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Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:*	**23/06/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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Between:

A FATHER

Appellant

-v-

A MOTHER

Respondent

IN THE MATTER OF UJ (A FEMALE CHILD AGED 5½ YEARS) and RT (A MALE CHILD AGED 3½ YEARS)

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The appellant appeared as a litigant in person

Mr A Magee QC and Ms M McHugh BL (instructed by Caldwell & Robinson solicitors) for the respondent

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McFARLAND J

Introduction

[1] This judgment has been anonymised to protect the identity of the children. I have used the random ciphers UJ and RT for the names of the children. These are not their initials. Nothing can be published that will identify the children.

[2] Her Honour Judge McCaffrey ("HHJ McCaffrey") after a fully contested hearing over several days with both parties represented by senior counsel, made a series of orders, namely:

a) Dismissal of the appellant's application for a residence order and making a residence order in favour of the respondent;

b) Granting leave to the respondent to remove the children from the United Kingdom and to reside in an EU country (which I will call "EUC")

c) Making a defined contact order in favour of the appellant to cover the period up to and after the proposed re-location;

d) Making non-molestation order against the appellant for one year;

e) Making an occupation order in favour of the respondent for one year.

The Appeal

[3] The appellant appealed the orders by a notice of appeal dated 29 January 2021. It is a lengthy notice stating 19 grounds. I have distilled these grounds into two principle grounds – a failure to carry out a proper proportionality evaluation and a failure to give adequate reasons.

[4] Both parties filed fresh statements of evidence and skeleton arguments and a social worker filed an updated report. Although the appellant appeared before me as a personal litigant he did have the assistance of senior and junior counsel and his solicitor up to the day before the hearing on the 18 June 2021. He therefore had legal assistance in the preparation of his statement of evidence and skeleton argument before this court.

The Law

[5] Keegan J in *Re Todd* [2020] NIFam 14 at [9] set out how courts should approach the hearing of an appeal:

> *"Again much ink was split in relation to the test on appeal. In this jurisdiction the issue of appeals flows from a number of cases. Appeals from the Family Care Centre are not conducted as automatic re-hearings for the reasons set out in McG v McC [2002] NI 283. However, that case has been subject to modification by judges sitting in the Family Division given Article 6 fair trial Convention obligations and the fluctuating nature of family life. The practice in this jurisdiction has been that a case is usually conducted by way of submissions with the judge determining whether or not oral evidence of additional statements are required."*

[6] For this appeal, I considered the written statements of evidence and the skeleton arguments. The appellant was a personal litigant. I called on him to give evidence and he was cross-examined by Mr Magee QC. I then adjourned the hearing for a short period over the luncheon break to consider the oral evidence that had been given in the context of all the other evidence before the court in written

form. I decided that it was not necessary to call evidence from the mother. I then heard submissions from both the appellant and from Mr Magee QC and reserved my judgment.

[7] The purpose of the appeal, including the consideration of the oral evidence and the submissions, is to determine whether HHJ McCaffrey was entitled to reach the conclusions that she did, by a correct application of the proportionality test. If the appellate court considers that the first instance judge was wrong then the appeal should be allowed, if not, it should be dismissed (see *Re B* [2013] UKSC 33).

[8] In *Re C* [2021] NIFam 1 at [12], I summarised the law in relation to the proportionality test as it applied to international relocation cases:

> *"The general approach to be taken in international relocation cases is best summarised in the judgment of Ryder LJ in Re F (A Child) (International Relocation Cases) [2015] EWCA Civ 882 at [29] - [31] when he stated:*
>
> > *'29. In Re W (Care Plans) [2013] EWCA Civ 1227, [2014] 2 FLR 431 at [76 - 78] I held that in relation to public law children proceedings the welfare analysis of realistic options that is required would be facilitated by a balancing exercise first recommended by Thorpe LJ in the different context of a medical treatment case in Re A (Male Sterilisation) [2000] 1 FLR 549 at 560. That approach had been identified by my Lord, McFarlane LJ in Re G (Care Proceedings: Welfare Evaluation) [2013] EWCA Civ 965, [2014] 1 FLR 670 at [54]:*
> >
> > > *"What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."*
> >
> > *It was subsequently approved by Sir James Munby P in this court in Re B-S (Children) [2013] EWCA Civ 1146, [2014] 1 FLR 1935 at [36] and at [46] where the approach was described by him in these terms:*
> >
> > > *'We emphasise the words 'global, holistic evaluation'. This point is crucial. The judicial task is to evaluate all the options,*

undertaking a global, holistic and ... multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option."

30. That approach is no more than a reiteration of good practice. Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary. That is neither a new approach nor is it an option. A welfare analysis is a requirement in any decision about a child's upbringing. The sophistication of that analysis will depend on the facts of the case. Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or 'left behind' parent) from being sidelined in a linear analysis. Not only is it necessary to consider both parents' proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse.

