised by the Swiss authorities as D was a British national through his mother. However, recognition may be denied if the decision was *"manifestly incompatible with"* Swiss public policy";

c) That the decision taken to withdraw the mother's parental rights could apply indefinitely. The mother could seek D's return to her care subject to demonstrating *"new and important facts"*. Such an application would only be available to the mother from March 2022 and would be subject to review on a periodic basis in any event;

d) Subject to the necessary applications being made, the Swiss court could consider a domestic adoption (presumably to D's present foster carers) or an inter-country adoption. The mother's consent to adoption could be overridden if there was a request by prospective adoptive parents (who had cared for D at least a year to adopt him) or D's legal guardian asked the Child Protection Authority to dispense with the mother's consent. There would be some uncertainty as to whether the Swiss court would dispense with the mother's consent if she opposed D's adoption;

e) If jurisdiction were transferred to this court, the status quo would be maintained pending a decision as to D's long-term welfare. D would be able to stay with his foster family in Switzerland during this process.

The Positions of the Parties

The Mother

24. The mother was neither present nor represented at the June 2021 hearing. I am however satisfied that she received the link to the remote hearing by email and I decided that I could proceed in her absence. I have seen email correspondence from the mother to the parties which made her position clear.

25. At 10.12 a.m. on 23 June 2021 and in response to service upon her of the skeleton argument prepared on behalf of the Children's Guardian, the mother emailed the solicitor for the Children's Guardian, stating the following:

"This child is not British under the British nationality Act. Britain [sic] court does not have jurisdiction regarding this child and definitely not best interest. English court cannot determine any genetic link between [F] or [the mother]. There is no family link to anybody in England. [D] have [sic] never been to Britain. [D] cultural value by being Barbados means that British values are at odds with LGTB [sic] which thankfully is still a criminal offence in Barbados. [D] is settled with a family in Suisse. Suisse have jurisdiction. [D] best interest is Switzerland. [D] does not speak or understand English. [D] only speaks French. Kind regards [the mother]."

26. At 17.45 on 23 June 2021 following receipt of the hearing link, the mother responded by email to the local authority and the Children's Guardian. Her email explained that she had contacted the solicitor for F's adopters and that they had subsequently declined to communicate with her. That refusal was interpreted by the mother as the adopters not wishing to adopt D. Her email went on to state the following:

"… The English Family Court should not be arriving at any decision let alone a decision based on [F's adopters] being prospective adoptive parent [sic] which they are not. I am innocent still, even in the English Family Court and you have invaded my privacy regarding [F] temporary and minor accidental injury that [F] self-inflicted. The Family Court have treated me like s..t. You are basing the same original decision for [F] and onward transmission to [D] case. You have invaded [D] and mine [sic] rights to a private life. I am innocent regarding [F] and [D] and you have no authority over me or [D]. Kind regard [the mother]."

At 22.06 on 23 June 2021, the mother emailed the local authority and the Children's Guardian's Solicitors as follows:

"[D] Suisse legal guardian is called [name omitted] - and Attorney (which you all are not [Ds] legal guardian) has confirmed that there will not be any change to [Ds] long-term carers who are in Suisse. That [D] is to remain in Suisse which is where he has permanent residency and is settled. I don't live in England and I certainly would not have a British passport out of choice which can be relinquished for a different nationality that is more suited to my own values. I do not live in England. I don't wish to engage with the English Family court. You ruin people's lives unnecessarily rather than make peoples [sic] lives better including [Fs]. In [F] case you put him with a family with less opportunities than I could have given him and you have ruined his emotional and mental health. I did not do anything wrong. Kind regards [the mother]."

27. In a further email sent to the local authority at 17.50 on 23 June 2021, the mother made clear that she would not participate in the court hearing and reiterated her position that D was not British. She asserted that the English court had no evidence of any biological link between F and the mother, and no evidence that the mother was the mother of D. There was thus no reason to continue with English family court proceedings. Moreover, D's care needs were being met in Switzerland and the Swiss had jurisdiction in respect of D who was a Barbadian citizen. The email contained further assertions by the mother that the proceedings with respect to F had proceeded

on the basis of false medical evidence and falsified social work evidence. At the conclusion of this email, the mother stated that she was living in Switzerland.

28. I have also seen an email sent by the mother on 14 June 2021 to the solicitor for F's adopters. In it, she stated that she had been acquitted of all matters concerning F and alleged that the care proceedings in respect of F had been based on false medical evidence and falsified social work evidence. She made a variety of requests which included (a) a request that F should be interviewed to confirm that he had inflicted injuries upon himself; (b) a request for an update on F's development and progress; (c) a request that F be interviewed to explain his wishes with respect to her contact with him and her status as his mother; (d) a request for contact to F, including visiting contact twice a month; (e) a request that F be permitted to take exams which would allow him to attend Eton College (the well-known public school); (f) for the restraining order against her to be discharged; and (g) a statement from F's adopters that they had no interest in fostering or adopting where there was no proven genetic link to F.

