Neutral Citation Number: [2015] EWCA Civ 888

Case No: B4/2015/0437

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Justice MOYLAN
[2014] EWHC 4532 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 August 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE BLACK
and
LORD JUSTICE VOS

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In the Matter of CB (A Child)

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- -

The Appellant mother LB appeared in person assisted by a McKenzie friend Mrs Julie Haines
Mr Henry Setright QC and Mr Chris Miller (instructed by the South London Legal Partnership) for the London Borough of Merton
Mr Ian Griffin (instructed by Children and Family Law LLP) for the prospective adopters
Ms Hannah Markham (instructed by CAFCASS Legal) for the children's guardian
Mr Agris Skudra of the Central Authority of the Republic of Latvia (the Intervener)

Hearing dates : 1, 15 April 2015

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Judgment

Sir James Munby, President of the Family Division :

1. This is an appeal from a judgment and order of Moylan J dated 19 December 2014: *Re B, London Borough of Merton v LB* [2014] EWHC 4532 (Fam). His judgment is available, free to all, on the BAILII website.

2. The judge was exercising public law jurisdiction under the Adoption and Children Act 2002 (the 2002 Act) in relation to a little girl, CB, who was born in April 2008. CB and her mother, LB, are citizens of the Republic of Latvia, though it is correctly common ground that CB, who was born in this country, has at all material times been habitually resident here. CB's father has had no involvement in her life.

The history of the proceedings

3. Following an incident on 5 March 2010, the distressing details of which were recorded

by Moylan J (judgment, paras 27-28), CB was taken into police protection in accordance with section 46 of the Children Act 1989 (the 1989 Act) and then, within days, taken into care by the local authority, the London Borough of Merton, under section 20 of the 1989 Act and placed in foster care. Moylan J recorded the subsequent events (judgment, paras 30-33). In May 2011, the mother, as she was entitled to, requested that CB be returned to her care. The mother seems not to have pressed the point. Be that as it may, the local authority did not return CB to her mother's care. Instead, on 15 June 2011, it commenced proceedings seeking a care order under section 31 of the 1989 Act. It also sought a placement order under section 22 of the 2002 Act.

4. On 10 July 2012, care and placement orders were made by District Judge (Magistrates' Court) McPhee sitting in the Inner London Family Proceedings Court. Moylan J recorded the proceedings before the District Judge in some detail (judgment, paras 36-54), quoting at some length (para 53) the District Judge's conclusions. For present purpose it suffices to note four things.

5. The first is that the mother did *not* seek to argue that the threshold criteria in section 31 of the 1989 Act were not satisfied: see *LB v London Borough of Merton and CB (A Child)* [2013] EWCA Civ 476, [2014] 1 FLR 1066, para 13.

6. The second is that the District Judge referred to the "appalling condition" in which CB had been found on 5 March 2010. He quoted the police officer who had been there, having been called by the landlord:

> "I then heard a whimpering sound from a door directly in front of me. Once I had opened the door, I saw a room. In the left-hand corner of the room was a wardrobe and there were toys all over the floor. In the right-hand corner of the room against the window was a double bed that looked very soiled. On the wall beside the bed was a large area of damp and the wallpaper was coming away. There was a very strong and overpowering smell of urine and faeces in the room. I saw the child curled in an almost foetal position on the bed lying on a pillow. She sat up when we came into the room and she was holding an empty pink bottle. I went towards the child and she stood up and came towards me. I saw that her clothes were wet and that she was wearing a nappy that was falling off between her legs. Once in a different room, I could see that the child's clothes were wet and she was shivering. The strong smell was coming from her and it was clear that she had not been changed or cleaned all day. I removed the child's nappy to find dried and fresh faeces. The nappy was so swollen with urine that the child was unable to walk properly. There were also dried faeces on the child's body and her skin was soaked in urine that had leaked from her nappy and gone through her clothes."

7. The third is that the District Judge heard oral evidence from both a chartered clinical psychologist and a child and adolescent psychiatrist. The psychologist, whose evidence was effectively not contested, was of the opinion that the mother did not have a personality disorder but did have maladaptive personality traits. The psychiatrist, whose

evidence, although challenged, was accepted by the District Judge, considered that CB had a disorganised attachment to her mother and attributed the global developmental delay, reported in August 2010, to the care given to CB by her mother and as being caused by neglect, both physical and emotional. The District Judge described the psychiatrist's evidence as compelling:

> "His evidence was compelling when he said that observation of CB with the foster carer and with her mother was clinically dramatic for him, such was the difference in her presentation. I found his analysis of the available evidence persuasive and compelling and unshaken in examination."

8. The fourth thing to be noted is the District Judge's core finding:

> "CB has suffered significant harm in the care of her mother. I find that CB has been subjected to significant neglect, both physical and emotional, causing her physical harm, emotional harm in respect of her primary attachment and causing her to be developmentally delayed in all areas of her development. This I find is attributable to the care given to her by her mother.
>
> I find that her mother is in no better position now to prevent harm to CB than she was when CB was removed from her care on 5th March 2010. The personality traits and psychological deficits identified by [the psychologist] will still be present: one can follow her avoidance of issues throughout these proceedings and see her denial in action. I have no doubt that if CB was to be returned now to her care, that CB would continue to suffer harm through emotional and physical neglect."

9. The mother's appeal against these orders was dismissed on 8 October 2012 by His Honour Judge Cryan, who gave a long and detailed judgment. On 29 October 2012 the mother applied to revoke the placement order in accordance with section 24 of the 2002 Act. The application was dismissed by District Judge Jenkins on 30 November 2012, on the basis that there had not been a sufficient change of circumstances to justify revoking the placement order. On 6 December 2012 the mother sought permission to apply for judicial review in accordance with CPR Part 54. Permission was refused on the papers by Keith J the same day. The mother's renewed application was heard by Mr Charles George QC, sitting as a Deputy High Court Judge, on 10 April 2013. He dismissed her application as being misconceived, her proper remedy being by way of appeal from the orders she was challenging.

10. The mother sought permission from the Court of Appeal to appeal from Judge Cryan's order. McFarlane LJ gave her permission on three points of law which are no longer in contention. However, her appeal was dismissed by the Court of Appeal on 1 May 2013: *LB v London Borough of Merton and CB (A Child)* [2013] EWCA Civ 476, [2014] 1 FLR 1066.

11. In the course of his judgment, Ryder LJ said this (paras 14-15):

> "14 In a closely argued, detailed and most careful judgment, District Judge McPhee considered all of the evidence. He made findings of fact and exercised his discretion in a way which is clear. He identified the correct legal principles to apply and applied them to the facts as found. I can detect no error of law and nothing that can be described as plainly wrong. The conclusions he came to both as respects the witnesses and their evidence are coherent, consistent and well within the broad ambit that is to be afforded to a first instance judge.
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> 15 The same level of care is evident in the conduct of the first appeal by His Honour Judge Cryan. His Honour Judge Cryan dealt with an appeal by the mother and also an appeal by CB's sister, MZ. He likewise took 4 days and reserved judgment over a weekend. The judgment is a model of clarity and analysis. It takes every ground asserted, analyses the evidence, sets out all of the positives and the negatives and applies the appellate test to the findings and to the exercise of discretion by District Judge McPhee. Both appeals were dismissed and Thorpe LJ refused permission for MZ to bring a second appeal to this court."

