DRAFT

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Monday, 15 October 2018

Before:

MR JUSTICE MOOR

(**In Private**)

BETWEEN:

BB — Appellant

- and -

CC — Respondent

MS JONES (of Counsel) appeared on behalf of the Appellant.

DR R. GEORGE (of Counsel) appeared on behalf of the Respondent.

JUDGMENT

MR JUSTICE MOOR:

1 This is an appeal dated 8 May 2018 from an order made by Mrs Recorder Ball QC sitting in the Family Court at East London in April 2018. Permission to appeal was refused by the Recorder. It was also initially refused by Williams J on paper in June 2018, but following an oral renewal was granted by Baker J in July of 2018.

2 There is a significant history to the case that I have to set out in some detail. The mother resides in social housing in the North East of England. She is aged approximately 26 and is a trainee teacher. The father resides in the London area in a substantial property that he lives in with his parents and his younger brother. He is aged approximately 34 and is a civil servant.

3 The parties had an arranged marriage in Pakistan in April of 2013. The mother moved from Pakistan to the United Kingdom in October of 2013 and took up residence with the father at the home of the paternal grandparents in London. They have one child, RR, who was born in 2015 and therefore aged three. In any reports I would be grateful if it simply says that he is three years of age.

4 In January of 2016 the parties separated. The mother left the family home. She made a number of serious allegations of domestic abuse against the father and his family. She spent a period of time living with relatives in, I believe, South London.

5 In February of 2016, she was placed in a refuge in the North East of England by a woman's charity. I am told it was in part due to the allegations she made against the father and the paternal family. The father says she moved there without his knowledge or consent. The mother disputes that, but there is a finding of fact that it was without his knowledge and

consent made by the Recorder. Dr George, who appears on behalf of the father, described this as an abduction. I think that is too emotive a term. It is however, right to note that it did not give the father the opportunity to apply to the court in advance to restrain the mother from moving so far away.

6 In March 2016, the father applied for a residence order and a prohibited steps order to prevent removal of RR from the jurisdiction.

7 In May 2016, the mother obtained indefinite leave to remain in the United Kingdom.

8 In October of 2016 the mother obtained social housing in the North East of England, close to the centre of the city where she resides.

9 In November of that year an interim report from CAFCASS recommended there be no direct contact until after the fact-finding hearing in view of the serious allegations that were being made.

10 In June of 2017, Mrs Recorder Ball QC gave judgment following a fact-finding hearing. I am told that there were some six days of hearing during which she heard from all the relevant parties. Her judgment, in essence, dismisses all of the mother's allegations. It says that the mother's evidence was inconsistent and not credible; that she was a poor historian of fact; that she gave the impression of frequently reconstructing the past; and that there had been a great deal of elaboration and exaggeration.

11 The Recorder was concerned about the mother remaining in her room all day and isolating herself. The allegations that she was denigrated and humiliated by the paternal family were rejected. Equally, the Recorder found that the mother was not forbidden or dissuaded from

going out of the family home. She had not been isolated by the family, although she felt isolated and blamed the father and his family. She had not been denied money. Nor had she been denied her privacy, other than to encourage her to come downstairs. She had not been threatened with divorce. She had not been told she was worthless. She was not treated as a skivvy. She had not been frightened by threats of black magic. There had been no restrictions on her diet. The Recorder also found that the mother had not been assaulted by the father or the paternal grandfather as she had alleged, and the Recorder considered that visa and funding issues did play an important part in her fabrication and exaggeration.

12 The Recorder stated that reunification between the child and the father was long overdue.

13 I accept entirely that the mother has found it very difficult to accept those findings. She has talked about wishing to appeal. But it is clear to me that any appeal would have had no prospects of success, given that these were findings made by an experienced Recorder after she had heard the oral evidence of all the relevant parties.

