

How Do Judges Decide International Relocation Cases?

Rob George*

Abstract: There has been considerable controversy over the approach taken to international relocation disputes by the courts of England and Wales, but little has been known about how first instance judges approach such decisions in ‘everyday’ relocation cases. This article reports the findings of an empirical study in 2012 which looks at case outcomes and judicial reasoning in international relocation disputes based on the decisions of trial judges and the reports of lawyers. The article analyses case characteristics and some factors which may influence case outcomes, and explores the judicial reasoning used to reach those conclusions.

INTRODUCTION

For over a decade, international relocation disputes have remained one of English family law’s more controversial issues. These difficult cases involve the application by one parent for permission to remove their child permanently¹ from the United Kingdom against the other parent’s wishes. Until recently, the leading authority remained the 2001 Court of Appeal decision in *Payne v Payne*,² interpreted in the light of the 2011 Court of Appeal case of *K v K (Relocation: Shared Care Arrangement)*.³ The most recent decision, *Re F (International Relocation Cases)*,⁴ reduces the significance of *Payne* and calls for a holistic, case-specific analysis.

While relocation law has been subjected to significant criticism,⁵ little is known about the reality of these cases as they are being decided on the ground. The focus of scholars’ attention has understandably been on the principles as set out by appellate judges, together with the decisions of those few reported first instance cases. Work which has asked about everyday decision-making in relocation cases has approached the question indirectly, talking

* UCL Faculty of Laws.

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¹ Temporary relocation is an increasingly important area, but the issues are quite different from their permanent relocation counterparts.

² [2001] EWCA Civ 166, [2001] 1 FLR 1052 (hereafter, ‘*Payne*’).

³ [2011] EWCA Civ 793, [2012] 2 FLR 880 (hereafter, ‘*K v K*’).

⁴ [2015] EWCA Civ 882 (hereafter, ‘*Re F (International Relocation Cases)*’).

⁵ See, eg, M. Hayes, ‘Relocation Cases: Is The Court of Appeal Applying the Correct Principles?’ [2006] CFLQ 351; J. Herring and R. Taylor, ‘Relocating Relocation’ [2006] CFLQ 517; F. Judd QC and R. George, ‘International Relocation: Do We Stand Alone?’ [2010] *Family Law* 63; S. Gilmore, ‘The Payne Saga: Precedent and Family Law Cases’ [2011] *Family Law* 970; R. George, ‘Reviewing Relocation?’ [2012] CFLQ 110; R. George, *Relocation Disputes: Law and Practice in England and New Zealand* (Oxford, Hart Publishing, 2014) (hereafter, ‘*Relocation Disputes*’).

to practitioners about their experiences.⁶ This work is valuable, not least in understanding the wider processes involved in family dispute resolution of which, of course, the family court is only part. However, such research inevitably gives a somewhat detached perspective, asking judges and practitioners in the abstract rather than examining actual decisions.

At the same time, a major debate in England and Wales about relocation law is whether leave to remove a child from the jurisdiction is granted too easily. This important debate has been significantly hampered by a lack of knowledge about the proportion of applications that is, in fact, allowed. More generally, little is known about the people involved in relocation disputes, such as where they are seeking to go and why, how old their children are, and so on.

This paper reports the findings of empirical work carried out in 2012 designed to shed light on these issues. In particular, the following questions are addressed:

- (1) What are the characteristics of international relocation cases decided by courts in England and Wales, in terms of the families involved and case details?
- (2) What are the outcomes of litigated cases in terms of applications being allowed or refused, and what variables appear to influence those outcomes?
- (3) How are judgments constructed in international relocation cases to allow judges to reach these conclusions?

INTERNATIONAL RELOCATION: THE LEGAL FRAMEWORK

As with all private law disputes about children's upbringing, the welfare of the child is the court's paramount consideration in a relocation dispute,⁷ supplemented by the welfare checklist in s 1(3) of the Children Act 1989. In addition, when the cases being discussed in this article were decided, the courts remained focused on the guidance from *Payne*, which highlighted factors of particular relevance to the relocation context. In Thorpe LJ's judgment, a so-called 'discipline' was set out:⁸ the discipline asked about the applicant's motivation and the level of planning that had gone into the application, followed by the respondent's motivations, and then the effect of a refusal of the application on the applicant, all of which was said to be relevant to an overall analysis of welfare. Similar guidance was given by the then-President of the Family Division, Dame Elizabeth Butler-Sloss,⁹ though in the years following *Payne* it was Thorpe LJ's judgment which dominated judicial thinking.

The *Payne* guidance, particularly Thorpe LJ's 'discipline', was once 'commonly seen as walking and talking like a presumption' in favour of relocation applications being allowed.¹⁰

⁶ *Relocation Disputes*.

⁷ Children Act 1989, s 1.

⁸ *Payne*, [40]–[41].

⁹ *Payne*, [85]–[86].

¹⁰ C. Geekie QC, 'Relocation and Shared Residence: One Route or Two?' [2008] *Family Law* 446, 151–52; see also M. Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' [2006] CFLQ 351; *Relocation Disputes*, pp 88-90 and 90-112.

However, more recent decisions – especially *K v K (Relocation: Shared Care Arrangement)*,¹¹ which was decided shortly before the cases reported in this research were decided, and *Re F (Relocation)*,¹² which was decided three quarters of the way through the sampling period for this research – made clear that *Payne* was intended to guide judges in the factors which they might need to consider, but not as to the outcomes they should reach.¹³ In practical terms, this was generally thought to mean that the ‘rigour’ with which judges are approaching applications increased: the impression that a relocation application is almost bound to succeed was dying away in 2012 when this research was conducted.¹⁴ Consequently, although the guidance itself did not change, it was thought that the way in which judges approached cases using the guidance did.

The approach to international relocation cases has subsequently shifted again, with the 2015 Court of Appeal decision in *Re F (International Relocation Cases)*.¹⁵ Here, the appeal court said for the first time that following *Payne*’s guidance may amount to an error of law if the facts of the case being decided call for a broader (or simply different) approach; the court commended a global, holistic analysis of all factors, and a parallel analysis of the various proposals being put forward in an assessment of welfare. While this approach draws heavily on *K v K*, it marks a change of emphasis from the position as understood before mid-2015;¹⁶ when thinking about the cases discussed in this article, it is therefore important to keep in mind the legal landscape at the time, and how it appears to have shifted subsequently.

SUMMARY OF METHODOOOGY

This paper reports findings from two related studies.¹⁷ The first study, which is the principal source of data, comprises 96 judicial decisions in international relocation cases in the calendar year 2012, and referred to as the Court Case (‘CC’) sample. The CC sample comprises 96 international relocation decisions where either the court’s order (N=43), the court’s judgment (N=53), or both (N=20) were provided. For obvious reasons, judgments provide a great deal more information than orders alone, though most orders submitted contained detailed recitals and other information, and even the most basic usually contained considerable information. Nonetheless, it is worth noting that in the cases where only the order was available, less information was available and so the analysis that can be performed

¹¹ [2011] EWCA Civ 793, [2012] 2 FLR 880.

¹² [2012] EWCA Civ 1364, [2013] 1 FLR 645.

¹³ See, eg, *Re H (Leave to Remove)* [2010] EWCA Civ 915, [2010] 2 FLR 1875; *J v S (Leave to Remove)* [2010] EWHC 2098 (Fam), [2011] 1 FLR 1694; *Re W (Relocation: Removal Outside Jurisdiction)* [2011] EWCA Civ 345, [2011] 2 FLR 409.

¹⁴ *Relocation Disputes*, p 109.

¹⁵ [2015] EWCA Civ 882.

¹⁶ E Devereux and R George, “‘Alas Poor Payne, I knew him...’ An Interpretation of the Court of Appeal’s Decision in *Re F (International Relocation Cases)* [2015] EWCA Civ 882’ [2015] *Family Law*, October. For a summary of the law at the time of this research, see R George, F Judd QC, D Garrido and A Worwood, *Relocation: A Practical Guide*, 1st Edn (Jordans, 2013), Ch 2.

¹⁷ A full methodological appendix, highlighting various limitations of the dataset, is included at the end of this paper.

on those decisions is more limited. All 96 cases contribute to the quantitative part of this study, and the 53 cases where judgments were provided underpin the qualitative part.

The second study, designed to augment and test the reliability of the CC sample, comes from 52 questionnaire responses from family lawyers in England and Wales between October 2012 and January 2013, and referred to as the Research Questionnaire ('RQ') sample. These 52 cases augment the quantitative part of this paper, but not the qualitative.

Because the CC and RQ samples ask about cases decided in the same period, there is obvious scope for overlap. Cases were analysed for overlaps, looking at key characteristics such as number and age of children and proposed destination country. Nine likely overlap cases were identified in this way.¹⁸ When the two samples are analysed separately, all cases are kept in each sample; however, in places the two samples are combined and then the nine overlap cases are included only once. Where this is done, the CC cases are used, since the CC sample is more reliable: the data come directly from court documents, whereas the RQ sample relies on practitioners' recollection, potentially some months after their involvement with the case ended.

