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# PRIVATE CHILDREN LAW

## IN THE LIGHT OF *AY v AS*, WHERE DOES THE RECENT RELOCATION CASE-LAW LEAVE US NOW IN PRACTICE?

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## Introduction

1. In times of pandemic, many turn to philosophy. And so it is that I found myself, as I prepared this talk, contemplating the sage words of that noted turn-of-the-century, Irish philosopher, Ronan Keating: "Life is a rollercoaster, Just gotta ride it." For, while doubtless of more general application, those words certainly seem apt to describe life in the court of Mr Justice Mostyn, which is where we find ourselves for this particular lecture.

2. The law on relocation is currently settled. For an excellent bullet-point summary of the relevant legal principles, one need look no further than the judgment of Mr Justice Williams in last year's case of *Re C (Relocation: Appeal)*.[1] And, if anyone wants a helpful exposition on the way in which the proportionality assessment figures within the relocation balancing exercise, then they should seek out the judgment of Mrs Justice Knowles in the very recent case of *WS v KL*.[2]

3. That, however, the law on relocation is currently settled does not mean that there are not cases still throwing up interesting points likely to resonate in practice. *AY v AS*,[3] in which I represented the putative relocator mother,[4] is just such a case. And, while it is always tempting to think one's cases rather more important and influential than they actually are, it was when I read interesting articles about it by Emma Hatley at Stewarts and Simon Bruce at Farrers, two real heavyweights in the relocation field, that it struck home that this was one of the cases which could cause practitioners and indeed judges to think about these really difficult cases in new and different ways.

## The facts

4. To make sense of the court's decision and the practice points arising in consequence requires a relatively full summary of the facts.

5. The case involved a middle-aged English father, who was a self-employed builder, and

[1] [2019] EWHC 131 (Fam), [2019] 2 FLR 137.
[2] [2020] EWHC 2548 (Fam).
[3] *AY v AS and Another (Relocation)* [2019] EWHC 3043 (Fam), [2020] 1 FLR 536.
[4] Leading Roshi Amiraftabi (29 Bedford Row Chambers), on instruction by Grace Bradley (Family Law Company).

a younger, well-educated mother from Kazakhstan, fluent in four languages, with a master's degree in education management from King's College, London, which she had attended on a scholarship, and who was working at the university of Astana, when she first met the father in 2014. They would meet every two months, alternating trips between Kazakhstan and England, and in 2015 they became engaged.

6. In April 2016 the mother moved to Devon to live permanently with the father. The next month she became pregnant with the child who was to be the subject of the proceedings. The month after that, the parties married and the very next month the mother received a spousal visa. Quite the whirlwind.

7. But just as quickly as the relationship formed so it started to fall apart. As the judgment notes, things quickly went from bad to worse, so much so that by October 2016 the parties had entered into relationship counselling. Pausing there, Mr Justice Mostyn comments – and a Mills & Boon author he will never be - "I have no doubt that by this stage the relationship was doomed".

8. In December 2016, the parties moved to a rented cottage and the subject child (referred to as A in the judgment) was born on 31 January 2017. Mr Justice Mostyn deals with the early care of the child, whom he observes has been adored by both parents from the moment of her birth, as follows:

> "Comparisons are of course invidious, but it is my clear conclusion that the mother played the greater role in A's life in these early days. Plainly, the fact that she was breastfeeding A meant that the physical and emotional attachment between mother and daughter was very intense. This is not to say, however, that the father was remote, distant or uninterested. He was very involved and conscientious right from the start."

9. In July 2017 the mother and A travelled to Kazakhstan for a month-long holiday, during which A was introduced to the mother's very close family. In September 2017 the mother's parents visited Devon from Kazakhstan. Channelling his inner Barbara Cartland, at this point Mr Justice Mostyn interjects: "Meanwhile, the relationship continued its journey to inevitable collapse."

10. By October 2017 the parties were discussing separation, and the mother raised with the father the possibility of her returning to Kazakhstan, taking A with her. And, two months later, she did travel there with A, and with the father's consent. Whilst there she told him that she wanted to separate and live with A in Kazakhstan. The father agreed that he would give the necessary consent to A living in Kazakhstan with her mother but, when pressed for the requisite notarised letter of consent, indicated that the mother and A had to return to England first to sort out the paperwork. The father's oral evidence, which Mr Justice Mostyn did not accept, was that "he made an insincere promise as a ruse de guerre in order to get them both back into this country". The mother and A returned to the UK on 16 January 2018, but, pretty quickly afterwards the father changed his position, and this, the court found, "has generated within the mother a burning sense of resentment".

