



Neutral Citation Number: [2020] EWHC 488 (Fam)

Case No: FD18P00690

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28/02/2020

**Before:**

**MR JUSTICE WILLIAMS**

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**Between:**

**V**

**Applicant**

**- and -**

**M**

**1<sup>st</sup> Respondent**

**- and -**

**K (BY HIS CHILDREN'S GUARDIAN  
LYNN MAGSON)**

**2<sup>nd</sup> Respondent**

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**The Applicant Appeared in Person**

**Mr Edward Bennett** (instructed by **Charles Strachan**) for the **1<sup>st</sup> Respondent**  
**Mr Christopher Osborne** (instructed by **Cafcass Legal**) for the **2<sup>nd</sup> Respondent**

Hearing dates: 10<sup>th</sup> – 12<sup>th</sup> February 2020  
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**Approved Judgment**

I direct that pursuant to FPR 27.9 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**MR JUSTICE WILLIAMS**

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**Mr Justice Williams:**

1. I am concerned again with the child K (the ‘child’) who was born on 10 August 2015 and who is now 4 ½ years old. K has been the subject of litigation in both India and England since 2018 between his mother V (the ‘mother’) and his father M(the ‘father’). This is the third judgment that I have given regarding the child. The child was also subject to a judgment of Mr Gupta QC sitting as a deputy High Court judge.
2. The child is a ward of court but this judgment deals principally with private law applications advanced by the mother and the father. The mother, who is a litigant in person, seeks an order that the child lives with her in England and spends time with his father. In the event that I decide that the child should live in India the mother has indicated that she would return to India to co-parent the child with the father there, but she would not be in a position to do this immediately. The father who is represented by Mr Bennett, counsel, seeks an order that the child lives with him in India and spends time with the mother in England and in India. If he is unsuccessful in that, he seeks to spend time with the child in India and in England.
3. The child was made a party to these proceedings and a children’s Guardian was appointed, Lynn Magson. The child is represented by Mr Osborne of Cafcass legal. The Guardian concludes that the child should remain living in England with the mother and should spend time with the father in England and, subject to adequate protective measures being put in place, in India.

Previous judgments

4. By his judgment and order, Deputy High Court Judge Gupta QC made the following findings against the father:
  - i) the child has at all times been habitually resident in the jurisdiction of England and Wales since birth,
  - ii) the father intentionally deprived the mother and child of their passports as alleged by the mother,
  - iii) the father intentionally stranded the child in India,
  - iv) the father’s stranding of the mother and child in India was premeditated.
5. The judge consequently made a declaration in the following terms:

‘The child was habitually resident in the jurisdiction of England and Wales on 16 October 2018 and continues to be habitually resident and by reason thereof this court has jurisdiction to determine issues in relation to the welfare of the said child’.
6. On 6 February 2019 I gave judgment and determined that England was the appropriate forum to resolve the welfare issues relating to the child. I declined the father’s application to stay the proceedings but also refused the mother’s application for an anti-suit injunction in relation to the father’s litigation in India.

7. On 10 June 2019 I ordered that the child be returned to the jurisdiction of England. A number of the matters which I identified in that judgment which supported that order were:
  - i) The child had not been cared for by either of his parents over the last year as a result of the situation which the father had created.
  - ii) The multiplicity of the proceedings that the father had commenced in the Indian courts did not appear to be likely to promote an early resolution of the claim for custody in India.
  - iii) Although the father had been in India he had had very limited contact with the child.
  - iv) The resumption of care by his mother, his previous primary carer was critical.
  - v) His need for treatment could be met satisfactorily in England, at least on an interim basis, particularly with the mother and maternal grandmother providing much of the therapy in the home.

### **Factual Background**

8. The previous judgments contain a detailed history of events up until the summer of last year. In order to put this judgment in context I shall provide a brief outline of the history of this family.
9. The mother was born in India on 20 October 1987. She is an Indian citizen. The father was also born in India on 24 September 1983. He relocated to England in March 2011 and has lived and worked in the UK for the majority of his life since. He became a British citizen in July 2018 and I believe in consequence was obliged to relinquish his Indian passport, becoming an overseas citizen of India.
10. The parties married on 10 November 2014. The mother moved to live in the UK in February 2015 entering on a Visa as a dependent of the father. The child was born on 10 August 2015. He has suffered from speech and developmental delay. The child has British citizenship and a British passport.
11. In February 2018 the family travelled to India on a temporary visit. The purpose of it was to secure assessment and treatment for the child from the All India Institute for Speech and Hearing (AIISH) in order to ensure the child was receiving therapy whilst they waited for the NHS to make progress in providing appropriate treatment for him. On the 21 May 2018, the child had a paediatric appointment with the NHS but the father cancelled this without the mother's knowledge.
12. The father unilaterally decided that the mother and child should remain in India. He removed the mother's passport with her Visa and the child's passport and prevented the mother and child from returning to the UK. He kept his options open by renewing his own UK passport. Thus the mother and child became 'stranded' in India by June 2018. Deputy High Court Judge Gupta QC found that the father's actions were premeditated and deliberate. He also concluded that, previously, in 2017 the mother

and child were kept in India and the father made her agree to certain things before she was allowed to return to the UK.

