



Neutral Citation Number: [2020] EWHC 2548 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/09/2020

Before:

MRS JUSTICE KNOWLES

Between:

**WS
- and -
KL**

Appellant

Respondent

Mr Christopher Hames QC (instructed by **Cambridge Family Law Practice**) for the
Appellant

Mr Paul Hepher (instructed by **BDB Pitmans**) for the Respondent

Hearing date: 5 August 2020

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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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This judgment was delivered in public. 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.

Mrs Justice Knowles:*Introduction*

1. This is an appeal by the appellant father against an order made by HHJ Yelton on 6 April 2020 (as approved by the judge following further submissions on 28 April 2020) by which he granted permission to the respondent mother to remove the children, X and Y, permanently from the jurisdiction of England and Wales to live in the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong).
2. The appellant father ["the father"] was represented at first instance by Christopher Hames QC who has represented him in the appeal. The respondent mother ["the mother"] was represented by Paul Hepher at first instance and he also represented her in this appeal.
3. The order followed on from an ex tempore judgment delivered by the judge in the afternoon of 6 April 2020. During a hearing conducted remotely, the judge heard evidence from the parents and from the Cafcass officer on 30 and 31 March and heard oral submissions from counsel on the morning of 6 April 2020. Following delivery of judgment, the judge granted the mother permission to remove but doubted whether it would happen any time soon and made it a pre-condition that she should register a mirror order in the Hong Kong family court. He proceeded to announce some decisions in respect of child arrangements but left it to the parties to agree the form of draft order. He also refused the father's application for permission to appeal but granted an extension of time to apply to this court. In the event, the parties were unable to agree the terms of the draft so, with the agreement of the judge, rival draft orders and written submissions were emailed to the judge on 28 April 2020. The judge provided an approved order and a note setting out his decisions and brief reasons for them on 29 April 2020. This was after the judge's retirement from the Bench.
4. By a Notice of Appeal dated 3 May 2020, the father sought permission to appeal against the judge's order on the following grounds:
 - a) That the judge failed to adjourn the final hearing and ordered that it should proceed by remote video hearing;
 - b) That the judge's decision to permit the permanent removal of the children to Hong Kong was wrong and contrary to the best interests of the children in that:
 - i) He failed to undertake any or any proper holistic and non-linear comparative evaluation of the available options facing the children;
 - ii) He failed properly to assess the disadvantages to the children of moving to Hong Kong and to assess the advantage to the children remaining in England and Wales;
 - iii) He failed to make proper findings and/or to assess the risks to the children of the mother causing them emotional harm by failing adequately to preserve or promote their relationship with their father and to spend time with him pursuant to s.1(2A) of the Children Act 1989;

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- iv) He failed to conduct any assessment of the interference with the Article 8 rights of the children (and the father) or to consider the proportionality of the interference whether as a separate exercise or as part of the holistic evaluation;
 - v) Having found that the mother's proposals for the children's time with the father were not generous, he should have analysed and concluded that a relocation was not in the children's best interests;
 - vi) He placed improper weight on his finding that the mother had not wanted to move to England in 2016;
 - vii) He placed under weight on his own perception that parents of Chinese origin with school age children often moved to [location where the family lived] on the mistaken assumption that they would as a consequence be more likely to secure places at the University of [X];
 - viii) He placed improper and unreasonable weight on the mother's "devastation" if her wish to move with the children to Hong Kong was denied;
 - ix) He placed undue weight on the mother's concerns about the lack of a support network which, on investigation, amounted to her dismay that she had few visitors when ill in hospital in February 2019. The judge failed to find that the father was available at all relevant times to care for the children if the mother was unable to have them during the times allotted to her;
 - x) The judge failed to undertake any analysis of the unstable political situation in Hong Kong which was a major factor in the family's decision to leave Hong Kong in 2016 but which had deteriorated considerably while the family had been in England.
- c) The judge failed to provide for a mid-week overnight visit with the father in term times as recommended by the Cafcass officer and provided no reasons for failing to rule on this issue as he was invited to do in the written submissions he received on 28 April 2020;
- d) In the alternative, if grounds A and B were dismissed, the judge was wrong not to order the mother to ensure that the children had contact with the father when he was able to travel to Hong Kong during the school term time and in other school holidays apart from Easter, summer and Christmas.
5. On 9 June 2020 I made an order granting permission to appeal and limited the grounds of appeal to grounds A, B and D. With respect to ground C (contract prior to removal), the judge had subsequently retired and, given the limited significance of that ground, I considered that a direction he should provide reasons was disproportionate. Contact prior to removal was a matter which would fall to be considered either at the conclusion of the appeal or at any rehearing of the mother's application if the court so ordered. Finally, I stayed the judge's order permitting relocation pending the outcome of the appeal.
6. I listed this matter originally for 4 and 5 August 2020 to allow time for reading, submissions, and judgment. Unfortunately, work pressures meant that it appeared unlikely that I could hear the appeal on those dates. Via my clerk, I canvassed an

