

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2024/0006

BETWEEN:

CHARLOTTE BRODIE

Appellant

and

HENRY BRODIE

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

The Hon. Mde. Georgis Taylor-Alexander

Justice of Appeal [Ag.]

Appearances:

Mr. Teertha Gupta, KC with him Ms. Marie-Lou Creque for the Appellant

Mr. Alex Verdan, KC with him Ms. Asha Johnson-Willins for the Respondent

2024: October 31;

2025: January 29.

Civil appeal – Relocation application - Welfare of children – Best interests of the child – Appellate interference with cases affecting the best interests of the child - Relevance of parenting agreement in determining the best interests of a child – Appellate interference with trial judge’s findings of fact – Whether the learned judge erred in her findings of fact – Whether the learned judge erred in the weight given to her findings of fact - Whether the learned judge erred in the weight given to parenting agreement in determining relocation application – Whether the learned judge erred in the assessment of factors in determining the relocation application

The appellant (“the mother”) and the respondent (“the father”) are both British citizens who met in 2015 and were married in 2019. There are two minor children of the family born in England on 18th December 2017 and 12th August 2021 respectively. In November 2021, the family migrated to the Territory of the Virgin Islands (“the BVI” or “the Virgin Islands”) in order for the father to take advantage of a job opportunity. In July 2022, eight months after this relocation, the parties separated and in August 2022, they executed a parenting agreement which reflected their agreement in regard to their joint custody and care of the children. As

part of the parenting agreement, the parties agreed that the father would give the mother no less than 3 months' notice of their return to England.

In December 2022, the parties travelled to England for vacation with the minor children with each party staying with their own families. The father contended that at some point his employer determined his assignment in the Virgin Islands and requested that he return to work in England. He informed the mother, who refused to return to England and without notice to the father, applied *ex parte* to the BVI court on 2nd February 2023 and obtained an order requiring the children to be returned to the BVI. The mother then travelled back to the BVI with the children without serving the father with the order.

On 6th July 2023, in an application for ancillary relief (or "the application"), the father sought an order that the children be permitted to relocate permanently to England so that they can be enrolled into school there for the beginning of the school year in September 2023 or as soon as possible thereafter.

In November 2023, the learned judge ordered *inter alia* that the father is allowed to remove the two minor children from the BVI and return them to England.

Dissatisfied with the learned judge's decision, the mother appealed on a multiplicity of grounds.

Held: dismissing the appeal, affirming the decision of the learned judge, and making no order as to costs, that:

1. The father's application for ancillary relief and the totality of the evidence filed in support of and in opposition to the application, as well as the legal submissions advanced by the parties in the court below, clearly indicate that the case before the learned judge did not simply concern relocation for the purposes of the children's education. The reference to schooling in the application related solely to the question of the timing when the order for permanent relocation should take effect since it is clearly best that the children be well settled and, in a position, to enroll in the new school/nursery at the beginning of the academic year. Accordingly, grounds A-C of the appellant's appeal which take issue with the learned judge's findings that the father's application was not made solely for the purpose of facilitating the education of the children as expressly stated in the application, are dismissed.
2. An appellate court should not interfere with the trial judge's factual findings unless satisfied that the judge was plainly wrong. This restraint against the interference with findings of fact applies not only to findings of primary fact, but also to the judge's evaluation of those facts and the inferences drawn from them. The phrase 'plainly wrong' directs the court to consider whether it was permissible for the judge at first instance to make the findings of fact which he or she did in the face of the evidence as a whole. In this case, the father's evidence that he was required to work in England was supported by correspondence from his employer which was exhibited, and which evidence was not challenged by the mother in cross examination. The learned judge was entitled to accept the father's evidence. This is not a finding that

an appellate court could say is plainly wrong. Accordingly, ground D of the appeal is dismissed.

Margaret Blackburn v James A.L. Bristol GDAHCVAP2012/0019 (delivered 12th October 2015, unreported) applied; **Volpi and another v Volpi** [2022] EWCA Civ 464 applied.

3. The contents and the timing of the parenting agreement (executed following the breakdown of the marriage) are notable as they provide a useful snapshot of the parties' historic views as to the best interests of the children. This agreement would be relevant as it shows that as recently as August 2022, the parties anticipated a return to England which indicates that the parents thought that this was best for the children. It is clear that the learned judge was fully seized of the fact that regardless of the terms of the agreement, she is the ultimate arbiter of whether relocation is in the best interests of the children. The learned judge clearly applied the paramount consideration and the welfare checklist in arriving at her decision. Grounds E, F, I, J and L of the appeal are therefore dismissed.
4. While section 11 of the **Guardianship of Infants Act** empowers the court to make such orders as it thinks fit regarding the custody of an infant and the right of access of either parent, the court, in exercising its discretion, shall regard the welfare of the child as the first and paramount consideration. The court also applies the welfare of the child test in cases concerning either external or internal relocation. However, the inquiry is highly contextual because of the multitude of factors which may impinge on the child's best interest. The application of that test involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child.

Sections 3 and 11 of the **Guardianship of Infants Act** Cap 270 of the Laws of the British Virgin Islands applied; **Re TC and JC (Children: Relocation)** [2013] 2 FLR 484 applied; **DV (mother) v ZV (father)** [2024] EWFC 283 (B) applied; **Re C (A child) (Internal Relocation)** [2015] EWCA Civ 1305 applied.

5. The learned judge's reasons do not suggest any lack of awareness of the relevant legal test or the principles to be applied in considering the relocation application. In determining what was in the best interest of the child, the learned judge very carefully canvassed, in detail, the relevant factors which the courts have dictated should be weighed in concluding why relocating to England with their father was not best for the children. The trial judge's analysis was free from material error, serious misapprehension of evidence, or error of law. Overall, the learned judge did make a global, holistic evaluation of the best interests of the children and did so by applying the welfare checklist.
6. A trial judge is obliged to consider all the material evidence (although it need not all be discussed in her judgment). However, the weight which he or she gives to it is pre-eminently a matter for him or her. In this case, the judge had taken into account

and given appropriate weight to each of the factors to which the mother had drawn attention. There was no maintainable basis for any complaint that the judge had either taken into account irrelevant factors or failed to take into account relevant factors nor was there any sustainable basis for a complaint that the judge had erred either in the weight she had chosen to attach to the various factors she had taken into account or her evaluative decision as to where the ultimate balance had fallen. **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1 applied.

7. The impact of a refusal upon a parent seeking relocation may be an important factor in a case, but it is one factor of many which the court must consider in the balancing exercise to determine where the child's welfare lies. Ultimately, after balancing the parents' wishes and interests (along with all of the other relevant factors), the learned judge determined that relocation to England was in the best interest of the children. She did so having considered the historical parenting roles of the parties and the competing care plans and accorded significant weight to the children's need to maintain meaningful contact with both parents in a country where they are entitled to reside as of right. The learned judge further determined that relocation would not unduly disadvantage the children's education, medical care or exposure to extracurricular activities because the institutions and facilities in England are comparable. The trial judge was clearly of the view that relocation would both directly and indirectly benefit the children and it cannot be said that the learned judge has exceeded the generous ambit of her discretion, and or that her decision was wrong. Accordingly, the appeal is dismissed.

Re: V (Appeal: Relocation) [2024] EWHC 2600 (Fam) applied.

