

HONG KONG / JUDGMENT

HMS v. HMW

[2024] HKFC 48**COURT**

Family Court

DECIDED

14 March 2024

CASE / FILE NUMBER

FCMC4026/2016

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bjbj FCMC 4026/2016

**[2024] HKFC 48 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 4026 OF 2016**

BETWEEN HMS Petitioner and HMW Respondent

Coram: Her Honour Judge Thelma Kwan in Chambers (not open to public) Date of Trial: 10 and
11 July 2023 Date of Opening Submission: Respondent 30 June 2023, Petitioner 3 July 2023 Date of
Closing Submission: Petitioner and Respondent 8 August 2023 Date of Judgment: 14 March 2024

J U D G M E N T (Relocation)

This is an application by the Respondent Father () to relocate to the UK with the two children of the family. Petitioner Mother (M) opposes his application. The parties have two children, their daughter KY born in August 2007, and son YH born in May 2010, (collectively the Children). They are respectively almost age 16 and 13 at time of trial.

Procedural History

M petitioned for divorce in April 2016, the divorce was finalized with the granting of the Decree Absolute on 5 October 2016. On 19 August 2016, HHJ Melloy ordered by consent, that the custody, care and control of the Children be granted to F, with reasonable access to M. F made this application on 14 June 2022. I recall M attended Court on the return date in July 2022, and told the Court that she had no information about the relocation. I therefore made an Order for F to file a supplemental affidavit with information on the intended residence, schools, his personal

finances, and other relevant matters. This was promptly filed on 4 August 2022 showing F has done detailed research on residence options, and school options for the Children, and include the support of friends who have recently moved to the same city of B () where the F intends to go. There was also a consent signed by M dated 19 August 2022 agreeing to the F s application. On the return date on 9 September 2022, M suddenly informed the court that despite the consent she signed, she then opposes the relocation application. She was allowed to withdraw her consent, and to file her affidavit in opposition. M s affidavit was filed on 29 September 2022, and the F s reply on 19 October 2022. F s application was set down for trial on 10 and 11 July 2023. Both parties acted in person, gave evidence, and was cross examined by the other party. The social welfare office also attended trial. Background of Parties F is 51 years of age. He works as a Finance Manager of a credit company. M is aged 44. She is not working; she lives with her sister s family and claims to be supported by her family members. F raises the Children single-handed. They attend local schools, lead healthy structured lives, with good grades academically. Following the Order made in 2016, F says that the parties have arranged some accesses. He complains that M usually requested access last minute and made it difficult for him to arrange at short notice. M says that F treated her bluntly when she asked for access, and she says he told her not to contact the children again and blocked her messages to him. She says that she did not contact the Children again lest there would be further conflict with F. The last access with the Children was in May 2017. F s Case F says he has lengthy discussion with the Children on the relocation plans. It appears that he and the Children together have engaged in research on various aspects of living in the UK. One strong motivation for leaving is that F feels that the Children have more flexible options in the UK. He says that KY wants to study human related subjects especially psychology, and research shows that she can develop this interest at high school level as well as more options of universities in the UK. YH prefers the freedom of education in the UK. F says he has secured employment in the UK. His current employer, which is a credit company, intends to engage him to explore business opportunities there; and has offered him a monthly salary of 2,400 and a housing allowance of 1,200. F intends to look for accommodation in B, where he has friends, and on whom he can rely for assistance including care of the Children. F also says that if relocation is not permitted, he would find the means to send KY to UK when she turns 18, and to join her when YH turns 18 so that the family can reunite. M s case M told the SWO that she does not know the details of F s plan, this is despite F has filed his supplemental affidavit in October 2022, which was before the SIR was ordered by the Court. She says F has no concrete plans. She also queries if F s financial resources are enough to support the Children; and as his financial management is not good, the Children s livelihood will be affected. She also questions F s ability to parent the Children by himself as he will have a full-time job in the UK; and she doubts the alleged support of F s friends in B. She says she does not trust that F will facilitate access. The Social Investigation Report The following are salient points from the SIR dated 4 May 2023: That the relocation plan has been discussed between F and Children for a long time, even to the extent of formulating a budget plan together. Both Children are excited with the plan, they look forward to the relocation and are very determined to go. Both Children say that if not allowed by the Court, they will both go to the UK when they turn 18. Both Children are very close to their father and have absolute confidence in him to look after them

