



Neutral Citation Number [2024] EWHC 730 (Fam)

Case No: FD23P00585

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27.03.2024

**Before:**

**MRS JUSTICE MORGAN**

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**(1) H**

**(2) B**

**Applicants**

**- and -**

**S**

**First Respondent**

**-and-**

**SOPHIA**

**(By her Children's Guardian Daisy Veitch)**

**Second Respondent**

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**Olivia Magennis** (instructed by **Goodman Ray Solicitors**) for the **Applicants**

**S in person**

**Jamie Niven-Phillips** (instructed by **Cafcass Legal**) for the **Second Respondent**

Hearing dates: 11-13 March 2024  
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**Approved Judgment**  
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**MRS JUSTICE MORGAN**

**This judgment was delivered in private and a reporting restrictions order is in force. 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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.**

**Mrs Justice Morgan:**

1. I have before me cross applications concerning the future living arrangements for a child who is now 10. I will call her Sophia in this judgment. The name by which she should be known is one of the many aspects of her life which is matter of dispute between her parents. Since she prefers Sophia, so too do I.
2. The applicants to these proceedings are Sophia's birth father, H, and his husband B. They both have parental responsibility for her. Sophia regards them both as her fathers. In the course of this judgment that is how I too will treat them, though I recognise the route by which it comes about that they both hold Parental Responsibility. The respondent to these proceedings is S. She is Sophia's mother. I have characterised the parties as applicants and respondent in that way for ease of reference. The respondent's application issued first in Medway Family Court was directed to be heard alongside these proceedings. It might initially be thought that the application by Sophia's mother for a change in her living arrangements which was made in September 2023 had been the trigger for the fathers' application in November for permission to relocate. On closer examination however it can be seen that the applicants first notified the respondent on 22<sup>nd</sup> September of their wish to relocate. It was that which led to the mother making an application without notice which included not only the change of living arrangements but also sought a prohibition on removal to European Country A. When it had become clear that there would not be agreement reached in respect of relocation by those holding PR, the necessary application was issued in this court on 24th November 2023
3. The applicants seek:
  - i) Permission to relocate with Sophia to live in European Country A and
  - ii) A variation of the child arrangements order made by Ms Justice Russell on 30th April 2015The respondent:
  - i) Seeks a transfer of residence to her and
  - ii) Opposes the application for permission to relocate to European Country A with Sophia
4. As is obvious from the way in which the applicants' application is expressed, this week is not the first time that Sophia has been the subject of proceedings in this court. When she was fifteen days old, in circumstances it will be necessary to consider briefly by way of background, the applicants issued applications in respect of her living arrangements. Two days later the respondent issued a cross application. Those applications resulted in the living arrangements for Sophia reflected in the judgment of Ms Justice Russell now reported as *H v S (Surrogacy Agreement) [2015] EWFC 29*. It is curious that it is reported in that way given that very early on in her judgment Ms Justice Russell said this:

*There have been repeated references to surrogacy in these proceedings particularly on behalf of H and B as it is the Applicants' case that they had reached an agreement that S would act as their surrogate so that they could have a child who would be a part of their family. S says that H had agreed to be her sperm donor. The legislation which governs altruistic surrogacy has no part in the decisions of the court as S does not consent to a parental order or to having*

*acted as a gestational surrogate; indeed even on the Applicants' case S was to play an active role in the life of the child. The law which applies is that which applies in all private family disputes [Emphasis added]*

5. I have read carefully that judgment which forms the basis of the living arrangements obtaining to date. During the hearing before me, the enduring relevance of Ms Justice Russell's judgment and the matters contained within it to that which is litigated now has been obvious. Accordingly, this judgment should be read with that. It might have been preferable that this hearing also would be heard by Ms Justice Russell but, since she was unavailable there has been a departure from judicial continuity to that extent. There has, however, largely been continuity in the case management. It is unnecessary to set out the detail which appears in the judgment, which must be read in full, but it is convenient to note by way of summary the following aspects emerging from it:
  - i) Sophia was conceived by home insemination using H's sperm at the applicants' home. B was present at the time
  - ii) The pregnancy was contrived with the aim of a same-sex couple having a child to form a family assisted by a friend, this was ostensibly acquiesced to by all parties at the time the agreement was entered into, and conception took place
  - iii) The court accepted the Applicants' case that they would be parents to the child conceived but that her mother would have what was described as an active but subsidiary role. It explicitly rejected the mother's case that it had been agreed she would parent the child with H and that B would have no role in the child's life other than as H's 'boyfriend'.
  - iv) The court found that the mother had deliberately misled the applicants so as to conceive an additional child for herself and rejected her case that H had agreed to act as a 'sperm donor'
  - v) The court found that the mother had used homophobic and offensive language deliberately seeking to discredit the applicants. This had included but was not limited to stereotypical descriptions of gay men and persistent descriptions of the applicants' relationship as on/off and likely to be short lived rather than committed and enduring.
  - vi) The court found that the mother was unable to put Sophia's interests first and was unable to meet her emotional needs either at the time of that judgment or in the long term
6. The order consequent upon those findings and conclusions provided inter alia for the following:
  - i) That Sophia should live with the applicants
  - ii) That Sophia should have contact with her mother and that that contact should be supervised.
7. Within the order, there was no provision for contact to develop from supervised to more natural unsupervised time spent between Sophia and her mother. It was however the clear expectation in 2015 that it would so develop since in the judgment in concluding supervision was necessary so as to reduce conflict and enhance the likelihood of contact being a positive experience for her, Ms Justice Russell observed "*it is intended that a regime of supervised contact should not continue for long but that once Sophia is settled and living with the Applicants the parties will be able to reach their own agreement and arrangements over contact*"

