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Case No: FD12P02204

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
21/02/2013

B e f o r e :

MR JUSTICE MOSTYN

Between:

KAC	**Applicant**
- and -	
DJC	**Respondent**

Mr Paul Hepher (instructed by Thompson & Co Sols) for the Applicant
Ms Amanda Clarke (instructed by Rodney Warren & Co Sols) for the Respondent

Hearing dates: 14-15 February 2013

HTML VERSION OF JUDGMENT

Mr Justice Mostyn:

1. On the morning of Thursday, 12 May 2011 the mother, father and their two children T and J, then aged respectively 3½ and 2, were together at their rented home in Eastbourne. The marriage of the mother and father was in difficulties - three days earlier the father had asked for a divorce. The mother left the house with the children after breakfast. The father stayed at home because he was unwell. He thought that the mother would, as usual, drop the children at their nursery before going to work as a dental nurse. In the afternoon the father learned that the children had not been dropped at the nursery: he telephoned the nursery and was told that the mother had called them to say that they would not be attending because they had conjunctivitis. The father was surprised by this as the children were perfectly well enough to attend nursery. He called the dental practice where the mother worked and was told that she had attended in the morning, told them she was leaving, and had left behind at

reception the keys to their car. The father called the police who said that they could do nothing and recommended that he consult a solicitor. The senior nurse at the dental practice then called the father again and told him that the mother and the children had "gone home" to Australia. Later that day the police visited the practice and established from the nurse that the mother and children had taken the 3 pm flight to Melbourne that day.

2. This was an open and shut case of child abduction and, as I will explain, the children were in due course, and after protracted proceedings in Australia (which involved an appeal), returned to this country under the terms of the Hague Convention on the Civil Aspects of International Child Abduction 1980. Nearly two years after that fateful day I now have to adjudicate on the mother's application to relocate the children to Australia.

3. On 30 June 2011 the father, through the offices of the respective Central Authorities, made an application under the Convention in the Family Court of Australia for the return of the children. The application was made on his behalf by the State Central Authority. The mother defended the proceedings alleging that the children were not habitually resident in the United Kingdom at the time of their removal; that the father had consented to their removal; and that there would be a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation. The application was heard by Bennett J sitting in Melbourne over four days commencing on 1 August 2011. There was full oral evidence not only from the parents but other witnesses also.

4. On 12 August 2011 Bennett J handed down judgment. It was exceptionally thorough running to 172 paragraphs over 51 pages. She found the father to be a reliable witness and preferred his evidence on matters in dispute to that of the mother. She found the mother to be unreliable who "jumps rashly from one conclusion to another, dispensing with logic or inventing facts to enable her to do so" (see para 92). However, while she roundly rejected the mother's defences of consent and grave risk of harm, she found, applying Australian domestic law (as the Convention envisages), that at the time of their removal the children were not habitually resident in the United Kingdom. Therefore the application was dismissed. The State Central Authority appealed. On 16 February 2012 the appeal was heard by the Full Court of the Family Court of Australia (Finn, Strickland and Forrest JJ) and judgment was handed down on 22 March 2012. The appeal was allowed. The Full Court held that the trial judge had erred in her application of domestic law concerning habitual residence and remitted the matter for a rehearing.

5. The retrial was listed for 30 July 2012. However, on the day of the hearing the mother dropped her defences, conceded the application by the State Central Authority, and agreed that the children would return to the United Kingdom no later than 5 pm on 25 August 2012. It was ordered that following their return, and on the assumption that the mother would return also, the children would live primarily with their mother and would be with their father overnight on each Wednesday and for two weekends out of three. It was further agreed that the father would arrange and pay for appropriate accommodation for the mother for a period of three months following her return.

6. On 23 August 2012 the children returned with the father; the mother did not accompany them. On 29 September 2012 she applied in the Principal Registry for a residence order, an order for contact in favour of the father, and a specific issue order allowing her to relocate the children to Australia. Case management orders were made on 29 October 2012, 16 November 2012, and 16 January 2013. These included provision for independent expert evidence about the mother's UK immigration status, and a report from the Cafcass High Court Team.