14 In August of 2017, the CAFCASS officer, Ms M, prepared her main report. She considered that a shared care order was not in RR's best interests because of the distance involved between the two parents. She was concerned that RR might grieve at the loss of his primary relationship with the mother.

15 Transfer of residence to the father was not in his interests as long as the mother promoted contact.

16 Supervised contact was recommended, with a return to court following the first four sessions. That supervised contact commenced in September of 2017 and it progressed

positively. It is the father's case that the impetus for this has been the so-called "sword of Damocles", held over the mother's head if she did not comply.

17 In November 2017, the CAFCASS officer reported again, recording the very positive contact, giving high praise to the father for his engagement with RR and stating that there was no reason to suggest that the father was unable to protect or care for RR. The CAFCASS officer agreed that it was more beneficial for children to live near both their parents. She said that the mother had very recently promoted RR's relationship with the father. She remained of the view that RR should remain with the mother in the North East of England, as a change of residence would be confusing for him. He was however and should spend increasing amounts of time with the father. Eventually she was of the view it should build up to half the school holidays and a minimum of one overnight contact per month.

18 In December of 2017, staying contact commenced in the North East. In February of 2018 staying contact began in the London area and has proceeded since approximately every three weeks. In February 2018, the CAFCASS officer reported for the final time. She said that RR appeared to have a lovely time when in the father's care. He is very loved and cherished by both his parents. He has managed the transition between the parents well. There is no sign of him being unsettled or distressed. The father is absolutely committed to RR but RR may grieve for his mother if there is a change of residence.

19 In April 2018 Mrs Recorder Alison Ball QC gave the judgment that is under appeal to me. I am told it was after a further three-day hearing, so by this point she had been considering the case for a total of some 12 days.

20 The order accepted undertakings from both the mother and the father not to speak negatively about the other to RR.

21 There was a direction made that the mother would not have made herself intentionally homeless; that was for the purpose to enable her to make immediate enquiries about suitable accommodation in the South London Borough where the father is resident. As it has transpired, that South London Borough has rejected the application on the basis that the mother has not been resident within the Borough for the past five years, although of course it might have some residual obligations on the basis of the homeless legislation.

22 The father has continued to pay £680 per month in child maintenance and was to do so until March 2019. He also agreed to pay up to a further £350 per month for any private rented accommodation that the mother might require.

23 The learned judge then made what is a shared living together order. In other words, RR was to spend time with both his parents, and the various periods were set out in the order. Initially, the collection and delivery was to be in Birmingham and Sheffield, with the father paying half the mother's costs of getting to Birmingham and Sheffield. But, by the end of October of 2018, the mother was expected to relocate to reside within the area in which the father and his family reside. This was a direction made pursuant to s.11(7) of The Children Act 1989. And, as I have indicated, in the event the mother needed to enter a private rental agreement, the father was to contribute £350 per month to that rental.

24 The judgment deals with the law in detail. I will return to that later in this judgment.

25 It also states that, prior to the breakdown of the marriage, all four adults in the family home, namely, the mother, the father and both paternal grandparents played a large part in RR's care. It says the father is absolutely committed to his relationship with RR.

26 The Recorder says that the CAFCASS officer was unaware of the powers of s.11(7) of The Children Act and had not therefore considered the father's three options in depth – one of which was the one that the Recorder eventually plumped for.

27 There is no doubt that the judgment is very critical of the mother, both as to her approach to the role of the father, the previous judgment and many other matters. The judgment is also critical of the CAFCASS officer for saying that she had no significant concerns about the mother. The Recorder describes that as "remarkable" and "troubling". The Recorder considered it a serious omission that the CAFCASS officer had not examined shared care arrangements in South London, and, as a result, she took the view that she was not obliged to follow the CAFCASS officer's recommendation.

28 Although there are criticisms of the way in which the Recorder rejected the CAFCASS recommendation, it can hardly be said that the way in which she did so breached the Court of Appeal guidelines and requirements in relation to a judge who is differing from the position of a CAFCASS officer.