29. I am quite satisfied that the mother's clear position was to adamantly oppose any assumption by this court of jurisdiction with respect to D and that she was thus opposed to the Article 9 transfer request.

The Local Authority

30. I summarise the local authority's position as follows.

31. The local authority sought, at all times, to assist the Swiss authorities in line with the obligations on public authorities arising under the 1996 Convention. In consequence, it initiated the current care proceedings, in an effort to provide a framework in which any necessary decisions could be made for D in this jurisdiction and subsequently issued an application pursuant to Article 9 of the 1996 Convention. Nevertheless, the local authority had come to the view that it was appropriate to seek to withdraw its application under the 1996 Convention and to withdraw the public law proceedings. Initially, the local authority had hoped to explore permanence for D via adoption in this jurisdiction and would ideally have preferred him to be placed with F though it recognised it was presently unknown whether D and F were biological siblings or genetically related. However, on reflection, the local authority considered this proposal to be outside D's timescale and to risk damaging his substantive attachment to his present foster carers. It recognised that D was well settled and was now a French-speaking child. To progress a plan to bring D to this jurisdiction would require a dual language foster home for a minimum of six months before D could be placed with prospective adoptive carers. In short, the local authority envisaged considerable difficulty in finding such a placement and in implementing a plan for permanence on D's behalf.

32. Mr Setright QC submitted that Swiss law provided a framework for the proper consideration, if such were required, of DNA testing, adoption and even intercountry adoption were this to be pursued by F's adopters. Therefore, there was no want of jurisdiction to make the necessary orders to meet the totality of D's welfare needs as the competent Swiss authorities assessed them and there were no lacunae requiring or commending an ongoing role for this court in those matters. The requests made by F's adopters could properly be passed to the relevant Swiss authorities and F's adopters

could be provided with an introduction to the relevant Swiss decision-makers. Given the involvement of public authorities in Switzerland, there appeared to be no further role for either the care proceedings or for the local authority itself.

33. Mr Setright QC submitted that, given the opposition of the Swiss authorities to a move for D from his present foster home together with their assumption of parental rights, there could be no assurance that an Article 9 transfer request by this court would receive a positive response. If it did and if D were to remain in his present foster home pending decisions by this court, Mr Setright submitted that litigation in one jurisdiction coupled with foster care in another would be problematic practically if not legally. Significant delay would result which would not be in D's interests.

The Children's Guardian

34. Conversely, Mr Twomey QC on behalf of the Children's Guardian submitted that an Article 9 transfer request should nevertheless be made. He accepted that D was well cared for and had established primary bonds with and was securely attached to his foster parents. The mother's parental authority had been withdrawn indefinitely and there was no reason to believe that D's foster placement was in jeopardy or likely to end in the foreseeable future. The foster placement could be maintained notwithstanding a transfer of jurisdiction. Mr Twomey QC observed that the Swiss authorities had not sought to promote a relationship between D and F or with F's adopters. As sibling relationships were often the longest enduring family relationship, he submitted that this court was better placed to undertake a best interests enquiry with a view to making orders that fostered this relationship and which might, if this proved to be in the children's best interests, result in D and F being raised together. During his submissions, Mr Twomey QC refined his position so as to advance an Article 9 transfer request limited to the issue of contact rather than a request aimed at wider welfare considerations.

35. During oral submissions, I invited the parties to consider whether Article 8 of the European Convention on Human Rights was engaged in this case. Given that neither the local authority nor the Children's Guardian had addressed this issue in their written or oral submissions at the hearing, I permitted them to make short written submissions on this point by close of business on 2 July 2021.

The Legal Framework

The 1996 Convention

36. The formal title of the 1996 Convention is the *"Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children"*. The Preamble sets out broad statements of principle which inform the provisions of the 1996 Convention, namely the importance of international cooperation for the protection of children and the confirmation that the best interests of the child are a primary consideration in matters related to the protection of the child. The principle of *"best interests of the child"* is referenced several times elsewhere in the body of the 1996 Convention. The United Kingdom and Switzerland are both signatories to the 1996 Convention.

37. Article 1 sets out the relevant objects of the 1996 Convention as follows:

"(1) The objects of the present Convention are –

a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;

b) to determine which law is to be applied by such authorities in exercising their jurisdiction;

[…]

e) to establish such cooperation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

(2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child."

Article 2 notes that the 1996 Convention applies to children *"from the moment of their birth until they reach the age of 18 years"*. There is no qualification to this expression and, in particular, no requirement that there need be or is expected to be any extant proceedings in order for the 1996 Convention to apply. Article 3 sets out the broad range of measures which fall within the scope of Article 1 including: *"(a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation; (b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence."*

38. Article 4 excludes certain matters from the application of the 1996 Convention including *"decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption"*.

39. Bearing in mind the particular facts of the present case, Articles 5(1), 8 and 9 fall to be considered in respect of jurisdiction:

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- *request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or*

- *suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.*

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

a) a State of which the child is a national,

b) […]

c) […]

d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either

- *request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or*

- *invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.*

(2) The authorities concerned may proceed to an exchange of views.