Ryder LJ's conclusion (para 19) was that "The conclusions of District Judge McPhee are unassailable and His Honour Judge Cryan was right to uphold them." He had earlier made this observation (para 16):

> "It is important to understand that neither judge accepted the local authority's case without criticism. There was expressed disquiet about the local authority's management of the case and a careful critique of the apparently encouraging assessments. Those assessments were described as over optimistic, superficial, lacking analysis and insight and insufficiently rigorous in the context of the medical evidence about the child and mother's approach to her daughter's best interests while in care, which was described at best as expedient and lacking in motivation."

12. Following that, CB was placed with prospective adopters on 22 May 2013. She has been with them ever since. CB's last contact with her mother had been on 6 March 2013.

13. On 17 April 2013, the mother made an application for contact. It was refused by District Judge McPhee on 7 June 2013. By then, as the District Judge mentioned in his judgment, the mother had failed in her application for permission to appeal from the Court of Appeal to the Supreme Court, as also in her application to the European Court of Human Rights for interim measures.

14. On 16 July 2014 the prospective adopters issued their application to adopt CB. The directions hearing before District Judge McPhee on 27 August 2014 was attended by His Excellency the Ambassador of the Republic of Latvia and the Latvian Consul. The

District Judge gave permission for the relevant judgments and other documents to be disclosed to them and allocated the matter for hearing by a High Court Judge.

15. On 30 September 2014 the mother applied again for contact. On 16 October 2014 she made two further applications: an application under Article 15 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, commonly known in this country as BIIR or BIIA, for jurisdiction to be transferred to Latvia; and an application under section 47(5) of the 2002 Act for permission to oppose the making of an adoption order.

16. It was those three applications that came on for a directions hearing before Moylan J on 29 October 2014. The hearing was attended by His Excellency the Ambassador of the Republic of Latvia, the Latvian Consul and Mr Agris Skudra of the Latvian Central Authority. Moylan J gave them permission to attend future hearings. He joined CB as a party and directed that she be represented by a member of the CAFCASS High Court Team. CAFCASS is the Children and Family Court Advisory and Support Service, a statutory body established by the Criminal Justice and Court Services Act 2000. Following a further directions hearing on 7 November 2014, the substantive hearing of the mother's three applications commenced before Moylan J on 15 December 2014.

The hearing before Moylan J

17. Before Moylan J, the local authority and the prospective adopters were represented by counsel. CB was represented by an officer of CAFCASS Legal. The mother appeared in person. The Latvian Central Authority had provided the court with a written summary of its position dated 11 December 2014. Mr Skudra made oral representations.

18. In his judgment, Moylan J set out in detail (paras 70-103) the evidence and the parties' respective submissions. He described (paras 79-87) the involvement of the Republic of Latvia and the Latvian Central Authority's submissions. He dealt in turn with the mother's three applications.

Moylan J's judgment: Article 15

19. Moylan J summarised accurately the effect of Article 15 of BIIA and quoted the crucially important wording of Article 1(3)(b), which provides that BIIA does not apply to:

> "decisions on adoption, measures preparatory to adoption or the annulment or revocation of adoption."

He recorded (para 85) the acknowledgement by the Latvian Central Authority that BIIA does not apply to decisions on adoption or measures preparatory to adoption. He summarised Mr Skudra's submissions as follows:

> "Mr Skudra suggests that, if the mother is given permission to

> oppose the adoption application, the proceedings could become proceedings which concern parental responsibility and, therefore, fall within the Regulation. He also argues that an Article 15 transfer is the better way of seeking to preserve CB's culture, religion, language and Latvian identity. Indeed, he expresses concern that these matters have not been given sufficient weight and also refers to Article 20 of the UNCRC 1989."

20. Moylan J held that Article 15 did not apply. He referred to my decision in *Re J and S (Children)* [2014] EWFC 4. He explained his reasoning as follows (paras 105, 109):

> "105 … In my view the application to transfer the proceedings to Latvia under Article 15 must fail, because the Regulation does not apply to decisions on adoption or to measures preparatory to adoption. It is clear to me that Article 15 does not apply to this case or the applications now before the court, save, possibly, the contact application.
>
> 109 In coming to the conclusion that Article 15 does not apply, I have taken fully into accounts the points raised by the mother and by the Latvian Central Authority. I have to deal with the case as it is now, not as it might be in the future. Simply stated, BIIa does not apply to these proceedings, because they are adoption proceedings. The only application to which it might arguably apply is the mother's application for contact. However, it would clearly make no sense to transfer just this application, even if it was otherwise merited, which, for the avoidance of doubt, in my judgment it is not."

21. Moylan J also considered the question, appropriately raised by counsel for the local authority, whether to stay the proceedings in accordance with section 5(2) of the Family Law Act 1986, which provides that:

> "where at any stage of the proceedings on an application made to a court in England and Wales for a Part I order or for the variation of a Part I order, it appears to the court … (b) that it would be more appropriate for those matters to be determined in proceedings to be taken outside England and Wales, the court may stay the proceedings."

22. Dismissing the suggestion, the judge said this (paras 107, 110):

> "107 … I doubt that the provisions of this section apply in the circumstances of this case. In any event, the principles applicable would be the general principles applicable when it is contended that there is a more appropriate forum where, to quote from *Spiliada Maritime Corporation v Consulex* [1987] AC 460: "the case may be tried more suitably for the interests of all the parties and the ends of justice". In this exercise the child's welfare is not paramount, but it is, nevertheless, very important: *Re V (Forum*

> *Conveniens)* [2005] 1 FLR 718.
>
> 110 In my judgment, England is now clearly the more appropriate forum. The courts and state authorities here have been involved with CB and making decisions about her welfare since March 2010. She is now aged 6½. In these circumstances, I can see no basis for concluding that the Latvian Courts would be better placed to make decisions concerning her welfare."

23. Accordingly, he dismissed this part of the mother's application,

Moylan J's judgment: section 47(5)

24. In relation to the mother's application under section 47(5), Moylan J carefully and correctly directed himself (paras 65, 111-115) by reference to the decisions of this court in *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035, *In re W (A Child) (Adoption Order: Leave to Oppose), In re H (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1177, [2014] 1 WLR 1993, [2014] 1 FLR 1266, and *Re R (A Child)* [2014] EWCA Civ 1625. He summarised the mother's submissions, which on this point were threefold:

    i) First (para 72), that her circumstances had changed in that she now has a great supportive network, consisting of international support from around the world, including Latvian and other authorities, and also support from local friends in London. Their support, she said, had given her strength, both emotional and physical.

    ii) Secondly (para 76), that the Latvian authorities are willing to assume jurisdiction in this case, which would thereby help to maintain CB's Latvian heritage and identity by maintaining her connection with her country, her language, her religion and culture.

    iii) Thirdly (para 77), that the decision in *Re B-S* amounts to an additional change of circumstances.