7. The mother arrived here on 24 December 2012. The father had arranged accommodation but only for two months rather than three. The shared care arrangements were put into effect. The mother told me that her tenure of the accommodation ended on 18 February 2013 and that she was booked on a flight back to Australia the following day.

8. I heard the application on 14 and 15 February 2013. Mr Power, the extremely experienced Cafcass reporter, who gave oral evidence to me, described the case as "very difficult - almost unprecedented". He said that he had thought long and hard about it and had talked about it with other senior staff at the office. He told me that he was still wrestling with where the balance lay, and that it was very unusual for him not to be able to make a clear recommendation to me.

9. I agree that the decision I have to make is exceptionally difficult as the merits each way are very evenly balanced. But in a way the decision I have to make is not as heart-rending as is the case in so many of these relocation disputes. This is because the parents have agreed that whatever I decide there will be shared care (although there is a small dispute as to the precise division of the children's time in school terms). I will have to decide in which country the children should live and in the light of that decision the unsuccessful parent will travel to live in that country. This is to the very great credit of the parents, who each is prepared to put his or her interests beneath those of the children. These children will grow up enjoying the society of each of their parents and will not be confined, like so many children in these relocation disputes, only to occasional direct contact with the non-residential parent.

The legal framework

10. The foundation of the jurisprudence in this field is the well-known case of *Poel v Poel* [1970] 1 WLR 1469. Although there were many other subsequent decisions of the Court of Appeal the next major milestone was the case of *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052, where Thorpe LJ set out his memorable "discipline" in para 40. That decision was controversial, at least in some quarters, for arguably perpetuating a covert presumption in favour of location, at least where the application was made by the child's primary carer. It was reconsidered in 2011 in the case of *K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793, [2012] Fam 134, and the entire jurisprudence was recently summarised, and the modern principles enunciated, in a characteristically lucid judgment of Munby LJ (as he then was) in *Re F (A Child)* [2012] EWCA Civ 1364.

11. I have considered these four cases most carefully and, doing the best I can, I set out shortly what seem to me to be the presently governing principles derived from them for a relocation application:

i) The only authentic principle to be applied when determining an application to relocate a child permanently overseas is that the welfare of the child is paramount and overbears all other considerations, however powerful and reasonable they might be.

ii) The guidance given by the Court of Appeal as to the factors to be weighed in search of the welfare paramountcy, and which directs the exercise of the welfare discretion, is valuable. Such guidance helps the judge to identify which factors are likely to be the most important and the weight which should generally be attached to them, and, incidentally, promotes consistency in decision-making.

iii) The guidance is not confined to classic primary carer applications and may be utilised in other kinds of relocation cases if the judge thinks it helpful and appropriate to do so.

iv) The guidance suggests that the following questions be asked and answered (assuming that the applicant is the mother):

a) 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?

b) Is the mother's application realistically founded on practical proposals both well researched and investigated?

c) 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?

d) Is the father's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?

e) What would be the extent of the detriment to him and his future relationship with the child were the application granted?

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

v) Since the circumstances in which such decisions have to be made vary infinitely and the judge in each case has to be free to decide whatever is in the best interests of the child, such guidance should not be applied rigidly as if it contains principles from which no departure is permitted.

vi) There is no legal principle, let alone some legal or evidential presumption, in favour of an application to relocate by a primary carer. The old statements which seem to favour applications to relocate made by primary carers are no more that a reflection of the reality of the human condition and the parent-child relationship.

vii) The hearing must not get mired in taxonomical arguments or preliminary skirmishes as to what label should be applied to the case by virtue of either the time spent with each of the parents or other aspects of the care arrangements.