QUANTITATIVE FINDINGS

Case Outcomes

England has traditionally been seen as a 'pro-relocation' jurisdiction, with applications to remove a child from the jurisdiction perceived to be treated comparatively favourably.¹⁹ However, while some other countries have researched case outcomes to test this question, no work has previously been done in England and Wales, so making it difficult to know whether the perception is reflected in practice. The position in Canada (perceived as 'neutral' when it comes to relocation applications) and New Zealand (perceived as 'anti-relocation') make for useful broad-brush comparators, though the different methodologies used for collecting cases in different studies mean that caution is needed in making direct comparison. In Canada, Rollie Thompson's research (which involved only reported cases, though a high proportion are reported in Canada) showed an overall success rate of 68% for international applications going outside North America.²⁰ Similarly, Mark Henaghan's New Zealand study (which involved all first instance decisions in that jurisdiction) also showed an overall success rate of 68% for international cases in the courts in that country.²¹ Given that these jurisdictions are

¹⁸ A summary of all cases in the two samples, which indicates the likely overlap cases, is contained in R. George, *Relocation Disputes in England and Wales: First Findings from the 2012 Study* (Oxford Legal Research Paper 91/2013), online at ssrn.com/abstract=2306097, Appendix 2 (hereafter, 'First Findings')

¹⁹ T. Foley, *International Child Relocation: Varying Approaches Among Member States to the 1980 Hague Convention* (London, Court of Appeal, 2006); *Relocation Disputes*, pp 10-12.

²⁰ R. Thompson 'Heading for the Light: International Relocation from Canada' (2011) 30 *Canadian Family Law Quarterly* 1. Many moves to North America from Canada involve very short distances just across the border, which may be why differentiating broadly between North American and other destinations is helpful.

²¹ M. Henaghan, 'The Conundrums of Relocation' (London Metropolitan University Conference, July 2013).

said to represent different approaches to relocation, it is noteworthy that the reported success rates of applications appear so similar.

The two datasets in this study yield slightly different findings from each other in terms of overall outcomes: the CC sample had an overall success rate of 71.9%, the RQ cases 59.6%; when the two datasets are combined (and the supposed duplicates discounted), the overall success rate is 66.7%. Whichever percentage is used, the comparison with the results of the (broadly comparable) studies in other jurisdictions, as shown in Table 1, is interesting: apparently challenging the standard depictions of these jurisdictions as respectively pro-, neutral, and anti- regarding relocation, the findings show little difference in these broad terms between the court outcomes in the three jurisdictions.²²

Table 1: Table showing the percentage of international relocation applications that were allowed in the CC and RQ datasets, and in studies from Canada and New Zealand

Data Set	N	Percentage of Cases where Relocation Is Allowed
INT CC	96	71.9
INT RQ, Judicially Determined Cases Only	52	59.6
INT CC and RQ Combined	139	66.7
International Relocation Cases in Canada, 2005-10 ('neutral')	47	68.0
International Relocation Cases in New Zealand, 2011-12 ('anti-relocation')	44	68.0

Of course, the results of court litigation do not tell the whole story, because cases which reach the courts are filtered in various ways by pre-litigation advice and decision-making, all of which (it is generally assumed) takes place in the shadow of the law,²³ influenced by people's perceptions of the law as well as non-legal factors and individual bargaining chips. In the relocation context, earlier research has suggested that the advice that lawyers give to potential applicant and respondent parents varies considerably from country to country,²⁴ and this is likely to affect the overall picture of relocation case outcomes. On the other hand, the proportion of international relocation cases which settle is thought to be relatively low.²⁵

²² None of the differences is statistically significant, whichever of the CC, RQ or combined results is used for comparison with the Canadian and New Zealand data.

²³ R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950

²⁴ *Relocation Disputes*, esp pp. 85-86.

²⁵ *Ibid*, p. 3, reporting the views of lawyers in England and New Zealand, both of whom said that it was unusual to settle relocation cases.

While it is interesting and important to know the overall success rates for international relocation cases in this sample, the next question is to look at the factors which affect those case outcomes. It is not the case that every relocation application has an equal chance of succeeding. Practitioners have long argued that the motivation of the applicant probably is, and certainly should be, a factor influencing whether the relocation should be allowed or not;²⁶ and more recently, the English courts have placed renewed focus on the importance of the child's existing care arrangements before the relocation dispute begins as a factor which may influence the decision about relocation.²⁷ Consequently, the analysis now moves to look at factors which, from a statistical perspective, appear to be relevant to the decision-making which leads to the overall outcomes reported above.

Factors Influencing Case Outcomes

The study approaches this analysis using different methodological techniques. The first, called an Information Gain Score (IGS) analysis, ranks each of the variables according to how much additional information that variable provides when predicting outcomes. The results of that analysis are reported in an earlier paper,²⁸ their main function being to guide further work using other methods. The findings of that further work are set out here, divided into two broad sections.

Families and biographical characteristics

First, we can note that, in line with anecdotal reports, the vast majority of applicants in this study were mothers. In the CC sample, 93% of applicants were mothers, 5% were fathers, and 2% were grandparents; in the RQ sample, 95% were mothers and 5% fathers. This pattern is broadly similar to that in other countries; for example, a Canadian study of relocation decisions from 2001 to 2010 showed 92% of applicants were mothers, 7% were fathers and 1% were non-parents.²⁹

One of the most complete pieces of data available in the study is the children's ages. In the CC sample (N=140 children), the mean age was 6.75 years, while in the RQ sample (N=88 children) it was 7.9 years. The spread of ages is illustrated in Figure 1, where the percentage of children of each age in each sample is shown on a bar chart (with percentages used for ease of comparison). It can be seen that while the RQ sample has a single peak at 8 years, the CC sample has a higher percentage of children of pre-school age. It is not known why the two samples would be different in this respect.³⁰

²⁶ See, for example, the argument of Eleanor Hamilton QC, as she then was, in *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239; see also *Relocation Disputes*, Ch 4.

²⁷ See especially *K v K*.

²⁸ 'First Findings', paras 4.9-4.18.

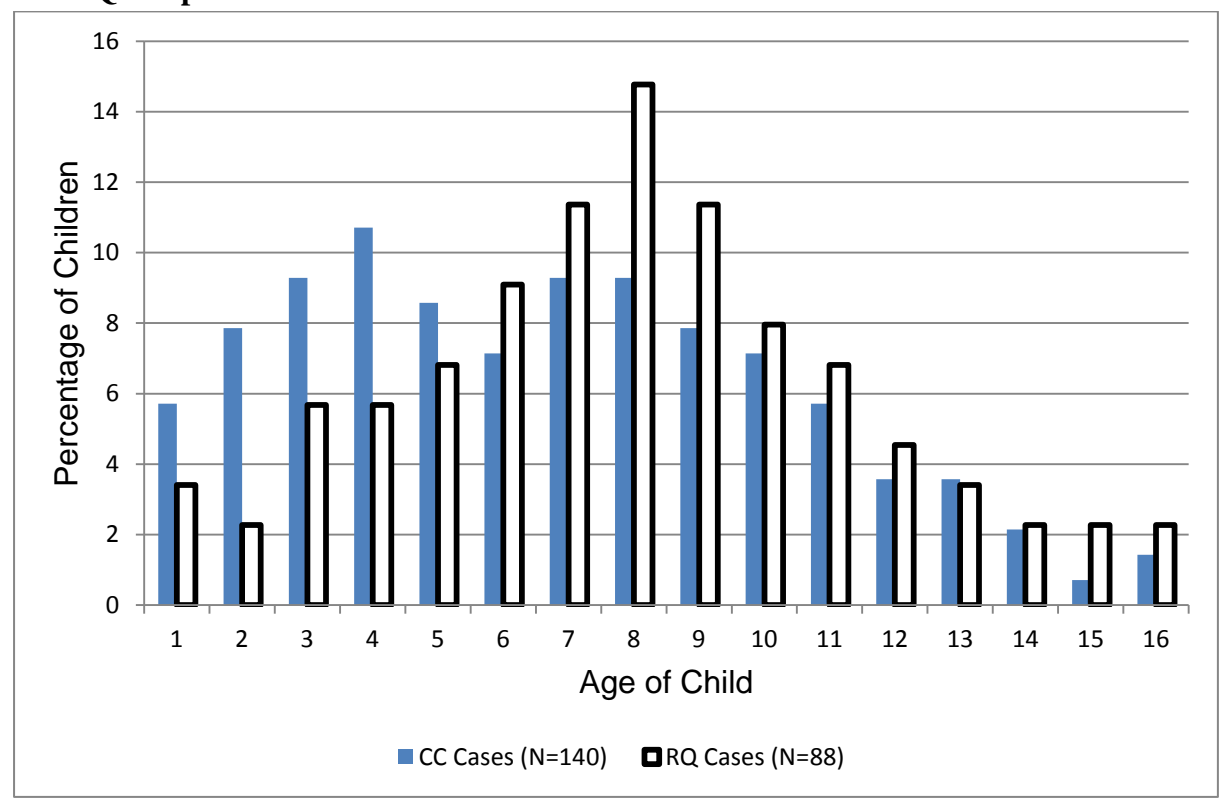
²⁹ N Bala and A Wheeler, 'Canadian Relocation Cases: Heading Towards Guidelines' [2012] *Canadian Family Law Quarterly* 271, 289.

³⁰ In 'First Findings', paras 3.27-3.35, this issue is explored in more detail.

It is also notable that in both samples, children over the age of about 10 or 11 feature relatively infrequently. When we look later at the qualitative analysis of court judgments, one reason why this might be the case is that older children’s views are more influential in decision-making, and so parents may settle litigation (or not start it at all) in some cases involving an older child, once the child’s views are known.