29 She then went on to deal with the proposed plan and her solution to it. She hoped, it is right to say, that the mother would be able to obtain social housing in South London. That has not proved to be the case. She said that, if that was not possible, the mother could reside temporarily with her relatives in South London. It is said that she has more than 100 in the London area. Equally, however, she could for example move to a two-bedroomed flat that

the father had found in a town outside London but still within the South East of England. She said that that evidence had not been challenged by the mother.

30 She then made a large number of findings as to her concerns about the mother. She was concerned about her isolation. She was not satisfied that her evidence about her network in Newcastle was correct.

31 The Recorder thought that the mother had no insight as to the effect of cutting off RR from the paternal family. She was concerned about the risk of alienation. She said that sharing both his parents, by residing with both of them, would be of great benefit to him. RR would be able to redevelop relationships if he was in the South East with the mother's wider family. She considered that a change of home would not cause him emotional harm, and took the view that there were advantages of a move that she set out in considerable detail, such as the family support on both sides.

32 She did, however, acknowledge that the mother might find it hard to adjust to the move South, but she was overall convinced that it would be beneficial to RR, and repeated her serious doubt that the mother could promote the father's relationship with RR. She said it was in the best interests of him to maintain a full and meaningful relationship with both parents, and there was a real risk of that relationship with the father being undermined if he continued to live in the North East.

33 The Recorder added that, if the mother did not move back South in accordance with the s.11(7) direction, there would be a further hearing to examine the reasons for that and to decide what should then happen. But she put down a marker that she would need to know why the move had not taken place, and she would consider seriously a transfer of residence to the father at that point if the mother's position was unjustified. She considered that the

father should do all he could to assist in the practicalities of the move, and she gave liberty to apply to resolve any *impasse* as to housing.

34 The mother's Notice of Appeal is dated May of 2018. She says that exceptional circumstances are required to make an order that requires a mother to relocate from one part of the country to the other. The point is made that the mother had been placed in the North of England rather than relocating there to frustrate contact – as does happen in some cases. The Notice of Appeal adds that the mother has made significant positive changes to her life since moving to the North East and did not wish to come back South. It says that insufficient weight was given to potential impact on the mother of having to relocate, and the Recorder had failed to consider at all the practical difficulties.

35 Williams J considered the matter on paper in June of 2018. He refused permission to appeal, saying that, in his view, the appeal had no realistic prospect of success. Amongst his reasons, he says that the judge considered the authorities and accepted it would be only in an exceptional case that an order forcing the mother to relocate would be in the interests of the child. In fact, as I will explain in due course, it appears that that is not, in fact, the law.

36 But he then went on to consider what I have described as the "welfare" side of the appeal. He reminds the court that very extensive and false allegations were made and that the judge found a risk to the child of suffering emotional harm in the sole care of the mother. He refers to the lack of insight of the mother, her continuing negative views and the like, and says that the Recorder gave sufficient justification for her decision. She did consider the practicalities and, therefore, he refused permission to appeal.

37 The mother applied in July 2018 to renew the application at an oral hearing which is, of course, her right. That oral hearing took place the same month before Baker J. The mother was granted permission to appeal. The learned judge took the view that:

1. the mother had reasonable prospects of showing that the proposed move is contrary to the welfare of the child; and

2. that there is uncertainty as to the principles to be applied in cases where the effect of the order would be to require a parent to relocate from one part of the country to the other.

As I have already indicated, I will explain in due course that I do not consider that there is uncertainty as to the principles to be applied.

38 Baker J stayed the order pending appeal and directed further contact in November and December of this year.

39 The mother's written statement dated July 2018 says that her application for housing in London has been refused.

40 In September 2018, the father served his skeleton argument, in which he contended that there is existing authority to which the court was bound, and that the Recorder's approach was in line with that existing authority. He goes on to submit that welfare was a matter for the trial judge, that the Recorder had dealt with the case over a prolonged period and heard witnesses and the decision could not therefore be faulted.

