

IN THE FAMILY COURT AT HASTINGS  
FAMILY COURT

Sussex Family Centre  
1 Edward Street  
Brighton  
East Sussex  
BN2 0JD

Friday, 26 June 2015

Before

**MR RECORDER FAROOQ AHMED**

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BETWEEN:

N

Applicant

and

N

Respondent

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Mr Grant Armstrong (Counsel) appeared on behalf of the Applicant mother

Miss Laura Bayley (Counsel) appeared on behalf of the Respondent father

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*This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.*

## JUDGMENT

### MR RECORDER FAROOQ AHMED:

#### The decision

1. The mother's application for permission to remove the child from the United Kingdom is refused.

#### Introduction

2. I am concerned with a child called J. He was born on 15 August 2011 and is therefore aged three years and ten months. His parents are KN (aged 22) and JN (aged 23). They met in 2010, married in June 2011 and separated in January 2013, when J was about 18 months of age. The mother has a new partner, CS, and they have a baby daughter called A, aged three months.
3. The father lives with his parents in Eastbourne, East Sussex. The mother lives with CS, J and A in a one bedroom chalet in St Leonards, East Sussex, owned by her parents who live in Australia. CS came to court, but has not filed a statement and was not called to give evidence.
4. The paternal grandmother is WN. The maternal grandparents are LS and SS. They emigrated to Western Australia in May 2013 and were followed by their two sons, leaving the mother in the United Kingdom.
5. The mother applies for a child arrangements order such that J lives with her and for permission under s13 of the Children Act 1989 permanently to remove J from the United Kingdom so that he can live with her, CS and A in Australia.
6. The father opposes the application. He has made what is described as a '*deemed application*' for a child arrangements order to allow J to live with him. However, in his position statement dated 15 June 2015, he says that he seeks a child arrangements order such that J lives with him, but only if the mother is going to live in Australia without J. She has made it clear that she will not be going to Australia if J cannot go with her. Therefore, the father does not pursue an order that the child lives with him.
7. I heard evidence on 15 and 19 June 2015 and reserved judgment owing to the lateness of the hour and the need to give this difficult matter careful thought.
8. The essential issues which I have to decide are whether to give the mother permission to take J to live with her in Australia and what, if any, child arrangements order to make as to contact.
9. There is currently an Order dated 18 November 2014 that J do live with his mother in the interim (p25/7). The Order also directed that there be contact between J and his father from 10 am on Saturday until 4.30 pm on Sunday, every fortnight. In addition, there was to be Skype contact every Sunday at 2 pm. The parents were each directed to have urine tests for cannabis. They were required to file and serve statements of the evidence upon which

they each intended to rely. A Cafcass report was ordered and the case listed for a final dispute resolution appointment, with a final hearing to follow.

10. At a hearing on 7 May 2015, the contact for J with his father was increased to two overnight stays, albeit with a slightly earlier return on the Sunday. That contact was now to be Friday 6 pm until Sunday 4 pm every fortnight (p30b). Mother was given permission to file a statement detailing the impact on her and J if she were unable to move to Australia (p30a). The case was listed for final hearing.

#### The mother's case and evidence

11. In her application, the mother says that her relationship with the father broke down, that he had not had contact with J for about 7 months and that he had not been in touch with her. She says that she wishes to emigrate to Australia as her parents and two brothers are there, there is work there for both her and her partner and that J would have a much better future in Australia than in the United Kingdom.
12. In her statement dated 9 December 2014, the mother says that the father did not care for J properly whilst she was out. She was also concerned that his dog might attack the baby and that father was using a lot of cannabis.
13. The mother says that some time after they separated, she and her new partner went to live in Dorset. This was in March 2014. The reason which she gives in her first statement is that it was because of fear as there had been a lot of incidents on the council estate where they had been living. She adds that it was also because her partner's mother lived there and because there was available work there (p32/2).
14. Contact stopped on 16 March 2014 because the father allegedly returned J crying and upset, with chocolate on his face, the car smelling of cannabis and full of people (p32/end). Following this, the mother offered only contact centre contact in Dorset or that father come to Dorset to see J at her home (p33/top). In June 2014, the father's solicitors requested to take J for contact for one week every month, but mother refused. The father did not take up the Dorset home or contact centre contact. Contact did not start again until November 2014 as will be seen below.
15. Mother says in her first statement that she has a management position waiting for her in a hair salon as a hair stylist in a family business in Western Australia (p33/5). CS also has a job waiting, as a bricklayer. She says that their income would enable them to send J to a private school that and he is already on a waiting list to attend in February 2016. That joint income would be take home pay of \$7,750 per month (around £3,875) (mother's oral evidence).
16. The plan is for them to live with the maternal grandmother until they settle in. This could be for about a year. The mother said in oral evidence that they would not have to pay any outgoings. However, on page 5 of the additional bundle, she says that they will be contributing to food and utility bills. They will build a house for \$1,000 (about £500) deposit, with the rest on mortgage (35b), bringing security for them all. In the additional bundle the mother says on page 5 that in fact the initial deposit is \$2,000 and then a \$10,000 cash deposit on completion.

