# FREE MOVEMENT OF LIFE? THE INTERACTION BETWEEN THE BEST INTERESTS TEST AND THE RIGHT TO FREELY RECEIVE SERVICES IN *TAFIDA RAQEEB*

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## 1. Introduction

Do the parents of a young child in a minimally conscious state have the right to take her to Italy if her doctors are proposing to withdraw treatment? After *Charlie Gard*[1] and *Alfie Evans*,[2] Tafida Raqeeb's case[3] represents another tragic and difficult example of a fundamental conflict between doctors and parents as to whether a child's medical treatment should be continued. The unique feature of Tafida's case was that, for the first time, a detailed argument based on free movement law was presented in support of the claim that her transfer to Italy should be allowed. This free movement argument formed the foundation of an application for judicial review, which was dealt with separately from the best interests test.

This article will focus on the free movement law dimensions of the judgment.[4] Three arguments will be made. First, the distinction between a judicial review claim and the best interests undermines the effectiveness of the procedure for determining a child's best interests. The outcome of the best interests test has to be compatible with free movement law. Second, a finding that it is in the patient's best interest to receive treatment in another Member State does not automatically mean that their free movement rights have been breached if the hospital refused a transfer. Third, it remains unclear to what extent doctors are under an obligation to facilitate patients in obtaining a second opinion from doctors based in another Member State.

## 2. The factual background and judgment

Tafida Raqeeb was a happy and healthy 4-year-old child when she suddenly stopped breathing in February 2019. It turned out that she had an extensive bleeding in her brain, which caused

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[1] *Great Ormond Street Hospital v Yates and Gard* [2017] EWHC 1909 (Fam).

[2] *Evans and James v Alder Hey Children's NHS Foundation Trust* [2018] EWCA 984 (Civ).

[3] *Tafida Raqeeb (By her Litigation Friend XX) v Barts NHS Foundation Trust* [2010] EWHC 2531 (Admin) and *Barts NHS Foundation Trust v Shalina Begum and Muhhamed Raqeeb* [2019] EWHC 2530 (Fam).

[4] For a detailed discussion of the medical law aspects of the case, see E. Cave et al., 'Making decisions for children: Accommodating parental choice in best interests determinations' (2019) 27 *Medical Law Review* (forthcoming).

irreversible damage.[5] She has been on artificial ventilation ever since and there is no prospect of any significant improvement of her situation. Her doctors in the Royal London Hospital recommended that treatment be withdrawn because it was no longer in Tafida's best interests. However, Tafida's parents, influenced by their Islamic faith, did not want treatment to be withdrawn under any circumstances.[6] They obtained a second opinion from a hospital in Genoa, Italy. The Italian doctors did not believe that treatment should be withdrawn and they were willing to continue to provide care to Tafida.[7] In July 2019, the Italian hospital accepted a request to transfer Tafida to Genoa.[8] The doctors in the Royal London Hospital considered that a transfer to Italy would not be in her best interests and made an application to the court for a decision on Tafida's best interests.

In September 2019, the case was heard by MacDonald J. A distinction was made between an application for judicial review, heard in the Administrative Court, and the best interests test, heard in the Family Court. In the claim for judicial review, Tafida's parents argued that the hospital had breached Tafida's right under Article 56 TFEU to freely receive medical services in Italy. Their primary argument was that the doctors had failed to take Tafida's free movement rights into consideration in reaching a decision on the continuation of her treatment.[9] If they had done this, they would have concluded that Tafida's transfer to Italy should be allowed. In the circumstances of this case, where a foreign hospital was willing to continue treatment without risk to Tafida, the parents submitted that a restriction of Article 56 TFEU could not be justified. The hospital argued that this case was not about *where* Tafida's treatment took place, but about *whether* further treatment was in Tafida's best interests.[10] Any restriction on free movement was justified to protect Tafida's best interests and to allow the court to reach a decision on this issue.