JUDGMENT

- [1] **ELLIS JA:** Before the Court is the appellant's ("the mother") appeal of a final decision in which the learned judge in the court below permitted the respondent ("the father") to remove the parties' two minor children from the Territory of the Virgin Islands and return them to England. The learned judge further ordered that the relocation is to be done during the first two weeks of the summer vacation so that the female minor child can be properly prepared for and enrolled in primary school.

Background

The parties are both British citizens who met in 2015 and married in 2019. The minor children were born in England on 18th December 2017 and 12th August 2021 respectively. In November 2021, the family migrated to the Virgin Islands in order that the father could take advantage of a job opportunity. It is accepted by both

parties that the Virgin Islands was never intended to be a permanent home but rather a temporary relocation. Both parties have extended families that currently reside in England.

- [2] As a result of unhappy differences, the parties' relationship soured and they separated in July 2022, only 8 months after they relocated to the Virgin Islands. However, laudably on 20th August 2022, they executed a parenting agreement (or "the Agreement") which reflected their agreement in regard to their joint custody and care of the children. At paragraphs 15 – 16 and 18, the agreement also provided as follows:

"Return to England

15. The Mother and Father agree that the children must have as much continuity as possible, and be in a place with the largest support network, love and where they are the happiest. This is the primary concern, it is important that their lives are not disrupted. Initially the children will be enrolled in the BVI until the Father's contract with his company is complete, and he (together with the family) can return to England.

16. The Mother and Father agree that when the Father can move back to England, the family will do so. The Father agrees that he will provide the Mother with no less than 3 months' notice of their return to England. The Mother and Father agree that they will live in the BVI for at least 3 months before moving back to England once the father has notified the Mother of his intention to relocate the family back to England to allow sufficient time to provide the necessary notice to work and rental commitments.

18. Upon moving back to England, the Mother recognizes that it would be beneficial for her to live close by (Surrey/Guildford area), with transport links into London which will be required for her work."

- [3] In December 2022, the parties travelled to England for vacation with the minor children with each party staying with their own families.
- [4] The father contended that at some point his employer determined his assignment in the Virgin Islands and requested that he return to work in England. The father informed the mother that he would need to return to England permanently for work. He did not however provide the agreed 3 months' notice. The mother refused to return to England and without notice to the father; she applied (ex parte) to the BVI court on 2nd February 2023 and obtained an order requiring the children to be

returned to the BVI. The mother then travelled back to the BVI with the children without serving the father with the order.

[5] On 6th July 2023, in an application for ancillary relief (or “the Application”), filed by the father, he sought *inter alia* the following orders:

- “1. An order that the children be permitted to relocate permanently to the United Kingdom (the UK) so that they can be enrolled into the school in the UK for the beginning of the school year in September, 2023 or as soon as possible thereafter.
2. In the event that the mother chooses to relocate to the UK should the father be successful in his application an order that the parties be granted joint custody with joint care and control of the children but if the mother chooses to remain in the Virgin Islands there be an order that the Parties be granted joint custody of the children with care and control to the father and reasonable visitation to the mother in view of the children’s best interest.”

The Judgment Below

[6] Following a two day in person final hearing in November 2023, the learned judge made the following orders:

- (1) Joint custody is awarded to the Parties.
- (2) The respondent is allowed to remove the two minor children from this jurisdiction and return them to the United Kingdom.
- (3) The relocation is to be done during the first two weeks of the summer vacation so that the female minor can be properly prepared for and enrolled in primary school. This also gives both parents an adjustment period which they would both require.
- (4) Pending relocation:
 - a. The petitioner will have the primary care and control of the children with liberal access to the respondent; the particulars of which are to be determined by the Parties.
 - b. Maintenance is awarded to the petitioner in the sum of \$400 per child per month.
 - c. Payment of this maintenance sum is to be made on or before the last working day of each month.

- (5) If the petitioner moves to the UK with the children or within three months thereafter:
- a. The petitioner is awarded primary care and control of the children with liberal access and visitation by the respondent; the particulars of which are to be determined by the parties.
- (6) If the petitioner does not move to the UK with the children or within three months after:
- a. The respondent is awarded primary care and control of the children with liberal access and visitation by the petitioner; the particulars of which are to be determined by the parties.
 - b. The respondent is to bear 50% of her travel expense to visit with the children in the UK or 50% of the children's travel expense to visit with the petitioner in BVI.
- (7) For the avoidance of doubt, if the petitioner does not move when the children relocate the respondent will have the primary care and control of the children from the date of the relocation until the three months have expired or the petitioner arrives whichever is earliest. Thereafter, the provisions of paragraphs 5 or 6 of this order become operative.

The Appeal

- [7] Being dissatisfied with the learned judge's judgment, the mother filed a notice of appeal on 13th March 2024 in which she levied a multiplicity of grounds which can be consolidated and categorized as follows:

Grounds A – C

- [8] Consolidating these grounds, the mother took issue with the learned judge's findings that the father's application was not made solely for the purpose of facilitating the education of the children as expressly stated in the application but instead was merely afforded a time frame or context within which the respondent would require the application to be heard.
- [9] The mother stated that this finding effectively resulted in the learned judge treating the application as an application for permanent international relocation *simpliciter*

rather than as it has been filed and issued namely – an application to remove the children solely for the purpose of education. The mother contends that this presented a serious procedural irregularity which led to a flawed approach to the subject of international relocation of the children which was wrong in law and lacking in sufficient factual detail for such an important decision.

Grounds D and G

[10] In these grounds, the mother took issue with a number of factual findings of the learned judge including:

(i) that the father's employment has recalled him to the UK when the father's evidence confirmed that his work permit in the Virgin Islands has been submitted for renewal (Ground D).

(ii) that the father should have given more than three (3) months' notice before the anticipated move when the parties did not in fact travel in anticipation of a move but solely on vacation (Ground G).

The latter ground appears to have been abandoned by the mother who advanced no written or oral legal submissions in support.

Grounds E, F I, J, and L

[11] Under these grounds the mother took issue with the weight accorded by the learned judge to certain factors. Primarily, she contends that the judge has placed too much weight or emphasis on the historic parenting agreement which only reflected the parties' joint wishes at that time it was signed. According to the mother, the learned judge failed to find that the parties' wishes can and did change owing to a material change of circumstances. The mother contends that the judge was distracted from the paramount legal principle of what was in the best interest of the minor children at the time of her decision.

[12] The mother also contended that the judge failed to place enough emphasis on her own findings (a) that the children had spent the majority of their young lives in the

Virgin Islands and were well adjusted and thriving; (b) that even though neither jurisdiction (Virgin Islands or the UK) is superior to the other in education, health care or activities for the children, the status quo should not be maintained; (c) that the father travels frequently and as such the children spend most of their time with the mother who has a thriving business in the Virgin islands. In the circumstances the decision to order the children to relocate at the request of the father but in the care of the mother was perverse, unfair and contrary to the children's best interest in the circumstances and wrong in law.

Grounds K and H

- [13] The mother contended that the learned judge failed to take into account relevant factors or considerations. These factors are identified as - the fact that the children's place of habitual residence was in the Virgin Islands and the fact the past actions of the father in attempting to wrongfully retain the children in England in the latter part of 2022 and his consent to them returning to live in the Virgin Islands on 6th February 2023.

Ground M

- [14] Finally, the mother contended that the learned judge's decision is wrong in law as it disproportionately interferes with the mother's and the children's fundamental right to family, private life and her fundamental right to freedom of movement under section 18 of the Constitution.