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alternative listing in the weeks commencing either 24 or 31 August 2020 only to be informed that the mother had arranged for the children to start school in Hong Kong on 27 August 2020. To accommodate these arrangements, I agreed to hear submissions on 5 August and, in advance of the hearing, to read the material in my own personal time. I did so and gave a decision without a judgment on 5 August 2020. This is my reserved judgment.

7. At the start of the hearing Mr Hames QC applied for permission to withdraw ground A in relation to the judge's decision to hold a remote hearing. I granted permission as the matters advanced in the skeleton had by then been superseded by authoritative guidance from the Court of Appeal on remote hearings. That guidance amply justified the decision to hold a remote hearing.
8. Mr Hames QC also made an application to adduce fresh evidence which was not before the judge. That evidence addressed the political situation in Hong Kong, it being a part of the father's case that unrest and political instability rendered Hong Kong an unsuitable place for the children's relocation. The evidence he sought to adduce was (i) a report deposited in Parliament on 11 June 2020 which analysed a number of incidents in Hong Kong, all of which had been reported in the press at the time they took place; (ii) a statement to Parliament made by the Secretary of State for Foreign and Commonwealth Affairs on 20 July 2020 which concerned the attitude of the United Kingdom Government to recent events in Hong Kong; and (iii) an article by the Prime Minister published in the Times on 3 June 2020 concerning the United Kingdom's ties of friendship and history with Hong Kong. Additionally, extracts from the United Kingdom Government's website as to travel to Hong Kong during the Covid-19 pandemic and an extract from the website of the Government of the Hong Kong Special Administrative Region concerning travel into Hong Kong were also provided. The father submitted that the travel guidance was unclear as to whether the mother and the children would be required to quarantine in a hotel on entry to Hong Kong or if his ability to travel to Hong Kong to see the children might be impaired by reason of quarantine restrictions.
9. The mother opposed the application to adduce fresh evidence as the father had made clear to the judge in his written and oral evidence his reliance on an uncertain political situation in Hong Kong. She provided evidence in rebuttal showing that, as Chinese citizens born in Hong Kong, she and the father would be allowed entry to Hong Kong as would the children irrespective of Covid-19 restrictions for other nationalities.
10. I had no difficulty in refusing the father's application. The travel guidance was largely irrelevant given the material produced by the mother. The father's evidence to the judge had dealt in detail with the political situation in Hong Kong, specifically addressing his fear that Hong Kong would become just another city in China without the freedoms previously guaranteed in that territory. Though the material identified above was published after the hearing, it was general in tone and thus difficult to see its practical relevance to the issues in this case. Had it demonstrated, for example, that there would be significant difficulties for the father in being able to travel to Hong Kong to see his children or that they could less readily travel to the United Kingdom to see him, that material might more readily have been admitted as being important though not decisive in the decision making.

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11. Mr Hames QC filed a skeleton argument in support of the appeal. Much of that argument focussed on ground B, namely the judge's erroneous approach to the law pertaining to permanent relocation abroad. The essence of his submissions was that the judge had failed to conduct any comparative evaluation of the parents' options for the children. Though his judgment identified the various factors in the welfare checklist, it failed to analyse why the mother's option was better for the children than the father's option. Additionally, despite stating the law was "*clear*" in paragraph 51 of the judgment, Mr Hames QC was critical of the judge's failure to make reference to the need for a proportionality assessment which considered the Article 8 rights of the children and both their parents. He suggested that the judge had approached his task in the wrong way by adopting a linear analysis which favoured the mother's application.
12. On behalf of the mother, Mr Hopher submitted that there was no basis for an appellate court to interfere with the judge's decision. It had been taken following long acquaintance with the case and having heard the oral evidence of the parties. It was further in accordance with the recommendation of the Cafcass officer. The judge's analysis of the welfare checklist was thorough, based on findings he was entitled to make. Moreover, he was not required to carry out a separate free-standing proportionality assessment of the children's welfare. The judgment, read as a whole, was imbued with an appreciation of proportionality which the judge did not need to spell out.

