



Neutral Citation Number: [2024] EWHC 2600 (Fam)

Case No: FA-2024-000121

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT BOURNEMOUTH AND POOLE
Ms Recorder Emma Southern
Case No. BH24P00076

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2024

Before :

MS JUSTICE HENKE

Re: V (Appeal: Relocation)

Miss Nicola Frost (instructed by Preston Redman LLP) for the Appellant
Miss Maria Henty (instructed by Thrings LLP) for the Respondent

Hearing date: 22 August 2024

Judgment

This judgment was handed down remotely at 10.30am on 11 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives following circulation of the draft on 23 September 2024.

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MS JUSTICE HENKE

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

Ms Justice Henke:

1. I have before me an appeal against the order made by Recorder Southern on 22 April 2024 in private law proceedings concerning a child who is not yet in full-time school. The child is much loved by the Appellant who is her father and the Respondent her mother. They are currently based in the South of England.
2. The Appellant and the Respondent met in 2015 and married in 2018. They separated in mid-2022 but remained living together for the remainder of the year. The parties are now divorcing, and family finance proceedings are ongoing.
3. There have been previous proceedings between the parties about the Child Arrangements that should be made for their child. Those proceedings concluded on 18 August 2023 when HHJ Simmonds made an order by consent. In accordance with the terms of that order, the child has lived with both parents under a joint lives-with order. In practical terms that means that she spends 8 out of every 14 days with the Respondent with the remainder with the Appellant. Holiday periods are shared equally between the parties. It is agreed that both parents can meet their daughter's needs. There are no safeguarding issues in this case. At the conclusion of the previous proceedings, the Respondent agreed to a Prohibited Steps order which provided that she would not relocate with the child outside the area in which the Appellant and Respondent were then living without the Appellant's written permission or court order.
4. On 14 February 2024 the Respondent issued a Specific Issue application for permission to relocate with the child within the jurisdiction. At the time of the application the intended relocation was to a city in the middle of England to take up a full-time permanent position in her chosen profession. However, on 11 April 2024 (eight days before the final hearing began), the Respondent changed the intended location to a city in the North of England where she wished to take up a part-time permanent position.
5. On 22 April 2024 at the conclusion of a two-day hearing Recorder Southern made an order in the following terms:
 - i. She permitted the Respondent to relocate the child to a city in the North of England; and
 - ii. Upon the Respondent moving to that City, varied the time the child should spend with the Appellant to accommodate the Respondent's work pattern. The order was to be varied such that the joint lives with order made by HHJ Simmonds remained a reality. That meant that until the Respondent moved, the child would live with her parents as set out above. Once the Respondent moved the arrangement would be an alternating pattern with week one seeing the child live with the Appellant from Monday at 6pm to Wednesday at 6pm and in week two the child being with the Appellant from Saturday at 6pm until Wednesday at 6pm. That would continue until the child attended school when they would spend every other weekend with the Appellant from Friday after school until Sunday at 2pm.

6. At the time of the hearing before Recorder Southern, it was the intention of the Respondent to relocate with the child at the beginning of August 2024. However, on or about 13 May 2024 the Appellant issued an application for permission to appeal. Within that Appellant's Notice he also sought a stay of the relocation order. The application for a stay was considered by Mrs Justice Arbuthnot on the papers on 13 May 2024. Mrs Justice Arbuthnot considered that the grounds of appeal were not fanciful and that it would be in the child's best interests to remain living in the South of England under the terms of the August 2023 order pending determination of the application for permission to appeal.
7. The application for permission to appeal came before me on 25 June 2024 for consideration on the papers. I granted permission to appeal. In giving my reason for my decision, I said this:

“14. On the basis of the papers before me, I do not consider that there is any real prospect of a successful appeal on the law that the learned recorder applied. However, I do consider that the applicant has a real prospect of success on the basis that there is a strong argument for saying that she [the judge] erred when making her holistic evaluation. She confined herself to a choice between two options, namely matters remaining as they are or [the child] moving to [the North] with the respondent. There was a third realistic option which it is arguable she [the judge] ought to have considered namely [the child] living with the applicant on the days when the respondent was working in [the North] and then spending time with the respondent on her days off. She failed to do so and it is that failure which gives this appeal a reasonable prospect of success.