17. Mother says that she would get 6 weeks paid holiday. The maternal grandmother, who would be her employer, said that it would not be paid holiday. Mother says that she will bring J back to England twice a year to visit his father and family. It would be for 3 to 4 weeks in the summer and 2 to 3 weeks in the Christmas holidays as her partner has family here that he would like to visit. She says that her brothers could also bring J here. She offers her family's home in Australia for the father to stay in (p34). She also offers Skype contact as often as is wished (p35). In oral evidence, the mother accepted the Cafcass initial estimate of £10,000 for travel costs, but said that she would get a lot of financial support from her parents.
18. In the mother's second statement, dated 15 May 2015, she sets out the impact on her and J if they were unable to move to Australia. She will not move to Australia if her application fails (p35a).
19. She says that her parents moved to Australia 2 years ago. She says that she has no family left here. Whilst she is coping, she says that she is missing her family and the support that her mother and the family gave her. She has the new baby, who was born on 3 March 2015.
20. Mother says that she cannot work here, whereas she could do so in Australia as she would have support and there is work available in the family business, which could be tailored for the care of the baby (p35a). She adds that her partner was laid off work on 3 March 2015 and has been unable to find work again. They are on income support and short of money (p35b).
21. The mother, her partner, J and their baby are living in a one bedroom property owned by her parents, which is very small. With a growing family, they say that they cannot stay there and will have to rent, with its accompanying insecurity. They might have to move areas and change J's school (p35b).
22. The mother says now that she will be devastated and will feel a terrible loss of opportunity for both J and herself. The dispute has saddened her and she says that she is suffering from depression and that she has been prescribed anti-depressants (p35c/12). The way that she put it was: "I am in good health, just a bit depressed about it. The depression is not sufficiently severe to stop me from working." She added, in oral evidence, that being denied permission to take J to live in Australia would depress her even more and that it would have an impact on how she cared for her children. She said that it was very hard not having anyone to help her out. I observe that she does have CS, at least whilst he remains out of paid work. She said that it was "...not going to be possible to shield J from her disappointment. It would have an impact on J..."
23. As for contact, the mother argues that father has not been consistent with contact until the first court hearing. The father is late every time, by 30 to 60 minutes and at times he has not answered the door despite his looking through the curtains (p35c). In her oral evidence, the mother said that J would lose his relationship with his father, but then he did not see him for 8 months and that did not affect his relationship. For the last couple of weekends, father had not taken up Skype.
24. In her oral evidence, the mother repeated some of what she had said in her statements. She admitted that she and her mother had had some difficulty, but said that that was just a normal mother and daughter relationship. She was asked in cross-examination about an

incident when she was allegedly thrown out of the maternal grandmother's home when she was around 16 was 17 years of age because she and her stepfather allegedly could not get on (p37). She accepted that she was helped out of the house and that she was very angry and was trying to come back in. She denied any physical altercations with her mother. She described arguments with her as being just rows that teenagers had with their parents. She said that she had never stopped working with her mother in the family's hairdressing business as a result of rows. She stopped working with her when she had J. Maternal grandmother said that she continued to work with her whilst she was doing her assessments. She accepted that she was going to be very dependent on her mother and stepfather and that there would be stresses in her move. They had had the rows, but she was a lot older now and her children would be her main priority. She said that the last argument with her mother was in 2010. Up until then, arguments had been every couple of months or so.

25. The mother accepted in cross examination that it may be that she had moved five times in three years. She said she moved to Dorchester in March 2014 and back to St Leonards in November/December 2014. Her oral evidence was that the owners of the property in Dorset were selling it and she could not afford another deposit. She said that she had not moved to Dorset to avoid contact. She said that the relationship between J and his father was important and that she had always tried to push the relationship. She said that J loves his father. However, she said that he could not keep coming in out of his life and added: "I want him to see his father – I just want a better life."
26. When speaking about what family she had in this country, she said that her grandfather no longer lived next door and that she had not seen her natural father since childhood, except at weddings.
27. The mother give evidence about her criminal history. On 16 July 2004, she slapped someone in the face because she had thrown a carrot at her head. In 2008, she was sponsored for a walk, but did not do the walk, yet kept the £100 sponsorship money. In 2009, she took her brother's car. She explained that he knew that she had taken it but said that she had stolen it because he would have had his licence taken from him. She admitted an offence of theft by taking money out of someone's hand to get petrol. Recently, in 2014, she stole knives, forks and a mattress from a caravan. Her partner was with her at the time. She said that she would declare these matters to the Australian immigration authorities when applying for a visa. Her partner has a caution dated 17 September 2010 for criminal damage (p191). As I have said, CS was not called to give evidence. I do not therefore have his evidence on this issue, nor on the effect upon him of a refusal of the mother's application.

#### The father's case and evidence

28. In his statement dated 26 January 2015, the father expressed concern about the relationship between the mother and maternal grandmother. He says that they never got on and were always arguing, often shouting at each other. She would frequently stop talking to her family for weeks on end following arguments.
29. The father says that he was made redundant in July 2012 and that as the mother was working shifts at a care home he was the primary carer for J and formed a very close

relationship with him. He referred to J's extended family, being his paternal grandparents, two uncles, an aunt and cousins, with whom he has much enjoyed spending time.