13. On 10 June 2018, the father wrote to the Home Office to say the marriage was over. In June the mother managed to obtain a replacement Indian passport and a replacement UK Visa but she was unable to obtain a replacement passport for the child without the father's consent. She returned to England on 11 July 2018 leaving the child with her parents to whom she provided a written document conferring guardianship on them.
14. The father then commenced litigation in India. He appears to have issued a petition on 4 July 2018 for the restitution of conjugal rights which was followed by a habeas corpus petition in the High Court of Madras on 14 August 2018. The High Court decided to exercise its *parens patriae* jurisdiction and took Custodianship over the child. Subsequently the father issued further petitions in respect of the child's continued treatment at AIISH and seeking custody. On 10 September 2018 the High Court ordered that the child should remain in the care of the maternal grandparents but be produced for treatment at AIISH; that treatment having ceased on 4 May. This involved travelling for up to 18 hours from the maternal grandparents' home.
15. As a result of the father's letter to the Home Office on 4 August 2018 the mother was informed that her Visa was being curtailed on 20 October 2018 as she no longer met the requirements under which leave to enter was granted.
16. On 16 October 2018 the father lodged a complaint with the child welfare committee in the local district court in India .
17. The mother issued proceedings on or about 15 October 2018 and they came before Mr Justice Francis on 25 October 2018. The mother attended in person and the father was heard by video link. The child was made a ward of court and other directions were given.
18. On 31 October 2018 in response to the father's application for an interim order prohibiting the child leaving India, the mother's Indian lawyers gave an undertaking on her behalf that the child would not be removed from India. On 9 November 2018 the court itself directed that the child could not be removed without order of the court in India.
19. On 14 November 2018 Mrs Justice Gwyneth Knowles listed the mother's application for hearing on the 21 and 22 of January in order to determine the issues of jurisdiction, the mother's application for summary return and the father's application for a stay.
20. Subsequently a petition was filed by the father with the child welfare committee on 25 December 2018. In the petition the father makes some very serious allegations in respect of both the mother and the maternal grandparents treating the child abusively and the mother neglecting his welfare. The prayer in the petition [D148] states

*prayer to transfer the physical custody [to father] of my son [name] for his welfare and treatment of child with mild autism*

21. The Deputy High Court Judge heard evidence on the 21 and 22 of January and delivered his judgment on the 23 January. He put over the issue of a stay on *forum conveniens* grounds, an anti-suit injunction and whether the child should be summarily returned.
22. An order was made by the child welfare committee on 30 January 2019. That order refers to an investigation report of 9 January 2019. The order records that:

*it is decided and ordered that the said minor child be handed over into the care of his father[...] And the child welfare committee hereby so orders.*

The maternal grandparents were directed to appear before the committee on 4 February 2019 to receive the order and handover custody of the child to the father.
23. However on 5 February 2019 the Honourable Mr Justice K Ravichandra Babu, sitting at the High Court of Judicature at Madras, made an order on the application of the maternal grandfather which provided:

*'...since the connected habeas corpus petition is still pending before the division bench of this court and in the meantime, the present impugned order is passed by the first respondent, that too, without notice to the petitioner, this court is of the view that the petitioner herein is entitled for an interim order of stay of the impugned proceedings. Accordingly there will be an order of interim stay of the impugned proceedings...'*
24. On 6 February 2019 I heard the applications for summary return, the father's application for a stay of the proceedings and the mother's application for an anti-suit injunction. Having concluded that England was the more appropriate forum and thus refusing the father's application for a stay, I adjourned the issue of whether a summary return order should be made to allow a guardian to be appointed and to make enquiries into the child's welfare.
25. On 27 March 2019 the Court of Appeal refused the father's application for permission to appeal the orders of Deputy High Court Judge Gupta QC and myself.
26. On 2 May I gave further directions in relation to the application for the summary return of the child and listed it for a one day hearing on 10 June.
27. On 10 June I heard from the mother in person, the father in person by telephone and from the Cafcass High Court team who had been appointed the child's guardian. I was satisfied that it was in the child's welfare interests to return. Although the father did not seek to appeal that order he opposed its enforcement in India.
28. The mother then applied to the Indian courts and on 1 July 2019 it appears that an order was made which in effect recognised and enforced the order that I had made and which subsequently allowed the mother and the child to return to England. However that court directed that the local district court in India (which I think is the same as the child welfare committee in the local district court in India) should finalise the child custody case on or before 14 August 2019. That appears to have been adjourned. However on 12 November 2019 the High Court of judicature in Madras made a further order which appeared to quash the original custody order of 30 January 2019

but again directed the court to complete the proceedings. A hearing appears to have taken place on 13 January 2020 when the case was adjourned for judgment. The next hearing was set for 28 January 2020 but I understand that this was further adjourned.