(3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

40. Pursuant to Article 15(1), *"in exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law"*. Recognition and enforcement are considered in Chapter IV, at Articles 23-28. The obligations of cooperation placed on a Contracting State, Central Authorities, and other public authorities and bodies in a Contracting State are set out in Chapter V at Articles 29-39.

41. In Child and Family Agency v D (R intervening) (ECJ) [2017] 2 WLR 949, the Court of Justice of the European Union held that, with respect to applications for transfer pursuant to Article 15 of BIIA, the court having jurisdiction must determine whether the transfer of the case to that other court is such as to provide genuine and specific added value, with respect to the decision to be taken in relation to the child, as

compared with the possibility of the case remaining before that court. In that context, the court having jurisdiction may take into account, among other factors, the rules of procedure in the other member state, such as those applicable to the taking of evidence required for dealing with the case. The court having jurisdiction should not, however, take into consideration within such an assessment, the substantive law of that other member state which might be applicable by the court of that other member state, if the case were transferred to it (paragraph 57).

42. Domestically, the procedural rules governing transfers under the 1996 Convention apply equally to the hitherto more familiar provisions of Article 15 of BIIA (Council Regulation (EC) No 2201/2003). The procedure for considering the making of requests pursuant to Article 9 of the 1996 Convention is set out at rule 12.65 of the Family Procedure Rules 2010:

"(1) An application for the court to request transfer of jurisdiction in a matter concerning a child from another Member State or another Contracting State under Article 15 of the Council Regulation, or Article 9 of the 1996 Hague Convention (as the case may be) must be made to the principal registry and heard in the High Court.

(2) An application must be made without notice to any other person and the court may give directions about joining any other party to the application.

(3) Where there is agreement between the court and the court or competent authority to which the request under paragraph (1) is made to transfer the matter to the courts of England and Wales, the court will consider with that other court or competent authority the specific timing and conditions for the transfer.

(4) Upon receipt of agreement to transfer jurisdiction from the court or other competent authority in the Member State or Contracting State to which the request has been made, the court officer will serve on the applicant a notice that jurisdiction has been accepted by the courts of England and Wales.

(5) The applicant must attach the notice referred to in paragraph (3) to any subsequent application in relation to the child.

(6) Nothing in this rule requires an application with respect to a child commenced following a transfer of jurisdiction to be made to or heard in the High Court.

(7) Upon allocation, the court to which the proceedings are allocated must immediately fix a directions hearing to consider the future conduct of the case."

By way of clarification, paragraph (5) refers to a notice *"referred to in paragraph (3)"*. This is incorrect as it is paragraph (4) which contains the provision with respect to a notice that jurisdiction has been accepted by the courts in this jurisdiction.

43. Rule 12.66 sets out the procedure following receipt of a request to assume jurisdiction:

"(1) Where any court other than the High Court receives a request to assume jurisdiction in a matter concerning a child from a court or other authority which has jurisdiction in another Member States or Contracting State, that court must

immediately refer the request to a Judge of the High Court for a decision regarding acceptance of jurisdiction to be made.

(2) Upon the High Court agreeing to the request under paragraph (1), the court officer will notify the parties to the proceedings before the other Member State or Contracting State of that decision, and the case must be allocated as if the application had been made in England and Wales.

(3) Upon allocation, the court to which the proceedings are allocated must immediately fix a directions hearing to consider the future conduct of the case.

(4) The court officer will serve notice of the directions hearing on all parties to the proceedings in the other Member State or Contracting State no later than 5 days before the date of that hearing."

44. The decision of Baker J (as he then was) in Re M & L (Children) [2016] EWHC 2535 (Fam) was the first domestic decision concerning the making of a request under Article 9 of the 1996 Convention. Baker J adopted, in respect of the Convention, the approach to comity applied to cases concerning BIIA:

"33. In my judgment, the English and Norwegian courts are equally competent in general terms to determine issues about children. Each court operates in a sophisticated and advanced legal system manned by experienced judges who are manifestly capable of making decisions in this type of case. Although there are some differences in the respective processes, and each court has advantages which the other does not, overall there is no substantial difference. Comparisons are odious. As Mostyn J observed in Re T [2013] EWHC 521 (Fam) at paragraph 37, the court

"should not descend to some kind of divisive value judgment about the laws and procedures of our European neighbours"

and as Sir James Munby P added in Re E (supra) at paragraph 20,

"beneath all the apparent differences in language and legal system, family judges around the world are daily engaged on very much the same task, using very much the same tools and apply the same insights and approaches as those we are familiar with"."