8. Sophia's fathers have been represented at this hearing by Ms Magennis who has acted pro bono. Her professional generosity in so doing is notable. Sophia has been represented by Mr Niven-Phillips taking his instructions from Ms Veitch the children's guardian appointed for Sophia. Not only has he safeguarded Sophia's interests, but he has assisted both the court and Sophia's mother in the approach he has taken at this hearing. Sophia's mother has represented herself but after the first day of the hearing, in circumstances it will be necessary to examine later in this judgment, she did not attend.
9. At or about the same time that Ms Justice Russell made the child arrangements order at the conclusion of the proceedings in 2015, a RRO was made. It was continued in an amended form by order of Holman J. It remains in place during the child's minority. No party has invited me to revisit it. Those members of the accredited media who attended this hearing were made aware of the terms of that order.

Preliminary Issues at this hearing

10. Three preliminary issues were raised at start of this hearing: two by the respondent, one on behalf of the applicants.
11. The respondent had been sent a note of the relevant and applicable law which Ms Magennis and Mr Niven Phillips had agreed and which they wished to provide to the Court for assistance. They did so in compliance with the case management direction made by Cusworth J that such should be filed by 8<sup>th</sup> March. Since the respondent is self-representing, they provided it to her last week and asked for her agreement that it might be sent to me in advance of the hearing along with any position statements. She objected and so it was entirely properly *not* sent to me (despite the directions for it) so that I could hear her objections. At this hearing she explained the basis of her objection was that as she is not a lawyer, she did not feel that she was in a position to prepare her own note of the law by way of answer; she regarded it the sort of detailed material that she was not able to absorb digest and respond to. In those circumstances she asserted that it was unfair to admit the note and invited me not to have reference to case law in making decisions on the application.
12. Her second preliminary issue was linked to the first. In the event I was against her and admitted the note, she sought a direction that the applicants should pay for her to have legal representation at least to the extent of enabling her to commission her own note of the law.
13. I rejected the respondents first preliminary issue for the following reasons:  
*First* Ms Magennis and Mr Niven-Phillips would be perfectly entitled when making their closing submissions each to direct my attention to what they submitted was relevant and applicable law. The fact that they had provided it to her during the week before the start of the hearing far from putting her at a disadvantage was indicative of their having gone out of their way to ensure they were fair to her  
*Second* Mr Niven Phillips, consistent with his role as the solicitor for the child and her guardian had, I accept, explicitly approached the document with an eye to

ensuring it contained all that was relevant to all parties' cases from whatever perspective and was not slanted in favour of one or another.

*Third* there are no circumstances in which I would be intending to decide this case, as the respondent proposed, without doing so by reference to the law and as she was aware from case management directions on the 4<sup>th</sup> march it had been directed.

I explained to the respondent that I would not anticipate a note on the law from her in circumstances where she represented herself, and fair presentation of her case would not need her to prepare one. I would accept the note at this stage as agreed by the other parties. In the event that later in the case she wished to say anything different or additional she could do so but I thought it unlikely. In respect of her second preliminary issue, whilst there are circumstances in which to ensure fair hearing a court will consider a properly made application for legal costs funding order and direct an applicant to fund the costs of respondent's legal representation. I am satisfied this is not such a case given the way in which respondent had couched her oral application in respect of the note on the law and the approach I had taken. Had she made an application for such an order which it had been necessary for me to determine it may in any event have been unlikely in circumstances where the applicants are represented pro bono that such an order would have followed, but I did not reach the point of having to determine it.

14. The preliminary issue raised on behalf of the applicants was for the late addition to the trial bundle of a Guardian's report dating from January 2015. This it was said included information relevant to issues raised in the position statement filed on behalf of the guardian in these proceedings which it had not been known would be raised. It was not agreed that this document, which had formed part of the material before the Court in 2015 should be added at this late stage. I had of course not seen it, but I was to a significant extent sympathetic to the respondent's submissions that in relation to matters as they are now a document which dated from some 9 years ago was unlikely to be of relevance. The more so since the proceedings in relation to which the report had been prepared have concluded with a reported judgment. It seemed to me however that the submissions made by the respondent went more to weight than to admissibility and since it was *contended* that the contents were directly referable to risk of unsupervised contact, I permitted the document to be added. As matters have turned out however and having now seen it, I have not found that it has assisted me in the decisions to be made at this hearing.