15. Accordingly, the applicant is permitted to appeal. Given the Respondent wishes to relocate by August I have given short timescales with the aspiration that this appeal can be heard, if possible, before the end of term.”

8. The appeal now comes before me. Sadly, it was not possible to list the appeal before the end of July 2024. However, the appeal was certified fit for vacation business to ensure it was dealt with as expeditiously as possible.

The Appeal

9. In order to determine this appeal, I have before me a bundle of documents which runs to 338 pages. That bundle includes skeleton arguments on behalf of both the Appellant and the Respondent, a copy of the learned Recorder's judgment, an agreed note of the first day of the hearing (the recording device having not worked at first instance) and a transcript of the second day. I also have the benefit of a bundle of authorities.
10. The Grounds of the appeal before me can be summarised as follows:
 - i. Procedural irregularity in the way the trial was conducted, in particular the curtailment of cross-examination and re-examination on key issues on behalf of the Appellant which breached the Appellant's Article 6 rights.

- ii. The Judge wrongly suggested that the question of relocating was a binary decision.
 - iii. The Judge was wrong to exclude commuting to the Northern City as an available option for the Respondent.
 - iv. The Judge made two errors of fact when she concluded that (i) the Respondent would likely become 'unemployed' if she did not accept the part-time job in the city in the North of England and (ii) that the Respondent's professional specialism would cause her to move away from the South of England in future to further her career.
 - v. The Judge was wrong to erroneously find that the Respondent's motivation in making her application was "*entirely genuine and not driven by an attempt to limit Father's role in [the child's] life*".
 - vi. The Judge was wrong to determine that the risk of emotional harm to the child from the Respondent's criticism of the father would not increase with a relocation.
 - vii. Overall, it is said the learned Recorder exceeded the generous ambit within which reasonable disagreement is possible.
11. If I allow this appeal in respect of the first ground of appeal, I am asked by the Appellant to remit the case for a rehearing. If I find ground one is not made out, but allow the appeal on any of the other grounds, I am asked by the Appellant to substitute my own decision so that the child's best interests are met, the current shared care arrangement remains in place and the child remains living in the South. On behalf of the Respondent, I am asked to dismiss the appeal.

The Arguments before Me

12. On behalf of the Appellant, Miss Frost, both in writing and in oral argument, emphasised that relocation had been permitted in this case to allow the Respondent mother to take up a part-time permanent position in an area in which she has no family and in a city to which she commutes currently to fulfil a part-time locum position. The Respondent had accepted in evidence that it would be preferable if she could remain living in their current location and that if permission to relocate was not granted, she would forego her permanent position. It was highlighted to me that over the past 18 months or so, the Respondent has been offered several positions across southern England and at the time of the final hearing was able to combine working locally with part-time locum work in the Northern City. The net effect was that at the time of the final hearing, the Respondent was commuting for 1-2 days a week on the same days as the permanent position she wanted to accept. In those circumstances, it is argued that relocation was neither necessary nor proportionate. The third option was the Respondent commuting with the child remaining living where she should have been considered.

13. Before me, Miss Frost emphasised that she had not felt able to cross-examine the Respondent as she considered she ought on key issues because of judicial interruption and insistence on keeping to time-estimates which became unrealistic because of what is said to have been the Respondent's reluctance to answer straight-forward questions and long-winded answers. It is said that the net result was that Counsel on behalf of the Appellant was:

- i. unable to explore the Respondent's motivation for relocating and the prospects of relocation diminishing the child's relationship with the Appellant given the Respondent's antipathy to the Appellant;
- ii. unable to explore whether it would be possible for the Respondent to continue commuting to the Northern City when she took up her permanent post which the Respondent said had a proximity clause; and
- iii. unable to explore whether there was a third option which would see the Respondent remaining where she currently lives but staying over in the Northern City for the two days a week she was working there.