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

[9] The proportionality test is applied by a global holistic approach to the evidence. It imposes on the court an obligation to treat the welfare of the children as its paramount concern, and in doing so it must consider the provisions of Article 3(3) of the Children (NI) Order 1995, the so called 'welfare check list.' Article 3(3) states:

"[A] court shall have regard in particular to –

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

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;

(g) the range of powers available to the court under this Order in the proceedings in question."

The first instance judgment

[10] HHJ McCaffrey in her judgment which ran to 21 pages and 76 paragraphs, correctly set out the law in relation to the consideration of re-location cases, specifically referring to the leading cases, both in Northern Ireland and in England and Wales.

[11] The evidence before the court at first instance comprised of numerous written statements (20 in total), 3 social work reports, 2 UNOCINI reports, together with some medical and police reports. During the hearing, oral evidence was heard from the mother and the father, the social worker, the maternal grandmother, the maternal aunt, a neighbour, and a work colleague. The judge had therefore a significant amount of evidence before her, and this is recorded and analysed in her judgment.

[12] The criticism of the judgment by the appellant focusses on several points. First he claims that it was a linear exercise rather than a holistic one. I reject this argument. It is clear if one reads the judgment as a whole that a holistic exercise was carried out. The appellant claims that the fact that the judge dealt with the re-location decision first is evidence that it was a linear analysis. This is simply a criticism of the style of the judgment, rather than its substance. HHJ McCaffrey was mindful of the need for a holistic approach, and referred to it on several occasions. This case was clearly primarily about the issue of re-location. There was another application before the court relating to the father's application for a residence order, but it is clear from the judge's analysis of the evidence, that she had rejected the ability of the father to be the primary carer for the children, notwithstanding his love for the children and his own evidence concerning this. This view is very well supported by the evidence including the appellant's problems with his mental

health, the social work evidence, his conduct during the summer of 2019 and after, particularly his conduct in repeatedly reporting allegations about the mother to social services, all of which have been considered to be unfounded.

[13] HHJ McCaffrey referred to several incidents, but one is worthy of repetition as it encapsulates the appellant's problems and how his conduct impacts on the mother, the principle carer for the children, and on the children. In the summer of 2019 the parties agreed to meet in a café to discuss their marriage. During this discussion, the mother indicated that she wished to end the marriage. She then left the table to go to the toilet, and the father left the café taking her motor vehicle, which he then kept for a week. This left the mother stranded in the café approximately 2½ miles from her home and unable to collect the children. The stated reason for the taking of the motor vehicle was that it required maintenance. During the hearing before HHJ McCaffrey, it is noted that the father, despite a period of some 21 months to reflect on his conduct, displayed a complete lack of appreciation how this would impact on the mother and the children, and a complete lack of insight into the distress that it caused.

[14] The social work evidence suggested that further assessments into his parenting ability would be necessary should the court have been minded to grant a residence order. The appellant had asserted that he had been the primary care giver during the marriage, although this had been rejected by HHJ McCaffrey. The stated opinion of the social worker was that she would not support a residence order in favour of the father.

[15] I therefore consider that HHJ McCaffrey had considered the appellant's application for a residence order, and her judgment reflects this, both by recording the relevant evidence and analysing it. She specifically considers the question of residence generally at [67] – [69] of her judgment. The judgment did focus primarily on the issue of re-location, but in reality that was what the case was really about. The decision rejected the notion of a residence order in favour of the appellant or even a shared residence order. It is clear that the judge considered this and rejected it. In doing so, the judge was applying the evidence as she found it to the correct legal principles and in my view was entirely correct in rejecting the appellant's application. Having had the opportunity of hearing and observing the father, there was absolutely nothing placed before this court which could cast doubt on the correctness of this approach.

[16] There is further criticism of the judgment in that it is claimed that it lacks balance by not referring to some of the father's evidence, it fails to resolve certain aspects of the disputed evidence, and it relies heavily on a single domestic incident and a report from a consultant psychiatrist on the appellant's mental health. These criticisms are without substance. Judges will consider a significant amount of evidence in the course of a hearing, and as stated at [11] above, this case is no different. It is not the function of a judge in either an oral or written judgment to slavishly repeat every piece of evidence in the case or to make a ruling on every

piece of disputed evidence. What is required is a consideration of the relevant evidence. This has been done in the judgment. That will necessarily result in some evidence being mentioned and some not being mentioned. It is entirely reasonable for a judge to consider one aspect of the evidence to be more important than another. A failure to mention a piece of evidence does not infer that it has been ignored.

[17] The final and core criticism concerns the evaluation of the evidence relating to the proposed relocation. I consider that HHJ McCaffrey did deal with this more than adequately in her judgment. The re-location was going to be a major change of circumstances both for the children and their parents and therefore did require a consideration of the evidence and an evaluation of the direct and indirect impact it would have on the children's well-being. HHJ McCaffrey did this in her judgement by setting out the evidence at [38] – [43] and her analysis of it at [52] – [66] and [70] - [75]. It is clear that the judge was focussing on the welfare checklist, and particularly Article 3(3)(c). In doing so she carried out an assessment of proportionality and she cannot be faulted in her analysis.