29. Following the return of the child to the jurisdiction I gave directions to provide for the father to spend time with the child when he visited this jurisdiction. I also timetabled the application to a final hearing of what had become in effect cross applications for child arrangements orders to a final hearing before me on the 10, 11 and 12 February 2020.
30. Following his return the child has been living with the mother and maternal grandmother in accommodation rented by the mother. The mother entered him into the school system and he began attending a mainstream school in year reception. It quickly became apparent to the school that this was not an appropriate level of education for him and he was moved into year nursery but in the main is taught on a one-to-one basis with a teaching assistant with experience of working with children with special needs. The child joins his classmates at break times and currently attends only from 9 am until 12 noon. The school are clear that his level of needs are such that he should attend a special school and they have identified a school as an appropriate educational institute for him. They have been liaising with the identified school in order to get advice as to meeting the child's needs in the meantime.
31. The mother has been proactive in seeking appropriate health and educational support. The child has now been seen by the community paediatrician and undergone assessment by an educational psychologist. I shall refer to the contents of those reports later. As a consequence of the views taken by the school and the educational psychologist the local authority has accepted that the child should be assessed for an educational health care plan. This commenced in January 2020 and is expected to be completed in April 2020. The consequence of the completion of the EHCP will be that the child's needs are clearly identified along with the resources which will address those needs. At present it is not known whether the EHCP will identify that the child needs schooling in a special school or not but even if it does not it will identify the level of support that he will need in another school. Having read the various reports about this child it seems more likely than not that the EHCP will accept that he needs to be placed in a special school.
32. The mother remains in employment. Fortunately it is flexible. She takes the child to school in the morning and he is collected by the maternal grandmother. When the mother finishes work she returns home and takes over the care of the child. Her description of the routine which they follow shows how knowledgeable and committed to the child she is. The child's needs are quite specific and whilst the mother narrated the routine in a way which emphasised the positives it was clear that it is also demanding. The maternal grandmother came to the UK on a visa which has now expired. An application has been made to extend her Visa to enable her to remain to assist with the child's care. She is clearly integral to the current arrangements and indeed has been caring for the child since the mother returned from India to England in July 2018. The evidence from the mother and from the school is that the child is making progress since his return.
33. The father travelled to England and has been able to spend time with the child both in the presence of the Guardian but also at a supported contact centre. I made orders

which provided for the child and the father to spend time together subject to safeguards to ensure that the child was not removed from the jurisdiction. The reports from the Guardian indicate that the child and the father have been able to restore their relationship. The evidence suggests that the child is comfortable in the company of his father and that the father is able to engage with him in an appropriate way. Some of the descriptions of them together illustrate an affectionate attachment. The father has been able to meet the child's physical needs in contact as well.

### **The hearing**

34. On the morning of the final hearing it emerged that the child had suffered a burn injury to his face the preceding Thursday night. Photographs that the father had sent the Guardian demonstrated what appeared to be a very unpleasant burn injury to the cheek area. The hearing did not commence on the Monday in order to allow further enquiries to be made as to how this occurred. The Guardian made a referral to the local authority safeguarding team.
35. These further enquiries included the disclosure of the child's GP record for the visit, photographs of the scene of the accident, copies of emails the mother sent to the father and the Guardian and eventually statements from the mother and maternal grandmother dealing with the incident. Ultimately neither the father nor the Guardian suggested that the injury was anything other than accidental.
36. In this hearing I have been able to read the parties statements and I have considered the majority of their exhibits including the medical reports and other documents. I have seen the mother and the father give evidence as well as the Guardian. I have heard submissions from each of them in support of their positions.
37. At the conclusion of the hearing I gave the parties my decision together with my brief reasons and said I would deliver my full judgment later.

### **The parties' positions and their evidence**

#### **The Mother**

38. The mother's case is set out in her final statement and in her position statement. Her proposal is that the child should continue to live with her and spend time with the father. Her preference would be for the father to remain living in England so that he could play more of a role in the child's life. She says she has done all that she can in order to access the education, health and social welfare services in this country. The child has been seen by the community paediatrician and an educational psychologist. His EHCP is well underway. She proposes that he moves to Redgate school on the assumption that the EHCP identifies that he needs such provision and a place is available. She and the maternal grandmother undertake a lot of occupational therapy at home and she is seeking support from the local support group of the National Autistic Society. She hopes that speech and language therapy will be provided as part of the EHCP. She may be able to access this through private healthcare if it is not made available otherwise. Disability living allowance has been applied for. It is proposed that the maternal grandmother continue to live with them assuming her Visa is extended. The mother proposes to continue the current arrangements and to pursue the child's health and education in line with her existing progress. She would like to

travel to India during holiday periods in order to enable the child to visit his Indian extended family and culture. She of course would also like to visit her family. She suggested that she might do so for up to 6 weeks in the summer and a month in the winter.

39. In the event that the father returns to India she proposed that he travels to England twice a year to spend time with the child and that he would be able to spend time with him whilst the mother was in India. Her proposal was not clearly articulated in her statement or position statement but in evidence it was clear that she was advocating for a phased increase in the time the father spends with the child and a process by which the child's response was monitored to ensure that he was coping with the changes. A move to overnight contact and an extension to longer periods of time was therefore something for the future rather than something she contemplated in the short-term.
40. One of the Guardian's particular concerns was how the mother would manage in the event that the maternal grandmother's Visa application were to be refused. The mothers contingency plan is to seek alternative work which will allow her to work from home; as a database administrator she is not tied to helpdesk or other office hours and can work at night or whilst the child is at school.