and to settle down together in the UK. KY says she has no motivation to contact her mother as she has not heard from her. YH, who was only 6 years old at the time of divorce, says he has little memory of her and she is a stranger to him. F's friend in B was contacted. She was F's university friend, they have a long-standing friendship and she knows the Children well, she has offered support and assistance to F for the Children in the past. She confirms her willingness to help and support F and the Children when they move to B. The SWO is of the view that the relocation plan seems feasible and the permanent removal is supported. Legal Principles My starting point is found in s.3 of the Guardianship of Minors Ordinance (Cap. 13), which states that the best interest of the minor is the first and paramount consideration. The applicable principles governing relocation application were based on the English Court of Appeal case of *Payne v Payne* [2001] Fam 473 and adopted by our Court of Appeal in *SMM v TWM* [2010] HKFLR 308, [2010] HKLRD 37 CA where Cheung JA summarised them at 21 of his judgment as follows: 2)

- 3) The application should be approached as follows: 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, i.e. 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 in so far as appropriate. (per Thorpe LJ at paragraph 40)
- 4) In short, the relevant factors are: The welfare of the child is always paramount. There is no presumption created by section 13(1)(b) of the English Children Act 1989 in favour of the applicant parent. The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight. Consequently the proposals have to be scrutinised with care and the Court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end. The effect upon the applicant parent and the new family of the child of a refusal of leave is very important. The effect upon the child of the denial of contact with the other parent and in some cases his family is very important. The opportunity for continuing contact between the child and the parent left behind may be very significant. (per Butler-Sloss P at paragraph 85) In the case of *BA v BL (Child Relocation)* [2019] 4 HKLRD 23 the Court of Appeal per Cheung JA reiterated and further elaborated on the approach to be taken in relocation cases: 4.12 This led to the more recent decisions of the English Court of Appeal such as *K v K* where it is stressed that, in the determination of applications for permission to relocate, the welfare of the child was the paramount consideration The three judges in *K v K*, Thorpe,

Moore Bick and Black LJ were of the same view on this point. 4.13 4.14 Ultimately it is one of the factors to be considered in the overall assessment whether the relocation is in the best interests of the child and the weight to be attached to this factor depends on the facts of the case. The value of Payne is that it "identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case", per Black LJ at [144] in *K v K*. In my view Payne is not to be jettisoned. The relevant factors provide a structured framework in which the appraisal is to be made holistically. ... I also found the following from Lady Justice Black (as she then was) in the abovementioned case of *K v K* [2011] EWCA Civ 793 to be of assistance:

141. The first point that is quite clear is that, as I have said already, the principle the only authentic principle that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child. HHJ I Wong has in his recent case of *JTMW v NAV FCMC 8504/2017* [2020] HKFC 244 succinctly summarized important points of principles enunciated in the case of *ZJ v XWN* at paragraphs 53 - 55:
53. The Court of Appeal endorsed what Vos LJ said in *Re C (A Child) (Internal Relocation)* at [82] and [83],
82. I add a few words in an attempt to summarise the position that has now been reached. As counsel before us agreed, in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. The exercise is not a linear one. It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child. It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.
83. ...
54. The Court of Appeal also dealt with the use of the welfare checklist in the balancing exercise. The welfare checklist is only an aide-memoire. A judge is not required to mechanically list every factor to demonstrate that he has considered the same.
55. The Court of Appeal emphasized that the guidance in Payne or *SMM v TWM* or the welfare checklist are simply tools to assist a Family Judge in making the multifactorial assessment to reach a result which is in the best interest of the child after taking account of the potential impact on the parents: at [30]. The consideration of guiding legal principles will be incomplete without citing what has been referred to as the welfare checklist factors, which