12. Factor (c) of the guidance always looms large and is particularly problematic, both in principle and in practice. It is a significant feature in this case, as will be seen. Discussing this factor in *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577 (at para 12) I stated

> "The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocator is always "how would you react if leave were refused?" The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward. "

I do not resile from these views but the paradox does not make the problem any easier to solve. The impact on the mother if her realistic proposal is rejected is a fact which has to be recognised whatever its psychological origin. I have to take the parents as I find them and if one finds himself as a result of my judgment to be a victim of his virtues then that is a cross which he will have to bear in the interests of his children.

13. I have observed before (in *Re AR (A Child: Relocation)* at para 15) that relocation has never been considered by the Supreme Court here. It has however been recently considered by the Supreme Court of New Zealand in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, [2010] NZFLR 884. In New Zealand the corresponding provisions to s1 Children Act 1989 are ss 4 and 5 Care of Children Act 2004. Although the language is different the principle of paramountcy and the statutory checklist are effectively the same.

14. The majority judgment was by Blanchard, Tipping and McGrath JJ, and given by Tipping J. In it there are, to my mind, some highly acute observations demonstrating the fallacy of the suggestion that there is, or should be, some kind of presumption in favour of an application to relocate. They stated:

> "[23] At the highest level of generality the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served. Put in that way, it is difficult to see how any presumptive weight can properly be given to either side of those competing but necessarily abstract contentions. To do so would risk begging the very question involved in what is necessarily a fact-specific inquiry.
>
> [24] Everything will depend on an individualised assessment of how the competing contentions should be resolved in the particular circumstances affecting the particular children. If, on an examination of the particular facts of a relocation case, it is found that the present arrangements for the children are settled and working well, that factor will obviously carry weight in the evaluative exercise. All other relevant matters must, of course, be taken into account and given appropriate weight in determining what serves the child's welfare and best interests, as s 4(5) puts it. The key point is that there is no statutory presumption or policy pointing one way or the other. All this seems to us to follow from ss 4 and 5 of the Act as a matter of conventional statutory interpretation."

15. Later, at para 34, they referred to "some of the writings [which] seem to lament the unpredictability of decisions in relocation cases and also the width of the 'discretion' given to Judges in deciding such cases". This is a common theme in discussions about this subject, and for that matter, about related family law topics. But they explain, convincingly to my mind, that the function of the judge in making decisions about the future care of a child is not really "discretionary" at all, at least not in the sense of a judge making a decision from a range of legitimate solutions none of which can be said to be wrong. Rather, as they explained earlier at para 32:

> "But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court"

16. So, when addressing the alleged vices of unpredictability and the width of "discretion" they stated at para 35:

> "These and other concerns … are inherent in the exercise in which judges administering ss 4 and 5 of the Act are involved. Lack of predictability, particularly in difficult or marginal cases, is inevitable and the so-called wide discretion given to judges is the corollary of the need for individualised attention to be given to each case. As we have seen, the court is not in fact exercising a discretion; it is making an assessment and decision based on an evaluation of the evidence. It is trite but perhaps necessary to say that judges are required to exercise judgment. The difficulties which are said to beset the field are not conceptual or legal difficulties; they are inherent in the nature of the assessments which the courts must make. The judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme."

17. Therefore, when discussing "policy", they stated at para 36:

> "The literature suggests that there are at least two competing schools of thought about relocation cases generally. There are those who consider relocation should generally be approved, and there are those who think that generally it should not. It is not our purpose, nor would it be appropriate, to express any preference. What is clear is that if there were to be any presumptive approach to relocation cases, it is contestable what that approach should be. This is very much a policy issue for Parliament, not judges. At the moment the New Zealand legislature has not opted for any presumptive approach. That is the way cases must be approached by the courts unless and until legislative change dictates otherwise."

18. To my mind these observations all capture precisely my function here. They explain irrefutably to my mind why presumptions have no place in a relocation application. I

therefore start with a blank sheet. There is no presumption in favour of the applicant mother. My determination will involve a factual evaluation and a value judgment. I will ask myself and answer as best I can the questions in paragraph 11(iv) above but their answers will not be determinative or even necessarily tendentious (in the true sense of that word). They will merely be aids to my determination of the ultimate single question, which is, of course: what is in the best interests of these children?