#### The Father

41. The father set out his proposals in his two witness statements. They were supported by a quite detailed care plan [C317]:
  - i) The child would live with him in a Tamil speaking area of India. The father referred to a leased property which was available to him albeit on further exploration in evidence it became clear that the intention really was to live with his parents. Their home was some 20 minutes away from the identified autism centre which the father proposed as the principal source of preschool and therapy for the child;
  - ii) The father would care for the child full time and can manage his work commitments around this. He proposed to work remotely to generate an income and to rely on savings to supplement any income;
  - iii) The child would attend a pre-school in India, which caters for autistic and special needs children. The centre is a charitable trust and makes clear that an assessment of the child could be undertaken very rapidly and that any therapy could be immediately implemented. The information about the centre which the father has visited illustrates a centre with a degree of flexibility in the provision it can make. An aim would be to get the child to a place where he could enter mainstream schooling and a number of success stories demonstrated that children with not to dissimilar difficulties to the child's had transitioned from the identified centre in India to mainstream schooling. However the provision could extend for many years in the event that the child was unable to transition to mainstream schooling. The father can afford the fees and it is understood a place is available whenever the father wishes to take it up;



- iv) The child would benefit from additional alternative therapeutic support which could be available to start immediately on his arrival in the form of massage and Varma treatment
- v) The father would facilitate contact between the child, the mother and the maternal family and he is willing to offer any assurance the court considers appropriate to satisfy it of his sincerity;
- vi) The father has the support of the paternal family to fall back on if needs be, as they live close by. This includes not only the grandparents but also siblings and in-laws in particular a sister-in-law who has a background in psychology and experience working with children with special needs.
- vii) The child would be educated and would live in a Tamil speaking environment which is familiar to him.

### The Guardian

42. Ms Magson has provided two reports to the court. First in support of the child's return on an interim basis. Secondly her final report for this hearing. Ultimately Ms Magson came down in support of the mother's proposal. Some of the salient part of her position are as follows:

- i) She has visited the child at home in the care of his mother and grandmother and has observed the child in contact with his father on three occasions. She has seen the child at school and spoken with the deputy head. She has also interviewed both parents and has undertaken safeguarding checks.
- ii) The school have made special provision for the child and receive support from a special educational needs school for children with severe learning difficulties and autism. This is the school that has been identified as a possibility for the child in future. The child has made limited progress and presents as a little boy with complex needs. The mother engages very well with the school. The father has visited the school.
- iii) The reports from the educational psychologist and the community paediatrician support the diagnosis of autistic spectrum disorder, suspected learning difficulties and possible negative early life experiences. This appears to relate to allegations of abusive behaviour which the father disputes. However the separation of the child from the mother might also count as a negative early life experience.
- iv) The EHCP has progressed past the first and most difficult hurdle which is to be accepted for assessment. Whatever the outcome of the EHCP it will make provision for the identified needs of the child. It is regrettable that the child's assessment in 2018 did not take place. This has delayed matters by a significant period.
- v) Observations of the child and the father were positive. The father was sensitive and supportive and the child appeared to be content in his care. The father expressed the view that the child could be cured if provided with the correct

therapies. He considered that the child would manage the transition and separation from the mother and grandmother without difficulty as the child was familiar with him. The Guardian noted that it was not evident how the child could be supported to understand the loss of the mother and maternal grandmother should he move.

- vi) Both the mother and the grandmother are supportive of the routine for the child.
- vii) Observations of the child illustrate his lack of interest or awareness in his peers. The school had recently reported that he had learned to sit and eat a snack which is a significant achievement for him.
- viii) The Guardian notes that although the father is critical of the mother's care in some of his documents and indeed is critical of the maternal grandparents in some of the documents filed in India, he did leave the child in the care of the mother and maternal grandmother when he returned to the UK in April 2018.
- ix) The Guardian observes that the mother has been an effective advocate for the child in progressing his assessments. Working full-time, dealing with this litigation and the added pressures of court proceedings in India shows she is a resilient and able woman.
- x) The Guardian notes positives in the father's proposals. The services the identified centre in India can provide, the additional therapies, his availability to be a full-time carer for the child and the benefits of the extended paternal family are all positives supporting the father's position. The significant negative is the further disruption that it would cause for the child in relation to the change of living arrangements, separation from the mother and maternal grandmother and the change from his current schooling. The assessments from India are not of the same sort of detail as those which have been undertaken in England. Moving the child to India would separate him from his mother who could not move immediately and even if she were able to it is not clear whether there would be further ongoing proceedings in India which would impact on the arrangements for the child. The father's attitude to the mother is such that it gives rise to concern as to whether the father would prevent the child having a relationship with the mother.
- xi) The mother's proposal would provide the child with continuity and the ability to build on the current progress that has been made in schooling. The disruptions of previous years should be avoided if at all possible. The mother has supported contact with the father both indirect and in establishing weekly direct contact. She has provided information to the father about the child. Initially the Guardian expressed concern about what would happen if the child was not provided with an EHCP but in evidence she confirmed that having been accepted for assessment this was the biggest hurdle. It was now more likely that he would receive an EHCP albeit its precise recommendations were speculative. The uncertainty meant the mother needed to have a contingency plan. Having heard the mother's proposal the Guardian considered that it was viable.

