Unapproved
No further redactions required

THE COURT OF APPEAL

CIVIL

Court of Appeal Record No 2021/255

Neutral Citation Number [2022] IECA 246

Edwards J.

Whelan J.

Collins J.

BETWEEN

D.K.

Applicant/Respondent

AND

P.I.K.

Respondent/Appellant

(CHILD RELOCATION)

JUDGMENT of Mr Justice Maurice Collins delivered on 28 October 2022

PRELIMINARY

1. Relocation cases have been described as the *"'San Andreas Fault' of family law"*, reflecting "*the tension between the freedom of people as adults to leave a relationship and begin a new life for themselves, and the harsh reality that while marriages (and other relationships) may be dissoluble, parenthood is not."* [1]

2. At the level of principle, the approach to be taken to relocation cases in this jurisdiction might appear straightforward. Section 3(1)(a) of the Guardianship of Infants Act 1964 (as amended) ("*the 1964 Act*") provides that where, in any proceedings before any court, the guardianship, custody or upbringing of, or access to, a child, is in question, "*the court, in deciding that question, shall regard the best interests of the child as the paramount consideration."* Part V of the 1964 Act then makes provision as to how the court is to determine the best interests of the child. The paramountcy of the best interests of the child is emphasised throughout the 1964 Act; see, by way of illustration, sections 11D and 12A. These statutory provisions reflect the constitutional imperative in Article 42A.4.1ii of the Constitution (inserted by the Thirty-First Amendment of the Constitution (Children) Act 2012).

[1] Parkinson et al, "The Need for Reality Testing Relocation Cases" in 44 *Family Law Quarterly* 1 (2010) (citing Chisholm, "The Paramount Consideration: Children's Interests in Family Law" in 16 *Austl J Fam L* 87, 107 (2002))

3. The Charter of Fundamental Rights of the European Union (in Article 24(2)) and the United Nations Convention on the Rights of the Child (in Article 3(3)) also require that the best interests of the child must be "*a primary consideration"* in all actions relating to them. Unsurprisingly, that is also the approach taken in the domestic law of many other jurisdictions.

4. However, the apparent simplicity of section 3(1)(a) of the 1964 Act is deceptive. In the first place, the legislative mandate that "*the best interests of the child*" shall be regarded as "*the <u>paramount</u> consideration*" (my emphasis) appears clearly to imply that in this context other considerations may also be relevant and are to be taken into account. However, section 3(1)(a) gives no guidance as to what those other considerations may be. Secondly - and more significantly - while the exercise of identifying what is in "*the best interests of the child*" will often be difficult, it is particularly fraught in the context of relocation. Relocation decisions are enormously consequential, for both child and parents. They may have lifelong impacts on the entire family. However, the alternatives that a court must choose between cannot be modelled or simulated in advance. The future trajectory of the life of a child (and/or of their parents) cannot be confidently mapped. There are far too many contingencies and uncertainties for that. Where (as here) more than one child is involved, each at a different stage of development and maturity and with their own particular relationship with each parent, those difficulties are compounded. The assessment of what is in the best interests of each may point in different directions. Objective measurement is unavailable and value judgments are

unavoidable. The exercise necessarily involves the making of predictive judgments by fallible human beings who may aspire to, but do not possess, the wisdom of Solomon.[2]

5. Little wonder then that it has been said that relocation cases are a *"dilemma rather than a problem"* because "*a problem can be solved; a dilemma is insoluble*." [3]

6. Even so, the role of the court is a critical one. It has to make a decision that is likely to cause profound distress to one parent or the other (and , possibly, to the child or children involved). That, unfortunately, cannot be avoided. But what the court can and must do is to carry out its adjudicative functions in a manner which makes it clear to the parties that its ultimate decision is the product of reasoned analysis, founded on a careful and fair-minded assessment of the evidence and arguments. That is of course a requirement of all judicial adjudication but it is especially important in this context.

7. Here, PIK appeals from the judgment and order of the High Court (O' Hanlon J) refusing her application to relocate the children of her marriage to DK from their current

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[2] One US family judge has suggested that "there is no evidence that our decisions in these types of cases result in an outcome that is any better for the child than if the parents did rock-paper-scissors" (W Dennis Duggan "Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation" (2007) 45 Family Court Review 214).

[3] Standing Committee on Legal and Constitutional Affairs Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Parliament of the Commonwealth of Australia, August 2005), at para 2.72, quoting from the evidence given to the Committee by the Chief Justice of the Family Court of Australia (Chief Justice Diana Bryant). The quoted passage is worth citation in full: *"Relocation cases are the hardest cases that the court does, unquestionably. If you read the judgments, in almost every judgment at first instance and by the full court you will see the comment that these cases are heart-wrenching, they are difficult and they do not allow for an easy answer. Internationally, they pose exactly the same problems as they pose in Australia. I have heard them described as cases which pose a dilemma rather than a problem: a problem can be solved: a dilemma is insoluble."*

place of residence (an EU Member State that I shall refer to as "*X*") to reside with her in another EU Member State (referred to in this judgment as "*Y*").

8. DK and PIK are married but their marriage broke down some years ago. DK subsequently brought these proceedings for judicial separation. At the hearing of this appeal, the Court was told that DK has commenced proceedings for divorce. DK and PIK have three children, E (a girl who is now in her mid-teens), L (a teenage boy who is a year younger than E) and I (a girl not yet in her teens). DK (the father) is Irish. PIK (the mother) is a national of Y. She was born there and lived there until she was 12 or so, when her family moved abroad. DK and PIK have the same professional qualifications and met and married while working in that field in the UK. They resided there for a number of years following their marriage and E was born while they were in the UK. They then moved to Ireland and lived here for a number of years. L and I were born in Ireland.

9. In 2013, the family relocated to X so that DK could take up a position in the Irish Embassy there. It appears to be common case that the move to X was intended to be temporary and that the family did not plan to remain there long-term. Since 2013 DK has held a series of posts with the Irish Embassy and with the EU. On the first day of the appeal hearing, the Court was told that DK had just begun a further 4 year posting with the Irish Embassy, which is capable of being extended for a further year.

10. DK and PIK's marriage appears to have broken down irretrievably in 2016. In 2017 PIK issued family law proceedings in X but in 2019 the court declined jurisdiction on the basis that DK enjoyed diplomatic immunity.

11. These proceedings for judicial separation were issued by DK in July 2019. An Amended Special Summons was served in December 2019. It pleads that DK is domiciled in Ireland and that his ordinary and habitual residence is here (Special Indorsement of Claim, para 1) and that he is habitually resident and domiciled within this jurisdiction for the purposes of Council Regulation (EC) No 2201/2003 (*ibid*, para 23). In any event, PIK does not dispute the jurisdiction of the Irish courts to deal with the proceedings. A wide variety of matters are canvassed in the Amended Special Summons and the Grounding Affidavit of DK and a variety of reliefs are sought. For present purposes, it is sufficient to note that the Summons pleads that it would be in the best interests of the children to remain in the joint custody of their parents and that they should have the opportunity to spend equal amounts of time with each parent *"allowing for the exigencies of schooling and the possibility that the family will return to Ireland without their mother following the end of their parent's diplomatic posting in [X]*" (Special Indorsement of Claim, para 4). It also specifically pleads that it would *not* be in their best interests to live in Y (*ibid*). Amongst the reliefs sought is an order under section 11 of the 1964 Act for a direction as to *"the country where they habitually reside following the determination of the proceedings*." Orders granting joint custody, and providing for access, are also sought.

12. In the summer of 2019, following the refusal of the Courts in X to accept jurisdiction of her proceedings, PIK removed the children to Y without the consent of DK. Following proceedings brought by DK under the Hague Convention, the courts in Y declared the removal of the children by PIK to have been wrongful and directed the summary return of the children to X. That order was not immediately complied with by PIK and subsequently DK brought proceedings to enforce the order. That resulted in a further hearing, the outcome of which was that the children were transferred to the custody of DK in circumstances which were enormously distressing for the children. It will be necessary to say something more about the removal of the children, and the circumstances surrounding their return, later in this judgment. At this point, however, it is sufficient to note that they returned to X with their father at the end of 2019 and have resided there since.

13. With the exception of the period that they spent in Y with their mother following their abduction, during which they attended school there, the children have lived in X, and attended school there, since 2013.

14. Custody of the children is currently shared, by agreement, by DK and PIK. There are no court orders in place regulating their custody or parental access. For a period after their separation DK and PIK maintained separate apartments and the children moved between them. PIK no longer has an apartment in X. At the hearing of the appeal, the Court was told that PIK travels to X regularly for extended periods during which she stays in short-term rentals which can also accommodate the children. We were told that the children currently spend approximately half their time with each parent. While, prior

to the breakdown of the marriage, PIK appears to have borne the greater share of responsibility for the children's day-to-day care, and was in that sense their primary carer, the children were, and continue to be, in the shared care of PIK and DK.

15. In February 2020 PIK brought an application in the judicial separation proceedings for orders directing that the children be returned to her primary care, regulating DK's access to them and permitting her to permanently relocate the children to Y. In addition, PIK's application sought an order pursuant to section 32 of the 1964 Act appointing an expert to determine and convey the wishes of the children. A section 32 order was made in advance of the hearing of the motion and the only relief ultimately pursued at the hearing was that of relocation. I shall refer to PIK's application as the "*relocation application."*

16. DK opposed the relocation application. Following a very contentious 5 day hearing in June 2021, the High Court (O' Hanlon J) refused the application. Her reasons for doing so are set out in her lengthy judgment of 23 July 2021 ([2021] IEHC 516) but her essential conclusions appear from the following passage from the final paragraph of that judgment:

> *"203 .. the court has balanced the rights of the parties and their children and understands the desire of the mother to relocate to [Y] but the court has had to balance the needs and wishes and legal entitlements of both parties and their children. In addition, the court has had to balance the mother's depression in the past and her health difficulties physically, her desire to work in [Y] her*

desire to live in [Y] with the children as well as the fact that access has been extremely difficult at times for the father to achieve same despite his best efforts. It is determined that the children have a better chance of seeing both their parents in a meaningful way in [X]. The court concludes that it is not in the best interests and welfare of the children to be relocated to [Y] at this time, and refuses the mother's request to relocate the children to [Y]. The effect of this ruling is that both parents enjoy joint guardianship rights and a shared parenting arrangement and agreement and the children are and have been based in [X], the place of their usual residence, given their father's employment and that situation is to continue pending further court orders and for agreements between the parties."

17. These proceedings have previously been before this Court. As her Judgment records, the Judge met with each of the children. The meetings all took place after the conclusion of the hearing and before judgment was given. Neither DK or PIK nor their legal representatives were present. The meetings were recorded by the Digital Audio Recording (DAR) system and, on the direction of the Judge, a transcript was prepared and put on the court file in a sealed envelope. Following Judgment, PIK applied for access to the transcript of the meetings with the children. The application was refused by the Judge. PIK appealed that refusal to this Court. The net question presented by the appeal was whether the Judge was correct in refusing access to the transcript of the meetings. This Court allowed the appeal and directed that the transcript of the meetings be furnished to the solicitors for each party, subject to the condition that they may be used only for the purpose of the judicial separation proceedings (including the appeal

from the refusal of the relocation application): see my judgment of 9 March 2022 (Haughton and Barniville J concurring), *DK v PIK* [2022] IECA 54. As will appear, the Judge's meetings with the children was also a central issue in this appeal.

THE COURSE OF THE PROCEEDINGS IN THE HIGH COURT

18. The judicial separation proceedings have progressed slowly and appear to be some way from being heard.

19. PIK's relocation application also took some time to get on for hearing, no doubt due to the difficulties presented by the COVID-19 Pandemic.

The Report of Dr Moane

20. On 20 May 2020 the High Court (Jordan J) made an order appointing an assessor for the purpose of preparing a report in relation to the children pursuant to section 32 of the 1964 Act. However, difficulties arose in carrying out the assessment due to the COVID-19 Pandemic and also because the children were resident outside the State. Ultimately, by order made on 22 October 2020, Dr Fiona Moane, a clinical psychologist, was appointed as assessor *"for the purpose of preparing a section 47 report in relation to the dependent children*." For reasons that are unclear, that order was made pursuant to section 47 of the Family Law Act 1995, rather than section 32 of the 1964 Act but nothing turns on that fact.[4]

21. In due course, Dr Moane furnished what the Judge described as a "*comprehensive report*" (Judgment, para 123). That report was dated 28 January 2021. The report and

[4] The relevant provisions of section 32 and section 47 are considered in my earlier judgment dealing with access to the transcript of the Judge's meeting with the children.

the Judge's treatment of it (as well as her treatment of the oral evidence given by Dr Moane) was a significant focal point in the appeal. Accordingly, it is appropriate to address it in a little detail.

22. As mentioned, Dr Moane is a clinical psychologist. She is a chartered member of the Psychological Society of Ireland and evidently has considerable experience in carrying out assessments of the kind she was tasked to undertake here.

23. For the purpose of preparing her report, Dr Moane conducted a number of individual interviews with DK and PIK and with the children as well as "*family observations*" with PIK and the children and with DK and the children. She also communicated with DK and PIK in writing and over Zoom. Various reports were made available to her, including court and police reports from Y and court reports/affidavits both from X and from this jurisdiction. Dr Moane also consulted with a number of health care professionals who were providing and/or had provided counselling and support services to DK and PIK and/or to the children. She also made contact with the children's school in X as well as the school they had attended while in Y in 2019. It is clear therefore that Dr Moane had a wide range of information sources available to her, in addition to her engagement with the family.

24. In her report, Dr Moane set out in some detail her engagement with, and professional assessment of, the three children. She noted that E had "*gone off*" the idea of living in Y with her mother and was "*starting to question*" the respective roles and responsibility of her parents in the Hague Convention proceedings in Y (which were extremely

traumatic for the children). Ideally, she noted, E would like to live in X with both her parents. However, if her mother was no longer living in X, she would live with her father, though that would be hard. In contrast, the report noted that L was clear that at that time his preference was to live in Y with his mother. Finally, I had declared that she wanted to be with her mother all the time.

25. In Dr Moane's view, the "*ideal situation*" for the family would be for PIK and DK "*to willingly agree to live in the same place with equal access between them, whilst allowing this to be flexible enough to adapt to the children's evolving needs*". However, she noted that that did not appear to be an option. Having identified and discussed the alternatives (effectively discounting as not "*a long term solution*" the possibility of the family staying in X),[5] she made a number of recommendations.

