

[2021 Gib LR 455]

MOTHER v. FATHER

SUPREME COURT (Ramage Prescott, J.): August 11th, 2021

2021/GSC/24

Family Law—children—removal from jurisdiction—mother refused permission to relocate to United Kingdom with children as not in best interests of older child

A mother applied for permission to remove children from the jurisdiction.

The mother and the father were both born in the UK. They moved to Spain in 2008 and to Gibraltar in 2014. They had two children, who were born in Gibraltar. The mother and father separated in September 2020 and the mother applied for a specific issues order pursuant to s.25(1)(d) and s.27(4)(a) of the Children Act for permission permanently to remove the children from Gibraltar to live in the United Kingdom.

The mother was employed in Gibraltar but her financial situation was difficult. She wished to return to the United Kingdom, to live with her parents. She was on medication for depression but the court was not provided with expert evidence as to the cause of her depression. The father was also employed in Gibraltar. Since the parties' separation he had become more involved in the care of the children. He opposed the mother's application to relocate and would not move to the United Kingdom if the application were granted.

The parties shared the care of the older child equally but the younger child spent more time with the mother. The older child was distressed by the parties' separation and did not want to relocate to the United Kingdom. His behaviour had become difficult, including a threat of self-harm, and he was receiving therapy in Gibraltar.

Held, dismissing the application:

(1) Section 4(1) of the Children Act provided that when a court was determining any question with respect to the upbringing of a child, the child's welfare would be the court's first and paramount consideration. Section 4(2) provided that a child's welfare would best be promoted by a continuing relationship with both parents, as long as it was safe to do so. When considering whether to make an order pursuant to s.25 of the Act, the court must have particular regard to the welfare checklist set out in s.4(3) (paras. 9–10).

(2) The court considered the evidence and facts specifically as against the welfare checklist. The material issue regarding the prospective relocation was the emotional challenge that the parties' older child was facing. His emotional instability had manifested itself with a threat of self-harm, and difficult and confrontational behaviour towards the mother. The court was of the view that in the circumstances the removal of the child from the home environment which he had always known, and from his father, would very likely have a detrimental effect on his wellbeing, and that such a move without the assurance of prompt continuation of therapy would likely have an even greater detrimental effect on his wellbeing. The court did not ignore that dismissal of the mother's application would cause her distress and deprive her of the family support which she sought. However, the court had to focus on the best interests and wellbeing of the children. The court had no doubt that at this time it was in the older child's best interests to remain in Gibraltar. Although the younger child could adapt to life in the United Kingdom with greater ease, it was in the children's best interests that they remain together. It was therefore also in the younger child's best interests to remain in Gibraltar. The mother's application would be dismissed (paras. 41–54).

Cases cited:

- (1) *F (A Child) (International Relocation Cases), Re*, [2015] EWCA Civ 882; [2017] 1 FLR 979; [2016] 2 F.C.R. 368; [2016] Fam. Law 565, considered.
- (2) *F (A Child) (Relocation), Re*, [2012] EWCA Civ 1364; [2013] 1 FLR 645; [2012] 3 F.C.R. 443; [2013] Fam. Law 37, considered.
- (3) *K v. K (Children: Permanent Removal from Jurisdiction)*, [2011] EWCA Civ 793; [2012] Fam. 134; [2012] 2 W.L.R. 941, [2012] 2 FLR 880; [2011] 3 F.C.R. 111, considered.
- (4) *Payne v. Payne*, [2001] EWCA Civ 166; [2001] Fam. 473; [2001] 2 W.L.R. 1826; [2001] 1 FLR 1052; [2001] 1 F.C.R. 425, considered.

Legislation construed:

Children Act 2009, s.4(1): The relevant terms of this subsection are set out at para. 9.

s.4(2): The relevant terms of this subsection are set out at para. 9.

s.4(3): The relevant terms of this subsection are set out at para. 10.

A. Balestrino (instructed by Phillips) for the claimant;

L. Armstrong (instructed by Ellul & Co.) for the respondent.

1 **RAMAGGE PRESCOTT, J.:** This is an application by the applicant ("Mother") for a specific issues order pursuant to s.25(1)(d) and s.27(4)(a) of the Children Act ("CA") seeking permission to permanently remove the two children of the family from the jurisdiction of Gibraltar to live in the United Kingdom.

Background

2 Mother is 37 years old, the respondent (“Father”) is 39 years old. Both parties were born in the UK, they have been in a relationship since 2003. In 2008 they relocated from the UK to Spain, and started working in Gibraltar shortly after. In 2014 they moved to Gibraltar. Both children were born in Gibraltar. The parties separated in September 2020. Child 1 is due to start secondary school in September 2022. Child 2 attends private nursery and is enrolled to start at a school nursery in September 2021.

3 Mother works full time from 8.15 a.m. to 5 p.m. and earns £1,783 net per month. Mother lives in the former matrimonial home, and rental on that property amounts to £1,100 per month, nursery fees amount to £350 per month. Mother estimates that her monthly outgoings amount to £2,608.33, with an additional £300 nursery fees for Child 1 in the summer months. As from September 2021 the £350 per month nursery fees in respect of Child 2 will not be payable, although nursery fees will still need to be paid over the school holidays.