14. It was argued that the learned Recorder made two errors of fact:

1. the Respondent would become unemployed if she did not take the permanent position in the North; and
2. the Respondent would need to move away in the future to pursue her career.

Given the Respondent's profession, the counter argument is that she could work anywhere including those more proximate to her current location.

15. It is submitted on behalf of the Appellant that the judicial interruptions prevented a fair trial and the Appellant's Article 6 right was breached. As it was put to me in oral argument – "*it felt unfair to me and my client. Questions were shut down*". I was asked rhetorically how the learned Recorder could have properly considered the third option when questions which went to that issue were not allowed. By preventing the asking of questions about the third option, it is said that the learned Recorder did not have the evidence upon which she could consider the third option, namely the child remaining living where they were and the Respondent commuting. As was stated at paragraph 42 in *P (A Child: Fair Hearing)* [2023] EWCA Civ 215:

*"It is a fundamental principle, rooted in the common law concept of natural justice and reflected in the ECHR, that a legally valid decision can only spring from a fair hearing. If a hearing is unfair, a judgment cannot stand: *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 at [49]."*

16. I was also taken to the Court of Appeal decision in *Re C (Children: Covid 19: Representation)* [2020] EWCA Civ 754 wherein at paragraph 23 it was stated that:

“23. *A number of aspects of the right to a fair hearing, guaranteed by common law and Article 6 ECHR , are relevant:*

(1) Fairness is case-specific and is to be assessed in relation to the proceedings in their entirety: Ankherl v Switzerland (2001) 32 EHRR 1 at [38].

(2) There must be protection not only from actual unfairness but also from the risk of unfairness: Kanda v Government of the Federation of Malaya [1962] AC 322 (PC) at p.5.

(3) The right of access to the court must be effective, so that the individual has the opportunity to address all material that might affect the court's decision and is placed in a position to call evidence and to cross-examine: Mantovanelli v France (1997) 24 EHRR 370 at [36].

(4) The importance attached to the welfare of the child must not prevent a parent being able effectively to participate in the decision-making process: L v UK [2002] 2 FLR 322 at 332.

(5) The principle of equality of arms entails a reasonable opportunity to present one's case, including one's evidence, in a way that does not place one at a substantial disadvantage to one's opponent: Dombo Beheer BV v The Netherlands (1994) 18 EHRR 213 at [33].

(6) The administration of justice requires not only fairness but the appearance of fairness: R v Leicester City Justices ex p Barrow [1991] 2 QB 260 ; P, C & S v UK [2002] 2 FLR 631 at [91]. However, the misgivings of individuals with regard to the fairness of the proceedings must be capable of being objectively justified: Kraska v Switzerland (1994) 18 EHRR 188 at [32].

(7) The determination must be made within a reasonable time: Article 6 itself.”

17. The learned Recorder’s failure to allow proper cross-examination on the key issues, is linked in the argument before me to the Recorder’s view that her decision was a binary one and commuting was not an option, as the Respondent was not prepared to consider continuing to commute. That, it is said on behalf of the Appellant, to have fundamentally missed the point. The decision for the learned Recorder was not whether the Respondent should be permitted to move but whether the Respondent should be permitted to relocate the child. Permitting the Respondent to relocate means that the Respondent will not have to commute but by travelling to and fro for contact, the child will be commuting. That is contrary to the child’s welfare. In support of this argument, I was taken to Re C (Internal Relocation) [2015] EWCA Civ 1305.

