

HONG KONG / JUDGMENT

SKA v. TI

[2023] HKFC 176

COURT

Family Court

DECIDED

31 August 2023

CASE / FILE NUMBER

FCMC3496/2018

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FCMC 3496 / 2018

[2023] HKFC 176

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES NO. 3496 OF 2018

BETWEEN

SKA

Petitioner

and

TI

Respondent

Coram: His Honour Judge G. Own in Chambers

Dates of Hearing : 31 July and 3, 4 August 2023

Date of Written Final Submissions: 16 August 2023

Date of Decision : 31 August 2023

DECISION

(Relocation)

Introduction

1.

This is the application by the Petitioner Father (“F”) for leave to permanently relocate the 2 children of the family, both are boys, the elder child aged 13 and the younger child turning 11 in September next month, to the United Kingdom.

Background

2.

Parties came to know each other in 2008. They married in March 2010 in England. In the same year, the Respondent Mother (“M”) gave birth to the elder child in England. The family later moved to live in Hong Kong in 2012. The younger child was born in Hong Kong in the same year of 2012.

3.

Parties separated with each other as 2 households in December 2015 (although living under the same roof until end of March 2018). Both children were taken care of by F with the assistance of a domestic helper after M moved out the former matrimonial home which was a rented apartment in Ma On Shan, New Territories.

4.

In March 2018, F filed a Petition for divorce based on “Two Years Separation”. On 24/6/2019, upon the consent of the parties and both of them were legally represented, F and M was granted joint custody of the 2 children, F continued to have the care and control and M to have reasonable access of the 2 children.

5.

Decree Nisi was granted on 7/9/2022.

F’s Relocation Application

6.

On 27/5/2021, F filed his Summons for relocation (“F’s Relocation Summons”). This was done by F himself without legal representation. Together with the said Summons, F also filed his supporting affirmation, his Statement as to Arrangement for Children (Form 2B), and his written Undertaking to return the Children to Hong Kong when called upon to do so (collectively called “the relocation documents”). It was fair to say the relocation documents are all standard forms obtained from the Family Court Registry by F without much ado save to fill in the basic

information in the forms.

7.

On 3/8/2023, which was the 2nd day of this 3-day trial, I brought up with F's Counsel Miss Sally S.Y. Wong a 6-page document signed by F dated 27/5/2021, which bears the same date as those relocation documents. I believe this 6-page document was prepared by F when he filled up the relocation documents. Probably, it was lodged with the Family Court Registry by F on the same day when the relocation documents were filed.

8.

I saw the need to check with F's Counsel whether the 6-page document signed by F are his reasons for the relocation application or merely general information which he would like to put before the Court. Reason being that neither F nor M or their legal teams referred me to this 6-page document on the 1st day of trial or in their respective written opening submissions or have included them in the Trial Bundle.

9.

M's Counsel Mr. Ken Lee submitted that this 6-page document was not served on M and hence M was not aware of it until today when I raised it with F's Counsel. F's Counsel Miss Sally S.Y. Wong informed me that F had served the relocation documents on M together with the 6-page document. To further check on the situation, I noticed that in the affidavit of service filed by F dated 2/6/2021, he only referred to the relocation documents having been served on M without mentioning this 6-page document. In the Court file, this 6-page document was stapled to the written Undertaking as one document and not a document separately on its own. It might or might be not that it was likewise stapled to the copy written Undertaking served on M and hence M treated it as part of the written Undertaking.

10.

F's Counsel submitted that this 6-page document could be taken as "Submissions" and hence not required to be included in the Trial Bundle. M's Counsel disagreed but would, for the sake of saving costs and time, be prepared to accept it as an "Annexure" to F's supporting Affirmation notwithstanding that it had not been served on M until today. M's Counsel proposed that the 6-page document should now be included in the Trial Bundle already in use before the Court. Further, M agreed to waive her right to file further affirmation or reply to such "Annexure" for reasons of costs and time saving whilst reserving the right to raise questions with F on such "Annexure" during cross examination. Such arrangement was agreed to by F's Counsel and recorded in a hand-written note signed by the parties and their legal teams.

11.

At the end, I decided that the 6-page document be classified as a signed statement of F and be included in the Trial Bundle with page numbers given for easy reference.

M's Variation Application

12.

Suffice for me to say was that following F's Relocation Summons, M issued a Summons on 18/10/2021 ("M's Variation Summons") seeking variation of the joint custody of the 2 children to sole custody to her. M also filed her 1-page supporting affirmation.

13.

At one stage, F's Relocation Summons and M's Variation Summons run in parallel and a Children's Dispute Resolution ("CDR") was held on both applications on 12/5/2022 which was unsuccessful. A Pre-Trial Review on both applications was then fixed for 8/8/2022. The trial of both applications was also fixed for 3 days to start on 27 to 29 September 2022 ("September 2022 Trial").

Legal Representation and the chronology

14.

On the day of the Pre-Trial Review on 8/8/2022, both parties turned up unrepresented. Parties were reminded their right to take independent legal advice, if so required, given the nature of the cross applications and also the September 2022 Trial was fast approaching.

15.

On 5/9/2022, M applied for legal aid. M's legal aid application was refused on the same day without triggering the period of 42-day stay of proceedings under the Legal Aid Regulations.

16.

On 6/9/2022, F applied for legal aid. F's application triggered the period of 42-day stay of proceedings. Hence, the September 2022 Trial was vacated and re-scheduled to 2, 3 and 4 of May 2023 ("May 2023 Trial").

17.

A new Pre-Trial Review hearing was fixed for 6/3/2023.

18.

On 7/9/2022, F's legal aid application was refused.

19.

It turned out that F somehow managed to obtain legal aid again. The legal aid certificate was granted to him on 8/12/2022 with Messrs. Fung, Wong, Ng & Lam LLP, Solicitors assigned to represent him.

20.

On 4/3/2023, M acting in person submitted a draft summons with a supporting affirmation to the effect that her father undertook to bear the financial responsibilities of the 2 children in the event that M was successful in obtaining sole custody of the 2 children. M also wrote in and requested her draft summons to be dealt with at the upcoming Pre-Trial Review hearing on 6/3/2023 (which was 2 days later).

21.

On 6/3/2023, the Pre-Trial Review hearing was adjourned to a 2nd Pre-Trial Review hearing on 29/3/2023 upon M's undertaking to serve the documents she unilaterally submitted on 4/3/2023 on F and that she should seek independent legal advice.

22.

On 22/3/2023, Messrs. Kevin L.H. Kwong & Co., Solicitors, filed a Notice to Act for M.

23.

On 28/3/2023, M's lawyers issued a Summons returnable the following day for leave to amend M's Variation Summons dated 18/10/2021. This application for amendment was unopposed.

24.

On 29/3/2023 (the 2nd Pre-Trial Review hearing), Counsel Mr. Napoleon Wong appeared for M. Apart from granting leave for M to amend her Variation Summons, what had happened was that Counsel Mr. Napoleon Wong obtained instructions from M and confirmed to the Court the following in a hand written noted paper :-

"[M] would not proceed the application of variation of custody,

care and control upon the successful of the Petitioner's
relocation application, if any.

I, [M], understand the consequence of the costs implications
once I do not proceed with the application of variation of
custody, care and control."

25.

Apart from providing such handwritten confirmation, Counsel Mr. Napoleon Wong also agreed that F's Relocation Summons should be dealt with before M's Variation Summons. This explained how the parties' cross applications running in parallel diverged, one after the other, with M's Variation Summons to be dealt with later and only if F's Relocation application was unsuccessful.

The "May 2023 Trial"

26.

On 2 May 2023, which was the 1st day of the 3-day trial, Counsel Mr. Napoleon Wong again turned up for M and the legal aid assigned solicitor Miss J Mak appeared to represent F.

27.

To everyone surprise, Counsel Mr. Napoleon Wong applied for adjournment of the May 2023 Trial. He produced a sick leave certificate of Counsel Mr. Ken Lee who was granted sick leave from 2/5/2023 to 4/5/2023 inclusive. The reason for seeking the adjournment was that it was

Mr. Ken Lee who would be M's Counsel conducting the trial of F's Relocation Summons but not himself.

28.