26. In Dr Moane's view, the priority was that the relationships between all three children and both parents should "*be repaired*". To that end, she recommended that the family should remain in X until the summer of 2021, or until such time as Dr L (the children's psychologist in X) assessed those relationships to be repaired enough to "*withstand an international separation"* (Recommendation 1). If that was not the position by the summer of 2021, she suggested that the stay in X should be extended to January 2022 (Recommendation 2). "*Should PIK and DK agree to live in the same country*", Dr

[5] By letter of 19 May 2021, DK's solicitors made it clear that he wanted the children to remain in X with him. According to PIK, that was the first time that she became aware of that position. Up to that point, (so PIK says) DK's stated position was that he should be permitted to return to Ireland with the children. That DK's position as regards wanting to stay in X had changed does not appear to have been disputed: see Day 1, page 10.

Moane made recommendations concerning access to the children (Recommendation 3). Recommendation 4 addressed the scenario where both parents could not agree to live in the same country. In that event, Dr Moane suggested that the:

> *"... Court might consider my assessment that on balance, and as a single parent without a second parent readily available, [PIK] has greater capacity for providing for the needs of L and I at present, notwithstanding that [DK] is also a vital parent in their lives. Given that [PIK] has more supports in [Y], and can work and be financially independent there, I believe her wellbeing will be overall better served by living in Y versus Ireland. This is supported by the Ethos [in Y] around the importance of family life, and work life balance which is also likely to provide the children with an enriched childhood and adolescence as appropriate for their ages. Whilst E's needs may be equally met by either parent I respectfully suggest that it would not be in the best interests of any of the three children for the sibling unit to be separated at this time. Nevertheless E could be given the option, depending on where [DK] resides, of completing her senior school cycle (equivalent of Irish 5th and 6th grades) while living with [DK]. This leaves [DK] with a number of choices including staying in [X] where he appears to be well-integrated within his community, [Y] where language would be a barrier but he would likely obtain work and enjoy the lifestyle, Ireland where his roots are, or another country such as [B] where he might obtain a Diplomatic posting with easier access to [Y]."*

Finally, Dr Moane made recommendations concerning ongoing individual therapy for PIK and DK (Recommendation 5) and for their attendance at a suitable course in X on co-parenting after separation (Recommendation 6).

27. In her Judgment, the Judge rejected recommendation 4, for reasons which it will be necessary to examine (Judgment, para 98) and indicated her preference for "*option 3*" (Judgment, para 99). A difficulty with that approach is, of course, that "*option 3*" was premised on PIK and DK *agreeing* to live in the same country. There was, as a matter of fact, no such agreement. PIK's position was that she decided to live in Y and wished to relocate the children to live with her there. DK intended to continue residing in X, at least for the foreseeable future, and rejected the possibility of moving to Y.

The Hearing in the High Court

28. The High Court heard evidence from PIK and DK, as well as from Dr Moane. No other witnesses gave evidence. Section 47(5) of the Family Law Act 1995 provides that *"the court or a party to proceedings … may call as a witness in the proceedings a person who prepared a report under subsection (1)."* As Hogan J noted in *AMQ v KL (otherwise KA)* [2018] IECA 97, it is somewhat unusual to confer on a court a power to call a witness and section 47 *"represents something of a move away from a purely adversarial approach in civil cases involving child welfare issues*" (at para 64). In my earlier judgment in these proceedings (at para 60) I made a similar point by reference to section 32 of the 1964 Act, which contains materially identical provisions. Here, however, it was the parties, not the court, that called Dr Moane as a witness. We were

told that both parties had required her attendance to give evidence. As PIK was the applicant, and therefore was the party who went first, Dr Moane was called by her but it was accepted by both parties before us – correctly in my view - that Dr Moane did not thereby become PIK's witness in the usual sense

29. The oral evidence took 5 extended hearing days. I do not propose to carry out any detailed survey of it. However, in light of the issues and arguments in this appeal, it is necessary to refer in some detail to certain aspects of the evidence, and of the Judge's interaction with the witnesses (and with counsel) in the course of the hearing.

30. PIK was the first witness. She began her direct evidence on the morning of Day 1. After lunch on Day 1, Dr Moane was, by agreement, interposed and she was in the witness box for the remainder of Day 1 and for a brief period at the start of Day 2, after which PIK resumed and completed her direct evidence and was cross-examined. That cross-examination extended into Day 3 and she was then re-examined and was also questioned by the Judge. DK began his direct evidence on the morning of Day 4 and that evidence extended into a part of Day 5, after which he was cross-examined and re-examined in the ordinary way.

31. Only very preliminary evidence had been given by PIK prior to the interposition of Dr Moane on Day 1. She said that in 2013 she had understood that the family was moving to X for three or, at maximum, four years. She and DK had decided that she would be the children's primary carer in X and would not be working. She had worked for only very limited periods since they had moved to X. She said that she and the children had

expected to be leaving X in 2017 but DK had extended his posting for an additional year. The marriage had broken down at that stage and they had decided to separate. She instituted proceedings in X in June 2017 seeking to relocate the children to Y.

32. Dr Moane was then called. She described the existing position as *"very unsettling for the children*". Asked by counsel what had been the impact on PIK of her *"involuntary prolonged stay in [X]"*, Dr Moane opined that it had been "*highly stressful"* and that PIK felt that she had no power or control in X, could not work in her chosen profession there, did not speak the language and had no family support. The family was, she said, in a "*transitory community*" in X. If the children did not have PIK as their primary carer, they would miss her a lot, though E might be the least impacted as she was the one with the strongest bond with her father. Dr Moane was confident that PIK had the resources and motivation to address the children's needs in the event that they relocated to Y, though she noted that they would miss their dad and "*so there's no ideal situation*." She was "*absolutely*" very positive about PIK as a primary carer. She (PIK) was the primary attachment figure for all of the children. Asked whether E should be dealt with separately, Dr Moane expressed the view that the siblings needed to be together and that it would be wrong to separate them until they have had some settling down together in a stable situation.

33. As counsel for PIK was coming to the end of her examination of Dr Moane, the Judge interjected to state that just before Dr Moane's cross-examination, she would have *"one or two points*" to raise with her. She then raised the position of E (who at that date was 14 plus), noting that she would soon be in a position to decide where she should live.

The Judge then asked Dr Moane "*if one were to decide that the children should stay in [X] with their father in the short to medium term, what would you envisage?"* Noting that that was not Dr Moane's recommendation, the Judge asked what the witness would see as appropriate access, given that there would be "*20 weeks to play around with*" (this being a reference to the level of school holidays the children would have) "*if a person insists on going to another country … and if [the] children were to remain in X*". [6] Later in the same exchange, the Judge asked Dr Moane "*what proportion of their holidays would you say should be with the non-resident parent, for example, P, if she wants to go to live in [Y]?"*. In response, Dr Moane indicated "*at least probably two-thirds*". There were some further exchanges on this issue. The Judge then stated:

> *"You see, you can think about this. I mean. I haven't made any preliminary view at all because I have not heard the husband, but I'm begging a couple of questions here. For example, you've two professionally qualified people. They agree to go [onto] the diplomatic circuit which, everybody knows, has great financial benefits. Children are educated free. Very expensive international school fees, as I understand it. Correct [me] if I'm wrong, but that's certainly the case here. So I'm asking myself, if you go into that situation, understanding what you're going into, even if it's a temporary contract, many people nowadays work on long-term temporary contracts and move from good job to good job within the EU with excellent contracts. So I'm at a loss then – I'm trying to balance things in my own mind from a marital father's point of view who*

[6] Day 1, page 53

happens to work every day for a living, balance that with the marital mother who is better qualified than him. She's both a [ ] and she has a science degree first of some sort, biochemistry or whatever it is, and I'm saying to myself, nine years of third level study, and she chooses not to work in [X], chooses not to learn the language where there are linguistically competent kids here, as far as I can understand. So I'm just trying to balance family life as it is for this family, where one parent – there must have been a choice somewhere along the line for one parent to work and one to be the main carer. But why then should the father be punished or penalised then as a result? I'm trying to balance the situation in my own mind, So would you like to think about [it]?"

Unsurprisingly, Dr Moane said that she would indeed like to think about the issues that had been raised and the Judge indicated that she could come back to them at the end of her cross-examination.

34. In this appeal, it is urged on PIK's behalf that these remarks were *"highly prejudicial and negative*" about her and indicate that the Judge had prejudged the relocation application prior to the conclusion of oral evidence.[7] According to Ms Jackson SC (who appeared for PIK in the High Court and also in the appeal in this Court) there had been a "*consistent pattern"* of such remarks which indicated opposition to her client's case.[8]

[7] Written submissions at para 19. The submissions refer to "*predetermination*" but in my view "*prejudgment*" is the more appropriate term.

[8] Day 2 of the appeal hearing (3 May 2022) at page 38.

Prejudgment/bias is one of the grounds relied on by PIK in this appeal and it will be necessary to address it further below.

35. Dr Moane was then cross-examined by Mr Ó hUallacháin SC, counsel for DK. He asked her to confirm that her overall position was that all three children should relocate with their mother to Y, to which Dr Moane responded "*Well, it wasn't an ideal. It wasn't an ideal situation*", noting that she laid down a number of options before coming to that one.[9] She agreed that she had had difficulty in coming to that recommendation. Counsel then explored aspects of Dr Moane's report and evidence, suggesting that she had uncritically accepted the narrative given to her by PIK (later in his examination, counsel suggested to Dr Moane that she was too much in PIK's corner in her assessment, which Dr Moane did not accept). Dr Moane was asked whether it was not acceptable that the children should remain in X, attending the school and residing in the apartment that they were familiar with, being picked up from school/afterschool activities by their father (or perhaps being brought home by a minder), with PIK enjoying significant access. In reply, Dr Moane said that she did not think that would be an adequate parental arrangement. Albeit expressing concern about the lack of permanency about the position in X, the main point made by her was that "*ultimately what I am saying is that these children, that their needs are going to be best met with their mother at this point."*[10] PIK was, Dr Moane said, more attuned to the emotional needs of the children and provided a lot of structure, engagement and stimulation in terms of the day-to-day

[9] Day 1, page 55.

[10] Day 1, page 77.

family life that children thrive on. Counsel finished his cross-examination late on Day 1.

36. There was a dispute at the start of Day 2 as to whether counsel for PIK was entitled to examine Dr Moane further and as to the extent of that entitlement. In the course of that dispute both counsel for DK and the court made observations suggesting that Dr Moane was to be regarded as PIK's witness. In response, counsel for PIK submitted that she was "*the Court's witness*" who was subject to cross-examination by both parties. She maintained an entitlement to "*re-examine*" in relation to issues raised following her examination on the previous day, including the questions that had been put by the court. The court, counsel continued, had asked Dr Moane to "*consider the question of my client as being a holiday-access parent*" and she wished to cross-examine on that issue. This prompted a lengthy series of observations from the Judge, addressed to Dr Moane, which PIK submits provide further evidence of prejudgment on the Judge's part. It is appropriate to set out the relevant passage in full:

> *"All right. Let's not waste time on it, Put it this way, the reason I asked the question is this: this man comes into Court as a joint custodial father and I was struck, certainly in my study of the report, as to why suddenly does he find himself looked upon as less than a joint custodian. I'm thinking of balance. Balancing the rights of parties before the Court for me to give a balanced decision. So, I'm concerned about that and I decided that it was fairer to everyone to highlight that. So if you want to explain further how the man can come into Court with joint custody rights and somehow he loses in your report.*

I'm concerned about this. It's my interpretation of what I've heard and read. Another thing that struck me – I'm not sure of the exact words used – but you referred to his family of origin – or his supposed description to you as not as emotionally attuned or whatever – that they weren't demonstrative. But I thought – my own reading of the report told me that he had a mother who was a primary school teacher – highly capable, he gets the – he's the youngest in his class in…. UCD with the highest points – very high points. I mean, he goes in very young. So, he has a father whom he describes as – he's very affectionate about his parents. His father [is] very involved in the community. To me, insofar as I can assess anything, it looks to me like a wonderful upbringing. So suddenly he's – he seems to be getting a huge thumbs down. All I want is balance." [11]

37. Dr Moane's response also warrants quotation in full:

"I would not be wanting to take away – if a balance could be maintained and they could be co-parents, I would not be suggesting that that be taken away. But if that can't be - and it seems in this situation that maybe – and this is why I came to my decision, that maybe there can't be a balance of co-parenting but they each have equal time and equal involvement in the day-to-day lives. This is where I had to assess: is there a parent here that better meets the complex needs of these children?" [12]

[11] Day 2, pages 3-4.

[12] *Ibid*, page 4.

In answer to a question from Ms Jackson, Dr Moane indicated that in her assessment PIK was the parent who better meets the needs of the children.

38. Ms Jackson then indicated that she would be addressing the points raised by the court after she had finished with the witness, stating that she had "*certain concerns*". Seemingly out of the blue, the Judge stated that if "*you want me to recuse myself I will*", while also taking issue with "*the tone*". Ms Jackson then asked for an opportunity to take instructions but the Judge stated that she could do so over lunch. She indicated that she would have questions for the witness at the end of the re-examination and referred to the fact that she had to hear DK and "*I may have to recall this lady at the end of that."* Counsel for PIK then observed that she was *"only very little into her own evidence in relation to the matter*". [13] The re-examination then proceeded. Asked to comment on the suggestion that the children's day-to-day caring could be met in X even while DK was working full-time, through school, after school activities and a minder, Dr Moane said that she wouldn't like to see PIK less involved and, if the relocation aspect meant that one of the parents was less involved, she wouldn't like to see that being PIK. There was, she said:

> *"more to, you know, being a parent of kids than bringing them to school, taking them home from school, making sure they're minded, as such. You know, especially during those teenage years you need a parent there who fully understands them, is there for them when they need the parent and knows when*

[13] Day 2, pages 4-5.

not to be there, you know, and let them have their space and, you know, a teenager needs to know that their parent is there." [14]

It is evident from Dr Moane's evidence that she considered PIK to be better positioned to meet the needs of the children.