Discussion

Appellate Deference in Cases Affecting the Best Interests of the Child

- [15] The scope of an appellate court's review in family law cases is narrow. The trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. After hearing from the parties directly, weighing the evidence, and making factual determinations, the trial judge is best positioned to determine the best parenting arrangement. Determining a child's best interests is always a fact-specific and highly discretionary determination and as has repeatedly been observed,

appellate courts should be highly reluctant to interfere with the exercise of a trial judge's discretion.

[16] An appellate court's role, as noted, is instead generally one of error correction; it is not to retry a case. An appeal is not a litigant's opportunity for a 'second bite of the cherry', especially in family cases where finality of litigation should be promoted. An appellate court therefore may only intervene where there is a material error, a serious misapprehension of the evidence, or an error in law. Absent an error of law or a palpable and overriding error of fact, deference is vital. Appellate courts must review a trial judge's reasons cautiously and as a whole, bearing in mind the presumption that trial judges know the law.

[17] It follows that the appellant in this appeal faces formidable obstacles in her quest to reverse the learned judge's findings and conclusions and it is with this caution that I now turn to consider the relevant grounds of appeal.

Grounds A – C

[18] In the opening paragraph of her written judgment, the learned judge made the following robust finding:

"While there are other matters for consideration, the primary issue before this court is whether the father should be allowed to remove the two minor children now aged 6 and 2 from this jurisdiction for relocation to the United Kingdom. This application was not only made for the purpose of education as submitted by the petitioner. That is rejected wholesale. Having looked at the "application" and the affidavit in support, I cannot find this to be so. The statement relating to education was simply a timeframe set for when he hoped the application would be heard."

The mother argued that this represented a serious procedural irregularity as the father's original application 'was phrased for the children to be educated in England and i.e. for them to be permanently relocated there for that reason.' According to the mother, the learned judge then reversed her own logic by wrongly prioritizing schooling in England (from September 2024 onwards) over all the other factors that

she needed to consider in reaching her decision as to the children's best interest.

[19] Counsel for the mother submitted that this meant that the application which was intended in furtherance of educational purposes should have been dealt with as such and that would have led to a decision in the mother's favour because the status quo would have prevailed because there was nothing to separate the quality of schooling in the BVI and the UK. Counsel submitted that continuing the status quo (with the children living in the Virgin Islands) was the best solution in all the circumstances because while the children were well adjusted and thriving in the Virgin Islands, relocating to the UK would mean that the children would be going to new academic institutions and living in homes away from all that is familiar to them.

[20] Counsel further submitted that in adopting her flawed approach, the judge conducted a very short and cursory analysis of the other factors that ought to have been examined in a full relocation application and whether it was ultimately in the best interest of the children to be internationally relocated to another continent. He argued that this pointed to a judicially inadequate approach to what would have been a life changing event for the children and the mother.

[21] Having comprehensively reviewed the father's application for ancillary relief and the totality of the evidence filed in support of and in opposition to that application, as well as the legal submissions advanced by the parties in the court below, I have no doubt the case before the judge did not simply concern relocation for the purposes of the children's education.

[22] In my judgment the wording of the notice of application makes that plain. The respondent's application for ancillary relief in fact, explicitly described the relief sought as:

"An order that ...(the "Children") be permitted to relocate permanently to the United Kingdom so that they can be enrolled into school in the UK for the beginning of the school year in September, 2023 or as soon as possible thereafter."

In my view, it is clear that the reference to schooling related solely to the question

of the timing when the order for permanent relocation should take effect since it is clearly best that the children be well settled and in a position to enroll in the new school/nursery at the beginning of the academic year.

[23] The proceedings below do not disclose any misunderstanding on the part of the parties as to the full remit of the application before the learned judge. The father's case was clearly that he considered relocation was in the best interests for a range of welfare reasons and he was fully engaged on these issues by the mother in robust evidence and submissions. In his oral submissions, counsel for the father submitted that the legal test for relocation is the best interest of the child. He pointed out that the father's evidence dealt with all aspects of the welfare factor. In his first affidavit in support, he set out his proposed care plan which would have addressed the factors which a court considering relocation would need to weigh. The parties were examined extensively on this and it is pellucidly clear that while the education of these minor children is a critical factor in assessing their best interest in the context of this application, this singular issue did not and could not form the focus of the learned judge's reasoning. Indeed, it is surprising that this suggestion could be advanced given the father's clear and obvious motive for relocation (taking up employment in England) and the broad legal test which would have to be applied by the judge.

[24] In my judgment, the learned judge was right to reject the suggestion that this relocation was simply of for purpose of facilitating the children's education. These grounds of appeal therefore fail.

Ground D

[25] Here, the mother takes issue with factual findings of the learned judge. First, she challenges the judge's findings that the father's place of employment had recalled him to the UK. Counsel for the mother pointed out that this cannot be true as the father's evidence confirmed that he had submitted his BVI work permit for renewal. He further pointed out that the father has subsequently confirmed in his affidavit

dated 21st June 2024 where he represented that '(he is) currently the holder of a temporary work permit.' According to counsel, this cannot be the case if the father has permanently relocated to the UK. He submitted that this wrong factual determination is one of the three cornerstones of the judge's decision to grant the application.

- [26] This Court has repeated on many occasions that it will not easily interfere with a judge's evaluation of the evidence or a judge's findings of fact and inferences of fact made by a judge especially when they depend to a significant extent upon the judge's assessment of witnesses he or she has seen and heard give evidence. In **Margaret Blackburn v James A.L. Bristol**¹ this Court prescribed that the correct approach of an appellate court with respect to interfering with a judge's factual findings is that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that the judge was plainly wrong. Further, the restraint against an appellate court interfering with findings of fact applies not only to findings of primary fact, but also the judge's evaluation of those facts and the inferences drawn from them.² Baptiste JA in **Margaret Blackburn v James A.L. Bristol** further held that the phrase 'plainly wrong' does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts. Rather, it directs the court to consider whether it was permissible for the judge at first instance to make the findings of fact which he or she did in the face of the evidence as a whole. The appellate court is required to make this judgment bearing in mind that it has only a printed record of the evidence. Thus, to interfere with a judge's decision, the appeal court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine the judge's conclusions.

¹ GDAHCVAP2012/0019 (delivered 12th October 2015, unreported) at paragraph [9].

² See *Landau and The Big Bus Company Limited and another* [2014] EWCA Civ 1102, *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, *Piglowska v Piglowski* [1999] 1 WLR 1360, *McGraddie v McGraddie and another* [2013] 1 WLR 2477 and *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5.

[27] In **Volpi and another v Volpi**³ Lewison LJ at paragraph 2 summarised the well settled principles in the following terms:

- "i An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
- ii The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
- iii An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
- iv The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
- v. An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
- vi Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

[28] Applying these guiding principles, I am satisfied that this ground of appeal must also fail.

[29] At paragraph 7 of the judgment, the learned judge made the following determination.
"...The respondent has intentions of relocating to the UK and seems to have

³ [2022] EWCA Civ 464.

started the process. He says his place of employment has recalled him to the UK as had been expected. The Court found this to be true.”