Counsel Mr. Napoleon Wong told me that he did not have the expertise and competence to handle cross examination in the present type of case. His role in this case was only to assist Counsel Mr. Ken Lee who turned out to be sick today. To be fair and precise, Mr. Ken Lee is not Senior Counsel leading any junior counsel. As the name of both Mr. Ken Lee and Mr. Napoleon Wong appeared as Counsel for M in their written submissions, I raised with Mr. Napoleon Wong that if he considered himself "not having the expertise and not being competent" to represent M, he should not have accepted instructions from M, putting his name in the written submissions and holding himself out as one of the Counsel team (emphasis added) acting for M. I did not receive any constructive reply from Mr. Wong on my comment. I then stood down the hearing for Mr. Wong to prepare for the trial.

29.

Counsel Mr. Wong then came back and submitted that M's instructions were that she would like Mr. Ken Lee to be her advocate and repeatedly said he was not able to do the trial by himself today. I must say this is highly unsatisfactory as the trial on children's matter would have to be delayed through no fault of the parties. It is outrageous and also unheard of for Counsel to hold himself out on paper (emphasis added) to be representing a party but, adopting the words of Mr. Wong himself, "not having the expertise and not being competent" to do so as a matter of fact (emphasis added) when he was required to do so.

30.

Worst still, I noticed that Counsel Mr. Napoleon Wong was absent from the Bar table in the morning of the 3rd day of trial on 4/8/2023. It was not until my enquiry with Counsel Mr. Ken Lee when I was told that Counsel Mr. Napoleon Wong could not attend the hearing in the morning but would be back in the afternoon. In the afternoon, I noticed Counsel Mr. Napoleon Wong appeared at the Bar table sitting next to Counsel Mr. Ken Lee but without a single word or apology for the "sudden and unexplained" absence in that morning. Given his name was provided as one of the Counsel for M, and not a pupil barrister or a trainee solicitor attending the trial, he was expected to show courteous and be respectful to the Court.

31.

That said, I look forward to the Hong Kong Bar Association and the Law Society to ensure that their members would strictly adhere to the respective code(s) of conduct and professional practice on taking up representation and also the need of courtesy and be etiquette to the Court. Members of the Bar should only accept briefs or instructions from solicitors to handle work within their field of expertise and was expected to be competent to handle the cases to the best interests of the clients that they represented. Also, Members of the Law Society should properly advise their clients on choice of Counsel based on their field of expertise and level of competence of the work to be undertaken before engagement of Counsel and briefs delivered.

32.

At the end, the May 2023 Trial was further adjourned to 31 July 2023, 3 and 4 August 2023. I noticed that there was a lapse of 2 years since

the filing of F's Relocation Summons before it could now be finally tried by me. This is highly unsatisfactory.

The statutory provisions

33.

There is not much dispute between Counsel for the parties as to the law and legal principles applicable in relocation cases.

34.

Section 3(1) of the Guardianship of Minors Ordinance, Cap.13 ("GMO") is the governing provision covering all kind of applications concerning children, irrespective whether they are born out of cohabitation or wedlock. Under the section, the often cited "best interests of the minor" is the sole and paramount consideration of the Court which could only be determined after thorough consideration of all subjective and objective factors, surrounding circumstances and evidence available to the Court, including Social Investigation Reports ("SIRs"), International Social Services Report ("ISSR") and Expert Reports (if any).

35.

Given the fact that there has not been in place any list of factors in our books and statutes by way of guidance, it is not uncommon for our Courts to refer to the so-called "welfare checklist" under the English Children Act 1989 when determining the best interests of a child. Those factors are :-

the ascertainable wishes and feeling 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;

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 the 1989 Act in the proceedings in question;

any other fact or circumstance that the court thinks are relevant."

Relevant Cases and Authorities

36.

To start with, the Hong Kong Court of Appeal in *SMM v TWM (Child : Relocation)* [2010] 4 HKLRD 37 adopted the English Court of Appeal case of *Payne v Payne* [2001] 1 FLR 1052 where Cheung JA said :-

"The principles

19.

The parties agreed that the applicable principles governing relocation application are based on the *Payne v Payne* [2001] Fam 473 line of cases. They are English Court of Appeal cases. There is no House of Lords' decision on this issue. These principles have been applied in Hong Kong, for example, in *M v B (Removal of children from the Jurisdiction)* [2009] HKFLR 349, by Judge Bruno Chan although there has not been any Hong Kong Court of Appeal decision on relocation applications.

20.

Payne is based on the earlier decision of *Poel v Poel* [1970] 1 WLR 1469. In *Re G. (Leave to remove)* [2008] 1 FLR 1587 the English Court of Appeal reaffirmed the principles in *Payne*.

21.

The principles in *Payne* can be summarised as follows :

(a)

The distinct features of a relocation application are first, the applicant is invariably the mother and the primary carer; second, generally the motivation for the move arises out of her remarriage or her urge to return home; and third, the father's opposition is commonly founded on a resultant reduction in contact and influence. (per Thorpe LJ at paragraph 27)

(b)

The two propositions that have been consistently applied by the Courts are, first, the welfare of the child is the paramount consideration, and second, refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore, her application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the children. (per Thorpe LJ at paragraph 26)

(c)

The application should be approached as follows :

(i)

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.

(ii)

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 ?

(iii)

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 ?

(iv)

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)

(d)

In short, the relevant factors are :

(i)

The welfare of the child is always paramount.

(ii)

There is no presumption created by section 13(1)(b) of the English Children Act 1989 in favour of the applicant parent.

(iii)

The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

(iv)

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.

(v)

The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

(vi)

The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(vii)

The opportunity for continuing contact between the child and the parent left behind may be very significant. (per Butler-Sloss P at paragraph 85)”

37.

In the later case of *K v K* [2012] Fam 134 where Moore-Bick LJ said :

“86.

I accept, of course, that the decision in *Payne v Payne* is binding on this court..... but it is binding in the true sense only for its ratio decidendi. Nonetheless, I would also accept that where this court gives guidance on the proper approach to take in resolving any particular kind of dispute judge at all levels must pay heed to that guidance and depart from it only after careful deliberation.....having considered *Payne* itself and the authorities in which it is discussed, I cannot help thinking that the controversy which now surrounds it is the result of a failure to distinguish clearly between legal principle and guidance As I read it, the only principle of law enunciated in *Payne* is that the welfare of the child is paramount; and all the rest is guidance. Such difficulty as has arisen is the result of treating that guidance as if it continued principles of

law from which no departure is permitted. Guidance of the kind provided in *Payne v Payne* is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them.”

38.

In the same Judgment, Black LJ went further to say that the welfare of the child is the paramount consideration of the Court. At paragraphs 141 and 142, it was said :

“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.

142.

Whilst this is the only truly inescapable principle in the jurisprudence, this does not mean that everything else – the valuable guidance – can be ignored. It must be heeded for all the reasons that Moore-Bick LJ gives but as guidance not as rigid principle so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable.”

39.

Thorpe LJ, as the third member in *K v K* (supra) who gave the leading judgment in *Payne v Payne* (supra) said :

“39.

As Moore-Bick LJ pointed out in argument, the only principle to be extracted from *Payne v Payne* [2001] Fam 473 is the paramountcy principle. All the rest..... is guidance as to the factors to be weighed in search of the welfare paramountcy.”

40.

In the recent case of *JTMW v NAV* [2020] HKFC 244 in our courts, His Honour Judge I Wong went through the line of authorities on relocation and said :

“52.

Recently, in *ZJ v XWN* (Leave to Appeal: Child Relocation) [2018] 3 HKLRD 644, [2018] HKCA 436, CAMP 67/2018, the Court of Appeal, after having reviewed *K v K* (Children: Permanent Removal from Jurisdiction) [2011] EWCA Civ 793, [2012] Fam 134 and *Re C* (A Child) (Internal Relocation) [2016] Fam 253, confirmed that the only principle of law enunciated in *Payne* is that the best interests of the child is paramount and the rest is guidance and that Cheung JA’s comments in *SMM v TWM* should be read in that light: at [18] and [23]. The *Payne* guidance should not be

regarded as a prescriptive blueprint: at [22].

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 meet the requirement to afford paramount consideration to the welfare of the child. It is not part of this exercise to regard a decision in favour or against any particular available option as exceptional.

83. One of the most difficult aspects of this case has been to establish in the light of previous authority what use, if any, should be made in the process we have just described of the 4 “disciplines” identified by Thorpe LJ at paragraph 40 of his

judgment in *Payne v Payne* ([2001] EWCA Civ 166, [2001] 1 FLR 1052) (the “Payne factors”). In my judgment, one of the valid concerns about the Payne factors is that they do not adequately reflect the gender-neutral approach to these problems that the court will now adopt in every case.