4 Father earns £282 per week. He rents a one bedroom property for which he pays £670 per month inclusive of utility bills. Father pays maintenance for the benefit of the children in the sum of £80 per week. Father has placed a cot and a sofa bed in his apartment to be able to accommodate the children.

5 Mother, in her first affidavit of November 18th, 2020 adopted by her in evidence, states that she has been on anti-depressants since 2014 because financially she is finding it very difficult to cope; she states that the stress and anxiety caused by lack of money has taken a toll on her mental health. She states that “I am in need of my family’s support and I am missing them so much. I have virtually no support here in Gibraltar.” In her second affidavit of March 8th, 2021, also adopted by her in evidence, Mother states that she was prescribed anti-depressants in 2004 due to her unhappiness in living in Spain and the fact that she desperately wanted to return to the UK and also because she was living with abuse from Father who insulted her and “blurred his days with drink and drugs.” Mother came off the anti-depressants in 2016 but was prescribed them again in 2018 after the birth of Child 2 to help with post-natal depression. Her evidence is that she remains on the medication. There is an indication in Mother’s evidence that her depression was caused partly by Father’s behaviour and partly by her wish to return to the UK. There has been no medical evidence to confirm or explain Mother’s depression. Whilst I accept her evidence that she has been depressed, without expert evidence on the cause of the depression, there is some doubt in my mind as to whether the cause is her wish to return to the UK, or the breakdown of her marriage, or the birth of her daughter (post-natal depression); it may be that it is a combination of the three.

6 At the start of this process some months ago Mother raised concerns about Father's use of alcohol and drugs. Father accepts that prior to Covid lockdown restrictions, he would go to the pub two or three times a week to watch football and "have a few pints of beer." Father states that since the parties' separation that practice has "gone down dramatically" and since separation he only has a drink socially and has completely stopped consuming cannabis resin. He explained that he had gone through a difficult time in the last two years after the death of his father, but that he has turned a corner. Social Services have raised no concerns over Father's sobriety with regard to his care of the children. I presume Mother has no current concerns, not only because she has not referred to any since the filing of the affidavits, but also because if she had any, she would presumably not agree to the children, particularly young Child 2 being in Father's care on a regular basis and overnight.

7 There is some divergence of opinion as to the amount of time the children spend with Father. Father alleges the parties share the care for the children on an equal basis. Mother alleges that she has been the main carer for the children and that it is only around the time of this application that Father has become more involved in the care of the children. True to say that the filing of this application followed close on the heels of the parties' separation, my sense is that upon separation Father realized he would need to make more of an effort to have a meaningful role in the children's lives. Father says he has adjusted his working hours to help with the children's care, initially he worked from 7 a.m. to 6 p.m. but changed that to 7.30 a.m.–4.30 p.m. In the morning when he arrives at work he video calls Child 1 to make sure he is up and getting dressed, because Mother has to leave for work with Child 2 at 8 a.m., before Child 1 leaves for school. He video calls Child 1 again at 3.30 p.m. when Child 1 finishes school, and then Father arrives home at 4.45 p.m. to help Child 1 with homework. Child 2 is collected from nursery at 5.30 p.m. by Mother on her way home from work. The impression I have formed is that prior to separation Father relied on Mother to take the brunt of the children's care, but that since separation Father has become more of a hands-on parent. Having heard both parties and read their witness statements I am of the view that the parties share the care for Child 1 equally. With regard to Child 2, I find that whilst she spends a considerable amount of time with Father, she spends more time with Mother, only staying overnight with Father once a week. That said, it is Mother who bears the responsibility for paying nursery fees and providing for the children's financial needs with Father making a contribution by way of maintenance.

8 I found both Father and Mother to be genuine in their regard for the children, and I do not question their dedication or their love for the children which I find to be sincere. Both are striving to live in the country that best suits them, both are concerned about the wellbeing of the children, within

the context of their own wishes and needs. Mother has indicated that if this application is refused she will not return to the UK without the children. Father's position is that Gibraltar is his and the children's home and if the application is granted he will not leave Gibraltar to move to the UK.

The law

9 As already stated, this application is made pursuant to s.25(1)(d) and s.27(4)(a) CA. Section 4(1) CA provides that when a court is determining any question with respect to the upbringing of a child, "the child's welfare shall be the court's first and paramount consideration." Section 4(2) provides *inter alia* that "a child's welfare is best promoted by a continuing relationship with both parents, as long as it is safe to do so."

10 When considering whether to make an order pursuant to s.25 CA, the court must have particular regard to the welfare checklist as set out in s.4(3):

- “(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; and
- (g) the range of powers available to the court under this Act in the proceedings in question.”