- xii) Overall although there were strengths and concerns with both parent's positions the Guardian considered that the risks of the father's proposal both in terms of his support for the relationship of the child and the mother and the lack of continuity led her to conclude that the mother's proposal was likely to promote the child's welfare overall in the short medium and long-term compared to the father's.

### The legal framework

- 43. Mr Bennett set out a short summary of recent decisions of the court in relation to international and internal relocation as well as temporary removals to non-Hague Convention jurisdictions. The framework to be applied when considering cross applications for child arrangements orders, one or both of which involving relocation to another jurisdiction is as follows.
- 44. In relocation cases there is now no priority afforded to the application to relocate, as opposed to any application for a Child Arrangements Order. There is thus no lead application and to approach relocation cases in such a way is to fall into the linear approach trap, which the authorities now clearly disapprove of. The essential task is to weigh up two or conceivably more competing options as to the country in which the child should reside and the parental care framework, in which the child will live. That requires a comparative evaluation of the options available. Such evaluation may be by a balance sheet, but of course one has to be wary of then following a map without contours, which of course can result in a misleading picture and the arrival at an unexpected and probably wrong end point.
- 45. The most recent in authoritative appellate decision on the approach to permanent overseas relocation is *Re F (A Child) (International Relocation Case)* [2017] 1 FLR 979. That, together with the earlier authorities, makes clear that the approach whether under section 8 or section 13 of the Children Act should be as follows.
  - i) The only authentic principle is the paramount welfare of the child.
  - ii) The implementation of section 1(2A) of the Children Act makes clear the heightened scrutiny required of proposals which interfere with the relationship between a child and his parents.
  - iii) The welfare checklist is relevant whether the case is brought under section 8 or section 13.
  - iv) The effect of previous guidance in cases such as *Payne* may be misleading, unless viewed in its proper context, which is no more than it may assist the judge to identify potentially relevant issues.
  - v) In assessing paramount welfare in international relocation cases the court must carry out a holistic and non-linear comparative evaluation of the plans proposed by each parent.
  - vi) In addition to Article 8 rights, indeed probably as a component of the Article 8 rights, I must factor in the right of the child to maintain personal relations and direct contact with both parents on a regular basis, unless that is contrary

to his interests. That is in accordance with Article 9 of the UN Convention on the Rights of the Child.

- vii) Furthermore, the court must also take into account the Article 8 rights of the parents. In the usual case the child's rights will take priority over the parents, but that should not cause the court to overlook the Article 8 rights of others affected and the court should balance the competing rights.
  - viii) It is likely that other family members' rights will be affected by a decision, of course the further removed from the parents and the child the individuals affected the less their rights are likely to be infringed and thus the less weight they are likely to carry in comparison to the parents and of course, at the top of the list, the child.
46. The question of proportionality has caused some confusion in the authorities and there are somewhat contradictory authorities. In *Re F* the Court of Appeal said that where the court is taking a decision of relocation and where the effect of that relocation is such as to potentially seriously infringe the child's rights to a relationship with the left behind parent the court should carry out a proportionality evaluation. In the subsequent case of *Re C* the Court of Appeal questioned how that dovetailed with the paramount welfare evaluation the court is mandated to undertake and in *Re Y* an earlier decision of Lord Justice Ryder in the Court of Appeal he also in that case doubted that a proportionality evaluation was appropriate in a private law case. In *Re C (Internal Relocation)* [2017] 1 FLR 1052 at [81]-[84] Vos LJ approved the approach that the Article 8 evaluation should "*be an essential part of the balancing exercise itself and should not be undertaken separately so as to disrupt a joined up decision-making process.*"
47. In my view, in reality and when considering the welfare checklist, and in undertaking the holistic evaluation, the court will necessarily have taken into account the potential infringement of the child's right to a relationship with the left behind parent and indeed other aspects of the child's Article 8 rights. So necessarily the court will have built into its holistic evaluation a degree of consideration or proportionality and in that way the proportionality issue feeds into the ultimate paramount welfare outcome.
48. Insofar as it may assist in identifying the relevant issues the court may find it helpful to consider what may be described as the 'FKC *Payne* composite'. This is no more than an integrated approach to the welfare checklist and the *Payne* guidance or discipline, which incorporates the *Payne* criteria and any other particular features of the individual case which appears relevant. Of course in some cases it may be that one or more particular aspects would emerge as carrying significantly more weight than the others, a contour map with high peaks and low valleys, in others the factors may be much more evenly weighed and present a gentle undulating landscape.
49. In the former case the balance may fall more obviously in one direction if it is dominated by a peak with no valleys. In the latter the gentle undulations may make the balance a very fine one, ultimately every case is fact specific.
50. The composite may appear in this form.