25. In addressing the first of these submissions, Moylan J drew attention (paras 74-75, 118) to how the mother had presented before him:

> "74 In her presentation to me, the mother focussed significantly on what she contends were significant failings in the evidence and the process during the course of the care proceedings. She described in emotive language how she felt she had been treated. She also pointed to evidence, such as a core assessment in January 2010 and another assessment in August 2010, which were positive, and to a proposed rehabilitation plan in November 2010. She showed me contact notes from 2011 and

2012.

75 The mother, clearly, has powerful deep-seated views about the wrongs that she considers she, her daughter and CB have suffered. It is clear that she does not, at any level, accept that the care and placement orders were justified or that there is any good reason why CB should not be returned to her care. She refers to the loss to CB of her Latvian heritage and identity – the loss of her nationality, language and culture – as well, importantly, of the loss of her birth family, if she were to be adopted.

118 … much of the mother's case was focused on seeking to demonstrate that she had been treated badly during the course of the proceedings and that the court's earlier judgments were flawed. She sought to demonstrate this by reference to events and evidence which predated the hearings before DJ McPhee and HHJ Cryan."

26. In relation to this, he correctly observed (para 119) that:

"I am not re-hearing the care proceedings. I am not considering whether the judgments were wrong or whether the judges' assessment of the evidence was wrong. In any event, the Court of Appeal, as I have already described, said that there was no discernible error in the principles of law identified and applied by either judge and that DJ McPhee's conclusions were unassailable."

27. As required by section 47(5), Moylan J first addressed the question, Has there been a change of circumstances of a nature and degree sufficient in this case to open the door to the exercise of the judicial discretion? In relation to the mother, his answer was a clear No.

28. I should set out his reasoning in full (paras 120-122):

"120 I must assess whether there has been a sufficient change of circumstances by reference to what has happened since 2012 and, in particular, by reference to the current circumstances. The key elements of DJ McPhee's judgments were:

(a) the circumstances in which CB was found on 5th March 2010, coupled with the previous incident in September 2009;

(b) that the mother had been found by a chartered clinical psychologist to have maladaptive personality traits;

(c) the conclusion of a child and adolescent psychiatrist that CB had a disorganised attachment to her mother and that her developmental delay was due to neglect, both physical and

emotional, whilst in the care of her mother. The psychiatrist referred to CB's disturbed emotional and behavioural presentation;

(d) a parenting assessment which concluded that the mother had very little insight into her past circumstances and limited understanding of CB's needs;

(e) the evidence from the psychiatrist that CB had a particular need to move only once and without delay and to a placement which would provide long term stability.

121 As referred to above, the District Judge concluded that CB, whilst in the care of her mother, had suffered significant harm due to significant neglect, both physical and emotional. He referred to the psychiatrist's emphatic evidence about the "dramatic effect" on CB which would follow the breakdown of a family placement and his evidence that CB required skilled parenting. To quote again,

> "The placement needs to be one which understands and recognises the harm which she has suffered and is able to deal with her more complex emotional needs."

DJ McPhee concluded that CB needs to receive care which will "remedy significant deficits in her early child care and (enable her to) move towards her majority better equipped to deal with adult life".

122 I have, regrettably, come to the clear conclusion that the mother has not demonstrated a sufficient change of circumstances. Indeed, I cannot see any real change from 2012 other than the passage of time. There is no evidence to suggest that any of the key elements of the District Judge's judgments, to which I have just referred, have changed. Rather the mother's sustained efforts to challenge the evidence and the judge's conclusions serve to demonstrate, in my view, that nothing of substance has, in fact, changed. The mother's reliance on having a wide support network, the support of her family and on her being more settled do not address the reasons why care and placement orders were made in 2012 and the circumstances which led to and justified those orders being made."

The incident in September 2009 there referred to had been described by Moylan J earlier in his judgment (para 25). The mother was found, drunk, in the middle of the night (at 1.00 am), walking down the middle of a road with CB in a buggy.

29. In relation to the mother's second submission, based on the willingness of the Latvian authorities to assume jurisdiction, Moylan J seems not to have addressed the point directly. By necessary implication he must have accepted the submission of counsel for the local authority which, as he recorded (judgment, para 89), was that Latvia's

willingness to accept jurisdiction did not amount to a change of circumstances.

30. In relation to the mother's third submission, it is clear that Moylan J accepted the submission of counsel for the local authority (para 89) that *Re B-S* did not amount to a change of circumstances, because it did not change the law. He recorded the mother's argument as having been (judgment, para 114) that *Re B-S* had effected a change in the law or otherwise undermined the judgments in particular of DJ McPhee. In relation to the first point, he quoted (para 115) my judgment in *Re R (A Child)* [2014] EWCA Civ 1625, para 44, where I emphasised that "*Re B-S* was not intended to change and has not changed the law." He went on to explain (para 116) that the District Judge had in any event applied the correct approach.

31. Having rejected the mother's assertion that there had been a change in circumstances, Moylan J nonetheless went on to consider the second stage question, If there has been a change in circumstances, should leave to oppose be given? His answer was No.

32. Again, I set out his reasoning in full (paras 123-127):

> "123 If I was persuaded that there had been a sufficient change of circumstances, I would next have to assess the mother's prospects of success. Having regard to the 2012 judgments and the evidence in the guardian's report for these applications, it is clear to me that the mother's prospects of success lack any "solidity". In my view, the mother realistically has no prospect of successfully opposing the adoption application. I appreciate that it will be extremely painful to the mother to hear this, but my decision on this part of the case has to be governed by my assessment of what is in CB's best interests throughout her life. There is, in my judgment, no other option available to the court because every other option would introduce an element of instability which would cause CB significant harm.
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> 124 In coming to this conclusion, I accept the guardian's opinion that, if CB were moved from her current carers, the distress to her would cause such damage that she would be at significant risk of suffering significant emotional harm. The guardian also refers to the resultant deterioration in her emotional health and the development of behavioural problems. This is not a freestanding piece of evidence, but can be linked with the evidence given during the course of the care proceedings, in particular as to CB's attachment disorder and the consequences of the parenting she had received.
>
> 125 The evidence establishes that CB is a particularly vulnerable child who has a compelling need for long-term security and stability. The only outcome in this case which can provide that long-term stability and security is adoption. Every other option introduces instability and uncertainty which would, inevitably, destabilise CB in a way which would be likely to

> cause her significant emotional harm.
>
> 126 In 2012 the psychiatrist's opinion was that no chance could be taken with CB's next placement because of the likely harmful consequences if that were not to succeed. The guardian's opinion is that, even the reintroduction of contact would be detrimental.
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> 127 In the circumstances of this case, I see no prospect of the mother being able successfully to oppose the adoption application".

He accordingly dismissed the mother's application under section 47(5) for permission to oppose.

Moylan J's judgment: contact

33. In relation to the mother's application for contact, Moylan J recorded the local authority's submission as being (para 92) that to reintroduce contact would have a significant and disruptive effect on CB and be likely to undermine her current placement; that the mother would not be able to manage contact in a way which would promote CB's stability in this placement, rather, the very opposite; and, referring to the expert evidence given by the psychiatrist and the psychologist in 2012, that contact would be likely significantly to undermine CB's emotional well being. He also recorded the guardian's view (para 103) that the prospect of disturbing the progress that CB had made, and of the harm which, in the guardian's view, this would cause CB, were of significant concern to her.