11 *Payne v. Payne* (4) has historically been considered the leading authority in relation to the external relocation of children. That case concerned a mother who wished to return home to New Zealand with her daughter, claiming that she lacked support in the United Kingdom. Underpinning the approach in *Payne* was the view that although the welfare of the child was paramount, refusing the primary carer's request to relocate with the children would be likely to impact detrimentally on her own ability to care for the children and thus impact detrimentally upon the welfare of the children. The court in *Payne* suggested that weight should be given to the primary carer's wishes and suggested that the following approach should be adopted ([2001] 2 W.L.R. 1826, at para. 40):

- (i) Is the application a genuine one or is it motivated by a desire to exclude the father from the child's life?
- (ii) Is the proposal practical both financially and in terms of educational and health provision for the child?
- (iii) What would be the impact on the mother if her application were refused?
- (iv) What would be the impact on the father and the child's relationship if the application were granted?
- (v) Is the father's opposition motivated by concern for the child or is it driven by an ulterior motive to control the mother and the child?
- (vi) The outcome of the above appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

12 In *K v. K* (3), Moore-Bick, L.J. warned against the failure to distinguish between legal principle and guidance when interpreting the decision in *Payne v. Payne* and was of the view that ([2012] Fam. 134, at para. 86):

“... the only principle of law enunciated in *Payne v Payne* is that the welfare of the child is paramount; all the rest is guidance. Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted. Guidance of the kind provided in *Payne v Payne* is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also plays a valuable role in promoting consistency in decision-making. However, the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child.”

13 The Appeal Court in *Re F (A Child) (International Relocation Cases)* (1) affirmed the approach taken in *K v. K*. Ryder, L.J. was of the view that ([2015] EWCA Civ 882, at para. 23, quoting [2012] Fam. 134, at para. 140):

“the only authentic principle—that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court

SUPREME CT. MOTHER V. FATHER (Ramage Prescott, J.)

in reaching its determination is put into the balance with a view to measuring its impact on the child.”

Ryder, L.J. then contextualized his comments by stressing that (*ibid.*, at para. 23, quoting [2012] Fam. 134, at para. 142):

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

14 Although Miss Armstrong submits that pursuant to Thorpe, L.J. in *K v. K* (3), the guidance in *Payne v. Payne* (4) is only applicable where the applicant is the primary carer, Ryder, L.J. in *Re F* (1) made it clear that the correct approach was that of the majority in *K v. K* as endorsed by Munby, L.J. in *Re F (A Child) (Relocation)* (2), that the guidance set out in *Payne v. Payne* will have relevance to all categories of case and is not confined to those cases where the applicant is the primary carer.

15 In his analysis of the approach to be adopted in these cases Ryder, L.J. in *Re F* (1) opined that the welfare analysis of realistic options would be facilitated by a balancing exercise. He said ([2015] EWCA Civ 882, at paras. 29–30):

“That approach had been identified by my Lord, Macfarlane LJ in *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, [2014] 1 FLR 670 at [54]:

‘What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options.’

It was subsequently approved by Sir James Munby P in this court in *Re B-S (Children)* [2013] EWCA Civ 1146, [2014] 1 FLR 1935 at [36] and at [46] where the approach was described by him in these terms:

‘We emphasise the words “global, holistic evaluation”. This point is crucial. The judicial task is to evaluate *all* the options, undertaking a global, holistic and . . . multi-faceted evaluation of the child’s welfare which takes into account *all* the negatives and the positives, *all* the pros and cons, of *each* option’

30. That approach is no more than a reiteration of good practice. Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary. That is neither a new

approach nor is it an option. A welfare analysis is a requirement in any decision about a child's upbringing. The sophistication of that analysis will depend on the facts of the case.”

16 In *Re F* (1), McFarlane, L.J. defined “a global holistic evaluation” as (*ibid.*, at para. 50): “no more than shorthand for the overall, comprehensive analysis of a child’s welfare seen as a whole, having regard in particular to the circumstances set out in the relevant welfare checklist.”

Mother’s proposals

17 Mother wishes to return to the United Kingdom and reside at her parents’ council home in a three bedroom property. Child 1 will have his own bedroom and mother will share a bedroom with Child 2. Mother will not pay rent in the UK but will pay a contribution towards utility bills and food which she estimates to be £200 per month. There is evidence before me in the form of emails to show that Mother and children have been added as occupants to the council house.

18 Mother’s brother and his family live close by as does paternal grandmother.

19 Mother’s current employers have agreed that if Mother should move to the UK she can work from home on a trial basis. As an alternative Mother has been offered a job in her father’s cleaning company working 30 hours per week with a salary of £19,500 per annum.

20 Mother states that Child 2 has secured a place at X primary school but that Child 1’s application can only be made once he is residing in the UK. Mother believes that his chances of attaining a place are high given that his sister will already be enrolled. In due course Mother proposes the children move on to Y secondary school. Both schools offer various after school clubs and sporting facilities.

21 Mother recognizes that Child 1 has a passion for football and her intention is to ensure that Child 1 is able to pursue that sport in the UK as he does in Gibraltar. She states that her brother is a football coach for children aged 12 and under and that there are various football academies in the area that Child 1 could have access to.

22 For Mother submitted that she will facilitate and encourage unlimited indirect contact with Father via telephone or social media. With regard to direct contact, she suggests that Father enjoy contact with the children for 7 days over each of the two school midterm breaks, for 15 days over Christmas and New Year, for 14 days over Easter and for 42 days over the summer holidays. She states that if arranged in advance there are cheap flights to be found. It is not entirely clear to me whether Mother envisages the children flying over to Gibraltar for contact or whether she proposes

that Father fly over to the UK. It is likely to be a combination of both. Mother points out that paternal grandmother lives close by, in a two bedroom property and Father could stay with her and not have to pay for a hotel. If contact were to take place in Gibraltar, as I understood it, Mother would fly out with the children and she would need to pay for somewhere to stay.

