Care proceedings with a European dimension under Brussels IIa: jurisdiction, mutual trust and the best interests of the child

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This article explores the use of the Brussels IIa Regulation in English care proceedings where the child is a national of another EU Member State. The structure and approach of the law on jurisdiction over care proceedings are explained to demonstrate that the Regulation is not well drafted to accommodate care proceedings. There are significant flaws in drafting and cooperation between national authorities in organising the transfer of jurisdiction between Member State courts. The underlying approach of the Regulation in assessing the child's best interests against a background of mutual trust between national family laws does not provide a coherent basis for the law. Mutual trust prevents the assessment of potential future outcomes for the individual child from foreign care proceedings, limiting the scope of any best interests assessment as an aspect of the rules of jurisdiction.

Introduction

Taking a child into public care is a serious interference with family life, but when proceedings are issued over a child who is a national of another country, further, potentially politically controversial, cross-national issues are engaged. The child deemed at risk is subject to state action in a foreign country, raising questions over which national court should take decisions, practical difficulties in evidence and information gathering, and throwing into contrast the approaches of different national legal systems to the care and best interests of children. International migration, and particularly the free movement of persons within the EU,[1] has increased the likelihood that children at risk of harm in England and Wales will have family connections in another country. This has become evident in a number of care cases arising in the English courts affecting a child who is a national of another EU Member State. When a local authority issues care proceedings over a child who is a foreign EU national, the English court must have jurisdiction under the EU's Brussels IIa Regulation (BIIa)[2] to take substantive decisions for their protection under Part IV of the Children Act 1989. Even if the English court has primary jurisdiction, in defined circumstances and in the best interests of the child, care proceedings may be transferred to another Member State under Article 15, BIIa.

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1 Treaty on the Functioning of the European Union (2012) OJ C 326/47, Article 20.

2 Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 of 23 March 2003 (2003) OJ L 338/1.

Recent care cases decided under BIIa in England have attracted both political and media attention[3] but there has been little sustained analysis of underlying principles and decision-making over the crucial issue of jurisdiction. BIIa only harmonises the rules on jurisdiction and recognition and enforcement of judgment; once the jurisdiction is determined by BIIa, the substantive decisions over the risk posed to the child is determined according to the national law of that country. BIIa is an instrument expressly designed to respect the fundamental rights of the child[4] and best interest assessments form an aspect of some of the jurisdictional rules created by the Regulation. However, there are distinct differences in national law on child protection between the Member States,[5] raising the possibility of an overt clash between family law systems and cultures. To avoid this possibility, BIIa operates on the principle of 'mutual trust' whereby each Member State is required to assume the equivalence of standards of protection in all other Member States without examining the nature or protections provided.[6] Identifying the best interests of the child in relation to jurisdiction cannot therefore include an assessment of the provision of foreign law for the protection of children. Applying the best interests of the child, as emphasised in BIIa, in decisions concerning where the child's case will be heard complicates the issue of mutual trust by inviting considerations of long-term care outcomes for the child in different countries, but without making provision for these comparisons.

This article will analyse the approach of the English courts to the provisions of BIIa in relation to jurisdiction over care proceedings. It will be demonstrated that BIIa is not properly designed to accommodate cross-national care proceedings, with significant drafting flaws and gaps in practical cooperation for the effective management of cases. More fundamentally, it will be argued that the underlying approach of the Regulation in aiming to secure the child's best interests in jurisdiction decisions against a background of mutual trust between legal systems is not a coherent basis for the law. There is an inherent tension between the highly contextual best interests assessment, and the exclusion by the mutual trust principle of issues relating to foreign law that are relevant to that assessment. The relationship between these fundamental principles underpinning BIIa and their articulation in care proceedings need re-examination to promote the efficient resolution of cross-border care proceedings, without placing the child at further risk of harm.

To explore these issues Part 1 of this article will consider the structure of BIIa and decisions on jurisdiction under Article 8 and Article 15 of the Regulation. Part 2 considers the practical difficulties in resolving cases that have arisen in managing cases in England and Wales, and in cooperating with agencies in other Member States. Part 3 addresses the underlying principle of mutual trust and how this affects the assessment of the best interests of the child in deciding jurisdiction over care proceedings under BIIa.

1. Brussels IIa and jurisdiction over care proceedings

Identifying which national court has jurisdiction to decide the future of a child and the substantive decisions adopted by that court are separate legal issues governed by different legal frameworks. Despite this separation, the reality is that the two issues of jurisdiction and

3 See, for example, the *Guardian* 14 August 2015, last accessed 31 August 2015, available at: www.theguardian.com/commentisfree/2015/aug/14/child-mother-court-of-appeal-latvian-girl-adoptive-parents-uk. See further Part 3 below.

4 Recital 33, BIIa.

5 See Council of Europe Parliamentary Assembly, 'Recommendation on Social Services in Europe: Legislation and practice of the removal of children from their families in Council of Europe Member States' 22 April 2015, available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21738&lang=EN, last accessed 12 June 2015.

6 Recital 21, BIIa. See *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FLR 151, para [15].

substantive decision-making are heavily interrelated. Identifying which court hears the case will be strongly determinative of the eventual outcome for the child because that court will apply its national law and procedures on child protection in making substantive decisions on the threshold for care proceedings and suitable orders.[7]

Traditionally the English court has adopted a protective approach to children at risk within the jurisdiction,[8] but the court only has the power to act regarding the substantive welfare of the child under the Children Act 1989, Part IV if they hold jurisdiction over an individual child under BIIa. The Regulation controls when Member States may exercise jurisdiction over children in cross-national legal proceedings, including private parental responsibility disputes, international child abduction and public care proceedings. The first preliminary reference to the Court of Justice of the European Union (CJEU) on the interpretation of BIIa established that public care proceedings fall within the material scope of 'civil matters' governed by BIIa,[9] although decisions over adoption are expressly excluded.[10] The extent of the material scope was perhaps not fully appreciated in early practice under BIIa because there are no specific public care provisions in the Regulation; care cases are dealt with under the normal rules of jurisdiction.

Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions) clarified the structure of the law on jurisdiction over care proceedings with a European dimension.[11] For the English court to assume jurisdiction over care proceedings the child must be habitually resident in England under Article 8(1) BIIa.[12] If the child is not habitually resident in England and Wales, the English court must decline jurisdiction[13] and may only adopt interim care and supervision orders[14] or emergency protection orders,[15] as emergency provisional and protective measures under Article 20 BIIa.[16] Even if the child is habitually resident in England, where the child has connections to another Member State, the English court must also consider whether the case should be transferred to the courts of another Member State better placed to hear the case under Article 15 BIIa.[17] Article 15 permits the transfer of jurisdiction over parental responsibility cases between Member State courts. The transfer must be to a court with a close connection with the child, better placed to hear the case in the best interests of the child. The possibility of an Article 15 transfer should be considered in all public law care proceedings with a European dimension.[18]

Recital 33, BIIa states that the Regulation 'seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union'. Article 24 contains three rights specifically applicable to children: the right of the child to express their views freely and have their views taken into account in decisions affecting them; in all actions relating to children, the child's best interests must be the primary consideration; and

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7 Under Article 15, Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996, the court with jurisdiction over a child shall apply their own law, although they may exceptionally, for the protection of the child, take into consideration the law of another state with a substantial connection to the situation.

8 See, for example, *Re P (An Infant)* [1965] Ch 568.

9 (Case C-435/06) [2007] ECR I-10141, para 53.

10 Article 3(b), BIIa.

11 [2014] EWHC 6 (Fam), [2014] 2 FLR 151, para [23].

12 If the child's habitual residence cannot be established, under Art 13 BIIa jurisdiction may be assumed on the basis of the child's presence in the jurisdiction.

13 Article 17 BIIa.

14 Children Act 1989, s 38.

15 Children Act 1989, ss 44–46.

16 *Re B (Care Order: Jurisdiction)* [2013] EWCA Civ 1434, [2014] 1 FLR 900, paras [80]–[81].

