Neutral Citation No: [2022] NIFam 9	*Ref:* **McF11775**
	Court ref. : 21/085981
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **28/02/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant;

-and-

A MOTHER

-and-

A FATHER

Respondents.

IN THE MATTER OF LS
(A MALE CHILD AGED 8 MONTHS)

Mr A Magee QC with Ms C McGrane BL (instructed by the Directorate of Legal Services) for the Health and Social Care Trust
Ms M Smyth QC with Ms N Rountree BL (instructed by McGeady Molloy Solicitors) for the Mother
Ms M Connolly QC with Ms A McHugh BL (instructed by John McCaffrey & Co Solicitors) for the Father
Mr G McGuigan QC with Mr B Devlin BL (instructed by McConnell Fyffe Solicitors) the Guardian ad Litem representing the interests of the child

McFARLAND J

Introduction

[1] On 27 January 2022 a social worker was on leave travelling on an inter-city bus service in the Republic of Ireland ("RofI") and observed a young child travelling in the company of two adults. She recognised the child as being the subject of

current intense social services involvement by the Trust. Neither of the accompanying adults was his parent. She telephoned her colleagues in the Trust and this has resulted in the issue of these proceedings first to the Family Care Centre with a subsequent transfer to this court.

[2] The Trust is seeking an interim care order, the interim care plan being to secure the protection of LS, to return him to this jurisdiction and to place him in the care of foster parents.

[3] I have anonymised this judgment by using a randomly selected cypher and by not making reference to any specific geographic location. This is to protect the identity of the child. Nothing can be published that will lead to his identification.

Background

[4] The Mother and the Father are unmarried. They do not live together. Both are named on LS's birth certificate so they share parental responsibility. They present a common case before this court with regard to outcome, although it is a far from harmonious relationship with the Mother protected by a non-molestation order.

[5] LS is their second child. An older girl is aged 4 years 9 months and she is currently the subject of care order proceedings in the Family Care Centre. An interim care order is in place and the girl is living in foster care. The court is advised that the proceedings are well advanced with a likelihood of a final listing for disposal in the near future. The Trust's plans for her would appear to be adoption, having rejected lesser interventions such as rehabilitation into the care of either parent or in a kinship placement.

[6] There was social services involvement with the family before and after LS's birth. Care order proceedings appear to have been issued on 8 September 2021, although not formally processed by the court office until 3 November 2021 but because of an agreed way forward at that time, the Trust did not seek an order, and the case proceeded on a 'no order' basis, with the child remaining in the Mother's care.

[7] The situation began to deteriorate in January 2022 when the Trust became concerned about LS's welfare. A joint Looked After Child review in respect of the older sister and a Review Child Protection case conference in respect of LS took place on 27 January 2022. The decision was that the Trust would re-commence the care order proceedings with an intention to obtain an interim care order to facilitate the removal of LS from the Mother's care.

[8] In accordance with established practice, the Mother was advised of this intention on 27 January 2022.

[9] This brings us to the bus journey later that day. Having been alerted by their

colleague, Trust officials made contact with the Mother who said that LS was being accompanied by his maternal grandfather and his partner and was on his way to their home for a respite break. The Mother has since said that she was being untruthful concerning the reason for the journey. She now asserts that the journey was a manifestation of her intention to permanently remove LS from Northern Ireland so that he would be based in RofI living with his grandfather and his partner. She states that she has plans to join the child in due course, although with no stated time-frame.

[10] On 28 January 2022 the Trust issued proceedings. It chose not to simply rejuvenate its existing proceedings which were already before the court but sought an emergency protection order and a recovery order. It now seeks a care order having issued new proceedings on 4 February 2022

[11] The court has now two sets of proceedings before it, both seeking care orders, one issued on 3 November 2021 and the other issued on 4 February 2022.

[12] There are various questions for the court to determine:

a) First, whether the court has jurisdiction given that LS is currently living in RofI;

b) If it has jurisdiction, should it determine that the RofI courts are better placed to assess his best interests;

c) If the court is to retain jurisdiction, should it grant an interim care order (or other order).

The court conducted a hearing on 17 February 2022. It received statements from both parents and the paternal grandfather, position papers from the parties and heard oral submissions on behalf of the parties. The court reserved judgment on points (a) and (b) (above) overnight, but then received a request to permit further brief written submissions which it acceded to. The court then re-convened the hearing on 24 February 2022 and announced the ruling on the preliminary points. It then heard submissions in respect of point (c) above and announced the judgment orally. This judgment sets out the reasons on all three matters.