23 I am of the view that contact arrangements have not been properly thought out. Finances have not been calculated or identified with sufficient clarity nor has the country in which contact is to take place. I am not sure how Mother proposes to pay for the necessary flights and accommodation. If the children were to come over to Gibraltar every time, Mother would be looking at funding five return flights per child, making a total of ten return flights per year for the children. To that she would need to add five return flights for herself, possibly more if she were to fly out with the children, drop them in Gibraltar fly back to the UK and then fly out to collect them after their stay. I have not been provided with an estimation of flight costs, nor has an analysis been carried out, even at a basic informative level, as to the varying costs of flights during the different times of the year, or even as to the average price of flights. The point was made for Father that travel costs rise at school holiday times such as midterm and Christmas. Mother proposes that Father cease to pay maintenance so that he can use that money to fund travel for himself and/or the children. I agree with Father that that is not a viable solution. Mother's salary will continue to be modest and the children are entitled and indeed will need the income from Father for their day to day support as a supplement to the money that Mother is able to provide.

24 Mother has not indicated with any degree of certainty whether she would be staying in Gibraltar during the time that the children would be visiting Father. If she does stay, then how would that impact her job? Would she have sufficient annual leave from which to draw? If she is not to stay, would Father be able to take annual leave to care for the children? Mother gave evidence that her current employer would likely pay for her to fly out to Gibraltar on occasions as part of her work duties, but there are no details attached to Mother's statement.

25 I remind myself of the importance of having clear and identifiable plans for future contact in these types of cases, in *Re F* (1), Ryder, L.J. said ([2015] EWCA Civ 882, at para. 31):

“a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged requires that the parents' plans be scrutinised and evaluated by reference to the proportionality of the same.”

Father's proposal

26 Father proposes that the status quo be maintained. He is of the view that Gibraltar will provide a better lifestyle and environment for the children to grow up in, and indeed this was why he and Mother made the lifestyle choice to leave the UK some years ago.

27 Father is alive to the financial difficulties that both he and Mother are experiencing. He suggests he works overtime to generate more income, but I do not consider this a realistic solution, not least because Father has since separation reduced his working hours to be able to help Mother with the care of the children. There has been no suggestion from Father that he should attempt to find a better paid job, or that he would pay a higher level of maintenance.

28 Father is of the view that he could have Child 2 for more hours, but that he has not done so to date because they have fallen into a routine which he has not wanted to upset.

29 Father is of the view that Mother's financial situation would not improve by moving to the UK in any way that would make a material difference.

Other evidence

30 Mother has provided the court with a letter from a friend, exhibited to Mother's second affidavit of March 8th, 2021. The friend was not called to give oral evidence. The letter is not dated, it is impossible to decipher how much of what is recounted therein comes from the author's direct knowledge and how much comes from what Mother has confided in her. The letter is an indictment on how good a mother Mother is, versus how disinterested a father Father is. I factor this letter into my considerations but without hearing from its author the reliance I place upon it is cautious and limited.

Care Agency

31 Mr. Phillips for the Care Agency has prepared two family welfare reports. The first is dated March 16th, 2021. Mr. Phillips confirms he has read both of Mother's affidavits, Father's affidavit in response, has spoken to Mother once and Father twice via Zoom due to Covid restrictions, has spoken to Child 1 once at school, has seen an email from the local housing office in the UK adding Mother and children as occupants to Mother's mother's ("maternal grandmother's") tenancy, has seen an offer of employment for Mother from her father's cleaning company and has seen an Ofsted report on a prospective school for Child 1.

32 The second report is dated June 2nd, 2021 and in it Mr. Phillips states that Child 1 was referred to school therapy following an incident in which he threatened to self-harm, Mr. Phillips confirms he has received an

overview of Child 1's therapy from his therapist Elizabeth Rodriguez, he has spoken with Child 1 at school on June 21st, 2021 after his return from the UK, he has spoken with Father over the telephone, and he has spoken with Mother via email. I shall highlight relevant parts from both reports.

33 Mr. Phillips is of the view that Mother's application is made in good faith and is motivated out of a concern for her finances and the impact on her mental health should she not have support from her family.

34 In light of the concerns raised by Mother with regard to Father's alcohol and cannabis use, Mr. Phillips would not be able to recommend at this stage that Father have sole care of the children. That said, he notes, as do I, that Father has extensive contact, including overnight contact, and the logical presumption must be that Mother has no serious concerns over Father's ability to parent. Social Services have none.

35 In both reports Mr. Phillips has set out positives and negatives of the children remaining in Gibraltar versus moving to the UK; having read the papers and heard the evidence, I adopt those comparators which for ease of reference I set out hereunder:

“Positives of Remaining in Gibraltar:—

[Child 1] was born in Gibraltar and is a popular boy who is also established in a local football team.

[Child 1] sees his father every day, including regular overnight stays and appears to have a very positive relationship with him. Indeed [Mother] states that at present [Child 1] 'hero worships' his father and this is to her detriment in terms of his behaviour.