- i) The ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding.
- ii) Physical, emotional and educational needs.
- iii) The likely effect on the child of any change in their circumstances. Within this some specific questions might be what changes to housing, schooling and relationships are likely if they remain in England? How realistic is the plan in the sense of how likely is it to be implemented as conceived? Will there be positive effects in respect of the removing parent's ability to provide care for them if they move abroad? What are the other positives and negatives about country X in terms of environment, education, links with family? What will be the impact on the child of moving permanently to another country in respect of their relationship with the left behind parent and other extended family? To what extent may that be offset by on-going contact and extension to other relationships in the new country?
- iv) The child's age, sex, background and any characteristics of his which the court considers relevant.
- v) Any harm which he has suffered or is at risk of suffering. There is obviously a significant overlap here with the effects of change and so within this, what may be the impact on the child of the change of their relationship with the left behind parent? How secure is that relationship now and how likely is it to endure and thrive if the child moves? How realistic are the proposals for maintaining contact? What will be the impact on the removing party of having to remain in England, contrary to their wishes? What will be the consequent impact on the child? What will be the impact on the left behind parent of the child moving? Will the ability of either parent to provide care for the child be adversely affected by the refusal or grant of the application and if so to what extent? To what extent will loss of contact with the left behind family be made up for by extension of contact with the family in the new country.
- vi) The capability of the parents, how capable each of them are and any other person in relation to whom the court considers the question to be relevant is of meeting the child's needs. How are the parents currently meeting their needs? Are there any aspects of their ability which may be particularly important in the context of a relocation, for instance their capability of meeting the emotional need of the child for a relationship with the left behind parent? Is the application to relocate wholly or in part motivated by a desire to exclude or limit the left behind parent's role? Is the left behind parent's opposition to the move genuine, or is it motivated by some desire to control, or some other malign motive? Will the parent be better able to care for the child in the new country than in England? What role can the left behind parent play in the future?
- vii) The range of powers available to the court under this Act. Can conditions of contact be imposed in terms of provision of funds, or frequency of visits? Can court orders be made in the other country, either mirror orders or orders which will allow reciprocal enforcement?

## **Discussion and Evaluation**

51. There were relatively few factual disputes between the parties and thus credibility as to the facts was only of limited significance in this hearing. However the personalities and character of the mother and father are both relevant to the evaluation of welfare.
52. The mother and father both gave evidence largely in English although the father had a Tamil interpreter to assist with some of the more complex linguistic aspects. I take into account that both were giving evidence in their second language. However their fluency in English was impressive and the mother emphasised that education in Indian schools takes place in English.
53. Although the mother was at times overoptimistic in terms of her proposals and unduly critical of aspects of the father's proposals in the main she provided what I thought was a reliable and accurate account of what had happened and what realistically could be achieved. Her account of the incident with the burn to the child's face was clear and supported by the evidence. The GP's conclusion that the burn was consistent with the child falling into the radiator was supported by his having seen photographs of the radiator at the time he saw the child. I'm satisfied that this was an accident. The only question mark that I was left with was whether the radiator had been off for as long as the mother believed. It is of course conceivable that the maternal grandmother had left the radiator on whilst it was in the living room with her and this might account for the burns being of the nature that they were. The grandmother was not cross-examined on this but in any event it would not change my conclusions as to the mechanism for the accident. The mother's account of routines with the child was detailed and insightful and full of affection for her son. She is clearly very highly aware of his needs and attuned to them. I have no doubt that she is an effective advocate of his best interests but also that she is (insofar as a mother can be) realistic and objective in what she considers is best for him. Her distrust of the father and her antipathy towards him were evident both in what she said about him but also in their exchanges when she cross-examined him. However these facets have not prevented her promoting the relationship of the child with the father both through indirect contact, direct contact and through providing information.
54. The father also loves his son and has a good appreciation of his needs. He has been diligent in putting together an alternative package which reflects the child's needs. However I do not consider he is as objective or as well attuned to the child as the mother. For reasons which I was unable to understand the father had not provided the educational psychologist's report or the community paediatricians report to the identified centre in India and in fact had not been in contact with them since August 2019. Although the information from the identified centre in India suggests that a child with this child's needs would not be unfamiliar to them it would surely have been appropriate to disclose those reports to them in order to doublecheck that they were able to meet the child's needs. The father said that he thought a transfer of the child's care from the mother and maternal grandmother to he and his family would be no more challenging than the transition from India back to England. In my view this is wishful thinking and illustrates the father's inability to be objective about the reality. When the child returned from India he came with the mother and maternal grandmother and was returning in effect to the primary care of his mother in England. He was also accompanied by the maternal grandmother who had been a constant feature for the previous 15 months and his primary carer for a year. The father has