The Function of the Appellate Court

13. I gratefully adopt paragraphs 10 to 14 of Re C (Relocation: Appeal) [2019] EWHC 131 (Fam), [2019] 2 FLR 137 in which Williams J set out the approach of the appellate court. Those paragraphs read as follows:

"10. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

11. In *Re F (Children)* [2016] EWCA Civ 546 Munby P summarised an approach to appeals,

22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB and KP* [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."

23. 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* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):

"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

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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.”

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann’s phrase, the court must be wary of becoming embroiled in “narrow textual analysis”.

12. Lord Hoffmann also said in [Piglowska v Piglowski \[1999\] 1 WLR 1360, 1372](#) :

”If I may quote what I said in [Biogen Inc v Medeva Plc \[1997\] RPC 1, 45](#) :

’...[S]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation.’

... The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed.”

13. So far as concerns the appellate approach to matters of evaluation and fact: see Lord Hodge in [Royal Bank of Scotland v Carlyle \[2015\] UKSC 13, 2015 SC \(UKSC\) 93](#) , paras 21-22:

”21 But deciding the case as if at first instance is not the task assigned to this court or to the Inner House ... Lord Reed summarised the relevant law in para 67 of his judgment in [Henderson \[Henderson v Foxworth Investments Ltd \[2014\] UKSC 41, \[2014\] 1 WLR 2600 \]](#) in these terms:

”It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

14. See also the Privy Council decision in [Chen-v-Ng \[2017\] UKPC 27](#) :

Recent guidance has been given by the UK Supreme Court in [McGraddie v McGraddie \[2013\] 1 WLR 2477](#) and [Henderson v Foxworth Investments Ltd \[2014\] 1 WLR 2600](#) and by the Board itself in [Central Bank of Ecuador v Conticorp SA \[2015\] UKPC 11](#) as to the proper approach of an appellate court when deciding whether to interfere with a judge’s conclusion on a disputed issue of fact on which the judge has heard oral evidence. In McGraddie the Supreme Court and in Central Bank of Ecuador the Board set out a well-known passage from Lord Thankerton’s speech in [Thomas v Thomas \[1947\] AC 484](#) , 487-488, which encapsulates the principles relevant on this appeal. It is to this effect:

”(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge’s conclusion; (2) The appellate court may take the view that, without having seen

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or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.”

Relocation: The Law

14. The decision of the Court of Appeal in Re F (A Child) (International Relocation Case) [2015] EWCA Civ 882, [2017] 1 FLR 979 is the most recent and authoritative exposition of the principles which judges should apply in determining international relocation applications. Together with the earlier authorities of (a) Payne v Payne [2001] EWCA Civ 166, [2001] Fam 473, [2001] 2 WLR 1826, [2001] 1 FLR 1052, (b) K v K (Relocation: Shared Care Arrangements) [2011] EWCA Civ 793, [2012] 2 WLR 941, [2012] 2 FLR 880 and (c) Re C (A Child) (International Centre For Family Law, Policy and Practice Intervening) [2015] EWCA Civ 1305, [2016] Fam 253, [2016] 3 WLR 1, sub nom Re C (Internal Relocation) [2017] 1 FLR 103, Re F makes clear that, whether the application is made pursuant to s. 8 or s. 13 of the Children Act 1989, the only authentic principle is the paramount welfare of the child. Further, the welfare checklist was relevant whether the case was brought pursuant to s 8 or s 13 of the Children Act 1989.
15. For the avoidance of doubt, Re F made plain that s 1(2A) and s 1(2B) were applicable when considering an application to relocate. S 1(2A) provides that a court is to presume with respect to each parent, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child’s welfare. S 1(2B) defines “*involvement*” as meaning involvement of some kind, either direct or indirect, but not any particular division of a child’s time. Ryder LJ stated in paragraph 35: “*These provisions like s 1(3) are not directly applicable to s 13 of the CA 1989 applications but I have no doubt they will in future heighten the court’s scrutiny of the arrangements that are proposed by each parent*” (his emphasis).
16. Ryder LJ noted that selective or partial legal citation from Payne v Payne without any wider legal analysis was likely to be regarded as an error of law. A judgment focussing solely on Payne and compounding that error by only referring to the four points set out in paragraph 40 of Payne was likely to be wholly wrong. Presciently Ryder LJ observed that “*there are no quick fixes to be had in these important and complicated cases*” (paragraph 27).
17. Re F emphasised the need for judges to have in mind the legal background against which relocation applications are made. In paragraph 28 Ryder LJ set this out with commendable clarity as follows:

“Given the agreement of the parties to an holistic approach to the court’s welfare analysis, I need to set out what this involves. The recrafting of s 8 orders from residence and contact into child arrangements orders has, inter alia, the benefit of emphasising, absent adverse circumstances and welfare conclusions, the equality of parental responsibility that each parent has. Parents are to be expected to exercise their autonomy and to respect the autonomy of their children by entering into arrangements that plan for their children’s long-term welfare by providing for a

meaningful relationship between each adult and each child. Where they cannot agree there is likely to be more than one proposal for the court to consider”.

18. Paragraph 30 of Re F went on to explain clearly what was necessary:

“... Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary. That is neither a new approach nor is it an option. A welfare analysis is a requirement in any decision about a child’s upbringing. The sophistication of that analysis will depend on the facts of the case. Each realistic option for the welfare of the child should be validly considered on its own internal merits (ie an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or ‘left-behind parent’) from being side-lined in a linear analysis. Not only is it necessary to consider both parents’ proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse.”

That welfare analysis or evaluation in a case of international relocation may be such as to require an analysis of “*some sophistication and complexity*” if it is to give due consideration and appropriate weight to the factors on either side of the scales of the welfare balance (see paragraph 50 per McFarlane LJ (as he then was)).

19. Finally, Re F recognised that “*a step is 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’ [note plural] plans be scrutinised and evaluated by reference to the proportionality of the same*” (paragraph 31). International relocation cases engage Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention). Those rights are those of both the child and the parents to maintain personal relations and direct contact unless that is contrary to the child’s interests. The child’s Article 8 rights will take priority over the parents, but that should not cause the court to overlook the Article 8 rights of the parents. What was necessary was to balance those competing rights.
20. In Re C (see paragraph 13 above), Williams J observed that there remained some degree of uncertainty as to how the proportionality evaluation was to be applied in relocation cases. Re F stated that such an exercise should be undertaken whereas in Re C (A Child) (International Centre for Family Law, Policy and Practice Intervening) [2015] EWCA Civ 1305, Black LJ (as she then was) expressed doubts as to how such an evaluation was to be undertaken. Williams J concluded that “*in most cases in practice the proportionality issue will be subsumed within the overall 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*”.
21. It seems to me that, in accordance with the analysis of Ryder LJ in paragraph 32 of Re E, what is required by a proportionality assessment is “*a welfare analysis of each of*

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the realistic options” and that such an assessment “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 Art 8 European Convention rights of those involved”. If, having carefully examined the parents’ wishes and their interests within the welfare analysis, a proportionality assessment is undertaken having regard to the best interests of the child concerned, that approach avoids the danger identified by Black LJ in Re C of inconsistency between the welfare analysis and the proportionality assessment (see paragraph 61).

22. The careful examination of parental wishes and interests which Black LJ considered important in Re C is not easily accommodated within the confines of the welfare checklist. Neither the likely effect on the child of any change in circumstances nor the capability of the parents really captures what is required in that particular regard. McFarlane LJ recognised this implicitly when he stated in paragraph 50 of Re F that the court’s task was to weigh up all the relevant factors, look at the case as a whole, and determine the course that best met the need to afford paramount consideration to the child’s welfare. One of the relevant factors would be the wishes and interests of each parent. That global holistic evaluation – undertaken within the ambit of all the relevant provisions of s 1 of the Children Act 1989 – has, in my view, proper regard for the Convention rights of both parents and child.

