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Neutral Citation Number: [2022] EWHC 2564 (Fam)

Case No: FA-2022-000206 and ZC21P00657

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 6 September 2022

Before:

Mr Justice Moor

- -

Between:

F

Appellant

-and-

M

Respondent

- -
- -

Mr Henry Setright QC and Ms Jacqueline Renton (instructed by Ribet Myles LLP) for the **Appellant**
Ms Deirdre Fottrell QC and Mr Tom Wilson (instructed by Hughes Fowler Carruthers) for the **Respondent**

Hearing dates: 5th and 6th September 2022

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JUDGMENT

MR JUSTICE MOOR:-

1. I have been hearing an application for permission to appeal with appeal to follow if granted, by F, the father of two twin girls, A and B. The respondent to the appeal is the girls' mother, M. I propose to refer to the parents as "the Father" and "the Mother" respectively. I do so for the sake of convenience and mean no disrespect to either by so doing.

2. The Father seeks to appeal an order of HHJ Gibbons made on 21 July 2022 in the Central Family Court in which she gave the Mother permission to relocate with the children permanently to live in City Y, Country Z. The judgment of HHJ Gibbons was dated 24 June 2022, with an addendum judgment dated 20 July 2022.

3. The Father's Grounds of Appeal and Skeleton Argument are dated 29 July 2022. Sir Jonathan Cohen gave directions on 4 August 2022 on the papers. He listed the application for permission to appeal with appeal to follow if permission is granted on 5 September 2022 with a time estimate of one day.

<u>The relevant history</u>

4. The Father is aged 43. He is a Country E/Country Z national of Country E domicile. He resides in London. He is a founding member with two others of K Company, a European Equities Fund, which is based in Country E. I am told he works in Country E six days per month.

5. The Mother is aged 38. She is a Country Z/Country F national of Country Z domicile. She resides in London. It appears that her family are very wealthy. She has a new partner, TT. She is expecting their child in mid-October 2022.

6. The Mother last lived in Country Z in 2007. The parties met in London in 2010 when the Mother was visiting here from New York. She moved to London in 2011. The parties married in March 2012. They have the two children, A and B. They are non-identical twins, who are now nine years of age. They attend school in London. I am told they are fluent in English, French and Portuguese.

7. In November 2016, A was diagnosed with a very rare illness. This was very serious. She received specialist treatment in Country G from shortly after the date of diagnosis until 2017. Very fortunately, subsequent testing showed no evidence of the disease. The family, which had moved to Country G for the treatment, were able to return to London. From September 2017 to December

2018, A received protective therapy in London. She remains under the care of a consultant paediatric neuro-oncologist, Professor H. There is also an endocrinologist and a clinical psychology and neuropsychology team available at the Great Ormond Street Children's Hospital. A is presently in remission. She receives two MRI scans per annum. The prognosis is reasonably good, but guarded. I am told there have been very few long term survivors of A's condition. There is therefore the ever present risk of relapse/secondary malignancy. In the future, hormone therapy may be required.

8. In June 2020, the Father left his salaried employment and founded K Company with two others. He has 60 clients with €54 million invested. I accept that this means that, at present, the business does not make sufficient money to pay him a salary.

9. The marriage clearly got into serious difficulties. On 3 September 2020, there was an incident in the family home. Both parents bore some responsibility. In October 2020, the Mother began a relationship with TT in Country Z. There is no doubt that this upset the father enormously. An unsuccessful family holiday took place in Mexico in February 2021. When the parties returned to London, the Father moved out of the family home. For a time, the children spent alternate weekends with each parent. The Father filed a divorce petition on 4 March 2021. On 11 May 2021, he applied for a joint lives with order. On 13 May 2021, a Deputy District Judge refused his application for equal shared care. The Mother raised the issue of coercive control. No safeguarding report had been received. It is likely that this played an important role in the decision of the Deputy District Judge, given the terms of PD12J.

10. On 27 May 2021, the Mother applied for permission permanently to remove the children to City Y in her native Country Z. As part of the directions, a report was directed from an independent social worker, Ms Judith Jones. It is clear from the letter of instruction that she was asked to consider the risk of domestic abuse, including any view she may have as to the relevance of any allegations made by the Mother if proven. She was also asked to report on the parenting capacity of each parent; the wishes and feelings of the children; the proposals of each parent for the future care of the children; the Mother's application to relocate to Country Z and the impact of that on the children; a recommendation on the child arrangements, in the event of either a relocation or the children remaining in London; and any such other matters as she considered relevant.