[30] The mother disputes this finding and relies on the father’s work permit in the BVI having been submitted for renewal. However, in my judgment, the fact that the father had a periodic work permit in the BVI did not detract from the fact that his employment now required him to be in the UK. I find much force in counsel for the father’s argument that this would not detract from the clear evidence from the father and his employer that he was required to work in the UK.⁴ This is especially so when the father’s evidence was supported by correspondence from his employer which was exhibited and which evidence was not challenged by the mother in cross examination.

[31] Counsel submitted that rather than doing so, the mother did not submit to the court in closing submissions that the father had not been recalled to the UK for work but rather suggested the recall was at the father’s request. In my judgment, the learned judge was entitled to accept the father’s evidence. This is not a finding that any appellate court could say is plainly wrong. Accordingly, the ground of appeal is dismissed.

Grounds E, F I, J, and L

[32] In these grounds, the mother contended that the trial judge placed undue emphasis on the parenting agreement which was executed in August 2022. Counsel for the mother submitted that this was an error of law for a number of reasons. First, he denied that the agreement was legally binding either in the eyes of the father or the Court. By way of illustration, counsel pointed out that the obvious fact that there had been breaches to the agreement by the father, particularly when he wrongly sought to retain the children in the UK when the parties and the children went on vacation in December 2022.

⁴ Bundle 1 page 413 Letter dated 22nd August 2023; Bundle 6 page 297 – 298.

- [33] Counsel submitted that the father attempted to rely on the parenting agreement but eventually consented to the children returning to their home in the BVI on 6th February 2023 following an ex-parte order made by Justice Wallace (Ag.) on 2nd February 2023. He further pointed out that there was further attempt by the father to take the children to the UK "on holiday" when he applied on 30th May 2023 (submitting an Affidavit that exhibited the aforesaid Agreement) for a court order to do the same. This was refused on 13th June 2023. This demonstrated that the agreement was not binding either in the eyes of the Court or the father during 2023 and was irrelevant to the issue of relocation because throughout 2023 the courts had decided that it was in the children's best interests to live in the BVI and refused the father's attempts to remove the children, even for a purported holiday.
- [34] Counsel for the mother pointed out that the circumstances had also changed for the mother who now had work opportunities and no longer consented to the relocation. These were material changes of circumstances to which the judge below did not appear to have paid any or any sufficient regard.
- [35] Finally, counsel for the mother submitted that the learned judge failed to recognise her duty to carry out an independent evaluation as to whether this was in the children's best interests at this stage for that relocation actually to take place (18 months later). Counsel submitted that while the parenting agreement may have been relevant in considering the question of financial provision for the children, it was irrelevant to when considering the relocation of the children. Instead, the judge should have considered the paramount consideration i.e. the welfare of the children based on the route map set out in the closing submissions on behalf the appellant.
- [36] Not surprisingly, these submissions were robustly opposed by the father who submitted that the while the judge found that the parenting agreement was important, she also made clear that it was subject to her consideration of the children's best interests. Counsel submitted that it would have been perverse for the

judge not to have attached weight to this agreement given its clear statement of the parties' plans especially as it was signed after the parents had separated and so it could not be said to be an agreement that only applied when they remained a couple.

- [37] Having reviewed the learned judge's reasoning, I find much force in the respondent's submission. At paragraph 16 of the judgment, the judge introduces the parenting agreement in the following terms:

"The parenting agreement is a comprehensive, reasonable and seemingly well thought out document. It is signed by both parties and although the petitioner says she did not have the benefit of legal counsel she has never said that she did not sign voluntarily. **This court accepts that the parenting agreement did reflect the parties' joint wishes at the time. This included the acceptance that they would all relocate when the father's contract was completed and the family could return to England together. It was stated therein that this was to facilitate continuity for the children and to ensure they were in a place with the largest support network, love and happiness.**" Emphasis added

At paragraph 17 the judge went on to make the following observation:

"The Court also accepts that the mother should have been given three months' notice before the anticipated move but the father failed to do this when he sprang his intention on her in December of 2022. He also attempted to withhold the children's passport on what began as only a vacation trip to the UK. This failure to give the requisite notice, however, is of very little moment at this time. Far more than three months have passed since this intention was made known. **This court sees no reason in these proceedings to determine whether the agreement is legally binding since it must always act in the best interest of the child. What is certain, however, is that the agreement states quite clearly the joint intention of the parties and this must necessarily form an integral part of the court's consideration.**" Emphasis added

- [38] In my judgment, this clearly reflected the judge's perspective of the weight to be attached to the parenting agreement. She clearly accepted that it was a historical reflection of what the parties – the parents of the children - thought would be in the best interest of the children. Counsel for the mother submitted that the use of the term "*integral*" (in paragraph 17 of the judgment *supra*) is indicative of the significance which this agreement played in the judge's decision making.

[39] I am not satisfied that the judge's treatment of the parenting agreement has been accurately described in the mother's submissions. The contents and timing of the agreement (executed following the breakdown of the marriage) are notable as they provide a useful snapshot of the parties' historic views as to the best interests of the children. Such an agreement would be relevant because who better to decide what was best for the children than their parents and the fact that they as recently as August 2022 anticipated a return to the UK indicates clearly that they then thought that this was best for the children. The agreement also provided an indication of the agreed parenting arrangements – a factor which is always relevant.

[40] I am not satisfied that the learned judge fettered the exercise of her discretion in deferring to contents of the parenting agreement. Rather, it is clear that the judge was fully seised of the fact that regardless of the terms of this agreement, and ignoring whether it could be said to be binding or not, ultimately, she is the arbiter of whether relocation is in the best interest of the children. The learned judge clearly applied the paramount consideration and the welfare checklist in arriving at her decision. In my judgment such reasoning cannot be faulted.

Grounds K and H

[41] These grounds of appeal contain considerable overlap with that set out in preceding grouping. In Grounds K and H, the mother contends that the learned judge failed to take into account relevant factors or considerations. These include - the fact that the children's place of habitual residence was in the Virgin Islands and the fact the past actions of the father in attempting to wrongfully retain the children in England in the latter part of 2012 and his consent to them returning to live in the Virgin Islands on 6th February 2023.

[42] In Ground I, the mother also contends that the judge failed to place enough emphasis on her own findings (a) that the children has spent the majority of their young lives in the Virgin Islands were well adjusted and thriving; (b) that even though

neither jurisdiction (Virgin Islands or the UK) is superior to the other in education, health care or activities for the children the status quo should not be maintained; (c) that the father travels frequently and as such the children spend most of their time with the mother who has a thriving business in the Virgin islands. In the circumstances the decision to order the children to relocate at the request of the father but in the care of the mother was perverse, unfair and contrary to the children's best interest in the circumstances and wrong in law.

The Framework Governing Relocation Cases

[43] In considering the issues arising under these grounds, the central question to be determined is whether the trial judge erred in her analysis of the father's application to relocate to England with the children. In carrying out this analysis I am satisfied that the starting point must be the relevant statutory framework and in the Virgin Islands section 11 of the **Guardianship of Infants Act**⁵ makes clear that the Court may make such orders as it thinks fit regarding custody of an infant and the right of access of either parent. Section 3 of that Act however provides that in exercising its discretion, the Court shall regard the welfare of the child as the first and paramount consideration. It provides as follows:

"Where in any proceeding before any Court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

[44] It therefore follows that it is the best interests of the child which are to be regarded as paramount and not the personal desires or preferences of the parents. The best interests of the child are an important legal principle in family law litigation. It is a staple in domestic and international legislation and the common law.

⁵ Cap 270 of the Laws of the British Virgin Islands.