[Child 1] will move to secondary school with many of his friends from Primary, which should make it easier for him to settle.

Crime rates in Gibraltar are described as 'very low'.

[Mother] has support from [Father] in respect of the children, although it is disputed about the level of that support.

[Child 1] behaviour towards his mother may improve if he knows that he is not relocating to the UK.

Both parties have secure employment.

Negatives of Remaining in Gibraltar:—

[Mother's] financial position is extremely precarious. This in turn, impacts on her mental health which may impact on the children.

[Mother] has very little support other than [Father] and given their recent separation this could leave her vulnerable in the future and there is no additional financial support.

If [Mother] delays returning to the UK by a significant period of time, the timing of such a decision may impact on the education of both [Child 1] and [Child 2]. [Child 1], will by then have started secondary school and depending on the timing, [Child 2] may have started reception, making the transition to the UK more difficult.

Positives of moving to the UK:—

The children will have a large house, with a garden and their own bedroom.

[Mother] will have employment.

[Mother] will have family support from her parents.

[Child 1] will attend a school with ‘Good’ Ofsted rating.

[Father’s] mother lives within travelling distance of maternal family and would be able to see [Child 1] and [Child 2] more regularly. [Father] would also have a base should he wish to visit.

[Child 1] is not yet at secondary school.

The family are English speaking so the transition would be easier.

Negatives of moving to the UK:—

The children will not be able to have physical contact with their father every day and whilst [Mother] states video calls will be offered ‘whenever’ [Father] wishes, this is not the same quality of contact or time, especially with [Child 2], given her age.

[Child 1] has no automatic link to the UK as he has grown up in Gibraltar.

[Child 1] will be moving during an academic year which will make it harder for him to form new friendships and settle in to his new school.

[Child 1] will not immediately be able to join a football team as he will need to familiarise himself with the area. The English football season also ends in May.

[Father], if he chooses to return to the UK, would have not any employment.

Crime rates in both [towns in the UK] are significantly higher than in Gibraltar.”

36 Mr. Phillips describes Child 1 as a friendly and likeable boy who loves football. In his first report he observes that Child 1 has expressed the clear view that he does not wish to relocate to the UK. In court, Mr. Phillips said that Child 1 had told him he would miss his friends and his father. Mr. Phillips reports that Child 1’s behaviour towards his mother has become

abusive and defiant. Mr. Phillips is of the view that Child 2 is too young to have a view.

37 In his second report, Mr. Phillips states that the report from Ms. Rodriguez the therapist indicates that Child 1—

“has presented as sad due to the separation of his parents and that he would like them to reconcile but is now beginning to enter the acceptance phase of loss and realizing that this will not happen, although [Child 1’s] family is his world and he has suffered significant loss upon the separation of his parents.”

Mr. Phillips reports that in the opinion of the therapist the main cause for Child 1 sadness is his parent’s separation. Despite not wanting to move to the UK, [Child 1] has not described the prospective move as the reason why he is sad. Mr. Phillips expresses the view that a move to the UK might help Child 1 in that it might make him realize that the separation of his parents is more permanent, on the other hand it could be that a move would impact negatively on Child 1.

38 There is concern on the part of Mr. Phillips that a move to the UK would deprive Child 1 of daily contact with Father, but he is of the view that the relationship between father and son would be sustained despite the distance.

Discussion

39 Mother’s reasons for moving are essentially that she works long hours and cannot spend quality time with the children and that financially things are very difficult. Moving to UK will mean that she can work more child-friendly hours and that in turn will benefit the children because Mother will become more accessible to them, more present and she will be less tired and more relaxed. Father has indicated that should this application be granted he will not move to the UK to be closer to the children because he feels his life is established here and because of the uncertainty with regard to the job market in the UK, he has been in the same job in Gibraltar for 10 years.

40 I agree with Mr. Phillips that Mother’s wish to return to the UK and Father’s wish to stay in Gibraltar are predicated upon what is best for themselves as opposed to what is best for the children. I say this as a fact I have found to be true, but I do not attach any negative connotations, each parent is striving to have the best quality of life which in turn will benefit the children and that cannot be a ground for criticism.

41 An imperative part of my deliberations must be to consider the evidence and facts of this case specifically as against the welfare check list.

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

- (i) Child 2 is too young for her wishes and feelings to be ascertained.
- (ii) See para. 37 *ante*. The particular weight to be given to a child's wishes and feelings depends to a great extent on his age and ability to understand the issues and have some foresight into the future. Child 1 strikes me as an intelligent and sociable boy, who knows his mind; that said there is no escaping that he is still very young and at age 10 his wishes cannot be determinative but rather must be considered as part of the bigger picture. The fact that he has spent time in the UK at his grandparents' house, and in particular that he was there on holiday immediately preceding the preparation of the second welfare report is of some relevance. It means that he is fully aware of where and in what environment he will live if he relocates to the UK, this adds more credibility to his wishes.

