

# FLJ

## Articles

### Relocation: the holistic approach restored

Damian Garrido QC

Barrister at Harcourt Chambers

Dr Rob George

Barrister at Harcourt Chambers and Reader in Family Law at University College London

Back in September 2017, one of the present authors wrote about the High Court's relocation appeal decision in *F v L (Permission to Relocate: Appeal)* [2017] EWHC 1377 (Fam), [2018] FLR (forthcoming), arguing that the case did not sit easily with established authorities in a number of respects (R George, 'Relocation: A Spanner in the Holistic Analysis?' [2017] Fam Law 1002). By coincidence, while that article was in press, an application through the Bar Pro Bono Unit came our way from the father in that case, who had successfully opposed the relocation in the Family Court but then lost on appeal in the High Court. He was seeking advice and representation for a second appeal to the Court of Appeal. Permission to appeal was granted by Macur LJ in September and the case came on for hearing in the Court of Appeal before Peter Jackson, Newey and Singh LJ on 7 December 2017. Judgment was handed down a couple of weeks later, allowing the appeal and restoring the trial judge's decision: *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121, [2018] FLR (forthcoming).

Peter Jackson LJ opened by noting that this case was the first time that a second appeal had been heard in the Court of Appeal from a private law family case since the change to the rules in 2016 which directed first appeals from Circuit Judges to the High Court. His Lordship then stated his overall conclusion at para 4:

'In the present case, my conclusion is that the decision of [the trial judge] HHJ Owens was not wrong or unjust in any way. Instead, the decision on appeal was regrettably both wrong and unjust because of serious procedural irregularity.'

### Procedural history of the case

Jackson LJ set out in some detail the basic framework for decision-making in private law children cases (paras 9-19). This was particularly relevant to the case as the main criticism levelled against the trial judge was that she had failed to make findings in relation to various allegations made by the mother, a decision which Russell J in the High Court had held amounted to an appealable error. This general framework was then set against what had actually happened in the present case at each stage, from FHDRA to DRA to Final Hearing, and then on appeal. Sections of the trial judge's judgment were set out at length (quoted at paras 29-35), and the short appeal judgment was set out almost in its entirety (quoted at para 41). In para 42, Jackson LJ set out the grounds of appeal, namely that Russell J had been wrong to allow the appeal on the following bases:

- (1) in relation to her interpretation of the correct approach to determining an application for leave to remove;
- (2) in relation to what was said to be the necessity for the trial judge to make findings in respect of allegations of domestic abuse;

- (3) in relation to the circumstances when a shared care arrangement may be appropriate;
- (4) in relation to the extent to which the judge must justify departing from a Cafcass recommendation;
- (5) in relation to the need for the court to consider the effect of the departure of the UK from the EU.

It is apparent, therefore, that although the case was at its heart a relocation dispute, the appeal raised a number of issues of broader relevance.

## Relocation

In a way, the relocation law issue was one of the least interesting aspects of this case, as it was not disputed that Russell J had erred in her approach to relocation. In the High Court's judgment, it had been said that it was necessary for a trial judge to decide first the question of child arrangements (including deciding on a main carer for the child), prior to making any determination about relocation. Jackson LJ set out that the arguments for the appellant in this regard were:

- that Russell J's approach was linear in nature, contrary to all recent authority on that issue;
- that, contra Russell J, there was no authority for the proposition that the court had to determine care arrangements before considering an application for relocation; and
- that requiring a judge to determine 'a main carer' was 'outmoded and discriminatory in a way that this court has repeatedly sought to avoid' (para 57).

His Lordship regarded each of these submissions as 'well-founded' (para 58). Moreover, it had emerged from the investigation of the case in the Court of Appeal that the mother had not argued for this point before the High Court and the matter had not been the subject of argument before Russell J, and therefore it was a 'serious procedural error' for Russell J to have allowed the appeal on this basis (para 58). As Jackson LJ had earlier put it (para 4):

'The main basis on which the appeal was allowed by Russell J arose from a legal argument that had not been raised in the grounds of appeal, had not been addressed by either party, and was in any event incorrect.'

This part of the judgment in *Re L* therefore serves to restore the well-established approach to relocation set out in the earlier and leading authorities of *K v K (International Relocation: Shared Care Arrangement)* [2011] EWCA Civ 793, [2012] 2 FLR 880, *Re F (A Child) (International Relocation Case)* [2015] EWCA Civ 882, [2017] 1 FLR 979 and *Re C (Internal Relocation)* [2015] EWCA Civ 1305, [2017] 1 FLR 103. The only legal principle applicable to such cases is the welfare principle, and the court must adopt a holistic analysis which considers all the realistic options for the child's future as part of the welfare assessment.

## Fact-finding

Domestic abuse and fact-finding in relation to allegations is a topical subject, given the introduction of the revisions to Practice Direction 12J. Although those revisions were not in force when the original decision was taken in this case, the changes are not in fact material to the case, and Jackson LJ set out PD13J in its new form. As his Lordship said (para 61), PD12J provides 'a clear and helpful framework to ensure that full consideration is given to the grave effects of domestic abuse, and that proper weight is given to abuse where it is proved'. However, as his Lordship went on to explain, almost all relationships have instances of bad behaviour during their breakdown, and it requires an exercise of judgment by the judge in each case to determine the necessary and proportionate approach to take to allegations. In this case, no fact-finding hearing had been ordered, and the trial judge had determined that she did not need to conduct a 'detailed forensic examination'

of the particular allegations.