34. Moylan J expressed his conclusion as follows (para 128):

> "I have also come to the conclusion that contact would be contrary to CB's best interests. In June 2013, DJ McPhee said that the risk of disruption which contact would be likely to cause was too great to permit it. This remains the position. The mother's powerful opposition to any course other than one leading to CB's reunification with her would inevitably result in contact being emotionally confusing and harmful, as described by the guardian."

So he dismissed that application also.

Moylan J's judgment: the outcome

35. Accordingly, Moylan J dismissed each of the mother's three applications. He added this (para 129):

> "In determining these applications, I have borne well in mind the

> loss which CB will sustain in terms of her national and cultural identity and, critically, her connection with her birth family. CB's welfare needs, both in the short term and, critically, throughout her life, come down powerfully in favour of my dismissing the mother's applications because of the emotionally damaging consequences of any outcome other than adoption. This conclusion is, in my judgment, necessitated by the overriding requirements of CB's welfare."

It is apparent that, in expressing himself in this way, Moylan J had very much in mind the submission of the Latvian Central Authority (para 87) that:

> "the short-term risks of CB suffering, what is referred to as "traumatic experiences" if she were to be removed from her prospective adopters, do not outweigh or are not proportionate to the loss which she will sustain from losing "her identity, belonging to her family, national community and rights to language and religion"."

36. In this connection I should also record what the judge said of the guardian's stance (para 102):

> "… the guardian says that she has given careful consideration to the effect of adoption for CB and the impact that this would have on her identity, her cultural and linguistic roots and her connection with Latvia. She acknowledges that there will be a significant loss in this respect for CB. Nevertheless, it is her clear conclusion, driven by her assessment of CB's needs, that adoption is the only option that will secure and promote CB's best interests. The significant benefit of a <u>secure</u> placement – I emphasise – combined with the likely negative consequences for CB, if this is not achieved, outweigh the fact that CB will no longer be part of her birth family and will have lost her direct Latvian connections."

37. Before leaving his judgment, there is one final matter I should mention. Moylan J referred (para 86) to the fact that Mr Skudra had questioned whether the conclusions reached in the judgments of District Judge McPhee and Judge Cryan were accurate:

> "He asks whether developmental delay, as seen in CB, might not have been due to factors other than the mother's care, such as the care given to her when she was looked after by foster carers or the fact that she was not placed with a Russian speaking family."

Moylan J continued:

> "I have already addressed this submission when dealing with the Court of Appeal's determination of the mother's appeal in May 2013. The Court of Appeal referred to the conclusions reached by

> the District Judge as "unassailable". There is no new evidence, in respect of his specific conclusion as to the cause of CB's developmental delay, which might undermine this conclusion."

38. I have deliberately dealt with Moylan J's judgment in some detail and set out many of the key passages in it verbatim. My reasons for doing so are three-fold: first, because it is important for anyone who reads this judgment to be able to see exactly what Moylan J decided and why; secondly, because it demonstrates the great care and sensitivity with which Moylan J (like District Judge McPhee and His Honour Judge Cryan before him) approached this difficult and concerning case; and, thirdly, because, at the end of the day, for the reasons I now explain, I have concluded that Moylan J was correct in his decision on each point and essentially for the reasons he gave.

The appeal

39. Moylan J refused the mother's application for permission to appeal. She renewed her application to the Court of Appeal. It came before me on the papers on 23 February 2015. I granted permission to appeal. In the circumstances I should set out my order in some detail:

> "On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal by the mother from the order of Mr Justice Moylan dated 19 December 2014
>
> AND UPON READING the transcript of the judgment of Mr Justice Moylan dated 19 December 2014, the appellant's grounds of appeal, the Report dated January 2015 of the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of the Council of Europe (Rapporteur: Ms Olga Borzova) 'Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States', and the letter dated 16 February 2015 from the Saeima of the Republic of Latvia to the Speaker of the House of Commons
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> Decision
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> Permission to appeal pursuant to CPR 52.3(6)(b)
>
> Reasons
>
> 1 The nature of the issues.
>
> 2 The matters raised in the grounds of appeal.
>
> 3 The involvement of the Republic of Latvia."

The letter which is there referred to is set out in an Annex to this judgment.

40. I should explain that CPR 52.3(6) sets out the grounds on which permission to appeal can be granted:

> "Permission to appeal may be given only where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

It will be noted that I gave permission in accordance with paragraph (b), *not* paragraph (a).

41. I gave various directions. In particular I directed that:

> "The Diplomatic and Consular Representatives of the Republic of Latvia and the Central Authority of the Republic of Latvia (all of whom were present at the hearing before Mr Justice Moylan) are permitted to appear and make representations at the hearing of the appeal if they wish provided that if they (or any of them) propose to do so they should:
>
> a. Notify the court and the parties of that fact by 12 noon on Friday 6 March 2015 and
>
> b. File a skeleton argument by 12 noon on Wednesday 11 March 2015."

42. On 26 February 2015, Mr Skudra, on behalf of the Latvian Central Authority, filed an application seeking leave to intervene. On 19 March 2015 I made an order that the Central Authority of the Republic of Latvia be joined as an intervener.

43. In accordance with the directions I had given, the appeal came on for hearing before us on 1 April 2015. The Appellant mother appeared in person assisted by a McKenzie friend Mrs Julie Haines. The local authority was represented by Mr Henry Setright QC and Mr Chris Miller, the prospective adopters by Mr Ian Griffin, and the children's guardian by Ms Hannah Markham. Mr Skudra appeared and addressed us on behalf of the Central Authority of the Republic of Latvia. There were also present in court both His Excellency the Ambassador of the Republic of Latvia and the Latvian Consul.

44. We had written skeleton arguments prepared by Mrs Haines for the mother, by Mr Setright and Mr Miller for the local authority, by Mr Griffin for the prospective adopters and by Ms Markham for CB's guardian. We also had two letters from the Latvian authorities addressed to this court: a letter from the Minister of Justice of the Republic of Latvia dated 5 February 2015 setting out the position of the Latvian Central Authority and a letter dated 5 March 2015 from His Excellency the Ambassador of the Republic of Latvia.

45. Unhappily, we had to vacate the building because of an emergency – a fire nearby – and were unable to finish the hearing, which had to be adjourned part-heard. The hearing resumed on 15 April 2015. We reserved judgment.