(b) *The physical, emotional and educational needs:*

Physical needs

- (i) Currently the children reside in private rented accommodation. Both parents are in secure employment. The family are on the Government Housing Waiting List in Gibraltar and whilst the expectation is that they will be offered council housing which will be much cheaper than a private rental, there is no indication as to when an apartment will be allocated to them, they have already been on the list for some six years.
- (ii) In her witness statement and also in examination-in-chief, Mother stated that if she and the children were to relocate to the UK, they would live with her parents in their council flat and would be permitted occupants of the property. The point made by Ms. Armstrong is that whilst Mother and children would be added as occupants they would not be tenants and their rights to remain in the property would be inferior to that of tenants. In addition, their occupation would be contingent upon the tenancy subsisting, and on the relationship between Mother and maternal grandmother subsisting. Father questions the strength of the relationship between Mother and maternal grandmother, but I accept Mother's evidence that their relationship is strong. That said cohabitation of Mother the two children and Mother's parents has not been tested other than for short holiday periods and therefore the unworkability of the proposed situation cannot be disregarded. When asked about the duration of her parents' tenancy Mother stated it was a life time tenancy. Of some concern,

not least because it has not been divulged earlier, is that despite describing her parents as tenants of the property in question, it came to light during cross-examination that in fact it was only maternal grandmother who is a registered tenant of the property, Mother's father ("maternal grandfather") it transpires, is registered as a tenant in a different Government property. Despite requests from Ms. Armstrong, maternal grandmother's tenancy agreement has not been produced, this too is cause for some concern, particularly given that at the start of the hearing Mother had represented that both her parents were tenants. In answer to the question what would she do if she had to move out of maternal grandmother's house, Mother stated that she would rent a two or three bedroom property and that that would cost in the region of £1,000. Whilst I do not dispute that may be Mother's belief, no evidence has been produced in support of average local rentals. Mother further stated that if she moved out of maternal grandmother's house she would be entitled to receive a rental contribution from the UK government depending on her earnings; again no evidence has been produced in support of this contention. In the circumstances, I have some concerns as to the reliability that can be placed on the proposed living arrangements and as to the security they can provide for future eventualities.

Emotional needs

- (i) Not in dispute that the starting point must be that a child's emotional needs are met by a meaningful relationship with both parents. I am of the view that the relationship with Father will continue even in the event of a relocation, but it will be an entirely different type of relationship, that of itself is not a bar to the relocation, but it would necessarily impact upon kind of relationship that Child 1 would have with his father. Whilst I believe that Mother is sincere about maintaining contact between the children and Father, I have concerns (as discussed at paras. 22–25 *ante*) that the contact arrangements have not been properly thought out and this might impact upon both the quality and frequency of contact with Father.
- (ii) Ms. Balestrino submits that the emotional needs of the children will benefit from being close to family, grandparents, uncles, aunts and cousins close in age to them. I agree this would be of benefit. It is also likely in my view that the children will benefit from Mother being less stressed.

Educational needs

- (i) I have dealt with the proposed arrangements for education in the UK. Not in dispute that the children's educational needs are being met in Gibraltar, arrangements are in place for Child 2 in the UK but not for Child 1 and whilst I am reasonably confident that Child 1's educational needs will eventually be met if he moves to the UK, there is a degree of uncertainty as to what school he will attend, where that school will be, whether it will be the same school as Child 2, and whether if it is further away what arrangements will be put in place to take him to school and collect him at the end of the day.
 - (ii) In September 2022, Child 1 will move to a new school in Gibraltar, he will move alongside his current friends; by contrast, the proposed relocation will involve him moving to a new school in a new country against his wishes. The impact upon Child 1's education and indeed upon his mother and sister if he resists that move and refuses to engage, is difficult to assess, but it is a potential cause for concern.
- (c) *The likely effect on the children of a change of circumstance:*
- (i) Given her young age, the proposed change of circumstance is likely to have little impact on Child 2, although she will not see Father on a daily basis and is likely to feel the effect of that in some way.
 - (ii) With regard to Child 1, the proposed change could impact upon his educational needs as described above. On the other hand, the change is likely to be of benefit to him because Mother will not have to leave for work early morning before he leaves for school, but will be able to see to him in the mornings and take him to school. Should they remain in Gibraltar, Child 1 will continue to be left alone in the mornings before school, have to make his own way to school and continue to do so as he enters secondary school.
- (d) *Their age, sex, background, and any characteristic of theirs which the court considers relevant:*
- (i) [Child 2's] young age works in her favour in terms of adapting to the proposed relocation. Child 1's social nature might make it likely that he will be able if he is so minded to adapt and integrate into a new environment.
 - (ii) No issues arise from their gender in terms of this relocation.