However, that possible pre-litigation filter issue aside, the data do not support the suggestion that the children’s ages might affect case outcomes. Indeed, case outcomes are stable whatever the age of the child involved.³¹

Figure 1: Bar chart showing the percentage of children of each age in each of the CC and RQ samples



Another issue to consider is the care arrangements in place for children prior to the relocation application. One might expect to find that the more the child’s day-to-day care was shared by the respondent parent, the less likely it would be that a relocation application would succeed. The intellectual justification for this approach would be that such a child has ‘more to lose’ by relocating, in terms of his or her relationship with the respondent parent, but also that an existing shared care arrangement would allow the child more readily to remain in the present location in the main care of the respondent parent if the applicant parent decided to relocate

³¹ ‘First Findings’, paras 4.51-4.55.

anyway.³²

Table 2 shows the success rates for international relocation applications in the two data samples.³³ Cases were classified as ‘shared care’ where the child spent at least 35% of time with each parent, ‘overnight stays’ where there was overnight time but less than 35%, ‘direct contact’ where there was no (or no regular) overnight time, and ‘no direct contact’ where the child had no face-to-face time with a parent; there was also an ‘other’ category, for cases where (for example) a non-parent was also involved in the child’s main care, or where the respondent parent was the main carer.³⁴ In the CC sample, this information was assessed by the researchers either directly or indirectly from the court documents; in the RQ sample, respondents reported the care arrangements that had been in place. It can be seen that in the CC sample, the success rates of applications follow the approximate pattern that would be expected, with shared care cases least likely to be allowed and no contact cases most likely to be. However, the RQ sample shows almost no difference between the main categories of care arrangement, which may lead to more doubt about the overall picture. In any case, the differences are not statistically significant in either dataset, so the differences seen may simply be the result of random chance.

³² An alternative way of thinking about this issue – in favour of relocation – is to say that a child in a shared care arrangement has a stronger existing bond with the respondent parent, and so will be better placed to maintain a positive and beneficial relationship after relocation.

³³ Information about care arrangements is not available for all cases in either sample.

³⁴ This classification was not used consistently by judges in their judgments, with the term ‘shared care’ used in many cases involving overnight time with both parents regardless of the extent of sharing.

Table 2: Table showing success rates for international relocation applications in the CC and RQ samples, and in the two combined, for different pre-relocation child care arrangements

Care arrangement	CC Cases		RQ Cases		CC and RQ Combined	
	N	Success rate (%)	N	Success rate (%)	N	Success rate (%)
All cases where care arrangements known	71	66.2	51	60.8	118	61.9
Shared care arrangement (35% <)	8	50.0	16	56.3	24	54.2
Some overnight stays	43	60.5	22	50.0	63	55.6
Direct contact, no overnight stays	11	72.7	6	50.0	16	62.5
No direct contact	5	100.0	3	100.0	8	100.0
Other care arrangements	4	100.0	4	100.0	7	100.0

That caveat – given the inevitable limitations of the dataset – aside, these findings might incline us to suggest that cases involving no overnight contact with the respondent parent are more likely to be allowed than those involving at least some overnight stays. However, it is more difficult to know whether, once *that* line has been crossed, the *amount* of sharing of care makes any difference: the CC data suggest that it does, but the RQ and combined data are more equivocal. Further work is needed to clarify this issue. Interestingly, as noted below in the court judgments analysis,³⁵ judges seldom varied their language in describing the relationship between the child and the non-moving parent. Save where that parent presented some kind of risk to the child, they were commonly described as, for example, having ‘a very loving and close relationship’, whatever type of care arrangement was in place.

A separate issue which the data seem to suggest may be of some relevance is the applicant parent’s current relationship status, whether married, cohabiting, and so on.³⁶ As the figures in Table 3 show, it seems that in this sample those applicants who were in some kind of stable relationship had a higher chance of their applications succeeding than those who were

³⁵ Below, text after fn 81.

³⁶ There is no apparent variation in relation to respondent parents’ relationship status, as might be expected: ‘First Findings’, para 4.57.

not in an on-going relationship.³⁷

Table 3: Table showing success rates for international relocation applications in the CC sample for different current relationship statuses of the applicant parent		
Current relationship type	APPLICANT PARENTS	
	N	Success rate (%)
All cases where relationship status known	47	68.1
Married	17	82.4
Engaged	2	[100.0]
Cohabiting	4	[75.0]
Non-cohabiting relationship	4	[75.0]
No on-going relationship	20	50.0
[] = small numbers, therefore percentages should be interpreted with caution		

Looking in more detail at the applicants who are married or engaged compared with those who are not in an on-going relationship, some striking differences emerge. For example, amongst the 19 single applicants from whom this information is known, none was a British national seeking to emigrate, whereas 14 of the 19 married or engaged applicants were. Similarly, the vast majority of single applicants were seeking to relocate in order to return home (80%) or to get increased family support (80%); between them, these reasons accounted for nine out of ten cases involving single applicants. Of the remaining two cases, one was based on a job offer abroad,³⁸ while the other was seen as a pure ‘lifestyle’ decision.³⁹

Amongst the married applicants, on the other hand, the clear majority were bringing an application based primarily on a factor related to their new spouse. In some cases, he was already in the new location (N=6), while in other cases he was seeking to return to his original home country (N=5). Four of these eleven cases also involved the new partner

³⁷ The result for those applicants not in an on-going relationship is statistically significant at the 5% confidence interval, with a p-value of 0.022.

³⁸ Case CC-81. The mother was offered a new job with her existing employer in its Brussels office, having moved to London from another EU country in 2007.

³⁹ Case CC-75. Note, though, that a background of domestic violence and child abuse by the father made this case atypical as ‘lifestyle’ applications go.

having a job offer, and job offers for the partner were the main basis for a further three cases. A few applications amongst the married group were based on the applicant herself seeking to return to her original home country (N=3) or were pure ‘lifestyle’ cases (N=2).

It is interesting to wonder how best to understand these patterns. Are judges concerned to protect applicants’ new relationships, which some authorities suggest will struggle if a new partner is prevented from pursuing his life ambitions involving relocation, so as to try to avoid the children experiencing a second relationship breakdown?⁴⁰ Do some judges take the view that children need a father-figure in their lives, and so keep children of single applicants near the respondent fathers while allowing re-partnered applicants to move because this role is seen as being performed by the step-father?⁴¹ Alternatively, is it that judges are generally less impressed by applications premised on a desire by the applicant to return ‘home’, but find those cases motivated by new partners or their careers more compelling?

Curiously, this aspect does not feature strongly in judicial reasoning. Judges frequently talked about the effect of a refusal of the application, but rarely linked this discussion to issues relating to new partners. As we will see,⁴² the focus was more often on the applicant’s present life in this jurisdiction and, in many cases, a need for support in the proposed destination country, neither of which tended to be linked to new partners.

Relocation Destinations and Motivations

The second broad category of findings relates to the destinations of the proposed relocations, and the parties’ motivations in seeking or opposing such a move. Starting with proposed relocation destinations, most international applications involve to one of three groups of countries: countries within the EU, countries in North America, and countries in Australasia; for the purposes of this analysis, other destinations are treated together as a collective ‘other’ group. Table 4 shows the success rates for applications in these four groups for the CC and RQ data sets, and for the two combined.

⁴⁰ See, for example, *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043, [11]-[12] and [31]-[32].

⁴¹ See generally R. van Krieken, ‘The “Best Interests of the Child” on Parental Separation: On the “Civilizing of Parents”’ (2005) 68 *Modern Law Review* 25, 30-31 and 35.

⁴² Below, text after fn **Error! Bookmark not defined.**

Table 4: Table showing success rates for relocation applications in the CC and RQ samples, and in the two combined, for different proposed destinations

Proposed relocation destination	CC Cases		RQ Cases		CC and RQ Combined	
	N	Success rate (%)	N	Success rate (%)	N	Success rate (%)
All cases where destination known	95	72.6	51	60.8	139	67.6
European Union	35	80.0	20	50.0	54	68.5
North America	21	71.4	13	61.5	31	64.5
Australia / New Zealand	23	52.2	10	[60.0]	32	56.3
Other destinations	16	87.5	8	[87.5]	22	86.4

[] = small values, therefore percentages should be interpreted with caution.

The CC data, on the left side, appear to tell a fairly coherent story: put simply, the further away the proposed destination, the less likely it was that the relocation would be allowed. The RQ cases, on the other hand, tell a different and in many ways less clear story. Proposed moves to the EU here had the lowest success rate (50.0%), and there is little difference between North American cases (61.5%) and Australasian cases (60.0%). The big variation in outcomes for EU cases between the CC and RQ data is particularly puzzling, since this group is the largest in both datasets and ought, therefore, to be least vulnerable to random fluctuations. Looking deeper, though, there may be reason to think that the RQ sample of EU moves is populated with ‘unusual’ cases. For example, while just 5.7% of the CC sample of EU moves (N=35) were heard in the High Court (either by full time Judges or by Deputies), almost a third (31.3%) of RQ cases to the EU were heard in that court (N=16). Consequently, there may be reasons to think that the CC sample is more ‘typical’,⁴³ and so to give greater weight to the higher success rate for EU applications seen in that data. This interpretation also fits with a more natural explanation of the patterns in the data, since it makes more sense if comparatively short-distance moves within the EU should be allowed more frequently than proposed relocations to the other side of the world.⁴⁴

Turning to applicants’ reasons for seeking to relocate, earlier research in other countries has

⁴³ Few cases are heard by High Court Judges, and almost all of them involve moves outside the EU unless they have unusual complexities. For a third of all EU cases to be heard by High Court Judges suggests a sample of cases which were unusual or complex on their facts, possibly caused by research participants more readily remembering an ‘interesting’ High Court case than a ‘normal’ case before a lower level of judge.