17 *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] Fam 139, [2014] 2 FLR 151, para [23].

18 Ibid, para [35].

the child has the right to contact with both parents, unless contrary to the child's best interests. The grounds of jurisdiction in relation to parental responsibility are shaped in the light of the best interests of the child and some grounds include specific reference to the child's best interests, including Article 15.[19]

Despite the reference to best interests in BIIa and the underpinning assumption that the grounds are compliant with children's rights, it is not clear how far the best interests principle can or should affect the assumption of jurisdiction, especially in cases where the child is deemed to be at risk.[20] A decision on jurisdiction may fundamentally affect the child's long-term future because each legal system will have its own particular substantive rules and processes of child protection. But whether an assessment of this potential outcome should form part of the considerations over where the case is heard is much less clear. BIIa, whilst including reference to the child's best interests in the grounds of jurisdiction, defers to national law and processes on how to achieve this outcome.[21] The extent to which the interpretation of the child's 'best interests' may vary between states has not been addressed by the CJEU. Traditionally, rules of jurisdiction have only sought to identify the most appropriate forum for the case, aiming for certainty and predictability to reduce litigation. Introducing a best interests assessment into decision-making over jurisdiction risks introducing undesirable elements of uncertainty because of the indeterminacy of a best interests assessment.[22] The question of jurisdiction is essentially procedural and all Member States are expected to interpret and apply the rules of BIIa, explained in the following discussion, uniformly, trusting all other Member States to do the same.

The general ground of jurisdiction: habitual residence and care proceedings

The primary ground of jurisdiction in relation to children under BIIa is habitual residence under Article 8. Habitual residence is a factual connection between a person and a country, and is intended to be flexible and responsive to changes in circumstances, so that the court with the current closest connection to the parties hears any family law dispute.[23] As a connecting factor it differs from nationality, which is a legal affiliation to a state, because habitual residence changes as individual circumstances evolve.

Identifying a child's habitual residence is not explicitly a decision taken in the child's best interests, instead being focused on the factual connections of an individual child to a country. The CJEU suggests identifying the centre of a child's life from a series of probative factors, including the duration, regularity, conditions and reasons for the child's stay in the Member State, the child's nationality, attendance at school, linguistic knowledge and the family and social relationships of the child.[24] In the case of infants, their primary environment is the family, and the child shares the family and social environment of the person(s) caring for the child.[25] In these circumstances, there must be some assessment of the integration of the infant child's carers' in the Member State and social environment. For older children, the court will consider the child's opinion on where they are habitually resident[26] and, arguably, the opinion of younger children should also be considered relevant to this assessment.[27]

19 Recital 12, BIIa; Art 12(1), Art 12(3), Art 15.
20 H Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing, 2012), p 102.
21 Recital 19, BIIa.
22 J Herring, 'Farewell Welfare?' (2005) 27 *Journal of Social Welfare and Family Law* 159, 161.
23 R Lamont, 'Habitual Residence and Brussels II bis: developing concepts for European private international family law' (2007) 3 *Journal of Private International Law* 261, 263.
24 (Case C-523/07) *A* [2009] ECR I-02805, paras 37–39.
25 (Case C-497/10) *PPU Mercredi v Chaffe* [2010] ECR I-14309, paras 54–55.
26 *Re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] AC 1038, para [58].
27 S Gilmore and J Herring, 'Listing to children . . . whatever' (2014) 103 *Law Quarterly Review* 531.

The CJEU's approach to the habitual residence of a child, in identifying the factual centre of the child's interests, is sensitive to the family and social circumstances of that child. The reference to nationality as a factor should not be determinative but recognises the cultural background of the child and family.[28] In a triumvirate of cases,[29] the UK Supreme Court has adopted the CJEU's approach to habitual residence based on the centre of the child's interests, in preference to the English formulation requiring a period of residence with a settled intention to remain.[30] This shift has been welcomed as a more 'child-centric' approach,[31] but parental intentions can still be relevant to establishing the reasons for a child leaving one country and living in another.[32]

The underlying reason for using habitual residence as the primary connecting factor is that the court with the closest connection to the child is the most appropriate forum for taking decisions over parental responsibility.[33] In judgment on Case C-523/07 *A*, the court stated that 'from Recital 12 [of BIIa] . . . the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular the criterion of proximity'.[34] The most proximate court is deemed to be in the child's best interests because, in theory, the child themselves, all the information about the child, their family and friends, and their circumstances including social workers', health and school reports will be in that jurisdiction and the proceedings will be conducted in a familiar language. This facilitates both the child's participation in proceedings and is normally the most appropriate decision-making environment. The primacy of the habitual residence court can be displaced only where one of the exceptions defined in BIIa applies.[35]

In cross-border care proceedings the child's family life may have been fundamentally disrupted, challenging underlying assumptions regarding the family environment as the child's primary site of care when assessing habitual residence. For example, in *Re J (A Child: Brussels II Revised: Article 15: Practice and Procedure)* the father was homeless and the mother would have been homeless had accommodation not been found for her and J in a baby foster home.[36] By contrast, in *Leicester City Council v S* the Hungarian mother had abandoned the infant DS and he had subsequently been cared for by foster parents.[37] The primary environment of the child may not be the birth family as anticipated by the CJEU case-law.[38] The accommodation provided by the local authority will have an impact on determining the centre of the child's interests. Even though the child is a foreign national, where the child was born in England and has never left the country, they are habitually resident in England for the purposes of BIIa.

In cases where the child was born abroad, normally in the state of nationality, and has subsequently accompanied their parent(s) to England, habitual residence may be more difficult

28 R Lamont, 'Annotation of Case C-523/07 A' (2010) 47 *Common Market Law Review* 235, 241.
29 *Re A (Jurisdiction: Return of Child)* [2013] UKSC 60, [2014] AC 1, [2014] 1 FLR 111; *Re KL (A Child) (Abduction: Habitual Residence: Inherent Jurisdiction)* [2013] UKSC 75, [2014] AC 1017, [2014] 1 FLR 772; *Re LC (Reunite International Child Abduction Centre Intervening)* [2014] UKSC 1, [2014] AC 1038, [2014] 1 FLR 1486.
30 *Shah v Barnet London Borough Council* [1983] 2 AC 309.
31 R Schuz, 'Habitual Residence of the Child Revisited: A trilogy of cases in cases in the UK Supreme Court' [2014] CFLQ 342, 344.
32 *Re KL (A Child) (Abduction: Habitual Residence: Inherent Jurisdiction)* [2013] UKSC 75, [2014] AC 1017, [2014] 1 FLR 772, para [23].
33 *E v B* (Case C-463/13) 1 October 2014, nyr.
34 *A* (Case C-523/07) [2009] ECR I-02805, para 35.
35 Articles 9–15 BIIa.
36 [2014] EWFC 41, [2015] Fam Law 129.
37 [2014] EWHC 1575 (Fam), [2015] 1 FLR 1182.
38 (Case C-497/10) *PPU Mercredi* [2010] ECR I-14309, para 55.

to establish.[39] In some care cases, the disrupted nature of the child's life has affected the extent to which they have integrated into England. For example, in *Re D (Habitual Residence)*[40] an 11-year-old Lithuanian girl was found sleeping rough and was placed in English foster care where she displayed sexualised behaviour. She was not fluent in English and expressed a wish to return to the Lithuanian children's home where she had previously been accommodated following allegations of abuse against her mother. Despite having lived in England for seven months, the court found that she was not habitually resident. There was little or no evidence of her integration into a social and family environment in England.

The impact of parent and foster care on establishing a child's habitual residence was considered in *Kent County Council v C and Others*[41] where the mother had unlawfully removed her son from Latvia to England. The local authority had issued care proceedings and placed the boy with foster carers. In finding that the son had still been habitually resident in Latvia when care proceedings were issued, the court considered the nature of the mother's care, and the fact that the son had been accommodated with foster carers who were not culturally appropriate or able to speak his first language. These factors were deemed to have affected the extent to which he had integrated in England. This decision indicates that the disruption and instability of the child's circumstances will affect the question of whether the child is habitually resident in England for the purposes of Article 8 BIIa.