Jurisdiction

[13] The preliminary point for the court to decide is whether it has jurisdiction in relation to LS as he is now resident in RofI. Previously the provisions of EU law applied as RofI and the United Kingdom were both member states. Jurisdiction was dealt with under Brussels IIA ("BIIA") and it was a provision well-known to both practitioners and the judiciary. Since the United Kingdom's cessation of membership of the EU, and the expiry of the transition arrangements on 30 December 2020, the relevant provision is the Hague Convention 1996 ("HC1996"). This is not a new treaty having been ratified by the United Kingdom in 2012, but it

only had occasional use as the high proportion of cases of this type in this jurisdiction involved EU citizens and member states with BIIA applying.

[14] Both provisions, BIIA and HC1996 have common themes and are broadly similar, but there are differences.

[15] HC1996 provides that the country where the child is habitually resident will assume primary jurisdiction.

[16] The relevant provisions are Articles 5 and 8 –

> *"Article 5. (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.*
>
> *(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."*

Article 7 relates to unlawful removal or retention and does not apply to LS's removal and retention, as he moved to RofI and remains there with the consent and permission of his parents who exercise parental responsibility for him.

> *"Article 8 (1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either*
>
> *- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or*
>
> *- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.*
>
> *(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are:*
>
> *a) a State of which the child is a national,*
>
> *b) a State in which property of the child is located,*
>
> *c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,*

> *d) a State with which the child has a substantial connection.*
>
> *(3) The authorities concerned may proceed to an exchange of views.*
>
> *(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests."*

[17] The first point for consideration is what is to be the relevant date at which I am to determine LS's habitual residence. There are three possible options;

- The date of the initial application for a care order – 3 November 2021
- The date of the second application for a care order – 4 February 2022
- The date of the hearing – 17 February 2022.

[18] Under BIIA the answer would have been relatively simple as the relevant date would have been when the court became seised of the case, which in normal circumstances would be when proceedings were issued (Article 8(1):

> *"The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.*")

[19] The provisions of HC1996 are silent as to the relevant date. This would appear to suggest that the relevant date is not the date of seisure but rather the date of the hearing.

[20] Cobb J in *obiter* comments in *Re NH* [2016] at [24] noted the absence of specific words from HC1996. He then referred to the fact that the principle of *perpetuatio fori* did not apply to HC1996, unlike BIIA. This principle was set out by Thorpe LJ in *Mercredi v Chaffe* [2011] 2 FLR 515, and in particular at [67]:

> *"[J]urisdiction is established in the State of the habitual residence of the child at the time the court is seised. Once seised that court retains jurisdiction even if the child changes habitual residence during the course of the proceedings. This is the principle of perpetuatio fori. It is a practical rule to prevent one party from aborting proceedings by a tactical move during their course."*

[21] Cobb J rejected the notion that the words of Article 8(1) BIIA had been imported from HC1996, referring specifically to the official Explanatory Report of Professor Paul Lagarde setting out the "General framework, principal orientations

and structure" of the convention at [38]–[43]. At paragraph [42] Lagarde reported a strong rejection by the Commission of a proposal to incorporate *perpetuatio fori* into HC1996. The Explanatory Report is an official publication of the HCCH (the Hague Conference on Private International Law). A handbook issued by HCCH in 2014 – Practical Handbook on the Operation of the 1996 Hague Child Protection Convention – adds further confirmation of this matter at 4.10:

> *"Where the child's habitual residence changes from one Contracting State to another at a time when the authorities of the first Contracting State are seised of a request for a measure of protection (i.e., during pending proceedings), the Explanatory Report suggests that the principle of perpetuatio fori does not apply and jurisdiction will therefore move to the authorities of the Contracting State of the child's new habitual residence. Where it does occur, consideration might be given to use of the transfer of jurisdiction provisions"*

[22] Cobb J therefore concluded that the non-application of *perpetuatio fori* in HC1996, unlike BIIA, resulted in the date of the hearing as being the relevant date.