11. Her first report is dated 7 November 2021. She deals with covert surveillance that the father accepts he undertook in relation to the Mother at the time she commenced her affair with TT. He told Ms Jones that he regretted the surveillance. Ms Jones observed an occasion when the Father collected the children. She reports that he was brusque and difficult about the use of some tennis rackets that he had purchased for the children. She said that the parents were both very concerned, loving, troubled and active parents. The toxic status quo must have been harmful to the children. The Father had become angry such that he undertook surveillance of the Mother in a way that terrified her. This was a "red flag" that worried Ms Jones. She said there was no excuse. She also dealt with an occasion when the police were called to the family home. The

Father accepted to Ms Jones that he had humiliated the Mother by raising the arrival of the Police with her in the presence of her colleagues. This was another "red flag" in relation to coercive control. Ms Jones added that she had not provided a full analysis as many of the facts were not accepted. If the findings were made as sought by the Mother, Ms Jones would recommend that the Father receives treatment for distress, depression and anger/behaviour management. She was not suggesting that the Father was at the most dangerous end of the continuum. She said that people often behave badly in the desperation of the moment. She considered that the Mother's application to relocate with the children permanently to Country Z was well thought out and thorough. She set out the positives and negatives of the proposal. In the end, she recommended the move to Country Z. The Father should engage in psychological help.

12. On 8 December 2021, Ms Jones responded to various written questions. The hearing before Judge Gibbons commenced on 1 February 2022. The judge adjourned the case on 2 February 2022 on the basis that the independent social worker had not ascertained the wishes and feelings of the children. A further report directed to this issue was ordered. The addendum report is dated 12 April 2022. Ms Jones concluded that the children probably veered towards going to Country Z. She considered weight should be given to this but it should not be determinative. The same month, the Mother told the Father that she was four months pregnant. She had not told Ms Jones. I do, however, note that Ms Jones was aware that the Mother had previously suffered a miscarriage.

13. The case returned to the court from 9 to 13 May 2022. Oral submissions were made on 20 May 2022. By my calculations, this means that the hearing lasted 8 days. HH Judge Gibbons gave judgment on 24 June 2022. She said it was a very difficult case and the result was extremely finely balanced. She added that it was common ground that the Father's behaviour had been indefensible during the final months of the marriage. The Father had observed the Mother on a video call to TT via a camera in her bedroom. He shouted at her through the microphone on the camera. This had been a gross invasion of her privacy. Having said that, the Mother had remained in contact with TT whilst continuing to deny it. The judgment dealt with various recording devices set up by the Father. He had instructed a private investigator. He had forged her signature on a letter of authority to attempt to obtain her bank statements, although he did not ever use the document. He recorded the Mother on holiday in the bathroom speaking to TT as well as in her office. Judge Gibbons said that he had apologised and accepted this was abusive behaviour and that he had been acting irrationally. He had, however, continued to send some abusive messages to her.

14. The judge found that both parents have strong and passionate personalities. Theirs was a volatile relationship, in which they would both shout. It also involved some physicality. The Father was not financially controlling nor did he seek to isolate the Mother from her friends and family. He was, however, much more subtly controlling about day-to-day matters, which the Mother found increasingly oppressive and undermining. He was entirely oblivious, dismissive, and often bossy. He was easily irritated and demeaning of the Mother. She felt more and more dominated and worn down. She experienced his behaviour as being unpredictable, dominating and undermining. During the

proceedings, the Father became extremely defensive and abusive. He called her "evil" in a text message. Ms Jones had observed his anger and look of contempt and hostility at the handover. The Father struggles at times to control his emotions and his actions. She shared the concern of Ms Jones. The Father is, however, now seeing a therapist. He had engaged well. Much of his evidence was genuine. He had developed a greater insight.

15. The mother was less able to acknowledge the Father's role with the children but not to the extent that she was unable to support the relationship between him and the girls. She was unable to acknowledge, in any meaningful way, the impact of relocation of the children on the Father. The judge rejected her case that the Father's motivation was not genuine. It was troubling that it had been raised. The Father had, in the context of trying to save the marriage, agreed to a future move to Country Z in two years time in 2020. This would, effectively, be now in 2022. The Mother's desire to return to Country Z had intensified. She felt trapped, lonely and unsupported here. An expert says that she has been suffering from post traumatic stress. She has found it extremely difficult to control her distress. The Father has had three episodes of anxiety/depression. He is emotionally very vulnerable. Relocation could have a very detrimental effect on his mental health. He said that life would be "meaningless" without regular contact with the children.