have been listed in our Children s Proceedings (Parental Responsibility) Bill, and has yet to be passed as law in Hong Kong (the Welfare Checklist). These are factors that should be taken into account when determining issues relating to children and where their best interest is to be considered: the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding; the child s physical, emotional and educational needs; the nature of the relationship of the child with each of the child s parents and with other persons; The likely effect on the child of any change in the child s circumstances; The child s age, maturity sex, social and cultural background and any other characteristics which the court considers relevant; The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child s parents; Any harm which the child has suffered or is at risk of suffering; Any family violence involving the child or a member of the child s family; How capable each of the child s parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (a broader formulation along the lines of) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child s right to maintain personal relations and direct contact with both parents on a regular basis; The range of powers available to the court under this Ordinance in the proceedings in question. Any other fact or circumstance that the court thinks is relevant. With regard to recognition of Children s point of view, it is of assistance to refer to the case of *Re D (Abduction: Rights of Custody)* [2007] 1 AC 619 at 641 F-G, which involves a child then age 8: But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents views. With these principles in mind, I shall proceed to apply them to the case at hand. The Analysis Is the application genuine and not motivated by F s desire to exclude M from the Children s life I find the F s application to be genuine. He is relying on the BNO Visa Scheme offered by the UK government. His explanation and reasoning have been consistent from the first time he appeared in this Court with his application. He wants the Children to benefit from the Scheme to study in one of the best education systems, with subsidy from government, and resulting in the opportunity to apply for naturalization as British citizen. The living environment will be better for the Children than their present public housing unit in Hong Kong. M has not been in the Children s lives since May 2017, this is a fact. Although she has given her explanation that she was discouraged by F, if that was indeed the case, she has produced no evidence to that effect. Nor did she appear to have fight for time with the Children at all. She has just stayed away. I find that the F s application is not made with the desire nor intention to exclude M from the lives of the Children. Is the application realistic and found on proposals well researched and investigated Accommodation H has found an area in B. Not having been granted with an Order of Court, he has not, for obvious reason,

found an exact location to rent as his home with the Children. According to his research, his intended area of accommodation has parks and great schools nearby. His research for costs of rental accommodation is within the housing allowance offered to him for his UK employment. Schools Under the BNO Visa Scheme, children under 18 have free access to education. It is trite that without an address in the UK, a parent cannot approach the local council for placement in schools. F has provided a list of schools in the area of his intended accommodation which are rated from outstanding to good. The options have been explored with the Children. Financial The F s Form E shows that he had \$328,450 in form of cash, stocks and MPF as of late 2022. According to his oral evidence, he will have more money forthcoming in the form of long service payments, unclaimed commission, and unused holidays. He says this will take the total amount available to him calculated up to the time of hearing to be \$670,000. F has gone on the internet to look at the UK government home office website to calculate how much is required for maintenance of an adult and two children. According to his calculation, this amounts to 1,933 and 3,062 for half a year. Furthermore, based on average rental of 927 per month for half year, the rental payment required would be 5,562. He therefore says that the total maintenance for the family, even without income for half a year, would be $1,933 + 3,062 + 5,562 = 10,557$. F demonstrates that based on the finances he filed with Court, this amount is available. Reference is made to the job that is available to F from his current employer, which indicates that he will have income on arrival in the UK and when he starts working. Care plan F has demonstrated that he is an able carer for the Children. This is confirmed by the SIR. F also says, if need be, the B local Council can offer support for childcare including out of school clubs. F s friend and her husband, who moved to B in July 2022, have confirmed care support to the Children. The evidence is that the families know each other and F s friends are no strangers to the Children. Therefore, H has care support for them when required. M s Opposition M criticizes F s relocation plan on every front, saying it ill-thought-out and little researched : She calls F s view of UK education a blind admiration of the West without realistic thought ; and says there is no evidence of what education the Children wishes to receive, their academic profile, and which education institutions the Children will be able to get into. She says it is too early at their age to predict future academic profile and interests . She calls the F s analysis of schools hopeless shallow . She criticizes the employment offered by F s current employer, and says that the letter of appointment has expired, and F has not produced a fresh document despite saying that the offer has been renewed. She therefore says he has no concrete plans of employment and not even the slightest evidence of job openings . She criticizes F s lack of financials and historical debts; and says F s estimation of average 927 monthly rent is of the minimal standard, which is essentially a social welfare standard . And based on his calculation of monthly expenses, his savings could only give the three of them 19.5 months of basic survival . She questions F s ability as a sole primary carer as she says F s occupation plan is unsettled. And as F s friends need to work, their assistance would not be of much help. I find the M s criticism to be unnecessarily harsh. She questions the Children s education aspirations; but has made no attempt to speak to the Children about their relocation plan at all, or asks after their academic achievements, or their wishes regarding their interests in