#### The Respondent's Withdrawal from Participation at this Hearing

15. On the first day of the case I heard evidence from the first of the 2 applicants. I also heard evidence in chief from the second applicant leaving him part heard overnight. This unusual course I took deliberately so that the respondent with whom I had discussed the witness template and the time available to complete evidence and submissions, would be able to ask her questions of the first applicant on day 1 and have a clean start with the second applicant on the next day before giving her own evidence. I had also at the end of the afternoon indicated to the parties that I thought it unrealistic to expect (as had been provided for on the witness template circulated the previous week) that I should receive submissions at the end of the second day but that they should be pushed back to the morning of the third day so as to enable the

respondent to reflect on what she might wish to say. I was explicit, when the respondent asked, that I would accept either oral or written submissions, whichever better suited her. What I was also clear about however was that the case would have to be completed in the 3 days allocated to it.

16. On the second morning of the listed case the respondent sent a lengthy e mail to my clerk (not copied to the other parties) about 40 mins before the listed start time, indicating that she did not intend to attend the hearing. It was plain to me that she understood that this decision was contrary to the requirement that she should attend, since at the end of the e-mail she addressed the possibility that I might respond to her failure to attend by imprisonment. Much of the e mail addressed the difficulty and disadvantage she felt acting as a litigant in person, other parts of it expressed something of the case she advanced, made observations about the applicants' case and touched on matters which would likely have formed part of her submissions. She did not, in this e mail, invite me to adjourn the case part heard but I regarded it as prudent to treat it as including an invitation to me to consider so doing. Having directed that her e mail should be provided to the other parties, I warned her that in the event she did not attend the case might proceed and decisions be made in her absence.
17. I determined, after hearing the outline views of the other parties, that I would so proceed I gave short reasons for my decision and indicated that I would set them out more fully in this judgment.
18. This case has been listed for some significant time. It is true that some of the material – most notably the final statements of the applicants and respondent; the report of the children's guardian have come in very proximately indeed to the hearing. On examination of the case management directions, I note that there have been, in relation to the respondent's own application made in Medway Family Court : a hearing listed without notice on her application which she failed to attend; an order requiring an explanation for her non-attendance with which she did not comply. That application made in September of 2023 was ultimately transferred to be heard with the application in this court.
19. Within the application made by the applicants in the Family Division there have been orders for a witness statement from respondent to be filed by 10<sup>th</sup> January (by order dated 21 December to which a penal notice attached ); on 12 January the respondent who had by then not filed a statement but had made an application for Ms Justice Russell to recuse herself, failed to attend the hearing. The time for the filing of her witness statement was extended to no later than 19<sup>th</sup> January and a penal notice again attached. The respondent sought to appeal the case management orders of 21 December and to vacate both a further case management hearing listed 4<sup>th</sup> March and this hearing. Lord Justice Moylan on 2<sup>nd</sup> February refused permission on all grounds. On 4<sup>th</sup> March Mr Justice Cusworth further extended the time for the filing of the respondent's statement to 6<sup>th</sup> March and accepting her assurance of compliance did not attach a penal notice.
20. That short outline of the immediate run up to this hearing is useful when I consider as I have the respondent's complaint that she had had inadequate time to prepare. I am of

course well aware from decision in *Re R [2018] EWCA 198* that there are circumstances in which when a party has come late to a case the CA has taken the view that there has been insufficient time to prepare. This is not such a case. The respondent has been aware of the substance of the applications made by Sophia's fathers, has been dilatory in filing her own evidence in respect of that application and also setting out the basis on which she contends for a change of residence. She had, I am satisfied, done much to try to seek to frustrate the smooth progress of this hearing and the case management associated with it. I note that there is reference within the judgment from 2015 to what the Judge hearing the case then regarded as the respondent's attempts to impose her will on the court and manage the proceedings at that hearing.

21. When , finding myself partway through the evidence faced with the respondent indicating that she would not be attending to continue participation in the case, I came to consider whether it would be in Sophia's interests for me to adjourn the case or to continue to reach a decision it was my clear view that it would not be in her interests to adjourn. She is 10 years old. She is aware that there are decisions being made which will govern where she is to live geographically. There is also evidence that she has become aware recently that there is a suggestion that she should leave her fathers' home and live with her mother. However, it is that she came to understand that, I accept it has caused her anxiety. Were I to adjourn the case part heard the likelihood is that it could not be resumed at the earliest until well into the summer term. I am clear that Sophia needs a decision and her best interests outweigh the unconscionable delay caused by one party to the proceedings electing not to continue to participate at this late stage. It is a matter for the respondent if she decided not to pursue her own application for a change of residence – though I have her written statement of intended evidence which articulates as recently as last week what she says in support of that. Ceasing to participate in the hearing of the applicants' application should not however be permitted to stall it. I recognise of course that her Article 6 rights are engaged but it is not an affront to those rights that she is without representation. Many parents within private law children applications – which is what this case is – find themselves without representation. The respondent has the opportunity to participate and to do so meaningfully in these proceedings. From my observation of her on the first day of the hearing when she cross examined the first Applicant she is an articulate, able and intelligent woman. Her ability to articulate her views, argue her case and present the evidence on which she invites a court to rely is something I have also been able to see for myself from the inclusion of the documents relating to her applications made to the Court of Appeal for permission both in respect of the judgment in 2015 and during the lifetime of these proceedings.
22. The obligation of this court to have regard to fairness – not only as to Article 6 but by reference to the matters contained within the overriding objective – is not confined to fairness to the respondent. It is a balance. I have to take into account fairness to Sophia, fairness to her fathers. I have to have regard to the way in which it is proportionate to allocate court resources to this case knowing as I do that those resources are not infinite, having regard to the issues which fall to be determined. I am satisfied that I and those judges who case managed the case to make this hearing effective took steps to ensure that the respondent had the opportunity meaningfully to participate in this hearing. By way of illustration the note on the law as to which she has made complaint, has been directed at the PTR with the effect that she is not taken