Even if the child is habitually resident in England for the purposes of Article 8 BIIa, where the child or their parents is a national of another Member State, the possibility of transferring jurisdiction under Article 15 BIIa must be considered.

Transferring jurisdiction over care proceedings to another Member State

The inclusion of Article 15 to permit transfer of jurisdiction between Member States was an innovation of BIIa from previous EU measures. The preference in European private international law rules is for a strong assertion of jurisdiction[42] to reduce uncertainty, and primacy is therefore given to the court of the child's habitual residence under Article 8. The possibility of transfer acknowledges that there may be circumstances in which the child is more closely connected to another jurisdiction, taking account of the child's relationships and location of family members, availability of evidence, potential placements, language and cultural heritage. In care proceedings where the child has a connection to another Member State, even if the child is habitually resident in England, the court is now obliged to consider whether to make an Article 15 request to transfer jurisdiction to the foreign court.[43] The President of the Family Division has suggested that: '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 countries'.[44] The English courts must be willing to consider transfer as an essential aspect of mutual trust in other Member States judicial and social systems to protect children.

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39 Where the child was born in England and Wales and is moved to a foreign jurisdiction to avoid care proceedings, it is more difficult to change the child's habitual residence from England to another jurisdiction, see *X County Council v T and Others* [2014] EWHC 3321 (Fam), [2015] Fam Law 269.

40 (unreported) 11 November 2014, Family Court East London.

41 [2014] EWHC 604 (Fam), [2015] 1 FLR 115, para [56].

42 P McEleavy, 'The Brussels II Regulation: How the European Community moved into family law' (2002) 51 *International and Comparative Law Quarterly* 883, 887.

43 *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FLR 151, para [31]. The decision on jurisdiction is transferred to the High Court for a decision.

44 Ibid, para [13].

The application for a transfer under Article 15 BIIa may be made either by the parties to proceedings, the court hearing proceedings, or the foreign court.[45] Central Authorities are instructed to cooperate to achieve the purposes of Article 15(6), communicating between legal systems and between courts and the parties. Once an application has been made, the court has to first consider whether the child has a particular connection to another Member State. The particular connection is defined by the Regulation and may be the place of the child's nationality, or the habitual residence of a holder of parental responsibility.[46] In care proceedings, the nationality of the child is normally the particular connection identified under Article 15(3)(c) BIIa. If a particular connection does exist, the court must then consider whether the foreign court would be 'better placed' to hear the case, and whether this is in the best interests of the child.[47] If the court accepts that transfer should take place, it must request the foreign court to assume jurisdiction and the foreign court must then, in a second assessment of best interests, decide whether accepting jurisdiction is in the best interests of the child and, if so, assume jurisdiction over proceedings.[48] The best interests of the child are an overt factor of Article 15 because of the underlying assumption that the habitual residence court will be seised of proceedings and is normally the most appropriate court to hear proceedings, therefore any transfer must be justifiable by reference to the child's best interests. The Practice Guide to BIIa emphasises that the court must consider the transfer to be in the best interests of the child.[49] However, the English courts' analysis has focused more on identifying which court is 'better placed' to hear the case.

The Court of Appeal has given guidance on the approach to be taken to Article 15 in care proceedings in *Re M (Brussels II Revised: Art 15)*.[50] In the High Court, Mostyn J had suggested that for child protection cases Article 15 contained a 'subtext' that the court of the child's nationality should decide the child's future unless the child's connection to that country had become tenuous.[51] Ryder LJ rejected this suggestion as an error of law and an impermissible gloss on the text of BIIa, instead identifying a structured approach to deciding applications for transfer under Article 15. The focus of the English court's analysis cannot be on the child's nationality and their connection to another state alone.[52]

Once a particular connection to another Member State has been established through the child's nationality,[53] the court must consider the practical issues associated with whether the foreign court is 'better placed' to hear the case.[54] The court should identify the availability of witnesses of fact, the conduct of assessments and by whom any assessments can or will be carried out, the courts' knowledge of the case and judicial continuity, and the speed of resolution of

45 Article 15(2), BIIa. If the application is made by a court, at least one of the parties to proceedings must accepted by at least one of the parties to proceedings.

46 Article 15(3), BIIa. In addition, Art 15(3) includes the place where a child has subsequently become habitually resident after the court was seised, or the child's former habitual residence.

47 *AB v JLB (Brussels II Revised: Article 15)* [2008] EWHC 2965 (Fam), [2009] 1 FLR 517.

48 Article 15(5), BIIa. *Re L-M (Transfer of Irish Proceedings)* [2013] EWHC 646 (Fam), [2013] Fam 308, [2013] 2 FLR 708. Jurisdiction must be assumed within six weeks, otherwise it reverts back to the original court.

49 European Commission, 'Practice Guide for the application of the Brussels IIa Regulation', 34, available at: http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf. Last accessed 14 December 2015.

50 [2014] EWCA Civ 152, [2014] 2 FLR 1372.

51 *Re D (Transfer of Proceedings)* [2013] EWHC 4078 (Fam), [2014] 2 FLR 496, para [26].

52 *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para [26] reversing the decision to transfer proceedings because inappropriate weight had been given to the child's nationality, see *Re D (Transfer of Proceedings)* [2013] EWHC 4078 (Fam), [2014] 2 FLR 496.

53 Article 15(2), BIIa.

54 This is not an exercise of the domestic English law of forum conveniens because reference to domestic law would not be consistent with the European law principle of uniform interpretation, see *Re T (Brussels II Revised, Art 15)* [2013] EWCA Civ 895, [2014] Fam 130, [2014] 1 FLR 749, para [19].

proceedings if transfer does/does not take place.[55] All practical factors affecting the conduct of proceedings can be taken into account, including the stage reached by the English proceedings, whether the statutory 26-week time limit[56] has been reached or exceeded, the location of siblings and the role of the wider family,[57] and the existence of any foreign proceedings.

In cases where the family has left the country of their nationality for England explicitly to avoid care proceedings affecting siblings in their home state, then a transfer of the case to ensure continuity of proceedings is likely to be beneficial to aid the unification of siblings.[58] If the child involved in English proceedings is an infant, born in England, it is not appropriate to use the phrase 'returning' the child to the country of their nationality because the infant has lived exclusively in England.[59] Article 15 is directed at transferring jurisdiction to a better placed court, not to return the child to their habitual residence following an abduction. In these circumstances, the parent(s) is attempting to manipulate jurisdiction to avoid interference from the state, not necessarily from the other parent.

If the English court finds the foreign court is 'better placed' to hear the substantive litigation, it must then assess whether a transfer of jurisdiction is in the child's best interests. Ryder LJ suggests that BIIa is a legislative instrument derived to secure the best interests of the child and makes it clear that the best interests assessment under Article 15(1) is focused on the question of jurisdiction: 'The evaluation of a child's best interests under Article 15(1) is limited in its extent to the issue of forum ie the best interests question asked by Article 15(1) is whether it is in the child's best interests for the case to be determined in another jurisdiction'.[60] The decision on the final element of best interests is therefore decisively shaped by the decision on whether the foreign court is 'better placed' to assume jurisdiction.[61] The investigation is not into the child's overall situation, but instead into the forum for litigation.[62] The formulation of this best interests assessment means that the decision on the individual child's best interests tracks closely to the issues relating to the suitability of the foreign court to decide the issue because 'best interests within Article 15 is not best interests globally but best interests as to whether the case should be transferred or not'.[63]

The courts have emphasised that the question of where the child's best interests lie is 'intimately connected' to the identification of the court better placed to make decisions on the substantive welfare issues.[64] In *Suffolk County Council v DL*, Parker J adopted a 'pros and cons' evaluation to establish whether transfer of jurisdiction was in the child's best interests, focusing on the practical elements associated with hearing the case in Lithuania.[65] Beyond the location of evidence and extended family members, there has been discussion of the nationality and ethnic origin of the child and the risk posed to the child of losing their heritage if proceedings are conducted in England.[66] In *X London Borough v C*, referring to a ten-month-old child, born in England but of Roma Romanian heritage, Parker J stated that:

> 'if A is to remain here and the only option is adoption, that will be a profound dislocation of a child who, though as yet he has no appreciation of his cultural and ethnic roots, may

55 *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para [20].
56 Children Act 1989, s 32(1), as amended by Children and Families Act 2014, s 14.
57 *Re J (A Child: Brussels II Revised: Article 15: Practice and Procedure)* [2014] EWFC 41, [2015] Fam Law 129, paras [49]–[58].
58 *Re A and B (Children – Brussels II Revised – Art 15)* [2014] EWHC 3516 (Fam), para [59].
59 *Leicester City Council v S* [2014] EWHC 1575 (Fam), [2015] 1 FLR 1182, para [40].
60 *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para [21].
61 *Re N (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2016] FLR (forthcoming), para [144].
62 *Re T (Brussels II Revised, Art 15)* [2013] EWCA Civ 895, [2014] Fam 130, [2014] 1 FLR 749, para [25].
63 *X London Borough v C* [2014] EWHC 2472 (Fam), para [16].
64 *Leicester City Council v S* [2014] EWHC 1575 (Fam), [2015] 1 FLR 1182, para [79].
65 *Suffolk County Council v DL* [2014] EWFC 29 (Fam), para [9].
66 *Re A and B (Children – Brussels II Revised – Art 15)* [2014] EWHC 3516 (Fam), para [70].

> come to feel, however good a potential placement, stranded, dislocated, deracinated and disinherited by a permanent placement here.'[67]

This risk has assumed importance in the context of Article 15 decision-making, despite changes to national law on the role of race and ethnicity in adoption,[68] presumably because the elements of nationality and ethnicity are at the foreground in cross-national proceedings. It tends to be a factor cited to support a transfer to a better placed court, but the extent to which it may influence the decision to transfer proceedings in the best interests of the child is not yet clear.

The English courts have limited the best interests test in Article 15 in two ways: first, the test is restricted to an assessment of where the proceedings will take place, and not the substantive outcome of proceedings, and secondly, there must be no comparison between the foreign and English systems of child protection in the assessment. These two restrictions are interrelated because the decision is only over the forum, and the substantive outcome and protection available in each national forum is deemed equivalent. From the English case-law, the assessment of the child's best interests is not a full best interests assessment, but strictly confined to the issue of jurisdiction. The approach of the English courts to the best interests element of Article 15 has effectively elided the question of which court is better placed to hear care proceedings with the best interests of the child.

This truncated form of best interests assessment for the purposes of Article 15 is supported by reference to a UK Supreme Court decision, *Re I*, considering the interpretation of Article 12(3) BIIa. Article 12(3) is another exception to habitual residence as the primary ground of jurisdiction whereby parental responsibility proceedings can be linked to related divorce proceedings in another Member State, if this would be in the child's best interests.[69] Baroness Hale argued in *Re I (A Child) (Contact Application: Jurisdiction)* that the decision on whether a case should be determined in this country in the best interests of the child is:

> 'quite different from the substantive question in the proceedings, which is "what outcome to these proceedings will be in the best interests of the child?" It will not depend upon a profound investigation of the child's situation and upbringing but upon the sort of considerations which come into play when deciding upon the most appropriate forum.'[70]

The result of this interpretation as applied to Article 15 transfers is that the nature of the underlying proceedings has been notably absent from the assessment of the child's best interests. In particular, for care proceedings the assessment of the risks posed to the child by transfer and the elements of risk surrounding the assessment of the threshold criteria are not clearly articulated. Instead, the focus is on the connections the child may have to the alternative jurisdiction.

Re I is not an authority on the interpretation of Article 15 and, as yet, the CJEU has not considered a preliminary reference on the interpretation of Article 15 BIIa.[71] Case C-428/15 *Child and Family Agency v JD* has recently been referred from Ireland. This reference asks what factors should be considered as an aspect of a 'best interests' assessment in relation to transfer of jurisdiction under Article 15 and how this relates to whether a court is 'best placed' to hear the case, including whether it is legitimate to examine the content and practice of foreign law. English practice on Article 15 in child protection proceedings has adopted a

67 [2014] EWHC 2472 (Fam), paras [8]–[9].

68 Repeal of Adoption and Children Act 2002, s 1(5). See J Hayes and P Hayes, 'Adoption in England: The end of placements dictated by race, culture, religion and language' [2014] Fam Law 1288, 1297.

69 Expressed as 'superior interests of the child' in Art 12(3), BIIa.

70 [2009] UKSC 10, [2010] 1 AC 319, [2010] 1 FLR 361, para [36].

71 A question on Art 15 was referred to the court in Case C-436/13 *E v B* but it was not necessary for it to be answered.

structure considering first whether the foreign court would be 'better placed' to hear the case, and subsequently whether this is in the best interests of the child, a factor which is strongly influenced by the decision on which court is deemed best placed. No consideration is given to the content and practice of child protection in the other Member State. This reference will give the CJEU an opportunity to consider the nature of the best interests assessment in the jurisdictional rules of BIIa and whether, in questions of jurisdiction, the assessment is circumscribed in the way Baroness Hale suggests in *Re I*.

In a recent decision on Article 12(3), the CJEU emphasised that jurisdiction in matters of parental responsibility must be determined in the best interests of the child.[72] This can only be determined by an examination of whether prorogation of jurisdiction is in accordance with the child's best interests in each individual case.[73] The approach relied on by the English courts to assessing the child's best interests under Article 15 is individualised in the sense that it considers the facts of each case but it focuses on how the child's circumstances relate to the forum. In *Re M (Brussels II Revised: Art 15)*[74] Ryder LJ suggested that the jurisdiction rules of the Regulation had been derived to protect the child and their rights under the Charter of Fundamental Rights of the European Union[75] and the UN Convention on the Rights of the Child 1989.[76] Both these documents state that the child's best interests should be the 'primary consideration' in all actions relating to children. References to these provisions have been cursory in the English case-law on Article 15, and the relationship between protection of the child's rights and the jurisdiction in which litigation takes place has not been clearly analysed.[77] Hopefully the decision on Case C-428/15 *Child and Family Agency v JD* will provide further guidance on the interpretation of best interests and the approach to be adopted by national courts.

The rather limited assessment of the child's best interests has arisen from the influence of mutual trust: the English court is prohibited from assessing or comparing the child protection procedures and services in the alternative Member State. This restriction has been explained by Munby P: 'it is not permissible for the court to enter into a comparison of such matters as the competence, diligence, resources or efficacy of either the child protection services or the courts of the other State'.[78] No favouritism can be shown for the English system or the English jurisdiction. This prohibition on comparison between systems effectively limits any best interests assessment or discussion of possible outcomes for the individual child from the substantive proceedings. A strict division is maintained between the assessment of jurisdiction, and the question of the long-term best interests of the child to be decided in substantive proceedings.[79] This is a highly artificial and legalistic division since the point of a dispute over jurisdiction is usually that the jurisdiction seised affects the substantive outcome of proceedings by changing the applicable law.

Even if the English court retains jurisdiction and refuses to make a transfer to the foreign court, it is only making a jurisdictional decision. The court has not determined that the child's

72 (Case C-436/13) *E v B*, paras 44–45.
73 (Case C-656/13) *L v M*, para 49.
74 [2014] EWCA Civ 152, [2014] 2 FLR 1372, para [20].
75 [2010] OJ C 83/389, Art 24(2)
76 Article 3(1), CRC.
77 Under Art 51(1) of the Charter, the English court is bound to apply the Charter when it is implementing EU law.
78 *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para [54]. See *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FLR 151, para [15].
79 *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para [54].

long-term future is in England, but merely that care proceedings should be heard in England. The outcome of the substantive hearing may still be that the child is placed abroad in another Member State.[80]

2. Managing cross-border care proceedings under Brussels IIa: flaws and challenges

Although there is now a body of English case-law on the management of care proceedings under BIIa, there remain difficulties in its operation both in practice and in the interpretation of the child's best interests in this context. The experience of the English courts in using BIIa has demonstrated that there are areas of concern in domestic practice and in BIIa itself that undermine the effectiveness of the Regulation in resolving cases that deserve further reflection.