[23] MacDonald J in *Warrington BC v T, R, W and K* [2021] EWFC 68 at [42] indicated that he shared Cobb J's view concerning the relevant date being the date the question came before the court for hearing. He, not unreasonably, referred to the need to avoid delay in such situations:

> *"in order to avoid the question of habitual residence being determined simply by mere effluxion of time over the course of protracted proceedings."*

Further *obiter* comments on the issue were made by Black LJ in *re J* [2015] EWCA Civ 329 when she observed that:

> *"If [the child] remains habitually resident in Morocco, things would remain the same; Morocco would still be the Contracting State with substantive jurisdiction under Article 5 of the 1996 Hague Convention. However, if it were to be established that by the time of the fresh application [the child] had become habitually resident in England and Wales, it may be different."*

[24] The learned authors of *Lowe & Nicholls - International Movement of Children (2nd edition 2016)* at 5.60 appear to question the validity of Cobb J's view in *re NH* although they offer no alternative argument that would suggest that *perpetuatio fori* does apply to HC1996.

[25] I consider that the relevant date is not the date the court is seised of the proceedings, but rather the date when the case comes on for hearing before the court. Not a lot turns on this decision in practice, but as MacDonald J in *Warrington*

BC observed, in long protracted cases it could have significant consequences should habitual residence change between the making of interim orders but before the final order stage.

[26] The next question for consideration is - what was LS's country of habitual residence on 17 February 2022 when the matter was heard by the court?

[27] The country of habitual residence is very much a question of fact. I recently dealt with this in *re DX* [2022] NIFam 2 and at paragraph [23] set out what I considered to be the relevant considerations:

> *"Cobb J in Re L [2016] EWHC 1844 established a list of relevant factors and this list was built upon later that year by Hayden J in Re B. Both relied on the jurisprudence of the UKSC and the CJEU, and sought to distil and highlight key factors to be considered. These factors have received approval from Keegan J in K v Y and from Moylan LJ in Re M [2020] EWCA Civ 1105. Borrowing from their efforts I consider the following factors are applicable in this case:*
>
> *a) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment;*
>
> *b) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses;*
>
> *c) It is possible for a parent or guardian unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent;*
>
> *d) A child will usually but not necessarily have the same habitual residence as the parent(s) or guardian(s) who care for him or her. The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.*
>
> *e) Parental or a guardian's intention is relevant to the assessment, but not determinative;*
>
> *f) It will be highly unusual for a child to have no habitual residence. Usually a child will lose a pre-existing habitual residence at the same time as gaining a new one;*
>
> *g) It is the stability of a child's residence as opposed to its*

permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there;

h) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident;

i) The requisite degree of integration can, in certain circumstances, develop quite quickly;

j) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents or guardians being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely."

[28] It is common case that on 26 January 2022 LS was habitually resident in Northern Ireland. That is where he lived with the Mother. The Father and sister also lived here although in separate households. The Mother asserts, with the support of the Father, that LS changed his habitual residence on the 27 January 2022 and if not on that date then on some intervening date up to 17 February 2022 to reflect his life in RofI.

[29] Although Butler-Sloss J in *Armstrong* [2003] EWHC 77 was of the view that a person could be habitually resident in more than one state, this view has not found favour, and was specifically rejected by Munby J in *Marino* [2007] EWHC 2047 at [42] when he stated that it was an assumption based on a *"frail foundation."* Bearing this in mind it is also important to recognise that in certain circumstances habitual residence may not be established in any state. Moylan J in *Re M* [2020] EWCA Civ 1105 at [63] emphasised the need to look at the factual situation in the new state at the time of determination, rather than consider the degree of connection (or lack of connection) with the old state.

[30] The Trust has to show, on the balance of probabilities that LS is habitually resident in Northern Ireland.

[31] The core facts relating to this are not controversial, although the expressed intentions of the adults in LS's life are. As stated above, on the 26 January 2022, LS was habitually resident in Northern Ireland. On the 27 January 2022 he was placed by the Mother into the company of his maternal grandfather and his partner, and

this couple brought him to their home in the RofI, where he has continued to live. This couple have lived all their lives in RofI and are well established and integrated within the community of their home city. Although the grandfather states that *"LS is well integrated into my home and into life in the [RofI]"*, he presents no evidence concerning this, save that LS sleeps in his bedroom.

[32] The Mother is originally from this area of RofI and the wider maternal family continue to reside in that locality. She has expressed an intention to relocate with LS to RofI and will do so when the situation in relation to her older daughter has been confirmed.

[33] The Father continues to live in Northern Ireland and intends to remain here. He was not told of the decision to remove LS from the jurisdiction, but has retrospectively given his permission.