Whilst the Payne factors may still be of some utility in some cases, they are no part of the applicable test or the applicable principles. In some circumstances, the judge may find them useful. In others, the judge may not. If the judge finds them a useful guide to some of the factors that he should consider, he will be doing so only as part of the multi-factorial balancing exercise that is required.”

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]”

41.

In the most recent Hong Kong Court of Appeal decision in *H v W* [2021] 2 HKLRD 1251 (date of Judgment : 24/5/2021), the legal principles on relocation cases were once again summarised. The Payne guidelines was said to have identified a number of relevant factors which provided the Court with a structured framework to make holistic appraisal. The Court (Hon Lam VP, Yuen JA and B Chu J) said :

“The legal principles

31.

There was no dispute as to the applicable legal principles on relocation as summarised by the Judge in paragraphs 16 to 20 of the Judgment. In fact, shortly after *ZJ and XWN* [2018] 2 HKLRD 644, Cheung JA again set out the legal principles in paragraphs 4.1 to 4.14 of his judgment in *BA v BL (Child Relocation)* [2019] 4 HKLRD 23, [2019] HKCA 822, CACV 18/2018. In particular, paragraph 4.14 states as follows :

“In Hong Kong the paramount consideration is whether the relocation is in the best interests of the child. Hence whether a relocation application is made by a primary carer or a non primary carer does not give rise to any presumption in favour of or against the applicant. There may be myriad reasons why such a parent applies for the relocation of the child. 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.”

32.

The Payne guidance can be summarised as (1) Is the applicant’s proposal genuine and realistic in the sense that it is not motivated by some selfish desire to exclude the father from the child’s life ? (2) Is the respondent’s opposition motivated by genuine concern for the future of the child’s welfare or is it driven by some ulterior motive ? (3) What

would be the impact on the applicant, either as the single parent or as a new spouse of a refusal of his/her realistic proposal ? (4) The outcome of the appraisals in (2) and (3) must be considered in the overriding review of the child’s welfare [on in Hong Kong the child’s best interests] as the paramount consideration.”

42.

With all the above cases and authorities, I would conduct a holistic balancing exercise upon the evidence before me, guided by the Payne approach and taking into consideration of any relevant factors under the “welfare checklist” as an aide-memoire to determine what outcome would fit the best interests of the 2 children in this case.

F's case

43.

F is a British citizen now aged 51. F and M together with the elder child moved from England to live in Hong Kong in around 2012. F

last worked as a Systems Manager in the Information Technology Department of a US based investment bank in Hong Kong with a monthly salary income of around HK\$100,000.

44.

On 20/5/2021, F received notice of redundancy from his employer. He received redundancy payment of around HK\$1.1 million. F said he could not find other suitable jobs in Hong Kong due to his language barrier as he could not speak Chinese. He had tried with head-hunters and was told that there were only posts around the market which required less experience than him and given the overall economy; in particular, the information technology industry which was no longer booming at that time.

45.

There was disagreement as to whether F was not able to find a job or had he ever attempted or tried to find a job after he was made redundant. Whatever the situation might be, it remained a fact that F stayed jobless since around May 2021. Also undisputedly, F was the parent primarily assuming the role of taking the daily care of the 2 children for the past 2 years. Having no work income, F terminated the domestic helper around August 2021 and single-handedly looked after the 2 children himself. Over this period of time, F lived upon his personal savings over the years and the redundancy payment he received to defray the accommodation costs and living costs of himself and the 2 children.

46.

On 27/5/2021, which was 2 days after the last paid day of his redundancy, he took out the Relocation Summons seeking leave to bring with him the 2 children back to England.

47.

F said at first he did not foresee any issue with his intended relocation with the 2 children. Upon seeing that there was an issue with M, he immediately sought assistance from the Court in May 2021. However, he had never expected that it took over 2 years for his application to be finally heard by the Court.

48.

Given his tenancy was expiring in October 2022 whilst his relocation application had yet to be heard, he managed to agree with the landlord allowing him and the 2 children to continue to stay on a “month-to-month” arrangement but he had to pay to the landlord 7 months’ rental upfront in advance. The payment for such arrangement caused F to have to raise a loan of HK\$170,000 (repayable by 60 monthly instalments). As at the trial today, there was still around 4 years to repay.

49.

With leave of the Court, F filed his Affirmation dated 28/7/2023 updating this Court that both children were allotted places in the coming academic year 2023/2024 starting on 6/9/2023. The elder child would be attending Grade 9 and the younger child would be attending Grade 6, both of them would be attending public schools arranged by the Nxx County Council. The preferred schools of both children have been allotted by the Council.

F’s Relocation Plan

50.

F’s parents supported his relocation by offering him and the 2 children to stay in their home upon their arrival. F’s parents are both retired, at the age of 75 and 78 and are in good health. They are able, and indeed willing, to look after their 2 grandchildren whilst F was at work or searching for work. They lived in a self-owned 2-storey semi-detached house in Pxx, Nxx, England.

51.

Upon arrival in England, F and the 2 children would initially stay with their paternal grandparents on short or long term, depending on when F was able to find a job there. There are 2 bedrooms in the grandparents’ house. The 2 children would be living in one of the bedrooms, the grandparents in the other bedroom and F would be sleeping in the sitting room.

52.

On the financial side, F said he does not have to pay for the costs of accommodation at his parents’ home in Pxx save that he might have to pay some daily expenses on food or groceries, which would not be of significant amount. In the worse scenario that when all his savings were drained out, his parents would still support him and the 2 children financially. F’s parents are able to handle those expenses and he would continuously and actively look for jobs to generate income for the living costs.

53.

Since there would be no language barrier for him to work in the UK, F was confident that with his contact(s) there he would be able to find jobs within a relatively short period of time. He had actually found some jobs in England by searching online in Hong Kong which are suitable for him. However, he did not apply for those jobs since he was uncertain when he could start working there if was successful in the job application.

54.

According to the International Social Investigation Report (“ISIR”), F’s parents are receiving £2,462 monthly combined pension income, winter fuel payment of £16.60 (paid as lump sum of £ 200 per annum), government Christmas bonus of £1.60 (paid as lump sum of £20 per annum). The total monthly income was around £2,480.

55.

F’s parents’ monthly spending consists of mortgage and bills at £1,138, household and personal items (including groceries) at £264, leisure at £25 and their car and petrol at £35. The total monthly expenses were around £1,466.

56.

With the above monthly income and expenses, the net amount available to the grandparents for spending would be around £1,014 (that is £2,480 minus £1,466) a month.

57.

The grandparents’ mortgage payment was £702 per month which just ended in July 2023; therefore, by the time of this Decision and thereafter, they would have an additional sum of £ 702 per month to spend. Adding this to the available sum of £1,014 a month, the grandparents would have around £1,716 each month in total for spending and without having to worry about the costs of accommodation as the mortgage had been paid off.

58.

F’s younger sister “B” and her partner “J” are living in a self-owned 2-storey semi-detached house in Nxx, Nxx, England. The city of Nxx is less than 15-minute drive from Pxx where F and the 2 children would initially be residing upon their arrival. Both “B” and “J” are at the age of 36. They are willing to accommodate the 2 children for a temporary period if F or the grandparents are unable to care for them. “B” and “J” told the ISIR investigating officer that they are always willing to provide other kinds of support on an ad hoc basis, such as bringing shopping to the children’s grandparents’ home.

59.

F in his evidence said he was confident that it would be much easier for him to secure employment back in England where there was no language barrier. He was prepared to take up other type of work with less income than what he was earning in Hong Kong since his monthly expenses in the UK would be considerably less than in Hong Kong when he had to pay the rental here, which was over HK\$20,000 a month. Further, there would be financial support from his parents in case there was such a need.

M’s grounds of opposition

60.

M's grounds of opposition, as stated in her Affidavit filed, are as follows :-

F could not deprive her right to be with the 2 children who had enjoyed quality time during her alternate weekend access and holidays. She organised activities for the children and taught them things different from what F had taught them.

Both children grew up in Hong Kong and have established strong friendship with their school peers and teachers. Moving them to the UK would mean that the children have to adapt new life and may experience unnecessary stress in a new environment; especially in a country that was experiencing surging level of Covid cases daily.

Both children are used to the educational environment of an international school in Hong Kong. Moving them to the UK to study in local public schools there likely to provide them with less resources. The UK government had experienced budget deficiencies on national expenditures including education, health and social care. Both children would likely to receive inadequate health care protection. At present, there are private health care for the children in Hong Kong since 2018.