16. The Mother became engaged in January/February 2022. She had suffered two miscarriages. Her pregnancy was relevant but unfortunate. TT works in City X. The Mother feels isolated in London and has a deep seated desire to be closer to her family. The independent social worker, Ms Jones, recommended that she should be allowed to relocate if findings were made of controlling and coercive behaviour. Later, Ms Jones was more firm and less equivocal. The judge found that Ms Jones did stray across the line and accept much of what the Mother had said to her, even though it was in dispute. She had formed a clear view, but she had hard information on which to do so, including the admissions from the Father of his abusive behaviour. The judge considered that the Father's behaviour was less a deliberate act to control and subordinate the Mother. Rather, it was a more subconscious sense of entitlement. The Mother had suffered a loss of self-esteem. It would have an effect on her parenting. This would diminish if she was surrounded by family and friends.

17. The Mother's proposals were well thought out and reasonable. The judge was disappointed that she had got pregnant and engaged. This had not led to Ms Jones changing her mind. The judge did not accept that Ms Jones failed to weigh the impact on the Father of a disruption of his relationship with the children by a relocation. The judge was satisfied that the Mother had properly and fully researched A's medical needs in Country Z. Professor H in London could continue to monitor A here every six months. The Mother would be able to fund this with financial assistance from her mother. The children were sad, worried and confused. Both had expressed a veer towards Country Z but they were worried they would not see their Father as much. Ms Jones had told the judge that she should not attach much weight to their views as they had no real concept of the consequences. The children had spent a lot of time in City Y. They are intelligent and resilient children. They will adapt relatively easily. It is likely

they have been overly exposed to the Father's feelings. There is potential for emotional harm either way. If they remain in London, there is likely to be a negative impact on the Mother's parenting. She will not be able to cope. TT had not given evidence. The judge concluded that he would move to this country if the Mother was not given permission to relocate. The conflict between the parents would, however, likely continue if they remained here. The judge was satisfied that the Mother does genuinely recognised the importance of the Father's relationship with the children.

18. The judge then reached her conclusions. She again repeated that it was an extremely difficult and finely balanced decision. She said she needed compelling reasons to depart from the recommendations of Ms Jones. The judge decided that the balance fell narrowly in favour of a move to City Y where she found the children's welfare would be best met. There was an imbalance in the parents' relationship. There needs to be more balance in that relationship to enable them to co-parent successfully. The Mother needs to be emotionally safe and she could not achieve that in London. The Father will be able to spend more time with the children than he has said. He can travel to City Y for a week or more a month and see them for half of each holiday. He will therefore continue to be an integral part of the children's lives. The children are likely to cope well. The judge therefore authorised permanent relocation to Country Z but limited to City Y. They were not to move to City X.

19. She dealt in an addendum judgement dated 20 July 2022 with the holiday arrangements for the summer. She also decided that the move should take place no earlier than mid-September 2022 or at the conclusion of any appeal of the Father, if later. However, she was clear that it was not necessary for the move to await registration of the order in Country Z. To delay for what could be 6 to 12 months would leave the children in limbo and not be in their best interests.

20. Her order dated 21st July 2022 sets out that a jointly instructed expert on Country Z law had agreed that the English order could be incorporated into a Country Z order. The children were to live with the Mother. Permission was given to her to relocate with them permanently to City Y. They were not to move to City X. A move to City X would not be in their interests. The Mother was not to remove the children until a security bond of £250,000 had been lodged to be held until the Country Z court had made a mirror order. Arrangements were made for the children to have holidays with both parents this summer. Whilst in this jurisdiction, the children were to spend alternate weekends from Friday to Monday with their Father as well as Wednesday evenings. Following removal, there was to be contact to their Father one week per month in City Y during term-time. In addition, there was to be contact for half the school holidays. This was set out as being two weeks in July in Europe; three weeks in December/January in Europe; the October half-term in Europe; and one week in the Easter holidays in Europe. There was to be indirect contact, by video link, at least twice per week. The Mother was to pay for three return trips to Europe per annum. The children were to attend a British school in City Y. There was a prohibited steps order preventing the Mother from relocating with the children to City X.