by surprise at it but has it in advance. The allocation of time on the witness template (which she was not prepared to agree before the hearing) I had determined so as to give her the greater share of the time, by imposing a guillotine on the allocation to the represented parties, to reflect that it is less easy for her to formulate questions and to distil them from what may in reality more closely reflect her own oral evidence. I concluded that the balance of fairness tipped decisively in favour of continuing the hearing notwithstanding the fact that the respondent would no longer be participating.

23. As it turned out I had been correct to treat the respondent's first email as if it had included an application for an adjournment. When the court broke for the short adjournment part way through the Childrens Guardian's evidence, I received a further email sent by the respondent this time asking the court to adjourn and indicating that she had now made enquires to obtain pro bono representation though she was not confident of getting it and she offered no time scale for such. The information that at this late stage, with the hearing underway, an enquiry had apparently been made then but not before as to the availability of pro bono representation did not alter the conclusion I had reached that I would continue in the respondent's absence.
24. Having reached that decision and reflecting on the timing of the respondent's withdrawal from further participation at this hearing I took the view that, albeit on a lesser forensic scale, the approach taken by the then President in *Re X (no 4) [2018] EWHC 1815* where parties had withdrawn from participation, was appropriate. Accordingly I indicated to Mr Niven –Phillips that I would expect him to put to the second applicant those matters which were relevant to her case including those raised in the respondent's evidence and email. Mr Niven-Phillips has the gratitude of the court for his having done so assiduously.

### The Legal Framework

25. I am indebted to Ms Magennis and Mr Niven-Phillips for the thorough and detailed note on the law prepared in compliance with the direction of Cusworth J on which I draw for that which follows. It appears in greater detail than would be the case had the respondent not made clear her anxiety that she should not be disadvantaged by her lack of legal knowledge. I have had regard to that which is set out in this part of the judgment when I have made the decisions I have for Sophia.
26. The fundamental principle underpinning the Children Act 1989 'the Act' is that child's welfare shall be the Court's paramount consideration (s1).
27. Since each of the applications before me invites me to vary the living arrangements made by Order of Ms Justice Russell in 2015 I must have regard to s1 (3) of the Act which is known as the welfare checklist. That is familiar territory to legal practitioners in the field of family law but will also be something which the respondent has encountered during the earlier decisions made by Ms Justice Russell who made her decisions within the same statutory framework. For ease of reference the respondent has been provided with the note setting out that to which s 1 (3) directs the court's attention:
  - a. the ascertainable wishes and feelings of the child concerned (considered in the light of her age and understanding);

- b. her physical, emotional and educational needs;
  - c. the likely effect on her of any change in his circumstances;
  - d. her age, sex, background and any characteristics of hers which the court considers relevant;
  - e. any harm which she has suffered or is at risk of suffering;
  - f. how capable each of her parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting her needs;
  - g. the range of powers available to the court under this Act in the proceedings in question.
28. I must also, by operation of s 1 (5) of the act not make any orders unless I consider that doing so would be better for Sophia than making no order. This is the ‘No Order’ principle.
29. There is a presumption contained within s1(2A) of the Act that unless the contrary is demonstrated the involvement of a parent in the life of the child concerned will further the child’s welfare. Involvement means “involvement of some kind, either direct or indirect, but not any particular division of a child’s time” (s1(2B)).
30. When I come specifically to consider the application for permission to change the living arrangements for Sophia to relocate to European Country A I have had regard to the most recent appellate authorities in relation to relocation cases: Re F (International Relocation Cases) [2015] EWCA Civ 882, (in which the Court of Appeal considered the earlier authorities of – in particular - K v K (Permanent Removal from Jurisdiction) [2011] EWCA Civ 793 and Re F [2012] EWCA Civ 1364) and Re C (Internal Relocation) [2015] EWCA Civ 1305, in which the earlier authorities of Payne v Payne [2001] 1 FLR 1052 and Re Y (Leave to Remove from the Jurisdiction) [2004] 2 FLR 330, were considered by a differently-constituted Court of Appeal).
31. The salient features emerging from those authorities were distilled by Williams J in Re C (A Child) [2019] EWHC 131 as follows:

[15]

The only authentic principle is the paramount welfare of the child  
The implementation of section 1(2A) Children Act 1989 makes clear the heightened scrutiny required of proposals which interfere with the relationship between child and parent  
The welfare checklist is relevant whether the case is brought under s.8 or s.13 Children Act 1989  
The effect of previous guidance in cases such as 'Payne' may be misleading unless viewed in its proper context which is no more than that it may assist the judge to identify potentially relevant issues.  
In assessing paramount welfare in international relocation cases the court must carry out a holistic and non-linear comparative evaluation of the plans proposed by each parent. In complex international relocation cases this may need to be of some sophistication and complexity.  
In addition to Article 8 rights – indeed probably as a component of the Art 8 ECHR rights and s.1(2A) one must factor in the rights of the child to maintain personal relations and direct contact with both parents on a regular basis (unless

that is contrary to her interests) in accordance with Article 9 of the United Nations Convention on the Rights of the Child ("UNCRC").