UK was facing a sharp surge of Covid cases. Further, the rules relieving the need to wear masks in most of the public places might lead to infection rates going higher. Moving the children to such high risk country was putting their life and health at risk.

The UK Royal Family members, the Prime Minister and the Secretary for Health had all contracted Covid. Given the fact that all of them supposed to have the most experienced healthcare experts, even if F could avoid the virus, the rising cases would very likely lead to a new wave of Covid lockdown. What would then follow would be schools closure and the children would then be missing physical classes and experienced social isolation again.

It was in doubt whether the children could have the same standard of living in the UK. Given F had not yet secured a job in the UK and, with the worrying economy after Brexit, F could not be expected to provide financial stability to the children. F's parents themselves are relying on social security. M's parents are financially stable with rental income for the children to enjoy the same standard of living in case F was unable to find a job in the UK.

F's CV shows that he was competent to secure above average paying jobs in Hong Kong and there was no reason that moving himself and the children to the UK was the only choice for the children.

The crime rate in Hong Kong is very low in the world whilst the crime rate in UK is significantly higher than in Hong Kong.

61.

I will refer to M's grounds of opposition by their alphabetical order in the following paragraphs of this Decision.

Social Investigation Reports ("SIRs")

62.

The Social Investigation Officer in charge of this relocation case was Miss Kong Ping Fei ("Miss Kong"). Miss Kong prepared 3 social investigation reports ("SIRs") dated 11/10/2021 ("1st SIR"), dated 28/1/2022 ("2nd SIR") and the last updating one was dated 25/4/2023 ("3rd SIR").

63.

The conclusion and recommendation made by Miss Kong in each of the 3 SIRs are as follows :-

"Overall speaking, F's relocation plan seems feasible while the children's will to stay with their father in the UK is strong. Nevertheless, the provision of accommodation from the paternal grandparents at the family's initial stage of settlement in the UK, the offer of school placements for the children and the readiness of childcare assistance from the paternal relatives have not yet confirmed at this stage. Under the circumstances, the IO would recommend, subject to your Honour's consideration, the case be adjourned for three months for an International Social Investigation Report for reviewing the feasibility of F's relocation plan with his children to the UK." - paragraph 37 of the 1st SIR;

"For the father's relocation application, [elder child] and [younger child] both indicate their strong will to follow their father to move to the UK. The place is not new to them and they like to live in the UK with paternal family and friends around. As noted from the International Social Investigation Report prepared by the social worker of CFAB, the paternal relatives in the UK have adequate means and readiness to support [elder child] and [younger child] in terms of provision of accommodation, childcare assistance, and schooling arrangement. Under the circumstances, the father's relocation plan with the children to his hometown in the UK is considered feasible with strong family support." - paragraph 20 of 2nd SIR;

"The IO understands that it is not easy for the mother to leave the sons to the sole care of the father with the relocation plan to the UK. Indeed, she has made good efforts in preparing a decent living abode with support from her father to prepare for taking care of the children in the future. Nevertheless, [elder child] and [younger child], though understand both parents' love to them, have explicitly indicated their strong wish to move to the UK to live and study there. They do not accept the father leaving them for the UK and express their strong wish to live with the father whom they have got used to living with and have already developed a very strong bonding. Besides, they have been to the UK from time to time in the past and enjoy the family time with the grandparents and aunt, as well as having some friends there. As both children clearly show their strong wish on the living arrangement, granting the care and control of the children to the father is considered the most viable option." - paragraph 22 of the 2nd SIR;

"The information gathered reveals that the children condition, access arrangement and the children's schooling remain similar as before. In the interest of the children, [mother's] worries about the uncertain situations in the UK, such as the future employment and financial condition of the father, the stability of the schooling and health care for the children as well as the personal safety of the children, are understandable. Nevertheless, being under the care of their father since the parents separated in

2018, [elder child] and [younger child] have established very strong bonding with their father. While [Father] makes no change of his relocation plan, [elder child] and [younger child] also indicate their persistent and strong wish to follow their father to move to the UK for living. On the other hand, though the children treasure the regular access time with their mother and maintain close relationship with her, they determine not to stay in Hong Kong but have trusted in their father who assures them to keep contact with their mother by whatsoever

means after relocation. With the readiness and support from the paternal relatives in the UK in the provision of accommodation, childcare assistance and schooling arrangement, [Father's] relocation plan with [elder child] and [younger child] to the UK is considered feasible.” – paragraph 10 of the 3rd SIR

International Social Investigation Report (“ISIR”)

64.

The ISIR was prepared by the body by the name Children and Families Across Borders (“CFAB”) at the request of the Cross-Border and Intercountry Social Service, ISS Hong Kong. The officer who handled the ISIR was Eve Joy Wilson (“Eve”).

65.

The 48-page ISIR was a detailed and comprehensive report covering a wide spectrum of investigation neatly grouped under the following headings :-

Profile and observation of family members;

Evidence of family safety;

Circumstances of F's parents, his younger sister (“B”) and her partner (“J”);

Health;

Employment;

Finances;

Home conditions;

Local Community and Services;

Capacity to support the 2 children;

Planned support arrangements;

Family members' description of the children;

Current level of communication with the children;

Ability to care for the children;

Managing behaviour;

Meeting the children's physical and emotional health needs;

Approach to education;

Encouraging peer relationships;

Facilitating quality time with [Mother];

Wider network;

Other forms of financial support for the children;

Evaluation of the primary and secondary schools proposed for the children; and

Analysis.

66.

With her thorough investigation and careful analysis, Eve came to the conclusion that F's paternal family could provide adequate means to accommodate and support the 2 children if they were to study in Nxx, England, and they could stay at their paternal grandparents' place with F.

67.

At paragraph 13 of the ISIR, Eve said :-

"I am of the view that the family have adequate means to accommodate

and support [elder child] and [younger child]. I have come to this conclusion on the basis of the information and documentary evidence

I have received. I will outline the key strengths of this placement.

The family plan is consistent and [paternal grandfather], [paternal grandmother] and F have made tangible steps to prepare for [elder child] and [younger child's] arrival, including liaising with schools and the local authority.

[paternal grandmother] and [paternal grandfather] and "B" and "J"'s perception of [elder child] and [younger child] is positive, and they are familiar with them. [paternal grandmother] and [paternal grandfather] have been in regular contact with [elder child] and [younger child] and were able to give detailed descriptions of their personalities and needs.

[paternal grandmother] and [paternal grandfather] have experience caring for children including [elder child] and [younger child], and their strategies for managing behaviour were thoughtful and appropriate. [paternal grandmother] and [paternal grandfather's] routine is compatible with the needs of the children. They understand that they must be supportive of [elder child] and [younger child's] relationship with [mother] and will ensure that they facilitate visits and telephone/virtual communication.

The family appear to have positive and stable relationships. [paternal grandmother] and [paternal grandfather], and “B” and “J” have been in their current long-term partnerships with no reported periods of separation. [paternal grandmother] and [paternal grandfather], and “B” and “J” live on close proximity to one another and were able to give example of recent support to one another.

The schools F has chosen for [elder child] and [younger child] are of a high standard. Their extracurricular provision will allow them to form friendships and pursue their interests in sports. [paternal grandmother] and [paternal grandfather’s] home is in the catchment area for all schools with the exception of Hxx Academy, and all schools are within reasonable walking or driving distance of their property and “B” and “J” home. If [elder child] and [younger child] do not get a place at their chosen schools, they are guaranteed a place at another school in Nxx.

The medical practice that will be the first point of access for [elder child] and [younger child] in the case they need medical attention is ‘outstanding’ and within walking distance of [paternal grandmother] and [paternal grandfather’s] property. [elder child] and [younger child] will be able to access hospital care in the case they require urgent medical attention. There are services in the area that [elder child] and [younger child] can access if they need support with their emotional wellbeing.

[paternal grandmother] and [paternal grandfather], and “B” and “J” are financially solvent and own their homes. Their homes are maintained to a high standard and are sufficiently spacious to accommodate [elder child] and [younger child], and are in relatively safe and well-resourced locations. F may also have the opportunity to purchase one of the available homes in the area, which would offer the children greater consistency and continued support from [paternal grandmother] and [paternal grandfather].

[paternal grandmother] and [paternal grandfather], and “B” and “J” were easy to communicate with, able to validate their claims with documentation and compliant with my requests to obtain information from statutory authorities. This suggests that they were transparent with me and willing to work with professionals on the behalf of [elder child] and [younger child].