30. Father says that when he and the mother were together, they had some discussions about Australia. However, he says that neither of them had a wish to go. He thinks that he recalls her talking about the family and friends she had here and would lose if she left. She did not want to leave them behind (p38).
31. After the parties separated, the father says that it was agreed that J would spend every Tuesday with him overnight until the middle of the next day and alternate weekends from Friday to Sunday (p38). The father says that he never turned down an opportunity to have J with him (p39). He says that out of the blue, in December 2013, he received a text message from the mother saying, "I don't need you to have J on Tuesdays any more." He states that "she simply dictated terms indicating what the new arrangements would be, whether I, and J, liked it or not." (p39/14).
32. On 12 March 2014, the mother sent a text message to the father telling him that she had moved to Dorset and that if he wanted to see him he would have to go there and pick him up. There had been no forewarning of this move. It is in the bundle at page 93 and reads as follows: "Hi I've moved to Dorset so to see J it's gonna be a 3 and a half hour drive, I haven't done this so you can [*sic*] see him I did tell you I was moving away if you didn't let me go oz, I'm happy for you to have him on the weekend and like normal but you will always have to come and get him and bring him back, and making sure you can always drop him off, and if you don't drop him off on time that will be it you wont see him again, so the choise is yours."
33. On 16 March 2014, the mother sent a text saying, "I told you I was moving to either oz or away! It was of been easier for you to let me go oz lol" (p40). Mother sent a letter to the father. There are two versions of that letter, one being dated 18 March 2014. She said that she had made a copy, but it is not in quite the same words as the original. Mother said that she had produced it from memory and had not been able to produce the copy exactly.
34. There was a further text message from the mother at 10.56 pm on 27 March 2014, the night before J was to be collected for contact. It said "Your not having J this weekend, my letter will explain" (p40).
35. The father has produced a number of copies of text messages. They include the following. 31 January: "...you have the right to go to the csa. However you don't have the right to stop me seeing my son!" Mother replied: "I've done csa lol. Oh yes I think you find I can." The father says that the mother stopped him from seeing J for some months following the March texts.
36. Father says that the mother has moved 6 times in 12 months (p42). At the time of her application she was living in Dorset. On 1 December 2014, she moved back to East Sussex. The Order for contact made on 18 November 2014 was when mother was living in Dorset. As the mother had moved back to East Sussex on 1 December 2014, father's solicitors wrote to request an increase in contact to a full weekend, but mother refused. The current contact is alternate weekends staying contact, the father travelling 15 miles for collection. He says that he is occasionally a couple of minutes late.

37. In oral evidence, the father said that the mother's grandfather still lives next door to her and that he saw him last Sunday. He also said that he and the mother used to go and visit her natural father when they were together. He said that the mother sees one of her cousins regularly and they used to visit her.
38. Father said that the mother and maternal grandmother stopped working together after an argument. They argued frequently whilst they were together. The arguments were not as aggressive as J was now around and grandmother wished to see him. Father thinks that it is a bad idea for mother to live with her mother and does not think the arrangement would last very long. If they argue, they will not talk to each other for a couple of months, as in the past, he says.
39. Father does not believe that the mother would bring J back to see him. He would find it difficult to stay with the mother's family as the two families do not get on. He says that he could not afford to go to Australia. He adds that the rest of the paternal family would not be able to see J and that he will miss them. He agrees with the recommendations of the Cafcass report.
40. The father denies that there was any cannabis smell or that there was chocolate around J's mouth as alleged by the mother. He had stopped using cannabis around September 2014.

#### LS's evidence

41. I heard evidence from LS, the maternal grandmother. She had come from Australia with her husband, SS, and had been here for a few weeks. They were due to return to Australia the next day (20 June 2015).
42. The maternal grandmother said of the plan to build a house that the deposit was \$2,000. In addition, \$10,000 was given by the government as a further deposit, which did not have to be paid back. As to costs of flights, she said that they would be about £2,000 return. She offered accommodation in her own home or nearby for the father and the paternal family. The maternal family would pay for flights and accommodation for the father and paternal family. She said that the paternal and maternal extended family got on with each other. The maternal grandmother denied that arguments had resulted in the mother ceasing to work in her salon. She said that they had never not spoken for months at a time and described a very close family unit.
43. SS referred to HQ Migrations Solutions as being a government agency to do with obtaining visas to enter Australia. She said, however, that they charged a fee for their services. She was asked for detail about her salon business. She earns \$70,000 a year, after tax. She intends to pay mother \$35,000 a year. The business has been going for a year and she is putting a lot of time and effort into building it up. She said that she could help with the child care.

#### WN's evidence

44. WN is the paternal grandmother. She gave evidence that she has known mother and her family since 2010. She had seen mother and maternal grandmother arguing and shouting at each other on an occasion when mother had used washing up liquid on the Vax machine, in 2011 when J was a baby. She said that mother gave no reason for stopping the Tuesday

contacts. She knew nothing in advance about the move to Dorset and said that they had 2 days to get down to Dorset before the mother's deadline expired. They picked J up and that was the last weekend that they saw him until December 2014. She accepted that she could cooperate with maternal grandmother. However, she said that she did not know her that well and that it would be very awkward to stay with her in Australia. If WN went to Australia, she would have to take her 14 year old son, and was not able to afford it. As to the mother's family being in the United Kingdom, she said that she had seen maternal grandfather just two weeks ago. She said that mother's cousin T was here and that maternal great grandmother was in Bexhill.

#### Benefits and detriments of the proposed move to Australia

45. I will set out the possible benefits and detriments of moving J to live in Australia and of his remaining here, before I make any findings and depending on my findings. I deal with these matters at paragraph 81 onwards below.