The approach to comity adopted by Baker J finds expression in the Supreme Court's decision in In the matter of N (Children) [2016] UKSC 15 where, at paragraph 4, Baroness Hale stated as follows:

"It goes without saying that the provisions of the Regulation are based upon mutual respect and trust between the member states. It is not for the courts of this or any other country to question the "competence, diligence, resources or efficacy of either the child protection services or the courts" of another state: see In Re M (Brussels II Revised: Article 15) [2014] 2 FLR 1372, para. 54(v), per Sir James Munby P. As the Practice Guide for the application of the Brussels IIa Regulation puts it, at p 35, para 3.3.3, the assessment of whether a transfer would be in the best interests of the child "should be based on the principle of mutual trust and on the assumption that the courts of all member states are in principle competent to deal with a case". This

principle goes both ways. Just as we must respect and trust the competence of other member states, so must they respect and trust ours."

Withdrawal

45. It is well established that public law proceedings, brought under Part IV of the Children Act 1989 cannot be withdrawn without the permission of the court. A helpful summary of the law was provided by MacDonald J in paragraphs 18-26 of the recent decision in Manchester City Council v D (Application for Permission to Withdraw Proceedings after Abduction) [2021] EWHC 1191 (Fam). In summary:

a) Distinct tests apply in cases where the local authority may, or conversely may not, be capable of satisfying threshold;

b) The child's welfare is the court's paramount concern. Whilst there is no requirement to have regard to the welfare checklist, it may well provide a useful analytical framework to consider the merits of the application;

c) In considering further fact finding, the court should apply the familiar approach of McFarlane J (as he then was) in A County Council v DP, RS, BS (By the Children's Guardian) [2005] 2 FLR 1031;

d) The court should undertake *"an objective and dispassionate check on whether the local authority should be entitled to disengage from proceedings"*;

e) In summary MacDonald J observed: *"It is clear from the foregoing authorities that the factors relevant to deciding whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned and the overriding objective under the Family Procedure Rules are not exhaustive. Accordingly, and subject to the best interests of the child remaining the court's paramount consideration, the court is not precluded from taking into account other factors relevant to the welfare of the child concerned and the overriding objective under the Family Procedure Rules"* [paragraph 25].

46. There is no previous reported decision concerning the withdrawal of an application for transfer under the 1996 Convention. It is noted that BIIa provides, at Article 15.2, that a request could be made of the court's own motion, but that the determination in favour of a transfer *"must be accepted by at least one of the parties"*. Articles 8 and 9 of the Convention make reference to *"the authorities of a Contracting State"* and there is no explicit requirement for a determination to be accepted by any of the parties.

47. In the case of Ciccone v Ritchie (No 2) [2016] EWHC 616 (Fam), MacDonald J considered an application for permission to withdraw an application under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Convention"). In like manner, an application under the 1996 Convention also appears to fall within the scope of the Family Procedure Rules 2010, rule 29.4(1)(b), and thus 29.4(2) applying the reasoning of MacDonald J:

"59. I have come to the conclusion that FPR 2010 r 29.4 does apply to applications in proceedings under the 1980 Hague Convention, governed as they are by FPR 2010

Part 12 Chapter 6 and that, accordingly, the permission of the court is required to withdraw such proceedings. My reasons for so deciding are as follows.

60. In my judgment this is the plain meaning of FPR 29.4(1)(b). FPR 2010 r 29.4(1)(b) provides that r 29.4 applies to applications in proceedings "under Parts 10 to 14 or under any other Part where the application relates to the welfare or upbringing of a child". I am satisfied that r 29.4(1)(b) is to be read disjunctively and that the words "where the application relates to the welfare or upbringing of a child" are intended to qualify only the words "any other Part" and not the words "under Parts 10 to 14". I am reinforced in this view by the fact that Part 10 to Part 14 of the FPR 2010 deal with a wide range of applications that do not, or need not concern the welfare or upbringing of a child.

61. Whilst it might be argued that the use of the phrase "any other" in r 29.4(1)(b) demonstrates that Parts 10 to 14 are included in r 29.4 only in so far as they apply to applications concerning the welfare or upbringing of children, if this had been the intention I am satisfied that those who drafted the rules would have said so expressly, rather than leaving it to be implied in circumstances where, as I have said, those Parts also deal with applications that need not, and often will not, concerned the welfare and upbringing of children. Further, pursuant to FPR 2010 r 1.2(b) when interpreting r 29.4 I must seek to give effect to the overriding objective in FPR 2010 r 1.1. In my judgment reading r 29.4 in this context further militates against this latter interpretation."

48. MacDonald J gave consideration to the manner in which the court should approach such an application:

"70. When considering an application under FPR 2010 r 29.4 for permission to withdraw, pursuant to FPR 2010 r 1.2(a) the court must seek to further the overriding objective and must consider those factors set out in FPR r 1.1(2) to which the court is required to have regard when seeking to do so. Indeed, even where the application concerns the welfare and upbringing of a child, and the welfare of the child is the paramount consideration in determining an application for permission to withdraw, the factors relevant to the application of the overriding objective set out in FPR 2010 r 1.1(2) will also fall to be considered.