[34] Habitual residence is *"the place where the person had established, on a fixed basis, his permanent or habitual centre of interests"* (Munby J in *Marino* at [33]). Length of time in a state will obviously be a relevant factor when determining whether a residence is fixed or permanent, but as Singer J stated in *L-K v K (No 2)* [2006] EWHC 3280 at [44]:

> *"It is not a conclusive factor. Nor is there any particular period set down as a minimum."*

[35] LS is now living with his maternal grandfather and his partner. Neither has parental responsibility. Apart from his sleeping habits no other evidence has been placed before the court. His mother, father and sister continue to remain in Northern Ireland. The Mother's clear intention on the 27 February 2022 was to place LS beyond the control of the Trust and the courts in this jurisdiction. I do not regard her as a particularly truthful witness as she has already confirmed that she lied to the Trust at the time of LS's removal. I consider her intention on 27 January 2022 was both spontaneous and opportunistic and not part of any well thought out plan as to LS's, or indeed her own, future.

[36] As determination of this issue is very fact specific existing case-law is of modest value. The Mother sought to distinguish two English decisions in which it was determined that the habitual residence of a child remained in the United Kingdom despite each going to live abroad with their grandparents on the grounds that they were both private law disputes with the mothers acting unilaterally against the wishes of the fathers, to place the children away from the United Kingdom. The decisions however have some relevance because the children in each case were living with grandparents and the mothers were continuing to reside in the United Kingdom. In *AM v EM* [2020] EWHC 549 the 4 year old was living with her grandparents in Egypt and attending school, and in *MZ v RZ* [2021] EWHC 2490 a 3 year old was also living with her grandparents but with a paucity of evidence about her circumstances.

[37] There is no evidence to suggest that LS has become integrated in any family or social environment in RofI. Habitual residence is much more than sleeping in your grandfather's bedroom and living in his home. No other social or other activities are mentioned in evidence, although it is highly unlikely that an 8 month old child would be doing much outside the immediate control of his carers. The position of the grandfather and his partner is therefore crucial. Neither the grandfather nor his partner have any parental responsibility for the child. There is no evidence that LS is registered to receive medical services in RofI. Both the Mother, the Father and his sister live in Northern Ireland. The Father does not intend to re-locate to RofI. The Mother has indicated an intention to re-locate sometime in the future but not now. I have already voiced my concerns about her truthfulness, so even this cannot be certain.

[38] Changing a child's habitual residence is much more than placing the child on a bus and moving it across a frontier. Lord Wilson in *Re B* [2016] UKSC 4 made several suggestions at [46] about the point at which habitual residence might be lost and then gained –

> *"(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;*
>
> *(b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and*
>
> *(c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."*

This is a case of LS being deeply integrated in Northern Ireland for his entire life, his move being the subject of no pre-planning, and with all the central characters in his life remaining in Northern Ireland. The parents' contention of a change of habitual residence fails on each of these points. In all the circumstances of this case, I consider that LS is not habitually resident in RofI. He has retained his habitual residence in Northern Ireland, and this court has jurisdiction under HC1996.

Is the RofI better placed to assess the best interest of LS?

[39] The next question for the court is to consider the provisions of Article 8 of HC1996. LS by virtue of his parentage and place of birth is a citizen of RofI, thus satisfying the condition in Article 8(2). This court has the discretion to request the authorities in RofI to assume jurisdiction, or to invite the parties to apply to the

authorities in RofI to do so. The test is whether the authorities in RofI would be in a better place to assess the best interests of the child.

[40] I recently dealt with a similar application concerning transfer in the case of *Re TH* [2021] NIFam 44, although that was a case applying Article 15 of BIIA. The case-law for transfer under BIIA (in particular re N *[2015] UKSC 15, Child & Family Agency* [2017] 1 FLR 223 and *Re Tom* [2021] NIFam 7) is well established, but it must be borne in mind that despite similar themes, there are differences between Article 8(1) of HC1996 and Article 15(1) of BIIA. Article 15(1) provides that –

> *"By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they 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 where this is in the best interests of the child."*

The provisions of Article 8(1) are set out above at [16] but for convenience I will set them out here –

> *"By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child …"*

[41] Both provisions apply 'by way of exception', and are therefore a derogation from the general rule, which is that the court where the child has habitual residence should exercise jurisdiction. Transfer should therefore only occur in exceptional circumstances with a strong presumption in favour of retaining jurisdiction.

[42] The wording in respect of the 'better placed' test is different. Both speak of the other Contracting, or Member, State being better placed, but in HC1996 it is better placed to assess the best interests of the child, and in BIIA it is better placed to hear the case. BIIA also adds a second limb to the test - that the transfer must be in the best interests of the child, however the CJEU in *Child & Family Agency* has stated that this simply means that the transfer would not be detrimental to the situation of the child.