39. At the conclusion of counsel's examination, the Judge indicated that she still had concerns that she wished to address. She asked a number of questions directed at the issue of how DK's rights as a joint custodial parent could be maintained in the event that the children relocated to Y. In response, Dr Moane indicated that she would recommend joint custody if the parents were still in the same country. In an "*ideal world*", she said, they would both be in the same country, having equal access. Even in that scenario, she thought that PIK should be the most involved in the children's day-to-day lives and having a stronger emotional connection overall. If, however, they were in different countries, equal access became more complex, though regular visits (at least monthly) to the other parent would be possible (though the witness expressed concern at the capacity of PIK and DK to agree such arrangements given their "*very conflicted relationship*"). In the course of the discussion, the Judge referred to the fact that PIK wanted to "*go back to her home country of origin and she wants to live on an island.*"[15] That, the Judge said, was "*fine*" but, she asked, "*does she have to take the children with*

[14] Day 2, page 6.

[15] As PIK observed in her evidence subsequently, Y is a country of islands with three large landmasses, where she wished to live with the children.

her?"[16] She then asked Dr Moane whether DK was "*a good enough parent*", to which the witness replied by stating that he had definitely been a good enough parent in the context of the marriage but in the context of "*the circumstances we're looking at, I wouldn't be so confident about that."*[17]

40. At the conclusion of her questions to Dr Moane, the Judge indicated to her that she might have to recall her at the very end of the evidence. In the event, although the Judge later indicated that she was recalling Dr Moane and *"would have plenty to ask her when I've heard all the evidence*", she was not in fact recalled and gave no further evidence. The Judge did not explain her evident change of mind about recalling Dr Moane.

41. PIK then resumed her direct evidence. Shortly afterwards, the Judge intervened to ask counsel to tease out with her what she was "*willing to do in terms of [the children's] time with their father"* in the event that the children were permitted to relocate. She noted that she hadn't heard DK and didn't know what he was going to say "*about all of this*" but she had a decision to make. She continued:

> *"So I'm asking myself, as time goes on, if the children – if I directed, for example – and Ms Jackson you can tease this out please – that everybody stays in [X] for the moment – for the foreseeable future and day-to-day – just for the sake of argument if I follow the report to the extent where it says day-to-day care and*

[16] Day 2, page 12.

[17] Ibid

control to yourself that would confine you for a period of time in [X], what would you suggest in a joint parenting arrangement?"

42. PIK then gave evidence to the effect that "*it would be nigh impossible for me to remain in [X] and have any chance of supporting myself and my children financially and practically."* She described the barriers to her working in the field of her professional qualification in X, including that it was "*overwhelmingly impossible*" to have her qualification (which she had obtained in the UK) recognised there and the fact that her language proficiency was not sufficient to allow her to work in the area in any event. Asked what emotional support she had in X, PIK referred to the *"very very transient*" nature of the international community (a point she made on a number of subsequent occasions during her evidence and which was also made by Dr Moane). She then went through a book of material she had prepared – described as "*the relocation booklet*" – in relation to the proposed relocation to Y. She gave evidence that she would not have any difficulty in obtaining employment in her field there (she had in fact secured a job a few weeks after moving there previously). Even if she were to work full-time, she would be able to care for the children without requiring any additional childcare and she could be able to work part-time, and still be in a position to support the children, with a little financial help from DK. She gave detailed evidence about the education arrangements for the children in Y and the family support that would be available to her and to them in the event of relocation.

43. PIK finished her direct evidence on the afternoon of Day 2 and was then cross-examined. Counsel canvassed a number of issues with her, including the circumstances

in which DK extended his appointment in 2017 and the commencement by PIK of family law proceedings in X shortly afterwards, before addressing PIK's removal of the children to Y in the summer of 2019. "*With hindsight*", PIK said, "*I will hold my hand up and say it was a mistake".* She accepted that it was "*the wrong decision"* and said that *"if I had my time again, I would do things differently for sure."* She had been trying to move matters forward in the aftermath of the decision of the courts in X to refuse jurisdiction but apologised to DK for the hurt that he undoubtedly felt. It was put to her that, in light of the fact that she had removed the children in the way she had, no credence could be given to her promises to keep DK involved in the life of the children. There was detailed discussion of the 2019 Hague Convention proceedings which DK had brought to secure the return of the abducted children to X. Counsel referred to WhatsApp messages sent by PIK to I on the day that the final order was made in Y for the children's return, *inter alia* telling her to "*run*" and to tell "*the others run*". PIK accepted that they were "*absolutely not appropriate messages to send"* but explained that she was "*out of her mind with concern and worry for the children"* at that point. It was not, she accepted, in the best interests of the children to receive such messages. PIK was also asked about Facebook posts around that time in which she had suggested that her children were being held against their will by an "*Irish diplomat*" in X, under cover of diplomatic immunity. She accepted that that was not reasonable and apologised. She was asked in detail about alleged difficulties that DK had had in getting access to the children but said that her relations with DK had *"turned a corner*" and there was no reason to think that position would not continue.

44. In the course of PIK's ongoing cross-examination on Day 3, the Judge intervened to ask PIK what she would do in the event that the court decided that the children were not to be taken to Y.[18] PIK stated that she would "*have to leave*" X. She would have to go to Y and start working and then endeavour to find a way, with work, to be able to exercise visitation and access with the children. She thought that that would be "*very difficult*" for the children.[19] She was asked by counsel for DK whether, regardless of the decision of the court on the relocation application, she intended to go to Y. She again indicated that she would "*have to go to [Y]*". Asked whether there were *"any circumstances*" in which she could stay in X if the children were to remain there, the witness referenced winning the lottery and never needing to go back to work, although adding that *"ideally, overall, my feeling is that the children's needs and best interests are best met .. outside [X]."*[20]

45. The Judge intervened again to ask PIK to consider what sort of access she would want in the event that she moved to Y but the children remained in X. That led to a debate between counsel and the court as to whether, in the event that the Judge refused the relocation application, she would have jurisdiction to make orders relating to access. The Judge was referred to a decision of this Court, *RL v Judge Heneghan* [2015] IECA 120, where the Court held that section 11 of the 1964 Act did not confer on a court hearing a section 11 application a freestanding jurisdiction to depart from the terms of the application or to grant a substantive relief materially different to the relief sought.

[18] Day 3, page 29.

[19] Ibid, page 30.

[20] Day 3, page 31.

On that basis, Ms Jackson submitted that, in the event that the court decided to refuse relocation, it could go no further. While that submission appeared to exercise the Judge, Mr Ó hUallacháin did not disagree with it.[21] In the course of the ensuing discussion, the Judge suggested that Dr Moane's report strayed "*beyond the pleadings*". [22] The Judge did not explain (and was not asked to explain) the basis for that suggestion. However, in view of the reliefs sought by DK in his Indorsement of Claim and those sought by way of counterclaim by PIK, and bearing in mind the terms of the section 47 order (which simply directed Dr Moane to prepare a section 47 report "*in relation to the dependent children")*, it is not obvious to me that there was any proper basis for suggesting that Dr Moane had exceeded the proper scope of her appointment and it is notable that no such suggestion had been made by either party either to Dr Moane when she gave her evidence or in submission. The Judge went on to state she had been "s*hocked*" at the report "*for many reasons"*. Again, that statement was left unexplored but it does beg the question why, if the Judge considered Dr Moane's report to be "s*hocking*", she had not said so to Dr Moane or given her an opportunity to respond to whatever concerns had prompted the Judge's observation.

46. In re-examination, PIK confirmed that she would have no difficulty with the making of mirror orders in relation to access in Y (as Whelan J explains in her judgment, Y is not a party to Council Regulation 2201/2003 or to Council Regulation 2019/1111 which has replaced it. It is, however, a party to the Hague Convention). She expressed the view that, if the children remained in X with DK, significant childcare would be needed.

[21] Day 3, page 54.

[22] Day 3, page 57.

The Judge then asked her a number of questions. She was asked what she had to say about recommendation 3 made by Dr Moane (relating to access arrangements in the event that DK and PIK agreed to live in the same country). Before PIK had an opportunity to give her response, the Judge stated that "*ideally you would choose both of you to live in the same country*" so that they could have joint access. [23] She queried how progress could be made with recommendation 3, and in particular that part of it addressing the relationship between DK and I, in the event that PIK went to Y with the children. The Judge then read recommendation 4 from Dr Moane's report, pausing as she did so to observe that she was not sure that she agreed with it. PIK then asked to be allowed to address recommendation 3, emphasising that she and DK had spent 4 years looking for a solution. She expressed the view that the sort of contact that I required could be available even if I relocated to Y. The Judge then observed that DK *"wouldn't be there."* PIK took issue with that, saying that DK would have very general access and that he would not be there in X either on a Monday to Friday scenario. The Judge then expressed concern at how tiring DK would find the travel to Y. E had described that when "*dad arrived on the weekends up to [Y] that he was tired".* DK had, the Judge observed, *"done a week's work in a high pressured job. I mean come on. I have a lot of questions about this."* [24] The Judge then explained that she was just highlighting the options. They were "*not A or B*" and Dr Moane had said that ideally PIK and DK should live in the same country. Again, PIK observed that it had not been possible to reach agreement in four years and that the parties needed to sort matters out for the children.

[23] Day 3, page 85.

[24] Day 3, page 89

47. The final witness, DK, began his evidence on Day 4. It is necessary only to highlight certain aspects of his evidence.

48. DK was firmly of the view that it was in the best interests of the children to remain in X. He believed that PIK could work in the field of her professional qualification in X. He wished for the "*week on week off*" access that was in place to continue. The children were thriving in their school, the fees for which were discharged by the Irish Government. He gave evidence as to the time, inconvenience and expense that would be involved in visiting the children in Y in the event of their relocation. In the course of his direct evidence, the issue of the Judge meeting with the children, particularly E, arose which resulted in PIK being recalled to the witness box to give her view on that issue. I will address that issue separately and in that context refer to the respective positions of DK and PIK. DK's evidence then resumed. He gave evidence that it was PIK that had suggested a further extension of his posting (for a fifth year, from summer 2017 to summer 2018). He gave evidence about the proceedings in X, in which PIK had been seeking to relocate the children to Y. According to DK, PIK had re-enrolled the children in their school for the 2018/2019 year and that had prompted him to look for employment so that he could remain in X and that had led to a position on secondment with the EU. He gave evidence that in the latter part of 2018 and into 2019 he had great difficulty in getting access to the children. Access was, in his words, "*almost non-existent*".

49. DK then gave detailed evidence about the abduction of the children to Y. They had been due to go to Ireland with him for a family holiday but PIK had not brought them to his

apartment as arranged. He did not know where the children were and had only very limited communication with them. He had gone to the Gardaí here who made contact with their counterparts in Y and eventually the children were located. Only then did PIK send an email to DK indicating that she and the children had settled in Y and would be remaining there. He immediately initiated child abduction proceedings for the children's return. He described the day on which the order was made returning the children into his care and how he brought the children back to X. As DK's direct evidence was coming to a conclusion, the Judge intervened to ask counsel to deal with Dr Moane's Report. Dr Moane had, the Judge suggested, qualified her remarks "*regarding the nuclear option of a transfer to [Y]*". She had, the Judge said, described it "*as a very difficult case but more or less as a last resort option."*[25] DK agreed with counsel's suggestion that "*we're probably at recommendation 3*" and expressed the hope that it would continue. The children had (so DK said) struggled in school in Y (a point which seems not to have been put to PIK in her evidence). He expressed concern at the prospect of the children being with PIK, without him, referring to "*angry outbursts*" which PIK occasionally had which he felt affected the children. He dismissed the possibility that he could relocate to Y. Asked whether he thought that PIK would leave X in the event that the court did not permit the relocation of the children, he expressed the view that she would not. She had, he said, suggested that before (when she had removed the children to Y and sought to retain them there) but she had come back. There were, in his opinion, no obstacles to her remaining in X.

[25] Day 4, page 103.

50. DK was then cross-examined. He suggested that PIK had sought to alienate the youngest child I from him (a point which does not appear to have been put to PIK in cross-examination either). He raised the possibility of the entire family relocating to Ireland and said that he had discussed that with Dr Moane but it had not featured as an option (in fact, recommendation 3 addresses a scenario where DK and PIK agree to live in the same country, which would clearly encompass an agreement to live in Ireland). He had expressed confidence to Dr Moane that PIK would return to Ireland if the children relocated there given that "*she absolutely loves the children*". [26] However, as PIK had made it clear that she would not return to Ireland, DK wished to "*retain [the children] in the status quo."* He expressed a strong view that the children needed his influence and that their best interests would not be served by being in a different country to him.

51. DK's evidence continued into Day 5. At the start of that day's proceedings the Judge referred to the position of each of the children in terms of staying in X or going to Y and – clearly referring to E - suggested that there was one "*who dearly wants to stay where she is*". Ms Jackson then observed that Dr Moane's Report suggested that E was not opposed to moving to the degree suggested by the Judge and seemed to be more ambivalent. Counsel read an extract from the Report relating to E. Counsel then said she had some concern arising from the Judge's reference to the "*nuclear option*" of a transfer to Y. She noted that Dr Moane had not used such language in her Report. That appeared to irritate the Judge considerably. She had, she said, expressed a "*preliminary*

[26] Day 4, page 125.

view" which she was entitled to do. There could not, she continued, be a situation where *"[counsel] now tells me what I can and can't think or say and one could say that it was intimidatory."* She stated that she was "*not easily intimidated*". Ms Jackson then asked for time to take instructions, which the Judge initially refused to allow, though she did withdraw the suggestion that counsel had sought to intimidate her. The Judge explained that she had not meant to give any indication of how she was going to decide the case and thought that Dr Moane had clearly indicated that recommendation 4 was the "*last resort*" or "*final option*". The Judge indicated that she would have to recall Dr Moane (though, as I mentioned earlier, she was not in fact recalled). Ms Jackson pressed her request for an opportunity to take instructions in circumstances where (she said) the court believed that she was seeking to intimidate it. The Judge stated that she had withdrawn that remark and apologised and asked Ms Jackson to stop making "*too much"* of it. Ultimately, the Judge indicated that she would rise.