The grounds of appeal

46. The mother identifies four grounds of appeal. As elaborated in her skeleton argument, they can be summarised as follows:

i) Change of circumstance: the mother advances a number of changes but states that the "main change" is the involvement as intervener of the Republic of Latvia since January 2014. It was, she submits, a "major" change of circumstance. She says, rightly, that the Republic of Latvia has a developed system for dealing with the welfare needs of a child such as CB and that the Latvian system would be able to undertake all the necessary assessments of CB's needs before coming to a conclusion as to how her welfare could best be secured.

ii) Error of law: the mother advances three complaints (a) what she says is the systemic failure of the United Kingdom to inform the Republic of Latvia of what she calls "the detention of their citizen", (b) what she says was Moylan J's failure properly to examine the relationship between her applications under Article 15 of BIIA and section 47(5) of the 2002 Act, and (c) what she asserts was Moylan J's error in concluding that Article 15 does not apply. In relation to (a) the mother makes two additional points: first, that the United Kingdom's failure to comply with its obligations under the Vienna Convention cannot be used as an excuse to say that the application under Article 15 is too late; and, secondly, that timely compliance with the requirements of the Convention "could have possibly resulted in a different outcome for the case." In relation to (b) and (c) the mother's key point is that the relevant application before the court was *her* application under section 47(5) seeking to *oppose* the adoption. Such an application, she says, is not a "measure preparatory to adoption" but in fact the very antithesis of it, for it is a measure seeking, as she puts it, to propel the child *away* from being adopted.

iii) Absence of up-dating information: the mother points out, correctly, that the assessments go back as far as 2011, the most recent being in 2012, now some three years old. She submits that the State's failure to commission a fresh assessment constitutes a breach of her rights under both Article 6 and Article 8 of the Convention. She relies in this connection upon the decision of the Strasbourg court in *Lashin v Russia (Application number 33117/02)*.

iv) "Nothing else will do": I set this out verbatim:

> "Most countries in Europe do not have a policy of "forced adoption." As they do not, then the jurisdiction of England and Wales needs to be brought further in to line with the rest of Europe."

This is elaborated by the mother in her skeleton argument with the assertion that if this case had been heard in another European jurisdiction, then a different solution would have been found. She says that other European countries have a greater understanding of familial ties, whereas in this country, she says, too little weight is attached to the child's biological, national, ethnic and cultural inheritance. She says that this country should consider that it may be causing or permitting too many children to be adopted, and is out of line with the rest of Europe. Whilst accepting that there is a margin of appreciation, she says that this country is so far out of step with the rest of Europe that it needs to bring itself into line. She refers to the observations of Mostyn J in *Re D (Special Guardianship Order)* [2014] EWHC 3388 (Fam), [2015] 2 FLR 47, para 35, and to what Holman J said in *A and B v Rotherham Metropolitan Borough Council* [2014] EWFC 47.

I note that there is, as such, no challenge to Moylan J's decision in relation to contact, but in the circumstances I propose to examine that as well.

47. The Latvian authorities voice similar complaints and make similar submissions, adopting a stance explicitly supportive of the mother's appeal. In particular, the Latvian Central Authority submits that, because the mother still retains her parental rights, and because the relevant application was her application under section 47(5) – a prelude to possible re-unification of the child and parent – a transfer under Article 15 could still have been directed. The Latvian Central Authority is critical of many aspects of the local authority's handling of the case, pointing, for example, to the fact that at one stage CB, despite her Orthodox background, was placed with Muslim foster parents. There is understandable complaint about the failure of the local authority to involve the Latvian authorities early on. It is submitted that better and more up-to-date assessments are required, and that these would best be undertaken in Latvia by the appropriate Latvian authorities. His Excellency the Ambassador of the Republic of Latvia fully supports the arguments of the Latvian Central Authority.

48. One aspect of what is being said by the Latvian authorities is particularly significant. Essentially, what is being proposed is that CB should be returned to Latvia so that her needs can be assessed and her future determined, in the light of such assessment, by the appropriate Latvian authorities. The Latvian authorities are not putting forward any specific placement, whether within or outside the family, as having been identified for CB. On the contrary, the Latvian Central Authority contemplates that although the outcome of a new assessment of everyone in Latvia might lead to CB's placement with her mother, or perhaps with other relatives, it might lead to CB being placed for adoption in Latvia.

49. For ease of exposition I propose to deal with the various grounds of appeal in a rather different order, starting with Article 15.

<u>Grounds of appeal: Article 15</u>

50. Mr Setright, on behalf of the local authority, supported by Mr Griffin and Ms Markham,

submits that Moylan J was right to follow my decision, also at first instance, in *Re J and S (Children)* [2014] EWFC 4. He points to the commentary in paragraph 28 of the *Lagarde Report*, explaining the materially identical language of Article 4(b) of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children:

> "The exclusion of adoption, which was the subject of the recent Convention of 29 May 1993, was a matter of course. It was formulated in a very broad way and, in order to avoid any misunderstanding, the text specifies that it extends to cancellation and revocation of adoption, even though the revocation would be decided for the purpose of protecting the child.
>
> The exclusion extends also to measures which prepare the adoption, and particularly to a placement with a view to adoption. The Special Commission, sensitive to the fact that the placement is in itself a measure of protection which often will subsist even in the case where the adoption were not to be granted, provided that this measure ought at least to be recognised in the other Contracting States if it had been taken by an authority which had jurisdiction under Chapter II of the Convention, which in most cases would be the State of the child's habitual residence. The solution, which had its logic, ran the risk, however, of being difficult to apply, and the complete exclusion of measures preparatory to adoption was retained by the Conference out of concern for clarity and simplicity."

51. It is clear from this, he submits, that the exclusion was specifically intended to extend to placement measures. So, both the prospective adopters' application for an adoption order *and* the mother's application for permission to oppose their application were, he submits, measures preparatory to adoption within the meaning of Article 1(3)(a). Any decision on the mother's application is, he points out, a preliminary stage within the adoption application. It goes to the heart of the issue of whether or not there will, in due course, be an adoption order. Moreover, it comes *after* the conclusion of the placement order proceedings.

52. In relation to the arguments put forward by the mother and the Latvian authorities based upon the mother's retention of parental responsibility, Mr Setright draws attention to the wording of Article 15(1) with its reference to the ability of the court "to hear the case, or a specific part thereof." This does not, he submits, connote a possible transfer of jurisdiction at large in respect of a child. So, he submits, whatever jurisdiction might be transferred to Latvia in relation to other aspects of the mother's parental rights, Article 15 cannot be used in such a way as to transfer jurisdiction in relation to a matter specifically excluded by Article 1(3)(b). Accordingly, Moylan J was, he submits, entirely correct in the approach he adopted in paragraph 109 of his judgment.

53. Mr Setright also points out, correctly, that a possible transfer of the case to Latvia was never advanced by anyone at any stage during the original care and placement

proceedings.

54. Mr Griffin on behalf of the prospective adoptive parents makes much the same submissions. He asserts that an application under section 47(5) is not a separate process contemplating a move away from adoption. The only right it confers is participation in proceedings which are manifestly part of the process of adoption.

55. Ms Markham, to the same effect, submits on behalf of CB's guardian that on a proper reading Article 1(3)(b) embraces all aspects of the adoptive process. The mother's application for leave in accordance with section 47(5) is, she submits, a preliminary stage within the adoption proceedings, directed to a consideration of whether a parent is to be a party to those – adoption – proceedings. It is not some separate process.

56. I agree with Mr Setright, Mr Griffin and Ms Markham. In my judgment, Moylan J was correct to decide as he did and for the reasons he gave. An application under section 47(5) of the 2002 Act is a "measure preparatory to adoption" within the meaning of Article 1(3)(b) of BIIA. I do not overlook what Ryder LJ said in *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para 12, in a judgment with which both Lewison LJ and I agreed. But Ryder LJ's observations about the reach of Article 15 were obiter, the point had not been argued before us and there had been no reference to Article 1(3)(b); they cannot, in my judgment, be treated as being entirely accurate in every respect.