[43] Professor Paul Beaumont in a paper delivered at the University of Cambridge on 27 March 2017 comparing Hague Treaty Law with EU Regulations (available at - https://www.abdn.ac.uk/law/documents/CPIL%20Working%20Paper%20No%202017_2.pdf) stated the following:

> *"It seems to be the case that under [HC1996] the court considering offering a transfer or considering making a transfer request has to compare which of the possible courts to hear the case is best placed to hear it from the perspective of determining*

> *the child's best interests. Therefore, no consideration should be given to substantive law (as the CJEU rightly stated in relation to Article 15 [BIIA]) but the examination of the relative merits of the two courts should focus on the ease with which those courts can determine the best interests of the child. Thus the most important factors seem to be the location of the child, the people contesting parental responsibility and any witnesses from whom oral testimony would be desirable. Other relevant factors may be whether the parties (and possibly the child depending on the circumstances) can be legally represented and, where appropriate, the availability and cost-effectiveness of experts (eg child psychologists and social workers) to assist in the determination of the child's best interests."*

[44] In an instructive judgment in *JA v TH* [2016] EWHC 2535, Baker J discusses the position of the English and the Norwegian courts in assessing a child's best interests. At [32] he discusses many of the practical issues alluded to by Professor Beaumont, before concluding at [33]–[35] that the courts in both countries are equally competent in general terms to determine issues about children, referring to the sophisticated and advanced legal systems operated by experienced judges in both countries. At [36] onwards he does refer to one point which carried decisive weight and that was the fact that the court making decisions about contact with one of the children (a 10 year old) should be the one making the decisions about contact with the younger 8 year old.

[45] Turning now to the position of the jurisdiction better placed to assess LS's best interests, I would make a similar observation to Baker J concerning the courts in Northern Ireland and RofI, and would also add a similar comment concerning the sophistication and advanced nature of social services in both jurisdictions. Geographical considerations are not relevant as LS is currently living approximately 80 miles and a two hour drive away from the principle locations in Northern Ireland. The Trust has already undertaken significant preparatory work in relation to LS's older sister and has carried out assessments of the parenting capacity of both parents and any other kinship carers who have been suggested or put themselves forward as carers. Pre-birth and post-birth assessments have been carried out in respect of LS. All the associated reports, subject to courts in this jurisdiction granting leave, could be released to the courts in RofI. It is likely that an assessment will be required in respect of LS's current living arrangements and as to the parenting ability of the grandfather and/or his partner. The Child and Family Agency ("TUSLA") in RofI may well be better placed to conduct that assessment, but again, that report could be made available to the courts in both jurisdictions.

[46] Language will not be a barrier to any assessment or participation in court proceedings.

[47] The parents will have equal access to the courts in both jurisdictions. Currently both parents enjoy full legal representation with solicitors, junior and

senior counsel, in this jurisdiction at public expense. I assume that they would have similar access to legal representation in RofI.

[48] Taking everything into account, the only factor in favour of transfer is the physical presence of LS in RofI, but that alone does not carry decisive weight. It would not in any way prevent authorities in this jurisdiction carrying out an assessment of LS's best interests, either directly or, more likely, in conjunction with TUSLA.

[49] A significant fact is that this court is exercising jurisdiction in respect of LS's older sister. She is habitually resident in Northern Ireland. Neither parent has asked this court to transfer her case under Article 8(1) of HC1996. Should they make such an application, without pre-judging the issue, it would not be overburdened with merit. This court will be making decisions about her in the near future, and the decisions will include contact with LS. It is not as significant an issue as it was for Baker J in *JA v TH* as he was dealing with contact between 8 and 10 year old siblings, but it is still a relevant point.

[50] Bearing all this in mind, and in particular the presumption in favour of the Northern Ireland authorities exercising jurisdiction over children which are habitually resident within its boundaries, I consider that RofI is not better placed to assess LS's best interests, and I decline to either invite the authorities in RofI to take measures of protection, or to invite the parties to apply for such intervention.

[51] This ruling does not prevent the authorities in RofI from taking steps under Article 11 should urgent measures of protection be required in respect of LS. If they consider that they are better placed to assess LS's best interests then it would be open to them to exercise their right under Article 9 to request that this court authorise them to take measures of protection.