⁴⁴ Conversely, language and cultural differences may be less with a long-distance Commonwealth country than some short-distance European ones where the applicant and children are originally British nationals – but that may be less of a factor where applicants want to return to their original home country.

shown that most applicants give several reasons.⁴⁵ Consequently, while we can look, for example, at all cases where the applicant was seeking to ‘return home’ to her original country, and at cases which involved a move for a new job, some cases will fall into both groups.

Table 5 breaks down cases by reference to the three main reasons given: returning home, moving to take up a new job that the applicant or her new partner had been offered, or moving for a generally improved lifestyle; plus a catch-all ‘other reasons’ category. Since the categories are not mutually exclusive, the total number of cases for each dataset is less than the sum of each reason for moving.

Table 5: Table showing success rates for international relocation applications in the CC and RQ samples, and in the two combined, for different primarily reasons given by the applicant for seeking to relocate

Reason for seeking relocation	CC Cases		RQ Cases		CC and RQ Combined	
	N	Success rate (%)	N	Success rate (%)	N	Success rate (%)
All cases with known reasons	75	72.0	52	59.6	123	65.9
Return to applicant’s original country	42	73.8	23	73.9	61	72.1
New job for applicant or partner	16	93.8	25	56.0	40	70.0
Lifestyle choice	21	47.6	21	52.4	40	47.5
Other reasons	9	[66.7]	5	[40.0]	14	57.1

[] = small values, therefore percentages should be interpreted with caution
 NB: Categories of reasons for seeking relocation are not mutually exclusive, therefore the sum of all reasons is greater than the total number of cases.

These data again suggest a somewhat confused picture between the two datasets, with the CC data suggesting that moving for a new job has a significantly higher chance of success while moving to go home is about average, whereas the RQ data show the exact opposite. Both datasets show that lifestyle choice cases are less likely to succeed than any other reason, though, and this finding is statistically significant in both the court case and combined datasets. This finding is consistent with practitioners’ views from earlier research suggesting

⁴⁵ See N. Taylor, M. Gollop and M. Henaghan, *Relocation Following Parental Separation: The Welfare and Best Interests of Children* (Dunedin, Centre for Research on Children and Families, 2010), p. 26; R. Kaspiew, J. Behrens and B. Smyth, ‘Relocation Disputes in Separated Families Prior to the 2006 Reforms: An Empirical Study’ (2011) 86 *Family Matters* 72, 74; P. Parkinson, J. Cashmore and J. Single, ‘Mothers Wishing to Relocate with Children: Actual and Perceived Reasons’ (2011) 27 *Canadian Family Law Journal* 11.

that ‘lifestyle choice cases are the hardest to [succeed in bringing]’.⁴⁶

Finally, we can look briefly at the way in which some of these factors appear to interact.⁴⁷ Most interesting is the interaction between the proposed destination and the applicant’s principal reason for seeking to relocate, as set out in Table 6.

Table 6: Table showing success rates for relocation applications in the CC sample, divided into the main geographic locations of the proposed destinations, for different primarily reasons given by the applicant for seeking to relocate

Reason for seeking relocation	European Union		North America		Australia / New Zealand	
	N=	Success rate (%)	N=	Success rate (%)	N=	Success rate (%)
All cases where reasons known	28	78.6	16	68.8	18	50.0
Return to applicant’s original home country	18	83.3	10	70.0	7	[42.9]
New job for applicant or partner	5	[100.0]	2	[100.0]	5	[80.0]
Lifestyle choice	6	[33.3]	5	[80.0]	10	40.0

[] = small values, therefore percentages should be interpreted with caution. NB: Categories of reasons for seeking relocation are not mutually exclusive, therefore the sum of all reasons will be greater than the total number of cases.

The pattern is not entirely consistent between the three groups of destinations, and the small numbers in many of the categories mean that significant caution is needed when looking at many of the percentages. But the patterns amongst these cases are largely unsurprising, given the previous data seen. For example, permission to move to Australia in ‘lifestyle’ cases was particularly unusual, whereas ‘going home’ to EU countries was very often allowed.

QUALITATIVE ANALYSIS OF COURT JUDGMENTS

So far, the analysis in this article has focused primarily on individual variables and how they may impact on case outcomes. In practice, of course, each case involves many variables which interact. As noted at the end of the previous section, some multi-variable analysis can be done in a statistical way, but that analysis can inevitably only go so far, because the

⁴⁶ *Relocation Disputes*, p. 102.

⁴⁷ It is not possible to do this for all variables, as the data are not clear enough to lead to robust conclusions.

outcomes of court cases depend upon considerations which simply cannot be quantified. If we knew that factors *x*, *y* and *z* added up led to outcome 1, and factors *a*, *b* and *c* added up led to outcome 2, there would be little need for courts at all. The reality is that many of the considerations which inform judicial reasoning and hence court outcomes are not quantifiable in this way. In particular, the personalities of the people involved often have an effect – even a decisive effect – on the judge’s decision.⁴⁸ Consequently, we turn now to look at judges’ reasoning as expressed in judgments as a way better to understand how various factors fit together in leading to case outcomes.

In looking at the 53 judgments available for this analysis, a number of themes can be identified. First, it is interesting to see how the judges constructed the law itself, particularly as this issue is particularly difficult and, perhaps, controversial following *K v K*.⁴⁹ From there, we turn to look at particular issues raised by the *Payne* guidance which are of especial relevance to the overall reasoning processes seen in the judgments.

Constructions of the law

The treatment of the Payne guidance

In general, judges did not engage in lengthy discussion of the law relevant to relocation cases. Most cases quoted the key summaries from *Payne*,⁵⁰ and many judges proceeded to address each of the points raised using headings based on either Thorpe LJ’s ‘discipline’ or Butler-Sloss P’s ‘guidance’ (or sometimes both). Other authorities were mentioned intermittently.⁵¹ Most judges also gave express consideration to the items on the welfare checklist.⁵²

While judges frequently reiterated that ‘[i]t is imperative ... that the court heeds the words of caution of the Court of Appeal in *K v K* and avoids the risk of elevating the guidance in *Payne* to the status of principle or, worse still, presumption’,⁵³ only occasionally did they make evaluative comments about the authorities. One District Judge discussed at some length various criticisms of *Payne* before somewhat begrudgingly saying that ‘I shall ... submit to the “discipline” suggested by Lord Justice Thorpe’.⁵⁴

The only point on which there was any real variation in approaches was about cases

⁴⁸ *Relocation Disputes*, p 173.

⁴⁹ See, eg, E. Devereux and R. George, ‘When Will the Supreme Court Put Us Out of Our Payne?’ [2014] *Family Law* 1586.

⁵⁰ *Payne v Payne*, [40]-[41] and [85]-[86].

⁵¹ The most commonly cited was *K v K*, followed by *J v S (Leave to Remove)* [2010] EWHC 2098 (Fam), [2011] 1 FLR 1694 and *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577; in the final months of 2012, judges also sometimes cited *Re F (Relocation)* [2012] EWCA Civ 1364, [2013] 1 FLR 645, which was decided in October 2012.

⁵² Children Act 1989, s 1(3).

⁵³ CC-34, [86].

⁵⁴ CC-46, [27]; also CC-58, [7].

involving shared care arrangements, which was described by one judge as a ‘particularly vexed question’.⁵⁵ There were two clear views in the eight cases where this issue was discussed.⁵⁶ One was that the court’s approach would be different in a shared care application, and therefore that ‘[w]hether or not this is a shared care case is a question, in my judgment, which I need to deal with at the outset of any discussion of the relevant law’.⁵⁷ For these judges, a finding of shared care meant that the *Payne* guidance was often given little further attention, whereas if the judge declined to label the arrangements as such then *Payne* was the court’s focus. It is interesting to wonder whether some judges might have used this labelling as a means of reinforcing a decision already made on another basis: for example, if a judge were inclined to refuse a relocation application for other reasons then categorising the case as ‘shared care’ might help to bolster that conclusion if *Payne* is seen as not applying to shared care cases. There is no way to assess whether this is so from court judgments, but earlier work suggests that judges may be conscious of these considerations.⁵⁸

Other judges rejected the idea that shared care cases called for a different legal approach – ‘the court should not categorise cases in accordance with the concepts of primary or shared care’.⁵⁹ In a clear reflection of the arguments put forward by counsel, judges in this group often commented that they were ‘not assisted ... by attempting to decide who was the primary carer’.⁶⁰ These judges avoided any classification, but were happy to state (as Black LJ had done in *K v K*) that ‘the guidance set out in *Payne* carries less weight’ in cases involving truly shared care.⁶¹

It is likely that this confusion over shared care relocation cases has been resolved by the October 2012 decision in *Re F (Relocation)*,⁶² wherein Munby LJ reiterated the non-classificatory approach and declared that Moore-Bick and Black LJ represented the majority in *K v K*,⁶³ and more so by Ryder LJ’s decision in *Re F (International Relocation Cases)*. However, it is clear that throughout 2012 there was variation in approaches to these cases, and judges felt compelled to engage with these questions.

Human rights law

⁵⁵ CC-81, [104].

⁵⁶ Not all of the cases discussing this issue were classified as shared care cases – judges sometimes discussed the controversy but then determined that the facts of the case fell outside the shared care area. Consequently, the 8 cases here do not correspond exactly with the 8 shared care cases shown in Table 2; in 3 of those cases, only an order was sent to the study, so no comment can be made about the judges’ approaches in their judgments.