#### Demerits if J stays in the UK

- Mother feels isolated and unsupported here
- She has little or no close family here
- She is unable to go out to work
- Her partner is unable to find work here
- The family is living on income support
- The family lives in a one bedroom chalet, housing 2 adults and 2 young children
- J would have to go to a State school which might not be as good as a private one
- Mother would feel devastated and it might affect the care that she gave to J

#### Merits of staying in the UK

- J would be able to maintain and build his relationship with his father and paternal family through frequent contact

#### Merits of moving to Australia

- Jobs waiting for mother and her partner
- J would be better provided for as there would be more money
- The mother would be less stressed as there would be support from family
- Her depression might be lifted
- She would be with her family, whom she misses
- The family would be able to buy a house
- J could have a private education
- The quality of life may be better

#### Demerits of moving to Australia

- J might lose all face to face contact with his father and paternal family
- He might be harmed by that loss
- Mother might fall out with her mother and lose her job



## The law

46. I have had regard to the case law that deals with the principles applicable to applications permanently to remove children from the United Kingdom and it is not necessary to set them all out here. Mostyn J sets out in *Re TC and JC (Children: Relocation)* [2013] EWHC 292 (Fam) a helpful summary of the principles derived from the relevant cases, including *Payne v Payne* [2001] 1 FLR 1052. At paragraph 11 Mostyn J states the following:

- 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 than 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.

### Findings and analysis

47. I am satisfied that the mother genuinely wishes to move to Australia with J and also that the father's opposition to the proposal is motivated by genuine love for his son and the desire to maintain and build a relationship with him. I do not consider that the purpose of the mother's intended move to Australia is to make contact difficult for the father. However, I find that she has placed obstacles in the way of contact. She considers that she can stop contact or make it difficult if she wishes. She has done so in the past and is highly likely to do so in the future, if she is so minded. It would be very difficult if not impossible for the father to make an application to an Australian court to obtain an order for contact. The result would be that contact would not take place, that it would be restricted or be indirect only. The evidential basis for that finding starts with the text messages and what the parents say about them. I find that in December 2013, for no good communicated reason, the mother stopped the Tuesday overnight contacts, by text saying "I don't need you to have J on Tuesdays any more." She places the emphasis on her needs, rather than on J's needs as she should have done. Although she said in oral evidence that it had been because of J's pre-school, she did not give the paternal family any reason, nor did she discuss it with the father first. The Tuesday contact was never reinstated.
48. On 31 January 2014, the father sent the text saying that the mother did not have a right to stop him seeing his son, to which she replied, "Oh yes I think you find I can." I accept the father's oral evidence that she stopped him from seeing J for some months after the March 2014 texts.
49. I find that she moved to Dorset without informing the father in advance and that she sent him the text message dated 12 March 2014. I am concerned about her threat that if he does not drop J off on time, that will be it and he will not see him again. I do not accept her evidence when she told me that she had not meant it. That is supported by the evidence that she did in fact stop contact. Contact was then denied for the weekend of 28 March 2014, as appears from the text of the day before, stating, "Your not having J this weekend, my letter will explain." This had been threatened by text message dated 16 March 2014: "If you can't stick to what I say JN you won't see him!" The further text from the mother that day does not bode well for the complex arrangements that will be required to and from Australia: "Why should I have to, you want to see him. You sort out arrangement!" (page 96).
50. The father says that he received the version of the letter which is undated and starts "To JN." The mother's reasons for denying contact that weekend as set out in the letter were that she had deep concerns about J's welfare in father's company. She says that on many

occasions when she has met him in his car there has been a strong smell of cannabis, he has had slurred speech and blood shot eyes and that that had been the case last weekend. I do not accept the mother's evidence that the car smelt of cannabis. Had it done so, she would not have allowed unsupervised contact thereafter.

51. The mother also says that father was texting the whole time that he was driving and that he gave J a chocolate bar at 9.15 pm, which was too late in the day. She says that J was brought back too late, at 10.15 pm, and that J was consequently very miserable and tired for nursery the next day.
52. She expresses concern about the dog possibly biting J. I consider that to be without basis, especially as the dog lived with them both when they were together. I rely on the mother's oral evidence: "We had the dog together when we were married."
53. The mother goes on to say that father must have contact only in a contact centre in Dorset (page 103) so that she knows that he is safe and that father is drug free. The father did not take that up as he wanted unsupervised contact, not at a contact centre and not in Dorset. His solicitors sent mother's solicitors a letter dated 2 June 2014 asking for contact to be restarted and for it to be in the father's home area with a pattern of one week in every 4. The mother issued her application to take J to live in Australia on 17 October 2014. A contact order for staying contact every other weekend was made by the court on 18 November 2014. It was either made by consent or the court must have been satisfied that father would provide reasonable care for J during contact, or the order would not have been made. At that time, the mother was living in Dorset. However, when she moved back to East Sussex on 1 December 2014, the mother's solicitors were sent a letter dated 11 December 2014 asking for contact to be extended to 2 nights so as to start on Fridays as the distance between the parties' homes was no longer a problem. The mother declined to agree to any increase. I see no reason for her not to have done so, especially as on 7 May 2015 the Court increased the contact to 2 nights.
54. I find that the mother was genuine when she said that J loves his father. However, I do not consider that she regards the relationship with him as being important. An example is in her application itself at page 5 where she says that father has not had any contact with J since March 2014, and that nor has he attempted to contact her and she wishes to emigrate. That was misleading because there is a letter at page 111 dated 2 June 2014 from father's solicitors requesting contact. She has also said that there had been a meeting about mediation. The impression that she sought to give was of a father who had chosen to stop seeing his son and who was not interested in him – therefore she should be allowed to take him to live in Australia. She is willing to try to mislead the court to get what she wants.
55. The mother feels that she has the power to stop contact, especially if the father does not comply with her terms. I give considerable weight to the text messages which reveal the mother's attitude to the father and contact as being peremptory, controlling and at times unreasonable. This is likely to re-emerge from her being in a new family unit in which she feels that demands are being made on her time by father's continuing involvement in their lives. The history of contact and the texts give a glimpse of the likely future of contact, especially when so much time, money and effort will have to be expended to turn it into reality for J and his father. The mother did not offer to meet the father even half way when she was requiring him to make a 3 and a half hour journey to Dorset. That makes it doubtful that she will make the much greater effort required to travel twice a year from Australia to