68.

Eve also provided some observations in her Report which, by reading the contents of them, could be seen that they are made out of abundance of caution and after careful consideration. They are recited as follows :-

“In the case F’s application to bring the children to the United Kingdom

is successful, [paternal grandmother] and [paternal grandfather] should buy bunk beds for the children, and arrange the spare bedroom so that there is space for the children to study, store their belongings and complete school work with a computer, and to engage in gentle play in

the house. [elder child] and [younger child] could be included in some decisions as to how the space is reorganised, such as choice of display objects and colour scheme, which will (sic) them to feel comfortable when they arrive.

The Child and Adolescent Health Services (CAMHS) service in Nxx has a high threshold for access and children and young people can wait for a long time to be seen. In this case the children need support with their emotional wellbeing when they arrive in the United Kingdom, the family could explore the other services discussed in section 10.11 so that they know how to connect the children with appropriate help.

In the case [elder child] and [younger child] arrive in the United Kingdom before the next academic term begins, they could access a holiday playscheme. This would allow them to begin to build friendships with other young people in the area. The family could research and apply to local schemes via the 'Find a holiday playscheme service on the Nxx County Council website.

F may be eligible to claim Child Benefit and other state payments shortly after he arrives. He could contact the Nxx Welfare Rights Service when he arrives to ensure he makes the claims he is eligible for as quickly as possible, as they can take time to process. [paternal grandmother] and [paternal grandfather] may also wish to consult the service in case the presence of F, [elder child] and [younger child] in their household could impact some of their bill payments, such as council tax."

69.

Within a week on 3/2/2022, Eve on her own initiative provided an addendum to confirm that she did not receive any information from the medical practitioner at Hxx Surgery in Pxx, Nxx, England, where the [paternal grandmother] and [paternal grandfather] were registered. This addendum served as a piece of additional information on the health condition of the paternal grandparents.

Discussion

70.

Since there was no dispute on the law and legal principles on Relocation cases, I would go directly to the parties' evidence and the evidence of the SWO Miss Kong and the evidence of the social welfare officer Eve who compiled the ISIR Report (with addendum).

Social Welfare Officer Miss Kong

71.

SWO Miss Kong joined the Social Welfare Department after her graduation in 1994 with 29 years of experience by now. She was posted to work for the Family and Child Protection Services Unit in February 2019 and have compiled around 33 social investigation reports for use in the Family Courts. At this trial, she adopted all the 3 SIRs prepared by her over the years since 2021 as her evidence in chief, confirmed the contents of each of them to be true and correct. She stood by her recommendation(s) in all the said reports.

72.

In her 1st SIR, Miss Kong expressed her views that although F's

relocation plan seems feasible, she saw fit not to recommend relocation at that time whilst the provision of accommodation from the paternal grandparents; the offer of school placements and readiness of the paternal relatives have yet to be confirmed. Miss Kong rightly recommended an adjournment for 3 months for the above issues to be explored by the ISIR which was not available at that time.

73.

With the availability of the ISIR, Miss Kong in her 3rd SIR confirmed her supporting views of F's relocation. She said F's relocation of the 2 children to the UK was considered feasible. For the sake of clarity and completeness, I specifically asked Miss Kong whether F's relocation plan, apart from being a feasible one, would that be in the children's best interests given F's reasons for leaving Hong Kong was his inability to secure employment allegedly due to his language barrier.

74.

Miss Kong provided a firm and supportive answer for F's relocation. She explained clearly that F's reasons were not the only or dominant factor but only one of the many factors. She placed emphasis on the children's repeated and unequivocal expression of their wishes and desire to live in the UK with F and the paternal grandparents in every meeting she had with the children. The children had been to the UK on a number of occasions. Undisputedly, they were back to the UK for 3 weeks with F in July this year and stayed at the grandparents' home. F brought them back to Hong Kong shortly before this trial. Both children enjoyed the life style and environment there.

75.

Further, strong and long established bonding between the children and F was another major factor which Miss Kong took into account of in this case. F has been the main carer of both children since M moved out of the former matrimonial home in around March 2018. Given the children's ages are now 13 and 11 respectively, both of them well understand F's present application. Both children are well prepared and ready for the move with their father F to stay with the paternal grandparents in the UK which had not been materialized for over 2 years by now.

76.

According to Miss Kong's evidence, the children said they also loved M and enjoyed the access times with M over the alternate weekends in the past years. There had never been any occasion when their father F obstructed or restricted M's access over them. Both children have also built up trust and confidence with their father F in that access with M would continue even after the relocation. This was also the views of Miss Kong in terms of access after relocation.

77.

M's Counsel, in his cross examination of Miss Kong's report(s)

and her evidence, was unable to show her investigation was not thorough or complete or there was any flaw in the process of investigation. Miss Kong's evidence was unshaken by M's Counsel's cross examination. Although this was the first relocation report that Miss Kong had prepared, I am satisfied that Miss Kong was diligent and competent when she saw the need to recommend a short adjournment in her 1st SIR for important issues to be first ascertained by the ISIR. This shows that she was a careful and responsible social investigation officer who would not form any views or recommendation haphazardly without being satisfied that all essential investigation had been completed and all material evidence well received on hand had been fully considered.

78.

Overall speaking, I find Miss Kong is a reliable and responsible case officer and her investigation was thorough and complete. I accept her recommendation in support of F's relocation to the UK together with the 2 children are in the children's best interests.

ISIR case officer Eve

79.

As I said earlier, this 48-page ISIR was a comprehensive and detailed report covering different areas of investigation.

80.

M's Counsel made no submission on the ISIR or any part of it not being thorough or complete. I myself have read the ISIR more than once. I am convinced that it is all round and comprehensive on all factual matters which need to be considered in F's relocation case.

81.

I accept the evidence of the ISIR.

M's evidence and grounds of opposition

82.

In her evidence at trial, M referred to her father had agreed to provide accommodation to F at a place in Tsuen Wan area where F could live in “rent-free” and look for jobs in Hong Kong. The children could stay with her and she was prepared to assist in taking care of the children whilst F was looking for jobs or later at work. Such an arrangement could immediately relieve F from his financial stress and also free him for work. This proposal was, however, not accepted.

83.

M’s proposal, in my view, could not be taken as defence to F’s relocation application. This was only an arrangement or a solution to keep or retain the children physically in Hong Kong to their mother without addressing the key issue of the best interests of the children, which is the key issue to be decided in all relocation cases.

84.

Now I would turn to each of M’s grounds of opposition in their alphabetical order of sequence.

85.

On ground (a), M in her oral testimonies at trial referred to herself would meet the children and bring them to activities she arranged and also teach the children directly. She could no longer do so if the children were to leave Hong Kong and relocate to the UK.

86.

The term “best interests” of the children must be viewed upon and considered objectively from different perspectives. Although it would be desirable for M to have physical contact and meeting with the children as much as possible, parent-child physical contact was only one of the many factors to serve the best interests of the children in the legal (matrimonial) context.

87.

On the facts of this case, F has been the primary carer of the children when the parties physically separated around 2018. As a matter of fact, this had led to the building up of the strong father-child bonding found by the social welfare officer Miss Kong. M in her evidence repeatedly said that she had always been the parent bringing the children to school and picking them up after school before the Covid pandemic. Such evidence was not challenged by F.

88.

In my view, the parent performing the role of the primary carer of their children has far too many roles to play; ranging from attending to the children’s educational and non-educational needs at all times, providing them with suitable guidance on their daily life, understanding their needs and expectations, assisting them in overcoming any difficulties that they may encounter, so on and so forth. There was no exhaustive list on parental duties and it was also not possible to draw up any “check-list”.

89.

That said, M's uncontroverted evidence of bringing the children to school and picking them up after school, in my view, was only a minority role to play comparing with F's continuously staying unemployed to take care of the children full time and single-handedly for around 2 years since August 2021, which was the time after he released his domestic helper when he was being made redundant. On the other hand, M has had her own career or building up her aromatherapy wholesaler business since 2016 and also became a Financial Planning Officer of a reputable insurance company since July 2021. M's reported monthly income at present was around HK\$30,000.

90.

Had parent-child physical contact been the sole or dominant factor to serve the "best interests" of the children (there was no such finding by me), I have no hesitation to say that it must be F rather than M, without any discrimination or preference over paternity or maternity care.

91.

I do not accept M's ground (a) to be of merit or substance to oppose F's relocation.