life. She did not produced any evidence of what she claims to be minimum or survival expenditure level; or what she thinks the expenditure to be in her version of reality. She questions F s ability to provide comparable living standard with his finances , but there is not a shred of evidence to show how much she knows of their living standard or even of their lives. I am of the view that F is a credible witness. I believe that his relationship with his employer, for whom he works for 7 years, has enabled a job opportunity for him in the UK. In believing his evidence, I accept that this offer is still open to him. I believe F will continue to be an able carer of the Children, as he had in the past 7 years. I also believe F s version of care support in his friends who said they are ready to provide a helping hand. Afterall, the children are respectively 16 and 13 years of age (and older by the time they relocate); they will be attending full day schools near their residence, and do not require hands-on constant care. In my view, M has not succeeded in challenging the arrangement F has researched and presented for the purpose of his application. Is the M s opposition motivated by genuine concern for the future of the Children s welfare or is it driven by some ulterior motive Looking at some WhatsApp messages between the parents back in May to June 2022 just prior to F s application, it could be seen that M s initial reaction was positive on 1 June 2022, and she even asked F where in UK they are planning to go. After F filed his application, M suddenly on 13 June 2022 raised the issue of outstanding debts she alleges F owed her, purportedly after consulting with her lawyer. M says that she is worried about the F s financial situation which will impact the children. M also says she will not be able to see the Children after relocation and continues to blame F s previous obstruction of access. She also says a refusal to grant relocation will not be a problem for the Children as they say they will go to the UK anyways when they turn 18. I do not find M s comments to be one of care and thoughtfulness for the Children. From the time of being made aware of the F s relocation plan, she has still not reached out to the Children. If she has been concerned in the slightest that this Court will grant F s application, and she really wanted to reconnect with the Children, maybe to even make up for lost time, she has had a lot of time to do so but nothing has happened on her part, up to the time of the hearing. I do not attach much weight to M s challenge on the Children s academic ability. I am of the view that F has been frank with KY s strength and weakness in her academic subjects, and I find him credible in talking about KY s pursuit of her interests in psychology related subjects. F believes that getting into a university in HK is very competitive, his wishes for KY to have more opportunities to pursue her dreams in the UK is compelling. As for YH, he does well at school, ranking 2nd in class, and 3rd in form; and is described to be industrious, obedient and attentive . There is no evidence before me that either of the Children will have issue adapting to studying in the UK. I do not believe that her opposition is based on a genuine concern for the Children. To what extent would that detriment be offset by extension of the child s relationship with the paternal family This factor is not relevant to this application. What would be the impact on the F on the refusal of his realistic proposal I believe that the refusal of the relocation application will result in a set back of the F s plan with the Children. Clearly there will be disappointment. However, F s back up plan is to find the means for KY to leave first, and F and YH will stay behind and the family will only reunite three years