England for contact. Contact is likely to be given a low priority by the mother because of the cost, time and effort. The cost was agreed by the mother to be £10,000 a year. It is likely to be much lower at around £6,000 if one looks at the new figures in the supplemental bundle. Even so, I cannot see that she and her partner will bring J all the way to England, particularly at such a high cost, hand over J to his father and occupy themselves for 3 to 4 weeks in the summer whilst father has contact. They might do it once, for a week or two, but they are unlikely to repeat it and not for 3 to 4 weeks at a time. They will want to choose where they go on holiday and they will want to spend Christmas in Australia sometimes. The offer of contact for extended periods in England is not grounded in reality and is not likely to be achieved. I find that the father cannot afford to take up contact in Australia. I accept that he is acting reasonably in not accepting the offer of free accommodation with the maternal family, because of the tensions and feelings of obligation that there would be. In my view, any future contact would be or eventually become just through Skype and not face to face direct contact with the father and J being in the same place together.

56. It is in that context that I turn to the evidence of Ms Marie-Elza Henderson, the author of the Cafcass report. I found her to be a good witness who had considered the issues in the case with some care. As Mr Armstrong submits, I am not bound to agree with her reasoning or her recommendations.
57. Ms Henderson considers that J is too young to have a conscious understanding of these proceedings. It follows that his wishes and feelings about a move to Australia cannot reliably be ascertained. I agree, but add that it may be assumed that he would want to live in a reasonably safe, happy household where his welfare needs were met and that he would want to see his father and have a relationship with him which could be built upon as he grows.
58. Ms Henderson recognises that to move a three-year-old child permanently from the jurisdiction to the other side of the world is a decision of the utmost gravity and will have irreversible implications in respect of J's identity, family relationships and emotional development into adulthood (p192/10).
59. Ms Henderson refers to cannabis use. Each parent has used cannabis in the past. The mother says that in her case it was only at parties, some years ago. The latest drug test from father is from a sample taken on 26 May 2015, which was negative. There is no evidence of current cannabis use.
60. Ms Henderson suggests that it may be of benefit for the court formally to determine why contact between J and his father broke down in 2014. I was impressed by the father and I am entirely satisfied that he is close to his son and wishes to spend as much time as possible with him. I find that contact broke down in 2014 because of the mother's sudden move to Dorset. The travelling time increased to 3 and a half hours each way, which made it very difficult for the father to have contact. I find that the car did not smell of cannabis because I accept the father's evidence that he did not use cannabis in the presence of J. Further, I find that the mother wrote in her explanatory letter that on many occasions the father's car smelt strongly of cannabis and that his speech was slurred. Had that been true, I find that the mother would have stopped contact immediately. She would not have allowed J to be taken away by his father had he been in that state even once whilst he had care of J away from her.

61. Ms Henderson's opinion is that for a secure bond to be developed between the father and such a young child as J, it is very important that J sees his father often and consistently. She says that this means at a minimum weekly frequency. She considers this to be even more important where there has already been such a significant break down of the arrangements, as the case is here (p194/24). That demonstrates that she is considering *this* child and that she is not generalising. She suggests that it would be very difficult for J to adjust to spending periods of time being cared for by his father after not seeing him for two or more months. She foresees that J would struggle to cope with moving from the full-time care of his mother to being in the full-time care of his father after such lengthy gaps of time. It follows from that that even if the mother brought J to England for contact as she says she will, the proposal of placing him in his father's care for several weeks at once is unlikely to meet his welfare needs. Ms Henderson observes that if J is not able to spend time with his father often and consistently, the relationship between them will be substantially weakened over time. J is also likely to experience significant separation anxiety in periods between seeing his father. J's anxieties might lead to some 'acting out' behaviour before after contact. In such a scenario, Ms Henderson foresees that the scope for conflict between the parties over arrangements will increase, with the risk of another serious breakdown in arrangements. In my judgment, this would be disastrous for J. Ms Henderson is of the view that it would be harmful for J to grow up feeling emotionally distant from his birth father and that this outcome is much more likely if J is not able to enjoy a consistent and regular relationship with his father at this unique and formative stage of his emotional development. She says that Skype and telephone time are helpful, but with such a young child these forms of communication cannot replace regular one-to-one time, with physical affection, hands-on care and periods of fun and play. I accept these observations.
62. Ms Henderson noted that the mother was not an Australian who wanted to go back to her home country. The mother had lived in this country all her life. She did not accept that the mother would be devastated by a refusal of permission to go to Australia. She thought that the mother would be saddened, disappointed and frustrated. Her opinion was that mother had managed very well so far. She would cope and continue to offer good enough care to J. There was no psychiatric history to suggest that she would not be able to cope. The stage that J was at now required giving priority to his developmental needs. I agree with this evidence.
63. Ms Henderson appeared to be implying that she had a general principle in respect of applications to take children of this age to the other side of the world because of the effects on the nature and frequency of contact. I consider that any such general principle would be erroneous as the welfare of every child has to be considered specifically for that child. Ms Henderson made it clear in her oral evidence that did not take a generalised view about a child; she was looking at this particular child.
64. It was put to her that it followed from her evidence that no child under 3 could be relocated [ *to somewhere as far away as Australia*]. She said that she was not saying that. She explained that "There is a strong presumption for both parents to have a relationship with their children. It would take exceptional circumstances to sever the relationship between a father and a child this young. The travelling time is another problem. The relationship will not be preserved." She added: "I would expect exceptional circumstances for this child to be moved now to Australia."