92.

On ground (b), M was unable to rebut the evidence that the children also have friends and peers in the UK since they had been there on a few occasions over these years. In all relocation cases, children have to adapt to new life and environment is always inevitable. If adapting new life and change of environment could be a legitimate ground of opposition, there would not be any relocation cases. What is vital and important was that the children are ready to relocate and that they are not unfamiliar with the place that they are going to relocate to.

93.

The proper question to be asked was whether F's relocation would bring unrest and stress upon the children rather than concern over the children that they would have to adapt to new life and changing environment.

94.

In this case, both children are familiar with their grandparents' place and the place of Nxx, England, where they would be staying and receiving education on a successful relocation.

95.

F had brought the children to meet and stay with the paternal grandparents in Nxx, England on a few occasions and also had been there lately for around 3 weeks in July this year just before this trial commenced. The children stayed with M after the 3-week trip upon returning Hong Kong to spend with M the remainder of the summer vacation. The children had an understanding of the latest school arrangement in Nxx during the trip in July. F also produced his affirmation dated 26/7/2023 to exhibit the letter from Nxx County Council in England confirming that the preferred schools had offered placements to the children for the academic year 2023/2024.

96.

M's other submission of England, UK, having experienced surging level of Covid cases daily is a complete non-starter. First, as at present, the Covid pandemic was fading out at a steady pace and no longer a threatening issue worldwide, including Hong Kong and England, UK. Secondly, it is not fair to say England, UK, was the only country (emphasis added) experiencing surging level of Covid cases. At one time in Hong Kong, there could be around 60,000 Covid cases within a day. Lucky though, all this panic experience had now become historic.

97.

I do not accept M's ground (b) to be of merit or substance to oppose F's relocation.

98.

M's ground (c) touched upon the education provided to the children by public schools in the UK would likely to be with less resources than the international schools that the children are now studying in Hong Kong. M sought to justify her views by referring to the UK government budget deficiencies on national expenditures which include education.

99.

Such views by M may be over-simplistic and lack of evidence to support. Without any data, research, statistics or detailed analysis by experts or economists, I can hardly accept M's own perception or her mere say-so as sufficient evidence to support her views that resources provided by the UK public schools would more likely than not to be less than international schools in Hong Kong, just because the latter was funded by parents themselves and not by the state government.

100.

Furthermore, to compare between state funded education and privately funded education in two different jurisdictions is unfair. It is far more unfair for such comparison to come from M's personal views without any objective analysis or assessment by experts or economists based upon any hard figures or data.

101.

M also referred to the children likely to receive inadequate health care protection than what they are now enjoying under the private health care protection in Hong Kong. Same as what I said on the comparison of education above, this is not what we called the "apple-to-apple" kind of comparison.

102.

I do not accept M's ground (c) to be of merit or substance to oppose F's relocation.

103.

M's ground (d) was a repetition on the Covid issue with reference to the relaxation of rules on wearing masks. Whilst this might be a concern in the past, it was no longer an issue at present.

104.

I do not accept M's ground (d) to be of merit or substance to oppose F's relocation.

105.

M's ground (e) referred to some of the leading government officials and other members of the UK government having contracted Covid and the possibility of a new wave of lockdown and school closure. In my view, this was speculation rather than evidence to be accepted as grounds of opposition to F's relocation.

106.

M's ground (f) referred to the uncertainty of the children having the standard of living same as in Hong Kong after the relocation. F had not been able to secure a job in the UK and hence he could not be expected to provide financial stability to the children. Furthermore, the paternal grandparents themselves are also on social security.

107.

I failed to see the logic of M's ground (f). F had stayed unemployed for over 2 years by now. He had spent almost all his savings and redundancy payment to maintain himself and the children over the years. Had there been no application for relocation taken out by F and he was to continue to stay in Hong Kong, unless he could secure employment to generate income (emphasis added), the fate of the so-called "financial stability" by M or, financial crisis so to speak, would definitely come along no matter where F was; in Hong Kong or in the UK. That said, M's concern over F not being able to provide financial stability to children would only be decided by whether F could secure employment and not where he physically was. Hence, this could not be a legitimate ground of opposition to his relocation application.

108.

I do not accept M's ground (f) to be of merit or substance to oppose F's relocation.

109.

M's ground (g) referred to F's CV would support him to secure above average paying jobs in Hong Kong. Clearly, this was only a bare statement or mere assertion of M without any evidential value. Whether a person could or would be employed does not solely depend on his or her CVs. There are far too many objective factors dictating chances of employment. Given the fact that M had never been in the information technology field of work, it would be unfair for her to determinatively say that F could secure above average paying jobs in Hong Kong.

110.

I do not accept M's ground (g) to be of merit or substance to oppose F's relocation.

111.

M, in her last attempt to oppose F's relocation application, referred to the crime rates in Hong Kong was very low in the world. Arguable, it could be said that it would not be in the best interests of the children to relocate to a place where the crime rates are higher. However, there was no assurance that Hong Kong was the safest place in the world where the children should continue to stay.

112.

I do not accept M's ground (h) to be of merit or substance to oppose F's relocation.

F's evidence and reasons for relocation

113.

F's reasons for relocation was that he was not able to secure employment in Hong Kong after he was made redundant on 20/5/2021 (redundancy effective on 25/5/2021). He had worked as the Systems Manager in the information technology department of a US based investment bank in Hong Kong for 8 years. His last monthly salary was around HK\$100,000.

114.

F had not stated his reasons for the relocation in details when he filled out the prescribed form of the Summons and supporting Affirmation. As I said earlier, there was a 6-page document of F attached to the prescribed form of Undertaking in the Court file. I managed to resolve this 6-page document with the parties' and with the consensus of their respective Counsel, the 6-page document was now included in the Trial Bundle. M's Counsel was allowed to raise questions on the 6-page document of F in his cross examination. M with legal advice confirmed that she would not file any evidence in response to F's 6-page document. In any event, the 6-page document (by itself) was not made by F under oath but was treated as an "Annexure" forming part of F's supporting affirmation.

115.

In the 6-page document, there was a brief chronology followed by several paragraphs under the heading : "Application for approval to relocate to England". Within the brief chronology, F put down the date of 20/5/2021 as the date when he was made redundant and the last day of paid work was 25/5/2021.

116.

I now recite below some of the paragraphs in the 6-page document signed by F which are of relevance and importance.

“My team was made redundant from [Name of Bank] and my last paid working day was 25th May 2021. As I have explained to the court during the previous proceedings, I am only just able to cover monthly living costs in Hong Kong with my salary and I was unable to save much more money. The Respondent has said many times she has no income or money and cannot help pay for the children’s costs (other than the agreed maintenance of HK\$1,500 per month per child that was decided in 17th April 2020). I am unable to stay in Hong Kong without a salary.

This was a tough decision to make but it is in the best interests for the welfare of the children to be with me and return home to England. The respondent has never shown any interest to look after the children any more than her bi-weekly weekend visits and rarely if ever contacts them outside this time.

We will initially live with my parents while I look for work and sort a permanent place for us to live. I will not only have the assistance of my parents but also my sisters and nephew who are close by.

Contact with local schools was positive and school places can be granted due to where we will stay and the school catchment areas. Part of the need to return quickly, end of July, is to help to finalize the school places ready for term 1 after the summer holidays and allow the children to settle.

.....

I will have a lot more options for work in England. In Hong Kong I can only look at the larger international companies that do not require Cantonese speaking candidates.

.....

I hope this can be looked at urgently as I cannot live in Hong Kong without a salary and want to make sure the transition is as smooth and stress free for the children as possible.”

117.

From the above, it was clear that F was notified of the redundancy on 20/5/2021 with the effective last day of work on 25/5/2021, that is 5 days later. He then filed his Relocation Summons on 27/5/2021, which was only 2 days after his last paid day of work. That said, whether he did try to look for work within the week between 20/5/2021 and 27/5/2021 and turned out to be unsuccessful due to his language barrier could be sceptical but, in my view, was not at all not possible.

118.

F in his oral testimonies said he had searched for work online including by using some electronic platforms such as Linkedin. He had even checked with the children’s international schools in Hong Kong to see whether there were any suitable jobs around. Although F had not produced a list of the postings that he had searched, I accepted that it was not uncommon for job postings to specify some basic requirements such as relevant work experience and language requirement before any interested party was eligible to apply.

119.