In the application under the Children Act 1989 and the court's inherent jurisdiction, the hospital submitted that no benefit would be gained from further treatment. It accepted that Tafida was not experiencing pain.[11] She was currently in a minimally conscious state, but if she ever were to regain more awareness, this could lead her to experience pain. According to the hospital, it was not possible for the court to ascertain Tafida's wishes on whether her treatment should be continued and her parents' religious convictions did not give them the right to access medical treatment that was not in Tafida's best interests. The parents argued that the doctors' perspective had been too

[5] *Raqeeb*, [8].
[6] *Raqeeb*, [12].
[7] *Raqeeb*, [13].
[8] *Raqeeb*, [13].
[9] *Raqeeb*, [49].
[10] *Raqeeb*, [58].
[11] *Raqeeb*, [64]-[66].

narrow and had focussed exclusively on Tafida's medical best interests.[12] The doctors should have taken the broader religious and cultural context in which her family experienced her situation into account. At the age of four, Tafida had already developed an understanding of her religion and her rights under Article 9 of the ECHR should be protected by granting her the right to be treated in Italy.[13] The parents argued that the medical position of the Italian doctors was in accordance with mainstream medical opinion and was entirely responsible in the circumstances of her case.[14]

MacDonald J granted the application for judicial review. His decision was primarily based on the Court of Appeal's judgment in *Blood*,[15] in which it had held that a public authority was under a duty to consider a patient's free movement rights. The hospital had not directed itself properly as to the applicable EU law.[16] MacDonald J found that if the hospital had taken Tafida's Article 56 TFEU rights into consideration, it would still have reached the same decision, because the restriction could be justified on public policy grounds. He held that the procedure established by the Children Act, whereby doctors are required to apply to the court for a declaration on the patient's best interests, was compatible with Article 56 TFEU.[17] The judge concluded that, since the hospital would have reached the same outcome if it had taken Tafida's free movement rights into account, it was not appropriate to grant relief.[18]

In deciding on Tafida's best interests, MacDonald J was critical of the hospital's narrow "medical best interests" test, which failed to take sufficient account of Tafida's cultural and religious background.[19] The sanctity of Tafida's life was paramount and the Italian hospital was able to provide substantially the same treatment as was currently provided in London. This treatment would be compatible with Tafida and her parents' religious views. MacDonald J held that the English courts and hospitals do not hold a monopoly on ethical matters.[20] Overall, he concluded that the withdrawal of treatment was not in Tafida's best interests.[21] The hospital decided not to bring an appeal against the judgment. As a result, Tafida could be transferred to Italy. She arrived in Genoa on 15th October 2019.[22]

### 3. The distinction between judicial review and the best interests test

[12] *Raqeeb*, [75].
[13] *Raqeeb*, [77].
[14] *Raqeeb*, [79].
[15] *R v Human Fertilisation and Embryology Authority ex parte Blood* [1999] Fam 151.
[16] *Raqeeb*, [144].
[17] *Raqeeb*, [151].
[18] *Raqeeb*, [155]-[158].
[19] *Raqeeb*, [171].
[20] *Raqeeb*, [178].
[21] *Raqeeb*, [185].
[22] See https://www.bbc.co.uk/news/uk-england-london-50068246.

It is not surprising that this complicated and sensitive case was ultimately decided by the best interests test. From the overall perspective of this case, the free movement argument could be seen as a "prologue" to the best interests test, where the real balancing of the various medical, religious and ethical arguments took place. This impression of free movement law as an introduction to the main issues was reinforced by the distinction between a judicial review claim based on Article 56 TFEU and the best interests test under the Children Act. However, rather than turning the free movement argument into a separate judicial review claim, it could have been directly integrated in the best interests test.

The judicial review "frame" is problematic for two reasons. First, the focus on the hospital's decision-making process undermines the rationale for and the effectiveness of the procedure established by the Children Act for dealing with conflicts between doctors and parents over the medical treatment of a child. Second, the outcome of the best interests test *itself* has to be compatible with free movement law. By focussing on the hospital's decision-making process, the obligation of the court to respect Tafida's free movement rights under Article 56 TFEU was not made sufficiently explicit. This obligation has an important impact on what can be expected from hospitals in decision-making processes that involve the free movement rights of patients. Each of these criticisms will be now be explored in more detail.