⁵⁷ CC-23, [42]; also CC-27, [7]; CC-12, [33] and CC-54, [29].

⁵⁸ *Relocation Disputes*, pp 69-71 and 78-79.

⁵⁹ CC-96, [5].

⁶⁰ CC-61, [36].

⁶¹ CC-67, [19].

⁶² [2012] EWCA Civ 1364, [2013] 1 FLR 645

⁶³ On the confusion over the ratio of *K v K*, see R. George, ‘Reviewing Relocation?’ [2012] CFLQ 110.

Another legal point, conspicuous primarily by its absence, was discussion of human rights issues. Very few cases even mentioned the rights of the children, parents or others involved; those that did contained only perfunctory comments. The handful of cases where rights were mentioned fell into two groups. In one group, the mention of rights involved a purely abstract acknowledgement that the parties had rights which were engaged by the decision:

I am also acutely conscious of each of the parties' Article 6 and Article 8 rights under the human Rights Act and, in coming to my decision, I have all of that at the forefront of my mind.⁶⁴

The other group of cases involved judges going one step further and noting (still only in the abstract) that any interference with Article 8 rights needs to be necessary and proportionate and in the pursuit of a legitimate aim. Two cases – which mark the high point of the rights analysis in the relocation judgments – put the issue in these ways:

This order does affect each party's rights to family life under the European Convention. The interference in the father's is merited by the welfare interests of his son and is proportionate.⁶⁵

[In allowing relocation] I would interfere with the father's right to family life pursuant to Article 8 ECHR, which I can only do if I consider it necessary and proportionate. I do consider it necessary and proportionate to do so.⁶⁶

It would be easy to criticise these judgments for their minimal engagement with the potentially substantial interferences with the rights of the parties involved. But these judges at least commented expressly, albeit minimally, on the human rights issues in their judgments. In practice in the relocation cases in this study, therefore, human rights issues were not a central focus for judges. However, human rights issues have a potentially substantial effect on analysis of the issues.⁶⁷ It is not that judges should undertake a rights analysis as a sort of *pro forma*, but their analysis of 'the entire family situation' needs to demonstrate that they have engaged in an overarching balancing of interests.⁶⁸ A mere acknowledgement of rights or assertion of proportionality may not advance matters much, and may not be adequate to allow an appeal court to review the judge's 'compliance or otherwise' with human rights obligations.⁶⁹ That said, although the Court of Appeal in *Re Y* suggested that no separate analysis of Article 8 is required in private law children cases,⁷⁰ in *Re F (International Relocation Cases)* Ryder LJ held that in a case involving a potential international relocation

⁶⁴ CC-55, [79]; similarly CC-27, [A31]; CC-41, [5]; CC-94, [5].

⁶⁵ CC-62, [34].

⁶⁶ CC-69, [98].

⁶⁷ J. Herring and R. Taylor, 'Relocation Relocation' [2006] CFLQ 517.

⁶⁸ *YC v United Kingdom* (Application No 4547/10) [2012] 2 FLR 332 (ECtHR).

⁶⁹ *Re B (Care Order: Proportionality: Criterion for Review)* [2013] UKSC 33, [2013] 2 FLR 1075, [45].

⁷⁰ *Re Y (Removal from Jurisdiction: Failure to Consider Family Segmentation)* [2014] EWCA Civ 1287, [2014] 3 FCR 483.

the potential for an interference with Article 8 rights means that a clear and separate proportionality evaluation may be required. Quite what this involves is not spelt out by Ryder LJ, but experience in the public law field suggests that a careful assessment involving the parallel analysis of all realistic options can be done in a way which involves the proportionality assessment and overall balancing exercise required under Article 8.⁷¹

Factors coming from Payne

The applicant's proposals

Both judgments in *Payne* ask about the applicant's proposals. Judges usually scrutinised the substance of applicants' relocation proposals in great detail. For example, in many cases where relocation was refused, judges made critical remarks about the details of the plans. While occasionally these criticisms were substantive,⁷² a more common criticism was that the plans were 'vague',⁷³ 'ill thought out and ... over-ambitious',⁷⁴ or 'not well evidenced'.⁷⁵ While, of course, these remarks may have been entirely justified, a plan that one person sees as 'over-ambitious' could be considered exciting and potentially highly rewarding by another. For example, in another case the judge said of the mother:

I accept that she may not have dotted every 'i' and crossed every 't', but frankly ... the mother seems to me to be so capable that any unexpected obstacle could – and would – be easily overcome by her.⁷⁶

In the end, while judges spoke at greater length about practicalities, their views about the each parent's truthfulness and reliability often seemed more influential.

The broad pattern was that unsuccessful parents were the subject of criticism from judges about what they had claimed or the way in which they had claimed it. For example, in about half the cases where relocation was refused, judges were concerned about the applicant parent's attitude to contact and her trustworthiness in relation to the child's on-going relationship with the father. One or two cases appeared to turn entirely on these findings, such as CC-55, an application to move with children aged 8 and 7 to the United States. The judge found that the 'cunning and manipulative' mother 'seeks to undermine contact'; her 'very abusive' comments about the father were 'indicative of the depth of hatred' she felt.⁷⁷

⁷¹ The European Court of Human Rights sometimes takes the same view: see, eg, *YC v United Kingdom* (Application No 4547/10) [2012] 2 FLR 332 (ECtHR).

⁷² For example, CC-13 involved the mother proposing to leave her job in London and go to Canada, where she had no other connections and where she would commute for nearly 3 hours each day for 4 hours of low-paid work which would barely cover the costs of childcare.

⁷³ CC-90, judge's cover note.

⁷⁴ CC-55, [87].

⁷⁵ CC-39, [5].

⁷⁶ CC-67, [20].

⁷⁷ CC-55, [77], [51], and [70] respectively.

On the other hand, cases where relocation was allowed were characterised by adverse remarks about the respondent parent's attitude to the child or to the applicant parent,⁷⁸ often coupled with negative comments about his evidence at the hearing. The latter of these ranged from mild remarks about the father 'not being completely frank',⁷⁹ through more significant findings that the father was 'a dishonest man',⁸⁰ and giving evidence which was 'in parts excessive and in parts false'.⁸¹

The effect of relocation on the child's relationship with the non-moving parent

Payne next asks about the effect of a relocation on the non-moving parent, and about the steps that can be taken to offset the loss of relationship with the child, about which judges expressed a variety of views. With the exception of those handful of cases where the fathers represented a safety risk to the children, judgments almost invariably spoke of there being 'a very loving and close relationship',⁸² where 'it goes without saying that this child has a strong bond with her father'.⁸³ Indeed, so similar were the comments across the body of cases that, looking just at these sections of the judgments, it would be difficult to differentiate between those applications that were granted and those that were refused. A similar convergence of language is seen in those cases where judges spoke about the loss of the 'everyday parenting experience' – what Eleanor King J once described as 'lying around on a sofa on a Saturday evening, eating pizza and watching a DVD with your dad, or being taken to school by him every other Monday'.⁸⁴

By contrast, a small number of cases proceeded on a basis which seemed to lack much appreciation of the importance of these ordinary everyday interactions. Case CC-44 was a particularly egregious example, where the child had been mainly looked after by the father on a day-to-day basis for a year. Allowing the mother to remove the child from the father's care to join her abroad, the judge said this:

Furthermore, and I know that the father will find it difficult to accept this, it seems to me that [the child] will have a better relationship with his father in many ways if regular contact takes place. I did get the impression ... that an awful lot of time that [the child] spent with his father was either at school or being fed or doing homework and not much of it was time for [the child] and his father to have fun together ... in what one might call

⁷⁸ For example, a drug-dealer father who had been in prison for most of the child's life claimed 'that he had been a good role model to [his son, which] demonstrated ... a lack of understanding of the impact of his lifestyle on his then-family': CC-62, [10].

⁷⁹ CC-81, [31].

⁸⁰ CC-5, [28].

⁸¹ CC-12, [29].

⁸² CC-72, [10].

⁸³ CC-7, [82].

⁸⁴ *J v S (Leave to Remove)* [2010] EWHC 2098 (Fam), [2011] 1 FLR 1694, [99].

down time. This will be available to his father on contact.⁸⁵

Many would find this a truly extraordinary statement. Of course a large part of the week for a school-aged child involves being at school, having dinner and doing homework. The father was continuing to work full-time in his job, since that was the family's only financial support, and weekends were often being spent having contact with the mother. To tell the father that losing the day-to-day care of his son would lead to 'a better relationship' was, at best, unfortunate language.⁸⁶ Here we see direct engagement by the judge with the father, but the sexist undertone and detachment from the father's own experiences as claimed in evidence are likely to have undermined the intended positive effect.

Much the same sentiment can be found in case CC-56, though the case did not involve the same direct engagement between judge and parent. Here, the judge accepted that the father had been providing 65% of the children's care for the three years since the parents' separation. He had given up full-time work to do so, while the mother continued in her demanding job in London and started a relationship with a man (to whom she was now married) who lived in the USA. As the judge said, '[m]ainly her career but also her current marital choice have impacted upon her ability physically to spend time with [the children] though she has done her utmost'.⁸⁷ Somehow, the fact that 'a very high proportion of [the mother's] contacts have been at extended weekends and thus there was proportionately more time available with the children'⁸⁸ counted for more than the father's daily commitment, because the mother was said to be providing a 'pivotal emotional relationship' such that 'the welfare of the children is threatened by [her] inability to cope and thereafter to provide emotionally'.⁸⁹ Despite the judge's recognition that '[the father] undoubtedly loves his children and has been a good father to them, shouldering as he has the greater bulk of the parenting duties',⁹⁰ still the inherent qualities of the mother – who might alternatively have been thought to have behaved selfishly and without thought for the children – made her more suitable to care for them and justified a removal from the father's care and from the jurisdiction.