- (iii) With regard to background, England and Gibraltar are closely connected by language, laws, social culture and education. Child 1's sport of preference, football will be easily accessible to him in the UK.
- (e) *Any harm which they have suffered or are at risk from suffering:*
 - (i) Child 2 has suffered no harm and there is no indefinable risk of harm if she were to relocate, other than a loss of daily physical contact with Father, but that could be minimized by maintaining indirect and direct contact.
 - (ii) Ms. Balestrino addresses the risk of harm from the point of view of Mother's mental state, but is silent on the subject with regard to Child 1. It is clear to me that this part of the welfare check list is directed at the children and not at the parents. Parents are dealt with in the next section.
 - (iii) On or around March 2021 just prior to the second hearing in this matter, Child 1 was referred to school therapy following an incident in which he threatened to self-harm. From the evidence before me it is apparent that Child 1 was upset and struggling with the separation of his parents, and in addition he was upset by the proposed relocation to which he is opposed. Mr. Phillips states that in his opinion Child 1 has suffered a significant loss upon the separation of his parents. Of some importance in my view in relation to the impact upon Child 1, is the timing of the separation and the filing of the application. According to Mother's evidence, she and Father separated in September 2020, she filed the application for relocation in November 2020 and Father left the family home in December 2020. In the space of three months this 10-year-old boy has had to deal with two radical changes to his life: the breakup of his parents, and the prospect of moving to a different country and away from his father to whom he is very close. In those circumstances, Child 1's inability to cope expressed through an inclination to self-harm and to rebel is perhaps not surprising. Mother describes the first few months of 2021 as "horrific"; she says Child 1 was very angry with her. Mr. Phillips said that although it is normal for most children to suffer harm when their parents separate, the threat to self-harm is not normal. To my mind this is an indicator of Child 1's difficulty in coping with the situation.
 - (iv) In the opinion of Mr. Phillips, the benefit of staying in Gibraltar would be that Child 1 would have both parents to support him through the transition of parental separation, if he moved to the

UK he would only have Mother and at the same time be dealing with the absence of Father.

- (v) Mr. Phillips was unequivocal in his view that Child 1 would need to continue with therapy in the UK and he was concerned that there might be a delay after the move in setting up that therapy, and concerned therapy might not be available to him. He explained that the therapy Child 1 is receiving through school will end at the end of this school year but immediately thereafter therapy would be available to him through the Care Agency so that there would not be a long break in therapy. Mr. Phillips stated that whilst the Care Agency could make a referral to Social Services in the UK for therapy to continue he was not able to say whether Social Services in the UK would be able to provide therapy or if they were able, how soon the UK could give Child 1 access to that therapy.
- (vi) In the opinion of Mr. Phillips, Mother is committed to continuing therapy in the UK for Child 1 and whilst I do not doubt her intentions, she has provided no information as to how she will ensure that Child 1 receives the therapy or indeed what therapy is available. She states that she had made enquires in the UK about therapy, but she does not say from whom or what body she had made enquires or indeed what the results of those enquires are. Given the level of her income it is unlikely that she will be able to pay for private therapy and she has provided no information of what options could be available from social services.

(f) *How capable each of their parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting their needs:*

- (i) In the opinion of Mr. Phillips at this moment in time he is not able to support the prospect of Father as the full time carer of both children. Given that Mother has raised an issue relating to Father's use of alcohol and drugs, Social Services would need more time to ascertain whether Father can maintain abstinence over a period of time. That said Mr. Phillips raises no concern about Father's capacity to care for the children as he does at present.
- (ii) Mother has historically been the main carer for both children and in my view continues to bear the greater responsibility for them. I am in no doubt that she is a loving, caring and able care giver and parent.

- (iii) I have no doubt that Mother has a genuine and difficult financial struggle and that together with lack of familial support is what motivates her wish to move to the UK.
- (iv) Mother states in evidence that the stress and anxiety caused by financial difficulties has had an effect on her mental health. She says:

“I was prescribed anti-depressant in 2014, by my Doctor due to my unhappiness living in Spain and the fact that I desperately wanted to return to the UK. Also I was living with constant mental abuse, insults, moaning, haranguing from the Respondent, who was also unhappy but blurred his days with drink and drugs, especially whilst he was unemployed.”

“I came off the anti-depressants in 2016 but when I had my daughter in 2018 the Doctors prescribed them again to help with post-natal depression. I remain on these tablets and will come off them when I feel better. However this has not impaired my ability to look after the children, nor get promoted in 2020 and keep a full time job.”

Whilst I do not question that mother is depressed, I also note that I have nothing by way of medical evidence to explain or identify the reason for that depression, nor whether the prospect of recovery is related to relocation. The position as I see it is that notwithstanding mother’s emotional difficulties she is and will remain able to care for her children whether in the UK or in Gibraltar.

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

The options are twofold: to dismiss Mother’s application which would have the effect of no order and maintain the status quo or to grant the specific issue order granting Mother permission to permanently remove the children from the jurisdiction.

Conclusion

42 Mother has made allegations against Father that he has not been a hands-on parent in the past and that he has been unfaithful. Efforts to preserve the reasonably amicable relationship that the parties enjoy must include the avoidance of the attribution of blame for past behaviour. I am satisfied that post separation Father has become directly involved in the children’s lives, he will need to ensure that that level of involvement is sustained and even increased to give the children the continuity they need, and to give Mother the support that she needs.

43 I have formed the view that both parents are sincere and genuine in their love for their children. Mother's application to remove the children is not *mala fides*, nor is Father's objection to the application.

44 Mother raises the issue of her mental health and submits that it will suffer if she is denied permission to relocate with the children. This may be so, and it is a potential cause for concern; the difficulty I have is that, other than Mother's assertions that she has been medicated from time to time for depression, I have no medical evidence before me confirming that Mother is clinically depressed, the reasons for that depression or, importantly, the prognosis going forward. I am alive to the fact that the welfare of the children is inextricably linked to the stability and welfare of Mother, and her ability to parent effectively, particularly given the fact that Father is not in a position currently to be a full time carer for the children but, in the absence of medical evidence, I cannot assume that remaining in Gibraltar will result in a deterioration of Mother's mental health, in fact by her own evidence she asserts that even if she is denied permission to remove the children, her mental health will not suffer to the extent that she will be incapable of looking after the children.

