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Case No: FD19P00271

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2019

Before :

HHJ MORADIFAR
(SITTING AS A DEPUTY HIGH COURT JUDGE)

In the matter of:

Re H (Children: Relocation)

Indira Ramsahoye (instructed by **Nockolds Solicitors**) for the **Mother**
Dorothea Gartland (instructed by **International Family Law Group**) for the **Father**

Hearing dates: 17 and 18 October 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ MORADIFAR (SITTING AS A DEPUTY HIGH COURT JUDGE)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HHJ MORADIFAR:

Introduction

1. At the centre of this case, there are two children. I will identify them as A and B. They are four and three years old respectively. Since March 2018 the children have lived with their mother in England. They have had regular and extended contact with their father. The mother seeks court orders to secure the continuation of these current arrangements. The father applies for permission to relocate the children to the Netherlands where he now lives. The parents agree that wherever the children live, it would be ideal that the other parents should relocate to live close to the children where they can be “co-parented”. In the absence of such arrangement, the parents agree that the children regularly and extensively see the parent who lives in another territory.
2. Ms Jennings who is the CAFCASS officer appointed to this case, found the parents to be exceptional parents and has no material concerns about either parent’s ability to parent the children to the highest standards. As such, she finds herself unable to make a positive recommendation about the children’s living arrangements. She suggests that the children should spend a significant portion of their school holidays with the parent with whom they do not live during the school term.

The law

3. Each parent must prove his/her case on a balance of probabilities. S1 of the Children Act (1989) makes it clear that the children’s respective welfare is my paramount consideration and that I must make my decision by reference to the ‘welfare checklist’ as set out in the s 1(3) of the said Act.
4. I have considered the following cases:

Payne v Payne [2001] 1 FLR 1052

Re (Children) [2011] EWCA Civ 793

K v K (Relocation: Shared care arrangements) [2012] 2 FLR 880

Re F (Relocation) [2013] 1 FLR 645

Re F (a Child) (International Relocation) [2015] EWCA Civ 882

Re C (a child) [2019] EWHC 131 fam in the course of which Williams J most helpfully summarised the most up to date approach to be taken by the court as follows;

“15. The most recent and authoritative appellate decision on the approach to permanent overseas relocation cases is Re F (A Child) (International Relocation Case) [2015] EWCA Civ 882 [2017] 1 FLR 979. The material paragraphs of the judgment are 3, 4, 30-35 (Ryder LJ) and 45-52 (McFarlane LJ). Re F together with the earlier authorities of 'Payne, Re F, K-v-K and Re C (Internal Relocation) makes clear that that whether the applications are configured under s.8 or s.13 Children Act 1989 the following framework applies.

(a) The only authentic principle is the paramount welfare of the child

(b) The implementation of section 1(2A) Children Act 1989 makes clear the heightened scrutiny required of proposals which interfere with the relationship between child and parent

(c) The welfare checklist is relevant whether the case is brought under s.8 or s.13 Children Act 1989

(d) The effect of previous guidance in cases such as 'Payne' may be misleading unless viewed in its proper context which is no more than that it may assist the judge to identify potentially relevant issues.

(e) In assessing paramount welfare in international relocation cases the court must carry out a holistic and non-linear comparative evaluation of the plans proposed by each parent. In complex international relocation cases this may need to be of some sophistication and complexity.

(f) In addition to Article 8 rights – indeed probably as a component of the Art 8 ECHR rights and s.1(2A) one must factor in the rights of the child to maintain personal relations and direct contact with both parents on a regular basis (unless that is contrary to her interests) in accordance with Article 9 of the United Nations Convention on the Rights of the Child ("UNCRC").

(g) Furthermore, the court must also take into account the Article 8 rights of the parents. In the usual case the child's Art 8 right will take priority over the parents but that should not cause the court to overlook the Art 8 rights of others affected and the court should balance the competing Article 8 rights.

(h) The effect of an international relocation is such that the Article 8 rights of a child are likely to be infringed and the court must consider the issue of proportionality of the interference. There remains some degree of uncertainty as to how the proportionality evaluation is to be applied in relocation cases. In Re F it was said one should be undertaken, In Re Y [2015] 1 FLR 1350 it was said in private law cases it doesn't need to be, The Court of Appeal in Re C (Internal Relocation) expressed doubts about how it was to be undertaken. I consider that in most cases in practice the proportionality issue will be subsumed within the overall holistic evaluation in particular when considering effect of change and risk of harm. In reality in the judicial consideration of the welfare checklist it simply is likely to mean the judge will be that much more alert to the importance and thus weight to be afforded to the child's right to maintain contact with the left behind parent and their rights to a stable and secure family life with their primary carer, if there is one.