41 I will deal, first, with the law. The Recorder set the law out at some considerable detail over approximately four pages of her judgment. I am clear that I cannot fault her statement of the law.

42 She says that in deciding the future living arrangements for a child under s.8 of The Children Act 1989 the child's welfare is the paramount consideration, and she must have regard in particular to the matters in the welfare checklist under s.1(3). She derives from the authorities the following:

(i) That, in considering the welfare of the child, she must perform 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. (McFarlane LJ in *Re G* [2013] EWCA Civ 965 at 54);

(ii) That, in looking at the options and the welfare considerations, she must approach the case on a gender neutral basis and recognise the equality of parental responsibility that each parent has;

(iii) That she must base her decision on what is in the welfare interests of the child, not only in the short and medium term but also in the long term. This is particularly relevant when considering the need to provide for a meaningful relationship between each adult and child;

(iv) That the only principle of law in *Payne v Payne* [2001] 1 FLR 1052, is that the welfare of the child is paramount and that all the rest is guidance which

may or may not be relevant to the facts of an individual case, although possibly useful as a checklist;

(v) The parents' plans must be scrutinised by reference to the proportionality of the proposals where there is potential in the proposed outcome for an interference in the Article 8 ECHR rights of those involved. She quotes the case of *Nazarenko v Russia* [2015] 2 FLR p.728, where it was said at para.73:

> *"Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, primary importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents".*

It is therefore clear that she had very well in mind the Article 6 and Article 8 points raised on behalf of the mother.

43 She then goes on to say that under sections 1(2A) and (2B) she must:

> *"... presume unless the contrary is shown, that the involvement of [each] parent in the life of the child concerned will further the child's welfare. 'Involvement' [in this context may be] direct or indirect, but not any particular division of [the] child's time".*

44 The s.1(2A) presumption does not apply if the involvement of that parent would put the child at risk of suffering harm.

45 She takes into account the decision of Wall J, in *A v A* [2004] 1 FLR 1195 where he made a shared care order despite extreme acrimony between the parents on the basis of the need for the importance of both parents to the children to be recognised. This point is likely, she said, to be of particular importance where, as in this case, the child's relationship with one parent has been severed as a result of allegations which were not sustained on the evidence.

46 Finally, she did not accept that *Re A (Residence order)* [2010] 1 FLR 1083 establishes that a change of residence should be a measure of last resort. This was an intractable contact case where, because of the sabotage of contact by one parent, court orders were ineffective, leaving the court with no alternative but to make a change in the living arrangements. She repeats that her approach will be governed by the principles set out in s.1 of The Children Act and not by any gloss imposed on those. I cannot fault anything in that statement of the basic law.

47 She goes on to consider s.11(7) of the Act and the way in which it may impose conditions which must be complied with by a parent; and she sets out the various subsections of that part of the statute.

48 She then deals with the way in which s.11(7) has been dealt with, and in particular the three authorities with which I have been particularly concerned today.

49 First, she refers to two particular authorities: *Re C* and *Re M*. *Re M* was the first of those authorities. It is a decision of McFarlane LJ's in the Court of Appeal at [2014] EWCA Civ 1755. It concerned an order which had been made for the mother to move from the location where she and the child were living under shared care arrangements, to London where the father was living. The Court of Appeal held that that was impermissible save in exceptional circumstances.

50 Dr George, who appears on behalf of the father in this case, reminds me that this was a decision in which no authorities after 2002 were referred to by the advocates in the Court of Appeal. In particular, the various decisions in the late 2000s casting doubt on the need for exceptionality, were not referred to. He argues that, whilst it may well be unusual to make such an order, that does not mean that you have to establish exceptionality. If he was forced to do so, I consider that he would say that the circumstances in this case were exceptional.