[18] Decisions of this type involving the re-location of children are always very difficult for the parents concerned. Separation from one parent will always create problems for that parent. The reality in this case is that the mother is the primary care-provider, and the evidence before HHJ McCaffrey, and before me, suggests that this will have to remain the case for the foreseeable future. There was an evaluation of the mother's proposed relocation to EUC by HHJ McCaffrey particularly focussing on the impact on the children, including the predicted relationship with both their mother and their father. As with all evaluations involving predictions, there will be uncertainties and a degree of speculation about future events, however, insofar as it was possible, the judge did attempt to deal with all the relevant issues.

[19] The final decision to permit relocation was one that was available to HHJ McCaffrey based on the evidence before her, and there has been no reason placed before me to suggest that it was wrong.

[20] Before concluding my remarks, I will deal with two final matters. The first relates to contact. The appellant criticises the judge for failing to set out a defined contact plan or orders including who will book tickets, which airports should be used etc. There is also a general criticism that no reasoning is provided concerning the judge's decision about the precise details relating to contact. The exact terms of the contact are set out in the court order and I do not propose to repeat them in detail but they will include Zoom, Skype or telephone contact two or three times a week to be facilitated by the mother; direct contact for one week at Easter, one week at Halloween, one week at Christmas and two weeks in the summer, all in Northern Ireland. The travel costs for Easter are to be funded by the father and the travel costs for the other periods are to be funded by the mother. There is an arrangement for alternative Easters and Christmases with each parent and an ability for the father to visit the children in EUC for a further week in the summer and for the Easter contact to take place in EUC.

[21] It is clear that HHJ McCaffrey took some care in approaching this issue, notwithstanding the fact that she dealt with it in a rather perfunctory fashion in paragraph [75] of her judgment. It was entirely appropriate for her to deal with this issue in such a fashion. Meaningful contact between the children and the father and the extended paternal family is essential in this case when the children relocate. HHJ McCaffrey will have heard the conflicting evidence and submissions. She would have been aware of the financial pressures for both parents managing any arrangements of this type. She was perfectly entitled to set out the decision that she arrived at in the form that she did and to give very limited reasons for each constituent element of the contact. It is not necessary for a judge to set out in detail reasons why a certain week or holiday is preferred and why another is not preferred. The essential aspect is that the overall result is a regime for contact which is both practical and workable and, above all, is in the children's best interests.

[22] The father misunderstands the role of the court when he suggests that the order is somehow defective because it fails to set out who will buy the tickets, when they will be bought, which airports will be used, which hotels will be used and so on. These are all matters for the parents to work out along with all the other duties that they should fulfil in exercising the parental responsibility they share in bringing up the children.

[23] The final matter is the length of the non-molestation order and the occupation order. HHJ McCaffrey dealt with this at [76] of her judgment and it was entirely proper that she should extend both for one year. It is correct that there have been no recorded breaches for the 16 month period when an interim order had been in place. That is one factor to be taken into account in determining if a further order is required at all, and if so, for how long. The main rationale for the decision was the fraught and difficult parental relationship. It was evident before this court that the existence of the order was a deterrent to the father as he did state in his oral evidence that he felt constrained in contacting the mother because of the order. The conduct of the father in repeatedly reporting the mother to social services concerning what turn out to be unfounded allegations is, at one level, a form of conscious or sub-conscious attempted coercive control over the mother. This conduct did have a detrimental impact on the mother, the principle care-giver to the children. HHJ McCaffrey was correct in putting the order in place for one year up to January 2022 and there was sufficient evidence to support that decision. Once the mother has left Northern Ireland, the occupation order will become obsolete. The non-molestation order will become less relevant because of the physical separation, but given the father's conduct to date, it will continue to fulfil some use by providing reassurance to the mother that she will be protected from harassment and pestering from the father, although because of the physical separation, it will be of less relevance.

Conclusion

[24] For the reasons I have set out above, I consider that the father's appeal must

fail and it is therefore dismissed. The orders made in the Family Care Centre are affirmed.

[25] There is one discreet matter concerning the residence order in favour of the mother and the contact order in favour of the father. It is desirable that they be registered in EUC, so I will direct that the mother be required to register, at her expense, the residence and contact orders in the local court, such application to register to be made within 2 months of her arrival in EUC. The purpose of such registration is to provide re-assurance to the father that although the courts in Northern Ireland have exercised jurisdiction over the children on the basis of their current habitual residence in Northern Ireland, the orders will be registered in EUC and can be enforced in that country as if they were orders of the local court.

[26] I will hear both parties in respect of costs.