16. Insofar as it may assist in identifying the relevant issues a court may (but is not obliged to) deploy what may be described as the 'F, K, C, Payne' composite. This is no more than an integrated approach to the welfare checklist and the 'Payne' guidance/discipline incorporating within the welfare checklist relevant Payne criteria and any other particular features of the individual case which appear relevant. Of course in some cases it may be that one or more particular aspects will emerge as carrying significantly more weight than others – a contour map with high peaks and low valleys; in others the factors may be much more evenly weighed and present a gently undulating landscape. In the former the balance may fall more obviously in one direction if it is dominated by peaks with no valleys in others the peaks may be balanced by the valleys creating a finer balance. In the latter the overall undulations may make the balance a very fine one. Ultimately every case is fact specific. This case is a paradigm example of that.”

5. Finally, each of the parties have a right to a fair trial pursuant to Article 6 and together with the children a right to private family life pursuant to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). These rights cannot be interfered with unless such interference is pursuant to a legitimate aim, necessary, proportionate and in accordance with the law.

Background

6. The mother is English and works as a journalist. The father is Dutch and works in a government department. Previously he worked for an NGO. The parties met in 2010 when they both lived and worked in west Africa. In 2013 they set up a home in the Ivory Coast. The children were born in 2015 and 2016. They were both born in England and spent a short time in England before visiting Netherlands and finally returning to their home in the Ivory Coast.
7. In 2016 the parents' relationship began to suffer. They were committed to resolving their difficulties. The sought help through relationship counselling that concluded in early 2017. Later in the same year their relationship came to an end, but they continued to live under the same roof.
8. There is a great deal of dispute between the parties about the circumstances in which the mother removed the children from their home. On the mother's case, she was faced with threats of court proceedings by the father that he intended to issue in the Ivory Coast. The mother was fearful about the prospect of such threats coming into fruition. The father denies making such threats and states that the mother made a unilateral decision to remove the children without discussing the same with him. It is beyond dispute that on 27 March 2018, the mother informed the father that she was taking the children to the beach. Instead she took the children to the airport and left for England where the children have continued to reside. In April 2018, the mother enrolled the children at nursery. B continues to attend the same nursery. A started school in September 2019.
9. On 11 April 2018 the mother applied for orders securing the children's living arrangements with her. The following day, on 12 April 2018 the father issued his application for the summary return of the children to the Ivory Coast. The court found

that the mother had unilaterally removed the children from the Ivory Coast where they were habitually resident but the courts of England and Wales should continue to deal with this matter. The father's application was dismissed.

10. Thereafter the parties engaged in the Child Abduction Mediation Scheme and two separate privately funded mediation services. Regrettably, the parties' efforts were not rewarded with a concluded agreement about their children's future living arrangements. During 2018 and 2019 the children have spent extended period with their father in the Netherlands. Initially this was at the paternal grandparent's home. The father relocated to the Netherland in March 2019 and latterly has obtained his own address where the children live with him during the time they spend with him. Communications between the parents have not improved and remain difficult.

Evidence

11. I have read the papers that are within the court bundle. Additionally, I have heard the oral evidence of Ms Jennings who is the allocated CAFCASS officer of thirty years experience, the father and the mother. Having considered all of the 'welfare checklist', I will set out the material parts of their evidence by reference to the relevant sections of the said checklist.
12. As confirmed by Ms Jennings, A and B are delightful, healthy and well-adjusted children. They each have a close and positive relationship with each of their parents. They are much too young to have an informed view about the issues before the court. It is clear that they very much enjoy living in their two homes. I have little doubt that the children would wish to see as much of their parents as possible. I note that A is reported to have said to her father "*I want to live with you daddy*" and at other times has said to her father "*I want to live with you and mummy*".
13. Neither child has any physical, emotional or educational needs that are beyond their age appropriate needs. These considerations are also closely connected to the parents' capabilities to meet those needs. Subject to the foregoing, Ms Jennings observes and the parents attest to each other's capabilities as parents together with their abilities to meet the children needs. In her reported dated 27 September 2019, Ms Jennings notes two points of concern in respect of the mother's abilities to meet the children's needs.

Firstly, when A stated that “*hates Dutch*” and secondly, the mother’s interjection to clarify that A becomes ‘anxious’ about train journeys. In her oral evidence Ms Jennings tempered her note of concern in respect of these two issues that are strongly denied by the mother. She was clear that the mother is not deliberately undermining the children’s relationship with their father. Furthermore, she found the children to be entirely relax in the care of the father.