11. Having moved out of the family home, the mother made her relocation application on 26 April 2018, and on 7 May 2018 it came before Her Honour Judge Robertshaw who effectively transferred the case to the High Court – a decision Mr Justice Mostyn was to criticise, not least because of the delay in ultimate determination that caused. Later that month the father made an application seeking two nights of overnight staying contact each week, and, when that came before Her Honour Judge Robertshaw, she actually granted him three nights a week. And so it was that at an interim hearing the case transformed into one of shared care, with the father ending up with three consecutive nights a week. Disappointed though she was, the judgment notes that the mother had complied scrupulously with the child arrangements order ever since.

12. Shortly before the final hearing the mother was able to move to a rented two-bedroom flat in the centre of Exeter, where she survived on a combination of universal credit, child benefit and £400 a month in spousal maintenance. She had made a fair number of applications for part-time employment, some of which had been well below her level of qualifications, but none had been successful. Mr Justice Mostyn encapsulated the desperation of the mother's situation with no little poignancy:

> "[25] She finds herself in an objectively intolerable position: she lives alone, close to the breadline, unemployed and isolated geographically and socially.

> There is no Kazakhstani community to speak of in Exeter. She has one close friend and has made some other less close friends from the NCT classes. She misses her family in Kazakhstan desperately. She has been recommended for antidepressants by her GP."

13. It was against that background that the mother pursued her application to relocate with A to Kazakhstan – where her family lived and where she would find personal contentment and reasonable employment commensurate with her level of education and skills – all of which would, on her case, have considerable consequential welfare benefit for A. In the event of her application being granted, the mother proposed that A have contact with her father initially for around 70 days a year, about half of which would be in Kazakhstan.

14. The father, a man of relatively modest means, opposed the application, principally by reason of the impact that such would have on his relationship with his daughter, and in that he was supported by the guardian that the court had previously appointed for A. He also sought to make out that there was an abduction risk, magnified by the presence of corruption in Kazakhstan. That caused him also to oppose the mother's case, in the event of relocation refusal, for regular and substantial holidays to Kazakhstan each year – a holiday request that did carry the support of the guardian.

15. And so the stage was set for a battle between an evidently strong relocation application, seeing that it was a 'going home' case after short duration away and that there was plainly nothing contrived about the 'distress' argument advanced, and a manifestly strong relocation defence, given that this was a genuinely shared care arrangement that would be disrupted – the factor that caused the guardian to take the line she took.

**The rollercoaster**

16. So my personal rollercoaster started on the evening train down to Exeter where the case was being heard, when my cheese course in the buffet car – and, for those with short memories, that is something that used to exist pre-Covid – was interrupted by the arrival of an email with attachment from Tony Pallace, Mr Justice Mostyn's ever-helpful clerk. The covering email simply read: "Dear Counsel, Please see message

and attachment from the judge. The judge thinks that this may be relevant to the second issue? [that being the holiday issue in the event of relocation refusal]." And the attachment was a document, dated 7 June 2016, emanating from the European Commission, entitled: 'Proposal for a COUNCIL DECISION authorising certain Member States to accept, in the interest of the European Union, the accession of Kazakhstan to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.'

17. And, much though the bluffer side of me wanted to email straight back: "Thanks, Tony, I'm already aware of this. Best, Piers", I instead spent some time with my junior, who I happened to find in the next carriage along, trying to penetrate the kind of Euro legalese that regularly sends Nigel Farage into a hot fury. And, by the time we reached Taunton, we were satisfied that it was favourable to us.

18. The rollercoaster continued into the hearing itself where my cross-examination of the father was interrupted by the kind of searching questions only to be expected of a cerebral High Court judge. "Litotes, Mr Pressdee, do you not know what that is?" And to my shame I did not. And then about half an hour later, "You don't judge a book by its cover, Mr Pressdee … do you know where that's from?" This I was sure I knew. I had Martin Fry singing 'The Look of Love' in my head. 'ABC', I answered with relative confidence. Wrong again. It was apparently the 'Rocky Horror Picture Show'. And I remember just being relieved that my tribunal did not then add that he had played the lead in his school production, because I am not sure that I would have got that image out of my head over the rest of my cross-examination.