[45] However, even with a wealth of jurisprudence as guidance, determining what is “best” for a child is notoriously a difficult task for any adjudicator. In the Virgin Islands, courts⁶ have increasingly been guided by the welfare checklist set out in the section 1 (3) of the **UK Children Act 1989**. This includes:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs.

[46] This is by no means an exhaustive list. The inquiry is “highly contextual” because of the multitude of factors that may impinge on the child’s best interest. The difficulties inherent to the best interest principle are further amplified in the relocation context. A child’s welfare remains at the heart of the relocation inquiry, but many traditional considerations do not readily apply in the same way. Thankfully, the common law has consistently developed in this area affording well needed assistance to judges tasked with this often onerous duty.

[47] In **Re TC and JC (Children: Relocation)**⁷ Mostyn J considered the development of the legal jurisprudence in this field. At paragraphs 10 of the judgment he observed: “The foundation of the jurisprudence in this field is the well-known case of

⁶ See *Brathwaite Jr. v Brathwaite* BVIHMT2011/0069 (delivered 18th July 2012, unreported) and *Alvin Hodge v Marguerite Denise Hodge* Claim No. 33 of 2002.

⁷ [2013] 2 FLR 484.

Poel v Poel [1970] 1 WLR 1469. Although there were many other subsequent decisions of the Court of Appeal the next major milestone was the case of Payne v Payne [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052, where Thorpe LJ set out his memorable 'discipline' in para [40]. That decision was controversial, at least in some quarters, for arguably perpetuating a covert presumption in favour of [relocation], at least where the application was made by the child's primary carer. It was reconsidered in 2011 in the case of K v K (Children: Permanent Removal from Jurisdiction) [2011] EWCA Civ 793, [2012] Fam 134, and the entire jurisprudence was recently summarised, and the modern principles enunciated, in a characteristically lucid judgment of Munby LJ (as he then was) in Re F (A Child) [2012] EWCA Civ 1364.

I have considered these four cases most carefully and, doing the best I can, I set out shortly what seem to me to be the presently governing principles derived from them for a relocation application:

- (i) The only authentic principle to be applied when determining an application to relocate a child permanently overseas is that the welfare of the child is paramount and overbears all other considerations, however powerful and reasonable they might be.
- (ii) The guidance given by the Court of Appeal as to the factors to be weighed in search of the welfare paramountcy, and which directs the exercise of the welfare discretion, is valuable. Such guidance helps the judge to identify which factors are likely to be the most important and the weight which should generally be attached to them, and, incidentally, promotes consistency in decision-making.
- (iii) The guidance is not confined to classic primary carer applications and may be utilised in other kinds of relocation cases if the judge thinks it helpful and appropriate to do so.
- (iv) The guidance suggests that the following questions be asked and answered (assuming that the applicant is the mother):
 - a. Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
 - b. Is the mother's application realistically founded on practical proposals both well researched and investigated?
 - c. What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

- d. Is the father's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?
 - e. What would be the extent of the detriment to him and his future relationship with the child were the application granted?
 - f. To what extent would that detriment be offset by extension of the child's relationships with the maternal family and homeland?
- (v) Since the circumstances in which such decisions have to be made vary infinitely and the judge in each case has to be free to decide whatever is in the best interests of the child, such guidance should not be applied rigidly as if it contains principles from which no departure is permitted.
 - (vi) There is no legal principle, let alone some legal or evidential presumption, in favour of an application to relocate by a primary carer. The old statements which seem to favour applications to relocate made by primary carers are no more than (sic) a reflection of the reality of the human condition and the parent-child relationship.
 - (vii) The hearing must not get mired in taxonomical arguments or preliminary skirmishes as to what label should be applied to the case by virtue of either the time spent with each of the parents or other aspects of the care arrangements.

[48] This dictum has been favourably applied in judgments in the Eastern Caribbean and also in the England and Wales as recently as this year in **DV (mother) v ZV (father)**⁸ where the judge in that case also applied the judgment of HHJ Jones in **F v M**⁹ in which he importantly observed that:

“[41] Whilst a balance sheet approach might be of assistance, this is not an arithmetical exercise. As emphasised by Macfarlane LJ at para.52 of *Re F*, the court should attribute weight to any relevant factor and, therefore, it is perfectly possible for one factor to have greater weight than two or three other factors.”

⁸ [2024] EWFC 283 (B).

⁹ [2016] EWHC 2691.

[49] The English Court of Appeal in **Re C (A child) (Internal Relocation)**¹⁰, reiterated the test and helpfully summarised the correct approach to be adopted by the judge:

“[82] As counsel before us agreed, in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. **The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. The exercise is not a linear one. It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child.** It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.” **Emphasis added.**

[50] Counsel for the mother complains that the learned trial judge made no reference whatsoever to the relevant legal authorities or to any case or statutory law cited by either party in the proceedings below. A quick review of the judgment confirms a dearth of relevant case law, legislation or other legal authorities. While this is unusual it is not necessarily fatal. Although it is certainly not recommended, it is entirely possible for a judge to correctly consider and apply the legal principles dictated by accepted legal precedent and statute without having actually cited the same. As long as the judge’s analysis demonstrates that he or she was well seised of the relevant law and appropriately applied the legal principles it would be hard to conclude that any reviewable error could be made out in the simple failure to cite the same. This is especially so when it is clear that both parties were well represented by counsel who argued the respective positions robustly and who assisted the court with well researched legal submissions and statutory provisions and authorities.

[51] Counsel submitted that it is consequently impossible to analyse the judge’s *ratio decidendi* with any clarity. I find no merit in this submission which is clearly at odds with the well-articulated complaints levied in the written legal submissions advanced on behalf of the mother. According to counsel, what is clear is that had the learned

¹⁰ [2015] EWCA Civ 1305.

judge conducted a bespoke and streamlined welfare based exercise, she would not have been distracted by irrelevant factors such as the parenting agreement, the time that the family had been in the BVI or the educational aspect of the father's application, but would have conducted a holistic analysis and be driven to the conclusion that the father's application had no merit. He argued that the judge did not approach the decision from the perspective of why the status quo should not be upheld and why the children should be uprooted from their country of habitual residence.

- [52] The mother therefore raises three main issues with the trial judge's analysis. Counsel for the mother argues that (i) the trial judge failed to conduct a bespoke and streamlined welfare based exercise; (ii) the trial judge was distracted by irrelevant factors such as the parenting agreement, the time that the family had been in the BVI or the educational aspect of the father's application (iii) did not approach the decision from the perspective of why the status quo should not be upheld and why the children should be uprooted from their country of habitual residence.

The trial judge failed to conduct a bespoke and streamlined welfare-based exercise

- [53] Having reviewed the learned judge's reasons, I have no doubt that she was well seised of the relevant legal test and principles and that she applied the appropriate judicial approach in considering such applications. At paragraph 3 of the judgment the learned judge makes clear that her task is to "meticulously weigh and balance the relevant factors including the rights and wishes of the parents, while making no presumptions about the applicant in its effort to determine which solution is in the best interest of these two children.
- [54] The learned judge clearly acknowledged the age of the minor children and accepted that the views of the children were not ascertainable (unknown) (paragraphs 1 and 3). She assessed the physical, emotional and educational needs of the children (paragraphs 8, 9, 10, 12, 17 – 21), other characteristics of the children should be

relevant (paragraph 12), the likely effect on them of a change in circumstances (paragraphs 10, 11, 20, and 21), how capable each parent is of meeting their needs (paragraphs 9 and 13 - 15). The learned judge also acknowledged that there was no presumption, in favour of an application to relocate by a primary carer (paragraph 3); the authenticity of the motivation for the father's application to relocate with the children and the mother's motivation for resisting the same (paragraphs 18 and 19), the content of the father's care and relocation plan (paragraphs 15 and 19); the impact on the parties if the application was refused or granted (paragraphs 14, 15, 20 and 21) and the extension of the child's relationships with the maternal family and homeland (paragraph 21).