52. When the hearing resumed, Ms Jackson informed the court that her client was concerned that certain of the comments made by the Judge indicated "*a level of predetermination*". Asked by the Judge to identify such comments, Ms Jackson referred to the observations that the Judge had made about DK, his university results, career and his family background, which "*had not been reciprocated*". She also returned to the Judge's reference to Y being a "*nuclear option*". Dr Moane had not characterised it as such in her evidence and in fact her evidence was "*very strongly"* that the best interests of the children would be served by them living with her in Y and was "*very supportive and positive"* about the life they would have there. In response the Judge said she may have mis-used the word nuclear and that all she meant to convey was that Dr Moane

had said that the option of the children going to Y was a "*last resort*". She had, she said, no greater admiration for DK than for PIK, both were highly intelligent and educated people committed to the education and welfare of the children. She then indicated that she wished to hear the remainder of the case and DK's cross-examination resumed.

53. As may be apparent from the above, no formal application was made to the Judge to recuse herself.

54. As regards the remainder of DK's evidence, there was a lengthy discussion of the proceedings brought in X by PIK and the circumstances in which the issue of diplomatic immunity had arisen. The issue of whether DK's diplomatic immunity could be waived so as to allow the courts in X to make orders in relation to the children was also discussed at some length both with DK and in submission. That is not an issue in this appeal and it is not necessary to say any more about it. DK was generally very critical of PIK in his evidence, though he acknowledged her love for the children. Indeed, he relied on that to suggest that the "*scenario*" whereby PIK relocated to Y without the children was not plausible. He suggested that the assertion that PIK would leave X was made "*strategically*" and he simply did not believe it.[27]

[27] Day 5, pages 73-74.

THE JUDGE'S MEETINGS WITH CHILDREN

55. The question of whether the Judge should meet with the children or any of them surfaced from time to time during the hearing.[28] Both DK and PIK gave evidence on the issue. In my earlier judgment, I summarised their respective positions as follows:

> *"Each expressed their views thoughtfully and with manifest regard for the potential impact of any such meeting on the children. DK appeared to favour the Judge speaking with E. PIK was more doubtful but expressed the view that, if the Judge was to speak to E, she should also speak to L. For her part, the Judge expressed the view that, if she heard one of the children she should hear them all. Neither party objected to the Judge meeting any or all of the children and each accepted that it was ultimately a matter for the Judge to decide whether or not to do so."* (at para 18)

56. As at the conclusion of the substantive hearing on 30 June 2021, the Judge had not made any final decision as to whether she would meet the children. She did, however, indicate that if she decided to do so, she thought that it would only be fair to hear them all.[29] The proceedings were then put in for mention on 9 July 2021. In the event, however, on 6 July 2021 the Judge informed the parties that she had decided to meet with the children and in fact met with all three of them individually on 8 July 2021.

[28] See Day 1, page 29; Day 2, page 29; Day 4, pages 37-46; Day 5, page 90.

[29] Day 5, page 90.

57. I do not propose to say anything at this stage as to what was discussed at those meetings. It will, however, be necessary to do so at a later stage in addressing certain of the complaints advanced by PIK in the appeal.

58. As I stated in my earlier judgment:

> *"Unfortunately, there was no discussion as to the parameters within which the suggested meetings should proceed or their precise purpose. Neither party raised any question as the basis on which any meetings should proceed. That question was not raised by the Judge either. The High Court (Abbott J) had previously offered guidance about judges meeting with children in O' D v O' D [2008] IEHC 468, [2013] 3 IR 189. Putting aside the detail of that guidance for the moment (and I shall return to it), its over-riding message is the need for clarity in advance of any such meeting..."* (at para 19)

59. Regrettably, there was a complete absence of clarity here as to the basis on which the meetings with the children should proceed.

THE HIGH COURT JUDGMENT

61. The High Court's Judgment includes a lengthy recital of the evidence of the parties. It also deals at some length with the report of Dr Moane and the evidence given by her. The Judge noted that Dr Moane had said in her evidence that relocation was not "*an ideal solution"* (Judgment, para 73). Noting Dr Moane's view that the needs of the children would best be met with their mother and that she was more attuned to their emotional needs, the Judgment then states that the *"Court does not accept that the needs of the children are best met with their mother and feels the father is actually more attuned to their emotional and psychological needs and more in tune with what they want and why that is so."* (Judgment, para 81).

62. The Judgment then sets out the recommendations made by Dr Moane in her report. Recommendation 1 is summarised at para 88(1) and reference is made to Dr Moane's recommendation that the children should remain in X until the summer of 2021 or until such time that Dr L assessed the relationships between children and parents to be *"repaired enough to withstand an international separation*". The Judgment also refers to the fact that Dr Moane had also indicated that the relationship between I and DK required most repair and that it was important that PIK supported and facilitated that. The Judgment then states that the "*Court does not accept this finding and holds that the necessary therapy is ongoing*." It is not clear what "*finding*" is being referred to here or the basis on which the Judge appears to have made a finding as to the therapeutic needs

of I or any child of the family, in substitution for the assessment of Dr L. Recommendations 2-5 are then set out without comment.

63. The discussion immediately following is central to the Judge's assessment and conclusions and for that reason I will set it out in full:

> *"89. In her evidence [Dr Moane] seemed to place great emphasis on relocation to [Y] as the ideal solution. This Court does not agree with her view on many aspects of her findings. Her evidence is opinion evidence, albeit from a clinical psychologist, and the court fundamentally disagrees with her assessment of the father. The court fundamentally disagrees with her assessment of the children. The court does not find that the mother is without any power or control in [X], nor does she lack legal rights and nor is she incapable of working. While it is true that both of them, while they do have a network of friends and acquaintances and while they did have many visits from grandparents on each side of the family, they do not actually have family support in [X].*
>
> *90. The argument is made that to stay in [X] with the continuing problems will impact on the wife's stress levels and her mental health and that, in turn, will impact on both parties. It seems that further claims of the wife re-establishing a life in [Y] are available while still working the week on, week off arrangement with some modification whereby her children would see her, for example, on week one and then on week two she might travel to [Y] and work there on a week on, week off basis and she would be able, in those circumstances, to work five full days as opposed to half days which she had been doing when in [Y] before.*

That would not be ideal but she is not restricted to staying in [X] herself but it is not what the children want. They need to have both parents at this stage in the same country. While she has done a lot of research on [Y] and has explained that in detail to the court, it is not a point scoring exercise for either place in fact, rather it is an assessment of what is in the best interests and welfare of the children at this point.

91. In terms of status, viz-a-viz the children, while she stayed at home to mind the children for a long number of years, this Court acknowledges that the father has always been a hands-on parent and was very involved with the children and both parties excelled in their respective parenting roles. It is noted that they had two au pairs when both were working in Dublin.

92. This Court felt that there was a lack of balance in Dr. Moane's assessment and that she was unnecessarily negative about the father and about the father's parenting role in circumstances where the children clearly love both parents and are dependent on both parents. As matters stand and since they re-established access post the child abduction, the reality of the case is that, by virtue of their marriage to one another, they are both joint custodial parents of these children, they are both joint guardians and they have worked successfully a week on, week off arrangement with certain other arrangements as described in this judgment so that the children see the other parent when they are not with that parent for one week at a time and vice versa.

93. The mother has full rights as an EU citizen and she is [?entitled] to travel within the EU as she wishes and her problem is that she wants to uproot the

children now that they are settled again and undergoing therapy successfully and take them to [Y] for a new further start. This Court found that that was contra indicated on the evidence, particularly having regard to the views of the children and particularly having found the children as particularly secure and of an age when their respective views ought to be taken into account.

94. The husband's own personality cannot be used as a feature against him anymore that the wife's personality should come into this assessment of what is best for these children at this point. They are highly different in manner and personality. Their common intention and design has always been to co-parent their children and to do the very best for them, in particular, with regard to their educational needs, but it is quite clear from the therapeutic engagements that they are also very concerned to do what is right for them in terms of their physical and psychological needs.

95. Essentially, the father's case is that they went from [the UK] and back to Ireland after the birth of the first child and that the two other children were born in Ireland and that they moved as a family unit with the same intention and aims and objectives so that he could take up a prestigious post in [X] with diplomatic status at that time.

96. With regard to her second recommendation that they would move to [Y] at the end of this academic year or, alternatively, until January, 2022, this too is contra indicated on the evidence, having regard also to the best interests of the children and their stated views. They are clearly not in a position to tolerate an international separation, in the view of this Court.

97. With regard to option 3, they should still live in the same country and have the week on, week off basis access for a joint arrangement for at least a year, obviously as children get into their mid to late teens, that will be fluid situation. The court found that the youngest child, while her situation is quite complex, this Court did not find her negative as such about her father but she is anxious herself to overcome what she sees as a lack of connection with him. This Court is also of the view that what the children need now is certainty and that that certainty can best be served by having them remain where they are continuing in a system they know well where they are doing extremely well in academic terms and spreading their vacation time equally between the parents.

98. With regard to recommendation 4 of Dr. Moane's report, it is not the view of this Court that the mother has a greater capacity for providing for the needs of the two younger children at present notwithstanding their father's vital role in their lives. The court simply does not accept the evidence of Dr. Moane in this regard and feels that the father is a vital component in this unit of five people where they badly need the stability and calm of their father.

99. This Court prefers option 3 for the reasons out in this judgment save that the scheme going forward must give the children the security they crave in that it should be allowed evolve naturally, as they mature, but should not be subject to constant challenge as this would not be in their best interests."

64. It will be necessary to come back to discuss a number of aspects of this analysis in more detail. However, a number of points may be made immediately. The first is that the

suggestion that Dr Moane had in her evidence placed great emphasis on relocation to Y as "*the ideal solution*" is, on any view, a significant misstatement. In neither her Report nor in her oral evidence had Dr Moane made any such suggestion. On the contrary, as paragraph 73 of the Judgment accurately reflects, Dr Moane had made it clear that relocation to Y was *not* an ideal solution. Her evidence was that the "*ideal situation*" was for the parents to agree to live in the same country and that was reflected in her recommendation 3. Indeed, the Judgment notes that position in paragraph 116. Recommendation 4 was made on the basis that it did not seem possible for DK and PIK to reach such an agreement.

65. Secondly, and as already noted, in preferring "*option 3*", the High Court appears to have chosen an option that was not, in fact, an available option at all. There was no agreement between DK and PIK to live in the same country. The evidence of PIK was that she had remained in X after the breakup of the marriage pending the determination, successively, of the family law proceedings brought by her in X and the relocation application brought by her in this jurisdiction, that it was no longer feasible for her to do so and that she had made the decision to relocate to Y, irrespective of whether the relocation of the children was permitted. DK had made it clear in his evidence that he was not willing and did not consider it feasible for him to relocate to Y. He also expressed the view that, if relocation was refused, PIK would not actually leave X. Notably, however, the Judge made no finding to that effect.

66. Third, the suggestion that PIK could work in Y on a week on week off basis, and spend the off weeks in X with the children, seems never to have been discussed at the hearing

or put to PIK as a workable option. In any event, it appears to differ materially from "*option 3*". Notably, the possibility that DK could make similar arrangements to enable him to spend off weeks in Y with the children in the event that the application for relocation was allowed does not appear to have been considered by the Judge.

67. The Judge then discussed the views of the children. It is evident from that discussion that the Judge relied to a significant extent on the impressions she had gained from her – very brief [30] - meetings with them.[31] The Judge noted that the children did not want to be separated. Unsurprisingly, they were fearful of a scenario where their parents lived in different countries and did not agree that that should happen (Judgment, para 108). They had a strong preference for having equal time with both their parents (Judgment, para 109). Maintaining family relationships was deeply important to them and they could not "*countenance parents in different countries"* (Judgment, para 113). There was no question but that it was in the best interests of the children to continue to have good contact with both parents and they envisaged week on, week off contact (Judgment, para 122). In the children's view, and in the Court's assessment, the children needed both their parents and needed and wished them to be in the same country (Judgment, para 124)

[30] On the Judge's own estimate, each of the meetings lasted 15 minutes approximately (Judgment, para 100). On that basis, the Judge spent a total of 45 minutes with the children.

[31] By way of example, at para 110 of the Judgment, the Judge expresses the opinion that I had made "*great progress*" since Dr Moane's report had been prepared. The only basis for that opinion could have been the Judge's meeting with I. See also para 175 which emphasises how the views of the children had developed in the period since the report of Dr Moane and the Judge's meetings with them in July 2021.

68. In the Judge's view, the relocation application cut across a system of therapeutic endeavour in X as well as a co-parenting regime (Judgment, para 118). It was *"contra-indicated*" that the children would be subject to any further move (Judgment, paras 107, 126). Another move would not be in their best interests and not what they wished (Judgment, para 127).

69. In essence, the children wanted a continuation of the *status quo* and that is what the Judge considered should be the position also, albeit with some minor modifications relating to access. Parents and children were *"very much a family unit of five people".* E and L could not be coerced into moving given their stated views and it would be against the spirit of cooperation and communication which had existed in terms of the parenting approach, especially that of PIK as mother, *"were she to insist on this with regard to the children*" (Judgment, para 132).

70. The only express reference in this part of the Judge's Judgment to the possibility of DK relocating to Y is at para 117. At para 116 the Judge refers to Dr Moane's *"ideal situation*" being one where the parents would *"willingly agree to live in the same place with equal access between them."* The Judgment then continues:

> *"117 [Dr Moane] sees value in [PIK] relocating with the children to [Y] as set out in para 6 of her report and notes that, while [DK] is adverse to this scenario were it to happen, he would want to see his children as much as possible. It seemed to this Court as the case unfolded that [DK] was anxious to remain in [X] for as long as possible and envisaged him being able to obtain employment*

there in a variety of possible scenarios. Were [PIK] to be committed to basing herself in [Y], it would then be a question of organising access for her in Ireland."

71. As far as the Judge was concerned, DK's stated intention to remain in X as long as possible seems to have definitively foreclosed any further consideration of the possibility of him relocating to Y to be near the children in the event that they moved there. It was indeed PIK's evidence that she was committed to "*basing herself in [Y]."* In that event – so the Judge appears to be saying – the question would be how access in X (the reference to Ireland here is clearly an error on the part of the Judge) should be organised. That scenario would appear to involve DK having day to day care and custody of the children. Such a scenario had been addressed by Dr Moane and by PIK in their respective evidence and each had expressed concerns about it in terms of the interests and welfare of the children. DK had also given evidence as to how he would manage to care for the children while working full-time. However, the Judge says nothing more about this issue in her judgment. Instead, she effectively addressed – and elected between - two scenarios only, the continuation of the *status quo* and the relocation of the children to Y, with DK remaining behind in X. As we shall see, that approach is strongly criticised by PIK.