71. Within this context, in my judgment, where an application to which FPR 2010 r 29.4 applies is an application that does not concern the welfare or upbringing of a child, the test for permission to withdraw will centre on those matters set out in the overriding objective at FPR 2010 r 1(2), including the need to deal with the proceedings expeditiously and fairly, the need to deal with cases proportionately, the need to save expense and the need to ensure the appropriate sharing of the court's resources. That is not to say the court will be prohibited entirely considering issues of welfare because the overriding objective set out in FPR 2010 r 1.1 requires the court to deal with cases justly "having regard to any welfare issues involved". However, in applications for permission to withdraw which do not concern the welfare or upbringing of the child, this factor is unlikely to feature heavily, and will in most cases not feature at all, when deciding whether to give permission to withdraw."

The European Convention on Human Rights

49. Article 8 of the Convention entitled *"Right to respect for private and family life"* states as follows:

> *"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

50. The question of whether family life exists is a question of fact depending upon the real existence, in practice, of close personal ties. The decision in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 (though in the quite different context of adult children/siblings) would tend to support (a) the fact sensitive nature of the enquiry, (b) the difficulty of establishing family life when not living together, and (c) the factors to be examined in order to assess proportionality are the same regardless of whether private or family life is engaged.

51. In Re RA (Baby Relinquished for Adoption) [2016] EWFC 47, Cobb J noted that, in circumstances where a grandmother sought to pursue the care of a child who had been relinquished for adoption and placed in a foster to adopt placement but had not had contact, *"the right to a private and family life is not a theoretical right or one created by kinship alone; it must have body and substance"* (paragraph 43 (vii)). The making of adoption orders always brings pre-existing Article 8 rights as between a birth parent and an adopted child to an end. Those rights arose from and coexisted with the parent-child relationship which was extinguished by adoption (see Peter Jackson J (as he then was) in Seddon v Oldham MBC (Adoption: Human Rights) [2015] EWHC 2609 (Fam) at paragraph 2(1)).

52. In Re TJ (Relinquished Baby: Sibling Contact) [2017] EWFC 6 at paragraph 27, Cobb J extended the reasoning in Seddon and Oldham MBC by analogy and noted that *"the same must be true of relationships between birth siblings/half siblings"*. He noted in paragraph 28:

> *"While there exist some potential benefits to TJ in having some contact with his half-brother even if limited to indirect contact, for identity purposes if nothing else, any such order for indirect contact (under section 51 or otherwise) would not be founded upon there being any actual relationship between the boys, and would in those circumstances be highly unlikely in itself to create Article 8 rights".*

Cobb J applied similar reasoning in the recent case of Re F (Assessment of Birth Family) [2021] EWFC 31, endorsing the local authority's submission that:

> *"25. Fourthly, they maintain that Article 8 almost certainly does not apply to the birth family in this case (see also [15](viii) above). The existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact and degree, depending upon the existence in the individual case of a relationship and/or personal*

ties which have sufficient constancy and substance to create de facto "family ties" see: Lebbink v The Netherlands [2004] 2 FLR 643, ECHR. On these facts, they submit (and I can confirm that I agree) that it does not apply."

53. Private life as provided for by Article 8 is a broad concept incapable of exhaustive definition. In Niemietz v Germany (A/251-B), (1993) EHRR 97 (1992), the European Court of Human Rights described it thus [paragraph 29];

"The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

In Odievre v France (Application no. 42326/98), (2004) 38 EHRR 43, a case concerning an adopted person's right to access information about his/her birth family, the European Court of Human Rights addressed the right to private life in the context of potential family relationships as follows (paragraph 29):

"The Court reiterates in that connection:

'Article 8 protects a right to identity and personal development, and the rights to establish and develop relationships with other human beings and the outside world… The preservation of mental stability is in that context and indispensable precondition to effective enjoyment of the right to respect for private life.'

Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents. Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Art. 8 of the Convention….".

54. It is well-established that the choice of means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is, in principle, a matter that falls, on the international plane, within the Contracting States' margin of appreciation. However, a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out. It cannot avoid that obligation by reference to a margin of appreciation to be allowed to the government or Parliament (at least not in the sense that the expression has been used by the European Court of Human Rights) (see paragraph 29 of R (On the application of Steinfeld and Keidan) v Secretary of State for International Development [2018] UKSC 32).

Discussion and Analysis

Jurisdiction

55. Following D's birth, it appears that he left Barbados shortly thereafter in December 2018. From December 2018 until 20 November 2019, the date upon which the mother

was arrested in Switzerland, nothing is known about his whereabouts to inform an analysis of his habitual residence. D has been resident in Switzerland since November 2019 and both parties accept that he was not habitually resident in this jurisdiction at the point the care proceedings were issued. I accept that D was, at time the care proceedings were issued and thereafter, habitually resident in Switzerland. He remains so to date.