57. So far as concerns Moylan J's decision in relation to section 5(2) of the Family Law Act 1986, this was not the subject of any challenge before us. I propose therefore to say only that I agree both with his decision and with his reasoning on the point.

Grounds of appeal: section 47(5)

58. Mr Setright submits that Moylan J directed himself correctly in terms of our domestic law. I do not understand the mother really to be challenging this. The focus of her challenge relates to what she says was Moylan J's failure to recognise that there had been a change of circumstance.

59. Mr Setright says that nothing identified by the mother is a change of circumstance sufficient to cross the threshold. She did *not* assert that she had brought about change to her capacity to parent. She did *not* point to a change in her personal circumstances that would better place her to provide good enough care for CB. She did *not* provide details of any family member she asserted was willing and capable of caring for CB. The sad reality, he says, is that nothing has changed on the ground, either in this country or in Latvia. The fact that the mother now has the additional support to which she refers, including in particular the support of the Latvian authorities, does not, he submits, amount to any change of the realities on the ground. The fact that the Latvian authorities may have the ability to identify a culturally appropriate foster carer (as he points out, they have not actually done so) is not, he submits, a change of circumstance. He reinforces the argument by observing that, since the court has determined that only adoption will do for CB, the availability of a better cultural match in a foster care setting

is not a change of significance for the purposes of section 47(7).

60. So far as concerns the second stage question, Mr Setright submits that Moylan J directed himself correctly in law, had proper regard to the relevant international law, and came to a conclusion directed to CB's specific circumstances and needs and securely based on the guardian's evidence, which he was entitled to accept.

61. Mr Griffin makes very similar submissions. He characterises Latvia's involvement as being essentially jurisdictional: Latvia's support for the mother was based on criticising the earlier judgments, supporting the notion of the child's identity and culture, and proposing the transfer of the case to Latvia. Other than the mother, Latvia did not identify any proposed carer for CB either here or in Latvia. So far as concerns the mother, her position, fundamentally, was of continued dissatisfaction with previous judgments: there was no acceptance of those judgments, no evidence of any change in the mother, and no identification of any possible alternative carer for CB.

62. Ms Markham, on behalf of the guardian, says much the same. She points out that the guardian, when considering the mother's leave to oppose application, was most careful to look at the balance between CB's Latvian heritage, her links and ties to her mother's country of birth, and the security of her current placement. Her priority was to focus on CB's best interests throughout the whole of her life. To summarise her careful and helpfully detailed submissions, Ms Markham says that Moylan J directed himself correctly in law and that, in his application of the law to the facts and the evidence, he adopted the correct approach.

63. It is noteworthy in this connection that the mother's stance before us was that CB had "never been abused while in my care" and was "happy and well-developed." She referred to her "non-stop fight" over five years to get CB back.

64. In my judgment the various arguments deployed by Mr Setright, Mr Griffin and Ms Markham demonstrate compellingly why, as I conclude, Moylan J was right to decide as he did and for the reasons he gave. None of the matters relied upon by the mother was, in the circumstances, such as to amount to a change of circumstance. So, as Moylan J correctly found, she fell at the first hurdle. She would in any event, as Moylan J correctly found, have fallen also at the second.

<u>Grounds of appeal: up-dating information</u>

65. Mr Setright makes the powerful point that the mother's case before Moylan J was *not* that there had been a change in her abilities, but rather that the assessment of her abilities had been wrong in the first place. To suggest that the court should have ordered an assessment of its own motion, when the mother had not provided any foundation to suggest that such an assessment was required and when there was nothing in the papers to indicate the need, must, he says, be wrong. Moreover, the court was not bereft of all updating information, for in relation to CB's needs the court had both the local authority adoption report and a report from CB's guardian. In these circumstances, Mr Setright submits, there can be no question of any breach of either Article 6 or Article 8, and

Lashin v Russia does not assist the mother. As Mr Setright puts it, the Convention does not require a court to take steps that a party does not themselves ask for and which are not suggested upon reading the materials before the court.

66. Mr Griffin points out that the mother was given every opportunity to provide any information she wished the court to consider to demonstrate that there had been a change of circumstance. In fact, her focus was on what she said were failures in the earlier proceedings.

67. Ms Markham, on behalf of the guardian, says much the same, submitting that without any prima facie evidence of change the need to consider a further assessment was not triggered.

68. I agree with Mr Setright, Mr Griffin and Ms Markham. There is no basis for the mother's complaint.

Grounds of appeal: contact

69. This is not, as I have said, a matter in relation to which the mother raises any explicit challenge. In those circumstances, Mr Setright's submission is brief. The suspension of contact pending determination of the adoption application was proportionate to the legitimate aim of ensuring that CB was able to settle and that her ability, as he put it, to embed in the adoptive placement was not undermined by ongoing contact with a mother who, understandably, does not feel able to support the placement. I agree.

Grounds of appeal: the Vienna Convention

70. On 14 January 2014 I handed down judgment in *In re E (A Child) (Care Proceedings: European Dimension) Practice Note* [2014] EWHC 6 (Fam), [2014] 1 WLR 2670, [2014] 2 FLR 151, in which I set out (paras 39-40) Articles 36 and 37 of the Vienna Convention on Consular Relations of 24 April 1963 (Cmnd 2113). I went on (para 41):

> "This is not the occasion for any elaborate discussion of the effect of these provisions as a matter of either public international law or English domestic law (as to which see the Consular Relations Act 1968 and the Diplomatic and Consular Premises Act 1987). I am concerned only with what they suggest as good practice in care cases. But in that context there are, as it seems to me, three points to be borne in mind: (1) 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. (2) 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).

> (3) 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."

71. I went on to consider the implications of this for practice in care cases. I said this (para 44):

> "I express no views as to the effect of articles 36 and 37 of the Vienna Convention as a matter of either public international law or English domestic law. There is no need for me to do so and it is probably better that I do not. Nor do I take it on myself to proffer guidance to local authorities, health trusts and other public bodies as to how they should interpret whatever obligations they may have under the Convention. That is a matter for others. What I do, however, need to do is suggest how as a matter of good practice family judges, when hearing care and other public law cases, should from now on approach these provisions."

72. I need not quote all that I then said. For present purposes I go to this (paras 46-47):

> "46 In cases involving foreign nationals there must be transparency and openness as between the English family courts and the consular and other authorities of the relevant foreign state. This is vitally important, both as a matter of principle and, not least, in order to maintain the confidence of foreign nationals and foreign states in our family justice system. To seek to shelter in this context behind our normal practice of sitting in private and treating section 12 of the Administration of Justice Act 1960 as limiting the permissible flow of information to outsiders, is not merely unprincipled; it is likely to be counter-productive and, potentially, extremely damaging. If anyone thinks this an unduly radical approach, they might pause to think how we would react if roles were reversed and the boot was on the other foot.
>
> 47 Given this, it is highly desirable, and from now on good practice will require, that in any care or other public law case: (1) The court should not in general 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 … (2) 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. (3) Whenever a party, whether an adult or the child, who is a foreign national … is represented in the proceedings by a guardian, guardian ad litem or litigation friend

> … 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."