65. In my judgment, there is no requirement of 'exceptional circumstances' to be shown before J could move to Australia. It is the matters set out in the case law which have to be considered and the welfare checklist, the welfare of the child being paramount.
66. Despite the criticisms of the Cafcass report, I am still able to extract from the Cafcass report material and advice upon which I can properly rely.
67. Contrary to the submission made on mother's behalf that Ms Henderson does not acknowledge the mother's proposals, she specifically does so at page 192 and in oral evidence.
68. Ms Henderson has taken into account, as have I, that the mother's case is that the father is not committed to his relationship with J and will not consistently take up time with him if this is offered and that he will neglect his essential care needs. Ms Henderson observes that because the father now lives with his parents, there will be substantial daily support and monitoring in respect of meeting J's care needs. She is satisfied that the paternal grandmother is an experienced and responsible carer who was able to demonstrate her understanding of J's needs to her at interview. I agree with Ms Henderson's assessment.
69. The point was made by Mr Armstrong that there had been a regular pattern of contact from January 2013 until March 2014, mother having facilitated contact. Ms Henderson replied that she wanted regular contact to continue until he was older. She said that J's attachments were still forming and quite fluid. His sister, A, would be calling CS daddy and he, also, will come to see him as his father figure, in place of his real father. I think it likely that that will be the case and that the importance and significance of his real father will quickly diminish and as he gets a little older he will be reluctant to leave what he sees as his family and all that the outdoor way of life has to offer, to instead spend several weeks with his father, someone with whom he has little real connection for most of the year. That is what Ms Henderson is getting at when she expresses concern about the difficulties for J in moving from his mother's and CS's care into the care of his father for several weeks at a time. I do not consider that J would feel stable and be able to adjust and to find his place again in the paternal immediate and extended family.
70. I do not think that the mother is opposed to contact in principle. It is rather that she would prefer it if the father were no longer in the life of her new family, and if contact is to take place it must be on her terms and if those are not adhered to, contact will stop, even if possibly only temporarily.
71. I agree with Ms Henderson when she says that Skype is not the same thing as being picked up from school, being given a bath, having meals together and physical affection. Skype was better than a telephone call, but not as good as being physically present.
72. Ms Henderson comments on whether the dog appears to be dangerous. This is something which she is not qualified to assess. However, historically the dog has been taken out of the premises elsewhere whenever J comes to the house to visit.
73. Ms Henderson advises an increase in contact by having at least one further overnight stay in the week that he does not see his father. She further suggests the mother should be given permission to travel to Australia for extended periods once a year for 6 to 8 weeks before J start school and for 4 to 6 weeks once he has started school. I consider that it should be

for a maximum of 3 weeks at any one time to maintain the benefits of the need for frequency of contact with the father that Ms Henderson advocates.

74. Ms Henderson has considered the financial circumstances in this country for the mother. She has the use of a chalet, owned by her mother. CS has as good a chance as anybody else of getting a job. Mother is an independent person, able to make her own way.
75. When Ms Henderson spoke to her, the mother was focused on denigrating the father and could not think of a single positive thing to say about him. However, having read the Cafcass report, Ms Henderson thinks that the family has moved on and that mother is not quite as negative about the father. She wonders whether the mother and her family will make the huge effort to maintain the contact. She notes that it would be very difficult to enforce any orders for contact. She observed, "It is easy for promises to the court to dwindle." She noted that both parties had reported to her at court on Friday 19 June 2015 that contact had been going well. She regarded the time that father did not see J as water under the bridge, as do I.
76. I find that the father is committed to his son and wishes to spend as much time as possible with him. I do not think that he did not accept the offered contact centre contact because he did not want to see J. He wanted unsupervised contact and to be allowed to take J away with him, as before. I can understand that if contact moved to a contact centre the father may have thought that it would stay there. He should perhaps, however, have taken up those offers of contact, even if it meant it was at the contact centre, although I can see that that would have been very difficult for him to do if he had to travel all the way to Dorset. Now, as the parties live close to each other, Ms Henderson advises an increase in contact.
77. Ms Henderson finished her evidence by saying that the welfare of J was what she had thought about. She has looked at the welfare checklist. Her focus is on the impact on J. She is trying to predict how J will be at the end of his childhood. That has formed a significant part of her reasoning and recommendations. I agree with her observation that the focus has been on the maternal family whereas the focus should be on J and his parents.
78. Mr Armstrong criticises the Cafcass report in a further number of respects. He argues that there is no proper consideration of the effect of refusal on the mother. However, at page 198 Ms Henderson says that she anticipates that mother and maternal will be extremely disappointed. She expanded on that in oral evidence. When she wrote her report, the mother's second statement dated 15 May 2015 was not available. It is only in that statement that the mother refers to the effect on her of refusal. She refers to it there because she was specifically given permission by order dated 7 May 2015 to set out the impact on J and her if she is unable to go to live in Australia. I consider that she has greatly overstated the likely effect on her of refusal, especially as she makes no reference to it in her first statement. The impact on the mother of refusal is dealt with by Ms Henderson and I have taken it into account in any event as follows.
79. The mother says that she will be devastated if her application is refused. 'Devastated' is a strong word. Having seen her give evidence, I do not consider that she would be devastated. As with anyone else in her situation, she will be very disappointed. Apart from some occasions to do with contact between J and his father, she is a good mother. I consider it highly unlikely that she will allow her care of J to be adversely affected by her disappointment. She has not produced any medical evidence of her depression or of her

being on medication, but even if she is depressed, she told me that it was because of the dispute, the decision not yet having been made. She also said in evidence that it was from not having the support of her family. She told me that the depression is not sufficiently severe to stop her from working.