Summary of Background

23. Both parents were born in Hong Kong but spent substantial and significant periods of their lives outside Hong Kong. Now aged 52, the father moved to Canada and then to the USA when he was 14, only returning to Hong Kong when he was 28. Now aged 41, the mother moved to Canada when she was 10 only returning to Hong Kong when she was 26. By virtue of descent, the mother was a UK citizen at birth. Both parents have Canadian citizenship and passports. They met in 2006 and married in December 2008.
24. X, a little girl, was born in 2012. In 2013 the couple decided to leave Hong Kong and chose to relocate to the UK. The father was granted a visa in 2014 but the move was delayed by the birth of Y, another little girl, in 2015. The family all moved to the UK in June 2016. X was aged three years and Y just over one year at that time.
25. Initially the family lived in rented accommodation and then looked to buy their own home because their landlord was considering selling the property in which they then lived. The property was purchased in April 2019 in the father’s name. There is a dispute about the involvement of the mother in the purchase of the property.
26. During their time in the UK, the family lived off the proceeds of sale of various properties which had previously been owned by (or through companies controlled by) the father in Hong Kong. He was trained as an architect but had successfully operated a property investment/portfolio company. Neither parent was employed in the UK.
27. The couple argued in July 2019, causing the father real concern that the mother would remove the children permanently to Hong Kong without his consent. He made an application for a prohibited steps order on 23 July 2019 and that step marked the beginning of the breakdown of the parents’ relationship. The mother’s reaction was to refuse all contact between the children and their father unless supervised by her. She

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moved with the children to a friend's home on 6 August 2019 and the father moved into the property purchased in his name. It was only with the assistance of court by order on 27 August 2019 that the children were able to enjoy unsupervised contact with their father without the mother's presence.

28. Children Act proceedings continued throughout 2019, the hearings being conducted by the judge. On 9 August 2019, the mother made an application for permission to relocate with the children to Hong Kong. Contact arrangements provided that the children lived with their father from Fridays after school to Monday morning at school on alternate weekends and for additional time during school holidays to be agreed. The mother agreed to sharing of time during the Christmas holiday 2019 it only permitted five consecutive nights the father. In January 2020 she applied unsuccessfully to reduce the children's time with their father. During the February half term the parents were unable to agree an equal sharing of that holiday, the mother permitting only one extra day from 10am until 6pm (and no overnight stay).
29. Prior to the relocation hearing, a Cafcass officer, Ms Warren, provided a report to the court supporting the mother's application for the children to relocate permanently to Hong Kong. At the hearing before the judge were the following applications: (a) an application by the father for a prohibited steps order preventing the mother from removing the children permanently to Hong Kong; (b) an application by the mother for permission to remove the children permanently to Hong Kong; (c) an application by the father for a child arrangements order providing for shared care of the children; and (d) an application by the father for a variation of the interim contact arrangements put in place in August 2019.

The Judgment Under Appeal

30. The judgment was given ex tempore and comprised 78 paragraphs setting out the judge's reasoning for acceding to the mother's application. The first 50 paragraphs set out the background to the proceedings and also encompassed a variety of findings made by the judge. He found that the mother did not wish to relocate to the UK and that, by early 2019, the mother's desire to return to Hong Kong had strengthened. He also found the father had behaved insensitively towards the mother when she was unwell and that he was a man of inflexible and strongly held opinions who found it hard to see why others might oppose his point of view. The judgment went on to rehearse the history of the proceedings and the positions of the parties at the relocation hearing.
31. At that hearing the mother made clear her desire to take the children back to Hong Kong as soon as possible though she indicated she did not wish to leave until the financial remedy proceedings had concluded. The father however wanted the children to remain in the UK and to spend more time with him than they did presently. In the event of the mother's application to remove the children being dismissed, the mother made it very clear she would not return to Hong Kong alone but would stay with the children in the UK.
32. In paragraph 51 the judge stated that the law was clear, the application being "*primarily*" decided with the welfare of children being paramount. He referred to the decision of the Court of Appeal in Re F [2017] 1 FLR 979 and that of Williams J in Re C [2019] 2 FLR 137. He reminded himself the court had to consider all the matters

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contained in the welfare checklist and should consider, in particular, the effect of less involvement in the life of children by the parent who has been left behind. He noted that the court should not approach such cases on too narrow a focus but should take into account the factors set out in earlier cases such as Payne v Payne in order to illuminate what should be done though not to dictate the decision itself.

