**EXPATRIATE LAW DUBAI**

**LEAVE TO REMOVE A CHILD FROM ENGLAND AND WALES:**

**THE ENGLISH PERSPECTIVE**

**3rd MAY 2018**

1. Permanent relocation is either permitted or refused. **In every case there is a risk that the child will not adapt satisfactorily and there is the certainty of disruption to a status quo which may be working well for the child in England and Wales. In many cases the family is torn apart by the emotional and financial strain of the relocation litigation.**
2. **Temporary relocation applications to enable a child to go on holiday, usually to a parent’s home state and there experience their culture, are increasingly common. The decision of Baker J in DO and BO [2017] EWHC 858 (Fam)** is useful.
3. Relocation applications most often fall into the category of:
4. **The going home with the child to where there is family support;**
5. **The joining a new partner who has a life abroad; or**
6. **The opportunity for the relocator to take up a good job abroad.**
7. It is often stressed that judicial decisions are fact specific. It is dangerous to rely upon authority. This adds to difficulty in predicting outcome. The checklists appended are designed to aid in preparation or resisting the application.

***“The focus from beginning to end must be on the child's best interests. The child's welfare is paramount. Every case must be determined having regard to the 'welfare checklist', though of course also having regard, where relevant and helpful, to such guidance as may have been given by this court.*”** [Re K Black LJ]

1. The court must if there is a dispute first decide with whom the child should live and then proceed to determine the relocation issue

**The Law**

**The Children Act 1989, Section 1**

**The welfare principle**

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| 1. *When a court determines any question with respect to—* 2. *the upbringing of a child; or* 3. *the administration of a child’s property or the application of any income arising from it,*   *the child’s welfare shall be the court’s paramount consideration.* | |
| 1. *In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.* | |
| *(2A)* | *A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.* |
| *(2B)* | *In subsection (2A) “involvement” means involvement of some kind, either direct or indirect, but not any particular division of a child's time.****]*** |
| 1. *In the circumstances mentioned in subsection (4), a court shall have regard in particular to—* 2. *the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);* 3. *his physical, emotional and educational needs;* 4. *the likely effect on him of any change in his circumstances;* 5. *his age, sex, background and any characteristics of his which the court considers relevant;* 6. *any harm which he has suffered or is at risk of suffering;* 7. *how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;* 8. *the range of powers available to the court under this Act in the proceedings in question.* | |
| 1. *The circumstances are that –* 2. *the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or …* | |

**Recent decisions of the English court**

**Permanent relocation**

1. **A v B [2018] EWHC 328 (Fam) Theis J.**

Appeal against (i) the refusal by a Recorder to grant permission to a mother to move her 8-year old child to Poland, and (ii) the making a shared care arrangement. T's mother and father were both polish and in a relationship between 2004 and 2014 The breakdown of their relationship was bitter. They had an equal shared care arrangement. Mother's partner, Y, lived in Poland. They intended to marry in the summer of 2017. The father’s family was nearby in Poland. In 2016 mother sought permission to remove T to Poland with her and Y. The CAFCASS officer recommended that permission should be given, with contact arrangements to father The psychologist, reported that T had suffered some degree of emotional harm and that if the application was granted, T would have some distance from the ongoing conflict but would experience loss of the relationship with his father; although that could be mitigated by ensuring extended contact during the holiday and Skype. The Recorder refused permission.

**Held** Theis J allowing the appeal: the Recorder failed properly to evaluate the impact on the mother, and thereby T, of the application being refused. Although the Recorder referred to the mother being *'devastated'* and *'extremely* *upset'*, he fell into error as he failed to properly consider what lay behind those words. As to the risk of the mother not abiding with future contact arrangements, the recorder failed to take account that the mother had despite conflict with the father abided by the arrangements for T to see his father.

The cumulative effect of grounds (1)-(4) was that the Recorder's reasoning in support of his decision to refuse the application to relocate and determining the shared care arrangement could not stand. The case was remitted for rehearing.

***The judgment was successfully “picked apart”. The judge had not addressed the central welfare factors and was held to have overlooked a matter of importance. The fact that the father was also Polish and the mother had persevered with contact despite the acrimony will have got her a long way. The involvement of a psychologist is also of interest*.**

1. **Re N-A (Children) [2017] EWCA Civ 230 Iran relocation wishes of children.**

Appeal by the father of two children, aged 16 and 14 years, against the decision to refuse permission for him to take them to live permanently in Iran. L and B, aged 16 and 14 years wanted to live in Iran. The CAFCASS Officer, considered that the risks of a move to Iran outweighed the benefits for the children in the light of the broken family relationships. The Judge met the children in the presence of CAFCASS and reported back. She considered neither boy gave her the impression that they really understood what a move permanently to Iran would entail. She had the *'gravest* *doubts'* regarding the level of contact if the children were to move to Iran. A new order for contact with their mother was also made. The judge refused the leave.