The free movement argument presented on behalf of Tafida had two components. Tafida's parents did not only criticise the hospital's refusal to allow Tafida's transfer to Italy – they also criticised the procedure for dealing with conflicts between parents and doctors about the medical treatment of a child. They argued that the procedure under the Children Act could not justify a restriction of Tafida's free movement rights when reasonable medical treatment in Italy was available.[23] The judge correctly rejected this submission. Although the hospital's decision to refuse to allow Tafida's transfer to Genoa before the court has given its judgment constituted a restriction on free movement, this restriction could be justified on the ground of the protection of the rights of the child. The whole purpose of the best interests test is to place the judge in the position of final arbiter in determining the child's best interests.[24] In these circumstances, it is appropriate and necessary for a hospital to refuse to make any final decisions about treatment before the judge has ruled on it. As MacDonald J noted, this is confirmed by the fact that Article 8 of the Brussels II Regulation grants jurisdiction to the courts of the child's habitual residence in such cases.[25]

[23] *Raqeeb*, [52].
[24] See *Kings College Hospital NHS Foundation Trust v Haastrup* [2018] 2 FLR 1028, [69]; *An NHS Trust v MB* [2006] EWHC 507 (Fam).
[25] *Raqeeb*, [148]-[149].

Nevertheless, the judge granted the application for judicial review. He relied on the Court of Appeal's judgment in *Blood*, in which it had held that a failure on the part of public authorities to correctly direct themselves as to the applicable (free movement) law rendered their decision unlawful. Since the hospital had not taken Article 56 TFEU into account in refusing Tafida's transfer to Genoa, it had acted unlawfully.[26]

It is argued that the judge's conclusion puts at risk the effectiveness of the procedure established by the Children Act. If the doctors and parents reach a point where they cannot agree on whether or how a child's treatment should be continued, there is a presumption that the hospital refers the case to the court.[27] As soon as this procedure is initiated, the decision about the child's best interests – including the weight to be given to their free movement rights – is put in the hands of the judge. MacDonald J emphasised that hospitals *should* apply to the court under the Children Act if there is a conflict between doctors and parents as to the treatment.[28] If there is a legal expectation that such cases will be brought before the court, the purpose of a separate judicial review claim is not clear. An application for judicial review could be appropriate where the hospital refused to bring – or unreasonably delayed bringing – the case before the court. In those circumstances, the judicial review challenge would be directed at the decision of the hospital *not* to make an application for a declaration on the child's best interests.

Tafida's case is fundamentally different from *Blood*, in which the Human Fertilisation and Embryology Authority had to take the final decision on whether Mrs Blood should be allowed to take her late husband's sperm to Belgium for fertility treatment. In disputed best interests cases, the free movement rights of the child should be taken into account when the judge makes a determination on the patient's best interests. If doctors are required to make detailed assessments of the free movement rights of patients, there is a risk that this process would delay cases reaching the court in its role as final decision-maker. This delay would not be in the best interests of the child. Furthermore, the judge is in a better position to decide what weight should be given to free movement law. The judge is significantly more qualified to assess free movement arguments, which require an assessment of the justification and the proportionality of the restriction. Medical doctors cannot – and should not be – expected to make this complicated and inherently legal assessment. Rather, the free movement assessment should become an integral part of the best interests test conducted by the judge.

[26] *Raqeeb*, [144]-[145].
[27] *Raqeeb*, [105]-[106]].
[28] *Raqeeb*, [107].

The second criticism is that, by separating the judicial review claim from the best interests test, insufficient attention was paid to the fact that the outcome of the best interests test *itself* has to be compatible with Tafida's free movement rights. The court has to comply with Article 56 TFEU in reaching its judgment. Therefore, the free movement argument should have been integrated much more explicitly in the best interests test. It should have become one of the factors that was taken into account in deciding what course of action would be in Tafida's best interests. An integrated approach to the best interests test and free movement law would have recognised the court's responsibility to protect Tafida's free movement rights. Furthermore, it would have emphasised the important link between Tafida's free movement rights and her best interests. After all, the free movement argument was based on – and facilitated by – a difference of opinion between the English and Italian doctors. In substance, Tafida's parents' free movement argument was directly linked to their wish to see Tafida's treatment continued. As we will see below, the judge returned to the free movement argument in his analysis of the best interests test. However, he did so in a rather implicit way. Moreover, his approach to the free movement argument was very narrow. The role of the free movement argument and the judge's approach will be discussed in the next section.