- [55] In my view, the trial judge's reasons do not suggest any lack of awareness of the relevant legal test or the principles to be applied in considering the relocation application. In determining the best interests of the child, the trial judge very carefully canvassed, in detail, the relevant factors which the courts have dictated should be weighed in concluding why relocating to England with their father was not best for the children. In my judgment the trial judge's analysis was free from a material error, serious misapprehension of evidence, or error of law.

The trial judge was distracted by irrelevant factors

- [56] It is clear from her judgment that the judge took into account and weighed the factual background and the historical parenting arrangements. For the reasons already indicated I am satisfied that the judge gave appropriate weight and context to the parenting agreement. In my judgment the history of parenting arrangements is always relevant to understanding a child's best interests. A parent who cares for the child on a daily basis is in a unique position to assess what is in their best interests. This logic equally applies to both parents who have entered into a shared parenting arrangement, and accordingly, both of their views are entitled to great respect in an assessment of the child's best interests.
- [57] In my view, the trial judge's reasons do not suggest that she gave undue weight to the parenting agreement and I find no merit in that suggestion. In this case, the

judge had the benefit of such a parental assessment and it makes perfect sense for a court to pay careful attention to the parties' views. In doing so, she applied the appropriate perspective, (1) noting that the agreement reflected the parties' joint wishes 'at the time' and (2) declining to make any finding as to the agreement's binding nature and deferring instead to a thorough analysis of the factors which she was obliged to consider in determining whether relocation is in the best interests of the child.

[58] Having read her judgment, I consider that the learned judge did make a global, holistic evaluation of the best interests of the children and did so by applying the welfare checklist. In making that analysis she considered the *current* wishes and feelings of the parents, and how they will impact on the child.

[59] There can be no doubt that an inquiry as to whether it is in the best interest of a child that he/she be relocated is necessarily fact-specific and discretionary. In my judgment, both the length of time which the family had been in the BVI and the father's proposals as to the children's education are obviously relevant in carrying out an assessment of what is in the best interests of the children. These factors are clearly relevant and fall to be weighed by a judge in search of the welfare paramountcy and I can find no fault in the judge's assessment.

The trial judge had no regard to the need to preserve the status quo and the habitual residence of the children

[60] The mother has submitted that the judge had failed to consider the importance of the children's status quo, and had she properly evaluated the facts and properly applied the relevant guidelines and principles, she would have recognised that the circumstances had fallen down on the mother's side. I cannot agree with that criticism. A cursory evaluation of the learned judge's judgment reveals that she was fully aware of the length of time that the family had resided in the Virgin Islands and the fact that the children had spent the recent part of their lives in the BVI and

weighed this factor in the balance.¹¹ Moreover, the judge had carefully taken into account the children's current circumstances in the Virgin Islands, the quality of each parent's care for them and their respective plans, wishes and feelings.

[61] Habitual residence is a key factor in international family law, guiding courts in deciding jurisdiction especially in child abduction cases. However, courts have accorded it significantly less relevance when considering arrangements when determining leave to relocate applications. Certainly, there has been no authority proffered in which it has been accorded the presumptive status commended by counsel for the mother. Indeed, the jurisprudence reflects that to the extent that presumptions detract from the need to assess each case on its own facts or detracts from the individual justice to which every individual child is entitled, presumptions in favour of status quo or habitual residence are inappropriate. Instead, courts will consider a range of factors, such as why the individual has made the application, the duration of residence and the connections formed, and the social and family ties in the new location, including the day-to-day lives of the child and the nursery or school they attend.

[62] The dictum from the Canadian Supreme Court in the seminal case **Gordon v. Goertz**¹² provides useful guidance. In that case, the court was considering a presumption in favour of the custodial parent on an application for variation of a custody order upon proof of a material change in circumstances, which in the case before the Court, was the proposed move of the custodial mother to Australia. However, I am satisfied that this approach would be equally applicable to a presumption in favour of maintaining the status quo or habitual residence of the child.

[63] McLachlin J put the position this way:

“... Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court

¹¹ See paragraph 8 of the judgment.

¹² [1996] 2 S.C.R. 27.

to safeguard the best interests of each child is inconsistent with the requirement of the Divorce Act for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child" whose best interests the court is charged with determining. '[G]eneral rules that do not admit of frequent exceptions can[not] evenly and fairly accommodate all of the varying circumstances that can present themselves': per Morden A.J.C.O. in *Carter v. Brooks*, supra, at p.51. The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected. 'No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts, in which way are the best interests of the children met': *Appleby v. Appleby*, supra, at p.315."

- [64] Ultimately, the primary and paramount issue is the children's best interest having regard to their physical, emotional and psychological safety, security and well-being. This must be found within the practical context of the reality of the parents' lives and circumstances. In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in one location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community.

Weight and relevance

- [65] The mother asserts that the judge was wrong in law in not appreciating the relevance of the past actions of the father in 2022 in wrongfully keeping the children in England and his consent to returning then to the BVI in February 2023. I agree that where one parent has previously removed a child from the jurisdiction (or wrongfully retained the child) without the consent of the other, this is a factor which should be taken into account in deciding a subsequent application for relocation because a parent who 'takes the law into their own hands' and wrongfully removes and retains a child jeopardises a relocation application as it puts into question the motivations for such an application and whether the parent wishing to relocate can be trusted to maintain, promote and facilitate a relationship with the left-behind

parent.¹³

[66] At paragraph 17 of the judgment, the learned judge acknowledges that the father sprang his intention to relocate to England on the mother without any prior notice in December 2022 and that he also attempted to withhold the children's passport on what began as only a vacation trip to the UK. However, she clearly accorded little weight to this and treated this as all water under the bridge. Given the passage of time and subsequent actions of both parties, and legal proceedings both the England and the Virgin Islands, I am inclined to agree.

[67] The mother has also complained that the judge failed to accord sufficient weight to other relevant findings which were made by her. These include the fact that children had spent the majority of their young lives in the BVI, the fact that neither jurisdiction (UK or Virgin Islands) is superior to the other in terms of education health or activities; the fact that the father travels frequently and so that children spend most of their time with their mother who has a thriving business in the Virgin Islands.

[68] A trial judge is of course obliged to consider all the material evidence (although it need not all be discussed in his judgment). However, it is now well established that the weight which he gives to it is pre-eminently a matter for him. The position was clarified by Lord Briggs in **Ming Siu Hung and others v J F Ming Inc and another**.¹⁴

“A view that a judge should have given ‘more weight’ to a relevant matter is not within the scope of appellate review. Matters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational.”

[69] In this appeal there had been nothing to suggest that the learned judge had started off with any presumption in favour of the father's claim. The judge had taken into account and given appropriate weight to each of the factors to which the mother had

¹³ Re Z (Relocation) [2012] EWHC 139.