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

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

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

32. I have found that exposition by Williams J, albeit a first instance consideration, to be helpful as I consider Sophia's situation. The reference to the “Payne factors” is once again something that is familiar within the family justice system but since it was thought it might be less so to the respondent the passage at [§40] of the judgment in Payne where they appear was set out for her benefit and I repeat that here:
- “Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
- If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the

application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

33. In respect of each of the applications before me I have the benefit of the recommendations made by the Guardian who has been appointed for Sophia. It is self evident that part of the respondent's case is that I should reject those recommendations since they are at odds with the case she advances. I therefore remind myself that whereas professional advice is usually of great assistance to the Court, in the end it is judges who decide cases. I am not bound to follow the recommendation the Guardian makes. The Court is entitled to depart from the recommendations of the Cafcass officer if the report is not balanced. The Court has to look at the case in the round (*Re E (Relocation: Removal from Jurisdiction)* [2013] 2 FLR 290, CA; *Re L (Relocation: Second Appeal)* [2018] 2 FLR 608, CA).
34. I have been helpfully reminded that it is important that I must have in mind the extent (or absence) of any meaningful reciprocal enforcement regime in European Country A, the risk of any breach of contact arrangements and the consequences of any such breach.
35. Both the UK and European Country A are signatories to the *1996 Hague Convention*. The 1996 Convention was directly incorporated into domestic law by s3C, *Civil Jurisdiction and Judgments Act 1982* (inserted by s1 *Private International Law (Implementation of Agreements) Act 2020*), as recently confirmed by the Court of Appeal in *LB Hackney v P* [2023] EWCA Civ 1213 [§39].
36. I have also held in my mind throughout the Article 8 and Article 6 rights of all parties. Those rights are engaged. As reflected earlier in the judgment the respondent's article 6 rights featured prominently in my thinking at the point when I determined it was right to continue the hearing when she heralded her intention not to participate in the remainder of it

### Evidence

37. I heard Oral evidence from H, B and Ms Veitch. I did not have the opportunity to hear oral evidence from the respondent. I have therefore read with particular care that which she has contributed in written form. I have her statement of her written evidence dated 6<sup>th</sup> March which set out over 13 pages that which she relied upon in support of her own application and in opposition to that of the Applicants. The statement was accompanied by a table of attachments identifying the exhibits she had provided. I have also had and taken the opportunity to read those documents contained within the court bundle which were generated in relation to the respondent's applications to the Court of Appeal, her correspondence with Cafcass, in relation to this hearing and the documents referable to discussions about contact. In respect of some of that correspondence I have taken notice that she had expressed the view that she and not the fathers should be cast in the role of applicants at this hearing

although that is not a matter she pursued at the stage when I was determining preliminary issues raised by the parties. Finally I have read the e mail correspondence which the respondent sent to the Court at the time she ceased participation at this hearing.

38. It is not my intention in this judgment to recount the detail of all that I heard or read in reaching the conclusions that I have come to. Rather I will make mention of that which has been influential in my thinking or has assisted me in arriving at those conclusions.
39. During a recent meeting at the contact centre between Sophia and her mother, it is asserted by the fathers - and asserted strongly by H in the course of his oral evidence – that the mother engaged Sophia in direct questioning about these applications, including by passing a note to Sophia out of sight of those supervising. The Guardian had by this time interviewed the mother and explained to her why she would not in her professional enquiries as to wishes and feelings ask directly of a child in Sophia's position questions which might risk placing the sense of burden of responsibility for choosing on the child herself. I found myself suspicious that the allegation made as to the mother's actions at that session might be substantially true but as I read in advance of the hearing, I was far from satisfied that the evidence before me was of the quality to enable me to make a finding. That impression did not change once the hearing started and so although I had been suspicious, I have reminded myself that suspicion must be kept in its proper place, and I am explicitly clear that I have not made any finding in this respect. What is clear is that Sophia has become aware that one of the things to be decided at this hearing is whether she should live with her mother rather than her fathers.
40. All three adults parties to these proceedings obviously love Sophia very much. Whilst the mother did not give oral evidence, because she was representing herself I was able to hear the way in which she spoke with urgency and passion, when asking questions or addressing the court, about her wish to have Sophia more fully and naturally as a part of her life.
41. I will consider aspects of H's presentation later in this judgment. He too clearly had Sophia and her best interests at the forefront of his thinking. He made clear that careful thought had been given to how best as a family they could maintain a life for Sophia and for themselves which they found themselves unable to afford without a move of some kind. I found it useful to hear his description of how he and his husband had come to realise that a move out of the French educational system which Sophia had experienced all her life and into the English system at this stage is one which she would find it very hard to tolerate. That had assumed therefore a greater prominence in their thinking I had the impression from him that the experience of the last hearing and the very hurtful ways in which the mother had spoken of the applicants remained very keenly felt by him. When the guardian later said that listening to the applicants' evidence she had felt that things were still very raw I think she was entirely right. It may be that this contributed to the impression I had that H, of Sophia's two fathers, was the more wary of how progress might be made in the relationship. I had the sense that this was reflective of the lack of trust between the

adults . I was reinforced in this by listening to his suggestions (since abandoned) that in the event of relocation, any Teams calls between mother and child should be recorded so that they could be listened to if need be afterwards. He seemed impervious to why the Guardian did not regard that as containing any protection for Sophia since all it would provide was a retrospective check. In this regard, I formed the view that H had, for reasons I understand, become focussed on what he might need to evidence rather than what was going to make contact work best for Sophia.