56. The care proceedings are the vehicle by which the mother and child are represented before the court though I note that, since her release from prison, the mother has chosen not to avail herself of the non-means, non-merits public funding available to her. Absent the issue of care proceedings, it is unclear that either the mother or D would be entitled to funded representation within a stand-alone application pursuant to the 1996 Convention. In the circumstances of this case and mindful of the 1996 Convention requirement for Contracting States to cooperate to achieve the purposes of the 1996 Convention, the issuing of care proceedings by the local authority was an entirely appropriate step to take. Though D was not present in the jurisdiction at the time care proceedings were issued, I am satisfied that the local authority's application was properly made. Given the likelihood that D was, at birth, a British national, the jurisdiction to entertain proceedings in relation to him could be founded under the parens patriae jurisdiction of the High Court. The exercise of that jurisdiction requires caution as Baroness Hale observed in paragraph 59 of Re B (A Child) [2016] UKSC 4 because to do so may (a) conflict with the jurisdictional scheme applicable between the two countries in question; (b) result in conflicting decisions in those two countries; and (c) result in unenforceable orders. None of those difficulties have much traction in these circumstances where the care proceedings are the vehicle by which the cooperation between this jurisdiction and the Swiss authorities envisaged by the 1996 Convention was brought to life.

57. Further, the Family Procedure Rules 2010 and the operation of the 1996 Convention permit the making of the local authority's Article 9 application. I am wholly satisfied that I have the jurisdiction to determine the application pursuant to Article 9.

The Article 9 Request: Qualifying Criteria

58. There are three criteria to be considered before requests can be made pursuant to Article 9 of the 1996 Convention. First, the requesting State must fall within the terms of Article 8(2) which provide specific criteria at subparagraphs (a) to (c) and a broader catch-all at sub-paragraph (d) that the child has a *"substantial connection"* with the requesting State. Second, the purpose underlying a transfer request must not engage any of the provisions of Article 4, being issues which lie outside the scope of the 1996 Convention. Third, in accordance with Article 9(1), the authorities of the requesting State must *"consider they are better placed in the particular case to assess the child's best interests"*.

Article 8(2)

59. Neither Mr Setright QC nor Mr Twomey QC sought to argue that Article 8(2) was not engaged in this case. In my view, they were right to do so.

60. First, it appears likely that, whatever the mother may say, D is (and has, since birth, been) a British national. There was no information before the court which suggested

that the mother had renounced her entitlement to a British passport, and I infer from her email sent at 22.06 on 23 June 2021 that the mother continues to use a British passport. On the assumption that D is the mother's natural child, it appears highly likely that he would have acquired British nationality by descent at birth (see s.2(1)(a) of the British Nationality Act 1981). I accept there is some uncertainty arising in respect of this as a result of the position adopted by the mother in these proceedings, the lack of information about the fertility treatment obtained, and the absence of any absolute confirmation of a biological connection.

61. Alternatively, by virtue of D's mother being British, this jurisdiction *is "a State with which the child has a substantial connection*". The evidence before me demonstrates that the mother – who remains a British citizen - lived and worked in this jurisdiction for many years prior to the births of F and D. At the time the proceedings were issued by the local authority in November 2020, the mother was physically present in this jurisdiction and awaiting trial. Moreover, this jurisdiction was properly seised of the proceedings concerning the mother's other natural child, F and F remains living in this jurisdiction. I note that the mother has not asserted that F is not her biological child. In my view, these facts are sufficient to establish the substantial connection with this jurisdiction required by Article 8(2)(d).

62. I am satisfied that Article 8(2) is satisfied in this case.

Article 4

63. Article 4 excludes certain matters from the application of the 1996 Convention including decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption. By refining the basis upon which he invited me to make an Article 9 request and confirming that it only related to issues with respect to contact between D and F, Mr Twomey QC did not, in my view, fall foul of Article 4(b) (decisions on adoption etc).

64. The investigation of contact between D and F in this jurisdiction proposed by Mr Twomey QC might well require DNA testing to establish a biological/genetic link between both children. Mr Twomey QC submitted that this did not fall foul of the provision in Article 4(a) which excluded from the scope of the 1996 Convention *"the establishment or contesting of a parent-child relationship"*. This was because such testing would not interfere with or contest the relationship between D and the mother recognised by the 1996 Convention.

65. I am satisfied that the purpose for which transfer was sought did not engage any of the matters set out in Article 4.

Better Placed to Determine Welfare

66. It is plain that, over the period from August to December 2020, the attitude of the Swiss authorities to a possible transfer of D to this jurisdiction (by whatever means) altered. Initially in August 2020, it appeared that the Swiss authorities considered a transfer of jurisdiction, and of D, to be in his welfare interest. That change appears to have occurred in consequence of the combined effect of (a) the time that had elapsed; (b) the concerns of the Swiss authorities that they had received insufficient reassurance about the way D would be looked after if he had to be sent to this

jurisdiction; and (c) the disruption to D's present and regained stability in his foster home.

67. The Swiss authorities have made a final decision in respect of D and approved a long-term arrangement for his welfare (though subject to reviews, and the possibility of the mother pursuing an application to resume D's care). D is well settled in his foster home and, taking into account the delay to date, the invitation to transfer any aspect pertaining to D's welfare to this jurisdiction would delay finality for him. However, I recognise that the mother may seek to challenge D's placement in Switzerland and that this may, itself, lead to further consideration of his situation and potential disruption to him.