## 4. The role of free movement law in the best interests test

The distinction between a judicial review claim and the best interests test created the impression that the free movement argument had been fully dealt with when MacDonald J moved on to analyse the best interests test. However, Tafida's free movement rights still played a "hidden" role in the best interests test. This was brought to light by the judge's conclusion, where he started that he was satisfied that "the court having determined the dispute regarding best interests in favour of the treatment being offered to Tafida in Italy, there can be no justification for further interference in Tafida's EU right to receive services pursuant to Art 56".[29] In other words, the judge held that if Tafida's best interests determined that she should be treated in Italy, the restriction of Article 56 TFEU could no longer be justified. This direct link between the outcome of the best interests test and the outcome of the free movement assessment will be challenged. It will be argued that the determination that Tafida should continue to be treated in Italy does *not* necessarily mean that her free movement rights have been breached. Before this is developed in more detail, it is necessary to analyse the way in which the judge took the free movement argument into account in the best interests test.

In the determination of Tafida's best interests, MacDonald J criticised the hospital's approach because the doctors had focussed exclusively on Tafida's "medical best interests". This was a

[29] *Raqeeb*, [186].

narrow perspective on her best interests, which ignored the religious and cultural context in which she had been raised. This context explained why her parents were so strongly opposed to withdrawal of treatment. In essence, the judge was saying that the doctors should have adopted a broader perspective on Tafida's best interests.[30] A similar criticism could be made of the judge's narrow approach to the interaction between free movement and medical ethics. MacDonald J held that whilst "the opinion of the Italian team that it would be appropriate to maintain Tafida on life-sustaining treatment is a view reached in the context of the particular legal and ethical framework applicable in Italy, this jurisdiction does not hold the monopoly on legal and ethical matters".[31] He was right to say that free movement law makes it possible for EU citizens to make their own ethical choices. This is facilitated by their right to freely receive – unethical or morally doubtful – services in other Member States. However, at the same time, Member States are allowed to adopt and defend their own ethical positions.[32] In particular, Member States are not usually required to allow conduct that they consider to be unethical on their own territory.[33] This is precisely what has happened in this case, because the London doctors were required to accept the interference by the Italian doctors in Tafida's treatment in England, which ultimately led to a decision that they had to change the proposed (withdrawal of) treatment and allow Tafida to be transferred to Italy. From the point of view of free movement law, this is a highly radical and controversial outcome.

The Court of Justice of the EU ("the ECJ") has consistently adopted a deferential approach to the position of Member States on sensitive ethical questions. In *Omega*, the ECJ held that the public authorities in Bonn were allowed under Article 56 TFEU to prohibit a laser-tagging game, which had been developed in the UK, from being provided in Germany.[34] The justification for this restriction was that, for historical reasons, Germany wanted to provide a higher level of protection to the concept of human dignity. Similarly, in *Sayn-Wittgenstein*, Austria was allowed to "ban" noble titles on its territory because the Austrian Constitution protected the right to equality in a strict way.[35] As a result, Ms Sayn-Wittgenstein, who had acquired the title of princess in Germany, was not allowed to register this title in Austria. In both cases, although the ECJ found a restriction on free movement, this restriction could be justified on the ground of the protection of the national