72. Having emphasised that section 31(4) of the 1964 Act was intended to avoid "*point scoring"* as to what had happened in the past[32] and having discussed in some detail the possibility that DK's diplomatic immunity might be waived so as to allow the courts of X to implement any orders that might be made in these proceedings, the Judge concluded this part of her judgment by noting that the views of the children had been obtained comprehensively and then stating:

> *"143. Great consideration has been given [by] this Court [to] Dr Moane's report. The court felt that it was very much in favour of allowing a relocation without due regard to the implications of same as set out above."*

Again, this characterisation of Dr Moane's position is, in my view, inaccurate and unfair.

73. The Judgment then discusses the law, referring to Article 42A and section 31 of the 1964 Act and a number of decisions of the courts here, including the decision of this Court in *SK v AL* [2019] IECA 177, in which Whelan J gave the sole judgment (Edwards and McCarthy JJ concurring). There was little or no dispute as to the applicable principles in relocation cases so it is not necessary to review the Judge's analysis at this point. I shall endeavour to set out the relevant legal framework later in this Judgment.

[32] Later in her Judgment the Judge made it clear that the fact of the abduction was merely a fact and was not to be held against PIK (Judgment, para 191). She also found, however, that it was not an impulsive matter but a planned move (Judgment, 182).

74. At paragraph 175 onwards of her Judgment, the Judge returns to the substantive issue of relocation. In paragraph 175 she suggests that the views of the children had developed in the period between their engagement with Dr Moane and her meetings with them. They were strongly in favour of living with both parents in the same country, on a week on week off basis. E was "*very against being moved to [Y]*" and separation of the siblings "*was not an option."* Great stability had come into their lives since their return from Y to X. They had had the benefit of extensive therapeutic intervention, which needed to continue (Judgment, para 176). The children had been 8 years in X (other than the period when they had been abducted to Y), longer than they had been anywhere else and were *"integrated in a social and family environment as established by the evidence."* (Judgment, para 181). The court was "*unconvinced*" that PIK had made every effort to obtain employment in the field of her professional qualification in X. No *"proof positive"* had been provided to the court and the Judge noted the evidence of DK to the effect that she could have taken steps to make herself eligible for such employment. No "*documentary proof"* had been provided of any application for employment at all (*ibid*).

75. At para 190, the Judge noted that the parties had, *de facto*, entered into their own agreement as joint custodial parents of the children and joint guardians with shared parenting arrangements. Two of the children were now teenagers. The course of dealing showed a capacity to work that arrangement and the children were happy with it and wanted it to continue. There was no presumption either in favour or against relocation, it was purely an exercise in welfare assessment (Judgment, para 191). To permit the relocation of the children would not be in their best interests and would cause difficulty

in terms of vindicating the children's right to their father (Judgment, para 193). The Judge then went on to address the habitual residence of the children. While it was not for the court to decide where they were habitually resident, their "*primary connection is with Ireland*" (Judgment, para 194). That is a somewhat surprising suggestion in all the circumstances but it is not necessary to address it further here. The court had taken "*an entirely child-centric approach"* (Judgment, para 195). While the court had naturally considered "*to a great degree*" the wish of PIK to leave and the "*extensive research*" she had carried out, the case turned on its own particular facts, including the fact that the children were not babies or toddlers but were emerging toward adulthood and had been through quite a traumatic series of events (Judgment, para 196). Given the continuing therapeutic regime in X, it was "*not deemed appropriate to move these children at this time*" (Judgment, Para 198). The Judge appears to have been critical of PIK's unwillingness to have the court give directions giving formal effect to the *de facto* week on week off position (Judgment, para 198). After some further observations on issues of diplomatic immunity and habitual residence, the Judge proceeded to state her conclusions in the terms already set out above. It seems appropriate, however, to set out again what the Judge considered to be the effect of her ruling:

> "*The effect of this ruling is that both parents enjoy joint guardianship rights and a shared parenting arrangement and agreement and the children are and have been based in [X], the place of their usual residence, given their father's employment and that situation is to continue pending further court orders and for agreements between the parties."* [Judgment, para 203]

76. The order made by the Court consequent on its Judgment (dated 23 July 2021) simply recites that the reliefs sought by PIK were refused. Subsequently, on 30 July 2021 the issue of costs was debated and the Judge awarded DK his costs.

THE APPEAL

77. PIK brought separate appeals from the High Court's refusal of the relocation application and its refusal to allow access to the transcript of its meetings with the children. The latter appeal was obviously dealt with first.

78. PIK's Notice of Appeal set out a number of grounds, not all of which were ultimately pursued. Written submissions were exchanged in the ordinary way and the parties then sought a hearing date. A priority hearing date of 4 April 2022 was allocated on the basis that Costello J was assured that the hearing of the appeal would conclude in three hours (there was another short appeal already listed on that date and so a three hour slot was all that was available). Perhaps inevitably, that turned out to be a significant under-estimate. At the start of the hearing on 4 April, Ms Jackson SC indicated that she wished to address four specific issues in her submissions on behalf of PIK. By the time that the Court rose at the end of that hearing day, Ms Jackson was still some way off completing her submissions on the second of those issues. In the circumstances, the hearing had to be adjourned and a second hearing day allocated. The appeal resumed on 3 May 2022 for a full day. It is understandable that the parties were anxious to have the appeal dealt with as quickly as possible. At the same time, it is not helpful that this Court should have been asked to list this appeal on the basis of what was, in my view, a wholly unrealistic time estimate.

79. In any event, as just mentioned, Ms Jackson identified four issues which she focussed on in her submissions, as follows:

Issue 1 – The Judge's treatment of Dr Moane's Report and of the evidence given by her

PIK accepts that, having regard to the decision of the Supreme Court in *McD v L* [2009] IESC 81, [2010] 2 IR 199, the Judge was not bound by the views expressed by Dr Moane in her report and in her oral evidence. However, she submits that the Judge did not adequately explain her reasons for rejecting Dr Moane's evidence and departing from her recommendations (and in particular Recommendation 4). It is also said (and this clearly overlaps with issue 2 below) that the Judge wrongly relied on her meetings with the children as a basis for rejecting Dr Moane's evidence, thus (so it is said) inappropriately setting herself up as an expert and going beyond her proper adjudicative role.

Issue 2 – The Judge's meetings with the children and the reliance placed by the Judge on what was said at those meetings

A number of related complaints are made arising from the Judge's meetings with the children. First, PIK suggests that the Judge was ultimately responsible for the failure to clarify in advance the scope and purpose of the meetings. Second, it is said that the Judge's engagement with the children went beyond what was appropriate and that she had an "*agenda*" which was to use the meetings to elicit information which could then be relied on as a basis for rejecting Dr Moane's evidence (which, it was said, the Judge "*didn't like*"). Third, it is said that, in any event, the Judge erred in relying on what was said

by the children at her meetings with them as it did not constitute evidence. In that context, it is said that, to the extent that anything of significance was said by the children in the course of the meetings, it should have been referred to Dr Moane for review and she could then have prepared a supplemental report which could have been put before the court in the ordinary way. Fourthly, and finally, it is said that, as a matter of fair procedures, the parties should have had an opportunity to review the transcripts of the meetings and make submissions on them before the Judge made her decision.

Issue 3 – Alleged prejudgment of the issues

Relying on *AP v McDonagh* [2009] IEHC 316, PIK says that the Judgment of the High Court here should be set aside. Here, as in *AP v McDonagh* – so it is said – the comments made by the Judge during the hearing, and in particular the comments made by her on the first day of the hearing, indicated that she had "*reached a conclusion on a question in controversy between the parties, at a time prior to it being proper for such adjudicator to reach such a decision*" (per Clarke J at para 7.4). The Judge was thus guilty of a pre-judgment – or as Clarke J considered was a more accurate description, premature judgment - of the relocation application.

As is apparent from the discussion in *AP v McDonagh,* prejudgment is (or may be) a species of *objective* bias. At various points during her submissions, however, Ms Jackson's criticisms of the Judge's approach suggested *actual* bias

on her part. As Mr Fitzgerald SC (who argued the appeal for DK) observed, the suggestion that the Judge had an "*agenda*" in meeting the children appears to go far beyond a complaint of objective bias. None of the grounds of appeal suggest any form of subjective bias on the part of the Judge and when this issue arose during the hearing, no application was made to amend the notice of appeal to add such a ground. It follows, in my view, that no issue of subjective bias is properly within this appeal.

Issue 4 – Misapplication of the applicable test for relocation applications

The complaint here is that the Judge effectively approached the relocation application as involving a choice between, on the one hand, the *status quo* – a continuation of the co-parenting arrangements in X – and, on the other, permitting the relocation of the children to Y with their mother. According to PIK, there were other options that the Judge did not consider, or did not consider properly. One was the option of DK relocating to Y. More significantly (so it is said) the Judge did not have any proper regard to the fact that PIK had made a decision to relocate to Y in any event. Accordingly, the *status quo* was not an option and was, in effect, a false comparator. The real comparator involved the children remaining in X with their father, in circumstances where PIK had relocated to Y, and where, accordingly, there would be a co-parenting arrangement and DK would have day-to-day responsibility for the children. However – it is said - the Judge did not address that scenario in any meaningful way. In any event, it is said, the Judge did not properly address PIK's relocation

application and had effectively sought to compel PIK to remain in X, notwithstanding her entitlement to decide to relocate to Y in light of the breakdown of her marriage.

80. Although advanced as four distinct grounds, it is evident that these grounds are closely connected. All involve the same essential complaint, namely that the Judge did not properly or fairly assess PIK's relocation application. I will address the final issue identified by Ms Jackson first.

DISCUSSION

The Proper Approach in Relocation Applications

SK v AL [2019] IECA 177

82. The agreed starting point is the decision of this Court in *SK v AL* [2019] IECA 177, in which Whelan J gave the sole judgment (Edwards and McCarthy JJ agreeing). *SK v AL* involved an application to relocate to the United States. The applicant was the mother and primary carer of the child – a 10-year-old girl - and the respondent was the father. The parties had previously been in a relationship but were not married. The application was allowed in the High Court and the father's appeal was unsuccessful. The facts differ significantly from the facts here but the judgment of Whelan J gives general guidance as to the proper approach to applications for relocation.

83. Whelan J began her analysis by noting that the approach of the court is governed by the Constitution, the 1964 Act and the jurisprudence governing the ascertainment of the best interests of the child. She noted that in any trans-national child relocation case a variety of conflicting or competing interests are potentially engaged, including the best interests of the child in question, the rights and interests of the relocating parent (including their family circumstances) and of the left-behind parent. Such an application, she observed, "*frequently, if not invariably, brings into stark relief the conflicting aims and objectives of the parent who proposes to relocate and who is usually the primary carer of the child with the rights of the left behind parent to*

maintain a relationship with the minor" (at para 40). Even if PIK is not the primary carer here given that she and DK share the care of the children, that observation undoubtedly holds good here.

84. Whelan J emphasised that, having regard to the constitutional mandate and the clear legislative provisions, there "*can be no presumption in favour of or against either the applicant parent or the remaining parent*." What is involved "*is purely an exercise in welfare assessment"* (at para 42). In carrying out that exercise, the conduct of either parent (including previous wrongful removal or retention of a child) could be considered "*to the extent that it is relevant to the child's welfare and best interests only*" (as per section 31(4) of the 1964 Act). The objective of that legislative approach is *"to direct the focus of the enquiry away from recriminations, blame or fault finding with regard to the past conduct of either parent*" unless relevant to the child's welfare and best interests (at para 52).

85. It was, in Whelan J's view, "*imperative*" that in relocation applications the views of the child are considered and taken into account. On the facts, the "*constitutional mandate to obtain the ascertainable views of the child*" had been met by means of the appointment of a consultant clinical psychologist pursuant to section 32 of the 1964 Act who had interviewed the child, prepared a report and who had given evidence in the High Court and had been cross-examined at length by the father. Notably, Whelan J characterised the psychologist as a witness of the court and not a witness for either party (at para 54).

86. While noting that parents in relocation proceedings may invoke rights, including rights of free movement, Whelan J emphasised that the paramount consideration in any relocation application must always be the best interests of the child (para 56). In carrying out a best interests assessment in that context, Whelan J identified the following particular factors as being of potential relevance:

> *"(a) The minor's emotional and/psychological dependency upon the primary carer.*
>
> *(b) The relationship between the child and the remaining parent.*
>
> *(c) The relationship between the child and his or her extended family, including siblings, step-siblings, step-parents and grandparents and the extent to which the dynamics of those relationships that operate positively and beneficially for the minor may be affected by the relocation, and considerations as to how such changes might be ameliorated or addressed.*
>
> *(d) The reasonableness of the proposed relocation and, so far as relevant, the motivation of the parent who proposes to relocate which is required to be objectively assessed.*
>
> *(e) The practical consequences of a refusal of the application for all of the directly concerned parties and in particular the minor, the directly concerned parents or guardians."* (at para 55).

87. Access for the non-custodial parent is also a key consideration in this context. *SK v AL* involved an application to relocate to the United States and in that context Whelan J observed that "*significant distance can impact on the frequency and modalities of contact and generally can be a relevant factor in judicial consideration of the minor's bests interests in the context of such an application"* (at para 39). Where relocation was permitted, care had to be taken to structure contact arrangements so as to preserve and vindicate the child's relationship with the non-relocating parent so as to ensure that, as far as practicable, the relation is maintained in such a manner as operates in the best interests of the child (para 57).

88. Whelan J noted that, while there is no international convention or protocol governing international family relocation, in March 2010 the Washington Declaration on International Family Relocation had been published. Although the Declaration did not have any legal effect, Whelan J noted that the factors that it identified as being relevant to decisions on international relocation (set out at para 58 of her judgment) appeared to resonate with the provisions of the 1964 Act.