51 In any event, the second authority which is referred to in the judgment of the Recorder is the case of *Re C (Internal relocation)* [2017] 1 FLR 103, a further decision of the Court of Appeal where the lead judgment is that of Black LJ. The history of the development of the so-called rule, that it is exceptional for the court to consider imposing a condition as part of a s.8 order on parents as to where they live in the UK, was comprehensively examined by Black LJ in her judgment in that case. Her conclusion, (at para.53) was as follows:

> "*It is no doubt the case, as a matter of fact, that courts will be resistant to preventing a parent from exercising his or her choice as to where to live in the [UK] unless the child's welfare requires it, but that is not because of a rule that such a move can only be prevented in exceptional [circumstances]. It is because the welfare analysis leads to that conclusion".*

52 There is then a third case on which reliance has been placed, namely, the case of *Re R*, a decision of the Court of Appeal [2016] EWCA Civ 1016; [2017] 2 FLR 921. In that case the appellant argued that the court should adopt a *quasi*-Hague Convention approach to unilateral moves within the United Kingdom where a parent moves without consent or court order. Black LJ rejected that submission, making clear that in line with *Re C*, which had been decided just a few months earlier, the only legal principle was the welfare principle.

53 At para.27 her Ladyship said:

> "*In short, in a domestic abduction case, as in a non-Convention international abduction case, the judge must derive the answer by applying section 1(1) of the Children Act to the particular facts of the case before him, having regard to all the relevant features, including the matters listed in section 1(3) (whether because the circumstances are within section 1(4) of the Act or otherwise by analogy). This is also, of course, the approach that must be taken to an internal or external relocation case"*.

54 I am quite satisfied that the law is very clear in this area. The Recorder, and any other judge dealing with such a matter, has to apply the paramountcy principle in s.1 of The Children Act, and there is no requirement for exceptionality. To the extent that Williams J thought that there needed to be, he was, in fact, mistaken.

55 I am clear, however, that I cannot accept Ms Jones's submission that there is some uncertainty about this in or that a different test should apply when one is requiring a parent to return from one part of the country to another, as against when one is dealing with an application either to prevent a parent from moving or to grant permission to a parent to move. I am quite clear that there is no exceptionality test in any of those scenarios and that the law as set out in *Re C* and *Re R* is good law.

56 It is therefore clear to me that this Recorder applied the law correctly, even if she did not have her attention drawn to the case of *Re R*. It matters not because she applied *Re C* and did so correctly.

57 I am therefore equally clear that it is not possible for this mother to say that the way in which the law was dealt with by the Recorder was wrong. It therefore comes down to the question of whether or not the welfare test can be said to have been outside the bound of reasonable decisions to which she could come to in the circumstances of this case. I am clear that, in this regard, I have to apply the test that is set out by Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 AC 1360 in the House of Lords, namely:

> "*The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that: it applies also to the judge's evaluation of those facts".*

58 I have a very careful and detailed 31-page judgment at the end of a three day final hearing that followed on from an earlier hearing that lasted for some six days and included very detailed oral evidence. The judge made findings of fact, and I am clear that she was entitled to make those findings having had the advantage of hearing the witnesses that I have not been able to hear.

59 It is most assuredly not a question of whether or not I might have exercised my discretion in a different way. Perhaps I might have done. The question is whether or not this Recorder exercised her discretion in a way that can be said to be wrong such that it was outside the range of reasonable decisions that she could have come to. I am clear that that cannot be said.

60 Ms Jones has made a valiant attempt to convince me that the Recorder did err in that regard. She has made a significant number of points that are critical of the Recorder's assessment of the case. She says that, in essence, the Recorder looked backwards rather than forwards.

I take the view that the Recorder did indeed look back, but she also looked forward as she was required to do. She was entitled to take into consideration her findings of fact as to the past to assist her in relation to what she considered was in the best interests of this child going forward.