[30] *Raqeeb*, [168]. This distinction between a "medical best interests" test and a "broader best interests" test is controversial. See E. Cave et al., above n 4.
[31] *Raqeeb*, [178].
[32] See F. de Witte, 'Sex, Drugs and EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 *Common Market Law Review* 1545 and B. van Leeuwen, 'Euthanasia and the Ethics of Free Movement Law: The Principle of Recognition in the Internal Market' (2018) 6 *German Law Journal* 1417.
[33] F. de Witte, above n 32, 1574-1576. A recently established exception to this is the recognition of same-sex marriages: Case C-673/16, *Coman and others v Inspectoratul General pentru Imigrari*, ECLI:EU:C:2018:385.
[34] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin des Bundesstadt Bonn*, ECLI:EU:C:2004:614.
[35] Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, ECLI:EU:C:2010:806.

ethical position. The Member States were given a broad margin of discretion in deciding how high or how low that level of protection should be.[36] In the context of free movement of patients, in *Peerbooms*, a Dutch health insurer refused to reimburse the costs of medical treatment in Austria on the ground that this treatment not "normal" in Dutch medical circles.[37] Mr Peerbooms, who was in a coma after a road traffic accident, had received (successful) experimental neuro-stimulation therapy in Innsbruck. This treatment was not evidence-based – there was no medical research to prove that it was effective. The ECJ held that the health insurer was allowed to apply the criterion of "normal" treatment as long as the concept of normality was based on international scientific evidence.[38] It could not be exclusively based on national standards.[39]

If this case law is applied to Tafida's case, the conclusion is that London doctors should be allowed to adopt and defend their ethical position vis-à-vis patients who are being treated in their hospital. Free movement law cannot force doctors in one Member State to change their course of action on the basis of medical views in another Member State. Whilst patients should be free to travel elsewhere if they prefer the ethical views in another Member State, their own Member State – or, in this case, the hospital – cannot be required to actively facilitate this. In Tafida's case, the position of the London doctors was weakened by the fact that they could not conclusively rely on national or international standards on withdrawal of treatment of children in a minimally conscious state. The guidelines adopted by the Royal College of Paediatrics and Child Health were too openly formulated to provide explicit support to the doctors' position.[40] This lack of support or foundation made the ethical position adopted by the doctors more vulnerable. The position was not expressed in legislation or in professional standards – it was exclusively based on the judgement of the doctors in Tafida's case. This is an important difference with the ethical positions in *Omega* and *Sayn-Wittgenstein*, which were embedded in the German and Austrian Constitution.[41]

Following *Peerbooms*, if there were international standards for this type of case, the doctors would have to rely on and comply with these standards in free movement cases. However, it is unlikely that such standards exist in a field where there are significant ethical differences between Member States. The requirement to rely on international scientific evidence could have been particularly

[36] F. de Witte, above n 32, 1570. See also J. Zglinski, 'The Rise of Deference: the Margin of Appreciation and Decentralised Judicial Review in EU Free Movement Law' (2018) 55 *Common Market Law Review* 1341.
[37] Case C-157/99, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*, ECLI:EU:C:2001:404.
[38] Ibid., [94]-[98].
[39] For a detailed analysis, see B. van Leeuwen, 'The Doctor, the Patient and EU Law: The Impact of Free Movement Law on Quality Standards in the Healthcare Sector' (2016) 41 *European Law Review* 638.
[40] Royal College of Paediatrics and Child Health Guidelines, 'Making Decision to Limit Treatment in Life-limiting and Life-threatening Conditions in Children: a Framework for Practice', March 2015.
[41] *Omega*, above n 34, and *Sayn-Wittgenstein*, above n 35.

important for the London doctors in assessing and rebutting the argument of the Italian doctors that Tafida could potentially go home with artificial ventilation after tracheostomy.[42] Although it was explicitly accepted by the hospital – and the judge – that the Italian doctors in Tafida's case could not be compared to the controversial doctors who had intervened in Charlie Gard's case,[43] the position of the London doctors would have been stronger if they had been able to defend their position more robustly by reference to national or international standards.