Section 31 of the 1964 Act

89. Certain of the provisions of the 1964 Act have already been referred to. I have already noticed the section 3(1) injunction to regard the best interests of the child as the *"paramount consideration*" in deciding questions relating to guardianship, custody and access. Section 3(2) provides that the best interests of the child are to be determined in accordance with Part V of the 1964 Act. Part V was inserted by the Children and Family

Relationships Act 2015. Section 31(1) provides that in determining what is in the best interests of a child, the court "*shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family."* Section 31(2) then lists the following factors and circumstances as included in those to be considered for the purposes of section 31(1):

> *"(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;*
>
> *(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);*
>
> *(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;*
>
> *(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;*
>
> *(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;*
>
> *(f) the child's social, intellectual and educational upbringing and needs;*

(g) the child's age and any special characteristics;

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;

(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

(k) the capacity of each person in respect of whom an application is made under this Act—

(i) to care for and meet the needs of the child,

(ii) to communicate and co-operate on issues relating to the child, and

(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates."

90. Section 31(2) – which is broadly similar to section 1(3) of the (UK) Children Act 1989 - provides a useful checklist which helps to structure the court's assessment of what is

in the best interests of the child in any given circumstance. However, the extent to which those factors are engaged, and the weight to be given to them, will vary from case to case. In any given case, different factors may point in different directions. That is not a criticism of the section; rather it is a reflection of the complex and untidy reality of family relationships and the breakdown of such relationships. As Moore-Bick LJ observed in *K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793, [2012] Fam 134, *"the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child"* (at para 86). That approach is, in my view, entirely consistent with the 1964 Act.

91. As Whelan J stressed in her judgment in *SK v AL*, what is involved is "*an exercise in welfare assessment"*, without any presumption either in favour of or against the proposed relocation. The exercise is necessarily comparative: what the court is required to do is to identify and evaluate the available options, carrying out a *"balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options"* (per McFarlane LJ in *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, [2014] 1 FLR 670, at [54]). The judicial task is "*to evaluate all the options, undertaking a global, holistic and .. multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option*" (per Sir James Munby P in *Re B-S (Children) (Adoption Order: Leave to Oppose*) [2013] EWCA Civ 1146,

[2014] 1 WLR 563, at [44]). "*Holistic*" in this context means simply that all the factors bearing on the child's best interests must be considered *as a whole* rather than in isolation (per McFarlane LJ in *Re F (A Child) (International Relocation Case)* [2015] EWCA Civ 882, [2017] 1 FLR 979, at [48]). In all of this, the only principle, properly so-called, is that the welfare of the child is paramount: *K v K (Children: Permanent Removal from Jurisdiction*) [2011] EWCA Civ 793, [2012] Fam 134.

92. A critical component of the judicial task in this context is to provide an adequate explanation for the court's decision. The point is well expressed in another recent decision of the Court of Appeal of England and Wales, *Re M (A Child)* [2017] EWCA Civ 2356, in a judgment given by Peter Jackson LJ:

> *"24. In proceedings of this kind, a great deal is at stake for a child and his parents. The impact on the child's future is substantial and the decision is always a tough one for the disappointed party. The task for the judge is to select the outcome that best meets the child's welfare needs and to give adequate reasons for the choice. In this kind of case, a valid judicial decision requires, as was said in Re F, an analysis of some sophistication and complexity. That analysis is the engine that drives a decision that takes the parties from a state of disagreement to one of clarity. Without it, the essential judicial task has not been performed."*

Whether it is realistic to think that, in this context, any judicial decision, however well-reasoned, will take the parties "*from a state of disagreement to one of clarity"* is,

perhaps, open to debate but Peter Jackson LJ is surely correct in characterising a reasoned and sufficiently detailed analysis as being a critical component of the *"essential judicial task."*

93. As Whelan J explains in her judgment, Article 8 ECHR is also engaged in this context. So too is Article 6 ECHR. A proportionality evaluation may therefore be required. However, neither party sought to address the Court on the impact of the Convention here. I agree with Whelan J that it is something to be considered by the High Court in due course.

The Application here

94. What were the options to be evaluated here? There was, of course, the option proposed by PIK, involving the relocation of the children to Y. Unless DK also moved to Y – and as already explained he dismissed that possibility in his evidence and it was not explored by the Judge in any meaningful way in her Judgment – that would involve the children being in the day-to-day care and custody of PIK, with DK having such rights of access as he and PIK might agree or, in default of agreement, as might be directed by the court. Manifestly, the relocation of the children would have a significant impact both on them and on DK and on their ongoing relationship.

95. No formal counter-application by DK was before the Judge. Instead, DK advocated for the refusal of relocation application. It was therefore incumbent on the Judge carefully to assess the position that would obtain in the event that she refused the application.

96. In many relocation applications, the applicant parent – typically the mother – will be pressed to state whether, in the event that their application is unsuccessful, they intend to proceed with their move in any event or whether instead they will remain with their children. In *Payne v Payne* [2001] 2 WLR 1826, Thorpe LJ – a judge of great expertise and experience in the area of family law - noted that *"in very many cases"* applicant mothers were questioned as to what they would do in the event that their application was refused and if *"the mother responds by saying that she will remain with the child then the cross-examiner feels that the impact on the mother would not be that significant."* If *"on the other hand she says that she herself will go nevertheless then the cross-examiner feels that he has demonstrated that the mother is shallow or uncaring or self-centred."* (at para [42]).

97. Similar observations were made by Gaudron and Kirby JJ in their (dissenting) judgments in the High Court of Australia in *U v U* [2002] HCA 36. In her judgment, Gaudron J expressed regret that "*stereotypical views as to the proper role of a mother are still pervasive and render the question whether a mother would prefer to move to another state or country or to maintain a close bond with her child one that will, almost inevitably, disadvantage her forensically. A mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child runs the risk of not having her reasons for relocating treated with the seriousness they deserve"* (at para 36) She noted that it was likely that, in very many relocation cases, the mother would concede that, if she had to choose between relocation

and having her children live with her, she would choose the latter. That, in Gaudron J's view, gave rise to a risk that the mother's interests would not be properly taken into account.

98. In his judgment, Kirby J expressed the view that treating the maintenance of the *status quo* as an alternative proposal in such circumstances effectively meant that the wife's application for relocation would never really be determined on its merits, given that the *status quo* involved the advantage of continued access by both parents. Courts, in his view, *"should not ignore the disproportionate burden typically placed upon women by their being effectively immobilised as the custodial/residence parent"* (at paras 144-145).

99. In *U v U*, the applicant mother had brought an application for the relocation of her child to her native country - India. The husband then brought a cross-application for an order providing that the child would reside with him in Australia. In the course of her evidence, the mother indicated that, if her relocation application failed, she would remain in Australia so as to be near the child. The trial judge treated that as an alternative proposal and concluded that it was in the best interests of the child. That decision was upheld by the High Court of Australia, over the dissents of Gaudron and Kirby JJ

100. Here, of course, PIK's position – which she maintained in her direct evidence and in cross-examination - was that she felt that she had no option but to relocate to Y even if her application for relocation was unsuccessful. However, the Judge effectively disregarded that evidence. If she disbelieved PIK, it was incumbent on her to say so in

terms and to explain why she had reached that view. However, her Judgment is entirely silent on this critical point. That being so, it would be quite wrong to proceed on the assumption that the Judge must have rejected this portion of the evidence of PIK.

101. PIK was entitled to decide to relocate to Y. She did not need the High Court's permission to do so. She explained her decision in detail in her evidence and, although the Judge did not accept certain aspects of that explanation – such as her inability to obtain employment in X – the Judge did not suggest that PIK's decision to relocate to Y was not made *bona fide* or was objectively unreasonable. PIK was not required to show that her relocation to Y was a matter of necessity or that it was impossible for her to remain in X. The circumstances in which she had agreed to move to X and in which she had resided there with her husband and children had altered very significantly on the break-up of her marriage and she had been seeking to leave X – with the children – since 2017.

102. Of course, PIK's decision to relocate did not give rise to any entitlement on her part to bring her children with her. On any view, having regard to the fact that the children had been in X since 2012 (with the exception of the period that they spent with their mother in Y in 2019), having regard to their age, and in particular to E's age and to her views on the relocation issue and having regard to their very significant educational and social ties with X, the relocation application faced significant hurdles. However, PIK had a fundamental entitlement to have her application properly assessed.

103. In his submissions Mr Fitzgerald did not dispute that PIK was entitled to choose to relocate to Y, come what may. He emphasised, however, that it was a *choice*. It was open to her to choose to stay with the children in X. No doubt, that is so. However, it does not follow from the fact that it was a choice that it was to be regarded as insubstantial or irrelevant. As a result of that choice, the "*international separation*" referred to in the Judgment was an unavoidable fact. It could not be wished away by positing the continuance of the *status quo* as an available alternative to relocation of the children.

104. On the case made by PIK, the relevant comparison to be undertaken by the Judge was as between the relocation of the children with her to Y on the one hand and the children remaining in X, in the day-to-day care and custody of DK, on the other. As Dr Moane made clear in her evidence, neither was an ideal solution. But Dr Moane nonetheless understood that those were the available options, absent any agreement that PIK and DK would reside in the one country (and there was none). However, as I have said, the Judge did not weigh the relocation option against the alternative of the children remaining with their father in X, with PIK residing and working in Y. It may be that, had she done so, she would have reached the same conclusion but it is by no means inevitable that she would have done so in light of the evidence of Dr Moane (which, for the reasons set out below, I consider was not properly assessed by the Judge).

105. The Judge's failure to correctly identify and assess the available options is, in my view, fatal to her decision. The consequences that flow from that error will be addressed later in this judgment.

106. The Judge's analysis was, more generally, unsatisfactory in another significant respect. As Whelan J emphasised in *SK v AL*, decisions on relocation are to be assessed without any presumptions either way. Here, however, it was evident from the Judge's very first interventions that she was starting from a presumption against relocation, which she characterised as penalising or punishing DK. These observations are, of course, relied on as indicating prejudgment on the part of the Judge. I am not addressing the issue of prejudgment here, however. Rather, I am addressing the issue whether the Judge's assessment was consistent with the approach identified in *SK v AL*, which in turn was drawn from previous jurisprudence as well as from the relevant provisions of the 1964 Act. Both in her observations in the course of the hearing and in her Judgment, the Judge evinced a strong reluctance to contemplate any course of action that would interfere with DK's custodial rights. The Judge was, of course, entitled – indeed obliged – to have regard to the impact of relocation on DK's rights of custody and access, given the implications for the welfare and interests of the children. But it is another matter entirely to start – as the Judge did here - from a point where the proposed relocation is characterised as an attempt to punish DK. That was an inapt characterisation in any event but it also indicates an inappropriate approach to the proper resolution of the difficult issues that the relocation application necessarily gave rise to.

107. Furthermore, even if the Judge was correct to identify the only available options as the maintenance of the *status quo* in X on the one hand and the relocation of PIK and the children together to Y on the other (and, as I have said, that involved disregarding the evidence of PIK that she did not intend to continue living in X), it was necessary for

her to assess those options thoroughly and fairly. Dr Moane and PIK herself had expressed concerns about the negative effects on the children of extended residence in X, where they were part of a transient community and where they were remote from their extended family, on either side. Each saw significant benefits to the children in the event of their relocation to Y. However, the Judge did not engage with that evidence. Nor did the Judge properly acknowledge or address the fact that if the consequence of her order was indeed to effectively immobilise her in X, that placed a very significant burden on her, potentially affecting both her own welfare and that of the children. The Judge was certainly very alive to the impact on DK of permitting relocation – that is clear both from the hearing and from the Judgment - but no similar sensitivity to the impact on PIK of refusing relocation is evident.

108. I do not, I should say, consider that the Judge's errors were necessarily all one way. The abduction of the children was an issue that warranted more rigorous consideration. True it is that the focus of the court's inquiry in a relocation application should not be on "*recriminations, blame of fault finding with regard to the past conduct of either parent":* per Whelan J in *SK v AL*, at para 52. However, as Whelan J went on to observe, section 31(4) of the 1964 Act provides that a parent's conduct may be considered to the extent (and only to the extent) that it is relevant to the child's welfare and best interests only. A critical factor in every relocation case is the impact of relocation on the child's relationship with the non-relocating parent. In that context, the issue of whether access arrangements - whether consensual or court-directed - are likely to be respected and supported by the relocating parent is a significant one. Whelan J makes that point in her judgment and I fully agree with what she says. The circumstances of the abduction here,

and particularly PIK's conduct *vis-a-vis* the children during the court proceedings in Y, were matters which, in my view, were potentially of significance to the welfare assessment to be conducted by the Judge. As the relocation application is to be remitted for rehearing, it is not appropriate to say anything further on this issue other than to agree with Whelan J that this is a matter to be considered by the judge hearing the remitted application.

The Treatment of Dr Moane's Evidence

109. As already explained, PIK accepts the Judge was not bound to accept the evidence of Dr Moane. She says, however, that the Judge could properly reject Dr Moane's evidence only on a reasoned basis and that no adequate reasons for rejecting her evidence are set out in the Judgment. PIK also criticises the manner in which Dr Moane's evidence was assessed by the Judge. Separately, PIK says that the Judge wrongly relied on her meetings with the children as a basis for rejecting Dr Moane's evidence, thus (so it is said) inappropriately setting herself up as an expert and going beyond her proper adjudicative role.

110. As for the first aspect of this issue, the starting point is the decision of the Supreme Court in *McD v L* [2009] IESC 81, [2010] 2 IR 199, which was the subject of extensive discussion during the hearing of this appeal.

111. The applicant in *McD v L* was the father of a child conceived a result of artificial insemination utilising sperm donated by him. The respondents were a same sex couple. The applicant and the respondents had agreed that the respondents would raise the child

and that the applicant would not have a parental role (though he would have contact). After the birth of the child, the respondents became concerned that the applicant was seeking to play a parental role. At the same time, the first respondent (who was Australian) had become unwell and the respondents decided to move to Australia to be near her family. That prompted the applicant to bring proceedings under the 1964 Act to prevent the removal of the child to Australia and seeking guardianship of and access to the child.

112. Shortly after the commencement of the proceedings, on the application of the applicant, the High Court made an order appointing a Dr Byrne to prepare a report pursuant to section 47 of the Family Law Act 1995.[33] Dr Byrne interviewed the parties and prepared a report which advised against the applicant having any role in the child's life that could interfere with their family life with the respondents and he advised against the applicant being given rights of access or guardianship (judgment of Hedigan J in the High Court, at para 77 (page 224 of the report)).