Using Children Act 1989, section 20

The nature of the care provided for the child is important where the local authority has accommodated a child under section 20 of the Children Act 1989. When the local authority accommodates a recent migrant child, the placement may establish the child's integration in England outside of their family, consequently changing their habitual residence and awarding the English court jurisdiction if care proceedings are subsequently issued.[81] Hayden J has stated that: 'I must emphasise that where there is . . . obvious potential for a jurisdictional issue, protracted periods under section 20 voluntary arrangements are highly undesirable'.[82] The potential for the local authority to affect the child's habitual residence through its actions must be fully appreciated.[83] Section 20 accommodation facilitates the protection of children without the involvement of the court.[84] A social worker can take action under section 20, unless a person holding parental responsibility over the child objects, without involving the court, which is particularly useful where the threshold criteria are not met under section 31(2) of the Children Act 1989. This includes accommodation for foreign national children. However, the parent may not be fully aware or advised of the consequences of this agreement, and particularly the potential impact on the child's habitual residence.

Section 20 arrangements are not time limited or supervised by the court.[85] For the purposes of BIIa, the court is only seised of proceedings[86] when it becomes involved in decision-making processes.[87] The use of section 20 avoids 'seising' the court, but could simultaneously affect jurisdiction over the child by effectively changing their habitual residence under Article 8 BIIa as the child settles and integrates in England.[88] Munby P has highlighted these difficulties in *Re N (Adoption: Jurisdiction)*[89] where the delay caused by using section 20 accommodation before commencing care proceedings over a foreign national child was heavily criticised. The court addressed the need for informed consent and the requirement that a foreign national parent has a proper understanding of the nature and consequences of consenting to the local authority accommodating the child. Parental consent should normally be recorded in writing, with the

80 *Southampton City Council v M, F and IB* [2014] EWFC 16, [2014] Fam Law 1378, para [24].
81 *In the matter of T (Habitual residence: Article 15 transfer)* (unreported) 11 November 2014, Family Court, East London.
82 *Re SR (A Child: Habitual Residence)* [2015] EWHC 742 (Fam), para [5].
83 *Norfolk County Council v VE and Others* [2015] EWFC 30 (Fam), [2015] Fam Law 768, para [63].
84 *Re SR (A Child: Habitual Residence)* [2015] EWHC 742 (Fam), para [33].
85 J Masson, 'Emergency Intervention to Protect Children: Using and avoiding legal controls' [2005] CFLQ 75, 80.
86 Article 16, BIIa.
87 *Re SR (A Child: Habitual Residence)* [2015] EWHC 742 (Fam), para [33].
88 This is not the case for determining 'ordinary residence' in English law where any period of accommodation by the local authority is disregarded under s 105(6)(c), Children Act 1989, but this has not been applied to the interpretation of 'habitual residence' for the purposes of BIIa.
89 [2015] EWCA Civ 1112, [2016] FLR (forthcoming), para [157].

written document translated into the parent's own language.[90] In international cases, the involvement of the court at the earliest opportunity to resolve any question of jurisdiction, and to facilitate transfer of the case to another Member State if necessary, may in fact be more desirable than providing accommodation under section 20 of the Children Act 1989. This may be problematic where the threshold criteria are not made out for proceedings, leaving the child apparently less protected. This concern also highlights the importance of social workers having a full awareness of the family and foreign connections of the child when deciding upon an appropriate course of intervention, since this may significantly affect the subsequent jurisdictional issues.

Changing procedural practices

Local authority children's services and the English courts have had to adapt their practice when a child of foreign nationality is identified as being at risk of harm. Specific guidance has been provided to social workers and the courts on the conduct of such proceedings. When carrying out an assessment under section 47 of the Children Act 1989, social workers are advised to identify the international links of the child and to notify the relevant embassy if care proceedings are instituted.[91] In giving case management directions, where the case has an international element the English court should resolve the issue of jurisdiction over the proceedings at the earliest possible opportunity.[92] A District Judge should allocate the issue of jurisdiction to a Circuit or High Court judge for a decision.[93] If the decisions about the child's future are to be made in England, the 26-week deadline on the disposal of care proceedings[94] must be taken into account, and the decision on jurisdiction cannot therefore be delayed or unduly extended. Hearings on the question of transfer to a foreign jurisdiction have been run alongside local authority assessments of the family and the child to progress the case and avoid delay.[95] The case should still be timetabled through to a final hearing in England as a contingency to avoid infringing the 26-week deadline for the completion of domestic care proceedings if transfer does not take place.

In some cases, requests for transfer under Article 15 BIIa have been raised late in English care proceedings, after the threshold criteria have been met under section 31(2) of the Children Act 1989 and at the point of the welfare hearing to determine the orders to be made for the future of the child.[96] In these circumstances, judicial continuity militates against transfer under Article 15 and the emphasis has therefore been on considering questions of jurisdiction at the earliest possible stage in proceedings at the case management hearing following the making of the application.[97] This is appropriate to ensure that the best-placed jurisdiction is seised at the earliest opportunity (see further below).

These processes are reliant on the effective cooperation between authorities in the Member States. BIIa provides for Central Authorities in each Member State as a conduit for information exchange in relation to children involved in all types of cross-border family proceedings.[98]

90 Ibid, para [170].
91 Department for Education, *Working with Foreign Authorities: child protection cases and care orders. Departmental advice for local authorities, social workers, service manages and children's services lawyers* DfE, 2014). Available at: www.londoncp.co.uk/files/wking_foreign_auth_cp_court_order.pdf.
92 Family Procedure Rules Practice Direction 12A: Care, Supervision and other Part IV Proceedings.
93 *Re J (A Child: Brussels II Revised: Article 15: Practice and Procedure)* [2014] EWFC 41, [2015] Fam Law 129, paras [43]–[46].
94 Children Act 1989, s 32(1), as amended by Children and Families Act 2014, s 14.
95 *Suffolk County Council v DL* [2014] EWFC 29 (Fam), para [5].
96 *X London Borough v C* [2014] EWHC 2472 (Fam), para [4].
97 *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para [32].
98 Article 53 BIIa.

Their role is essential to informed decision-making by the court, for example providing information on potential placements, assessments of family members living in the Member State, or information about the families' circumstances before migration to the UK, which would otherwise be unavailable. Each Member State is obliged to create a Central Authority but national law governs their operation.[99] This means that their resourcing and procedures vary, thus affecting their functionality. In care cases, this has had a significant impact on the conduct of proceedings. In some cases, cooperation between Central Authorities, the court and social services is effective,[100] but when requests for information are not fulfilled, it becomes very difficult for the English court to make an assessment of the impact of a transfer under Article 15, or whether transfer will be accepted by the requested court.