The Grounds of Appeal

21. There are five grounds of appeal set out in the Notice of Appeal dated 29 July 2022. Ground 1 is that it was procedurally and substantially unjust, as well as wrong, for the judge to place any weight on Ms Jones' assessment and recommendation due to the significant flaws with her approach to the case, given:-

    (a) Ms Jones' bias, or in the alternative, the perception that Ms Jones was biased;
    (b) Ms Jones' pre-judging the issues of domestic abuse in the case; and
    (c) Ms Jones' failure to conduct a holistic welfare evaluation as a result of her permitting the issue of domestic abuse to dominate her assessment.

22. Ground 2 is that the judge was wrong to follow Ms Jones' recommendation either in full or in part having accepted that her welfare evaluation had been wrongly dominated by the issue of bias and domestic abuse. Ground 3 is that the judge erred and was wrong in her holistic analysis of the children's welfare. In particular:

    (1) She placed excessive weight on the impact on the Mother of a refusal to grant permission to relocate;
    (2) She placed insufficient weight on the impact on the Father of granting permission to relocate;
    (3) She was wrong in her assessment of the time that the Father could spend in Country Z during the children's school term-time;
    (4) She was wrong to trust the Mother to promote a healthy and positive image of the Father and otherwise promote the relationship the children would have with him if they move to Country Z;
    (5) She placed insufficient weight on the emotional harm to the children of being deprived of the love, care and time of the Father;
    (6) She placed insufficient weight on the significant changes of circumstances; and
    (7) Overall, she placed excessive weight on the recommendations of Ms Jones.

23. Ground 4 is that the judge was wrong to rely on Ms Jones' recommendations as regards the new circumstances of the case that had not applied at the time of her report given Ms Jones' evidence on this issue. Ground 5 is that the judge was wrong:-

    (a) To determine that were the children to be removed permanently to Country Z they would have contact with the Father once a month during term-time and for only half of the school holidays; and
    (b) To change her mind about the need for the homologation process (obtaining a mirror order) to be a precondition to the children being remove permanently to Country Z.

The law on appeals

24. FPR 2010; Rule 30.3 provides that:-

> *(7) – Permission to appeal may be given only where –*
>
> *(a) The court considers that the appeal would have a real prospect of success; or*
> *(b) There is some other compelling reason why the appeal should be heard.*

25. In Re: R (A Child) [2019] EWCA Civ 895, the Court of Appeal held that there must be a realistic, as opposed to a fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not.

26. If permission is granted, Rule 30.12 states that:-

> *(1) Every appeal will be limited to a review of the decision of the lower court unless –*
>
> *(a) an enactment or practice direction makes different provision for a particular category of appeal; or*
> *(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.*
>
> *(2) Unless it orders otherwise, the appeal court will not receive –*
>
> *(a) oral evidence; or*
> *(b) evidence which was not before the lower court.*
>
> *(3) The appeal court will allow an appeal where the decision of the lower court was –*
>
> *(a) wrong; or*
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.*

27. The appeal courts have considered the approach to such appeals on many occasions. An appeal court should be appropriately reluctant to interfere with the exercise of the trial judge's discretion. As Lord Nicholls explained in Re B (A Child) (Sole Adoption by Unmarried Father) [2002] 1 FLR 196, at [16] and [19]:

> *"There is no objectively certain answer on which of two or more possible courses is in the best interests of a child. In all save the most straightforward cases, there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong. There are too*

many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have for the child…

…cases relating to the welfare of children tend to be towards the edge of the spectrum where an appellate court is particularly reluctant to interfere with the judge's decision."

28. As Lord Wilson explained in Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911, at [40]:

> *"Thus an error in the balancing exercise justifies intervention only if it gives rise to a conclusion that the judge's determination was outside the generous ambit of reasonable disagreement or wrong within the meaning of the various expressions to which he had referred."*

29. I accept that a court should be cautious not to strain to find error where there is none. As Sir James Munby P explained in Re F (Children) [2016] EWCA Civ 546, at [22]-[23]:

> *"Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."*
>
> *The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360…*
>
> > *"[…] An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*
>
> *It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".*

30. An appeal court must be particularly careful before interfering with findings of fact, given that it has not seen the witnesses and been able to assess their oral evidence. As Lewison LJ explained in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5, at [114]-[115] (emphasis added):