18. Overall, it is said on behalf of the Appellant that the learned Recorder erred and exercised her discretion in a manner which exceeded the generous ambit of reasonable disagreement.
19. In contrast, on behalf of the Respondent, Miss Henty argued that the Recorder did take a holistic approach. Whilst it is accepted that the learned Recorder did refer during the course of evidence to her decision being a binary one that does not make this case appealable because it is said that:
- i. The decision she was being asked to make was binary, namely whether to permit relocation or not; a point the learned Recorder clarified when asked for permission to appeal;
 - ii. The decision was binary as matter of fact because the Respondent's case was that if she was not allowed to take the child with her, she would not take the position in the North of England. The Respondent was not, as a matter of fact, prepared to contemplate continuing to commute and gave evidence that she could not afford to maintain two bases; and
 - iii. The judgment demonstrates that the learned Recorder considered whether there was a way this move could be made to work for the child and considered the case as a whole.
20. It is argued that Recorder Southern, when making her decision, was entitled to consider the Appellant's own evidence that he might move to the Northern City if the child was permitted to relocate to prevent her having to travel and to maintain his relationship with her.
21. It is said on behalf of the Respondent that the tenor of the judgment was child focused and is concerned with reducing the changes the child in question is likely to have to face in the future if her mother does not take this permanent post and continues either to work as a locum or to move around for work. It is the Respondent's case that this extempore judgment is soundly reasoned and is not open to appeal. It should be read as a whole and not subject to narrow textual analysis. It is argued that Recorder Southern rightly exercised her case management powers in accordance with the overriding objective. The hearing was fair, and the outcome cannot be said to be wrong.

The Law on Relocation

22. The law in relation to relocation is well-settled. In argument I was taken to paragraph 85 of *Re C (Relocation)* (above) wherein Bodey J stated:

"I agree that this appeal should be dismissed for the reasons given by Lady Justice Black. Following comprehensive review of the authorities as set out in her

judgment, the proper approach to the whole issue of relocation may be stated in summary as follows:

a) There is no difference in basic approach as between external relocation and internal relocation. The decision in either type of case hinges ultimately on the welfare of the child.

b) The wishes, feelings and interests of the parents and the likely impact of the decision on each of them are of great importance, but in the context of evaluating and determining the welfare of the child.

c) In either type of relocation case, external or internal, a Judge is likely to find helpful some or all of the considerations referred to in Payne v Payne [2001] 1 FLR 1052; but not as a prescriptive blueprint; rather and merely as a checklist of the sort of factors which will or may need to be weighed in the balance when determining which decision would better serve the welfare of the child.”

23. Given that Bodey J specifically agreed with the lead judgment given by Black LJ in *Re C* (above). I have reminded myself of paragraphs 53-60 of her judgment which state:

*“53. Given the central thread of welfare that runs through all these authorities, and with the reasoning in *K v K* very much in mind, I would not interpret the cases as imposing a supplementary requirement of exceptionality in internal relocation cases. It is no doubt the case, as a matter of fact, that courts will be resistant to preventing a parent from exercising his or her choice as to where to live in the United Kingdom unless the child's welfare requires it, but that is not because of a rule that such a move can only be prevented in exceptional cases. It is because the welfare analysis leads to that conclusion. One can see from the authorities, and indeed from this case, that the courts are much pre-occupied in relocation cases, whether internal or external, with the practicalities of the child spending time with the other parent or, putting it another way, with seeing if there is a way in which the move can be made to work, thus looking after the interests not only of the child but also of both of his or her parents. Only where it cannot, and the child's welfare requires that the move is prevented, does that happen.*

*54. Once welfare has been identified as the governing principle in internal relocation cases, there is no reason to differentiate between those cases and external relocation cases. In my view, the approach set out in *K v K, Re F (Relocation) [2012]* and *Re F [2015]* should apply equally to internal relocation cases. Clearly, however, the outcome of that approach will depend entirely on the facts of the individual case. At one end of the spectrum, it is not to be expected, for instance, that the court will be likely to impose restrictions on a parent who wishes to move to the next village, or even the next town or some distance across the county, and a parent seeking such a restriction may well get short shrift. At*

the other end of the spectrum, cases in which a parent wishes to relocate across the world, for example returning to their original home and to their family in Australia or New Zealand, are some of the hardest cases which the courts have to try and require great sensitivity and the utmost care.

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

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

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

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

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

Violations) [2013] EWCA Civ 1104, [2014] 1 FLR 1185 the court can have an obligation to ensure that appropriate steps are taken to enable the family tie between parent and child to be maintained. It is not difficult to see how Article 8 influences the outcome in that situation – the court has to strive harder.