33. The judge proceeded to go through the welfare checklist. He noted that the children had rightly not been asked for their views and that both knew Hong Kong as they had been there for holidays. He was satisfied that the children looked primarily to their mother everyday care and comfort but loved their father and enjoyed the time with him. With respect to the children's physical needs, the judge accepted that both parents could look after these but that the mother was more experienced in doing so. He noted that the mother was somewhat overprotective but was more attuned to the needs of children whereas the father did not take sufficient note of medical problems. He considered that the mother was the better parent to deal with the children's emotional needs and criticised the father putting pressure on X and being somewhat controlling. He declined to make findings as to the educational systems either in the UK or in Hong Kong and accepted that there would be some disruption to the children from moving school. He considered that the mother was capable of sorting that out but made no reference to the father's role in the children's future education.
34. The judge stated that the likely effect on the children of any change in their circumstances was crucial. He noted that the father would see the girls much less frequently, this being on holiday time rather than the alternate weekend arrangement for contact presently in force. He observed that it did not seem to him that separate consideration of the Human Rights Act added anything very much to the father's case though he bore this in mind. He noted that the entire family were familiar with Hong Kong and that contact would be easier for the father there because of that fact and because he had the means and the ability to travel there.
35. There was nothing particular about the ages, sex, background and characteristics of the children. The judge thought the children were at risk of suffering harm in the future from continued bickering between the parents if they were to be in close proximity and would also suffer such harm arising from the mother's unhappiness if she were prevented from relocating. He was satisfied that the mother was the more capable parent, but the children needed to continue close association with their father whom they loved. He noted that the mother agreed to the implementation of a mirror order in Hong Kong though it was unclear how long this would take to organise.
36. In addition to the welfare checklist, the judge also made reference to the genuineness of the mother's application and proclaimed himself satisfied that the mother was not trying to exclude the father from the life of the children. He noted that the father's role would continue after relocation though it would be a different in nature. The judge was satisfied the practical consequences of moving were not decisive. However, he was satisfied that the mother would be "*devastated*" if her application were refused. He noted that the father was unhappy because he felt that the ideal life he had set up for his wife and children had come to an end because of the mother's actions and he strongly resented that turn of events. Finally, he noted the views of the parents about the political situation in Hong Kong but came to no conclusions about that matter.

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37. In paragraph 72 the judge noted that he had to balance these factors on a holistic basis and, having reminded himself that he had heard the evidence and read the papers, he declared himself satisfied that it was in the best interests of the children they return to Hong Kong with their mother and this would be the best for them in the long term. He concluded by saying that “*the parties had very little connection with [location where the family lived] and the mother never wanted to be there, and I do not think the disruption would be that great*”.
38. Having made that determination, the judge went on to say that he bore in mind the fact of the children of not seeing father every other weekend. He opined that the mother was not being generous in offering a mere 28 days a year during which the children might see their father after relocation to Hong Kong. The judge thought they should certainly spend three weeks with their father during the summer holiday but went no further in that regard other than to state that 28 days of contact each year was not enough for the children.
39. Finally, the judge stated that it was a precondition of the move that the mother applied for a mirror order in Hong Kong. In his concluding comments, the judge said that, if he had not granted the mother’s application, he would have continued the existing regime of contact and expressed himself unpersuaded that it was in the best interests of children they should spend half their time with each parent.