Where the judge allowed relocation, there was usually a statement to the effect that this father-child bond was strong enough to survive the resulting geographic separation. As one judge put it, 'the fundamental strength of the relationship ... would not be impaired'.⁹¹ In another case, the judge thought that '[t]he quantity of contact will be reduced but the quality

⁸⁵ CC-40, [26].

⁸⁶ See also CC-48, [111]: 'I am sure [the children] will miss [the father] and he will miss them, but this will make their regular reunions all the more satisfying for them.'

⁸⁷ CC-56, [24(ii)(b)].

⁸⁸ Ibid, [23].

⁸⁹ Ibid, [47].

⁹⁰ Ibid, [53].

⁹¹ CC-48, [111].

will not in my judgment be affected'.⁹² Judges had 'no doubt that the father will be devastated if permission to relocate is given'⁹³ and endeavoured to make orders for on-going contact that reflected the fact that '[the] father remains hugely important ... and he will see [the children] just as often and for as much time as is possible'.⁹⁴

By contrast, a number of judgments in which relocation was refused expressed concern that the relocation might risk a loss of the meaningful relationship between the child and the father. In some cases, these concerns were based on a lack of confidence in the mother's commitment to contact, but more often the perceived risk was based on a view that the distance involved and the consequent change in the nature of the relationship would be too serious for a meaningful relationship to survive.

A majority of cases where this loss or damage was seen to be a 'decisive point' in refusing relocation involved an existing strong relationship between child and father,⁹⁵ but in others it was thought that the child's relationship with the father needed strengthening, and that relocation would prevent this from taking place; here, the relocation was prevented largely in order to improve a currently poor relationship.⁹⁶

These two classes of comment might suggest certain judicial (or legal) assumptions about the benefits of a strong father-child relationship.⁹⁷ Relocation might be refused because of an existing strong relationship which was already important to the child, or might be refused because there was no such relationship and it needed to be built and strengthened. Conversely, relocation might be allowed because the parent-child bond was strong and would allow the relationship to survive the distance, or it might be allowed because the bond was not that strong and so the risk of loss was less important because the relationship was not as central to the child's welfare as other factors.

These judicial choices explicitly relate to the law's present uncertainty about parenting norms and the importance of fathers in children's upbringing. In 2014, after the cases in this study were decided, the Children Act 1989 was amended to include a so-called 'parental involvement presumption'.⁹⁸ This provision states, in short, that a parent should be involved in his or her child's life unless it is not safe for that to happen, but that 'involvement' does not mean any particular division of time. While this new subsection has not yet been the subject of significant judicial consideration, either in general or in the relocation context specifically, Ryder LJ has said that in an international relocation case s 1(2A) is likely to 'heighten the

⁹² CC-12, [35].

⁹³ CC-96, [14].

⁹⁴ CC-61, [39].

⁹⁵ For example, CC-30 and CC-84.

⁹⁶ CC-36 and CC-55.

⁹⁷ See, eg, R. Bailey-Harris, J. Barron and J. Pearce, 'From Utility to Rights? The Presumption of Contact in Practice' [1999] IJLPF 111.

⁹⁸ Children Act 1989, s 1(2A), inserted by the Children and Families Act 2014.

court's scrutiny of the arrangements that are proposed by each parent'.⁹⁹

Effect of refusal on the applicant

Set against this, judges considered the likely impact that a refusal of the application might have, where again judges seemed to be able to construct identical arguments leading to opposite conclusions. The issue of the effect of refusal is, perhaps, the area which most tests trial judges in the relocation context. In the wake of several Court of Appeal judgments in the early 2000s,¹⁰⁰ a narrative was established that judges were *required* to find that there would be a substantial impact of refusal and that this factor would carry substantial weight in the overall analysis.¹⁰¹ While recent decisions have stressed that this is not the case,¹⁰² in an area like relocation, where most judges are inexperienced and may see a case only once every two or three years, it takes time for these changes to filter down. Consequently, judges may still see it as 'safer' to allocate considerable weight to the impact of refusal, while a finding that there would be little or no impact – or, even more so, that there would be impact but that it is outweighed in the overall evaluation – remains 'braver'.¹⁰³

It is therefore noteworthy to find many judges pointing out – in line with the more recent authority¹⁰⁴ – that the effect on the parent of refusing relocation was only one of many factors to be assessed based on the evidence in the case:

I give no primacy to the mother's application and do not adopt any approach which creates some presumption in her favour by attaching weight to the emotional and psychological impact upon the mother, or any consequential impact upon the child. These factors do, nevertheless, have to be considered as part of the overall balance.¹⁰⁵

In assessing a possible shift away from the one-time focus on the effect of refusal of leave, two trends can be noted. One, in the cases where relocation was refused, involves judges willing to find either that the impact of refusal would not be as bad as the mother thought, or that she was able to deal with that effect well enough.

[A]lthough the mother would be very disappointed ... she would cope and ... she would not allow her disappointment to taint the loving relationship that either parent has with

⁹⁹ *Re F (International Relocation Cases)*, [35].

¹⁰⁰ In particular, *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043 and *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239.

¹⁰¹ M. Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' [2006] CFLQ 351, 366.

¹⁰² *Re W (Relocation: Removal Outside Jurisdiction)* [2011] EWCA Civ 345, [2011] 2 FLR 409; *K v K*.

¹⁰³ *Relocation Disputes*, p 79.

¹⁰⁴ At the time, the clearest expositions were *J v S (Leave to Remove)* [2010] EWHC 2098 (Fam), [2011] 1 FLR 1694 and *K v K*. The point is reiterated by the general requirement of a holistic, non-presumptive approach from *Re F (International Relocation Cases)* [2015] EWCA Civ 882.

¹⁰⁵ CC-21, [29].

the child. She would move on. Indeed, she said so herself in oral evidence.¹⁰⁶

[T]he mother will undoubtedly be extremely upset... [T]he Cafcass officer was of the clear view that the mother would cope ... [and] I formed the same view. ... I feel sure that the mother will cope in this country, as she has done for many years.¹⁰⁷

These cases – including some which seemed to involve judges *instructing* mothers that they were required to cope¹⁰⁸ – illustrate the willingness of judges to find that the overall balance of the welfare assessment favours refusal of relocation, despite the effect on the applicant.

The competing trend, where relocation was allowed, shows that a successful application can be brought without any reliance on the effect of refusal. In a small but substantial minority of cases, ‘the mother’s case is not put on the basis that she will suffer severely if not permitted to travel’.¹⁰⁹ As another judge explained:

This is not the kind of relocation case in which a mother states that she cannot continue with life in England... When asked how she would feel about the refusal of her application, the mother in effect said that she would just have to cope with it. ... In fact, unusually for an applicant, her situation in England is, I believe, considerably tougher than she admits.¹¹⁰

Set against these cases were a sizeable number of applications which were allowed where judges clearly considered that the impact of refusal was a major consideration. In many of these, the judges linked their conclusion to specific parts of the evidence:

If she was not allowed to go the nightmare ... that her life ha[s] become would continue, and I do not think that is an unfair way of describing it.¹¹¹

Mother was trying to hide how distressed she feels at her situation here... Her desire to go home and her devastation if she has to stay here were plainly genuine. ... I do think she will be devastated by a refusal. She was trying to be brave ... [but] she is trapped and worn down by life here.¹¹²

If refused permission she would be very distressed and frustrated and would entirely blame the father. ... She would be badly affected if refused permission, with an indirect effect on [the child].¹¹³

¹⁰⁶ CC-67, [21].

¹⁰⁷ CC-85, [87(e)].

¹⁰⁸ For example, CC-30, [81].

¹⁰⁹ CC-14, [41(5)].

¹¹⁰ CC-27, [A51].

¹¹¹ CC-5, [40].

¹¹² CC-49, [40] and [56] respectively.

¹¹³ CC-62, [25] and [30].

However, in other cases, the conclusion that the mother would be ‘devastated’ seemed less compelling. In one case, the parents were operating a shared care arrangement in central London and the mother’s job at a large multinational company took her to Brussels on a regular basis; she proposed to move there full time, though her employer was content to have her based either in Brussels or in London. The judge’s view in this case that the mother ‘would be extremely upset, indeed devastated, if she could not move to Brussels’¹¹⁴ seems, with respect, to overstate the case. The mother, irritated no doubt, would in all likelihood have carried on her life much as before, and perhaps in time sought a posting that required less travel (surely a possibility, given that she worked for a major international company with its global headquarters in London).