> *"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 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."*

Skeleton Arguments

31. Before Judge Gibbons, the Father was represented by Ms Jacqueline Renton. In the latter stages of the case, Mr Christopher Hames QC led Ms Renton. They drafted the Grounds of Appeal and Skeleton Argument. Mr Henry Setright QC has led Ms Renton before me at this oral hearing. The Mother was represented before Judge Gibbons by Ms Deidre Fottrell QC and Ms Lucy Maxwell. In this court, Ms Fottrell has led Mr Tom Wilson. I am very grateful to all counsel for the very considerable help and assistance they have given me. Nothing more could have been said or done on behalf of either parent.

32. The Skeleton Argument filed on behalf of the Father is dated 29 July 2022. It asserts that the judgment was flawed and wrong. It is said that the judge did not conduct a fair and adequate assessment. It complains that she placed undue reliance on the assessment and recommendation of Ms Jones which was unjust given Ms Jones' "*obvious bias and flawed recommendations*". In consequence,

it is argued that the judge lost focus on the children's welfare. It is said that the judge should have placed greater weight on the obvious antipathy of the Mother to the Father and her wish to be with her new partner. The risk of emotional harm to the girls by the significant loss of the Father in their lives required dismissal of the application. Adverse inferences should have been drawn from the failure of the Mother to call her new partner, TT, to give evidence. The Skeleton then deals with the allegation of bias against Ms Jones. Mr Setright has accepted that the Skeleton is incorrect in that it argues that the subjective perception of the Father as to Ms Jones' bias is just as important as the objective consideration. He was absolutely correct to make that concession. I had, indeed, noted just that when I originally read the Skeleton. Nevertheless, the Skeleton makes a number of factual points that it is said shows Ms Jones' bias, namely her belief that the Mother was telling the truth; the fact that she blamed the Father for all of the conflict; that she took it upon herself to warn the Father's partner about his controlling behaviour; and her belief that he could do nothing right. It is argued that this must have coloured her overall welfare evaluation of the case.

33. Complaint is then made that the judge failed to make a clear finding of bias. It is argued that she should have done so and, having done so, put aside the report and recommendations entirely. Moreover, it is said that the judge was wrong as a matter of law to say that she would need to find "*compelling*" reasons to depart from the ISW's recommendation. She needed reasons, but not "*compelling*" reasons (see Re C [2017] 1 FLR 10 at [72]). The Skeleton then complains that the Judge followed Ms Jones' assessment, whereas it is said that if she had relied on her own findings, she would have reached her own conclusion that the Mother would be able to cope if she remained in London. It is then asserted that the Judge placed excessive and impermissible weight on just one parents' distress and isolation. An attack is made against the finding of fact that the Father can travel to Country Z on the basis that it was wishful thinking but crucial to the Judge's determination. Complaint is made that the Mother did not view the Father as important as her. The Judge was, it is said, therefore wrong to conclude that the Mother would promote the children's relationship with him. The Mother only disavowed a move to City X when it was clear the court had concerns. The failure to call TT should have led to an adverse inference that he had something to hide, such as an intention for the Mother and children to move to City X. Finally, it is said that it is wrong to permit the Mother to go prior to a mirror order being obtained in Country Z as her huge wealth means that lodging £250,000 is irrelevant to her.

34. The Mother's Skeleton praises the judgment and argues that I should refuse permission to appeal on the ground that the appeal has no real prospect of success. It is said the judgment was a careful, balanced decision with no errors of law or fact. The judge heard all the evidence and gave a comprehensive and balanced judgment that is a model of its type. Her welfare analysis was her own. Ms Fottrell submits that it is clear overall from the judgment that the judge rejected the contention that Ms Jones was biased. The judge was careful to identify what she considered to be the flaws in Ms Jones' analysis and squarely addressed the Father's criticisms. It is argued that the judge then undertook her own assessment, factoring in the flaws and matters not addressed by Ms Jones.

The judge did what was required of her, namely evaluating the professional's evidence objectively, in the round and on its own merit. Finally, it is submitted that the judge did make the adverse inference against TT that he would move to London if the application was denied.