Analysis

40. In Re L (Relocation: Second Appeal) [2017] EWCA Civ 2121, [2018] 2 FLR 608 Peter Jackson LJ described relocation applications as “*among the more difficult applications that come before the Family Court. The effects of distance on relationships, often accompanied by cultural and linguistic factors that may shape the child’s lifelong identity, raise the stakes above those found in most domestic cases*”. I wholeheartedly agree.
41. As Ryder LJ stated in paragraph 33 of Re F, the court’s primary function on an appeal flowing from a relocation decision is to review the welfare analysis and proportionality evaluation and decide whether those value judgements were wrong within the meaning of that phrase, for example, as described by Lord Neuberger in paragraph 93 of Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33, [2013] 1 WLR 1911, sub nom Re B (Care Proceedings: Appeal) [2013] 2 FLR 1075. In coming to my decision on the father’s appeal, I have taken into account Lord Neuberger’s guidance that an appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adhered to the view that the trial judge’s decision was wrong, then the appeal should be allowed.
42. I have also taken into account that the judgment was given ex tempore and have looked to the substance of the judge’s decision rather than the form of his analysis. Given the forensic advantages enjoyed by the judge, it is also, in my view, not for me - without compelling reason - to seek to go behind his factual findings. What concerns me is the application of those findings to the matters he was required to consider on a relocation application. With all the above caveats and guidance in mind, I have

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regretfully concluded that I have real doubts about the judge's decision and, on balance, consider that it was wrong.

43. This analysis focuses on ground B of the father's case. Ground D necessarily falls away if I allow the father's appeal.
44. Though the judge recognised in paragraph 75 of his judgment that he should undertake a holistic evaluation, unfortunately he did not undertake an analysis of the welfare factors relating to each of the options for the care of these two children which were before him. Nowhere in the judgment was there reference to or analysis of the other realistic option available to the court, namely the children remaining in the UK with both parents resident here. That was surprising given that the court was also seised of an application by the father for shared care of the children. The judge made a glancing reference to that application at the very end of his judgment, having already determined in the mother's favour that the children should move with her to Hong Kong. The only additional reference to a possible outcome other than that contended for by the mother was the judge's finding that the mother would be devastated if she had to remain in the UK. There was no comparative evaluation side-by-side of the realistic options for the children's care. Though Mr Hephher sought to persuade me that the judge's analysis of the matters contained in the welfare checklist constituted such a comparative evaluation, I was unconvinced because, in the absence of clarity that the judge was indeed evaluating each of those options, it was hard to discern this in his analysis of the welfare checklist. Though McFarlane LJ expressed some caution about the use of a balance sheet in case such as this (see paragraph 52 of Re F), the judge's findings might have been more securely grounded had he, in addition, adopted the approach of Ms Warren, the Cafcass officer, whose report contained an analysis of the positive and negatives of each option before the court.
45. The judgment identified various factors in the welfare checklist but failed to analyse why the mother's option was better for the children than the father's. While the judge made a series of findings on various aspects of the case, it was difficult to discern from the judgment as a whole exactly why he found the mother's proposals for the children, including their time with the father who would remain living in the UK, were better than the father's proposals which would enable the children to have both parents living in one jurisdiction (the mother having made clear that if denied permission she would remain in the UK). Thus, for example, the judge's findings that the mother was better at meeting the children's emotional needs and at dealing with medical issues needed to be weighed against each of the two options available – relocating to Hong Kong or remaining here with both parents. Neither finding pointed decisively towards the mother's option being better for the children. Without undertaking the explicit evaluation of the findings made in relation to the welfare checklist and other matters against the options put forward by each parent, the judge's reasoning for his decision was profoundly flawed.
46. In paragraph 75 the judge appeared to give as his principal reason for permitting the relocation of these children his finding that the mother never wanted to move to this jurisdiction in 2016. Without seeking to go behind that finding, I accept the submission by Mr Hames QC that it was incapable of providing a proper reason to conclude that the children's best interests were served by unravelling in 2020 what had happened in 2016.