19. But the rollercoaster did not stop there. Come the end of the father's evidence, the feeling in our camp was good. Having thought that on day 1 we were behind, we felt that we might even be ahead. Maybe we should have channelled our inner Donald Trump and sought to declare a presumptuous, early victory. But we still had the guardian to go on the morning of day 3 and she proved annoyingly good. As the judgment records, not only did she write "two very thoughtful reports" but she "gave measured and persuasive evidence from the witness box". Drawing on the judgment

of Lord Justice Thorpe in *Re G (Leave to Remove)*,[5] which had involved similar contact proposals, Mr Justice Mostyn asked her whether in this case she felt that the mother's proposals would give rise to an appreciable risk of the essential nature and quality of the bond between the father and A being lost or diminished. As he recorded, her clear answer, albeit one delivered after many seconds of tense silence, was that, in her opinion, there was indeed such an appreciable risk.

## Decisions

20. Those with long memories will recall the self-same Mr Justice Mostyn kicked off his High Court career in the case of *Re AR (A Child: Relocation)*,[6] in which he had, in characteristically low-key fashion, called upon the Supreme Court to urgently review the law on international relocation.

### *The middle way – the premature application*

21. But that case is as famous for its oft-quoted early remarks which he repeated in the opening part of his judgment in *AY v AS*:

> "[4] Applications for leave to relocate are always difficult for the court and distressing for the parties. They involve a binary decision – either the child stays or he goes. There is no scope for any middle way. If the decision is that the child goes, then the left-behind parent inevitably suffers a disruption to his relationship with the child, at the very least in terms of quantum and periodicity of contact. If the decision is that the child stays then the primary carer, if not invariably, then frequently will suffer distress and disappointment in having what will normally be well reasoned and bona fide plans for the future frustrated. So the decision, whichever way, is bound to cause considerable trauma."

22. Ten years or so on from saying that there was no scope for any middle way in the international relocation case, as the next paragraph of his judgment in *AY v AS* reveals, he found and preferred one in this case – a middle way that would allow the mother to relocate internally, so moving out of Devon, and thereby seek to exploit her considerable potential in the employment market. Mr Justice Mostyn's judgment records his view that this middle way "is the solution most consonant with the best

[5] [2007] EWCA Civ 1497, [2008] 1 FLR 1587.
[6] [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577.

interests of A" and that it "was identified as this case drew to its conclusion". But that does not really tell the whole story.

23. The option of an internal relocation formed no part of the oral evidence, whether in chief or cross-examination, and, but, for the court's intervention, would not have featured within closing submissions either. It was not actually raised by Mr Justice Mostyn until part-way through the closing submissions of counsel for the father,[7] when it was accepted on the spot by the father, doubtless fearing a worse outcome if he said no, and it was endorsed with equal speed by the guardian. The mother elected to continue to pursue her primary case, but unsurprisingly indicated that she would accept the option of an internal relocation were her primary case rejected.

24. Its evidential root actually lay in the mother's first statement, filed as long ago as 15 months before trial and the father's response – or more accurately - non-response to it. As Mr Justice Mostyn records:

> "[27] However, a move back to Kazakhstan does not seem to have been always her position because she has raised with the father the possibility of a relocation within these shores, specifically to London. In London there are far greater employment opportunities for a person in her shoes. Moreover, there is a significant Kazakhstani community in London.
>
> [28] In her first statement dated 30 May 2018, the mother said this:
>
> 'If I remain in Devon I expect to have to settle for minimum-wage work. I would find this very demoralising given the hard work I have put into my education. I would also then struggle to maintain myself and A and pay for childcare … In time I would consider moving to London if I was able to find a job there. I have already mentioned this possibility to [the father], but his response was that he would not allow me to live further than half an hour's drive away from [his home]. I feel he is being completely unreasonable and is holding me to ransom using A. … I am concerned about how I would cope if I had to stay here. As mentioned above, I continue to feel that [the father] seeks to belittle and undermine me when we see each other at handovers. I find this very distressing, particularly as I am so far away from my support network. I feel that [he] is trying to control me using A. The fact that he would not even consider or discuss the idea of me moving to London for better job prospects says a lot.'
>
> [29] The father did not specifically traverse this in his evidence in response, nor did he deny it from the witness box. However, it is fair to say that his formal resistance to the mother's application has been to her application to take A out

[7] Zoe Saunders (St John's Chambers).

of this country rather than resistance to an internal relocation."