The history up to the removal

19. The judgment of the Full Court dated 22 March 2012 contains a very clear summary of the background up to the removal on 12 May 2011. It was unchallenged. I set it out in full:

> "5. The following background facts, which are unchallenged, are taken from Her Honour's comprehensive reasons for judgment.
>
> 6. The mother is an Australian citizen by birth, aged 34 at the time of hearing. The father is a British citizen by birth, aged 33 at the time of hearing. He is a permanent resident of Australia.
>
> 7. The couple met in Brisbane in 2001 whilst they were both holidaying and renewed their acquaintance when the mother was travelling in the UK. They lived together at the home of the father's parents in the UK for the first half of 2005 before the mother returned to Australia. The father travelled to Australia in late 2005, took up cohabitation with the mother again and they married in Australia in April 2006.
>
> 8. The couple purchased a home in Melbourne in November 2007, with the financial assistance of the father's mother, but in 2010, they decided to move to England so that their children could get to know their paternal grandparents and other family members. They sold their home in Melbourne, packed up all of their possessions, and shipped virtually all of them to the UK, leaving only a small number of boxes stored with the mother's mother.
>
> 9. The family departed Australia on 20 July 2010. Their immigration departure cards, completed by the father, stated that they were leaving Australia temporarily and expecting to return in five years.
>
> 10. The mother entered the UK on a settlement spouse visa, which entitled her to work there and, within a month or so of arrival, she had obtained full-time employment as a dental nurse and the children were enrolled in part-time child care, three days per week. A few months after their arrival, the father enrolled in a fee paying course in massage therapy and later still, in early 2011, he obtained work as a labourer, working for his brother three days per week.
>
> 11. After their arrival in the UK, the family lived with the father's parents. On or about 12 October 2010, the couple went together to the bank to put the mother's name on the father's bank accounts and the father enquired of the bank officer about mortgage finance to enable them to buy a property in the UK. Lack of a credit history prevented them from doing so at that time.
>
> 12. The mother became unhappy, particularly living with her parents-in-law. She saw a doctor on 12 October 2010, and the doctor's records include notes made that day that she was missing home, that she was offered counselling,

and was likely to be suffering from circumstantial depression. She saw the same doctor again on 18 November 2010 and the doctor's records include notes made that day that the mother was "feeling ok".

13. The mother argued fiercely with her father-in-law around the middle of October 2010 and she fled the home, called friends in Melbourne and ended up at the home of the father's aunt. The Melbourne friends called police in the UK and also the Australian High Commission in London. The mother received a call and follow up enquiry from the Australian consular office in the UK. She returned to the father's family home to live though and the couple then decided to move out of the father's family home as soon as possible, However, they could not procure suitable rental accommodation until January 2011.

14. In November 2010, the father sought legal advice because he feared that the mother may try to take the children back to Australia without his consent. He hid the children's passports for a time. The mother was miserable at that time, but had no intention or desire to leave England.

15. The family moved into a rented house in mid January 2011. They paid five months rent in advance and entered into a lease that was to expire in August 2011. Once housed independently of the father's parents, the mother still thought the father was spending too much time at cricket or outside the home and not enough time with her and the children and she complained to him about that.

16. On Monday 9 May 2011, the father told the mother he wanted a divorce from her. On Thursday 12 May 2011, the mother took the two children, and flew with them back to Australia."

20. The only addition which I would make to this account is in relation to paragraph 7. According to an affidavit made by the father in the Australian proceedings the mother was in the UK from late 2002 until December 2003 and from April 2004 until July 2005. This was not challenged. In his oral evidence he told me that in one or other of these periods the mother had worked as a dental nurse in Leicester. Again, this was not challenged.