¹⁴ [2021] UKPC 1.

drawn attention. She had acknowledged that the mother was the primary carer and had recognised the importance the mother had been attaching to the argument based upon the status quo. She had given appropriate weight to both, whilst correctly appreciating that neither could be decisive.

- [70] In my judgment, there was no maintainable basis for any complaint that the judge had either taken into account irrelevant factors or failed to take into account any relevant factors nor was there any sustainable basis for a complaint that the judge had erred either in the weight she had chosen to attach to the various factors she had to take into account or her evaluative decision as to where the ultimate balance had fallen¹⁵.

Ground M

- [71] Finally, the mother has submitted that the decision of the court below interferes with her rights. This decision is wrong in law as it disproportionately interferes with her Article 8 right to family and private life (and those of the children) as well as her right to freedom of movement (Article 2 of Protocol No. 4) of the European Convention of Human Rights which are mirrored and expanded on in section 9(c) and section 18 of the Constitution of the Virgin Islands: the Fundamental rights and freedoms of the individual and Protection of Freedom of Movement respectively. She further contended that substantial financial and emotional hardship will no doubt follow from the decision if it is not set aside - she will have to move to the UK to continue to be the children's primary carer and her hard fought but thriving BVI business is bound to suffer/fail.

- [72] Counsel for the father made short shrift of these arguments. Describing this latter suggestion that the mother would suffer "substantial financial hardship" if she moved to the UK as new, he submitted that it is also inconsistent with the oral evidence that her earning capacity would be greater in the UK. Counsel further submitted that since the mother made it clear that if the relocation was granted, she too would

¹⁵ See paragraphs 20-21 of the judgment.

move and that she would be able to continue her work in the UK any interference with the mother's family and private life would therefore be minimal and proportionate.

[73] Counsel also countered that the father also has a right to family life which would have been seriously affected if the relocation was not allowed because he was obliged to work in England and therefore the time that he would be able to spend with the children would be severely reduced if they stayed in the BVI, as has transpired to be the case. He further submitted that the children also have a right to family life and this equates to a right to have as full a relationship and the maximum time possible with each parent. He argued that this is possible to achieve with both parents in England but impossible to achieve with the mother in the BVI and the father in England.

[74] By way of reply, the mother submitted that although the father has used his right to family life, as an additional crutch to ground his application for the relocation of the children, his right to family life does not mean that the mother should be forced at his election, to move jurisdictions to accommodate him. This is especially where it is implied by the father's evidence, that when his employers direct him to move, he will have to do so, and raising children requires stability.

[75] These arguments would present a conundrum for any court considering an application to relocate a child because they clearly reflect a potential adverse impact whichever way a court decides. In the recent English case of **Re: V (Appeal: Relocation)**¹⁶, the court had to contend with similar arguments and provided useful guidance on the proper approach to be adopted in this case. The court was considering an appeal against the order made by Recorder Southern in which she permitted the respondent to relocate the child to a city in the North of England. Citing and applying the dicta in **Re C (Internal Relocation) [2015] EWCA Civ 1305**¹⁷ the

¹⁶ [2024] EWHC 2600 (Fam).

¹⁷ See also *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882, [2017] 1 FLR 979, at para 32. Applied in *Re CB (International Relocation: Domestic Abuse: Child Arrangements)* [2017] EWFC 39.

court quoted extensively from the judgment of Black LJ where she turned to consider the question of proportionality. At paragraph 55 onwards she observes:

“55. Before I leave the law, I want to venture a few words on the subject of proportionality. Ryder LJ raised this issue at paragraph 31 of Re F [2015] as follows:

‘Finally, a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged requires that the parents’ plans be scrutinised and evaluated by reference to the proportionality of the same. There was no question of that before this court, nor could there have been. It is a proposition that has already been decided that international relocation cases engage articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 [ECHR]. Whatever earlier obiter observations on and doubts about the applicability of the Convention to these cases that there had been were settled by the Strasbourg court’s decision in Glaser v United Kingdom (Case No 32346/96), [2001] 1 FLR 153 at (57) to (65)’

56. Ryder LJ went on to say, at paragraph 32, that:

‘it will not be every private law application that requires a proportionality evaluation. Many if not most private law children applications will be more than adequately protected by the domestic statutory regime and the jurisprudence of this court. International relocation applications under section 13 CA 1989 may require a proportionality evaluation because of the likelihood of the severance of the relationship between the child and one of her parents. That evaluation will inevitably focus on the welfare analysis of each of the realistic options and may amount to no more than an acknowledgement that one option is better than the other and that the preferred option represents a proportionate interference in the article 8 ECHR rights of those involved.’

57. The present appeal has caused me to consider how a proportionality evaluation would actually work in the context of a relocation case. We are now entirely familiar with the role of proportionality in relation to public law children proceedings, see particularly In the matter of Re B (Care Order: Proportionality: Criterion for Review) [2013] UKSC 33, [2013] 2 FLR 1075. Its impact is upon whether the court sanctions an interference in family life by the state in the guise of the local authority. Interference will not be permitted if it would violate the rights of the child or parents to respect for their family life under Article 8 of the ECHR. Proportionality also has a well established role in contact disputes where, as can be seen notably in Re A (Intractable Contact Dispute: Human Rights Violations) [2013] EWCA Civ 1104, [2014] 1 FLR 1185 the court can have an obligation to ensure that

appropriate steps are taken to enable the family tie between parent and child to be maintained. It is not difficult to see how Article 8 influences the outcome in that situation – the court has to strive harder.

58. However, the situation in a relocation case is more problematic. Often, whichever way the decision goes, there will be an interference with the Article 8 rights of a parent. If the father is allowed to take the child to live at the other end of the country, there may be interference with the mother's Article 8 right. If, on the contrary, he is refused permission to move, there may be interference with his Article 8 right. Both parents may be disinclined to back off and middle courses are not often easy to find in these problematic cases. As Ryder LJ implies, the problems may be worse in the international context – Australia is more difficult than another town in the United Kingdom – but even moves within the United Kingdom can be seriously disruptive of established arrangements. Left with a significant interference with Article 8 rights whichever way one turns, what can the court do? What should it do?

59. Nazarenko v Russia (Application No 39438/13) [2015] 2 FLR 728 was put before us as a recent example of the approach of the ECtHR to balancing the rights of parents and children. At paragraph 63, the Court put it this way:

‘Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, primary importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents (see Sahin v. Germany [GC], no. 30943/96, § 66, ECHR 2003-VIII , and Plaza v. Poland , no. 18830/07, § 71, 25 January 2011).’