25. It was against that background that Mr Justice Mostyn came to consider the mother's relocation plan and the reasonableness or otherwise of her contact proposals. And he was not persuaded:

> "[30] Now, contact between father and daughter in Kazakhstan is a pallid substitute for contact between father and daughter at the father's home in England. It would have to be out of a hotel, or an Airbnb. The mother has proposed that she or her family would provide accommodation to the father but on due reflection I do not consider this to be very realistic. Similarly, the proposal that there should be a very regular WhatsApp video contact is a very poor substitute for the essential human interaction that direct contact allows. It is for these reasons that the guardian has opposed the mother's proposal."

26. Having indicated that he agreed with the guardian's assessment that, on relocation, there was an appreciable risk of the essential nature and quality of the bond between the father and A being lost or diminished, he asked himself whether that was a price worth paying, "in order to give the mother the personal contentment, and functional fulfilment that she so ardently craves". He concluded:

> "[32] My answer to that question, at least at the present time, is no. My conclusion is, at least until an internal relocation has been offered to the mother and has been authentically and in good faith tried and failed, that the mother's proposal for the contact between the father and his daughter is objectively unreasonable and contrary to A's best interests."
>
> [33] I have therefore reached the conclusion that the mother's application is premature and should fail. Instead the secondary solution should be adopted."

27. Having taken that decision in principle, Mr Justice Mostyn then went on to consider the thorny legal issue of whether the mother's application should be dismissed or should be stayed, which, as he put it, "would incentivise the father to cooperate with and to support fully a reasonable internal relocation plan by the mother". The concept of the application being stayed was one he himself had raised in the course of submissions. But, having delved deep into Nineteenth Century jurisprudence, including the landmark 1821 US Supreme Court case of *Cohens v Virginia*,[8] he concluded that the prematureness of the application was not a reason sufficiently exceptional to justify a stay and so accordingly the mother's relocation application was

[8] (1821) US (6 Wheat) 264.

dismissed.

***Holidays to Kazakhstan***

28. There then remained the second issue for the court's determination – that of whether the mother should be able to take A regularly to Kazakhstan for holidays. And of itself that begged the question of how as a matter of law the court should approach the temporary removal proposed, with the court being urged by the father in the particular circumstances of this case to treat Kazakhstan as though it were not a member of the 1980 Hague community. Instead, it was submitted, the court should adopt the well-worn approach applicable to non-Hague temporary removals set out by Lord Justice Patten in *Re A (Prohibited Steps Order)*,[9] which requires the court under the welfare paramountcy umbrella to consider the magnitude of the risk of breach of the order if permission were given, the magnitude of the consequence of breach if it occurs, and the level of security that may be achieved by building in to the arrangements all of the available safeguards.

29. Mr Justice Mostyn had none of that:

> [35] The guardian's recommendation was that if the mother's primary application were dismissed, she should nonetheless be permitted to take A to Kazakhstan for holiday periods so that she can meet her Kazakhstani family and engage with her Kazakhstani heritage. The father's position was that such permission should not be granted because there was a risk that the mother would unlawfully retain A in Kazakhstan rather than return her at the end of such holiday periods. This submission was made notwithstanding that since 1 April 2017 Kazakhstan has, as regards this country, been a full member of the Hague Convention on the Civil Aspects of International Child Abduction 1980.
>
> [36] The father's objection was based on some written evidence which suggested that corruption was rife in Kazakhstan and extended into the judiciary. I reject that evidence and do not regard it as acceptable where the country in question is a Hague 1980 member. I can see that it would be permissible to adduce evidence that an existing member of the 1980 Convention has fallen into civil collapse so that the Convention is not in effect working in that country, and one can think of two countries where that could be said to be the case. Equivalently, one can think of the situation where there is strong evidence that a long-standing member of the Convention is simply not complying with its rules. However, a vague and largely unparticularised assertion that corruption is at large generally in a state would not, in my

[9] [2013] EWCA Civ 1115; [2014] 1 FLR 643, at [23] and [25].

> judgment, be an acceptable reason for assuming that the country in question would not faithfully apply the Convention when asked to do so."