61 Ms Jones also made submissions that the judge was wrong, for example, to have nothing positive to say about the mother's support network in the North East; that she was critical of her case as to her friends and the fact that she said she was settled there. She refers to the photographs that were analysed by the judge and she says, essentially, that the Recorder got it wrong. But I remind myself that the Recorder was faced with a large number of allegations at the previous fact-finding hearing that she had found not true, and she was entitled to come to the conclusions that she did. This is exactly the sort of decision that a judge has to come to every day of the week, and that it does not entitle an appeal judge to interfere.

62 Ms Jones went on to tell me that it was accepted that both these parents can provide good care, but the mother has relocated to the North East. She is settled. The Recorder was imposing a condition which meant that she had to move when she does not wish to do so, and it was submitted the court had to do a very careful welfare exercise analysis. It is said that was not done.

63 I regret to say that I cannot agree with that conclusion. The Recorder, in my view, did an extremely thorough examination of all those points, and at para.43 she said this:

> "*For the reasons set out in this judgment and particularly in relation to the welfare checklist, I have reached the conclusion that it is in RR's best interests in the short, medium and long term. This court must ensure that he is able to maintain a full and*

meaningful relationship with both his father and his mother. In the circumstances which I have related, I consider that there are real risks of such a relationship with the father withering or being undermined if he is to remain living in his mother's sole care in the North East. I also consider that, although the move to the South will be more complicated for the mother herself, and that the mother will be likely to be unsettled by it at least temporarily, it is likely to be far more beneficial for RR than any of the other proposals. RR is not yet three. He needs to spend the rest of his childhood in the shared care of both his parents, and this can only be achieved by the mother and RR returning to the South from where RR was removed by his mother unjustifiably and without the agreement of his father or the court. I am aware this decision interferes with the Article 8 rights of the mother who does not wish to move, but I take the view that his welfare needs are such that they must override those of the mother in this case. In the circumstances I will attach the s.11(7) condition to my order requiring the mother and RR to move from Newcastle to the area (in which the father lives)".

64 I have come to the conclusion that, although that is quite a stiff paragraph, it is not something that I can say was plainly wrong and not something with which I can interfere.

65 Ms Jones further went on to say to me that the mother would lose her independence. She would become once more dependent on the father. I cannot accept that that is sufficient to overturn this decision. In one sense she may well be dependent on him for financial support, but that is true of many financial remedy cases.

66 There was then criticism of the town outside London that was put forward. I accept that the judge considered that matter and did not find it was too far away, although I equally take the

view that it would be better if the mother and RR were closer to the father. But these are all matters that the learned judge considered.

67 Ms Jones then submitted the matter had very serious consequences for the mother that had not been considered properly. I cannot accept that. The considerations are all clearly set out at paragraphs 86 and 87.

68 Ms Jones submitted that the list set out by the Recorder contained only the advantages for RR of him living in the South and did not include those of him living in the North East. It is quite clear that the Recorder thought that the advantages of moving South were overwhelming, but she did deal with the disadvantage of the move from the North East at paragraph 87 and the possibility that the mother might find it hard to adjust and that it might have a negative emotional effect upon her. But she decided that, overall, the balance came down firmly in favour of the move. I take the view that that is not something that can be criticised.

69 I therefore have come to the conclusion that the law was correctly applied in this case. The directions as to the law were not wrong, and it is impossible to say that this judge then came to a conclusion that was wrong or sufficiently in error for me to interfere with it. I am therefore clear that the judge was entitled to say that this was an appropriate case for a shared residence order; that for that to happen this little boy had to live in one area of the country rather than the other; that she was entitled to determine that that should be the South East; that she was entitled to say that the mother should therefore move back to that area but that, if she did not do so, there would be a further hearing to decide what should then happen, when the judge would consider whether to grant the father an order that the child lives with him, which clearly was well within her mind, or possibly not. I cannot say that

she was wrong in the conclusions that she came to, and I have therefore taken the view that this appeal should be dismissed.

CERTIFICATE

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** This transcript has been approved by the Judge (subject to Judge's approval) **