Furthermore, it could not be denied that the Covid pandemic ensued for 3 years (from early 2020 to late 2022) had caused unprecedented damage to the economy worldwide and led to drastic recession in almost all sectors of business and enterprises which, even at present, has yet to pick up or re-bounce. F was made redundant after 8 years of employment by an investment bank in 2021 speaks volume about the worldwide economy recession.

120.

F's evidence on job search was not heavily challenged by M's Counsel in his cross examination nor was F asked when he actually started the job search or to list out details of the job requirements that he had seen. This was not surprising since all along M's case in opposition was mainly that it was F's own wish and desire to return to his home country rather than his reasons of inability to secure employment in Hong Kong.

121.

F's evidence as to what he did around May 2021, as recorded by him in his 6-page document, such as telling his domestic helper to look for another role, unilaterally withdrawing the children from their schools, notifying the landlord of the flat that he and the children were living; all of which was criticised by M since they were all done by F for his own interests rather than for the children's best interests.

122.

In my view, whatever reasons are there for F to decide to return to his home country in England is neither here nor there. One must not over-looked the core issue (emphasis added) in this case, that is, would it be in the best interests for the children to stay and study in the UK ? Given that F was the parent having the care and control of the children, it follows that if the answer to the core issue was in the affirmative, F's Relocation Summons would be granted in that light rather than any personal wishes or desire of F to return to his home country.

123.

I have repeatedly reminded myself of such core issue and that only the best interests of the children are of paramount importance. The parties' wish, desire, preference or convenience would not take precedence in my determination of the core issue.

124.

I would now approach my decision by applying the established principles in *Payne v Payne* [2001] 1 FLR 1052 by asking the following questions.

Any motivation or selfishness to exclude the other parent from the lives of the children ?

125.

Apart from contesting F's relocation application was made out of his personal wish and desire rather than for the best interests of the children, M had not produced any evidence to suggest that F had the motivation or selfishness to exclude her from the living of the children.

126.

Quite to the contrary, it was M's admission that H had never obstructed or denied her access or contact with the children in the past years. Further access had also been provided by H upon arrangement or requests.

127.

Hence I find that there was no such motivation or selfishness on the part of F. With the language barrier of not being able to speak Chinese, F found himself unable to secure a suitable job with commensurate

salary for him to continue living in Hong Kong. With his savings and redundancy payment drained out for the past 2 years when he remained unemployed, F considered there are better options for jobs in his home country rather than in Hong Kong was understandable. Being the parent with care and control of the children and carrying the responsibility of supporting the children, he could not be faulted for taking out the Relocation Summons.

Was F's relocation realistic, practical and well planned ?

128.

F is a British citizen born in England and only came to live in Hong Kong in 2012 after his marriage with M in 2010. F was born in 1972 and is now at the age of 51. F's parents, his sisters and members of the extended family are all in England. F has no relatives or back-up support in terms of child care in Hong Kong with the exception of M and domestic helper (only if he was financially capable to hire one).

129.

From all perspective, unless F could afford hiring a domestic helper, he would have to take care of the children himself single-handedly as the parent having the care and control of them. F's relocation, if successful, would mean that he could "free" himself physically for work with all the assistance and support of his parents to help him in looking after their grandchildren. There is solid evidence from the ISIR that the grandparents are able, ready and willing to do so if F and the children are to return to the UK and stay with them.

130.

F in his evidence also mentioned about the prevalence of the “work from home” pattern of work nowadays after the Covid pandemic. If he was “working from home”, he probably could look after the children himself whilst working at home. Given that UK is his home country and he still had contacts there, F was quite confident that he would be able to secure employment in the UK within short period of time. This was particularly so when there was no language barrier for him to work in the UK.

131.

For the children, there are school placements offered to both children to start in the coming 2023/2024 academic year on 6/9/2023. F had produced his affidavit evidence on this at the trial.

132.

In the case of *Re F and H (Children : Relocation)* [2008] 2 FLR 1667 where Thorpe LJ commented upon whether a relocation plan is realistic or practical said :-

“..... the bar as to practicalities that must be jumped by the relocation application is set at a wide variety of heights depending on the facts and circumstances of the case. In this commonplace category of cross-border family creation, where the primary carer is returning to a completely familiar environment, the bar is obviously set considerably lower than in the case of an applicant who, in pursuant of some dream or ambitions, is proposing to take the children to an unknown and untried environment. The bar is set particularly low where the primary carer is returning to the completely familiar home life after such a brief absence. In this instance the mother had only been to the country for 6 years in total.”

133.

Further, in the later case of *SMM v TWM (Child: Relocation)* [2010] 4 HKLRD 37, where Hartmann JA (as he then was) in the Court of

Appeal said :-

“82.

For my part, the need for a set of rational relocation proposals is to ensure that the parent is not simply seeking to flee without concern for practicalities and thereby putting the interests of the child at risk.

In the present case, when matters are considered in the round, it is apparent, I believe, that the mother is not simply seeking to flee without heed of practicality. She is seeking to relocate to that part of the United States

from which both she and her husband originate, where both have families, where both grew up. In that respect, she is seeking to return ‘home’, to the shelter and care of both her extended family and, in so far as may be necessary in the interests of the child, to the shelter and care

of the father's extended family. There is no suggestion that she will be without funds. In respect of capital, that is not yet available to her for the purpose of buying a home, not until court proceedings are finalised. But the mother does have a plan to stay with her own mother, initially at least whilst she is looking for employment. There are schools in the area which are able to take the child even if the child has not yet been booked into one of them. They are educational institutions of different complexions but there is no suggestion that the mother, in consultation with the father, will not be able to choose one that is appropriate. In this regard it is to be remembered that both parents are highly qualified and clearly understand the importance of education. If the mother finds a job at some distance it may be necessary to move the child but that of itself is not critical. There is nothing to suggest that the child is not an average robustness and will not adjust.

83.

The mother's relocation proposals, it appears to me, are entirely acceptable. She will be returning 'home' in the sense that I have descended. Initially, while she seeks employment, she will be staying with family. During that time, the child will have schooling available as well as the benefit of spending time with extended family. When the mother has found employment, if it is necessary to move to a new place, there is no reason to think that she will not do so in an entirely rational and planned manner, making sure that the child's best interests are secured. There is nothing in the mother's history to suggest that she acts with blatant irresponsibility in respect of the child.

84.

In respect of relocation applications generally, there will, of course, be many occasions when the court is obliged to look carefully to the specific details of a plan to relocate and a lack of specific detail will be fatal. Each case is unique, each must be determined according to its own circumstances. In the present case, however, looking to all matters in the round, including the proven character of the mother as a responsible parent, I believe that the judge regrettably fell into error in looking too much to the lack of detail and too little to the broader imperatives which show the plan to be entirely understandable, rational and one that will protect the interests of the child."

134.

This is a clear case of F having to return to his "home" country for work to support himself and the children. The failed marriage brought him the responsibility of taking care of the 2 children and also the need to support them. For the past 2 years, he had undertaken the role of the primary carer in addition to also financially supporting the children by using his savings and redundancy payment of around HK\$ 1.1 million. As at trial, he deposed to having to take out a loan in 2022 for HK\$170,000 to pay for the advance rental payment of his rented apartment in order to bargain for a "month-to-month" tenancy arrangement whilst awaiting this trial to complete.

135.

F's "home" country of England, UK is not a place which the children are unfamiliar with. F and the children have been there on a number of occasions and had enjoyable times during those visits. The latest trip was completed in July 2023. Also, the elder child was born there.

136.

Given careful consideration, I am satisfied that F's relocation is realistic, practical and well-planned. As a matter of fact, this had been planned by F as early as two years ago in 2021. It was just unfortunate that for all sorts of reasons, the plan does not materialise until now.

137.

At the beginning of the trial, I expressly asked F's Counsel the position of F if his relocation fails and the children have to continue to stay

in Hong Kong. I was provided with the answer that F would also stay in Hong Kong to take care of the children. He said the children like to stay with him and taken care of by him. There was no moment of pause or hesitation when F provided this answer to my question.

138.

I was impressed by F's love and affection over the children and this was solid proof of evidence of the strong father-child bonding described by the social welfare officer Miss Kong in all her reports and evidence at trial.

Does M have any plan for the children if F fails in his application and F just left Hong Kong by himself?

139.

So far M had filed her Variation Summons of custody, care and control of the children from F to her. M had confirmed through her Counsel Mr. Napoleon Wong in writing that she would not pursue her Variation Summons if F was successful in his relocation application.

140.