**Held** on appeal:

1. The judge had acted properly in seeing the children She had followed the guideline.
2. Wishes and feelings were only one factor.
3. She had not overlooked positive factors in favour of the move*.*

***This case shows that although in many cases the wishes of teenage children prevail the court can and must look at the wider picture. One wonders whether the children would have become very angry with their mother. In many relocation cases the outcome will depend rightly or wrongly on the impression that the parties have made on the CAFCASS officer and the Judge. The view that the court takes of the applicant’s willingness to support contact is often crucial.***

1. **Re CB (International Relocation: Domestic Abuse: Child Arrangements) [2017] EWFC 39** CB, aged 16 months.

The mother (a Portuguese national) and father (a British national) separated when CB was 8 months old. M alleged that the relationship was emotionally abusive, with aggressive behaviour by F who had been convicted of harassment against the mother. MARAC considered that the mother remained at high risk of abuse from the father. Contact broke down shortly after the parents' separation but was reinstated with the assistance of the Local Authority. Following a breakdown of relations between the father and the social worker, and due to the mother's objection to contact continuing, contact ceased in March 2017. F wanted to spend time 3x pw with the child. M wanted to relocate to Portugal and monthly Skype contact.

**Held** M had become possessive over CB and inflexible in her approach to parenting [50]. Her plans and reasons for relocation were not well thought out. There was a lack of evidence. F should have one more chance to show he could co parent. Case adjourned 5 months. F to identify and undertake an appropriate course/programme in order to see whether he could safely parent CB. M to file more comprehensive proposals for relocation with corroborating evidence.

***This shows the reluctance of the court to make a permission if in effect it ends the chance of a paternal relationship***

**Temporary relocation for a holiday**

1. **DO and BO [2017] EWHC 858 (Fam) Baker J.**

# The Mother, a Chinese national who acquired a British passport, sought permission to take the parties' two children, aged 8½ and 6, on holiday to China for 21 days each year. There was a history of parental conflict and court proceedings. At the FHDRA the children were joined as parties and a r.16.4 guardian was appointed. Expert evidence on Chinese law was directed. The Guardian's view was that there was little evidence to suggest that the mother was planning to move permanently to China and that it was appropriate for the children to be able to explore their heritage and identity by visiting that country. The Judge cited *Re R (A Child)* [2013] EWCA Civ 1115. Drawing on earlier authorities, in particular the decisions of the same Court in *Re K (Removal from the Jurisdiction: Practice)* [1999] 1 FLR 1084 and *Re M (A Child)* [2010] EWCA Civ 888, Patten LJ observed (at para 23):

# *"The overriding consideration for the court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK-based parent. Although, in common with Black LJ in Re M (Removal from Jurisdiction: Adjournment), we do not say that no application of this category can proceed in the absence of expert evidence, we consider that there is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence which deals specifically and in detail with that issue. If in doubt the court should err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course."*

# At para 25, drawing on the judgment of Thorpe LJ in *Re K*, Patten LJ added:

# *"applications for temporary removal to a non-Convention country will inevitably involve consideration of three related elements:*

1. *the magnitude of the risk of breach of the order if permission is given;*
2. *the magnitude of the consequence of breach if it occurs; and*
3. *the level of security that may be achieved by building in to the arrangements all of the available safeguards.*

*It is necessary for the judge considering such an application to ensure that all three elements are in focus at all times when making the ultimate welfare determination of whether or not to grant leave."*

# Held: refusing the application: neither party was a wholly reliable witness. There was a *'moderate* *risk'*, i.e. not an insignificant risk, that the mother would not return the children to England at the end of a holiday to China. (2) The breach would have devastating consequences for the boys. (3) The level of security that may be given was limited. There were no effective safeguards which could be put in place to prevent the children being retained in China which was not a signatory to the Hague Convention and that no bilateral arrangements existed between the UK and China. The Chinese court would not make a mirror order or otherwise give effect to any English order. It would be difficult for the father to access the court in China.

**Future disputes**

1. **AP v TD [2010] EWHC 2040** **Parker J**

Unexpected help came to hand from the EU Regulation 2021/2003 (“Brussels II Revised.”) Parents may pursuant to Article 12 elect England as the jurisdiction where for future contact disputes may be determined when agreeing to relocation. Provided that it is in the child’s interest the court will try the case at the later date even if the child is residing abroad. The case was set down to consider contact, and whether it was in the child’s best interest for the English court to retain jurisdiction in relation to residence under Article 12.3.