30. He then bolstered his very purist approach by reference to the very document that his clerk had sent out on the eve of trial:

> "[36] … In the European Commission's Proposal for a Council Decision authorising Member States to accept the accession of Kazakhstan to the 1980 Hague Convention given on 7 June 2016 it is recorded that there had been stakeholder consultations and an experts' meeting as to the merit of accepting the accession of Kazakhstan. Further, information had been gathered by the EU delegation in Kazakhstan, as well as from the Permanent Bureau of the Hague Conference on Private International Law and UNICEF. In the view of the Permanent Bureau 'Kazakhstan is a motivated State working hard with a view to implement properly the 1980 Convention'. In the light of all of this the Council duly accepted the Commission's proposal to authorise member states to accept the accession of Kazakhstan and this country duly did so with the Convention coming into force between us and Kazakhstan on 1 April 2017.
>
> [37] In such circumstances I conclude that it is simply not permissible for the father to assert that Kazakhstan would fail in its duties under the Convention."

***Transfer and allocation***

31. Finally, Mr Justice Mostyn had something to say about transfer and allocation. He was at pains to draw the distinction between a case being transferred from the Family Court to the High Court and one being heard within the Family Court by a judge of High Court level, but he went further. Given that Kazakhstan is a Hague Convention country, he was quite sure that the criterion of complexity was not satisfied and that there was no reason for the case to be heard other than at circuit judge level within the Family Court. And then he went further still:

> "[49] … Indeed, I struggle to understand why any relocation case, whether or not the destination country is a Hague Convention country, needs to be heard within the Family Court at High Court judge level. While these cases are difficult at a human level they are not legally or factually complex."

**Implications for practice**

32. So what are the implications of the case for practice?

***The middle way – the premature application***

33. Perhaps inevitably it was for Mr Justice Mostyn's discovery of 'the middle way' that the case caught the eye of so many, not least given his own previous pronouncement

that there was no scope for any middle way in the international relocation case. A discovery that had the hallmark of a Harry Houdini feat rather than a Boris Johnson U-turn – the escapologist freeing themselves from the very encasement that they had previously thought impossible to escape. On any basis, it was a very clever piece of judgecraft that found the balance between the strength of both parents' cases and delivered of an outcome from which each could draw comfort.

34. Will there, though, be many cases where, on the facts, it could be said that an internal relocation could and should be tried first? It is hard to say. The magnetic factors in this case were the mother's reasonable expectation of a certain level of employment and the existence or otherwise where she lived and elsewhere within the jurisdiction of a community drawn from her own country and culture. If those factors reveal themselves in other cases, then one can see the argument being run – and possibly appealing to the court - especially in a case where there is no pressing welfare reason why the international relocation should occur now. Whether in the individual case it is a solution that appeals sufficiently to both parents or is one which in fact pleases neither is a different matter.

35. However, this, it seems to me, is a classic scenario where law is one thing and practice may be another. It is plainly not the law that an internal relocation should be tried before an international relocation should be considered, and, were the appellate court to comment on *AY v AS*, it would doubtless make that clear and emphasise its fact-specific nature. But, as is widely recognised, relocation decisions are notoriously difficult for the tribunal – a combination of their potentially life-changing effect and their (hitherto considered) binary nature. And one can readily see how an option of internal relocation, if somehow viable and justified on the facts, may appeal to the court as an option not only of most mutual appeal or least mutual offence but one which avoids a decision that, certainly one way and often both ways, involves the court in a very difficult predictive exercise as it contemplates life for the family in the rival scenarios of relocation grant and refusal.

36. But, to my mind, the implications go beyond the situation in which an internal

relocation may appear and appeal as some form of 'middle way'. For me, the real point of interest lies in the emergence of the concept of the premature international relocation application, and I see the need to try first some 'middle way' internal relocation as just one way in which the substantive application could be described as 'premature'.