Nevertheless, because this is such a sensitive ethical case with a clear difference in views between the English and Italian doctors, it is unlikely that the ECJ would have found a breach of Tafida's free movement of rights. This brings me to the point already made above: a finding that the continuation of Tafida's medical treatment in Italy is in her best interests should *not* automatically mean that her free movement rights have been breached. The direct link between the best interests test and the free movement assessment is based on a highly individualised perspective on free movement rights, which is not consistent with the ECJ's position in cases with a(n) (medical) ethical dimension. As a result, it should be possible for the court to conclude that treatment in another Member State is in the patient's best interests *without* necessarily finding a breach of their free movement rights. This would have two important consequences. First, although Tafida's treatment in Italy will be paid for privately by her parents after a crowdfunding action,[44] there is a risk that this judgment will put pressure on the NHS to reimburse this kind of treatment in the future. Patients have a right to be reimbursed for medical treatment that is covered by the NHS where similar or equally effective treatment is not available in the UK.[45] It would not be difficult to argue that Tafida's treatment is not available in the UK because the doctors are unwilling to continue treating her. It could then be said that since the English court has found that the treatment in Italy is in her best interests, the NHS should reimburse Tafida's continued treatment in Italy. This would impose a significant financial burden on the NHS. Second, a finding that the patient's free movement rights are not breached would mean that patients cannot use free movement law as a pressure tool to force their doctors to change their course of action or to facilitate obtaining a second opinion from another Member State. Irrespective of whether the treatment abroad would be publicly or privately funded, if courts were to give a clear message that the patient's free movement rights were not breached in cases like Tafida's, this would prevent

[42] *Raqeeb*, [26]-[29].
[43] *Raqeeb*, [178].
[44] See https://www.gofundme.com/f/save-tafida.
[45] *Peerbooms*, above n 37, [103]-[108]. See Article 8 of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare.

hospitals from having to facilitate a course of action that would go against their own ethical judgement. This will be analysed in more detail in the final section.

## 5. The implications of the judgment for doctors and hospitals

It is clear from MacDonald J's conclusion that counsel for the hospital had explicitly asked the court "to provide further guidance as to the proper course of action in cases where the child's EU rights are engaged".[46] The judge emphasised that "each case will fall to be decided on its own facts and in such circumstances, detailed guidance is likely to be unhelpful".[47] The only advice he was willing to give is that hospitals have to take a patient's free movement rights into consideration. If they do this, "it is highly likely that the decision will constitute a justified derogation from the EU rights engaged on public policy grounds".[48] This is not consistent with the judge's earlier conclusions. After all, he had found that the hospital would not have acted differently if it had taken Tafida's Article 56 TFEU rights into account. Still, he concluded that because Tafida's best interests favoured continuation of her treatment in Italy, there was a breach of her free movement rights. There is no indication that his conclusion would have been different if the hospital had taken Article 56 TFEU into account.

This shows that it is *not* sufficient for a hospital to consider the patient's free movement rights in the decision-making process. It raises fundamental questions about what doctors can be required to do in cases where patients would like to obtain a second opinion from a hospital in another Member State. In Tafida's case, Tafida's parents would not have been able to "frame" their case in the way they did if the Royal London Hospital had not facilitated the Italian doctors in providing their second opinion. This process of facilitation went very far: the Italian doctors were not just given access to all medical files – they also examined Tafida through a video link.[49] The question is how far doctors should have to go in facilitating this kind of second opinion that goes against their clinical and ethical judgement, and whether free movement law can now be used by parents or family to force treating doctors to engage with doctors in foreign hospitals who are willing to provide a second opinion.

Patients who are treated in the NHS do not have a formal legal right to a second opinion.[50] However, in practice, patients are able to seek a second opinion. A refusal to allow a second

[46] *Raqeeb*, [189].
[47] Ibid.
[48] Ibid.
[49] *Raqeeb*, [15].
[50] See https://www.nhs.uk/common-health-questions/nhs-services-and-treatments/how-do-i-get-a-second-opinion/.

opinion could lead to disciplinary proceedings against doctors – or even a negligence claim. As such, for doctors, facilitating a second opinion is usually a defensive exercise. This is different in cases with an ethical dimension. In Tafida's case, there was no suggestion that the doctors were acting negligently or in breach of professional standards. The second opinion was based on the ethical differences between doctors in different Member States. It is unclear whether Tafida's parents had approached other hospitals in the UK before they reached out to the hospital in Genoa.

