

# Determining jurisdiction

*Zoë Fleetwood and Wendy Ramus examine the two-stage process of transferring care proceedings and the designation of a local authority*



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**'It was accepted that whichever local authority was identified by Cobb J as the applicant authority would inevitably be bound to rely on the threshold findings made by the original circuit judge who had determined the proceedings concerning the mother's older three children.'**

The decision in *Re LM (A Child)* [2013] acts as a useful guide to a jurisdictional transfer of public law proceedings. The case also illustrates the factors considered upon allocation of a case to a designated local authority. The originating member state, in this case the Republic of Ireland, made an Article 15 Brussels II bis request for transfer. The request was in response to the mother's application to transfer proceedings to the jurisdiction of England and Wales. The mother, in an advanced stage of pregnancy, travelled to the Republic of Ireland in June 2012 with her husband, the father of the baby, in her own words, 'to avoid my child being stolen'. In July 2012, she gave birth to her fourth child, a baby girl (LM).

Her three older children had been the subject of public law proceedings in this country which concluded in May 2012 and were subject to public law final orders, and the children were all in kinship placements away from the mother in the area of X County Council.

Subsequently, the parents left Ireland, the mother to reside in Y County Council and the father to live in Scotland for work purposes. The mother wanted LM to be brought to the jurisdiction of England and Wales, and therefore in December 2012 sought orders that the Irish care proceedings be transferred to the English court.

## Step one: the request

The first stage in the transfer was a request, made by consent, that pursuant to Article 15(1)(b) of Brussels II bis the High Court of England and Wales accept jurisdiction in relation to the proceedings concerning the placement of LM into public care. Article 15 provides that:

- the courts of a member state having jurisdiction as to the substance of the matter consider that a court of another member state with which the child has a particular connection would be better placed to hear the case (or a specific part thereof), and that a transfer is in the best interests of the child;
- the court may stay the case, or the part thereof, and invite the parties to introduce a request before the court of that other member state in accordance with para 4 of Article 15 (see below); or
- the court may request a court of another member state to assume jurisdiction in accordance with para 5 (see below).

The provisions detailed above may be applied:

- upon an application from a party;
- of the court's own motion; or
- upon an application from a court of another member state with which the child has a particular connection, in accordance with para 3 (see below).

A transfer made of the court's motion or by application by a court of another member state must be accepted by at least one of the parties.

Paragraph 3 of Article 15 provides that the child shall be considered to have a particular connection to a member state if that member state:

- becomes the habitual residence of the child after the initial court was seised with jurisdiction;
- is the former habitual residence of the child;
- is the place of the child's nationality;
- is the habitual residence of a holder of parental responsibility;
- is the place where property of the child is located, and the case concerns measures for the protection of the child relating to the administration, conversation or disposal of this property.

Paragraph 4 of Article 15 provides that:

*Cobb J had regard to the practice guide to Brussels II bis which recommends that a court receiving a transfer application must decide, within six weeks of being seised, whether or not to accept the transfer.*

The court of the member state having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other member state shall be seised in accordance with para 1. If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

Paragraph 5 of Article 15 provides that:

The courts of that other member state may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with para (1)(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

The courts of the member states must co-operate for the purposes the provisions, either directly or through the central authorities designated pursuant to Article 53.

Birmingham J of the Irish courts declared himself satisfied that the criteria for transfer of the proceedings to this jurisdiction were established. Cobb J, on 27 March 2013, agreed that there was no doubt that this jurisdiction was the place of LM's nationality: see Article 15(3)(c), and s2(1)(a) of the British Nationality Act 1981. The mother was a British citizen by birth.

**Step two: accepting or declining the request**

Cobb J was therefore charged with adjudicating on whether the courts of England and Wales should accept the transfer under Article 15. He decided that his role was to determine simply the 'best interests' limb of the Article 15 test. The Irish courts considered, prior to making the request, whether

the courts of England and Wales were 'better placed to hear the case'. Cobb J agreed that this jurisdiction was better placed as the evidence which justified public authority intervention in the family's life in 2012 originated in this jurisdiction, in the area of X County Council. Additionally, the mother who had indicated an intention to vigorously oppose any final public law order, gave her residence in this jurisdiction and it would be preferable for her to have that opportunity in the courts of the country in which she now lived. Cobb J had regard to the fact that:

- LM was British and her parents, siblings and kinship carers were British;
- LM had no family in Ireland – her only connection with Ireland was that she was physically present there because of a tactical international move made by the mother to avoid the jurisdiction of the English courts;
- the mother was now in this jurisdiction and had indicated a wish to remain here and were LM

to be returned to this jurisdiction, this would render easier the facilitation of contact between her and her mother, plus assessments of family relationships would be more effective if the mother and daughter could be seen regularly together; and

- the background history of LM's older half-siblings originated entirely in the area of X County Council and this evidence was likely to be important in any determination of LM's future care.

Cobb J had regard to the practice guide to Brussels II bis which recommends that a court receiving a transfer application must decide, within six weeks of being seised, whether or not to accept the transfer. He concluded that the courts of England and Wales would accept the request for the transfer of proceedings, and jurisdiction to determine the case concerning LM.