after. This would of course mean that F will not be able to care for the daughter in the initial years, and the family will be apart. For such a close knit family, this is far from comparable to the family immigrating together to a new country and supporting each other in their new lives. Will the granting of the Relocation Application be detrimental to the M and her future relationship with the Children It is clear from the facts of this case that there is no existing relationship between M and the Children; there has not been since May 2017. It is also clear to me that M has proffered no evidence that she has even tried contacting the Children, and her only repeated allegation that F was obstructive was not supported by any evidence and hence a weak argument. On the contrary, F did produce WhatsApp messages exchange in February and May 2017, which showed that he was prompt in responding to her ask to see the Children; even then her access requests were three months apart. M has made no attempt to see the Children even after she was informed of F s application in May 2022 (based on Whatsapp message wherein F informed M of his intended plans) until the time of the hearing. Even on cross examination by the F as to this situation, her answers have been evasive. I do not believe granting the F s relocation application poses any detriment to her. That said, F has put forward a number of propositions for her access to the Children in his opening submission: Digital on-line access, which can be done frequently, within the schedules of M and the Children. Children will travel to HK once a year, access or even staying access during these times can be arranged. F offers to pay for M s flight to the UK once a year to visit the Children and stay an extended period of time. On request (if valid and reasonable) to arrange for unscheduled visit by the Children back to HK. M can visit their home, the Children s schools or attend special days at schools on her request. Despite this, M is still dismissive of the F s offer in her closing. Although she fails to cite any basis for her contention that F was not co-operative in arranging access. Other factors to consider Wishes of the Children It is clear from the SIR that the Children are keen to go to the UK. M quoted case law in her submission that I am not bound by the SWO s recommendation, especially if it is untested observations and recommendations made by the SWO; and she alleges that the Children have not spoken freely to the SWO. Going back to the cross examination by M of the SWO in court, she only asked the SWO around ten questions, and I am of the view that the SWO s stance and his recommendation and observations remain unshaken. I am therefore not of the view that M has established any of her allegations against the SWO at all. I place due weight on the SWO s report, his interviews with the Children, his observations, and his representation of their views and wishes. Holistic assessment of what is in the best interest of the Children: the Balancing Exercise I have only one guiding principle in making determination of such a nature, whether I am of the view that allowing the Children to relocate to the UK is in their best interest. Furthermore, in the light of this case, whether allowing them to go now under the BNO Visa Scheme together as a family is in their best interest. The factors in the Welfare Checklist are considered below. My first observation on the F is that he appears to have a very close relationship with the Children. Being a single parent is not easy, and the fact that the Children are doing well per the SIR is an indication that his parenting is working well; and the Children love, support and trust him implicitly. I must confess that I did share M s concern that F may be leaving

without substantial finances, although I accept his evidence in court that the amount will go up to \$670,000 with additional outstanding sums from his employer. Despite his finances being not substantial, but contrary to a lot of other people immigrating to a new country, F has a job in the waiting in UK, and therefore he does have occupation and income security; which on his research is adequate to support the Children and himself. W raises issues in her closing including questioning F's intended UK company set up, giving evidence on the UK Visa scheme, and citing lack of citizenship benefits in the UK. None of which issues were raised before trial or in cross examinations. I will therefore place no weight on these references. M has not been in the Children's lives for 6 years, on the application by F to relocate with the objective to provide better environment and opportunities for the Children, she makes an appearance to object, and inter alia, raises the issue of the money that F allegedly owes her. She was evasive when cross-examined, and continues to give excuses that F did not provide her with information of his application. Yet she fails to explain why she did not ask the F for more details or seek to speak to the Children directly. Based on the conduct of her case, her evidence and her demeanour in Court, I give very little credit to her objections to F's application. I accept the bases of F's application, giving the Children more choices, a better living environment and education options. I observe a strong sense of commitment on the F's part to make this plan work. I am of the view that the family is strongest as a unit if permitted to leave together. Mutual trust and support will assist them to overcome hurdles together and bring them even closer as a family. I will therefore allow the F's application. They shall be allowed to depart as soon as practicable or as could be arranged by F after necessary paperwork under the BNO Visa Scheme has been processed. The Order I make an Order in terms of F's application and allow relocation of the Children to the UK with immediate effect. For the avoidance of doubt, the sole custody, care and control of the Children to the F made in the Order dated 19 August 2016 do stand. Removal restriction in the Order dated 19 August 2016 shall be uplifted and removed. I make no Order as to Costs. This to be a Cost Order nisi to be made absolute within 14 days of this Order. (Thelma Kwan) District Judge Petitioner and Respondent both acting in person

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