This point was well made by another judge, who observed that ‘hyperbole has become jargon’¹¹⁵ at the start of eight full paragraphs dealing with the ‘devastation’ issue:

Both counsel, and I am bound to say I, sighed when we heard the word ‘devastated’ yet again. The problem is that there is a limited vocabulary of words available to describe the extent of a person’s feelings of despair, loss, grief, fear, exasperation, frustration and disappointment, but in so saying I illustrate that there are other words than ‘devastated’. In the mother’s case, she told the father that the refusal of her wish to relocate would be a disaster. She would lose her identify, autonomy and independence; and, inevitably, she would be devastated. I found that to be a considerable overstatement of what is likely to be the truth.¹¹⁶

That is not to say that the judge discounted the effect on her – it was considered and weighed, and the application was allowed. This judge was not alone, however, in expressing concern at the dominance of claims of ‘devastation’. Another judge, who also allowed the relocation application, found expressly that ‘M[other] will feel distress – but not devastation, as she said in evidence – if she does not [relocate]’.¹¹⁷ A number of cases where relocation was ultimately refused also commented on this point, with the word ‘disappointed’ featuring often as a likely impact; in one particularly telling case the maternal grandmother, giving evidence, ‘thought her daughter would be devastated if leave were refused, but conceded that the word “devastated” was suggested to her by the mother’s lawyer’.¹¹⁸

Children’s wishes and feelings

An issue not mentioned expressly in the *Payne* guidance, though imported into it by its

¹¹⁴ CC-81, [79].

¹¹⁵ CC-48, [112].

¹¹⁶ Ibid.

¹¹⁷ CC-72, [17]. See also CC-67, [21]: ‘the mother would be disappointed with refusal, but I hesitate to use the word “devastated” which was employed during the hearing as this seems to me to be putting it far too high’; CC-73, [65]: ‘I accept that the mother would be upset and distressed ... but ... I do not accept that she would be devastated’.

¹¹⁸ CC-36, [28].

reference to the welfare checklist, is the views, wishes and feelings of the children involved. Such wishes and feelings are principally brought into the family justice system through an officer from the Child and Family Court Advisory and Support Service (Cafcass) or an Independent Social Worker's report. Such reports can be limited to the issue of the child's wishes and feelings, though they tend to be much more wide-ranging and encompass all aspects of the case. A full welfare report typically carries great weight in parenting disputes; if the report includes a recommendation, judges are required to give specific reasons for rejecting that view if they reach a different conclusion.¹¹⁹ However, it has long been thought that Cafcass reports are less influential in relocation cases than elsewhere in child law.¹²⁰ Indeed, in the cases in this study, reports were not invariably ordered, often because the parties and the judge simply felt they did not need one.

Where Cafcass reports were made, judicial reactions were mixed. One area in which judges were generally united, though, was that the report was important in relaying the wishes and feelings of the children involved. However, in practical terms, children's views had quite limited impact in the judges' reasoning in most cases. Since the mean age of children in relocation cases is just under 7 years, it is perhaps unsurprising that judges often simply noted that the children were 'too young for [their] wishes to assist me',¹²¹ or even that they were 'too young to express [their] wishes and feelings on the issues before the court'.¹²²

For children in middle childhood (roughly ages 5 to 10), the most common approach was to say that the issues were too complex for their wishes and feelings to carry much weight. While one may have some sympathy with this view, it should be remembered that the children were not being asked to decide the case, but rather to express their wishes and feelings about it. While these children may not 'realise fully what would be involved' in relocation,¹²³ some showed real insight into what was being decided. One 7 year old who had been living in England for about three years rather wisely said to the Cafcass officer that 'he missed his life in [the other country] but that if he was [there] he might just as well have been saying that he missed his life in England'.¹²⁴ The judge thought that these expressed views 'don't help me very much' in making the decision, but one might have inferred that the child was aware of the benefits of his present life and was not expressing any desire to change.¹²⁵

Indeed, in other cases, children of this age did express views which influenced the decision-making. Usually these were cases where the children's views accorded with the outcome that

¹¹⁹ See, for example, *Re V (Residence: Review)* [1995] 2 FLR 1010 (CA).

¹²⁰ *Relocation Disputes*, p. 103.

¹²¹ CC-41, [41].

¹²² CC-74, [69]; also CC-53, [47].

¹²³ CC-39, [14].

¹²⁴ CC-40, [10]; also CC-72, [25], where another 7 year old had written two letters to the judge which revealed 'that [the child] is very torn indeed'.

¹²⁵ CC-40, [25]; see also CC-68, where the 11 year old child made the seemingly important point that she had never even visited the proposed destination country and 'thought she should go on holiday there first to see if she liked it' (para [4]).

the judge had reached, such as Case CC-69, where the parents were in a high-conflict shared care arrangement which the judge thought was not working well. The judge reported this exchange when the 8 year old met the judge in person:

I asked him ‘is there anything you want to say?’ And he said ‘I want to live with my mum’ and because he said that I felt I had to ask him ‘why?’ He said ‘when I see my mum my tummy doesn’t ache any more, and when I see dad my tummy aches’.¹²⁶

Unsurprisingly, in the handful of cases involving older children judges often said that their views ‘are something I have to give a lot of weight, albeit they are not determinative’.¹²⁷ One 13 year old spoke for many children when reporting that ‘she would, herself, [have] preferred not to have been asked’.¹²⁸ Despite that, the judge found significant value in what the child said:

she told [the Independent Social Worker] that she would be fine either way, [and] expanded that what she really wanted for herself (and I underline this for emphasis) was to move to the United States and go to school there, but she would miss her dad and would prefer it if dad moved there too and lived nearby.¹²⁹

Thus case outcomes generally accorded with older children’s wishes, but there were exceptions. In one case, relocation was granted in relation to a 13 year old boy who was described as ‘very apprehensive’ about the proposed relocation and who was ‘close to tears’ when discussing it with the Cafcass officer.¹³⁰ Two cases involved the judges specifically discounting the views of older children, one because ‘she tells people what they want to hear – she is a people-pleaser’,¹³¹ and the other because the judge concluded that the children’s views had been unduly influenced by their mother and were therefore simply expressing her views rather than their own.¹³²

Overall, it is clear that in only a small minority of cases did the children’s views have any great influence on the decision. In a high proportion of cases their views were either not sought or were entirely dismissed – the child was ‘too young’ or their views were discounted for some other reason – and even in those cases where weight was being given to the child’s views, the impression from the judgments was that the decision would have been the same regardless of the child’s view. In other words, judges said that they were giving weight to the child’s views when those views aligned with their own conclusions about the outcome of the

¹²⁶ CC-69, [76]. Note that judges are strongly discouraged from obtaining evidence directly from children: Family Justice Council Guidelines for Judges Meeting Children subject to Family Proceedings 2010; *Re KP (Abduction: Judge Meeting Child: Conduct of Interview)* [2014] EWCA Civ 554.

¹²⁷ CC-64, [17].

¹²⁸ CC-48, [125].

¹²⁹ *Ibid*, [124].

¹³⁰ CC-33, [6] and [26] respectively.

¹³¹ CC-43, [13].

¹³² CC-85, [75].

case (a reinforcement approach), and found reasons to dismiss the child's views when the outcome was not going to fit with them.

CONCLUSIONS

This is the first study in England and Wales that gives any insight into the outcomes of international relocation cases in the family court. While the two parts of the study show slightly varying results in places, the overall picture is clear and informative. We see, most crucially, that it cannot be said that relocation is automatically allowed – in this sample at least, something like 30 to 40% of applications were refused. We can also identify some variables which, overall, may be related to those case outcomes, such as the distance of the proposed move and the applicant's current relationship status.

Moreover, we have been able to look in detail at the reasoning that goes into making a determination in a relocation case. Presented with enormous amounts of evidence on wide-ranging issues, trial judges have many choices to make. They have to decide what is relevant at all and in what ways it is relevant; they have to choose between competing (often directly contradictory) versions of the same events; and they have to make predictions about various possible futures for a child, with effects potentially lasting a lifetime. They then have to construct a narrative account of their choices which weaves together their findings and conclusions within the legal framework so as to allow the decision to be understandable, coherent and (ideally) with minimal scope for appeal.

The research reported in this article tells us a great deal about the decision-making processes of judges in everyday relocation cases. We can see, in particular, that judges give very serious consideration to two main competing factors – the effect on the applicant of refusing her application, and the effect on the child's relationship with the respondent if relocation goes ahead. These are assessed against the background considerations of the practicalities of the proposal (including considerable focus on the plans for on-going contact), and the motivations of both parents.

In most cases, judgments were constructed such that all these aspects lined up to point towards the same conclusion. Sometimes that was, no doubt, an accurate reflection of the way in which the case had developed, but other cases raised some doubts, given that the same issue could be constructed to lead to exactly opposite conclusions: for example, a strong existing relationship between the child and the respondent could be seen as a reason to refuse a relocation (more to lose) or to allow one (relationship strong enough to survive the move). By contrast, a handful of judgments expressed genuine anxiety and uncertainty, which may more accurately reflect the reality of many relocation cases.

More generally, the big question about relocation when these cases were decided was whether the Court of Appeal's reinterpretation of *Payne* in *K v K* went far enough,¹³³ or

¹³³ This is Mostyn J's current view, according to *NV v OV* [2014] EWHC 4130 (Fam), [7].

whether the guidance itself needed to be rewritten. This research suggests a rather mixed answer to that question.

A number of concerns were expressed about the ‘*Payne* in the light of *K v K*’ approach. Perhaps the main concern was that *Payne* was premised on there being a primary carer applicant, when many cases no longer fit that pattern. *K v K* (as understood after *Re F*¹³⁴) demands that judges deal with this issue by weighing the *Payne* considerations differently, but there was a question as to whether *Payne* lends itself to such flexible interpretation.¹³⁵ Here, the findings of this research are somewhat equivocal. Some judges clearly understood that they were permitted to take this approach and did so with little apparent difficulty. In other cases, though, it appeared that *Payne* was applied fairly uncritically, despite being inappropriate to the facts of the case.¹³⁶ Whether because of greater seniority, greater experience, less risk-aversion,¹³⁷ or some other consideration, some judges readily modified the *Payne* guidance while others followed it closely as if it were a manual. This, in short, was the difficulty: there was a concern that *K v K* risked an inconsistency of approach and therefore of like cases not being treated alike. Moreover, as relocation cases are increasingly allocated to the District Bench, the Court of Appeal’s ability to have an overview of the general approach diminishes, since most applications for permission to appeal will now be heard by one of dozens of Circuit Judges rather than the handful of specialists in the Court of Appeal.