never been the child's primary carer and has barely seen the child for nearly two years. The two are so radically different that the father's attempt to equate them can only illustrate either his lack of appreciation of the real difference or a desire to minimise for the purposes of this process. Neither is child-centred. The father also was clear in his continued denial of the finding that he stranded the mother and the child in India. He sought to draw a parallel between those findings and the finding in the local district court in India that the mother had abandoned the child. Of course the finding in this court was the result of a process of oral and documentary evidence which was tested before a judge by advocates on both sides. The finding in India was an *ex parte* determination and in any event the order was subsequently set aside. Again this illustrates the father's lack of objectivity. When the mother was cross-examining him his irritation at being challenged by her was apparent. He sought to dominate the process at times and I got the impression that he was deeply unhappy at being challenged by the mother. Both the mother and the Guardian suggested that the father liked to keep his options open and when he was challenged about the ongoing Indian court process he said that he wished to bring it all to an end. However he was unable to explain why he had not approached the local district court in India at any stage to invite them to discontinue the process. He said that it was not up to him but the court. Even if that were so an application to that court to discontinue on the basis that the English court was now determining matters could still have been made by the father. Although Mr Bennett submitted that there was no evidence that the father had breached any English court order it is plain that the father had resisted the return orders enforcement in India and by maintaining the proceedings before the local district court in India sought to obtain substantive orders in India contrary to my conclusion that England was best placed to determine welfare. In the course of closing submissions the father instructed Mr Bennett to invite the court only to make an order for contact in England were the child to remain living here. The father said that he did not think it would be in the child's interests to see the father in India. I was unable to understand the logic behind this and I'm afraid I gained the impression that the father was responding petulantly to a dawning realisation that the case was likely to move against him. Having said that I would not hold him to that position I later received an email confirming that indeed the father did wish to pursue contact with the child in both India and in England. Although only a vignette this illustrates the father's inability at times to remain focused on his child's needs and allows his own emotions to cloud his judgement.

55. The evidence from health professionals is contained within the reports of AIISH, Dr Alu the consultant community paediatrician and Dr Riordan an educational and child psychologist. The report from AIISH is dated 3 May 2019. It confirms that speech and language, clinical psychological, and autistic spectrum disorder evaluations were carried out. The provisional diagnosis was a spoken language disorder secondary to ASD. Some progress was noted and home training was given. The therapy supervisor recommended discharge from speech and language therapy with advice to continue it at available centres from qualified professionals and to carry out intensive home training. Dr Alu's report seems to confirm the diagnosis of autism. She made several recommendations in relation to education and managing frustration. She notes that the child has a stronger liking for routine and predictability than most children of his age and that he may experience distress when things are changed. She noted that it was not always easy to notice how he is feeling. The report of the educational and child psychologist is detailed and thorough. She concludes that his learning is delayed for

his age although she was unable to carry out a cognitive assessment. The results of her assessment placed the child in the lowest centile in many areas of functioning including difficulties and additional needs (including adaptive behaviours) communication and language skills, daily living skills, socialisation and low scores in fine and gross motor skills. She notes he is showing difficulties in receptive and expressive language, social communication skills, academic progress, following routines and keeping himself safe, expressing and managing his emotions, and motor skills. They are likely associated with his diagnosis of ASD, but also some suspected learning difficulties and negative early life experiences. She makes extensive recommendations in respect of strategies to improve outcomes for the child.

56. Each of the parties' proposals clearly contained positives and negatives. Both on their face appeared to be potentially realistic or viable proposals. What emerged in the course of the hearing which in my view fundamentally undermined the father's proposal was the lack of any realistic means of implementing it in the short to medium term. Given that the father has only been spending two hours with the child in a supported environment, a substantial extension of the relationship would be required before one could contemplate the child living permanently with the father. This would be so for any four year old but for a child with ASD and a particular need for security and structure the need for a solid relationship based on full-time care is particularly pronounced. Realising this, the father suggested that he remain in England for three months or so and that over that period the relationship be extended. He also suggested that the mother and maternal grandparents could move to the identified local area in India and that a transition could take place there. However given that the mother is not prepared to do that or indeed financially in a position to do that, and given that there is no evidence that the maternal grandparents are willing to move to live in a city four hours away from their hometown, this would not be realistic. Were the father to remain in the UK for another three months and a transition to be implemented this would involve the child continuing to live with his mother and maternal grandmother, him continuing at school, the EHCP continuing to be developed, and an assessment of the impact on the child of the effect of making changes to his relationship with his father. Thus, in three or four months' time the court would be faced with reviewing whether it was then feasible for the child to move to India. At the same time as assessing whether the father was then capable of caring full-time for the child and whether the child was capable of making the move to full-time care with his father the court would also be faced with progress in the care arrangements for the child in England. There was no evidence before me of the father's home arrangements and whether it was practical to implement a transition here. At present the mother does not know where he is living and the Guardian has not carried out any assessment either of the living arrangements, the others living there or how its location would fit with the child continuing to live for significant periods of time with the mother and attending his school. In addition there is of course no guarantee that the child would be able to manage the transition from the care of the mother and the grandmother into the father's care over that three month period and so that 'experiment' all might come to nothing. In order to explore it further there would have needed to be a further adjournment to explore the practicalities and a clear potential benefit to justify both the delay and disruption. Thus, there was a significant obstacle facing the father's proposal. Whilst in the medium to long term it might be a viable solution the route through the short-term to achieving the medium to long term was extremely difficult to discern.