42. B, I found was perhaps by nature more reflective and more demonstrably empathetic than his husband. I formed the view that since he was the father whose role and status was denigrated and diminished by the respondent, he was more able to, for want of a better phrase, ‘take ownership’ of the decision to rise above it for Sophia’s sake. I thought it likely that for him it might not be as emotionally complicated as for his husband who would have a natural inclination to respond to the hurtful approach taken to the man he loves. Whatever the reasons for that, I found B a very impressive witness. He was perfectly well able to separate out what the Respondent meant to Sophia from how he might feel about her. I entirely agree with Ms Magennis that when he spoke of Sophia ‘*knowing her through her eyes not our eyes*’ that encapsulated his child-centred approach.
43. I had found the Guardian’s report thorough, detailed, careful and thoughtful. She had come to the conclusion that on balance, the application to relocate should be permitted. She had concluded also that a move to live with the respondent would be strongly contrary to Sophia’s interests. The guardian did not depart from either her conclusions or her reasons for reaching them in her oral evidence. What she did change her view by the end of the hearing was her original recommendation that the Applicants should be obliged to consult Sophia’s mother about the exercised of certain aspects of parental responsibility but should, having consulted be able to go ahead with decisions. By the time of submissions she had come to the view that this approach which she had intended to reduce conflict was likely to lead to dispute and litigation.
44. Ms Veitch is a professional witness who on my observation keeps the child at the very heart of all aspects of her analysis. It was she who worked to ensure that Sophia started to see her mother again after a long gap. She was dismayed by the fact that for so very many years contact had remained supervised and did not feel that she had really a clear picture of why that was so. What she was clear about however was that it was for the adults to move it on. She was impressive also in the way that she remained live to the fact that there are three adults with PR for Sophia and that though her mother might not be involved in Sophia’s day to day life to the extent that might have been anticipated by now at the time of the 2015 judgment, the fact that she holds PR remains a significant factor which should be accorded respect.

#### Discussion & Conclusion

45. The application for an order that Sophia should leave her fathers’ home and live instead with her mother is one which I do not regard as surviving even a cursory examination of the Welfare checklist. Coming as it does 9 years after the decision of Russell J that she should live with her fathers, one might expect it to be made against the backdrop of significantly changed circumstances from those which led Russell J to

decide that it was in Sophia's interests to move to live with her fathers and to set in place a programme of supervised contact. Although the Judge had contemplated contact moving on from supervision. It has not. That contact has continued to be supervised for so many years is disappointing to see. I do not see reflected in the papers any real indication that the fathers sought to move it on to unsupervised, though B described in his evidence a time when there was an effort to move to contact that was more supported than supervised. More surprisingly, I do not see any steps taken by the mother. Elsewhere in this judgment consider the fact that despite the limited and restricted nature of the contact it has nonetheless given Sophia a positive and real experience of her mother. Until the applications which have resulted in this hearing no one had returned to court because it had been impossible to come to agreement.

46. Whatever may have been the explanation for the fact Sophia saw her mother only in a supervised setting and relatively infrequently for so long, her experience has been that she lives with her fathers with whom she has a close and loving relationship. The mother's own powerfully made points that she has had so limited a relationship with Sophia, no birthdays or festivals spent together, no time in her home, that she has not put her to bed at nights serve in fact to underscore how very great a change it would be for Sophia now to move to her Mother's home. Sophia has no memory of her home being anywhere else. It would be a very significant change in her living arrangements involving her leaving all that is familiar to her. When I weigh that in the balance, I hold in my mind that the respondent's application is not made in isolation and that were I to accede to the applicants' case that would also involve significant change and disruption to her life. It would not, however, involve the loss of every familiar aspect of her daily life.
47. I have had regard as I must to the Welfare Checklist. It is not only the effect of change which featured prominently in my thinking. When I think about the ability of her parents to meet her needs, I see nothing in the intervening years which gives me reason to think that what underpinned the finding that mother is unable to meet Sophia's emotional needs has changed. The continued unwillingness or inability (it is unclear which) to recognise and respect the reality for Sophia that both applicants are fathers to her, on which point I accept the guardian's evidence and Ms Magennis's submissions, reinforces this.
48. I unhesitatingly reject the mother's application that Sophia should go to live with her.
49. I had pause to think about whether the application to relocate was motivated, or at least in part might be motivated, by the fathers wishing to exclude by geography as well as emotionally the mother from Sophia's life. When H gave his evidence I had not felt that when he described the way in which Sophia's mother was kept real in her life, talked about, and her importance and status as her mother reinforced, that it was wholly convincing. It so happens that the day before he was giving evidence to me had been Mothering Sunday. I asked at the conclusion of his evidence what if anything had been discussed with Sophia about a card or message. I was unimpressed by his response which came in the immediate form of not having an address to send a card and did not develop much further. It was all the more unimpressive because so proximately to this hearing I might have expected Sophia's mother to be very much at