68. Whilst not, by any means, determinative, the attitude of the Swiss authorities and their firm resistance to the possibility of any transfer appears to reduce the potential utility of any transfer request made by this court given the likelihood that it will meet with a further refusal.

69. Given the narrow ambit of the transfer request pursued by Mr Twomey QC namely matters pertaining to contact between D and F, he sought to persuade me that only in this jurisdiction was active consideration being given to the fostering of a relationship between D and F. To make good that submission, he referred me to the text of the final determination made by the Swiss authorities on 2 March 2021. I note that, in coming to that final determination, the Swiss authorities had access to the judgment of Mr Recorder Samuels QC relating to F. It is fair to say that, at no point in that judgment, was there any mention of the possibility of contact between D and F. Mr Twomey QC submitted that the potential for a lifelong relationship between D and F as siblings did not appear to be a matter that the Swiss authorities either prioritised or intended to explore. By contrast, he submitted that this court was uniquely well placed to explore the establishment of a sibling relationship between D and F since F and his adoptive parents were resident within this jurisdiction; had an existing relationship with the local authority; and a common and shared experience of dealing with the mother.

70. Mr Twomey QC was at pains to stress that no criticism was intended of the Swiss authorities and that a transfer of jurisdiction relating to contact between D and F would not entail any change in D's present placement or disruption of his attachment to his foster carers. He submitted that the provisions of Articles 8 and 9 relating to transfer requests represented the principle of comity in action in that they invited cooperation between two Contracting States without criticism of either State.

71. Mr Twomey QC submitted that transfer to this jurisdiction would represent a practical and effective response to D's Article 8 right to private life as expressed in the potential for contact with F. He relied upon the failure of the Swiss authorities to answer fully and accurately this court's respectful request for information, such that the court sought the assistance of an independent expert on Swiss law. Misunderstandings by the Swiss authorities as to the correct legal position were, he submitted, likely to have an impact on the future steps they might take with respect to establishing the sibling relationship. He submitted that there was a practical and effective advantage to D of this jurisdiction taking control of his Article 8 rights to a private life as it found its expression in the potential for contact with F.

72. Attractively put though these submissions were, I found myself ultimately unpersuaded by them. First, merely because the 1996 Convention contains a mechanism for transfer requests to be made between Contracting States does not mean that consideration of comity is satisfied thereby. Comity within the context of the 1996 Convention requires this court, when considering making a transfer request, to apply both the principle of mutual trust and the assumption that the authorities of the other Contracting State are, in principle, competent to deal with all aspects of a case.

73. Second, it is clear from the expert legal evidence that there is a legal framework capable of resolving any of the issues which might be engaged in consideration of contact between D and F. For example, the Swiss court could order DNA sampling to establish a genetic link between D and F, with consent from the same being provided by D's legal guardian. The Swiss authorities were likewise equally capable of assessing and promoting contact between D and F given the cooperation forthcoming from F's adopters. Moreover, an assessment of the frequency and nature of any contact between D and F is better undertaken by the Swiss authorities in whose area D lives. Those authorities would have an on-the-ground understanding of D's ability to manage contact, particularly in a language other than French, including how any difficulties might be overcome. In those circumstances, I struggle to see what genuine and specific added value there would be to a transfer of jurisdiction relating to contact issues.

74. Third, Mr Setright QC pointed to practical difficulties if the transfer request were accepted and jurisdiction with respect to contact were to be transferred to this court. He doubted that care proceedings would be the appropriate vehicle within which contact between D and F might be considered since the Swiss authorities had already assumed parental rights with respect to D. If he was wrong, the Swiss authorities would need to be a respondent to the care proceedings. However, if it were more appropriate for F and/or his adopters to apply for a child arrangements contact order with respect to D, the principal respondents would be the Swiss authorities, the mother and D. That scenario gave rise to uncertainty as to which person or body might drive the litigation forward given the very limited involvement of F's adopters to date (to say nothing of funding problems which may arise for them by involvement in High Court litigation). Additionally, Mr Setright QC submitted there would be a degree of artificiality about proceedings in this jurisdiction to which the Swiss authorities were a respondent. Those submissions were ones to which Mr Twomey QC had no real response.

75. The practical difficulties raised by Mr Setright QC are significant. Whilst some or all of them are potentially capable of being overcome given the ingenuity of lawyers and, sometimes, of judges, I can see real potential for significant dispute about (a) the means by which this court would be seised of contact issues and (b) this court's ability to resolve contested issues when one of the respondents would itself be a Contracting State to the 1996 Convention. In coming to that view, I have taken into account the mother's adamant opposition to this court exercising jurisdiction with respect to any aspect of D's welfare and I cannot exclude a real possibility that she would seek to challenge each step this court might take either procedurally or substantively. That would be to the potential disadvantage of both D and F and would import significant delay into any proceedings in this jurisdiction.