For example, in *Leicester County Council v S*, the Leicester local authority made several requests to the Hungarian Central Authority for information, documents and assistance in assessing family members in Hungary. No response was received from the Central Authority and subsequently two English social workers visited Hungary to conduct assessments, despite it being unclear whether this was permissible under Hungarian law.[101] Moylan J expressed concern over the poor response from the Hungarian Central Authority, identifying that: 'Central Authorities are . . . typically small agencies, and are not equipped to deal with a broad range of enquiries. They are not enquiry agents or general evidence gatherers. Any requests made pursuant to the provisions of [BIIa] must be focused on a specific provision within that Regulation'.[102] He identified that there is no expectation that Central Authorities should intervene or become engaged in proceedings under Article 15 since their role is information sharing, not evidence gathering, and only specific information should be sought.[103]

The English approach to Article 15 transfer requests has been to assume the functionality of the systems in other Member States to cooperate and provide the appropriate information. In some cases this assumption appears to have been unwarranted, making effective case management much more difficult. The court is unlikely to be able to make a full assessment of the child's best interests without appropriate and reliable information about the situation in the alternative Member State. Reliable methods for the provision of information upon which the court makes a decision over which court is better placed to hear a case under Article 15 need further development. This should include provision of information regarding potential carers, interim care arrangements and availability of existing family assessments in another Member State. Improved intra-Member State understanding of foreign social services structure, court structure and legal procedures relating to child protection is also necessary, including up-to-date and easily referenced European guidance on the operation of social workers abroad. The EU should also assume some responsibility for the provision of Central Authority services. Whilst training and cooperation is provided through the European Judicial Network, more thought could be given by the European Commission to defining a basic level of service provision, developing

99 R Lamont, 'Central Authorities and the European Judicial Network: Mainstreaming children's rights into cross-border cooperation in EU family law' in H Stalford and I Iusmen, *The EU and the Global Protection of Children's Rights* (Barbara Budrich, 2015), p 85.

100 *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FLR 151, para [33]. In this case Munby P gave guidance on the role of embassies in care proceedings involving foreign nationals, alongside the Central Authority, see para [13].

101 This also occurred in *Norfolk County Council v VE and Others* [2015] EWFC 30 (Fam), [2015] Fam Law 768, para [63] where assessments were carried out abroad without the agreement of the Lithuanian authorities. In *Re A and B (Children – Brussels II Revised – Art 15)* [2014] EWHC 3516 (Fam), para [33], it was unlawful for an English social worker to carry out assessments in the Czech Republic.

102 *Leicester City Council v S* [2014] EWHC 1575 (Fam), [2015] 1 FLR 1182, para [51].

103 Paragraph 14. Before sending English social workers to another Member State, it should be clear whether they are permitted to work there.

specific training in European obligations, and perhaps funding of Central Authorities across Europe, because of their key cooperative role in EU family law.[104]

Interpretative weaknesses in Article 15 transfers

The opaque drafting of Article 15 BIIa itself has led to difficulties since it fails to adequately define all elements of the process of transfer. If the parties are invited to introduce a request to the foreign court under Article 15(1)(a), then the court is seised when one of the parties initiates proceedings. If, however, the English court requests the foreign court to assume jurisdiction under Article 15(1)(b) (as is more usual), there is no identified process or responsibility for seisure. The foreign court must accept jurisdiction within six weeks of seisure, despite the lack of a process for seisure, if the transfer is in the best interests of the child.[105] It has been the practice of the English court, when considering whether to request a transfer of care proceedings, to approach the court in the other Member State to obtain an indication of whether jurisdiction would in fact be accepted. This has had mixed success. There can be difficulty in identifying which court to approach in the foreign jurisdiction,[106] or in receiving a timely response from the foreign court or authorities.[107] However, even if the request is made by the English court to transfer jurisdiction, this request does not seise the foreign court of proceedings. In fact, it is not clear whether current proceedings in the court seeking to transfer jurisdiction to another Member State are necessary for Article 15 to operate.[108]

In *Bristol City Council v HA*[109] the English court requested a transfer of jurisdiction over care proceedings relating to an eight-year-old Lithuanian boy to the Lithuanian court under Article 15. The Lithuanian court initially indicated that jurisdiction had been accepted and had subsequently closed the case, but the English court received no order confirming this outcome. After a delay of six months, during which the child remained in England, the English court requested the Lithuanian court either to transfer jurisdiction back to the English court, or to indicate the steps taken by the court for HA's long-term future. Following further delay, during which the child's presumed Lithuanian father sought to issue proceedings in Lithuania to establish HA's place of residence with him and HA's foster placement in England broke down, the English local authority filed a second application for a care order. The English court had to address the question of the scope of Article 15: whether it has the effect of transferring a particular set of proceedings, or whether subject matter jurisdiction more broadly is transferred. The English court decided that under Article 15 the transfer to the Lithuanian court was only for particular first care proceedings, which had subsequently been closed by the Lithuanian court.[110] The English court therefore held jurisdiction to hear the further, second application for a care order since HA remained habitually resident in England and jurisdiction more broadly over the child's welfare had not been transferred to Lithuania. The court highlighted that it is necessary to be precise in defining the terms of an order for transfer, identifying exactly what aspects of the case are being transferred.

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104 R Lamont, 'Central Authorities and the European Judicial Network: Mainstreaming children's rights into cross-border cooperation in EU family law' in H Stalford and I Iusmen, *The EU and the Global Protection of Children's Rights* (Barbara Budrich, 2015), p 91.

105 Article 15(5), BIIa.

106 The Practice Guide on BIIa suggests using the 'Judicial Atlas' to identify the appropriate court. Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm. Last accessed 10 June 2015.

107 See for example *Bristol City Council v AA and HA* [2014] EWHC 1022 (Fam), [2015] 1 FLR 625, where the international liaison judge identified the appropriate Lithuanian court but responses to requests for information were slow.

108 The CJEU was asked if this was necessary in *E v B* Case C-436/13 [2015] 1 FLR 64, para [29], but the decision of the court made answering this question unnecessary to the outcome.

109 [2014] EWHC 1022 (Fam), [2015] 1 FLR 625.

110 [2015] EWHC 1310 (Fam), para [5]1.

In addition, Article 15 does not provide directly for the transfer of physical custody of the child to the foreign authorities. Physical transfer of the child to another Member State is only an implication of transfer of jurisdiction, but in care cases this is a very important aspect of the process of ensuring the protection of the child. The Children Act 1989 provides for physical transfer of a child out of the English jurisdiction from local authority care if this is in the child's best interests and 'suitable arrangements' have been made for the child's reception abroad.[111] There is provision to facilitate such foreign placements in BIIa and Article 15(6) directs that cooperation should occur between Central Authorities for smooth transfer of proceedings. Under Article 55(c), Central Authorities should facilitate communication between courts and provide information and assistance where a child will be placed in another Member State under Article 56 BIIa. This is essential to help the English court to understand what provision can be made for the child in the other Member State.[112]

Article 56 provides for the placement of a child in institutional or foster care in another Member State after consultation with the Central Authority of the requested state, and with the consent of the 'competent authority' in that state. The competent authority should be identifiable under the public law of the Member State and consent must be given before the placement is carried out.[113] There are no time limits placed on the response to a request under Article 56. The English court, when considering whether to place a child in institutional or foster care in another Member State on transfer or at the conclusion of care proceedings, should consult the responsible authority in that state for its consent. The English court must reach its own judgment on whether the placement is in the child's best interests, but full cross-national consultation is necessary to ensure that the child, already deemed at risk, is not sent into a 'transnational void'.[114]

The underlying provisions of the Regulation need further clarity, including specific provision on the process for transfer of proceedings, not just jurisdiction, under Article 15. The relationship between Articles 15 and 56 needs to be further defined to include specific obligations on Central Authorities regarding the timing of responses to requests, communication between Central Authorities and local authorities (and their equivalent), and support for the physical transfer of children.

Failure to correctly resolve jurisdictional issues

The appropriate assessment of jurisdiction and the child's habitual residence is essential to securing the child's best interests. If the English court does not have jurisdiction, it must decline to hear the case[115] and may only adopt provisional, emergency protective measures under Article 20 BIIa. The CJEU has clarified that the nature of the protective measures adopted are for national law, but the need for such measures must be urgent and necessary to protect a child currently in the territory of the Member State, even though they are not habitually resident.[116] In England and Wales, provisional protective measures include interim supervision or care orders under Children Act 1989.

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111 Children Act 1989, Sch 2, para 19. The consent of the child and the holders of parental responsibility are also required, but this can be dispensed with where the court deems the child not competent to consent. Parents in cross-border care proceedings are normally seeking the transfer of jurisdiction, and of the child, under Art 15 BIIa to their home country.

112 *Re J (A Child: Brussels II Revised: Article 15: Practice and Procedure)* [2014] EWFC 41, [2015] Fam Law 129, para [29].