It may be that the Court of Appeal’s decision in *Re F (International Relocation Cases)* in August 2015 has changed the picture somewhat. Here, Ryder LJ suggested that undue reliance on *Payne*’s guidance could amount to an appealable error of law, and that the ‘required reading’ for a judge in an international relocation case no longer included *Payne*, but instead came principally from *K v K* and *Re F (Relocation)*. Even in the lifetime of the cases in this study, *Re F (Relocation)* appeared to be helping to standardise understandings of the approach after *K v K*, and it may be that *Re F (International Relocation Cases)* goes even further in standardising a holistic, all-factor approach.

Nonetheless, it may be wondered whether *Payne* will continue to exert influence, since it has still not been over-ruled. *K v K*, which Ryder LJ posits as the central case, is itself focused on the continued relevance of *Payne*, and thus working back through the authorities one still ends up with the guidance from that case. The concern, looking at the reasoning of judges in this study, is not that the issues raised by *Payne* are inappropriate in many cases; rather, it is the manner in which those questions are asked and the assumptions which underpin them (particularly in relation to the child having a single primary carer who is inevitably the

¹³⁴ *Re F (Relocation)* [2012] EWCA Civ 1364, [2013] 1 FLR 645.

¹³⁵ R. George, ‘International Relocation, Care Arrangements and Case Taxonomy’ [2012] *Family Law* 1478; E. Devereux and R. George, ‘When Will the Supreme Court Put Us Out of Our *Payne*?’ [2014] *Family Law* 1586.

¹³⁶ CC-40 and CC-56 were the most blatant examples.

¹³⁷ On judges’ concerns about appeals, see *Relocation Disputes*, p 79

mother) which seem inappropriate, and asking judges to determine the extent to which that guidance is relevant on a case-by-case basis may be too much of a stretch.

Indeed, it is difficult to see why the senior judiciary remains so attached to *Payne*. It cannot really be about precedent, because *Payne* is only guidance and the Court of Appeal has regularly abandoned one set of guidance in favour of another – that, indeed, is how *Payne* became the leading case in the first place. Despite the clarification from *Re F (International Relocation Cases)*, it is time for the Court of Appeal or the Supreme Court to look at this issue again from scratch, ideally by taking a number of conjoined appeals, with the aim of issuing new guidance that applies to all cases without relying on individual judges to make ad hoc modifications.¹³⁸

¹³⁸ My proposed guidelines are set out in *Relocation Disputes*, pp 157-9.

METHODOLOGICAL APPENDIX

This appendix describes the way in which the dataset was generated, and the resulting limitations of the data in terms of their representativeness or otherwise of relocation cases as a whole which reduce the extent to which they may be relied upon to make inferential conclusions about this class of case generally based on statistical significance of any of the findings.

The Court Case Sample

The CC sample of cases was decided in the calendar year 2012 and gathered directly from trial judges and practitioners.¹³⁹ Judges were contacted directly by email and letter. Initial contacts were made by Thorpe LJ, with follow-up communication through the Family Division Liaison Judges and the Designated Family Judges. Individual judges were also contacted personally where I received a ‘tip off’ that they had heard a relocation case recently. Individual judges were very helpful in sending materials when asked, but of course it is not possible to know how many decided a case but did not remember to send it in, or chose not to do so. Following a low response rate in the early part of the study, lawyers were then contacted in various ways to ask for their assistance, once it was clear that the President’s authorisation for the project allowed anyone who had a judgment or order to submit it to the project.

The CC study was an attempt to gather the entire population of relocation cases heard in England and Wales that year. It is not suggested that this attempt was successful;¹⁴⁰ 96 eligible cases were collected,¹⁴¹ but it is difficult to assess what proportion of the total population of relocation cases this is. Official records give some insight into how many international relocation cases are heard by the courts each year. Ministry of Justice statistics show that, in 2012, 384 children were the subject of orders allowing them to be removed from the UK following private law proceedings.¹⁴² However, caution may be needed in approaching this number. First, it is not clear how the MoJ data are collected, and so the likely accuracy of the number is difficult to assess. Second, it relates to the number of children, not the number of cases. There were 1.5 children per case in the CC sample which, if typical, would suggest something like 260 cases in total. Third, the MoJ data do not appear to differentiate between permanent and temporary leave to remove a child from the jurisdiction. Nonetheless, this number gives some insight into the size of the CC sample

¹³⁹ Sir Nicholas Wall, President of the Family Division when this project was running, authorised access to these cases.

¹⁴⁰ Because both judges and lawyers were being asked for cases, a good many of the 96 were collected more than once. Many judges also reported, directly or through Thorpe LJ’s office, that they had not heard any relocation cases in 2012.

¹⁴¹ A number of other cases with international elements were sent in, but discarded as not being relocation cases within the definition used in this study.

¹⁴² See <http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/csq-q4-2012/csq-q4-2012-family.csv>, column DR.

relative to the total number of cases. Assuming the figure of 384 children to be correct, and assuming 1.5 children per case on average, and assuming that holiday cases might amount to between 0 and 20% of those cases (though the number is unknown), the 96 cases in the CC sample would represent between 36 and 46% of cases. It is not possible to know whether the cases are representative or not, though having both lawyers and judges sending cases goes some way towards mitigating the risk of intentional bias on the part of those submitting material, since the incentives for the two professional groups to do so may differ. While a handful of judges and lawyers sent more than one case, the vast majority of individuals sending material sent just one case, and some cases were received more than once from different sources.

The Research Questionnaire Sample

In the final three months of 2012, a research questionnaire was distributed to family law practitioners throughout England and Wales. The questionnaire was intended to provide an alternative source of data about cases decided in 2012, to triangulate findings against the CC sample and check for possible biases in the case sample submitted to the study. It was also useful for bolstering the overall number of cases being considered, though both direct collection of cases for the CC sample and the questionnaire study for the RQ sample faced significant difficulties in obtaining responses from busy professionals.

Most questions asked lawyers to provide detailed information about their most recent relocation case, designed to elicit information comparable with the data collected from the court cases themselves. Practitioners were asked to complete a questionnaire about their most recent relocation case, international or domestic, if they had done one in the previous 3 years (and also to send nil returns), and the questions then differentiated between type of case, year of decision, and mode of resolution (court adjudication or settlement). Some aspects of the RQ data suggest that some respondents may have reported their most recent 'interesting' case (however they saw that), since – for example – the sample appears in places to be skewed towards High Court decisions.

The questionnaire was prepared in hard copy and online. 1,000 hard copies were distributed at practitioner conferences and by direct mail to chambers and family law firms around England and Wales, selected to get a range of large and small firms / chambers in all areas of the country. The online version was also advertised in articles and news items posted in practitioner journals and websites, and through the practitioner organisations Resolution, the FLBA, and the ALC. 187 completed responses were received, including 8 nil returns. While this number suggests a low response rate, it should be borne in mind that relocation cases are not everyday work for family lawyers, and a great many practitioners will not have done one in the last three years, even if they do private law children work. Of the 187 total responses, 52 related to judicially determined international cases heard in 2012, and it is these 52 cases which are used in this paper, being directly comparable with the 96 CC cases.

Data Analysis

This paper draws on a mixture of quantitative and qualitative methods. For the purpose of the quantitative analysis, each case was entered into a database containing 84 fields, though no single case had data relevant to every field. These fields included basic information such as the number and ages of the children, the proposed destination country and the case outcome, but also more detailed information about process (such as location of court, type of judge, whether each party had a lawyer), the family (such nationality of parents, presence of wider maternal and/or paternal family in this country and in the proposed destination), and the outcome (such as the extent of contact ordered). Many fields simply did not apply to many cases (such as whether there were child protection concerns). But particularly where only an order (i.e. no judgment) was available,¹⁴³ there were cases where more common fields could not be completed (such as the parents' nationalities). Consequently, when it comes to analysis of the data, it is not always possible to consider all cases in relation to particular variables.

The quantitative data were then analysed by Dr Ornella Cominetti, a statistician then at the Oxford University Department of Statistics. She used three primary techniques to assess the data: Pearson's chi-square test, logistical regression models, and information gain score (IGS) analysis. While the first two are well known, IGS is a less common technique. IGS evaluates the worth of each variable by measuring the information gain of a variable to the class (where, in this research, the outcome variable is whether the relocation is allowed or not).¹⁴⁴

The qualitative analysis related to the 53 cases from the CC sample in which court judgments were available. The judgments were analysed using a broadly grounded methods theory, but one informed by the fact that many of the key issues being sought were known in advance based on the research questions – since the questions were partly about the use that is made of the *Payne* guidance, issues identified within that guidance formed part of the coding framework from the start.

¹⁴³ Some questionnaires also had questions left blank, or respondents had written 'don't know' next to a question.

¹⁴⁴ See M. Hall and G. Holmes, 'Benchmarking Attribute Selection Techniques for Discrete Class Data Mining' (2003) 15 *IEEE Transactions on Knowledge and Data Engineering* 1437, 1447.