76. Within the parameters of D's Article 8 rights, it is difficult to see that, applying the case law cited above, there is *"family life"* between D and F, given that F is now an adopted child and that there is no existing relationship and/or personal tie which has sufficient substance to create Article 8 rights. However, that is not the end of the matter since the theoretical possibility of a future relationship with F engages consideration of D's right to private life. Mr Twomey QC pressed me to make a judgment on the practical and effective means by which D's right to private life was likely to be addressed by the Swiss authorities and by this court.

77. Before I do so, I endorse Mr Twomey QC's submissions as to the importance of sibling relationships in general and to the importance for D and F of a sibling relationship if this can be properly established. For my part, I am clear that sibling relationships are – more so that the relationship of child and parent – invariably the longest relationships in the lives of almost all persons. They have embedded within them a person's identity and life-story, stretching back into the past as well as forwards into the future. The existence of a sibling relationship is crucial for healthy emotional and identity development though it can be attenuated by time, distance, conflict and legal separation. For D and F, the establishment of a sibling relationship may have a particular added benefit in that it may serve to remedy some of the harms each has experienced whilst in the care of their mother and to give each of them a sense of positive connection to add to those existing within their foster and adoptive homes.

78. I have taken into account Mr Twomey QC's observations about the absence of consideration by the Swiss authorities of the potential for a relationship between D and F. The practical and effective advantage to D of this jurisdiction giving substance to D's right to private life in exploring the potential for contact between him and F is not established in circumstances where (a) there are likely to be significant legal and practical difficulties if this court were successful in advocating for a transfer of jurisdiction and (b) a clear legal framework exists in Switzerland for the exploration and/or establishment of contact between D and F. Any doubt as to the importance of exploring and giving substance to the potential relationship between D and F will be swept away by the contents of this judgment which will be disclosed to the Swiss authorities. I have no doubt that comity requires them to treat its contents with respect and the utmost seriousness.

79. My analysis leads me firmly to the conclusion that this court should not make an Article 9 request to the Swiss authorities as envisaged by the 1996 Convention.

Withdrawal of the Article 9 Application

80. Given the position of both parties that, if I were to reject the application for an Article 9 transfer request, the local authority's applications for both an Article 9 transfer and for a care order should be withdrawn, I have not heard detailed argument on these issues. In the light of my decision on the transfer request, I am satisfied that these two sets of proceedings no longer have any forensic utility, and that their continuance has no positive welfare benefit to D. In coming to that conclusion, I have applied relevant procedural rules and case law set out above.

81. I grant permission to the local authority to withdraw both its application for an Article 9 transfer pursuant to the 1996 Convention and its application for a care order.

Areas of Potential Collaboration

82. The positive obligations on the public authorities in this jurisdiction and in Switzerland to extend cooperation are set out within the 1996 Convention at Chapter V. In that spirit, I invited the local authority in its addendum submission to identify (a) matters upon which it might provide additional assistance to the Swiss authorities and (b) issues which the Swiss authorities and/or might seek to address in respect of D's welfare. I am grateful to Mr Setright QC for his thoughtful and practical suggestions.

83. With respect to the positive obligations upon this local authority, the following matters struck me as pertinent. First, it is desirable that the local authority should commit to facilitating an introduction between F's adoptive parents (and/or the relevant adoption service) and the Swiss authorities. This would give the Swiss authorities the means by which they might explore contact between D and F. Second, the local authority should provide all necessary information within its knowledge and control to the Swiss authorities. Third, the local authority should commit to assisting the Swiss authorities to liaise with the previous local authority involved with F and/or the Crown Prosecution Service, as might be required. Fourth, the local authority may assist this court by providing to the Swiss authorities the papers produced within these proceedings.

84. The positive obligations in Chapter V of the 1996 Convention also extend to this court. Although the Swiss authorities have already, by this court's orders, what received a number of documents generated within the legal proceedings concerning both F and D, I propose to order disclosure of the papers produced within these proceedings in order to inform and assist the Swiss authorities and/or Court with any future decision-making in respect of D. There is no objection by the local authority or the Children's Guardian to this course. Further, I make it plain that this court can be relied upon by the Swiss authorities to consider any necessary applications for recognition and/or enforcement which might assist with any arrangements for future contact between D and F (if this is arranged and takes place within this jurisdiction).

85. In the spirit of mutual respect and trust advanced by one Contracting State to the 1996 Convention to another Contracting State to that Convention, I respectfully suggest that the Swiss authorities and/or Court may wish to address the following matters:

a) The undertaking of DNA testing to establish whether D and F enjoy a half or full sibling genetic relationship;

b) Whether contact should be established between D and F and, if so, by what means;

c) Whether D should live with F;

d) And whether there should be an adoption of D by F's adoptive parents.

In the light of my judgment, I venture to suggest that consideration of those matters by the Swiss authorities will demonstrate their respect for D's right to a private and family life with the one person – a potentially genetically related sibling - with whom he might be expected to have a lifelong relationship.

Conclusion

86. That is my decision.