113 *Health Service Executive v SC and AC* (Case C-92/12) [2012] 2 FLR 1040, paras [81]–[82]. Member States must have clear rules and procedures for the purposes of obtaining appropriate consent. If the placement is with a foster family and consent is not required for such a placement under national law, the Central Authority or body with jurisdiction should still be informed under Art 56(4), BIIa.

114 *Re AB (BIIR: Care Proceedings)* [2012] EWCA Civ 978, [2013] 1 FLR 168.

115 Article 17, BIIa.

116 *Detičekv Sgueglia* (Case C-403/09) [2009] ECR I-12193, [2010] 1 FLR 1381, para [38].

In *Re B (Care Order: Jurisdiction)*[117] the child was habitually resident in Sweden with her family. The mother was English and had left England for Sweden to give birth, to avoid English care proceedings. During a subsequent visit to England with her now five-year-old daughter, the child was removed from her care and made subject to care proceedings on the basis that the mother posed a risk of emotional abuse to the child. Rather than declaring of its own motion that it did not have jurisdiction under Article 8 BIIa, the English court made an erroneous request for the transfer of proceedings to the Swedish court. This request delayed proceedings for a year and in that period the child had been resident in England. The failure to decline jurisdiction meant that the child risked being placed in jurisdictional limbo with no clear habitual residence.[118] The interim measures taken for the protection of the child were at the absolute limits of what could be envisaged as permissible under Article 20 BIIa. This case demonstrates the tension between the desire to protect a child present in the jurisdiction, with the risks posed to children by exorbitant claims of jurisdiction if not rapidly and accurately resolved.

These concerns were also evident in *Re CB (Adoption Proceedings: Vienna Convention)*,[119] where both the mother and child were Latvian nationals, but no request for the transfer of jurisdiction under Article 15 BIIa was raised during care and placement proceedings affecting the child. The birth mother eventually tried to request a transfer at the beginning of adoption proceedings.[120] BIIa does not apply to adoption decisions under Article 1(3) so a transfer request could not be made under the Regulation. This case has generated extensive media and political controversy, but it demonstrates the importance of identifying the international dimension to cases early in proceedings because of the significant impact on the potential outcome for the child and the rest of the family. The more recent case of *N (Children: Adoption: Jurisdiction)*[121] has established that BIIa applies to care proceedings even where the local authority plan is for adoption, but placement proceedings are measures preparatory to adoption falling outside the material scope of the Regulation.

3. The conflict between mutual trust and the best interests of the child

The practical difficulties of cooperation and interpretation of BIIa suggest that the Regulation is not well designed for managing care proceedings. Some of these difficulties arise from the implementation of the underlying principle of mutual trust, effectively prohibiting comparison between the child protection systems of each Member State when assessing jurisdiction despite the implications this has for the child. BIIa harmonises only rules of jurisdiction, and recognition and enforcement of judgments between EU Member States, not national family law rules. There remain very distinct differences between Member States' national family law rules and processes[122] for parental responsibility and child protection but mutual trust means that this cannot be considered in decision-making under BIIa, even if the nature of the protective care available will directly affect the child's best interests.

National difference is particularly apparent in public care cases between England and other EU Member States. English law permits adoption without parental consent where all ties between

117 *Re B (Care Order: Jurisdiction*) [2013] EWCA Civ 1434, [2014] 1 FLR 900.
118 Ibid, paras [80]–[81].
119 [2015] EWCA Civ 888, [2015] Fam Law 1344, para [56].
120 Adoption and Children Act 2002, s 47(5).
121 [2015] EWCA Civ 1112, [2016] FLR (forthcoming), para [68]. Jurisdiction over adoption proceedings is determined by the Adoption and Children Act 2002.
122 See M Harding, 'The Harmonisation of Private International Family Law in Europe: Taking the Character out of Family Law?' (2011) 7 *Journal of Private International Law* 203.

the child and the birth parent are legally severed[123] as a potential outcome of care proceedings.[124] An English adoption raises the possibility that a child national from another Member State could be legally adopted in England, losing entirely their national and cultural ties and relationship with their wider family. English care proceedings and adoption laws have caused significant political disquiet in other Member States. In some cases, the parent(s) have returned to their home state and enlisted support from the national press to highlight the circumstances of a child national involved in English care proceedings.[125] In May 2015 Lithuanian MPs petitioned the Speaker of the House of Lords regarding the care proceedings and adoption of a Lithuanian child in England, arguing that the child was being deprived of her cultural inheritance.[126] Similarly, in *CB (A Child)*,[127] a letter addressed to the Speaker of the House of Commons from the Saeima of Latvia objecting to the adoption of a Latvian national in England was published as an annex to the judgment. The Association of McKenzie Friends presented a petition with more than 2,500 signatures to the European Parliament for the 'Abolition of forced adoptions'.[128] In response to the petition, the European Commission identified the problem with the 'specificity' of English law on adoption but, as a matter for national family law, the EU does not have competence to regulate this issue and no further action can be taken.[129]

The Petitions Committee of the European Parliament subsequently commissioned a report from Claire Fenton-Glynn on 'Adoption without Consent'[130] outlining the position on adoption in English law in the BIIa context. Fenton-Glynn has made important recommendations for a specific practice guide for cross-border care proceedings and revision to BIIa, and supporting wider awareness and further resources amongst English child protection practitioners to support the effective implementation of the BIIa Regulation. She has highlighted that adoptions severing all legal and social ties to the birth parents should be considered only in the most severe and exceptional cases. These concerns result from an inevitable instinct to compare potential outcomes between child protection systems, and a desire to protect the child within the 'known' domestic legal system.[131] The fact that English law on adoption is regarded as distinct within Europe remains as a potential flashpoint and makes effective private international law rules essential. Private international law rules are developed to accommodate and manage national legal difference and there must be awareness of these potential cultural clashes

123 *Re B (Care Proceedings: Appeal*) [2013] UKSC 33, [2013] 2 FLR 1075. See A Bainham and H Markham, 'Living with *Re B-S: Re S* and its implications for parents, local authorities and the courts' [2014] Fam Law 991.

124 See also the Council of Europe Parliamentary Assembly 'Recommendation on Social Services in Europe: Legislation and practice of the removal of children from their families in Council of Europe Member States', 22 April 2015, available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21738&lang=EN, last accessed 12 June 2015. The preparatory documents for this recommendation notes that the UK is in the medium range for percentage of the child population in care and is unusual in recording ethnic and religious status of children in care.

125 See, for example, *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FLR 151, para [52]; *Re B (Care Order: Jurisdiction)* [2013] EWCA Civ 1434, [2014] 1 FLR 900, para [2] where an English mother travelled to Sweden to avoid English care proceedings and publicised her actions in the media.

126 'Lithuanian MPs petition Lords Speaker over child custody case' *Guardian* 12 May 2015: www.theguardian.com/society/2015/may/12/lithuanian-mps-lords-speaker-child-custody-case. Last accessed 11 June 2015.

127 [2015] EWCA Civ 888, [2015] Fam Law 1344.

128 Available at: www.change.org/p/eu-parliament-abolish-adoptions-without-parental-consent. Last accessed 11 June 2015.

129 Committee on Petitions Notice to Members, Petition 1707/2013: www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-536.123%2b01%2bDOC%2bPDF%2bV0%2f%2fEN. Last accessed 11 June 2015.

130 C Fenton-Glynn, *Study for the Petitions Committee of the European Parliament 'Adoption without Consent'* (2015). Available at: www.europarl.europa.eu/RegData/etudes/STUD/2015/519236/IPOL_STU%282015%29519236_EN.pdf. Last accessed 31 August 2015.

131 C McGlynn, 'The Europeanisation of Family Law' [2001] CFLQ 35, 40.

with the flexibility to accommodate them.[132] In the context of BIIa, this flexibility appears to be lacking because of the requirement of mutual trust.