73. I draw attention to the date of that judgment – 14 January 2014 – and to the fact that my observations were addressed to the court and not to local authorities. I think it fair to acknowledge that, until I gave that judgment, the potential significance of the Vienna Convention in relation to care proceedings was not as well appreciated as perhaps it should have been. My impression is that this is no longer the case. In particular, my impression is that the significance of the Vienna Convention is now, generally speaking, well recognised by local authorities, which are now appropriately pro-active, as they should be, in bringing to the attention of the relevant consular authorities the fact that care proceedings involving foreign nationals are on foot or in contemplation.

74. All this needs to be borne in mind when considering the mother's complaints, in particular against the local authority.

75. CB was taken into care by the local authority in March 2010. The care and placement orders were made on 10 July 2012. The first engagement of the United Kingdom authorities with the Republic of Latvia was when the Head of the Consular Section of the Embassy of the Republic of Latvia, having been approached by the mother, wrote to the local authority on 15 October 2012 seeking information about the proceedings. The letter voiced the Embassy's concern that it had not been informed about the case previously. The local authority responded by a letter dated 8 November 2012 which supplied the information requested and concluded:

> "The local authority's actions and care plan for CB have been endorsed by a court of law following full and comprehensive examination of the evidence.
>
> I note your concern that the Embassy had not been informed of this case, however I am not aware of any obligation on our part to notify the Embassy of such cases and this would certainly not be our usual practice."

76. I need not rehearse the subsequent correspondence, including correspondence passing between the local authority, the Central Authority of England and Wales and the Latvian Central Authority. On 22 May 2014, His Excellency the Ambassador wrote to the local authority. Referring to the Vienna Convention, his letter expressed concern that the Latvian authorities had not been informed at the outset and had not obtained any information until the end of 2012. The local authority's reply, delayed, as it said, because of the need to obtain specialist legal advice, was in a letter dated 23 July 2014:

> "the Local Authority recognises and makes sincere apologies to your Excellency for not complying with its obligations under the Vienna Convention on Consular Relations 1963 during the Care Proceedings in this case. In explanation of that failure it was not common practice at that time for Local Authorities to do so as there was a general lack of awareness of those obligations by

> Local Authorities, legal advisors for parents and children's guardians, and the Court."

Following reference to *Re E*, the letter continued:

> "I wish to reassure your Excellency that the Local Authority is now fully aware of its obligations under the Convention and will ensure that these are complied with in all cases in the future. During the care proceedings for CB [her mother] was legally represented and despite the failure of the Local Authority she did not make any application for a Consular Official to be present in the proceedings, or for information to he provided to the Central Authority or make any application for the case to be transferred to a Latvian Court for consideration.
>
> I wish to reassure Your Excellency that the Local Authority is committed to ensuring all its obligations in International Law are met and looks forward to working in co-operation with you and the Central Authority to ensure that CB is protected and her best interests are met."

77. Mr Setright, whilst repeating the local authority's unqualified apology to the mother and the Latvian authorities, questions whether its failure to notify the Latvian authorities has in fact had any effect on the outcome, not least given what as we have seen are the limits of the stance being adopted, even now, by Latvia.

78. In my judgment, any breach by the local authority of its obligations, whatever they were, under the Vienna Convention – and I am *not* saying that there was any breach of any relevant obligation – has not, in the circumstances of this particular case had any effect on the outcome. There is simply nothing to show that, if they had been earlier involved, the Latvian authorities would have adopted a stance different from that which, in the event they did, or which would have led to the proceedings taking a different course.

79. This is not, I emphasise any reason for not requiring, if only as a matter of good practice, that local authorities should be appropriately pro-active in bringing to the attention of the relevant consular authorities *at the earliest possible opportunity* the fact that care proceedings involving foreign nationals are on foot or in contemplation.

Grounds of appeal: 'nothing else will do'

80. I am acutely conscious of the concerns voiced in many parts of Europe about the law and practice in England and Wales in relation to what is sometimes referred to as 'forced adoption' but which I prefer, and I think more accurately, to refer to as non-consensual adoption. Manifestations of these concerns are to be found both in the Borzova Report and in the letter from the Saeima of the Republic of Latvia to which I referred in paragraph 39 above. I refer also to the fact that at its meeting on 19-20 March 2014 the Committee on Petitions of the European Parliament considered and declared admissible a petition by LB making allegations about the local authority's behaviour in the present

case. It would not, however, be appropriate for me to say anything more about that particular matter.

81. I refer in this connection to what I said in *In re E (A Child) (Care Proceedings: European Dimension) Practice Note* [2014] EWHC 6 (Fam), [2014] 1 WLR 2670, [2014] 2 FLR 151, paras 13-15:

> "13 Leaving on one side altogether the circumstances of this particular case, there is a wider context that cannot be ignored. It is one of frequently voiced complaints that the courts of England and Wales are exorbitant in their exercise of the care jurisdiction over children from other European countries. There are specific complaints that the courts of England and Wales do not pay adequate heed to BIIR and that public authorities do not pay adequate heed to the Vienna Convention.
>
> 14 In the nature of things it is difficult to know to what extent such complaints are justified. What is clear, however, is that the number of care cases involving children from other European countries has risen sharply in recent years and that significant numbers of care cases now involve such children. It is timely therefore to draw the attention of practitioners, and indeed the courts, to certain steps which can, and I suggest from now on should, be taken with a view to ameliorating such concerns.
>
> 15 It would be idle to ignore the fact that these concerns are only exacerbated by the fact that the United Kingdom is unusual in Europe in permitting the total severance of family ties without parental consent … Thus the outcome of care proceedings in England and Wales may be that a child who is a national of another European country is adopted by an English family notwithstanding the vigorous protests of the child's non-English parents. No doubt, from our perspective that is in the best interests of the child – indeed, unless a judge is satisfied that it really is in the child's best interests no such order can be made. But we need to recognise that the judicial and other State authorities in some countries that are members of the European Union and parties to the BIIR regime may take a very different view and may indeed look askance at our whole approach to such cases."

82. I do not resile from a word of that. But there are two important points to be borne in mind. There is, first, the point I made in *Re R (A Child)* [2014] EWCA Civ 1625, para 45:

> "The fact that the law in this country permits adoption in circumstances where it would not be permitted in many European countries is neither here nor there … The Adoption and Children Act 2002 permits, in the circumstances there specified, what can conveniently be referred to as non-consensual adoption. And so

> long as that remains the law as laid down by Parliament, local authorities and courts, like everyone else, must loyally follow and apply it. Parliamentary democracy, indeed the very rule of law itself, demands no less."

83. The second point is that, whatever the concerns that are expressed elsewhere in Europe, there can be no suggestion that, in this regard, the domestic law of England and Wales is incompatible with the United Kingdom's international obligations or, specifically, with its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. There is nothing in the Strasbourg jurisprudence to suggest that our domestic law is, in this regard, incompatible with the Convention. For example, there is nothing in the various non-consensual adoption cases in which a challenge has been mounted, to suggest that our system is, as such, Convention non-compliant.