37. As I give this talk, I am somewhat presciently between evidence and submissions in a external relocation case where I am arguing for a number of reasons, none of which have anything to do with internal relocation, that the permanent removal application is premature. And, if the application can legitimately be shown not to be time-sensitive, then, especially with the cautious court and in a finely balanced-case, it does open up the possibility, if acting for the parent resisting relocation, of raising a variety of arguments as to why the relocation decision should not be taken now and why in consequence the application is premature. A range that might, for example, encompass the argument that the family finances need to be sorted first, and, in the present climate, might comprise the need to see how the land lies post-pandemic, at home and in ways of work – a range which is potentially quite expansive. And, for the self-same inter-linked reasons - that it gets the court out of a difficult binary determination and allows the court to root its decision more in certainty and less in prediction – this is a potentially enticing line. And, when the potential prize of a finding that the relocation application is premature is a dismissal and not a stay, with all the practical and psychological as well as legal consequence of that outcome, there will, I imagine, be plenty of cases where the argument of 'premature application' might be worth running.

***The sound-bites***

38. If nothing else, Mr Justice Mostyn can always be relied upon for a decent sound-bite, and in that respect, his judgment in *AY v AS* does not disappoint.

39. While it is no part of the legal test, nor should it be the final word on the contact proposals of the putative relocator, one can confidently predict the wide use of the question to the section 7 reporter: "do these contact proposals give rise to an appreciable risk of the essential nature and quality of the bond between the child and

their left-behind parent being lost or diminished?" For that is a question – and I have asked it myself – that lends itself, it seems to me, to the answer yes.

40. And, if one wants a piece of persuasive pith to mark up the inadequacies of a largely technologically based parent-child relationship, then what about: "As Mostyn J observes in *AY v AS*, 'very regular WhatsApp video contact is a very poor substitute for the essential human interaction that direct contact allows'."

***Temporary removal***

41. I would suggest too that the very purist way in which Mr Justice Mostyn approached the question of holidays to Kazakhstan may prove somewhat influential in practice. Not just in terms of any future cases where that country is the holiday destination, but more generally in terms of stemming the tide that had been creeping up of treating certain Hague Convention countries as though they were not part of the Hague family.

42. The submission made on behalf of the father was certainly not without precedent. In *KR v SR*,[10] Mr Justice Baker (as he then was) applied the non-Hague test to Japan, which in relatively recent times had become a party to the 1980 Convention, on the basis that it was something of an "outlier" when it came to application and compliance. And in *SR v MA (Temporary Leave to Remove From the Jurisdiction)*,[11] Mrs Justice Roberts adopted the same approach to Brazil, despite its membership of the same 1980 Hague Convention.

43. I would expect now to see some push-back or at least some stall on that developing approach, with the sanctity of Hague membership highlighted and with an essentially non-Hague test for a 1980 Hague Convention state being considered appropriate only for those very limited kinds of case contemplated by Mr Justice Mostyn – namely those where an existing member of the 1980 Convention has fallen into civil collapse so that the Convention is not in effect working in that country or where there is strong evidence that a long-standing member of the Convention is simply not complying with

[10] [2018] EWHC 1571 (Fam).
[11] [2019] EWHC 435 (Fam).

its rules.

***Transfer and allocation***

44. In terms of Mr Justice Mostyn's observations about transfer and allocation, I would expect courts now to be rather more careful about whether a case is actually transferred to the High Court or whether it remains in the Family Court, to be heard by a judge of High Court level.

45. As to the comment that really all relocation cases, whether involving Hague or non-Hague countries, should be heard below High Court judge level, for my part I am not persuaded and hope that proposition does not find general favour. I doubt very much whether many circuit judges would have been researching for themselves relatively obscure European Commission documents and, had this case been heard at that level, I imagine that it would have been as likely that the issue of holidays to Kazakhstan would have been approached in the non-Hague manner urged by the father as it would have been in the way decided by Mr Justice Mostyn. And, beyond that immediate issue, I express that view because, while the law on relocation is essentially settled, I do think that there is more that can be said about its application in practice, and, unless it is said by a judge of High Court level or above, it simply will not resonate.

**Left on the cutting-room floor**

46. Which brings me to those points that, at the final hearing's outset, I had hoped might be considered by the court, but which did not make the cut because of the course that the case ultimately took and because Mr Justice Mostyn, as he was perfectly entitled to do, delivered a judgment which went no further than it needed to go.

47. I confess that I have a particular bugbear about the 'distress' argument. As I observed in my skeleton in *AY v AS*, the historical over-emphasis on the impact of refusal on the primary carer putative relocator was ripe for the criticism that it received from the self-same judge in *Re AR*, but the criticism could arguably have gone further.