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

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

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

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

24. In the context of the appeal before me reference was made to the factors set out by Thorpe LJ in *Payne v Payne* [2001] EWCA Civ 166. Those include the motivation behind both the application to relocate and the opposition to it, and the impact on the parent of a refusal to allow relocation.

My Task

25. I have reminded myself of the case law that sets out the proper approach of an appellate court to an appeal against findings of fact. In *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraphs 114-115 Lewison LJ stated:

“114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

- i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
- ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
- iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
- iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
- v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
- vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.*

*115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039 [2003] Fam 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135.”*

26. Further in *Volpi and another v Volpi* [2022] EWCA Civ 464, Lewison LJ at paragraph 2 stated:

“2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.”

27. This approach is followed by this Court hearing private law family appeals just as it is in other appeals in civil cases. Those passages from *Fage* and *Volpi* have been cited and applied on many occasions, including in *Re T (Fact-Finding: Second Appeal)* [2023] EWCA Civ 475.

28. I have further reminded myself that the task of this Court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowaska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at page 1372):

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

29. In this case the proposed appeal is against the learned Recorder’s exercise of her discretion within well-known and agreed legal principles. In Re H-W [2022] UKSC 17 Dame Siobhan Keegan stated:

“48. The very clear decision in In re B, albeit by majority, is that the existence of the requirement of necessity and proportionality does not alter the near-universal rule that appeals in England and Wales proceed by way of review rather than by way of re-hearing. It follows that it is not incumbent upon an appellate court to undertake a fresh evaluation for itself of the question of necessity and proportionality. For the reasons clearly stated by, in particular, Lord Neuberger at paras 83-90, such is contrary to principle, as well as undesirable in practice. In particular, if each appellate court were to undertake such a fresh evaluation, it would expose the parties, and the children, to the risk of successive investigations of the same issue, certainly two, and in some cases three or even four times. It would also mean that the appellate court was expected to undertake a task for which it is unsuited, having not heard the evidence or seen the parties for itself. A decision on paper is no substitute for the decision of a judge who has, as Lord Wilson felicitously put it at para 42, had the advantage of a face-to-face, bench-to-witness-box acquaintanceship with those who are under consideration as carers of the child(ren).

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

50. In In re B Lord Neuberger, at para 93, essayed a further dissection of the process of deciding whether a judge's decision was wrong. He cautiously prefaced his suggested breakdown of the possible states of mind of an appellate judge with the observation that there was danger in over-analysis. With hindsight, that was a prophetic observation, as this court held in the subsequent case of R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47;

[2018] 1 WLR 4079. Lord Carnwath, giving the judgment of the court, said this at para 63:

"With hindsight, and with great respect, I think Lord Neuberger's warning about the danger of over-analysis was well made. The passage risks adding an unnecessary layer of complication. Further, it seems to focus too much attention on the subjective view of the appellate judges and their degrees of certainty or doubt, rather than on an objective view of the nature and materiality of any perceived error in the reasoning of the trial judge." "

The Hearing before Ms Recorder Southern

30. The hearing before Recorder Southern was an entirely attended hearing for which she had a bundle of documents together with a supplemental bundle and other documents which were handed to her during the course of the hearing. Recorder Southern heard oral evidence from both the Appellant and the Respondent on the first day of the hearing, which was a Friday, before giving an extempore judgment on the second day of the hearing, namely on the following Monday.
31. The first day of the hearing was not recorded by the court equipment. However, I have an agreed note of the evidence for which I am grateful.
32. It is clear from the agreed note of the Respondent's evidence that her evidence in chief was that it was not simply the terms of the contract of her position in the Northern City that prevented the Respondent from moving. It was also that she was tired of commuting and not having a life herself as well as her wish to have a home in one place. In cross-examination on behalf of the Appellant she stated, albeit in the context of another position she had considered, *"I can do six months of commuting, but I can't do that as a long-term option"*. In relation to the proposed continuing commuting to the Northern City rather than relocate the child, the Respondent in cross-examination about the prospect of the child commuting answered that *"I'm used to the journey, of course I'm fed up, I don't think anyone would want to do that, getting up at 4am in the morning"*.
33. I have read the notes of the cross-examination of the Respondent. The learned Recorder did interrupt cross-examination on behalf of the Appellant on the issue of the Respondent's search for positions of employment once but did not prevent it continuing and from the transcript was clearly interested in it. The next interruption was about the position in the Northern City. It began with the Recorder stating the role *"is on the terms of living nearby, so it is not an option for her to take a full-time role and commute"*. There is then a significant period of cross-examination before the learned Recorder interrupts three times in a short space of time counsel's cross-examination on the issue of the Respondent's ability to support herself and the child if relocation is allowed before Counsel says she will move on and deal with the issue in submissions. Shortly before rising for the luncheon adjournment Recorder Southern then states this:

“No one’s suggesting she cannot purchase a property that won’t meet [the child’s] needs. I would like to break for lunch soon, a more direct approach in the remainder of cross-examination would be more beneficial for me.”

34. Moments thereafter there then follows this passage from Recorder Southern:

“Why has it been put that the mother can commute? Because mother said if she cannot move with [the child] then she won’t go. I have to decide if it is in [the child’s] best interests to go, if I decide no then she doesn’t need a property in [the Northern City]. We need to explore the realities in this case. It’s a binary decision. Reflect on that over lunch. [...] I’d like to finish the evidence today.”

35. After the luncheon adjournment and before cross-examination resumed, the Recorder states this:

“I will be interrupting if we are not getting anywhere.”

Early in the afternoon, there is a three-way discussion between counsel and the Recorder about the admissibility of the Standard Terms and Conditions attached to the proposed position the Respondent wishes to take. In that context the Recorder states:

“I don’t need to see the document. It won’t take this case any further. If I say yes, mother will live close to [her intended employment]; if I say no, mother isn’t going anywhere. I do not need to consider all options, it is a binary decision.”

Cross-examination then resumed with questions about the prospect of the Respondent commuting to her new position. The Recorder interrupts that line of questioning, stating:

“That’s not what the mother is saying - commuting is not a point”.

The Appellant’s counsel responded:

“The Court has to consider all reasonable options and if there are other alternatives; you are not deciding whether mother can move, you are deciding whether [the child] can move.”

36. There is then a significant passage of cross-examination before Recorder Southern interrupts again to prevent Counsel for the Appellant from asking questions that go to the Respondent’s motivation, but the Recorder does state quite clearly that Counsel can address her upon the issue in submissions. Cross-examination then proceeds and continues until about 3pm that day. After a short break the father gave his evidence which concluded at about 4.30pm.

37. On the second day of the hearing, Counsel for both parties spoke to their written submissions. I have the official transcript of that day. The transcript of that day includes the learned Recorder’s response to an application of clarification of her

judgment and permission to appeal made on behalf of the Appellant. The learned Recorder did not regard the points raised by Counsel for the Appellant satisfactory to grant permission but went on to state:

“A binary decision is one where I’m choosing between a remain or a move. That is the reality of all relocation cases and, in terms of considering all options, there are three options, and I considered them all in terms of remaining in [the South], moving, or indeed commuting.”