[52] Before leaving the issue as to which state is better placed to assess LS's best interests, I would make one further observation. I, like Baker J in *JA v TH* and Professor Beaumont, have approached how a court would assess LS's best interests by considering a broad canvas, looking at the scope of any assessment both now and in the future anticipating how the legal proceedings may develop. The Lagarde Explanatory Report (mentioned at [21] above) appears to suggest a much more restricted time frame for the relevant time of the assessment. Lagarde dealt with this at [56] in the following terms –

> "*The best interests of the child ought to be assessed in the concrete situation, 'in the particular case', as the text says, in other words at the moment when a certain need for protection is being felt, and for the purpose of responding to this need.*"

The reference to 'in the concrete situation' is perhaps an inaccurate translation from the French text of the Report which had incorporated the Latin expression '*in concreto.*' 'On the basis of the evidence' may be a more accurate translation, so the

sentence should begin - *"The best interests of the child ought to be assessed on the basis of the evidence, 'in the particular case' ..."* In any event, Lagarde appears to be suggesting that when determining whether the other state is better placed to assess a child's best interests, the court should confine itself to the available assessment tools at the time of the determination, and not speculate about any future assessment of a child's best interests.

[53] The difficulty that this interpretation presents is that without the application of the principle of *perpetuation fori* to HC1996, the position both as to habitual residence and as to which state is better placed to assess best interests has the potential to remain fluid, and as a consequence the state with primary jurisdiction due to habitual residence and the state better placed to assess a child's best interests could alter, and re-alter, during the proceedings.

Interim care order

[54] I now turn, finally, to consider whether it is appropriate to make an interim care order. The grounds for making interim orders are set out in Article 57 of the Children (NI) Order 1995. Before making an order the court must be satisfied that there are reasonable grounds for believing that the circumstances referred to in Article 50(2) apply. Those circumstances, in the context of this case, are that LS has suffered or is likely to suffer harm attributable to the care given to him by his parents, or likely to be given if an order is not made. Both parents, through their counsel, accepted that reasonable grounds did exist, and it is not necessary for the court to determine any facts relating to threshold at this stage.

[55] The granting of an interim care order is a neutral step and does not afford to any party, particularly a Trust, any advantage by creating a status quo in relation to the child's future. It is a welfare based evaluation and its primary purpose is to protect the child pending the final hearing of the case (see *Re G* [1993] 2 FLR 839).

[56] As the removal of a young child, such as LS, from a parent or parents is seen as a drastic step and a significant interference in the child's and the parent's family life, it should only be sanctioned where the child's physical safety or the child's psychological or emotional welfare demands it and in all the circumstances, including the consequences of separation from the parent, is a proportionate response to the risks (see *Re C* [2019] EWCA Civ 1998).

[57] The Trust's interim care plan is to secure LS's welfare by facilitating his return to Northern Ireland. A short-term foster placement is available for him, and there is a supervised contact plan of four times a week for the Mother and once per week for the Father. Sibling contact would be incorporated into the Mother's contact. This care plan is supported by the GAL.

[58] The Mother does not formally consent to this plan, but has indicated an acquiescence as to its principle objectives. She has also indicated that she may exercise her parental responsibility and facilitate the return of LS to

Northern Ireland, thus avoiding any potential litigation before the courts in RofI.

[59] The Father objects to the care plan and to the making of an interim care order primarily on the ground that he believes that it is not proportionate or necessary.

[60] I have considered the position of both parents. The reality of this case is that there has been a whirlwind of activity within the last month. LS has been removed from the Mother's care and placed in the care of strangers, albeit one is his grandfather. The Mother is only having limited contact with him and the Father and sister are having no contact. On the limited evidence available he appears to be well cared for, but there are verifiable concerns about the maternal grandfather and his partner. Police are visiting the home in RofI on a daily, sometimes twice daily, basis. There are also regular social work visits. LS is not registered for medical care. The current situation is unsustainable and there is a need to bring stability to this situation, establish patterns of behaviour, and then move forward to plan for LS's future. That cannot happen at present, and the Trust must be able to exercise parental responsibility to achieve these objectives.

[61] I consider the care plan to be entirely appropriate in all the circumstances.

[62] The court will therefore make an interim care order for 8 weeks, to be renewed thereafter on an administrative basis by the Master, with liberty to apply.

[63] It is desirable that the cases of both children are consolidated and I will ask the Family Care Centre judge to consider transfer of the sister's case to the High Court. Once that has been achieved, both matters can be listed for review on a suitable date.