45 I have already highlighted that the arrangements for future contact, should Mother be given permission to remove the children, lack the necessary detail and upon the proposals before me I cannot be satisfied that sufficient and meaningful direct contact will be afforded to Father, not because Mother would willfully deny him that, but simply because finances might make it untenable.

46 There is a lack of certainty with regard to the legal rights of Mother and children with respect to living arrangements in the UK. There is no evidence before me of the tenancy agreement in favour of maternal grandmother. I am therefore uncertain of the extent of her rights as a tenant. There is no evidence as to the rental amount paid by maternal grandmother. There is no indication of precisely what rights or protection from eviction registration as occupants would afford Mother and children. There is no evidence that Mother would be entitled to council housing in the UK, or how long a period she would have to wait to receive a council property. There is no evidence that Mother would be entitled to rent assistance or allowance.

47 Mother has asserted that her employers are prepared to allow her to work remotely from home on a trial basis should she relocate to the UK. There is no evidence before me from them to that effect. In any event it occurs to me that if her employers are prepared to entertain the idea of Mother working from home from the UK, they might well be prepared to allow her to work from home from Gibraltar. This would save them the money of flying her out to Gibraltar at regular intervals, and would also allow Mother to be at home to see Child 1 off to school in the mornings, it

would also have the possibility of reducing childcare costs during the summer holidays, potentially by half, because although Child 2 would require direct supervision which Mother would not be able to afford her whilst working, Child 1 would be old enough to stay home and entertain himself provided there was an adult in the house.

48 Whilst a place has been secured for Child 2 in an appropriate school, the same cannot be said for Child 1. Mother asserts an application for a place for Child 1 cannot be made until he is residing in the UK but, other than her assertion, there is no evidence of this, nor is there any evidence that were an application to be made, there would be a likelihood that a place would be available.

49 There has been evidence comparing crime rates between the UK and Gibraltar; that evidence tends to suggest that the crime rate in the UK is higher than in Gibraltar. That may be, but it is not so high as to be a deterrent to relocation.

50 From Mother's perspective, having greater family support in the UK and a less onerous financial burden would ease pressure off her; that said I am not persuaded that she will necessarily be financially better off in the UK. If she were to continue to work for her employers her salary would be same as it is at present £1,787 net per month, if she were to work for her father's cleaning company her salary would be £19,500 per annum that would translate to £1,625 per month gross, I do not know what the net figure would be. In any event when the £200 per month contribution to rent and bills is deducted, together with her general living expenses, plus the cost of travel and accommodation to and from the UK to Gibraltar, I suspect she will be in no better and possibly a worse financial situation than she is now.

51 Mr. Phillips described this as a very difficult report to write, pointing out that there are merits in the arguments of both parties. I share the sense of difficulty which this case presents, but ultimately the decision is driven by what is in the best interests of the children.

52 The material issue regarding the prospective relocation in my view is the emotional challenge that Child 1 is facing at present. His emotional instability has manifested itself with a threat of self-harm, and difficult and confrontational behaviour towards Mother. Concern was raised at school and after a referral, he has been receiving therapy through school and that therapy will continue to be administered through the Care Agency. Having heard the evidence, and in particular Mr. Phillip's evidence, I am of the firm view that:

- (i) His parent's separation has caused Child 1 great anxiety and sadness.

(ii) The separation coupled with the almost simultaneous prospect of moving away from his home and his Father has increased Child 1's anxiety very substantially.

(iii) Child 1 requires therapy to help him process his feelings and there should not be a prolonged break in his therapy.

(iv) Although Mother is supportive of Child 1 continuing with therapy, there is no evidence that any arrangements are in place for the therapy to continue in the event of moving to the UK.

(v) Under these circumstances, the removal of Child 1 from the home environment he has always known and from his Father, would very likely have a detrimental effect on his wellbeing, and such a move without the assurance of prompt continuation of therapy would in my view likely have an even greater detrimental effect on Child 1's wellbeing, particularly in view of the fact that he is resisting the relocation.

53 I do not ignore that a dismissal of Mother's application would cause her distress and deprive her of the family support which she seeks and which would ease her burden, but I must remind myself and keep at the forefront of my mind that my decision must be focused on the best interests and wellbeing of the children and for the reasons I have given I have no doubt that at this moment in time it is in Child 1's best interests to remain in Gibraltar. The position is different with regard to Child 2; she would adapt to life in the UK with greater ease, but in my view it is in the children's best interests that they be kept together as a sibling group and therefore it is in Child 2's best interests to remain in Gibraltar. Whether Mother will be able to continue to cope with the care of the children going forward without the support of her family will, to a large extent, depend on the level of support and commitment provided by Father and, if he wants to ensure the family remains in Gibraltar, I would encourage him to increase those levels of support by any means open to him, he should also look carefully into whether he can pay a higher level of maintenance.

54 Application is dismissed, no order as to costs.

Order accordingly.