The Judgment of Recorder Southern

38. Given the manner in which the appeal is argued, I consider it necessary to consider the scheme of the learned Recorder’s judgment.
39. She begins by setting out the background to the application before her before setting out the relevant law and defining her task. At paragraph 21 of her judgment, Recorder Southern summarises the oral evidence she heard. It is accepted that Recorder Southern rightly set out the law and properly summarised the evidence in this case.
40. In relation to the Respondent’s evidence at paragraph 25 of her judgment, Recorder Southern found that the Respondent had not given her answers in a straightforward manner and often deflected or gave extraneous information. However, overall, the learned Recorder found her to be open and frank with the court. At paragraph 21 of the judgment the learned Recorder captured the Respondent’s evidence that if she were not permitted to relocate with the child, she would be unemployed as she would not take the position currently offered to her. At paragraph 24, the learned Recorder sets out the Respondent’s view that living outside the catchment area for the position she had been offered was not a realistic option as it was unlikely to be permitted by her prospective employers. Later in her judgment, when acknowledging the submissions made on behalf of the Respondent before her, Recorder Southern records the Respondent’s case that *“the move to [the Northern City] is for a permanent role and she does not foresee a need to move again”*.
41. At paragraph 30 and following of her judgment, Recorder Southern précised the Appellant’s evidence. She found him to be a frank, open and honest witness. His key concern was the child being taken from all she had ever known - nursery, friends and family, and the impact of the move on his relationship with the child. At paragraph 32 the learned Recorder captured the Appellant’s evidence that if the court permitted the relocation, he would travel to the Northern city and base himself there for the periods of time the child was with him and thus minimise the impact of travel upon the child. Further at paragraph 38, she sets out that the Appellant would consider moving permanently himself to be near his child. However at paragraph 41 having heard submissions on behalf of the Appellant, she stated this: *“whilst he made an admirable offer of travelling and staying in [the Northern City] when [the child] is in his care, save perhaps for holidays and he may relocate to [the Northern City] himself, if the Court makes that decision, he does not believe a move is in [the child’s] best interests and rather her welfare is best served by the status quo remaining”*.

42. Between paragraphs 42 - 62 Recorder Southern then applied the welfare checklist to the facts as she found them to be before turning to her analysis. At paragraph 71 she states this:

“I am acutely aware of the importance attached to this binary decision that I am required to make. It is binary in that either [the child] relocates or she does not. I have scrutinised the mother’s proposals and balanced the benefits and disadvantages for [the child], the effect on the mother of refusing her application against the effect on [the child] of disruption of her relationship with her father, amongst all the factors I have outlined.”

She then proceeded to give her decision.

My Decision with My Reasons

43. The first issue I need to consider is whether the judicial interruptions made by the learned Recorder rendered the process and thus her decision unfair. Determining whether a hearing was unfair requires an objective assessment by the court of the conduct of the hearing. The fairness of the proceedings requires consideration of whether the judge was open-minded in the course of the hearing, whether the parties to the proceedings were treated in an even-handed manner and whether the judge demonstrated partiality during the hearing. In the context of judicial interruptions or interventions during oral evidence one issue will be whether that generated a risk of a descent into the arena; another issue will be whether it prevented the Appellant putting their case and a third issue will be whether it demonstrated a predetermined and fixed point of view. These matters are to be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by whether objectively the interruptions rendered the trial unfair.
44. I have read the note of the cross-examination of the Respondent at first instance with care. I take into account that the tape did not record the exchanges with Counsel for the Appellant and thus tone and volume are lost. I also take into consideration that the Appellant’s Counsel perceived that the interruptions were unfair and prevented her from developing her case as she wished. However, the issue is an objective one. I consider the interruptions were not ideal but from an objective standpoint they did not render the process unfair. Whilst the interruptions would have been off-putting, they were not that frequent, and the Recorder did not enter the arena. The reference to her decision being a binary one was made but it did not indicate a closed mind and did not prevent cross-examination by the Appellant’s Counsel on the Respondent’s understanding of the Terms and Conditions of her new position. The Appellant’s Counsel was interrupted when cross-examining on the timeline of events to establish a motivation to move which the Appellant asserted was to put a physical and emotional distance between the Appellant and the child. However, some cross-examination on that point was permitted and submissions were made on the Appellant’s behalf on this issue. There was judicial interruption when questions were asked relating to the issue

of the Respondent commuting but a reading of the note of evidence discloses that, in the context of this case, there was considerable cross-examination allowed on this issue in any event. Therefore, viewed overall, whilst the interruptions were in my view not ideal, objectively, I do not consider that the interventions vitiated a fair trial on the facts of this case. Objectively, the Appellant had a reasonable opportunity to present his case at first instance even if it was not as fully developed as he would have wished.