80. This is not a case of separation of a couple if permission to relocate the child is not given. The mother and CS will be remaining together, whether here or in Australia.
81. The demerits if J stays in the UK include the following. The mother feels isolated and unsupported here. I accept her evidence that she has little or no close family in the United Kingdom, certainly none to give her the support that she seeks. She is unable to go out to work, having two very young children and no family support. Her partner has been unable to find work since March 2015. However, bricklaying is a wanted specialist skill and there is a real possibility that he will find work sooner or later. In the meantime, however, the family is living on income support in a one-bedroom chalet housing two adults and two young children. That said, the chalet can accommodate them all for the time being. Also, they live rent free and I have no doubt that her parents will provide them with further financial support if required, as they have done thus far. J would have to go to a state school. It may or may not be as good as the private school proposed in Australia.
82. The merits of J staying in the United Kingdom are that J would be able to maintain build his relationship with his father and paternal family through frequent contact. He would not suffer the adverse effects of lack of frequent contact and of suddenly being transferred twice a year to the care of his father identified by Ms Henderson.
83. The merits of J being allowed to move to Australia include the following. I am satisfied that there are jobs waiting for mother and her partner. I have seen a letter which is CS's job offer. The mother gave oral evidence that the offer had been extended until the end of this case, which is not very long. However, there is probably a good chance of other vacancies for bricklaying work, as there are for hairdressers. I accept the mother's and maternal grandmother's evidence that there is a job available to the mother. I do not think that the maternal grandmother would dismiss her daughter's employment, even if they had a row. They are a close family, as demonstrated by the maternal grandmother coming to England for this hearing. She knows that if she fell out with her daughter, it would have an adverse impact on her daughter and on J. Further, she would not be likely to risk her daughter restricting or even not letting her see J at all. J would be better provided for as there would be more spare income. The mother would be less stressed as there would be support from family. Any depression which she currently has is likely to lift. She will be with her family, whom she misses. The family would be able to buy a house. J could have a private education, which may be better than a state provided one. The quality of life may be better.
84. The demerits of moving to Australia include the following. J is likely to suffer the harm identified by Ms Henderson as a result of the proposed contact arrangements and harm if contact does not take place.
85. I will follow the guidance set out in *Re TC and JC (Children: Relocation)* [2013] 2 FLR 484.



86. I find that the mother's application is genuine in the sense that it is not motivated by some selfish desire to exclude the father from J's life. That is agreed by both parties in any event. However, the mother is likely to place obstacles in the way of contact and to make it more difficult if the father puts a foot wrong. She is likely to do that wherever she is.
87. As to whether the mother's application is realistically founded and whether the practical proposals are both well researched and investigated, in some respects they are and in others less so.
88. There is no independent evidence as to whether the couple would be able to obtain a mortgage to build and own a property, but I am satisfied that J will be adequately housed somewhere, whether in the home of maternal grandmother or in rented accommodation.
89. As for education, a place at the proposed school is dependent on availability and interview. However, I am satisfied that a suitable school will have a place for J, even if it is not that one.
90. The mother has not yet obtained a visa. I drew the attention of the parties to Fact Sheet 79, produced by the Australian immigration authorities, which sets out in clear language that there are stringent character requirements applicable to everyone who wishes to enter or stay in Australia. Of relevance to this case are the mother's and her partner's encounters with the British criminal justice system. It may be that the Australian immigration authorities ignore these matters or it may be that a visa is refused because of them. Either way, it is not something that the mother had considered before it was brought to her attention in the witness box. She had thought that her application for a visa would not be scrutinized separately as she considered that the application was for a family visa.
91. The letter from HQ Migration Solutions, a commercial provider of visa services for a fee, is at page 1 of the supplemental bundle. Its value is that it tends to support the reliability of Fact Sheet 79. I do not accept that it can be said that the mother has a strong case for meeting the character requirements. The difficulty is that if an applicant's past criminal *or general conduct* shows that they are not of good character, they will not pass the character test, although there appears then to be a discretion to grant a visa notwithstanding the history. I consider that the mother's and CS's conduct histories will have to be disclosed by them in full to the Australian immigration authorities. Otherwise, they risk the later cancellation of their visas and removal from Australia. I have dealt with these matters as part of my consideration as to whether there has been proper planning. The fact of whether or not a visa is granted is not determinative of the application for permission to remove J from the jurisdiction. The visa might be granted. If it is not granted, the mother cannot go to Australia in any event.
92. I have already dealt with the likely impact on the mother of a refusal of her proposal. She would be disappointed but I do not think that would significantly adversely affect the care that she gave to J. The maternal extended family could visit mother and J here for a few weeks at a time, as they have just done. I find that they are willing to help the mother financially wherever she is.
93. I have no hesitation in concluding that the father's opposition is motivated by genuine concern for the future of J's welfare and is not driven by some ulterior motive.