The hearing before me

21. For the hearing before me the mother made three very full statements and the father two. Mr Power made a report. The mother's immigration status in the UK was explained in two reports from Mr Michael Harris, a barrister specialising in immigration law practising from 10 King's Bench Walk. On reading the papers I realised that the evidence about the father's immigration status in Australia was far from clear and right at the start of the case I suggested that contact be made with Mr David Truex of Taylor Hampton solicitors, who is well-known as being qualified in both England and Australia. Astonishingly, overnight he produced a full witness statement which incorporated the opinion of two specialist Australian immigration lawyers. Mr Truex's evidence was agreed. I am very grateful for the extremely efficient and thorough service which he provided to the parties at very short notice.

22. I heard the oral evidence of the mother and the father and of Mr Power. The parents were accompanied by their respective mothers. I was told that during the course of the

proceedings a rapprochement was achieved between these ladies which was gratifying and I hope a harbinger of good things to come.

23. The mother was represented by Mr Paul Hepher and the father by Ms Amanda Clarke. Both counsel made clear and eloquent submissions both orally and in writing.

The father's situation

24. On his return with the children on 23 August 2012 the father resumed living with his parents in Eastbourne. In September T (now aged 5) was enrolled at the local primary school. J (now aged nearly 4) attends a nursery. The children have resumed their relationship with their grandparents and their paternal cousins and have developed a network of friends and relationships through the school and locally. It is fair to say, however, that all this has been quite short lived.

25. Since September 2012 the father has qualified as a sports masseur and now works as such from his parents' home earning between £80 and £160 per week. He is hopeful that he may get work with the local football club Eastbourne FC and via the local gym. If he could amass 25 clients he could earn £500 a week. He has hard debts of £2,000, owed almost entirely on his credit card. He has a debt to his mother of £8,100, but he accepts that this is a soft debt and that he would not be forced to repay it until he could. He is entitled to receive each week £160 child tax credits and £33 child benefit, but because he was overpaid these in the past (to the tune of £3,000) he does not actually receive the child benefit and receives only £130 tax credits -- the rest goes towards the overpayment.

26. In his first statement the father stated "given my length of absence from Australia I do not know what my immigration position would be. However my current visa is due to expire in September 2013". In his second statement he explained that his visa was "subclass 801". He exhibited a copy of his visa which did not on its face appear to have any conditions attached to it. In Ms Clarke's skeleton argument it was stated that "there also appears to be a condition that the father inform the immigration authorities of any changes in the status of the relationship and it therefore appears highly unlikely that the father's visa will remain valid" . Mr Truex queried whether conditions had been attached to the visa but it was agreed that there were none. Mr Truex explained that the subclass 801 visa allowed the father to remain in Australia permanently and that it was not affected by any later separation or divorce. It was explained by Mr Truex that the father would be entitled to apply to convert his visa to a subclass 155 visa prior to expiry of his current visa and that he met the criteria for conversion. This subclass 155 visa confers the status of an Australian permanent resident and allows the holder to remain in Australia indefinitely. After four years of permanent residence in Australia the father would be entitled to apply for citizenship. In all cases the father would be entitled to work and to access the full range of state benefits.

27. In her second statement mother explained that as a full-time single parent she would be entitled to receive state benefits totalling A$657 per fortnight. She stated, and this was not challenged, that if the father returned to Australia, and if care of the children were shared equally, he would be entitled to half of that.

28. The father accepted that as a sports massage therapist he would have good opportunities in Australia although he sounded a note of caution in that further qualification up to degree level might be needed and he doubted whether he had the powers of concentration to achieve that. He accepted that he could supplement his work as a massage therapist by returning to his previous work as a fork lift driver. He reminded me that the cost of living in Australia is very high.

29. He accepted that he retained friends in Australia although these had dwindled to few in number. He was concerned that he would face hostility and rejection from the mother and her family in Australia.

30. The father's principal recreational interest is cricket and he is an active member of the Eastbourne Cricket club. He accepted that he had been a member of the Pines Cricket club in Melbourne and that he would be able, obviously, to pursue his interest in cricket in Australia.