35. I heard oral submissions from both leading counsel that amplified what I have set out above in a very helpful way.

My assessment of the judgment

36. Before I deal with the individual Grounds of Appeal, I accept entirely that applications for permission to relocate permanently are difficult and troubling, particularly when the relocation is a very long way, such as from London to Country Z. This case was no exception and was made more fraught by the ill-health suffered by A and the huge worry that this must create for both parents going forward. I accept the categorisation by the judge of the case as being very difficult and extremely finely balanced. I make it clear that I do not take this observation from the judge as making a successful appeal either more or less likely.

37. I do, however, take the view that the judgment was an extremely careful and thorough document, produced by an extremely experienced judge. With one possible exception, there are no errors of law. The test for relocation is set out correctly and I do not need to repeat it in this judgment. I cannot accept the criticism in the Father's Skeleton Argument that the judge did not conduct fair and adequate assessments. She most certainly did. Equally, I do not accept that she placed undue reliance on the assessment and recommendation of Ms Jones. I certainly do not accept that she lost focus on the children's welfare. I am clear that she made findings of fact as to each of the crucial matters that were in dispute and that needed to be resolved. These findings cannot be challenged. The judge then very carefully considered each of the factors set out in the welfare checklist to be found in section 1(3) of the Children Act 1989 and set out her conclusions in relation to each from paragraphs [97] to [124]. She obviously had the welfare of the two girls as her paramount consideration throughout. Having done so, she reached a conclusion in paragraph [125] that I consider cannot be challenged. She considered the risk of emotional harm to the girls by relocation. She rejected this as a reason to refuse the application.

The individual Grounds of Appeal

38. I now turn to the individual Grounds of Appeal. Ground 1 concerns the approach to Ms Jones. There is no doubt that the Judge was critical of Ms Jones. She sets out her conclusions at paragraph [81] of her judgment. She finds that Ms Jones "*strayed across the line*" by "*accepting at face value much of what (the Mother) said*". She gives an example, namely that Ms Jones accepted that, in downplaying the incident, the Mother had lied to the Police on 3 September 2020 as to what had happened, when this had not been established by a judge making a finding. Second, the judge refers to an occasion during oral evidence when Ms Jones referred to the Father as "*this man*". This must have troubled the judge or she would not have mentioned it, although for my part it depends

entirely on how it was said. Third, the judge accepted that Ms Jones was wrong to tell the Father's partner about the need for her to understand the allegations of controlling behaviour. The judge accepted that this was outside Ms Jones' remit and demonstrated that she had formed a clear view of the Father.

39. Whilst the Judge then accepted how Ms Jones' report would, as a result, appear biased to the Father, she then sets out a number of counter balancing factors, such as the admissions of abusive behaviour that the Father made during the assessment; her own professional assessment of the Father's lack of insight into, and his limited acceptance of his responsibility for his behaviours and their impact on the Mother; Ms Jones' observations of the handover where the Father made an issue out of the tennis rackets; and the observations of others close to the couple, albeit that she accepts the limited weight to attach to the last point.

40. I reject the allegation that the Judge did not deal with the allegation of bias. Whilst I accept that there is not a clear statement that she rejected it, it is abundantly clear from the judgment as a whole that she did not accept that Ms Jones was biased. Ms Fottrell reminds me of the definition of bias to be found in Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468 at [17] that bias means a prejudice against one party for reasons unconnected with the legal or factual merits of the case. This is a stiff test and I have found it impossible to see how that test could be satisfied in this case. Moreover, in Re AZ (A Child) (Recusal) [2022] EWCA Civ 911 at [56], the point is made that the "*fair minded and informed observer*" is not to be confused with the person raising the complaint of bias. I find that the reference in paragraph [82] of the judgment to the judge seeing how it might appear biased to the Father makes this very point.

41. Overall, it is clear that the Judge considered very carefully what she could accept and what she should reject from Ms Jones' evidence. She did this entirely properly. I do accept Mr Setright's submission to me that the Judge was wrong to say that she could only disagree with Ms Jones if there were "*compelling reasons*" to depart from her recommendations. I accept that the decision in Re C makes it clear that it is only "*reasons*" that are required. It may be that the judge was influenced by Ms Renton's written submission that "*good reasons*" were required. Whilst I have been troubled that this error crept into the judgment, I must assess the extent to which it may have affected the outcome. I am entirely clear that it did not have any material impact. The judge made entirely proper findings and considered Ms Jones' evidence from every perspective. She did indeed set out reasons for not agreeing with Ms Jones as well as reasons for agreeing with her. I accept Ms Fottrell's submission that, in her final analysis, she drew all the threads together and her decision was firmly rooted in her analysis of the children's welfare. In short, she reached her own conclusions, which she was absolutely entitled to do given the evidence she heard. It follows that I take the view that the error in the test to apply justifies me in granting permission to appeal on that ground alone but, having considered the matter carefully, the end result was not wrong. Ground 1 is therefore dismissed.