113. A second expert, Dr D'Alton, was called as a witness by the applicant. Dr D'Alton had not met with the respondents (or the child). Her evidence was more supportive of the position of the applicant.

114. The High Court judge (Hedigan J) did not find Dr D'Alton's evidence very convincing and considered that the report commissioned by the court under section 47 was a "*more*

[33] The proceedings pre-dated the amendment of the 1964 Act so as to (*inter alia*) insert section 32.

reliable guide." He also expressed the view that, in any event, *"the expert nominated by the court should, save in certain exceptional circumstances, be preferred to that of an expert witness called by one party."* (at para 80). Noting that there did not appear to be any direct authority on the status of a section 47 report, the judge referred to Supreme Court authority dealing with the role of the medical expert in childcare proceedings[34] and a decision of the Court of Appeal of England and Wales dealing with the status of the report of a court welfare officer in family law proceedings.[35] He continued:

> *"[83] It seems to me that the s.47 report should, at the very least, be accorded the same status as that accorded to a medical expert in childcare proceedings. Indeed, because the expert producing a s.47 report does so on the instructions of the court rather than either party, the report should be accorded great weight. Save for grave reasons against, which I think the court should set out clearly, the s.47 report ought to be accepted in its recommendations."*

The judge repeated his views as to the status of a section 47 report later in his judgment (at para 127).

115. Relying (*inter alia*) on Dr Byrne's report and the recommendations made by him, the High Court refused orders of guardianship and access. The applicant appealed. The application, and the appeal, raised complex issues as to the status of the European Convention on Human Rights and related issues as to whether and to what extent the

[34] *DL v DT* (Unreported, Supreme Court, 9 November 1998)

[35] *Re W (Residence)* [1999] 2 FLR 390.

respondents should be recognised as a "*de facto family*". For present purposes, however, I shall focus on the issue of the status of the section 47 report.

116. All five judges in the Supreme Court were of the view that Hedigan J had erred on that issue. Murray CJ expressed his agreement with the conclusions reached by Fennelly J and agreed, in particular, that "*undue weight*" was given by the trial judge to the section 47 report. The ordinary rules of evidence applied and, consequently, a *"trial judge must be free, for stated reasons, to depart in his or her findings from evidence contained in such a report either because there is other more persuasive evidence or because he or she is not sufficiently persuaded by the report as to the correctness of a particular fact or conclusion in it"* (at para 13).

117. In her judgment, Denham J accepted that the section 47 report should be treated as an expert report. However, the expert was simply giving his or her opinion to the court and the report was produced to assist the court. The weight to be given to such a report depended on all the circumstances of the case and the report *"should not, as a mandatory matter, be accorded great weight. A court is neither obliged to accept the report, nor is it required to expressly specify its reasons for its non-acceptance of the report."* (at para 134). Such a report had to be considered carefully, together with all the factors and circumstances of the case. A requirement that such a report had to be accepted, absent grave reasons for not doing so, would alter the role of the court as the decision maker. It was for the court "*to determine, in accordance with the law, what is in the best interests of the child, the paramount consideration being the welfare of the child, in determining issues such as access and guardianship."* (at para 135).

118. In his judgment, Geoghegan J indicated that he could not accept the trial judge's view that, unless there were special reasons, the court should adopt the advice of an expert appointed by the court (at para 215).

119. In his judgment, Fennelly J (with whom Hardiman J agreed) indicated that he would not disagree with the trial judge "*that great respect should be accorded to the report prepared for the court pursuant to s.47*" (at para 332). The judge was *"certainly entitled to attach particular weight to the very thorough and carefully prepared*" report of Dr Byrne, who was an expert of high repute. However, it was not right to erect a principle that the court could depart from any section 47 reports only for grave reasons. The court should not preclude itself from disagreeing with a report "*where a persuasive contrary view is available in the evidence*" (*ibid*). There was no reason to depart from the ordinary rules of evidence. He noted that in *Re W (Residence)* there was no contrary report and that the principal and repeated criticism that Thorpe LJ had expressed of the trial judge in *Re W* was that "*he had failed to give reasons for his departure from the recommendations of the child welfare officer*" (*ibid*).

120. The judgment of Fennelly J is clearly the majority judgment on the issue of the status of the section 47 report. Although "*great respect"* should be accorded to such a report, the court was nonetheless free to depart from it and was not limited to doing so only where there were "*grave reasons*". While Fennelly J did not say so in explicit terms, it seems to me to be implicit in his judgment that, where the court departs from a section 47 report, it must articulate its reasons for doing so. Notably, that was the *ratio* that he

extracted from *Re W*, without any expression of disagreement with it. Furthermore, Murray CJ – who was of the view that a judge departing from a section 47 report should state his or her reasons for doing so – seems clearly to have understood Fennelly J's judgment to be to the same effect, given his stated agreement with its conclusions on the section 47 issue.

121. Furthermore, I am not persuaded that the judgment of Denham J ought properly to be read as indicating that a section 47 report (and/or the evidence given by the author of such a report) might simply be rejected by a trial judge without any explanation. That would be a very surprising proposition, in conflict with the principles articulated by the Supreme Court in subsequent decisions such as *Donegal Investment Group plc v Danbywiske* [2017] IESC 14, [2017] 2 ILRM 1 (in which Denham CJ agreed with the judgment of Clarke J). Requiring a judge to give some explanation for rejecting a section 47 report - particularly where there is no contrary report or evidence – is consistent with what I understand to be the law generally: see the discussion in my judgment in *Morgan v Electricity Supply Board* [2021] IECA 29, at paras 20-22. That explanation need not necessarily be an elaborate one but the reasons should be sufficient to enable the parties – and in particular PIK - to understand why Dr Moane's evidence has been rejected and to allow this Court effectively to exercise its functions of review. In this regard, I do not discern any difference between the approach in this jurisdiction and that in England and Wales where it has been said that a judge should explain "*clearly and cogently*" why they had decided to reject the recommendation of the Cafcass (Child and Family Advisory and Support Service) officer: *K v K (Children:*

Permanent Removal from Jurisdiction) [2011] EWCA Civ 793, [2012] Fam 134, per Moore-Bick LJ at para 90.

122. I have already set out the material statements in the Judgment regarding the Judge's view of the evidence of Dr Moane. At para 81, the Judge rejects Dr Moane's view that the needs of the children are best met with PIK and expresses the view that DK is more attuned to their emotional and psychological needs. No basis for that conclusion is identified in the Judgment. Later, at para 89, the Judge states that in her evidence Dr Moane had seemed to place "*great emphasis"* on relocation to Y as "*the ideal solution."* I have already noted that that is a significant misstatement. Dr Moane did not characterise the relocation of the children to Y as an ideal solution at any point in her section 47 report or in her oral evidence. The *"ideal situation*" was, in her view, one where PIK and DK agreed to reside in the same country. The Judge's mischaracterisation of Dr Moane's evidence may throw some light on her further statements in para 89 that she "*fundamentally disagrees*" with Dr Moane's assessments of the father and of the children. The basis on which she did so is not immediately identifiable from the Judgment. At para 92, the Judge does state that she felt that there was a lack of balance in Dr Moane's assessment and that she was "*unnecessarily negative*" about DK and his parenting role *"in circumstances where the children clearly love both parents and are dependent on both parents."* No doubt the children love both parents and are dependent on them. However, the contrary was never suggested by Dr Moane and, with respect to the Judge, her observation does not provide any insight into why she considered that Dr Moane had been "*unnecessarily negative*" about DK and his parenting. No basis in the evidence is identified by the Judge. The Judge's rejection

of recommendation 4 (at para 98) raises similar issues. Nowhere had Dr Moane suggested that DK did not have a "*vital role*" in the lives of the children or that he was a *"vital component*" in the family. Recommendation 4 was clearly premised on the absence of any agreement that DK and PIK would live in the same country, in which circumstances the existing co-parenting arrangements could not be continued and it would be necessary to decide which parent was better positioned to be the primary day-to-day carer of the children. The Judge clearly disagreed with Dr Moane's view that PIK was that parent but her Judgment does not explain why she reached that conclusion.

123. The final significant reference to the evidence of Dr Moane is at para 143 of the Judgment where the Judge states that she had given "*great consideration*" to her report but felt that "*it was very much in favour of allowing a relocation without due regard to the implications of same as set out above*". The "*implications*" referred to here are, presumably, the implications for DK and for the children. As I have already said, this statement – which is not further elaborated on or explained – appears to me to be inaccurate and unfair. In her section 47 report and in her oral evidence Dr Moane had addressed in detail the implications of relocation both for DK and for the children (and it was, of course, the best interests of *the children* that was the paramount consideration for the court). She had addressed relocation on the express premise that the parties could not agree to live in the same country. In her evidence she made it clear that her view was that it would be preferable if such an agreement could be reached and, as a consequence, the existing co-parenting arrangements could continue.

124. Dr Moane's evidence was a critical part of the relocation application. She possessed particular expertise. She was not engaged by either of the parties but was instead court-appointed. Following her appointment, she prepared a detailed report based (*inter alia*) on extensive engagement with all members of the family. It was open to DK to call an expert to contradict Dr Moane's evidence but he did not do so. That is not to imply that the Judge was bound to accept Dr Moane's assessment: *McD v L* is very clear authority to the contrary. The task of determining an application such as that made by PIK here is for the court and cannot be sub-contracted or delegated. That is not in dispute. Nonetheless, the Judge was required to give adequate – and sustainable – reasons for rejecting Dr Moane's evidence. The Judge did not do so in my view. In the first place, the Judge's approach to that evidence appears to have been significantly coloured by her inaccurate and unjust perception that Dr Moane had promoted relocation as an "*ideal solution*." Secondly, the Judge failed to engage in any meaningful way with the substance of Dr Moane's evidence. In an application of this significance, rigorous analysis and reasoning are essential. Bare conclusionary statements will not do.

125. A further and distinct criticism advanced by PIK in this context is that the Judge inappropriately relied on her meetings with the children as a basis for rejecting the evidence of Dr Moane. That, says PIK, involved the Judge effectively constituting an expert and going beyond her proper adjudicative role. I will address that criticism in the context of considering the wider complaints made by PIK regarding the meetings. As will become apparent, PIK's criticisms of the Judge's reliance on her meetings with the children are, in my view, unanswerable.

The Judge's Meetings with the Children

126. PIK makes a number of complaints about the Judge's meetings with the children. In the first place, and fundamentally, it is said that the Judge erred in regarding what was said to her at those meetings as evidence in the proceedings at all. Secondly, it is said that the meetings went beyond appropriate parameters and involved the Judge probing the children in pursuit of an "*agenda*", eliciting statements from them which might then be used to justify the rejection of Dr Moane's evidence and the maintenance of the status quo. Thirdly, complaint is made that this "*evidence*" was not disclosed to the parties until after the High Court's decision (and then only on appeal to this Court) and therefore that the parties did not have any opportunity to consider it and make submissions on it in advance of the decision.

127. I have already indicated that the suggestion that the Judge was pursuing an "*agenda*" in her meetings with the children cannot be entertained.

128. This aspect of PIK's appeal raises a number of difficult issues, as is obvious from the discussion in my earlier judgment in these proceedings.

129. That the Judge relied on what was said to her by the children, and the impressions that she formed as a result of her meetings with them, in determining the relocation application is not in dispute. It is, in any event, abundantly clear from her Judgment. The Judgment sets out the "*Children's Views*" in some detail: see para 100 and following. As Mr Fitzgerald accepted in argument, the Judge's views as to the position

of I (at para 110) can only have been derived from her meeting with her. In paragraph 123 of her Judgment, the Judge identifies Dr Moane's report and her meetings with the children as the means by which the views of the children had been ascertained and in paragraph 175 the Judge refers to the development of the children since Dr Moane had provided her report, referring once again to her meetings with the children in that context. There are numerous other references in the Judgment to the views of the children and to their expressed desire that the existing shared parenting arrangement in X should continue (see, for example, paragraphs 175 and 189).

130. The Judge's reliance on this material raises an immediate and significant difficulty. The material was not made available to the parties and they did not have any opportunity to consider it before the Judge gave her Judgment. That, on its face, represents a serious departure from the rules governing the administration of justice in the State. In my earlier judgment, I considered whether PIK was entitled to have sight of the transcript of the Judge's meetings with the children for the purpose of her appeal from the refusal of her relocation application. For the reasons set out at some length in that judgment, I considered that the question admitted of only one answer: the basic ground rules of constitutional adjudication required disclosure: paras 51-74.

131. In my view, precisely the same considerations apply to the issue here. It was simply impermissible for the Judge to rely on material which was not disclosed to the parties and which they did not have any opportunity to address in deciding the relocation application.

132. In his careful submissions, Mr Fitzgerald suggested that what was said to the Judge by the children could not be regarded as evidence - precisely because it was not given in the presence of the parties and was not open to examination by them - but it was nevertheless material which the High Court was entitled and indeed obliged to take into consideration, having regard to the Constitutional mandate to hear the child. Even so, he accepted that, in an "*ideal world*", the parties would have been informed by the Court as to what had transpired at its meetings with the children and given an opportunity to comment.[36] While that had not happened here, the primary reason for that was that neither party had asked for it to happen. It was, in his submission, unfortunate that the Judge should be criticised by PIK for not having done something which PIK could have asked her to do but had not.

133. That point undoubtedly has some force. In my earlier judgment, I expressed regret that the Judge had not been referred to the decision of Abbott J in *O' D v O' D* [2008] IEHC 468, [2013] 3 IR 189 when the question of whether she should meet the children was mooted. If she had, the subsequent disputes around the meetings might have been avoided. Ms Jackson explained that, as of the conclusion of the substantive hearing, no final decision had been made about the meetings and it was anticipated that some further discussion would take place which, in the event, did not happen. That may be, but the parties had ample opportunity to raise any issues that they had about the meetings with the Judge and/or to seek clarity as to the precise purpose and parameters of them. In every case in which a judge is asked to meet a child, or where the judge of his or her

[36] Day 2, page 86.

own motion considers that it may be appropriate to meet a child, there ought to be discussion, and so far as practicable agreement, as to the applicable terms of reference. If that discussion is not initiated by the parties, then it should be initiated by the judge.