***Accordingly, a party who dreads future litigation overseas should seek the concession by the relocator in the hope that if there is future litigation the court will decide that it is in the child’s best interests that it take place be in England.***

**PRACTICE NOTE: INSTRUCTIONS**

**Checklist - whether for Applicant or Respondent - must encompass: -**

1. **Reasons for relocation?**
2. **The motivation of the parent seeking to relocate?**
3. **What relationships does the child leave behind in England?**
4. **What is the effect on the child of disruption with his significant relationships and life here?**
5. **Will the relocator promote a positive image of the other parent?**
6. **What is the effect on the stepfather and new family of refusal to relocate?**
7. **If it is a new partner case is the relationship solid?**
8. **What are the connections with the new state?**
9. **Are there special cultural factors such as religion or a language?**
10. **Is there support and back up in the event of problems such as illness or unemployment?**
11. **Are Immigration issues relevant?**
12. **What are the wishes and feelings of the child?**
13. **Does the child have a sophisticated appraisal of the impact on him of the planned dislocation in his life?**
14. **Is there stability in the housing plans?**
15. **Does the child have any relationships in new area?**
16. **Is there a real commitment to contact by the Applicant?**
17. **How exactly will the contact be funded?**
18. **What contact journeys can the child cope with?**
19. **What contact to the new homeland can the left behind parent achieve?**
20. **Are mirror orders likely to be effective (expert evidence on this point is often inconclusive)?**
21. **Is it realistic for a parent to take proceedings overseas in the event of disagreement?**
22. **Can safeguards be put in place, such as a Bond, to ensure contact?**
23. **What are the relative costs of living in each state?**
24. **Is insurance arranged?**
25. **Are suitable schools available?**
26. **Are there special cultural factors such as religion or a language?**
27. **Is the Applicant suffering from depression? If so, is it the stress because of uncertainty as much as because of the life in England?**
28. **What are the employment prospects of the Applicant or spouse in England and overseas?**
29. **Are financial issues realistically addressed in each state?**
30. **Is there evidence of back up in the event of problems?**
31. **Could the other left behind parent relocate?**

**THE CAFCASS REPORT**

1. The **court will generally order a report from a CAFCASS officer. The recommendation of the CAFCASS officer is very important. The judge if he departs from the recommendation of the CAFCASS officer he must give clear and compelling reasons for doing so. Sometimes the CAFCASS officer will sit on the fence. More often there is a recommendation and one party will be extremely disappointed at that recommendation.**
2. **Preparation of cross examination of the CAFCASS officer is different in every case. The methodology of the CAFCASS officer must be scrutinised. Instructions will be taken from the client on the details of the report.**
3. **A CAFCASS officer is not a psychiatrist and is not a psychologist. He or she is from a social work background. A CAFCASS officer’s expertise is with regard to the child not the adults. Observations upon the adults or the family dynamic may or may not be justified.**
4. **The CAFCASS officer may or may not have read the papers. Often they admit readily that they have spent one hour or so. Some CAFCASS officers prefer not to read the papers but to “come at the matter afresh”. It may be worth reminding the judge that he has a far more detailed knowledge of the facts than the CAFCASS officer and therefore be in a better position to form an opinion on certain points.**
5. **The CAFCASS officer may “go too far”. The view for example that the child is resilient and will adapt to the new environment may be highly questionable given the of amount of adaptation that will be required. Sometimes the CAFCASS officer forms a favourable view of the relocator and advises that the relocator will facilitate contact which in your client’s view is not likely in the light of the history.**
6. **The CAFCASS officer may have formed an opinion on an unsound factual basis. An opinion may be glib. Question the factual basis of a recommendation. The CAFCASS officer may not have been informed of certain pertinent facts or been misinformed of others. The CAFCASS officer: “*Would your opinion be different if the court were to find that the facts were as follows:-”*.**
7. In many cases it is sensible to advise the client to take stock upon receipt of the CAFCASS report. However, no Judge is bound to follow the recommendation of the CAFCASS officer. It is legitimate for a Judge to decide that (s)he has had the advantage of seeing the parents cross-examined and that cross-examination revealed defects in the case of one of the parents which would not have been apparent to the CAFCASS officer during an interview.
8. In conclusion, REUNITE research in 2006 found that a significant number of relocators were disillusioned with their new life. In the author’s experience the relocation does not work out in about 20% of cases.

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