14. The mother stated that she has been very supportive of the children’s Dutch heritage as illustrated by her continuing commitment to contact and that she could not conceive of circumstances where she would say such things. She stated that A does say a lot of things that do not always make sense. She thought this to be entirely age appropriate without any malice. The mother accepted that the children’s removal from their home in the Ivory Coast would have caused a great deal of confusion for the children and possibly damaging to them. In agreement with Ms Jennings, she further stated that the father has not “*moved on*” since the children came to live in England and his views of the mother are tainted by this experience. She explained that at handover, the father tends to communicate with the mother through A. This introduces an unnecessary tension that the children are very aware of. The father did not accept this as unreasonable and sought to excuse it by stating that it had only happened on one occasion. The mother’s answers to the questions about the last two Christmas holidays also sought to excuse her behaviour,
15. The issue of where they are to be educated is closely connected to their cultural needs. I accept the father’s concerns in this regard as well placed and genuine. As he told me, there is a significant difference between living and being immersed in a culture than being tutored whilst living in a different culture. Furthermore, the English mainstream education system is not set up to support their Dutch heritage and language. Inevitably this will require additional resources to be put in place that may lead to the children’s resentment of their father or their Dutch heritage. I note in recognition of this issue, the mother told me that A has a Dutch friend who she sees regularly. She has also looked into the possibility of extra tuition in Dutch and did not accept the father’s anxieties in this regard given that the children will be spending significant periods of time with their father and the paternal family. In Ms Jennings’ opinion, whilst this is an important issue, she was confident that the extended periods spent living in their home with the father

during the school holidays would go a long way to address this issue. The father has provided details of a school that will teach English and states that this will best meet the children's needs. He was unable to answer the mother's enquiry of the school who have stated to her that children between the ages of two and five will receive thirty minutes of English lessons each week and there after this will be increased to ninety minutes.

16. The children have already experienced a significant change in their circumstances. Notwithstanding these circumstances, they appear to have adjusted to those significant changes. Against this background and the children's established connections to their home with their father, Ms Jennings does not observe any serious concerns about the father's proposed relocation of the children to the Netherlands. She opines that the children will adjust quickly to their new school or nursery. Much like each parent, she stated that it would be ideal that the parents live in close proximity to 'co-parent' the children. She touched on the mother's observation to her that she will move to the Netherlands if the children are permitted to relocate. However, she made it clear that the mother also raised her concerns about her employment and quality of her life generally in the Netherlands.
17. The mother explained that it had been the parties' intention to relocate to Europe. Her comments to Ms Jennings were stated in the moment. She further stated that her employment prospects are very limited in the Netherlands and she does not speak Dutch. She would take any job possible, however unrewarding, if it means being close to her children but explained that this will come at a great sacrifice to her established career and quality of life where she has no friends or support in the Netherlands. Notwithstanding the lack of any direct evidence, the father sought to maintain a position that the mother could readily find suitable employment as a journalist. He invited the mother to reconsider the opportunity to co-parent in the Netherlands. He explained with great dignity and appropriate emotion that there is a material difference between the children visiting him and the children living with him. The latter would involve rushing in the morning to get to school and the normal daily challenges that are absent during the holiday periods. It is those challenges, he explained, that builds relationships and affirms his equal footing in the children's minds.

18. He raised understandable objection to the mother's use of the term "holiday" when visiting their father which in his view introduces a sense of impermanence to the children's lives in the Netherlands and capable of undermining their relationship with him and their cultural needs. He further stated that whilst a relocation to the Netherlands will be a material change for the children, the benefits of such a change overwhelmingly outweigh a short period of adjustment by the children. During visits, he is willing to open his home to the mother and for the children to have both parents in their lives. A relocation will have the added benefit of meeting the children's cultural needs that would otherwise suffer.
19. Both parents agreed with Ms Jennings' recommendation that more than half of school holidays should be used to increase the time spent with the parent with whom they do not live with in terms time. Miss Jennings also shared the father's concerns that when the children are living with their father, the contact with the mother should be more limited and less than daily. She expressed her concern that to continue such a high level of contact can make the children miss their mother, become homesick that can provoke anxieties and be unsettling for the children. Both parents agreed that this should be more limited. The mother further added that she would hope that this could be a more fluid arrangement that responds to the children's needs and the parents plans for the day. In this regard, she did not believe that it would be beneficial for the children or the parents to have a rigid structure in place.

Analysis

20. I found the mother and the father to be charming, intelligent and focused on their children's welfare. They each have a great deal to offer their children and in their own individual ways are exceptional parents. Their evidence and their conduct must be assessed in the context of the breakdown of their relationship which has in my judgment become the main barrier to these parents jointly making decisions about the children's welfare. I have little doubt that the failed attempts at resuscitating their relationship followed by the children's wrongful removal from their home and their father in the Ivory Coast, has cast a heavy cloud on these parents' approach to each other. There is an understandable breakdown in trust between the parents, particularly by the father, which has tainted the parents' views and the interpretation of the other's behaviour.