94. I have dealt with the extent of the detriment to the father and his relationship with J and the impact on J were the application to be granted.
95. As to the extent to which the detriment to the father and to J would be offset by extension of the child's relationships with the maternal family, I find that J would benefit enormously from being immersed in his maternal family in Australia. However, the harm to him from seeing his father in the way proposed by the mother would be as set out by Ms Henderson.
96. I have had regard to the welfare checklist. J is too young for his wishes and feelings about the application to be reliably ascertained. His physical needs would be met whether he stayed here or moved to Australia. His emotional needs would be unlikely to be met if he moved to Australia as he would suffer the emotional and/or developmental harm set out by Ms Henderson as a result of not seeing his father in person frequently. His educational needs would be met to possibly different but probably adequate standards, whether in the United Kingdom or in Australia. He would benefit from the change in his circumstances which a move to Australia would bring. There would probably be more disposable income for the family, larger accommodation and a sense of greater belonging in the extended maternal family. The father is capable of meeting J's needs, particularly as he has the support of his own mother with whom he is living. The mother is capable of meeting J's needs. The court could make a child arrangements order, including as to with whom the child is to live and with whom he shall have contact and the nature and level of such contact. It could also make a family assistance order. However, that has not been shown to be better for the child than making no order and was not discussed with Ms Henderson or the parties as is required by Practice Direction 12M. The court could make a prohibited steps order preventing removal from the United Kingdom save for specified times. However, I do not make such an order because there is no evidential basis for it. Ms Henderson did not recommend it and neither party submitted that such an order should be made.
97. I have found this to be a very difficult and finely balanced decision. Different weight attaches to each factor in support of and against the granting of permission to go to Australia, which I must balance and weigh.
98. It would very exciting for this little boy to start a new life in what appears from the photographs to be a desirable place, to be a close part of the extended family and to be with his mother who plainly wishes to move there. However, that is a superficial and overly rosy picture. The reality is likely to be that the mother will become more detached from this country as she invests in her new life. Bringing J all the way to England to be apart from him for up to 4 weeks at a time is not something to which any of the maternal family are going to feel committed, least of all the mother herself. Meaningful contact is likely to fizzle out and the father will not have the financial resources to do anything about it. Like the mother, he was doubtful that he could afford legal representation for a third day of this hearing in England. He is unlikely to be able to afford a hearing in Australia, especially after paying the cost of getting there and for accommodation and subsistence.
99. It is J's welfare which is paramount. As I have said, the mother's disappointment is unlikely adversely to impact on J; she will continue to provide him with reasonable and probably very good care. She would have to cope with the disappointment if she were to be refused a visa, even if I gave her permission to take J out of the jurisdiction and I am satisfied that she would cope. The mother's disappointment will pass and she and her new

family will continue to make a life here. They will be able to go for extended periods to Australia to see the extended maternal family. I have no doubt that the maternal grandparents will be happy and able to fund those trips if the mother and CS cannot afford it themselves. The maternal grandparents and uncles will be visiting England from Australia from time to time and so J and mother will probably see them in addition to her visits to Australia. Keeping J living in England allows him to maintain a proper relationship with his father and yet at the same time he will be able to spend a good deal of time seeing his maternal extended family in Australia. The mother will be able to do the same, which will ameliorate her missing her parents. The mother and CS are managing financially despite having only income from State benefits and being in a small chalet. They do not need to move to Australia for those reasons.

### Conclusion

100. In my judgment, carefully weighing up all the relevant factors and the advantages and disadvantages of J being allowed to go to Australia, the balance falls against his permanent removal from the United Kingdom. In doing so, I have balanced the article 8 rights of the mother to respect for her private and family life in being allowed to take J to live in Australia against the like rights of J to have a meaningful and significant relationship with his father. The application for permission to remove J permanently from the United Kingdom is refused.
101. Reference has been made by Ms Henderson (p198/45) to the possibility that when J is older, perhaps 8 or 9 years of age or older, the mother may wish to apply again for permission to remove J from this country to live in Australia. I would not encourage that hope. Although the suggestion is to obtain the father's permission through mediation, if he does not agree it will have to be by application to the court. The factors for the court to consider then will not all be the same as they are now. Whilst J might well be able to give a reliable view about his wishes and feelings, he will have established and consolidated a strong attachment to his father and probably also to other members of his paternal family. Those attachments will be precious and a court is unlikely to trample over them without very good reason.

### Orders

The orders which I make are that:

- 1) The mother's application for permission permanently to remove J (dob 15.8.11) from the United Kingdom be refused.
- 2) There be a child arrangements order that J shall live with the mother, KN, and shall spend time or otherwise have contact with his father, JN, as set out in this Order.
- 3) The mother do deliver up J to the father for time to be spent with him as follows:
  - a) Each alternate weekend from 6 pm on Friday until 4 pm on Sunday
  - b) From 6 pm on Wednesday of each intervening week until 9.15 am the following day.

- c) For 3 weeks, which shall be taken in two separate blocks of 1 week and 2 weeks, but may be in one continuous block if the parties agree in writing, in the summer school holidays and specifically for 2015 from 6 pm on 14 August 2015 until 4 pm on 30 August 2015.
  - d) For half of the remaining school holidays.
- 4) The mother may have liberty to take the child to Australia for a continuous block of, but not exceeding 3 weeks, on one occasion each year, save that for only 2015 the mother may increase the maximum duration of the visit to 4 weeks and the father's summer holiday contact referred to in paragraph 3(c) above shall be reduced for only 2015 from 3 weeks to 2 weeks.
  - 5) During periods when the child has holiday staying contact with either parent, the normal contact schedule will be replaced by the holiday contact.
  - 6) The parties are at liberty to agree to different contact arrangements from those set out in this Order, provided that such agreement is in writing.
  - 7) There be no order as to costs.