The impact of free movement law on second opinions depends on the rights or expectations that patients have under national law. Hospitals cannot make a distinction between second opinions from a hospital in the same or in another Member State. Does free movement law require that doctors facilitate obtaining a second opinion in circumstances where the proposed course of action would – in their view – be unethical? The judgment in *Raqeeb* provides no real guidance on this issue. Let us consider the hypothetical example of an elderly English patient with advanced dementia who is being treated in a London hospital for a delirium. Her children are able to show an advance declaration that states that she does not want any kind of treatment if she is admitted to hospital. In those circumstances, she would like to receive euthanasia if this ever becomes lawful in the UK in the future. They ask doctors from the Dutch "Euthanasia Expertise Centre" to provide an opinion on her case and the Dutch doctors say that she could lawfully receive euthanasia in the Netherlands. She could be transferred to the Netherlands without any further harm. Would the hospital have to facilitate this? If this case came before the Court of Protection, would the same weight be attached to the free movement argument?

One way of answering these questions would be to distinguish this scenario on the basis that euthanasia is unlawful in the UK.[51] The doctors would be engaging in unlawful conduct if they were to facilitate this kind of second opinion. Similarly, under English law, it would be unlawful for the Court of Protection to find that it would be in the patient's best interests to receive a type of medical treatment that is prohibited in the UK. However, from the perspective of free movement law, the fact that a particular kind of medical treatment is unlawful in the home Member State is irrelevant to the exercise of free movement rights. This is clear from the ECJ's judgment in *Grogan*,[52] in which it held that, in principle, Irish women enjoyed a free movement right to receive abortion in the UK. The fact that abortion was (at the time) prohibited in Ireland did not make a difference. As a result, it could be argued that free movement law imposes an obligation

[51] See B. van Leeuwen, above n 32.
[52] Case C-159/90, *Grogan*, ECLI:EU:C:1991:378.

on judges to ignore the fact that the conduct would be unlawful under national law. At the same time, it is likely that the unlawfulness under national law would result in a broader margin of discretion in deciding whether the restriction on free movement is proportionate.[53] In these circumstances, the ethical position – expressed in legislation – would have been adopted by the Member State rather than by a hospital or a group of doctors. Therefore, as discussed above, it would be easier for the Member State to justify the restriction on free movement.

Overall, it is clear that there is a need for further guidance in this field.[54] This guidance should be "two-way traffic": the relevant medical associations should adopt guidelines on how far doctors have to go in facilitating second opinions from other Member States, and the courts have to provide clearer guidance on what is required from doctors in cases like Tafida's. The personal and individual nature of the best interests test does not provide an excuse to refuse to engage with these broader issues, which are of significant practical relevance to doctors and hospitals.

## 6. Conclusion

A pragmatic way of looking at *Raqeeb* would be to say that no more free movement arguments can be made after Brexit. As a result, the free movement "frame" relied on by Tafida and her parents will no longer be available. Such a statement would certainly be correct. While the UK would like to keep free movement of goods – at least to a significant extent –, free movement of services is not currently on the table for the negotiations on a free trade agreement between the EU and the UK.[55]

However, to focus solely on free movement law would be too simplistic. After Brexit, there will continue to be cases with a conflict of opinion between doctors and parents, with doctors in different states expressing different views on the ethics of a certain type of medical treatment. *Raqeeb* has done very little to provide guidance to doctors on how they should act in this kind of cases. Therefore, the courts should be encouraged to provide more detailed guidance in future best interests cases. In the meantime, doctors should adopt guidelines on the extent to which they will facilitate second opinions in cases where the ethical views of the doctors in another state go against the ethical views of the English medical profession.

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[53] See F. de Witte, above n 32, and B. van Leeuwen, above n 32.
[54] See also the reaction of the hospital after the judgment in *Raqeeb*: https://www.bartshealth.nhs.uk/news/media-statement-regarding-our-care-of-tafida-raqeeb-6626.
[55] European Commission, 'Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019', https://ec.europa.eu/commission/sites/beta-political/files/revised_political_declaration.pdf.