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47. Having expressed the view that the likely effect of any change in the children's circumstances was crucial, the judge did not analyse the effect on these children of having a severely attenuated relationship with their father who – on the mother's proposals prior to his determination - they would see for a mere 28 days each year. There was clearly reference to the father's much diminished contact with the children in the judgment, but the analysis – and indeed much of the judgment - was dominated by consideration and acceptance of the mother's perspective. The fact that the father's contact in Hong Kong might be practically easier for him missed the point of s 1(3)(c), which was to evaluate how the children might be affected by this profound change in their relationship with their father. The judge's finding in paragraph 71 that the father's role would continue post-relocation, albeit in a different fashion, was an inadequate treatment of the relationship from the perspective of these two very young children. It was also inadequate when viewed from the perspective of the father's Article 8 rights.
48. What I found surprising about the judge's analysis was the absence of consideration of the contact arrangements between the father and the children on relocation to Hong Kong. A comparative evaluation of the merits of each parent's proposal for the care of the children in a relocation case should encompass how the relationship with the left behind or non-resident parent is to be promoted. That consideration engages the children's emotional needs, the likely effect of change on them, the evaluation of harm and the capability of each parent. Instead, contact between the father and the children post relocation to Hong Kong was only addressed by the judge **after** he had granted the mother's application. His view that the mother's contact proposals were not generous should properly have featured in an analysis of whether a loving and beneficial relationship between the children and their father could be maintained post relocation.
49. Mr Hames QC was critical of the judge for failing to conduct a proportionality assessment, either separately or as part of the welfare checklist. The judge made no explicit reference to the need for such an assessment, but I note he made reference to the judgment in Re C given by Williams J which stated in unequivocal terms that the court **must** [my emphasis] consider the proportionality of the interference (see paragraph 16(h)). The only reference to Convention rights in the judgment was in paragraph 63 where the judge considered the likely effect on the children of a change in their circumstances. He acknowledged that the father would see much less of the children and that Mr Hames QC put this at the heart of his case. The judge went on to state that "*it does not seem to me that separate consideration of the Human Rights Act adds anything very much to the argument, although of course I bear it in mind*". The remainder of the judgment was silent as to the Convention Rights of each parent and of the children and contained no explicit reference to a proportionality assessment.
50. I have thought very carefully whether it is possible to read into the judge's analysis of the welfare checklist in paragraphs 54-74 the sort of proportionality assessment identified by Ryder J in Re F (paragraph 32), namely an acknowledgment that one option was better than the other and that the preferred option represented a proportionate interference in the Article 8 European Convention rights of the children and the parents involved. With every respect to the judge, I do not see how that can be possible in circumstances where there was no evaluation in the judgment of the

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realistic options for the children, with an analysis of the welfare factors relating to each option.

51. Mr Hames QC was critical of the judge for stating that the application must be decided “*primarily*” by considering the welfare of the children [paragraph 51] and suggested that the judge had fallen into error by adding Payne v Payne factors to the welfare checklist, such as the genuineness or otherwise of the mother’s application. I do not regard that as a valid criticism since the judge was clear he took those factors into account additional to those in the welfare checklist and because those matters might illuminate what should be done [paragraph 54]. It was clear that he was not relying solely on the factors identified by Thorpe LJ in paragraph 40 of Payne v Payne.
52. Mr Hames QC was also critical of a variety of the findings made by the judge and indeed of what he described as the judge’s failure to analyse the political situation in Hong Kong. I have already indicated that I have adopted a very cautious approach to the judge’s findings of fact and I am not persuaded that I should go behind these as Mr Hames QC, in part, invited me to. I also do not consider that the judge’s approach to the situation in Hong Kong can be validly criticised. He made clear he had not received expert evidence on that issue and doubted that such evidence could have properly founded any conclusions about the political future of Hong Kong. I have already commented that, should expert evidence have been permitted in this case, evidence about the situation in Hong Kong more specifically focussed on the practicalities of family life would be required.
53. Standing back and looking at the substance of the judge’s decision in the light of the above analysis, I have asked myself whether my doubts about it are sufficient to warrant allowing the father’s appeal. Much of what the judge had to say about the father suggested that he was less attuned to the children’s needs than the mother was. However, the absence of a child-focussed, proportionate and holistic evaluation of each parent’s option for the care of these two children means that it is difficult to see how the judge’s various findings might be deployed in such an evaluation, undertaken without all the advantages accruing to the judge at first instance. I simply do not know whether undertaking that exercise would result in exactly the same conclusion as that reached by the judge. Regretfully I cannot be confident that it would, given the judge’s treatment of matters of fundamental importance to the children. Having undertaken that cross-check, I allow the father’s appeal.
54. The matter will require a rehearing before a Deputy High Court Judge at the earliest date that this can be arranged. Until the conclusion of that hearing, the mother and children will remain in the jurisdiction and the children will continue to have contact with their father as previously ordered.

Conclusion

55. That is my decision.