the forefront of the minds of her fathers. Had I had only the evidence of H I would I think have been left with a sense of disquiet but B I found to be far more convincingly attuned to the emotional landscape within which Sophia lives. He described to me and I accept, that he has talked to Sophia about how important is her relationship with her mother and how she knows and feels about her mother is something that is hers and no one can take that from her. He also explained in a clear and child focussed way how they had gone about creating 'Sophia's book'. This it had been put to H by the respondent was a lie. The respondent is right that aspects of it might be a lie in strictest adult terms but there is in this case an obvious need for Sophia to have a story of how she came to be born and to live in the way she does and an understanding of her place in her immediate family and her wider family. In due course she will have access to the judgment of Russell J but it is unlikely that the unvarnished truth contained in that judgment would be in her interests to receive until she is older. Were she to receive it ahead of time, the picture she would receive of her mother is a less kindly one than her fathers have created for her. What she has been given now is a more child appropriate and child friendly version and crucially what that has contributed to is giving her a positive view of her mother. The book for Sophia cannot have been easy for the fathers to put together for Sophia. By that I mean it cannot have been easy in two different ways. The first is that regrettably they had no professional advice on how to go about it. When I think about cases where a life story book is created for adopted children in public law proceedings and the considerable help and support given to the family to do that, it underscores the absence of any such help in this case. With hindsight it is a pity this was not built in when the earlier proceedings concluded. The second way in which it cannot have been easy was emotionally. To present a picture of the respondent to Sophia which focussed on her kindness in helping them to be a family when the reality of what they had experienced from her as it emerges from the judgment is very far removed from kindness is a demonstration of positive child-centred thinking and action. I agree with the Guardian that it is to their credit.

50. The relationship between Sophia and her mother is relevant to my decision about whether she should relocate with her fathers to European Country A. I have remarked on the extraordinary period during which contact has remained supervised. I share also the guardian's view that the adults should have found a way to move it on. A consequence however of the fact that contact has continued is that Sophia has a real and personal experience of her mother. She knows and loves her. I accept the submission Ms Magennis makes that this is very much to the credit of her fathers. I accept also the observation of the Guardian that it is yet more to be commended given that the feelings from the hearing in 2015 remain raw. The respondent has not, the Guardian reminded me ever made an overture of apology or similar for the ways in which she behaved in those proceedings and which the judgment reflects. Whilst 'homophobic and offensive' are easy headline points a full reading of the detail in that judgment is needed to understand how it is that the best part of a decade later the hurt caused is still keenly felt. What is admirable is that it is not felt by Sophia. I agree with Ms Magennis that B's articulation of how he drew a distinction between Sophia knows and sees her mother and how her fathers do was powerful. As well as being powerful it gives room for confidence that these fathers who have done so much to put their daughter's view of her mother ahead of their own are unlikely to renege on their commitment to continue that contact. It is in my view very much more likely than not that the applicants will continue to foster and promote Sophia having a



relationship with her mother. There is an irony, on which I hope Sophia's mother will reflect given her expressed approach to his role in Sophia's life, in the fact that it is B especially who has been so sensitive and empathetic in his take on what this relationship means to Sophia

51. For nearly a year – a little over 11 months, from March 2023, Sophia did not see her mother. The mother confirms that she made a complaint about an aspect of the contact centre's supervision. It matters not for my purposes what that complaint was (since it did not bear on Sophia's safety) nor whether it was valid (though it was dismissed and the mother embarked on an appeal process). For my purposes what matters is that without explanation Sophia did not see the mother she knows and loves. E mail evidence from the time demonstrates that the fathers were the parents who were making overtures to try to understand why contact had stopped and to get it to start again. The only possible explanation for them doing so is that they recognised the Respondent's importance to Sophia. It is hard to know what Sophia would have made of the fact that she was suddenly not seeing her mother. What is clear though is that she was not given the impression that it was through some fault of the mother and that her understanding of her mother was sufficiently secure and well established that once the contact started again, thanks in large part to the intervention of the guardian, it did so seamlessly. This also gives me confidence in the future. It also, substantially reinforces the conclusion I have come to when thinking about whether a motivation for relocation is to exclude the respondent from Sophia's life. I am satisfied that there is no such motivation. I note that faced with a recommendation from the Guardian that a minimum of 4 times a year in person contact should be directed if there is a move, the applicants invite me to provide in the order for a minimum of five.
52. The fathers have established that they will have to move from the very expensive area in which they now live. This is driven by increases in costs of living and the fact that B has found it more difficult than hitherto to obtain employment. He awaits the outcome of a job interview in European Country A. I accept the evidence before me that his skills and qualifications along with his EU citizenship mean that he is more likely to find employment in Europe than in London. If the applicants are not successful in their application for permission to relocate, their alternative plan would be to find a home to rent in the outskirts of London such that Sophia could travel into central London to school, and B would weekly commute to employment in Europe. The applicants do not expect him to be able to find work of sufficient remuneration in London.
53. Determining what is in a child's best interest almost always carries with it much that is fact specific. It so happens that in this case the child concerned is being educated within the curriculum of another country so moving out of London to a cheaper part of the UK would mean that she would have to enter a the English system. I accept the submission that a move to the English system is not in Sophia's best interests. Were I to conclude that her relationship with her mother could only be preserved in that way then it would be perhaps a detriment Sophia would have to experience but in view of the conclusions I have reached about continuing contact it does not arise. I have thought hard about the possibility that the family might move further out into greater London and commute in to Sophia's existing school. I did not regard as attractive the suggestion that it would not be in her interests to travel in on public transport. Many children go to all sorts of schools across London that way. Relatively few are in the