The mother's situation

31. As explained above the mother is a dental nurse although she has relinquished her employment for the time being to be here. However she anticipates no difficulty in obtaining employment as a dental nurse either here (if she is allowed to do so) or in Australia. In Australia she says she could earn $648 for a three-day week; for a five-day week that would correspond to $1,080. In addition she would receive the state benefits referred to at paragraph 27 above. Here she asserted that she could earn no more than £15,000 a year; the father said it would be nearer £20,000 -- it would depend on how many hours she worked.

32. The mother has hard debts owing to credit card companies of $12,171. She has been drawing cash on her credit cards to pay for her living expenses here. In addition she has exhausted her savings and has borrowed $20,000 from her grandmother and $15,000 from her mother to put towards her costs. She is not eligible for legal aid and has incurred costs of £35,000 of which she has paid £24,000. The mother accepts that the debts from her family are soft debts and that she will not be called to repay them unless she can do so. In contrast however are her credit card debts. It is essential she repays them if she is not to face enforcement proceedings from the credit card companies.

33. The mother lives with her mother in Melbourne and that is where the children would live if the decision is in her favour.

34. The mother's immigration position here is complex. Immigration law and practice in this country is exceedingly complicated. Mr Harris described it as a "looking glass world". I have recently concluded a three week sitting in the Administrative Court and so have become familiar, up to a point, with its intricacies. I have sought to explain the system in my recent judgment of *Thebo, R (on the application of) v Entry Clearance Officer Islamabad (Pakistan)* [2013] EWHC 146 (Admin). The Secretary of State will make a decision on an application for leave to enter or to remain in accordance with the Immigration Rules, but there remains a meaningful discretion to decide cases outwith the rules. Although the rules contemplate that claims under Article 8 (the right to family life) of the European Convention on Human Rights will

normally be decided in accordance with the rules, authority has decided that the residual discretion remains available to decide such claims. There is a statutory appeal procedure, and the system is subject to judicial review.

35. Here, an application by the mother for leave to enter or remain would, subject to the residual discretion, be decided in accordance with Appendix FM to the rules. It would however be conjoined with an application under Article 8 of the Convention. The application may be made either in-country or out of country. Mr Harris was of the view that the application would face fewer obstacles and will be resolved more quickly (including any appeal to the first tier tribunal) were it to be made out of country. His estimate was that it would take 40 weeks from the time of application until its conclusion with an appeal. He considered that an appeal would likely be necessary given the very strict approach adopted by the Secretary of State. There is an economic criterion which must be satisfied namely that the applicant must provide evidence that she will be able adequately to maintain and accommodate herself and her dependants in the UK without recourse to public funds. This is interpreted as representing no less than income support levels of earnings together with rent and council tax. Mr Harris explained that prospective employment would not suffice, but he accepted that this was an absurd Catch-22 because by definition an applicant out of country would not have employment in the UK.

36. Mr Harris was of the view that more obstacles would be encountered if the application were made in-country. He thought it would take 48 weeks from application to conclusion of an appeal. If the application were made in-country the mother would not be allowed to work or to access state benefits (although Mr Harris was unsure whether this would extend to NHS treatment). To satisfy the economic criterion she would have to receive maintenance from the father - subventions from her family would not suffice.

37. Mr Harris was of the view that this was a strong case on the merits which would be ultimately successful. However, he explained that the grant of leave, while permitting employment, would prohibit access to state benefits. This would last for 5 years. Further he stated that in order to achieve success it was essential that the mother instructed specialist immigration lawyers. With the heavy fees that are imposed her costs would be not much less than £3,000.

38. The father's proposal is that if the mother stays here to be with the children and to make any in-country application for leave he will borrow £10,000 from his mother in order to pay the mother £250 a week which should enable her to live somewhere modest and meet the economic criterion. He accepts that the mother's life with the children at that level would be basic. When the £10,000 ran out he would continue to make the payments from his earnings and his state benefits.

39. I assess that the absolute minimum amount that the mother would need to pay in rent, utilities and council tax would be £700 a month or £161 a week. She would therefore have only £88 a week to pay for the daily bread of herself and the children, to say nothing of obvious incidental expenses such as clothing and entertainment. It is true to say that the mother would have to live with the children at a subsistence level.