Peter Jackson LJ considered (contra Russell J) that the judge had been entitled to adopt this approach, and that it was appropriate for her to have set that out at the start of the hearing so as to direct the evidence towards the central issues (para 67). His Lordship also accepted that the lack of specific findings of fact did not mean that the issues were ignored – as his Lordship put it (para 66):

‘It would be a misconception to believe that because there was not a trial of each complaint made by these parents (were that possible), the Judge did not take into account the nature of their relationship.’

This section of the judgment is important in making clear that judges are not required to conduct fact-finding exercises every time allegations are made. The key point, per the Practice Direction, is that judges need to give proper consideration to the nature and seriousness of any allegations, set against the issues in the case, so as to make a determination about the extent to which findings are necessary and proportionate to the decision.

## Shared care

Russell J had criticised the trial judge for making a 50-50 shared care arrangement in circumstances where the parents did not get on. Her Ladyship had described this as being an ‘unsophisticated, over-simplistic approach’ (High Court, para 11), and made this general comment:

‘Splitting a child between two homes which are antagonistic and unsupportive of each other is not consistent with the best interests of a child nor congruent with that child’s welfare.’

The Court of Appeal rejected Russell J’s approach on two bases. First, the criticisms made of the trial judge were misplaced, as her judgment showed that she made the order based on her evaluation of the facts before her and not ‘in a weak attempt at even-handedness’ or due to her perception of the requirements of the 2014 amendments to the Children Act (para 73). Secondly, as to the general comment quoted above, that statement was ‘plainly wrong as a matter of law and goes beyond the proper role of the appeal court, which is to review the decision under appeal, not to substitute the view of the appeal court for that of the judge who heard the evidence’ (para 73).

This section of the judgment serves as a reminder that the earlier approach to shared care arrangements, seen in cases like *A v A (Shared Residence)* [2004] EWHC 142, [2004] 1 FLR 1195; *Re R (Residence: Shared Care: Children's Views)* [2005] EWCA Civ 542, [2006] 1 FLR 491 and *Re W (Shared Residence Order)* [2009] EWCA Civ 370, [2009] 2 FLR 436, remains good law. Again, the only legal principle is welfare, with no presumptions, and the fact that the parents’ relationship is poor or marked by lack of communication does not, as a matter of principle, rule out a shared care arrangement for the child. It is a matter of fact, to be determined by the judge.

## Diverging from professional advice

In this case, the trial judge departed from the Cafcass officer’s recommendation in two respects, both as to relocation and as to care arrangements. She gave reasons for doing so, but was criticised by the High Court on the basis that those reasons were ‘at best superficial’ (High Court, para 12). The Court of Appeal rejected this characterisation of the judge’s decision, saying that she had in fact gone ‘some way beyond the necessary minimum’ (para 77). It is, ultimately, always the judge who makes the decision, and the requirement for departing from a professional or expert recommendation is only that an explanation is given – there is no presumption that a recommendation will be followed.

## Brexit

Russell J criticised the trial judge for failing to consider the consequences of the UK's departure from the EU as part of her decision-making in a case which involved two Italian national parents (though the child had both Italian and British nationality). The Court of Appeal said this (para 79):

‘There are two reasons why this statement is unhelpful. In the first place, the reason why Brexit was not mentioned by the trial judge is because it was not mentioned in the evidence or submissions she heard. But secondly, and of more general application, the consequences of the UK's departure from the EU are presently unclear, and there is no sound basis on which courts can factor in the hypothetical possibility that an EU national's immigration position might at some future date become precarious. The task for trial judges of deciding these cases is difficult enough without adding imponderables of this kind.’

## Comment

*Re L* is an important case in a number of respects. It restores clarity to relocation cases when the High Court's decision had sown the seeds of confusion, and it analyses clearly the approach that should be taken in all private law cases when allegations of domestic abuse are a feature of the evidence.

Procedurally, the Court of Appeal also makes plain that the approach of the High Court in hearing appeals must be limited to a review of the trial judge's decision, and must not involve the High Court substituting its own view for that of the original judge. As Singh LJ points out in his short concurring judgment, the approach under Pt 30 of the Family Procedure Rules (which govern appeals to the High Court) is equivalent to Pt 52 of the Civil Procedure Rules, and the meaning of the word ‘wrong’ which governs both tests is set out in detail in the *White Book*. The same, of course, is true of appeals to Circuit Judges sitting in the Family Court, and so this case marks a timely reminder for all those hearing or litigating appeals as to the correct approach.

*Damian Garrido QC and Rob George acted pro bono for the appellant father in the Court of Appeal. They are co-authors, with Frances Judd QC and Anna Worwood, of Relocation: A Practical Guide (2nd edition, 2016, Jordan Publishing).*