The BIIa Regulation and English practice in cross-border care proceedings restricts the ability of courts and social workers to assess and compare potential systems and outcomes in different legal systems. The CJEU has the opportunity to consider this limitation in Case C-428/15 *Child and Family Agency v JD*, yet to be decided, but the English courts have relied on the obligation to trust that all other Member States have equal standards of competence and resource for the protection of children within the territory. Mutual trust underpins European private international law generally, not just BIIa, and is the 'basis for efficient cooperation'.[133] It has been heavily emphasised by the CJEU in its interpretation of BIIa in other contexts such as international child abduction.[134] It is regarded as a principle requiring reliance on foreign Member States' systems as if they were the equivalent of the domestic legal system. The Practice Guide accompanying BIIa states that: 'The assessment [of best interests under Article 15] 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'.[135] In practice, it obscures the differences between national family laws by assuming their equivalence and clouds the child's best interests by obscuring potential outcomes.

English practice has extended mutual trust to encompass all foreign provision and decision-making in relation to cross-border care proceedings:

> 'the starting point for the enquiry into the second question is the principle of comity and cooperation between Member States of the European Union enshrined in the European Union Treaty which the provisions of [BIIa] were designed to reflect and implement. In particular, the judicial and social care arrangements in Member States are to be treated by the courts in England and Wales as being equally competent.'[136]

The English court must not be jealous of its own jurisdiction, and must accept difference in foreign forms of intervention to protect a child at risk. The assessment of the child's best interests when considering a transfer of jurisdiction under Article 15 therefore cannot include an assessment of the potential substantive outcomes if the case is heard in a foreign Member State. It must be assumed that whatever the outcome of foreign proceedings, the provision for the child will be in their best interests and effective to protect the child from future harm. There is a clear tension in protecting the child's best interests in a system that relies on mutual trust because the scope of any best interests assessment has been closely circumscribed.

There are two sides to mutual trust. The English court is obliged to trust the legal and child protection systems of all other Member States, but all other states are mutually obliged to trust our system. If the English court assumes jurisdiction over the child, the assumption of jurisdiction and subsequent substantive decision should be respected. However, the English courts have encountered difficulty with the element of mutuality in the circumstances where a child with connections to another European Member State is to be adopted into an English family, against the wishes of the non-British parents. Munby P in *Re E (A Child) (Care Proceedings: European Dimension)* suggested that:

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132 N Dethloff, 'Arguments for the Unification and Harmonisation of Family Law within Europe' 35 in K Boele-Woeki, *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, 2003), p 59.

133 Stockholm Programme, 'An open and secure Europe serving and protecting citizens' [2010] OJ C 115, 1.2.1.

134 *Aguirre Zarraga v Simone Pelz* (C-491/10) [2010] ECR I-1427, para 70.

135 Practice Guide, p 35.

136 *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FLR 1372, para [19], approving *Re D (Transfer of Proceedings)* [2013] EWHC 4078 (Fam), [2014] 2 FLR 496, para [31].

> '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 [BIIa] regime may take a very different view and may indeed look askance at our whole approach to such cases.'[137]

If trust is mutual, once jurisdiction has been correctly assumed, this 'different view' should not be a concern for the English courts. If the English courts are not permitted to consider the validity and competence of foreign measures and systems of child protection, then other Member States must correspondingly be required to trust our system. Any concern that our law, in permitting adoption without parental consent, is unusual compared to other Member State laws, should be of no consequence if the English court deems adoption to be in the best interests of the child.

In reality, all these processes are highly artificial. The principle of mutual trust is designed to obscure the difference between national substantive laws. However, when it comes into conflict with the principle of protecting the child's best interests, which is designed to focus on the circumstances and needs of the individual child and is of central importance where the child is at risk of harm,[138] it is bound to falter. Closing off the question of the substantive protection available to children in another Member State arguably undermines the value of including a best interests assessment within a jurisdictional rule such as Article 15 BIIa. If all courts and systems are equally competent to protect the child's best interests, the better placed court should hear litigation in respect of that child. In assessing jurisdiction, the child's best interests are never going to be a primary consideration in a system where the potential future outcomes for that child cannot be assessed.

In relation to jurisdiction then, perhaps it is sufficient to identify the court with the closest connection to the child, without labelling this as a decision in the child's best interests when this cannot be properly assessed. This is certainly what the approach of the English court to Article 15 transfers would suggest. The English courts have focused on assessing the child's best interests in relation to the location of proceedings, rather than the outcome for the child. Reference to the child's best interests is used to justify a decision relating to a better placed court, rather than an individualised, stand-alone assessment of what is in the best interests of the child involved in proceedings, including potential substantive outcomes in different national laws.

Using the child's best interests as a 'rubber stamp' to approve a decision on jurisdiction made on practical grounds potentially undermines the right of the child to have decisions made in their best interests, providing only blunt confirmation of the decision, already reached, identifying the appropriate jurisdiction.[139] A true assessment of the child's best interests would be broader, taking into account the wider context of the proceedings and substantive outcomes for the individual child. However, the problems already evident with the provision of information through Central Authorities suggest that this fuller assessment may be a difficult to achieve in cross-national care proceedings. It would add substantially to the time taken for the assessment and would give rise to potential uncertainty and a lack of uniformity in jurisdictional decisions under BIIa.

If each Member State is deemed to be able to protect the rights and interests of the child in care, then the allocation of jurisdiction in care proceedings should be focused purely on practical concerns relating to the most appropriate forum. Given the influence of the concept of mutual trust in EU family law, it would be preferable if the drafting of Article 15 BIIa did not refer to

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137 *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FLR 151, para [15].

138 H Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing, 2012), p 34.

139 Ibid, p 104.

the best interests of the child, making its application simpler, and less value laden. The test for the allocation of jurisdiction based on mutual trust would then be focused solely on geographical links, availability of evidence and potential carers. This would mean that the child's best interests would be a less high profile element of BIIa, but would provide greater clarity and rapidity in the assessment of jurisdiction in care proceedings. Securing the child's best interests then remains the responsibility of the Member State deemed to hold jurisdiction over the care proceedings, providing a more coherent basis for the law as a whole.

Conclusions

Awareness of the interaction of English child law with BIIa in care proceedings is not well developed, but it is a growing field of legal practice. In its current form it appears that BIIa is not well drafted to accommodate care proceedings within its framework: its provisions for practical cooperation are lacking and some of the jurisdictional rules are poorly articulated. More work remains to be done in relation to the resourcing and support provided to both Central Authorities in the Member States, and local authorities and their equivalents to reach a uniformity of practice and protection across Europe.

Some of the difficulties in using BIIa for care proceedings stem directly from the underlying principle of mutual trust. This principle effectively shields domestic law on child protection from assessment by another Member State court, indirectly limiting the scope of any assessment of the child's best interests. In decisions made on transferring jurisdiction under Article 15, this process disguises what is a decision on the forum as a decision on the child's best interests. If the best interests of the child are truly an aspect of the jurisdictional rules, then individually assessing the outcome for the child under each system of law, depending on which court assumes jurisdiction, should be permissible and this, although perhaps more uncertain and slower in individual cases, would be a desirable approach. It is the outcome for the child deemed at risk that should be focus of decision-making in the child's best interests, not merely the forum for taking those decisions, even if it brings in an element of comparison between legal systems.

However, if, as seems highly likely, the underlying principle of mutual trust is to be retained in this field of law, then clarity regarding the basis of the decision is preferable. It has been suggested that the best interests of the child should not form a direct aspect of the assessment of a transfer of jurisdiction under Article 15 BIIa. Article 15 would therefore be limited to identifying a court better placed to take decisions and revised to include specific provision for protection in care cases and more comprehensive provisions for the transfer of children and proceedings, as well as of jurisdiction. BIIa is currently being revisited (once again), and it is to be hoped that the difficulties under the current Regulation are noted and addressed. Care proceedings affect children most at risk in our society and when the child is a national of another Member State, the challenge of providing a safe and secure future is even greater. These children deserve a clearer and more effective legal framework than the BIIa Regulation currently provides.