40. The mother says that she is faced with an impossible dilemma. It would be, she said, extremely hard for her to go back to Australia, but equally extremely hard to stay. In Australia she has her home with her family and employment and the opportunity of making some inroads into her hard debts. But she would not be with her children. Here she will be living at subsistence levels, forbidden from working, and with no opportunity of repaying her debts with all the likely problems that may thereby arise. She has no family here and no friends either. There may be opportunities to make friends with parents at the school but she feels that her reputation has been tarnished by virtue of unhappy publicity that appeared in the local press and on the local BBC News concerning this case.

The report and evidence of Mr Power

41. In his report at paragraph 41 Mr Power stated:

> "The qualitative difference I suggest the court can make to these children's lives is a shared care arrangement and the "line of least resistance" to this, one that does not impose further unwelcome on them would be for their mother to jointly share their upbringing with their father in the UK, which was in effect the status quo before she abducted them. How viable this is, depends in large measure on the evidence concerning immigration advice and other structural issues."

42. In his oral evidence Mr Power moved to the halfway line, as I have described in paragraph 8 above. On the one hand a move back to Australia would involve the children in yet further change. On the other hand the evidence, particularly the immigration evidence in relation to both parents, demonstrated that the mother would face more formidable challenges were the decision to be in the father's favour than vice versa.

My assessment of the parents

43. Like Bennett J I found the father to be an impressive witness. He was honest and fair. Inasmuch as he criticised the mother he considered his criticisms to be justified, and, up to a point, I agree with him.

44. Mr Power described the mother in these terms:

> "she is an organised, imaginative, industrious, intelligent loving mother who was probably and genuinely overwhelmed by the threat of a divorce and all that entails, so far from home. Nevertheless her actions were reactive and impetuous and not in the children's best interests. She chose 'flight over fight'"

45. I observed the mother very carefully in the witness box and I did not form the same adverse view of her credibility as did Bennett J. Mr Power had observed in his report that in the Australian proceedings, and in her statements in these proceedings, the mother displayed almost no remorse for her actions and had not once apologised to the father for them. The mother's third statement was filed after that report and was replete with statements of remorse and apology. Also, after she had read the report, she apologised directly to the father. The father considered this to be highly

manipulative and designed only to improve her position in the eyes of the court; he wholly rejected its sincerity. However, it must be possible for the scales to fall from the eyes of someone in the wrong; for her to recognise her wrongdoing; and to seek redemption. Although it was very late in coming, and had to be prompted by Mr Power, I judge the mother to have been sincere (up to a point) in her remorse and apology, and at last to have recognised that her behaviour was very poor indeed.

46. I do recognise Mr Power's observations that they mother appears to be overly proprietorial as regards the children. However, I do believe that these proceedings, when taken in combination with the Australian proceedings, have demonstrated to her that unilateral action and proprietorial or autocratic attitudes simply will not be tolerated by a court which has to take parental decisions when she and the father cannot agree. I am therefore prepared to give the mother the benefit of the doubt. I very much hope that the faith that I place in her will not prove false. She should have no doubt that if that faith is breached she will likely lose the shared care of the children.

47. I do regard the father as highly competent and self-sufficient. Were my decision to be in favour of Australia then I have no doubt that he would make a very good fist of it there. There would be no obstacles to him obtaining employment and finding a home suitable to share the care of the children in.

48. While recognising Mr Power's assessment of the mother I nonetheless judge her to be a fragile character. Her misery when here from 2010-2011 is well expressed by the Full Court and was not challenged. Even apart from the financial pressures which will endure for up to a year (to say nothing of the impossibility of her making inroads into her hard debts) I consider that she is less well equipped to face the challenges were the children to stay here than the father would face were the children to return to Australia.