84. The lessons of this and other cases are clear but bear repetition. We must be understanding of the concerns about our processes voiced by our European colleagues. We must do everything in our power to ensure that our processes are not subject to justifiable criticisms. This means ensuring that:

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

    ii) the court must, whether or not any of the parties have raised the point, consider *at the outset of the proceedings* whether the case is one for a transfer in accordance with Article 15 of BIIA: see generally *In re E (A Child) (Care Proceedings: European Dimension) Practice Note* [2014] EWHC 6 (Fam), [2014] 1 WLR 2670, [2014] 2 FLR 151, paras 31, 35-36;

    iii) if there is no transfer in accordance with Article 15, the court, if the local authority's plan is for adoption, must rigorously apply the principle that adoption is 'the last resort' and only permissible 'if nothing else will do' and in doing so must make sure that its process is appropriately rigorous: see *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035, and *Re R (A Child)* [2014] EWCA Civ 1625;

    iv) in particular, the court must adopt, and ensure that guardians adopt, an appropriately rigorous approach to the consideration of the 'welfare checklist' in section 1(4) of the 2002 Act, in particular to those parts of the checklist which focus attention, explicitly or implicitly, on the child's national, cultural, linguistic, ethnic and religious background and which, in the context of such factors, demand consideration of the likely effect on the child *throughout her life* of having ceased to be a member of her original family.

85. In this connection, everyone concerned with such a case needs always to remember the powerful point made by Mostyn J in *Re D (Special Guardianship Order)* [2014] EWHC

3388 (Fam), [2015] 2 FLR 47, para 1:

> "If any case illustrates the momentous and very difficult nature of the decisions that have to be made in the Family Division it is this one. My decision will determine whether ED grows up in the Czech Republic, where full respect will be paid to his Czech Roma ethnicity and where it is likely that the parental link will be maintained, or whether he grows up in the United Kingdom as an English boy to become, in adulthood, an Englishman. On this latter footing, being realistic, his Czech Roma heritage will either be extinguished or reduced to insignificance."

That is not, I wish to make clear, a reason for not making an adoption order where the circumstances *demand* and where *nothing else will do*. But it does serve to underscore the gravity of the decision which the court has to make in such cases and the pressing need for care and rigour in the process.

Complaints about the local authority

86. There are various respects in which the local authority can properly be criticised for its handling of this case. I have already drawn attention to previous judicial criticisms of the quality of the local authority's assessments. I have referred to the local authority's own acknowledgment of its failings in relation to the Vienna Convention. And although this is something which, in the circumstances, there was no need for us to explore in great detail, I do have misgivings about the local authority's use, indeed, on one view, misuse, of section 20 of the 1989 Act. I have anxiously considered whether any of these failings, taken separately or together, have affected the outcome. In my judgment they did not.

Conclusions

87. For all these reasons this appeal must, in my judgment, be dismissed.

Lady Justice Black :

88. I agree.

Lord Justice Vos :

89. I agree.

Annex

90. The letter dated 16 February 2015 from the Saeima of the Republic of Latvia to the Speaker of the House of Commons is as follows:

"Your Excellency Mr. John Bercow,

With all due respect and on behalf of two standing committees of the parliament of the Republic of Latvia - the Saeima - the Human Rights and Public Affairs Committee and the Social and Employment Matters Committee - we would like to draw your attention to a particular issue, as well as to request that you involve the relevant committees of your parliament in addressing this issue which has created concern within the two aforementioned committees. It is the matter of insufficient cross-border cooperation on the part of UK authorities in relation to the UK's national procedure of placing Latvian citizens up for adoption without parental consent.

The Human Rights and Public Affairs Committee and the Social and Employment Matters Committee of the Saeima of the Republic of Latvia have been made aware of several cases in which UK authorities have acknowledged that obligations in mutual cooperation between member states stipulated by international treaties and EU legislation have not been fulfilled in custody cases involving underage Latvian citizens; this has resulted in failure to safeguard the best interests of Latvian citizens.

In a joint meeting of the two committees on 3 February 2015, one such case was examined, and discussions were held regarding the assumption of jurisdiction by the Republic of Latvia in that case and placing the child under the supervision of the child protection and care authorities of the Republic of Latvia. This meeting was also attended by representatives of the Chancery of the President of Latvia, the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Welfare, the Ombudsman's Office and the State Inspectorate for Protection of Children's Rights

After hearing reports, including information on the specific case involving [KB], an underage citizen of Latvia, from several members of the Saeima and representatives of the authorities the committees regrettably concluded that there are cases in which UK authorities have failed to examine the option of involving Latvian counterparts in order to ensure, wherever possible, placing a child in the custody of family members or relatives in Latvia. This is in violation of the obligations placed upon member states by the UN Convention on the Rights of the Child; that is, when placing a child in foster care, due regard shall be paid to preserving the child's belonging to his/her national identity and cultural background, as well as maintaining family ties and ensuring continuity of upbringing.

In the case involving [KB], it was found that the relevant UK authority (the social service) had breached international and EU law *[e.g., the Vienna Convention on Consular Relations and Council Regulation (EC) No. 2201/2003 concerning jurisdiction*

and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No. 1347/2000] by creating circumstances under which a Latvian citizen was put up for adoption by UK citizens.

The Latvian authorities deem it unacceptable that from 2010 to 2014 UK authorities failed to inform the Republic of Latvia about decisions taken in regard to this underage Latvian citizen. If UK authorities had abided by the obligations placed upon member states by international treaties and EU law, the UK adoption of this underage Latvian citizen would not have been possible.

We would like to draw your attention to several circumstances which the committees of the Saeima regard as crucial in the examination of such a case.

In Latvia the foreign adoption of a Latvian citizen is not possible without first assessing possibilities of ensuring upbringing and family care for the child in Latvia.

If the child is residing outside of Latvia and has been removed from the family, the social service of the country of residence must inform the Ministry of Justice of the Republic of Latvia so that it can verify whether the child has living relatives in Latvia who would he willing to take the child into their care. Thus, the child may be placed under guardianship in Latvia, thereby ensuring the continuity of upbringing, especially as it pertains to ethnic origin, native language, culture and religion.

If the situation warrants the termination of parental rights, the child would be put up for adoption in Latvia, thus ensuring that the two most important interests of the child - a safe family environment and preservation of national identity - are safeguarded. However, if the child is adopted in the UK, full compliance with these requirements is not possible.

The committees of the Saeima of the Republic of Latvia emphasise that Latvia is concerned with safeguarding the rights of its citizens, especially underage ones, to maintain their citizenship, ethnic identity, native language, family ties and connection to the cultural and historical heritage of their country of origin.

The Human Rights and Public Affairs Committee and the Social and Employment Matters Committee of the Saeima call for an assessment of the situation, they urge that the necessary steps be taken to ensure exchange of information in compliance with international law between Latvian and UK authorities as regards custody cases involving underage citizens of Latvia, and they request that everything possible be done to rectify the breach of rights in the [KB] case and to examine the possibility of

implementing measures which would prevent such situations from occurring in future.”