**Designation of the local authority**

There were two possible local authorities in *Re LM* to whom the case could be designated. It is useful to consider the law that applies to the designation of public law proceedings as this can frequently be raised as an issue (more frequently than the transfer of jurisdiction).

Section 31(8) of the Children Act 1989 (ChA 1989) provides that the local authority designated in a care order must be:

- the authority within whose area the child is ordinarily resident; or
- where the child does not reside in the area of a local authority, the authority within whose area any circumstances arose in consequence of which the order is being made.

That provision should be read with ss105(1) and 105(6), ChA 1989. Local authority is defined in s105(1) as (in relation to England) 'the council of a county, a metropolitan district, a London borough or the common council of the City of London' and in relation to Wales, 'the council of a county or a county borough'.

ChA 1989, 105(6) provides that:

In determining the 'ordinary residence' of a child for any purpose of this Act,

there shall be disregarded any period in which he lives in any place:

- (a) which is a school or other institution;
- (b) in accordance with the requirements of a supervision order under this Act;
- (ba) in accordance with the requirements of a Youth Rehabilitation Order... ; or
- (c) While he is being provided with accommodation by or on behalf of a Local Authority.

In *Re LM*, the mother favoured Y County Council, some 200 miles or so away from X County Council. X and Y each argued that the other should be the designated council.

X County Council sought to persuade Cobb J that the provisions of ss31(8) and 105(6) do not apply readily, or at all, where a public law case is transferred to this jurisdiction under Article 15. X County Council illustrated that submission by suggesting that there may well be cases which fall into s31(8), when a child is not ordinarily resident in England and Wales, where there is a combination of the following factors:

- that the precipitating significant harm or likelihood of harm generating public law proceedings in fact occurs abroad;
- there are no pre-existing concerns about the child arising within this jurisdiction; but where;
- it is deemed by a requesting state that the child has a particular connection with a given requested state, that that state would be better placed to hear the case; and
- both states consider that it would in fact be in the best interests of the child that the public law proceedings are heard here.

Further submissions on behalf of X County Council, focusing on the individual facts of this case, were advanced as follows, that:

- it would be unhelpful, and contrary to the expectation of the Irish Court requesting the transfer, for the mother and child to be living in the

areas of separate local authorities which are 200 or so miles apart;

- if X County Council took the view that LM should be placed with her mother under an interim care order then, pursuant to s22C (as confirmed in *Sheffield County Council v Bradford Metropolitan Council* [2013]) the designated authority would become Y County Council; and
- that the mother has not lived in the area of X County Council since June 2012 and that an 'exceptionality' test should apply

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It was accepted that whichever local authority was identified by Cobb J as the applicant authority would inevitably be bound to rely on the threshold findings made by the original circuit judge who had determined the proceedings concerning the mother's older three children (and sat in the care centre in the area of X County Council).

On behalf of Y County Council it was argued that:

- the ordinary arrangements for designation under ss31(8) and 105(6) apply to a public law case which has been transferred under Article 15;
- LM was not ordinarily resident in the area of Y County Council (s31(8)(a));
- there was evidence that the mother was not herself ordinarily resident in the area of Y County Council; and
- s31(8)(b) therefore applied, which determined that the designation would fall to X County Council.

Cobb J rejected X County Council's submission that s31(8) did not apply to an Article 15 transfer case. The judge was specifically required (on acceptance of transfer) to proceed 'as if the application had been made in England and Wales' (Family Procedure Rules 2010, r12.66). This is a useful

judicial reminder of the interplay between jurisdictions. Once the transfer request was accepted, the ChA 1989 applied to the designation of the local authority.

Having determined that the provisions of s31(8)(a) did not apply on the facts, Cobb J turned to consider the provisions of s31(8)(b) – that the circumstances before the court, on any construction, could not be said to have arisen in the area of Y County Council. The situation as to the mother's older three children formed the essential factual foundation of the public authority intervention in Ireland, and would be

heavily relied upon by the applicant local authority in this jurisdiction to establish the threshold criteria under s31, ChA 1989. It followed that the local authority that would be designated for the purpose of a care order in this case would be X County Council. X County Council was accordingly regarded as the competent authority under Article 56(2) for the purposes of effecting the physical transfer of LM to this jurisdiction.

#### **Conclusion**

The application for a transfer of jurisdiction in *Re LM* met with no opposition and so the criteria of Article 15 BIIR was easily satisfied. It will take further cases to fully test the requirements as to whether a case is 'better placed' to be heard overseas. See also the judgment was handed down by Sir James Munby on 2 July 2013 in the matter of *Re HJ (a Child)* [2013] in which the President endorsed the approach of Cobb J on the issue of Article 15 and effected a similar transfer of jurisdiction from the Republic of Ireland to England and Wales. ■

*Re HJ (a Child)*  
[2013] EWHC 1867 (Fam)  
*Re LM (A Child)*  
[2013] EWHC 646 (Fam)  
*Sheffield County Council*  
*v Bradford Metropolitan Council*  
[2013] All ER (D) 321