My conclusions

49. In applying the paramountcy principle the court must have particular regard to the specified factors mentioned in s1(3) Children Act 1989 when deciding whether to make, vary or discharge an order under s8 namely:

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

50. I do not place any emphasis on the expressed wishes of the children given their ages. Their physical, emotional and educational needs are much the same whether they are in Eastbourne or Melbourne. At their age I do not place as much weight on the impact of a change in their circumstances as Mr Power does. I consider that if they were to move to Australia in the summer holiday (as Mr Power suggests should be the case if that is my decision) there will be ample time for the parents collaboratively to prepare the children for the change and that any adverse impact would likely be temporal. I do not consider that the children are at any risk of harm, as opposed to temporal disturbance, on either choice. I do consider, for the reasons I have explained above, that the capacity of the mother to meet their needs is likely to be diminished were she to have to stay here to negotiate the immigration labyrinth for up to a year, and to be exposed to the risk of bankruptcy in relation to her hard debts. I believe that the children would be adversely affected if she were forced to return to Australia and to be separated from them once again in order to make an out of country application for leave. Even if (or more likely when) the mother is granted leave her position would remain very precarious for 5 years, for she would not be able to access state benefits were she to lose her employment, for whatever reason.

51. I turn to the guidance of Thorpe LJ referred to above. That is of course predicated on the classic relocation dilemma where the decision will, if granted, impose a substantial geographical separation between the children and the non-residential parent. That is not the case here. The guidance is most relevant in directing me to consider the impact of my decision on the parents respectively. Here I have formed the clear view that the impact would, if favourable to the father, bear far more heavily on the mother than the other way around, for all the reasons which I have explained. That, for me, is the decisive factor which moves me off the knife edge in favour of the mother's proposal, which I judge to the one most in these children's interests. This is a case where, as I have indicated above, the father is the victim of his own virtues.

52. The decision that I make is based from first to last on the interests of these children. I must shut out my strong feelings for sympathy for the father at the high-handed, selfish and autocratic way he has been treated by the mother, and I must eschew any temptation to punish the mother for that conduct.

53. Although the mother expressed the view that the present shared care arrangement, giving her 14 days out of 21, and which involves the children in very frequent shuttling between the parents, was working very well, I agree with the father and Mr Power that this is a classic case for joint and equal sharing of the children's time whether during holiday periods or school time. In school time the parents should alternate weeks. It is agreed that the holiday periods will be shared equally.

54. I therefore order as follows:

    i) The mother's application to relocate the children to Australia will be granted but this will not take effect until an agreed date in the forthcoming school summer holidays.

    ii) The children will reside with both parents in Australia and their time will be divided equally between them on an alternate weekly basis in term time and on dates to be agreed in holiday time.

iii) Any disputes as to the living arrangements for the children will be adjudicated by the Family Court of Australia following the arrival of the family there.

iv) On the basis that the mother returns now to Australia she will be afforded telephone and/or Skype contact to the children on no fewer than three occasions each week.

55. I record the agreement of the parties that the divorce will be in whichever country the children and their parents live in. The father indicated that divorce proceedings had been begun here. Pursuant to the parents' agreement they should be discontinued and proceedings commenced in Australia when everybody has moved there.

56. Finally, I would repeat what I have said before. Child abduction seldom, if ever, has a happy ending. It has rightly been described as a form of child abuse. The mother's conduct was abysmal. It was an act of deliberate cruelty to her husband, the father of her children. It was directly contrary to the interests of the children for them abruptly to have been removed from the society of their father. It has subjected them to two years of uncertainty while they have been taken across the world, back and forth. It has embroiled all members of the family in extensive litigation with days in court in both countries. It has brought the mother to the brink of bankruptcy. Yet it has not been until very recently that the mother has developed any self-awareness. Her attitude was "I did not abduct them; I just took them home". This is an all too common attitude but it is as misguided as it is futile. If the place to which the children are taken is a subscriber to the Hague Convention then the children will almost inevitably be returned with all the delay and heart-break that this case has demonstrated. Had the mother behaved correctly and made an application for relocation in 2011 then I expect it would likely have been granted, and all that trauma avoided.