48. It was not just that the focus on that particular factor was tendentious, but also that by

focusing on the emotional and psychological well-being of the primary carer parent, there was the danger that the emotional and psychological well-being of the child in question was relegated to being nothing more than an assumed mirror image.

49. Of course, I recognised, the former will inform the latter. But it is surely a statement of the obvious that a robust 12 year old boy would not likely be so affected by the genuine devastation of their thwarted primary carer parent as would a 2 year old girl whose primary attachment will be to the parent who was their main source of emotional and psychological security and stability in their first formative months and will likely be the predominant influence on their emotional and psychological well-being as they move through the very many years of childhood and beyond that lie ahead.

50. I reminded my court of the seminal line of Lady Justice Black (as she then was) in *K v K (Relocation: Shared Care Arrangement)*[12] – that "everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child". And I suggested that it would always have been better – and less open to criticism - had this particular factor been expressed as being 'the impact of refusal on the emotional and psychological well-being of the applicant to the extent that such impacts on the emotional and psychological well-being of the child'. For under this head that would focus the mind of the court ultimately on the child and not the parent and emphasise that what is required is actually quite a nuanced and not a broad-brush judgement.

51. And, in such respect, I do take issue with the way in which Mr Justice Mostyn summarised my client's rationale for relocation which appeared only to be about giving her "the personal contentment and functional fulfilment that she so ardently craves" – a very adult-orientated perspective - when the case was put on the basis of the consequential positive welfare impact that such would have on the child.

[12] [2011] EWCA Civ 793, [2012] 2 FLR 880, at [141].

52. Secondly, I had invited him to say something more about selfishness and sacrifice. These were concepts that had played their part in his judgment in *Re AR*, but in a way only that reflected badly on the would-be relocator – selfish for wanting to pursue what they wanted, not prepared to make sacrifices for the greater good.

53. Depending on the circumstances of the particular case, I said, the concepts of selfishness and sacrifice can cut in different ways and sought to illustrate the point by reference to – what I described as – "the characteristic common sense and realism of Mr Justice Hedley", who in *S v T (Permission to Relocate to Russia)*[13] had part-rationalised his decision for relocation in that case with the following exposition:

> "[21] … [When] parties enter into transnational parenting then they are taken to be doing so with their eyes wide open and with an understanding that if their relationship broke down then going home was going to be a major issue. Moreover, if breakdown takes place whilst the child is very young then the child is likely to follow the one with whom he spends most of his time. If, of course (and this points the other way), the breakdown takes place much later in the child's life then it is far less likely that a child's position is going to be disrupted; a matter illustrated by my decision in *Re Y (A Child: Removal From Jurisdiction)* [2004] All ER (D) 366 to which reference has been made in the argument. The pain of separation is part of the price of a choice to enter into this kind of relationship and there is simply nothing anybody can do to spare parties the price of that pain in the event that the relationship goes wrong. The fact of the matter is that the mother's plans are no more and no less than would have been obvious to the parties had they considered at the time that they agreed to be parents what would happen if there was an early breakdown in their relationship."

54. On the back of that, and picking up on what Mr Justice Mostyn had said in *Re AR*, I submitted that it would be unfortunate and wrong if it is to be more widely assumed that the touchstones of selfishness and sacrifice should apply only to the putative relocator who, it might be said, really ought to get more of a grip, be stronger, show some selflessness and sacrifice when contemplating remaining in the country which is not their own.

55. On the particular facts of *AY v AS*, I suggested the court to ask itself: what on earth did the father, then approaching 50 (with 15 more years of life experience than the mother)

[13] [2012] EWHC 4023 (Fam), [2013] 2 FLR 457.

expect to happen if this relationship went wrong as early as it did? And to ask itself then, in that presumed discussion (contemplated by Mr Justice Hedley) when these parents took their first steps towards parenthood, what would have been the obvious, underlying assumption as to where the resultant child would grow up if the relationship quickly disintegrated – in England where the parent plainly intended and more suited to take on the primary caring role would, in a largely unfamiliar environment, be devoid of family and support and with (at best) limited prospects or back in her home country of Kazakhstan where the exact reverse would be true?

56. Out of that second observation, I submitted, came a third. While the law applicable to all kinds of relocation case remains the same, the underlying reason for the relocation is a factor that almost always should have some bearing in the balancing exercise that the court has to undertake. Indeed, as I reminded my court, among the 'factors relevant to decisions on international relocation', set out in the *Washington Declaration on International Family Relocation* that it had cited with such approval in *Re AR*, is "(iv) where relevant to the determination of the outcome, the reasons for seeking or opposing relocation".