42. I am clear that Ground 2 should be dismissed. I do not consider that the judge blindly followed Ms Jones' recommendation. She made her own welfare

evaluation that led her to decide to grant the Mother's application. The fact that she agreed in that analysis with Ms Jones most certainly does not undermine her conclusion. Far from it, but, to the extent that she did follow Ms Jones, she was entitled to do so. She had set out the areas where she disagreed with Ms Jones as well as those where she agreed with her. Having rightly not concluded that Ms Jones was biased, she was absolutely entitled to do so.

43. Ground 3 is a basic attack on the judge's analysis. I consider it is entirely unfair. The judge produced a very careful analysis of all the competing factors. It is clear that she had the advantages and disadvantages of granting permission clearly in her mind. I do not consider that excessive weight was placed on the impact on the Mother of a refusal or insufficient weight on the impact on the Father of granting permission. Her finding that the Father can spend time in Country Z cannot be challenged on appeal. Of course, only time will tell if it is correct, but the judge was absolutely entitled to find that he would do so. Exactly the same point applies to the judge's finding that the Mother would promote a healthy and positive image of the Father and promote his relationship with the children. The judge heard the Mother and made her finding. Moreover, I remind myself that this is a case in which the Father had been having the children with him for 5 days out of 14. Regardless of the reasons for it not remaining as shared care after the separation, it is not a case where there was no contact or difficulties were placed in the way of a good relationship, notwithstanding the matters of conduct that the judge found proved. Equally, I cannot accept the other matters raised in this Ground. The judge took all these matters into account and gave them the weight that she considered appropriate in a way that cannot be challenged. I do not accept that she placed excessive weight on the recommendations of Ms Jones.

44. Ground 4 relates to the new circumstances, namely the Mother's pregnancy and her engagement. I remind myself that the fact that the Mother had suffered at least one miscarriage was already known. It cannot therefore have been an entire surprise that she became pregnant again. I do not entirely understand how the Mother can be criticised for getting engaged, provided she puts the welfare of the children first. I take the view that the judge reached her own conclusions on this matter. She was clear that the Mother was to move to City Y not City X. She found that TT would move to London if the application was refused. In that respect, I find that she did make an adverse inference against TT's failure to give evidence. I do not consider she should have made any further adverse inferences against him in relation to this. It is thus clear that this aspect did not wrongly affect her decision, which was child focussed, and her approach cannot be criticised.

45. Finally, Ground 5 repeats the criticism of the judge for finding that the Father will ensure he can spend time with the children once a month in Country Z in term-time. I have already made it clear that this finding cannot be criticised. Spending half the school holidays with each parent is an entirely standard division of the children's time in any case, even when the parents live on different Continents. The judge was satisfied that the children would continue to have proper and fulfilling contact to their Father, in Country Z, Europe and by video call.

46. It may be that some judges would have required the mirror order to be obtained before the move took place but, again, the judge's decision not to do so in this case was entirely within her discretion. She had heard the Mother and was satisfied the Mother would not abuse the trust reposed in her. Equally, the judge considered it would be detrimental to the children's welfare if they were placed in limbo here, having to wait 6-12 months for registration. This is an important consideration. It follows that I am satisfied that she was entitled to change her mind on this issue and make the order she did.

Conclusion

47. It follows that I grant permission to appeal on Ground 1 solely on the basis of the test for disagreeing with an expert witness but, having granted permission, I dismiss the appeal. I refuse permission to appeal on Grounds 2 – 5.

48. I realise that this will be a huge blow to the Father. Nevertheless, I am satisfied that he will be able to continue to play a full and important role in the children's lives. It is fortunate that there has been such a sea-change in communications in the past forty years that he will be able to see and speak to the girls over the internet almost instantly on a very regular basis. I am also entirely satisfied that he will have good and regular holidays with them. I very much hope that he will be able to travel to see them in Country Z in term-time on a regular basis.

Mr Justice Moor
6 September 2022