privileged position of being able to walk to school in the capital. More attractive however is the submission that as a family unit Sophia and her fathers need stability and certainty and I accept that the rental market in greater London does not give them that prospect in the same way as European Country A. This is not a case in which it is intended or feasible for the family to be buying the property in which they will live. Although when employed B is a high earner, he earns sporadically and in between employments the family live on the balance of the money from the last. I accept the submissions that the earlier litigation was very costly and that diminished the family finances. There has been no evidence before me at this hearing which leads me to conclude that the applicants would be in a position to avoid the uncertainty of the London rental market by buying a property.

The selection of European Country A has been driven primarily by consideration of continued education within the same European education system. Allied to this has been consideration of employment opportunity and links to London to maintain relationship with Sophia's mother and with her maternal sisters (with whom the fathers have made contact). What European Country A does not have, is the character of a return home or of family links for either applicant. I accept that by reason of location it is within easy travelling of the applicant's mother and family elsewhere in Europe. I accept also that it is within easy travel of friends of the family in Europe but those aspects are not to be elevated to be taken as the sort of returning home that features in some of the decided case law. I accept of course that by reason of transport links, as the submission is made Sophia can in some senses more easily travel from European Country A to where her Mother lives than would be the case were the Family to have moved to, for example, Reading. The power of that submission is however undermined by the fact that a move to Bromley would have meant an even shorter journey. I have not found it helpful to take a piecemeal approach to this or that consideration but to look by reference to the welfare checklist holistically at the application in welfare terms.

Sophia's welfare is paramount. I have scrutinised with some care the interference in contact with her mother because s 1(2A) CA brings that into sharp focus. I am satisfied that the proposals made will continue and, I very much hope via mediation, have the potential to improve the quality of the relationship between Sophia and her mother. As I examine the realistic alternatives for Sophia, I accept that they are not in this case moving with her fathers to European Country A or things staying for her as they are. Neither are they moving with her fathers to European Country A or moving to live with her mother. They encompass a possibility of moving to live in greater London in the hope of remaining at the same school (albeit with uncertainty of continued affordability of fees) or moving out of London with a change also of school system. I accept that in both those instances there is the likely prospect of an additional change of one of her fathers working away from home during the week and returning at weekends. As I survey holistically the implications of those possibilities by reference to the welfare checklist I agree with the Guardian that it is in Sophia's best interests that she should be permitted to relocate with her fathers to European Country A. I accept that the plans which have been made for the practicalities to give effect to the relocation are sufficiently detailed within the written evidence filed.

The decision to permit relocation interferes with the Article 8 rights not only of the respondent but also infringes Sophia's Article 8 rights though to a lesser extent. I am satisfied that the interference in both cases is proportionate and necessary. I am satisfied that in

circumstances where as here, there are proper and appropriate proposals for Sophia to have a continuing and developing relationship with her mother in contact, then it is right for me to afford greater weight to her right to a stable and secure family life with her fathers. That stable and secure family life which is in her welfare interests is best achieved by permitting the relocation.

54. So far as the question of the exercise of parental responsibility is concerned I agree that the applicants should be able to take such steps and sign such formal registration documents as will enable them to give effect to the relocation to European Country A
55. I do not regard it as in Sophia's best interests in the circumstances of this case for her fathers to have to consult with her mother over day to day exercise of parental responsibility. She should however be notified in advance of any intended non urgent medical treatment requiring admission; any non urgent surgical treatment (including as a day patient) and should be notified retrospectively of any urgent such treatments. These requirements for notification will, once Sophia attains the age of 14 require her agreement as to private medical information. The mother is to be notified of any intended travel outside European Country A for a period of longer than 28 days.
56. The applicants are to update the mother in writing once every 3 months with updates including Sophia's schooling and extra-curricular life, interests, significant events. The mother is to receive Sophia's school reports forwarded within 7 days of the applicants receiving them.
57. I decline to make any direction as to the parental signatures required to obtain passports of another jurisdiction. That will be a matter for the authorities of that jurisdiction. For the avoidance of doubt I do not interfere with the Prohibited Steps order made by Ms Justice Russell which expires on Sophia's 16<sup>th</sup> birthday neither do I make any amendment to the terms of the Reporting Restriction order which remains in force.
58. I invite Ms Magennis and Mr Niven Phillips to draw up an order reflecting my decisions. That order should be agreed with the respondent. In the event that agreement has not been possibly by 12 noon on 22<sup>nd</sup> March, a draft order should be provided to my clerk – on one document only - annotating those aspects which are not agreed and the nature of any disagreement. I determine any remaining disagreement accordingly on paper.