45. The learned Recorder's use of the word binary during the course of the proceedings was unfortunate. However, in her judgment at paragraph 71 she set out what she meant when she said that her decision was binary. She meant that she had to decide whether it was in the best interests of the child to relocate or remain where she was. That was a correct statement of the decision she ultimately had to make. It was child focused. It did not mean that she approached the making of that decision in a binary or linear fashion. At paragraph 63 of the judgment, the learned Recorder sets out how she approached her task and states that:

"...in reaching this decision it is vital I weigh the advantages and disadvantages of each option holistically and in the round as against each other..."

46. Having read her judgment, I consider that the learned Recorder did make a global, holistic evaluation of the best interests of the child and did so by applying the welfare checklist. In making that analysis she considered the wishes and feelings of the parents, and how they will impact on the child. In this regard she did consider the Respondent's motivation for moving (see paragraphs 53 and 65 of the judgment) and the Appellant's assertion that it was to diminish his relationship with their daughter. However, on the evidence she did not consider that argument to be made out. Under the heading of 'harm' in her judgment, the learned Recorder considered the risk of emotional harm to the child if she spends less time with the Appellant and the risk of the Respondent using the geographical distance between child and the Appellant to undermine the relationship they have. The learned Recorder also considered the harm to the child which would arise if the Respondent did not relocate and was constrained to zero hours contracts or commuting significant distances for work (see paragraph 59 of the judgment) such harm arising if the Respondent does not secure the stable employment she wishes to take. In her judgment, *"such an arrangement is far from sustainable and will take its toll inevitably on family life and stability over time. I consider a similar burden weighs until the mother secures a permanent position"*. That was a finding open to the learned Recorder on the evidence before her.

47. Whilst the learned Recorder could have been more specific in her consideration of the third option, namely, the Respondent, not the child, commuting, the learned Recorder did have it in mind as paragraph 39 of her judgment demonstrates. Further I consider that whereas in theory there was a third option as a matter of fact it was taken off the table by the Respondent's evidence that if she was required to commute, she would not take the position in the North.

48. The learned Recorder at paragraph 60 of her judgment also considered the considerable inconvenience and discomfort which she found bordered on harm that will be caused to the child by having to travel for long periods to be with the Appellant, but she considered this ameliorated by the Appellant's offer to travel to see his daughter and thus minimise harm. That is an obvious consideration of the Appellant's argument that permitting relocation requires the child to commute when the Respondent could do the commuting but will not.
49. Contrary to the argument raised on behalf of the Appellant, I do not consider that the learned Recorder made two errors of fact, namely that:
1. the Respondent would become unemployed if she did not take the permanent position in the North; and
 2. the Respondent would need to move away in the future to pursue her career.
50. At paragraph 45 of her judgment, the learned Recorder actually states that it is likely that the Respondent would become unemployed for an unknown period if she did not take the position she had secured in the North of England, in her professional specialism. However, that finding is qualified by her stating immediately thereafter that:
- “...and, whilst she can secure other employment, there would remain the likelihood that, at some point in the future, Mother would secure another permanent [] role, as has been her intention when the parties were together. With this prospect, there remains a reality that the location of said role would result in a need to move away [from the current location] ...”*
- Those findings were findings open to the learned Recorder on the evidence.
51. I consider that the decision to grant permission to relocate was a finely balanced decision at first instance. My task as an appellate court is to review that decision in accordance with the principles established in the case law I have set out above. When I do so, I cannot say that the learned Recorder has exceeded the generous ambit of her discretion, and I cannot say her decision was wrong.
52. Accordingly, the appeal is dismissed. The decision made was neither procedurally irregular nor out with the generous ambit of the learned Recorder's discretion.
53. As to the issue of costs, I set out the relevant law in Re O (Appeal: Costs) [2024] EWHC 1163 (Fam). Applying those principles to this appeal, I do not consider either party has behaved unreasonably or reprehensibly in relation to this litigation. Accordingly, I consider the appropriate costs order is no order for costs between the parties.

54. The learned Recorder's judgment rightly included a consideration of the Article 8 interests of the parents and the child, and the proportionality of any interference in the parents' Article 8 rights. It cannot be said to be wrong.