60. Nobody has suggested that section 1 of the Act (the welfare principle and the welfare checklist) is incompatible with the Strasbourg jurisprudence and, **when one looks at the way in which relocation cases are approached in the courts of England and Wales, it seems to me it is an approach which is broadly in line with what is expected by the ECHR. The interests of the parents are not ignored but, if it is not possible to accommodate everyone's wishes, the best interests of the child dictate the outcome.”**

61. Mr Hale QC, for the father, originally suggested in argument that first the court has to carry out its comprehensive analysis of the welfare considerations and reach a conclusion, then that conclusion must be subjected to a cross-check by considering whether such interference with the article 8 rights of the parties as it involves is proportionate. I have struggled with how that could be made to work in practical, real life, terms. If the cross-check produced the same result as the welfare analysis, it would be unproblematic but not very useful except as reassurance. If it produced a different result, that result could only have an impact on the outcome of the case if the provisions of section 1 of the 1989 Act were to be ignored. **I am afraid that there also seems to me to be a real danger of the parties**

and the court getting so tangled up in the strands of the two separate exercises that they lose sight of what really matters for the child. All in all, therefore, in my view, matters should be approached as an analysis of the best interests of the child, whether the relocation is internal or external. Given the potential for the impact of the decision on the parents to affect the child as well, this necessarily involves a careful examination of the parents' wishes and their interests. Emphasis added

- [76] I commend this approach. Having reviewed the judge's reasons it seems to me that her approach largely followed that guidance.
- [77] It is beyond doubt that the father's application was robustly opposed by the mother who articulated her wishes clearly.¹⁸ The learned judge had before her the totality of the mother's evidence both written and oral. The mother's evidence addressed the potential impact which relocation would have on her, her relationships and her business interests and the judge made certain findings in that regard.¹⁹
- [78] The impact of a refusal upon a parent seeking relocation may be an important factor in a case, but it is important to bear in mind that it is one factor of many which the court must consider in the balancing exercise to determine where the child's welfare lies. The impact which a refusal will have upon the left behind parent must be fitted into the court's welfare balancing exercise. The judge also appeared to take some comfort from the fact that the mother's profession is a flexible one and that she indicated that she would relocate with the children in the event that she is unsuccessful. However, her order (at paragraph 6) makes clear that her decision is not contingent on this factor alone.
- [79] Ultimately, after balancing the parents' wishes and interests (along with all of the other relevant factors) she determined that relocation to England was in the best interest of the children. She did so having considered the historical parenting roles of the parties and the competing care plans. Ultimately, she accorded significant

¹⁸ See Paragraph 7 of the judgment.

¹⁹ See Paragraph 14 of the judgment.

weight to the children's need to maintain meaningful contact with both parents in a country where they are entitled to reside as of right.²⁰ She clearly had in mind that the children's need for stability and continuity in their schooling, social life, and community.

- [80] The learned judge further determined that relocation would not unduly disadvantage the children's education, medical care or exposure to extracurricular activities because the institutions and facilities in England are comparable. She recognized that there would be some disruption in the children's current socialization, some loss of friendships, but she was entitled to take into account the fact their tender ages and the resilience which this affords. She clearly weighed in the balance the fact that relocation to England would have afforded them an extended circle of family on both sides who could foster connections and support. The additional support of family and community at the new location would likely enhance the parent's ability to care for the children. In my judgment there is no basis to interfere with those findings.

Unworkability of the court's order

- [81] Although this did not feature as a ground of appeal, in oral submissions counsel for the mother took issue with the terms of the order made by the learned judge, contending that it is unworkable. According to counsel, rather than request that the mother provides a more comprehensive care plan, the learned judge made orders which lacked specificity and finality. He submitted that under the current terms of the order the child can be relocated to live anywhere in the UK including Scotland. He further takes issue with the fact that as the mother has been forced to relocate to the UK with no plan in place for her residence or employment and in circumstances where the judge has not broken down the constituent elements for the future care of the child. Instead, she has instead simply left it to the primary carer to arrange affairs.

²⁰Re L (A Child) (Custody: Habitual Residence) [2013] UKSC 75.

[82] I am not inclined to consider these arguments which would clearly represent an additional ground of appeal not canvassed in the notice of appeal or his written submissions. I will only say that it is always open to parties to return to the High Court to seek clarification or a variation of the terms of a court order once the requisite case can be made out.

Conclusion

[83] In conclusion, I am compelled to cite the case law which sets out the proper approach of an appellate court hearing private law family appeals and I reminded myself that the task of this Court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in **Piglowska v Piglowski**²¹ where at page 1372 he observed that:

"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the Judge by a narrow textual analysis which enables them to claim that he misdirected himself..."

[84] I am also guided by the following dicta of Dame Siobhan Keegan in **Re H-W**:²²

"48. The very clear decision in *In re B*, albeit by majority, is that the existence of the requirement of necessity and proportionality does not alter the near-universal rule that appeals in England and Wales proceed by way of review rather than by way of re-hearing. It follows that it is not incumbent upon an appellate court to undertake a fresh evaluation for itself of the question of necessity and proportionality. For the reasons clearly stated by, in particular, Lord Neuberger at paras 83-90, such is contrary to principle, as well as undesirable in practice. In particular, if each appellate court were to undertake such a fresh evaluation, it would expose the parties, and the children, to the risk of successive investigations of the same issue, certainly two, and in some cases three or even four times. It would also mean that

²¹ [1999] 1 WLR 1360.

²² [2022] UKSC 17.

the appellate court was expected to undertake a task for which it is unsuited, having not heard the evidence or seen the parties for itself. A decision on paper is no substitute for the decision of a judge who has, as Lord Wilson felicitously put it at para 42, had the advantage of a face-to-face, bench-to-witness-box acquaintanceship with those who are under consideration as carers of the child(ren).

49. In a case where the judge has adopted the correct approach to the issue of necessity and proportionality, the appellate court's function is accordingly, as explained in *In re B*, to review his findings, and to intervene only if it takes the view that he was wrong. In conducting that review, an appellate court will have clearly in mind the advantages that the judge has over any subsequent court - see Lord Wilson in *In re B* at para 41 and the earlier decision of the House of Lords in *Piglowska v Piglowski* [1999] UKHL 27; [1999] 1 WLR 1360".

- [85] In this case the proposed appeal is against the learned judge's exercise of her discretion within well-known and agreed legal principles. This Court's task as an appellate court is to review that decision in accordance with the principles established in the case law which has been set out above. When I do so, I find that the trial judge's analysis was free from a material error, serious misapprehension of evidence, or error of law. At all times, the trial judge remained focused on the child's best interests. She only considered the parent's needs, interests and views to the extent that they were relevant to the children. The trial judge was clearly of the view that relocation would both directly and indirectly benefit the children. I cannot say that the learned judge has exceeded the generous ambit of her discretion, and I cannot say her decision was wrong. Accordingly, the appeal is dismissed.

Respondent's Notice

- [86] The father has lodged a Respondent's Notice in which he relies on the following additional grounds to uphold the learned judge's decision. He contends firstly that the mother's breaches of her duty of full and frank disclosure on her ex-parte application heard on 2nd February 2023 which resulted in the children being returned to the BVI and the mother suggesting this was the status quo were not relied on by the judge and secondly that the parenting agreement that the parties relocate to the UK was referred to by the judge but should have had more weight attached to it.

[87] According to counsel for the father, these grounds if found by the court would have tilted the balance even more in favour of a relocation. However, in oral submissions before this court, counsel represented that this Notice was a procedural step which only becomes relevant in the event that this court is minded to allow the appeal. For the reasons indicated, I am not so minded. It is therefore unnecessary to go on to consider the Respondent's Notice.

Disposition

[88] For the reasons discussed above, I would make the following orders:

- (1) The appeal is dismissed.
- (2) The decision of the learned judge is affirmed.
- (3) As to the issue of costs, applying the principles in **Re O (Appeal: Costs)**²³ I do not consider either party has behaved unreasonably or reprehensibly in relation to this litigation. Accordingly, I consider the appropriate costs order is no order for costs between the parties.

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

I concur.
Georgis Taylor-Alexander
Justice of Appeal [Ag.]

By the Court

Chief Registrar

²³ [2024] EWHC 1163 (Fam).