134. Having said that, the issue here is whether PIK ought to be debarred from complaining about the Judge's reliance on material not disclosed to her and which she did not have any opportunity to challenge or comment on. Though not expressed in such terms, DK's objection appears to be based on some species of waiver or acquiescence argument. In the circumstances here, I do not see how any such argument could succeed. No doubt, PIK could be said to have acquiesced in the Judge meeting with the children. While she expressed certain reservations, she did not object to the meetings taking place. But that is as far as any acquiescence went. If it was evident that the Judge proposed to proceed as she did – placing substantial reliance on her meetings with the children as a basis for her judgment, without giving the parties any opportunity to be heard in advance and then directing that the transcripts of the meetings be sealed – a failure to object on the part of PIK might properly be regarded as a barrier to objection on appeal. But that is not what occurred here. It is striking that the Judge gave no indication to the parties or their advisors that she intended to proceed in the unusual manner she did. Before a party could properly be held to have lost their right to rely on basic principles of procedural fairness, in proceedings where so much was and is at stake, very compelling circumstances would have to be demonstrated (see the observations of Walsh J in *G v An Bord Uchtála* [1980] IR 32, at page 80). There are no such circumstances here.

135. It was, in my view, a serious error for the Judge to proceed as she did. Even if she was entitled to give evidential weight to what was said at the meetings with the children – and PIK says that she was not – procedural fairness required prior disclosure to the parties and for them to be afforded an opportunity to be heard.

136. The need for such a procedure is reflected in the *Guidelines for Judges Meeting Children Who Are Subject to Family Proceedings* which apply in England and Wales. The Guidelines contemplate the taking of a minute of any meeting and its communication to the parties (para [5](vii)) and provide that the parties or their representatives should have the opportunity to respond to the content of the meeting, whether by way of oral evidence or submissions (para [5](iv)). Notably, those Guidelines make it clear that the purpose of a meeting with the child *"is not for the purpose of gathering evidence*" (para [5]). That, it is made clear, is the responsibility of the Cafcass (Child and Family Court Advisory and Support Service) officer. There is no direct equivalent to Cafcass in this jurisdiction but, in terms of its function of giving evidence as to the welfare and wishes of children, experts appointed under section 47 of the Family Law Act 1997 and/or section 32 of the 1964 Act appear to perform a very similar function.

137. The Guidelines have been considered on a number of occasions by the courts of England and Wales. In *Re KP (Abduction: Child's Objections)* [2014] EWCA Civ 554, [2014] 2 FLR 660, the Court of Appeal set aside an order made for the return of an abducted child because of the way in which the High Court judge had conducted a meeting with the child concerned and her reliance on what was said at the meeting in

concluding that an order for return should be made. Giving the judgment of the court, Moore-Bick LJ stated that care needs to be taken in distinguishing between the process of gathering evidence and the process of meeting a child which is not for the purpose of gathering evidence. Where it was considered that a child should provide evidence in proceedings, upon which the court will rely, *"any process must respect the European Convention, Art 6 rights of the parties*" as well as the Family Procedure Rules (at para 51). Where a child volunteered evidence that would or might be relevant to the outcome of the proceedings*, "the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced."* (para 56(iv)). In the case at bar, the judge had met the child for more than an hour and had asked some 87 questions for the purpose of probing her wishes and feelings. That had, in the appellate court's view, strayed significantly over the line and into the process of gathering evidence, upon which the judge then relied in coming to her decision. The conduct and content of the meeting had *"achieved a pivotal status in the judge's evaluation of the case*" and had "*provided key evidence upon which the judge relied in coming to her conclusion*" (para 59). The material gleaned from their encounter went to the heart of the judge's analysis and, in consequence, that analysis could not stand.

138. In *B v P (Hague Convention: Children's Objections)* [2017] EWHC 3577 (Fam), [2018] 1 WLR 3657, MacDonald J observed that the injunction against using a meeting with the child as a means of gathering evidence was sometimes *"far easier to articulate in theory than it is to apply in practice."* While the injunction has "*an entirely legitimate procedural and forensic foundation*", it could place judges in some difficulty. Information gathered from a meeting with a child could not be relied on as evidence.

Against that, where the judge considered that something said or seen in the course of a meeting might be relevant to the issues to be determined in the proceedings, it would be entirely artificial, and potentially unjust, simply to *"banish those matters from his or her mind without more"*. On the face of the Guidelines, those difficulties were to be addressed pursuant to paragraph 6(iv) – set out above – which provided for parties to have an opportunity to respond. In *B v P* itself, MacDonald J had heard submissions from the parties on the contents of his meeting with the children and, in light of concerns that he had about the children's presentation, he had then decided that it was appropriate to authorise the joint instruction of an independent expert (a clinical psychologist) who had met with the children, prepared a report and then given evidence and been cross-examined in the ordinary way.

139. The Guidelines do not, of course, have any application in this jurisdiction. However, the issues that they seek to address arise here as they do in England and Wales (and beyond). The challenge of giving due effect to the principle that the voice of the child should be heard (which in this jurisdiction is a constitutional mandate) while also respecting the procedural rights of the parties (including, though by no means limited to, fair trial rights under Article 6 ECHR) and the rules of evidence is a common one. In that context, it appears to me that the Guidelines offer valuable guidance to Irish courts.

140. In my earlier judgment I identified a number of ways in which a child may be heard in proceedings in an Irish court. There may be circumstances where they are, or may be made, a party. They may give evidence (subject to competence) and the Oireachtas has,

in Part III of the Children Act 1997, sought to facilitate the giving of evidence by children (see para 31 of my previous judgment). The Oireachtas has also made provision for the appointment of guardians *ad litem* in proceedings concerning children but, regrettably, the provisions applicable to proceedings under the 1964 Act have yet to be commenced. Section 47 of the Family Law Act 1995 and section 32 of the 1964 Act provide further means by which evidence relating to the welfare of a child and/or as his or her "*views*" may be put before the court. These provisions effectively permit hearsay evidence, though the experts who have prepared a report under either section 47 or section 32 are of course subject to cross-examination.

141. Section 32 is perhaps a particularly significant provision in this context. It was enacted at the same time as the Thirty-First Amendment of the Constitution (Children) Act 2012[37] and is the only means of ascertaining the views of the child specifically identified in section 31 of the 1964 Act. While the 1964 Act certainly does not exclude any other means of ascertaining the views of the child, it seems reasonable to regard the section 32 report as the primary means of doing so. Section 32(10) provides for the making of regulations specifying the necessary qualifications and experience required to be eligible for appointment as an expert under section 32 and regulations have been made which impose specific and significant requirements.[38] As I observed in my previous judgment, that clearly suggests an understanding on the part of the Oireachtas

[37] The Thirty-First Amendment of the Constitution (Children) Act 2012 was enacted on 28 April 2015 and the Children and Family Relationships Act 2015 (section 63 of which inserted section 32 into the 1964 Act) was enacted on 6 April 2015. The referendum on the Thirty-First Amendment took place in November 2012 but the formal certification of the referendum result was delayed by court challenges.

[38] SI No 587 of 2018.

of the complexities that may be involved in reliably ascertaining the views of the child about difficult and disputed issues relating to custody and access.

142. The 1964 Act is silent on judges meeting with children. It neither provides for nor prohibits such meetings. It does not alter the rules of evidence to make what a child might say to a judge in such a meeting admissible as evidence. It does not purport to alter the position set out by Keane CJ (Denham and Murphy JJ concurring) in *RB v AS (Nullity: domicile)* [2002] 2 IR 428 where he stated that "*as a matter of principle, the only evidence which a trial judge, in family law proceedings, can receive is evidence on oath and affirmation given in the presence of both parties or their legal representatives"* (at page 43). That statement needs some qualification in light of the provisions of Part III of the Children Act 1997 but the essential core point remains valid. Family law proceedings are to be determined only on evidence given in the presence of the parties or their legal representatives.

143. It follows that what may be said to a judge by a child in a meeting conducted in the absence of the parties and/or their representatives cannot properly be treated as evidence or relied on as if it were evidence.

144. Here, as already explained, the Judge clearly gave evidential weight to what was said at the meetings and her assessment of the children that she formed as a result of meeting them. In truth, her engagement with the children was brief and innocuous. Having reviewed the transcript of those meetings, it appears to me that there is no substance in the suggestion that the Judge pursued any agenda or sought to direct the engagement in

an inappropriate way. Indeed, she did not actually raise the question of where and with which parent the children wished to reside (the Judge remarked to one of the children that she had purposely not asked any of them that question). There is some force to Ms Jackson's point that the Judge focused on access arrangements in X (which was not an issue before her). But that is not, in my view, the real difficulty with the Judge's treatment of the meetings here. The difficulty, in my view, is that the Judge clearly relied on the meetings as a basis for forming her own assessment of what was in the best interests of the children and for rejecting the assessment of Dr Moane. Even if that was a legitimate exercise in principle – and it was not - a series of very brief meetings with the children could not possibly provide a proper foundation for such an assessment. But the exercise is not an appropriate one in my view. Judicial meetings with children are not a means for a judge to seek to replicate and/or supplant the exercise undertaken by an expert appointed under section 47 or section 32. It is, of course, ultimately a matter for the court – not the expert – to determine what is in the best interests of the child but that assessment must be based on the evidence given in the proceedings, not on impressions formed as a result of private meetings with the child.

145. It follows from the analysis above that PIK's appeal based on the Judge's meetings with the children succeeds.

146. I emphasise that I do not mean to suggest that judges should not meet with children or to discourage them from doing so. The very large literature on the issue (some of which I identified in my earlier judgment) identifies a variety of potential benefits that may

arise from judicial engagement with children in proceedings affecting them. However, the basic norms of our civil justice system must be respected in any such engagement.

147. There may be some value in offering some general guidance for courts in this area. As will be evident, in doing so I have drawn on the guidance offered by Abbott J in *O' D v O' D* as well as the *Guidelines* from England and Wales:

1. In proceedings affecting children, the judge should always consider whether, and if so how, the voice of the child should be heard.

2. Any decision to meet a child should be made only after careful consideration, having heard the parties or their representatives and only where such a meeting appears to the court to be in the best interests of the child (and, of course, that the child is of sufficient maturity). Where an expert has been appointed under section 47 of the Family Law Act 1995 or section 32 of the 1964 Act, they should be consulted where practicable.

3. While neither parent should have a veto, where one (or both) parents object to a meeting, on a reasoned basis, the court should hesitate before proceeding to have such a meeting.

4. The court should give weight to any request for a meeting made by the child.

5. Ultimately, however, whether to have a meeting or not is a matter for the court.

6. The purpose and scope of the meeting, its timing and the identity of the attendees should always be discussed and identified in advance.

7. Meeting the child should not be seen as a substitute for the appointment of an expert under section 47 of the Family Law Act 1995 or section 32 of the 1964 Act.

8. The purpose of any such meeting is not to gather evidence and the judge should not rely on anything said at the meeting as evidence, at least without the consent of the parties. If as a result of a meeting, it appears to the court that further evidence is necessary or appropriate, such evidence should be heard in the ordinary way.

9. The judge should not seek to act as an expert.

10. An appropriate written record of the meeting – preferably a *verbatim* record - should be kept.

11. The judge should explain to the child that the decisions in the case are the responsibility of the judge alone and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself or any responsibility for its outcome.

12. The judge should explain to the child that the judge cannot hold secrets and that what is said by the child cannot be kept confidential and will be communicated to the

parties. There may be circumstances that might justify a different approach but that would require something truly exceptional.

13. The parties or their representatives should be provided with the record of the meeting and be given an appropriate opportunity to respond to it, whether by way of submission or oral evidence, before any decision is made by the judge.

148. Adhering to the guidance set out above would avoid the difficulties that arose here. But it is not intended to be definitive or all-encompassing. The *Guidelines* from England and Wales were produced by the Family Justice Council before being approved by the President of the Family Division. The Family Justice Council is a non-statutory body, chaired by the President, with a membership intended to reflect a broad variety of relevant expertise and interests in the area, including the judiciary and the legal professions, court administrators, persons with knowledge and experience in healthcare, social care and persons representing the interests of parents and children. There would appear to be much to be said for the establishment of a similarly broad-based body here to develop detailed guidance on the difficult issue of judges meeting with children in family law proceedings.

Alleged Prejudgment

149. Having regard to the fact that PIK's other grounds of appeal have succeeded, it is not necessary to adjudicate on her complaint of prejudgment.

150. Without intending to suggest that PIK's complaint here was well-founded, it is appropriate to emphasise that, in proceedings such as these, it is particularly important that judges should avoid any intervention that might reasonably suggest either a predisposition or hostility to one outcome or the other (and, more so again, any predisposition to, or hostility towards, either party).

ORDERS

151. The Court was urged by PIK to substitute its own decision on the relocation application. That PIK wishes to have a final decision on that application is entirely understandable. She has been seeking the relocation of the children since 2017 (when she issued proceedings in X). The years that have since elapsed are hugely significant in the lives of all the parties but particularly the children and the ongoing uncertainty is not in the interests of anyone and, most especially, is not in the interests of the children.

152. However, this Court simply is not in a position to justly or fairly determine the relocation application. Dr Moane's report dates from January 2021, more than 18 months ago. While she gave evidence more recently than that – in June 2021 – she did not see the children in the intervening period. Circumstances have changed since January 2021. PIK no longer resides in X, though she continues to have significant access to the children. The children have grown up further and their views may have been developed and/or altered. In the absence of an up-to-date welfare report on the children, it would be irresponsible for this Court to adjudicate on the relocation application.

153. In the circumstances, the only course that the Court can properly take is to set aside the High Court's refusal of the relocation application and to remit the application for rehearing by the High Court.

154. It is imperative that the application should be heard and determined as soon as practicable. The parties should make an immediate application to the appropriate High Court to take the application into case management with a view to ensuring that all necessary steps are carried out without delay. A further welfare report will have to be obtained. How that is to be done will be a matter for the High Court to direct having regard to the parties. It may be sensible (and cost effective) to have the relocation issue determined at the same time as the wider judicial separation/divorce proceedings but that will depend on when those proceedings will be ready for trial.

155. As to costs, the order for costs made in favour of DK by the Judge must be set aside. As to what order should be substituted for that order, and as to what order should be made in relation to the costs of the appeal, the parties should have an opportunity to be heard and the Court will schedule a brief hearing for that purpose at a date and time of which the parties will be notified.

Edwards and Whelan JJ have authorised me to record their agreement with this judgment and with the orders proposed.