If F fails in his relocation and assuming F did stay in Hong Kong, M could by then restore her Variation Summons and offer her plan for the children's care by way of affirmation evidence. If F decides to leave Hong Kong by himself, it follows that M's Variation Summons would be unopposed.

The Welfare Checklist

141.

As decided by Hon Poon J (as he then was) in the case of *H v N* [2012] 5 HKLRD 498, when deciding the best interests of a minor, the Court may refer to the factors listed within the “welfare checklist” under the English Children Act 1989 and may cherry pick upon those factors which are relevant to the case before the Court and which may be of value and assistance.

Wishes and feelings of the Children

142.

The children are now at the age of 13 and 11 respectively. They are capable of expressing their wishes and feelings to the social welfare officer Miss Kong at each of the interviews. There are clear and uncontroverted evidence from Miss Kong that the children have built up very strong bonding with their father F. The children fully aware their father’s on-going relocation application since 2021 and actually had longed for going back to the UK with F to meet their grandparents and stay there.

143.

Most importantly, the children expressed their very strong views that they would stay with their father F wherever he was.

Child’s physical, emotional and educational needs

144.

The children’s educational needs are well planned by F. On the evidence, their physical and emotional needs also clearly lean towards F.

Nature of relationship of the Children with their parents

145.

Both children have been living with F, the primary carer, for about 5 years by now since 2018. Although during these years M had been visiting them quite frequently and there were regular alternate weekends staying access, and also there were occasions of joyful events or activities whether at school or outside school which M had repeatedly emphasized in her evidence at trial by referring to photographs already produced and that there are many more photos to show if she was allowed to produce them.

146.

According to the evidence of the social welfare officer Miss Kong, both children loved their mother M and very much enjoyed the access times staying with M. Nonetheless, they would still choose to go to the UK with their father F rather than staying in Hong Kong with their mother M if the relocation was successful. They are determined that they would maintain regular contact with M after the relocation. They have trust and confidence with their father F who would allow them access or contact with the mother M same as what had happened in the past.

Likely effect of change in the Children's circumstances

147.

Given that this was a relocation case, the likely effect of change would normally be significant upon a successful application.

148.

In this case, however, it was the primary carer F who was seeking relocation with the children to his home country, a place which was also familiar to the children. I believe the likely effect of change to the children would be minimal and manageable by F.

Children's ages, maturity, sex, social and cultural background

149.

The children are at the age of 13 and 11 respectively. They are, or at least the elder child is, of sufficiently maturity to understand the father's intended relocation.

150.

The children are studying in international schools in Hong Kong and, according to the evidence of Miss Kong, both children cannot speak Chinese in complete sentences. They could only speak Chinese in single words one by one. Overall speaking, the children are of western cultural background.

Attitude of the Children and the responsibilities of parenthood of the parents

151.

The attitude of both children to follow their father F was clear, firm and determinative.

152.

F's responsibilities of parenthood over the children far exceed M's. This could easily be seen from F's willingness to take up the role of the primary carer of the 2 children whilst M chose to develop her career of aromatherapy wholesale business since 2016 and taking up the financial planner job since 2021.

The capability to meet the Children's needs

153.

Since M is bi-lingual in English and Chinese, she would be in a better position to meet the children's needs in terms of the Chinese language.

The practical difficulty of contact with a parent

154.

Given the advanced technology nowadays, such as zoom, video conferencing, face-time and so on, which are commonly used as alternative

mode of visual access although it might not be an absolute replacement of physical access which could not be easily and frequently arranged in a successful relocation case.

Any other circumstances that the Court thinks are relevant

155.

Given the age of F and his work in the information technology field, the longer period of staying out of work could be devastating to his career or job seeking, no matter where he was.

156.

From F's personal perspective, it was not easy, if not impossible, for him to take care of the children and to work for income at the same time (emphasis added) without any third party support and assistance, such as domestic helper or extended family members.

157.

Whilst M could be an option readily available but this would be another live issue yet to be explored with the passage of time and consideration of the children's best interests. At present, the only viable and proper option was for F to seek his parents' and extended family members' support and assistance which are all readily available in the UK.

What would be the impact on F if his relocation application was refused ?

158.

If F fails in his relocation application and he continues to stay in Hong Kong with the children, he would have to deal with M's Variation Summons if it was restored unless M accepts the status quo to continue.

159.

Further, F would also have to continue with his job search carrying with him his language barrier with the hope to get a job of commensurate income enough for him to meet the accommodation costs and living costs of himself and the children and also to hire a domestic helper.

160.

The impact on F was significant if his relocation fails. Having said, I have again reminded myself that such impact is only one of the consideration under the Payne guidelines. It should not be determinative or in any way a conclusive factor for deciding the children's best interests.

Some Other Considerations

161.

Unless there was a surge of demand of personnel with expertise similar to what F possesses, given his inability to speak Chinese in a community like Hong Kong where the predominant language is Chinese, either Putonghua or Cantonese, I accepted that it is comparatively easier for F to pursue other options of work in his home country rather than in Hong Kong.

162.

All in all, M was unable to convince this Court with any cogent evidence that F's relocation with the children to the UK should be dismissed because :-

The children's strong wish and desire to go to the UK as found by the social welfare officer Miss Kong should not be considered or respected;

The children's strong bonding with their father F should not be considered or respected;

The children's determined choice of staying with their father F wherever he was should not be considered or respected;

The children's best interests are to stay in Hong Kong instead of UK.

Decision and Orders

163.

Given full and careful consideration to all the above, and taking into account the facts and evidence, I accepted that it is in the children's best interests to stay and study in the UK. This decision rests solely upon the best interests of the children and should not be taken as upon the personal wish, desire or convenience of their father F.

164.

As regards M's access to the children after their relocation to the UK, it must be an extensive one and all round arrangement which I now decided as follows :-

There be access by telephone and/or zoom or via other electronic means or devices at least once but not more than thrice every week of not more than 30-minute duration each, or otherwise agreed by the parties. The dates and time of such access to be arranged by the parties and the children in advance;

There be direct physical face-to-face access to the children in the UK or in Hong Kong for half of the school holidays (to be worked out as per the school calendar) in Christmas, New Year, Easter and Summer Vacation, exact dates and logistics to be agreed between the parties no less than 14 days before the respective school holidays commence. F to be notified by M in writing no less than 30 days in advance of her intended physical face-to-face access;

Parties be at liberty to agree upon further access in whatever form and dates in addition to (a) and (b) above; and

All costs and expenses for physical face-to-face access to be borne by M or otherwise agreed between the parties in advance before the physical access.

165.

Given that F and M are joint custodian of the children, F should (at his own costs, if any) provide with M full details of the children's education in the UK; such as the name and address of the schools, their classes, school calendars, school reports, details of extra-curricular activities and the schedules and all other related information, expeditiously and in any event no later than 7 days when they are available to F.

166.

F to file and serve :-

the usual form of Written Undertaking to return the children or any of them to Hong Kong when called upon to do so; and

a Written acceptance of the terms of access under paragraph 164 above; and

a Written Undertaking to comply with the terms of access under paragraph 164 above; and

a Written Undertaking to keep M well informed from time to time the full address and telephone number(s) of the children and any changes thereof.

167.

Upon full compliance of paragraphs 166 (a) to (d) above, leave be granted to F forthwith to permanently remove the 2 children from the jurisdiction of Hong Kong to Nxx, England, UK.

168.

There be liberty to apply for further directions.

Costs

169.

Given the nature of this application, I decided that the usual costs order should apply.

170.

I decided that there be no Order as to costs including all costs reserved. F's own costs be taxed in accordance with Legal Aid Regulations.

171.

This is a costs order nisi which would become absolute if no application is made to vary the same within 14 days from the date of this Decision.

Other Matters

172.

For those matters I said in paragraphs 26 to 32 of this Decision, I direct a copy of this Decision be sent to the Hong Kong Bar Association and the Hong Kong Law Society for their attention and any necessary follow up action they considered appropriate.

173.

I also grant leave for the audio and transcripts related to paragraphs 26 to 32 of this Decision be released to the Hong Kong Bar Association and the Hong Kong Law Society upon their application and at no costs.

(George Own)

District Judge

Miss Sally S.Y. Wong instructed by Messrs. Fung, Wong, Na & Lam, LLP., Solicitors for the Petitioner, on the instructions of the Director of Legal Aid

Mr Ken Lee and Mr Napoleon Wong instructed by Messrs. Kevin L.H. Kwong & Co., Solicitors for the Respondent

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