57. Why do I say this factor is important? First, because in a very immediate sense, it provides the lens through which the impact of refusal on the putative relocator is most properly viewed, thereby allowing issues of motivation, selfishness and sacrifice to be most fairly assessed. The claims of likely devastation from a parent who after 10 years of marriage, gets bored and fecklessly pursues some change-of-lifestyle dream will inevitably be viewed with greater circumspection and lesser sympathy than the like claims of a mother not long removed from her homeland whose desire to return there to bring up her child best is not only entirely understandable but would have been the most reasonable and logical assumption in the very scenario contemplated by Mr Justice Hedley. And that observation serves too as a reminder that, whereas in some cases, the answer to the core question of the putative relocator "how would you react if permission were refused?", can seem pre-meditated, staged and entirely self-serving, there will be cases where the answer will be a peak into an emotional and psychological state of mind that is in no way contrived but a wholly predictable

reaction to the circumstances in which the parent now finds themselves.

58. The reason for relocation is important also, I suggested, because at some point the child will come to have an understanding of why they were or were not relocated; and, of course, as a matter of law, when considering the child's welfare, the court has to consider the child's welfare now, throughout their minority and beyond. If the child were to lose entirely the relationship with their left-behind parent, then that loss and any sense of grievance associated with it will likely be accentuated if this was all for a lifestyle dream or a step-parent's job opportunity. But, I observed, in a case like this, if relocation were to be refused, and if the deleterious consequences for the mother were to be as she expected, then there would likely be a welfare impact on the child that transcended the straightforward and well-worn expectation that an unhappy parent will lead to an unhappy child.

59. All those points, however, will have to be left, possibly to be judicially considered on another day – whether within this case, if it does return on the issue of permanent relocation to Kazakhstan, or in another.

**Coda**

60. It can be correctly inferred from what I have just said that the case has not returned to court on the issue of permanent relocation. But it has returned to court on the issue of holidays to Kazakhstan, and, while this further aspect of the case has not been reported, within the ambit of what is and is not prohibited by section 12 Administration of Justice Act 1960, I am allowed to reveal that the issue that fell to be considered was whether the mother should be able to take the child to Kazakhstan for the holidays that the court had previously sanctioned at any time while the UK government's advice to British nationals (which the child is) was against all but essential travel to Kazakhstan (as the advice then was).

61. And I am permitted to record that the court's double-barrelled order:
    - first reflected verbatim the relief sought by the mother within her application for a specific issue order, in providing:

> "In accordance with the order of Mostyn J, dated 14 November 2019, and with section 13(1) and (2) Children Act 1989, the applicant mother is permitted (for the avoidance of doubt) to remove the child to Kazakhstan for a period of up to one month on each occasion sanctioned by the order of 14 November 2019 without the prior written consent of the respondent father even if the removal is to take place at a time when the Foreign, Commonwealth & Development Office is advising British nationals against all but essential international travel to Kazakhstan."

- providing secondly, in line with the mother's oral submissions:

> "For the avoidance of any doubt, the [order above] does not derogate from the right of the father to seek a prohibited steps order to prevent such a temporary removal, but the court makes clear that on such an application, the father would have to demonstrate powerful reasons relating to circumstances beyond those subsisting today why the temporary removal was directly contrary to the child's best interests or that there were practical reasons why such a trip was impossible."

62. Alas, there was no judgment, for the issue of travel within the pandemic would have been worthy of one, but, as recorded on the face of its order, the court did indicate, by way of succinct justification for its decision, the high desirability of the mother travelling with her child to Kazakhstan as and when she planned.

**<u>And finally …</u>**

63. So there ends for now the tale of *AY and AS* and its potential implications in practice.

64. It simply remains for me to thank the White Paper Conference for inviting me yet again to be part of their magnificent programme. This is now my seventh participation in eight years, which pretty much makes me the Roger Federer or Lewis Hamilton of White Paper Conference lecturing. And, mindful that you may be tuning into this at a time of lockdown or not, may I finally say, dependent on when you do, stay home or stay alert, but just remember, if your relocation application is premature, then there is no question of stay at all.

20 November 2020 Piers Pressdee QC

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