21. There is no direct evidence that can assist me in gauging the employment opportunities that are available to the parents in both jurisdictions or the impact on their quality of life. I note that father has friends in the UK and is fluent in English. On balance, I accept his evidence that living in certain parts of England can be much more expensive than where he currently resides. The mother had clearly considered the prospects of working and living in the Netherlands. She does not speak Dutch and I accept her evidence that her employment opportunities as an English speaking journalist are very limited.
22. The English language is internationally more prevalent than Dutch. Through many television programmes, films, books and social media, an international version of the English language has become significantly more familiar than Dutch. If the children relocate to the Netherlands it is likely that they will continue to learn and use English. I accept that the current school proposed by the father has limited lesson in English. The children's exposure to the English culture will be more restricted and limited to the time they will be seeing their mother. Should the children remain living in England, their exposure to the Dutch culture will be limited to the time that they are living with their father. However, to learn and maintain their Dutch language, inevitably requires a greater effort by the parents and the children. Whilst this maybe further ameliorated by seeing their father regularly, it is beyond argument that the preservation of their Dutch heritage will be more limited.
23. I have carefully considered the father's concerns about the mother's ability to maintain and promote a positive relationship between him and the children. Whilst there were concerning features in the mother's approach to the last Christmas holiday and the notes of concerns raised by Miss Jennings, in my assessment of the mother's evidence in the context of the totality of the evidence before me, I am certain that the mother will promote a positive relationship between the children and their father. I found her to be entirely child centred and searching for better ways of promoting the children's needs. She was very open to suggestions and reflected on her past decisions. This was perhaps best illustrated by her approach to the daily contact with the children when they are in the father's care. She clearly reflected on Ms Jennings' advice and recommendation and was quick to recognise an alternative and a better way in which to approach this issue. I found the father to be more structured and rigid in his approach. However, I am

equally certain that he will promote and preserve a positive relationship between the children and their mother.

24. The children are very young and this may be the most opportune moment to make decisions about their living arrangements. I am sure that Ms Jennings is correct in stating that children will soon adapt to living in the Netherlands. It is clear that they have adapted very well to living in England where they have resided for the last nineteen months. This coupled with the parents' obvious abilities to provide excellent care for their children, I have no doubt that they will thrive and flourish wherever they live in the care of either or both of their parents.
25. The concepts of reward and punishment may find a great deal of focus when families discuss the circumstances that have brought them into the court arena. However, when considering the welfare of a child, there is usually very little room for such considerations. The focus is not to reward or to punish a parent, rather to find a solution that best meets the welfare needs of the subject child. Therefore, whilst it is not surprising that the father may feel that to allow the children to live in England with their mother would be "*rewarding her*" for the wrongful removal of the children, such consideration have no room in the balancing exercise that the court is tasked with.

Conclusion

26. This is a finely balanced case that has seen a very experienced CFCASS officer unable to make a firm recommendation about in which country the children should live. The evidence of the parents' capabilities and child focussed approach is overwhelmingly clear. I am certain that these children will have a close and enduring relationship with both of their parents. Having considered the totality of the evidence before me as applied to the 'welfare checklist', I find a lack of cogent evidence or justification for the court to interfere with the children's living arrangements. Accordingly, I dismiss the father's application for permission to relocate the children to the Netherlands. I am satisfied that the children's living arrangement with their parents should be recognised by a 'joint live with order' so that there can be no doubt that the children will continue to live both of their parents.

27. Going forward, as accepted by the mother the Christmas holidays should alternate between the parents which must commence by no later than 23 December each year and not conclude until 29 December of the same year. The second half will be spent with the other parent. The children will live with the father for the first half of the Christmas holidays in 2019. The alternating arrangements shall apply to the children's birthdays. The children will also live with the father during October and February half terms. They will live with the father for two thirds of the Easter holidays with Easter alternating between the parents. The children will also live with the father for a period of four weeks during the school summer holidays which must be arranged by reference to the provisions about the children's birthdays. During the school term, the children may spend time with their father on at least one extended weekend that would permit the father to collect and return the children to their school or nursery. Save in an emergency, during the time that children live with one parent, the other parents shall receive regular updates of two times per week and telephone or skype (or equivalent) contact with the other parent at two times per week. The parents must agree the convenient times for this to occur. These provisions may be varied by agreement between the parents. The children's needs will change as they grow and the parents need to work with a degree of flexibility so as to safeguard and meet the best interest of the children.