57. Although not mandatory in a leave to remove application the welfare checklist is mandatory in relation to the determination of child arrangements. I now turn to consider the welfare checklist.

- i) The ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding.

The child is unable to express his wishes and feelings in relation to such a complex issue as with whom he lives and in which country. This would be the case for many if not most children of this age but for a child with the complex needs of the child it is particularly so. I have little doubt that he is content living with his mother and with his maternal grandmother and given the progress he appears to have made since his return to this country, as evidenced by his being able to sit for a snack or his mother's recognition of Tamil words that he uses, and the schools and educational psychologist view that he is content at school, he is currently in general terms happy with the current arrangement. Equally it seems from the father's account and from that of Ms Magson that he is content seeing his father. It does not appear that seeing his father has had any adverse impact on him but rather he has been content to see him. Given that his mother was his primary carer from birth until July 2018, that his maternal grandmother was his primary carer for the following year and that since July 2019 his mother and grandmother have been his primary carer's I think it is reasonable to infer that the child would wish this position to endure. However of course that inferred wish is of relatively limited weight in the overall exercise. I'm equally prepared to infer from the positive contacts that have taken place with his father that the child would wish these to develop into a more fulfilling relationship.

- ii) Physical, emotional and educational needs.

The child has complex needs. The diagnosis of an autistic spectrum disorder with possible developmental delay or learning disability makes him as both parents describe him a special child. The report of Dr O'Riordan, the educational psychologist concluded that in those areas where he could be assessed the child performed in the lowest centile. His cognitive functioning was not susceptible to assessment given his presentation. The fact that his school consider that his needs can only be met by 1-to-1 support in a separate environment to the other nursery children, and their reports of his limited interaction with other children or indeed even his awareness of others, support the opinions of the community paediatrician and the educational psychologist along with the views of the parents and the report of AIISH that the child is a child with very significant additional emotional and educational needs together with a degree of additional physical needs (albeit these may be a product of ASD rather than any physiological condition). He will plainly need a very high level of support from his carers, his school, and health services.

- iii) The likely effect on the child of any change in their circumstances.

A change from the care of the mother and maternal grandmother is likely to have a very considerable impact on the child. He has been cared for by his mother and grandmother as his primary carer for the entirety of his life. Since

April 2018 he has had very little contact with the father, limited to occasional meetings at AIISH, indirect contact and some supported contact. Given that his father is not as attuned to the child's needs presently as the mother is and he suggests that the child would manage the change in the same way as he managed the move back from India that suggests to me that the impact is likely to be even more pronounced as the father will fail to appreciate the full extent of the impact on the child and cater for it. The evidence from the community paediatrician and the child psychologist identify that he may be particularly susceptible to harm around changes in his environment.

If the father were able to remain in England this would be a considerable benefit to the child in maintaining a regular and more extensive relationship between the two. I was left unclear as to why the father was really unable to remain in England and wonder whether it was a forensic position he took which may not be fulfilled. His asserted need to care for his parents and his spiritual needs did not seem to me to stand up to scrutiny compared to his sons needs.

The mother has implemented the plan she articulated in June of last year and it appears that the child is benefiting from it. Some progress is being noted by the mother and the school. There is every reason to suppose that the mother will continue to proactively pursue all avenues open to her to maximise the support that she can secure for the child in England.

The father's plan in India appears to me to be a viable plan. Care has been taken over it and although there are some uncertainties in relation to it the totality of the evidence suggests to me that it would be capable in many respects of meeting the child's physical and educational and emotional needs. In India the child will primarily be exposed to Tamil language which may make some aspects of the plan more beneficial. He will be in an environment with a wider network of family support. This would be of benefit to him as well. If his father were able to implement his plan to care for him full-time that would also be of some benefit although I note that the letter from the identified centre in India identifies that the child would be at their centre for six days per week and so the father's presence may be less significant. I also wonder whether the reality would in fact be that the father would dedicate himself full-time to the care of the child in the medium to long term. He was content to delegate care to the mother and grandmother from the child's birth through till April 2018. Two particular areas of concern are firstly in respect of the impact on the child of making the transition into that framework and secondly the nature of the relationship that would be sustained between the child and the mother, or indeed the wider maternal family in India.

- iv) The child's age, sex, background and any characteristics of his which the court considers relevant.

The child's Tamil background and his health are two prominent features.

- v) Any harm which he has suffered or is at risk of suffering.

The child has experienced some degree of harm in my view as a result of his separation from his mother and his father between July 2018 and July 2019. When the mother returned to England I do not believe she contemplated such a lengthy separation would ensue. Whilst the maternal grandmother has undoubtedly stepped into the breach the reality for this child is that neither of his parents were caring for him for a significant period of time. This was a consequence of the father's actions. I doubt that he contemplated those consequences when he stranded the mother and the child in India. Having been reunited with his mother a further permanent separation from her would I have little doubt be distressing for him and could potentially be significantly harmful.

The absence of the father from his life will also to some extent in my view be harmful. The child needs the presence of loving and supportive parents to help him to achieve as much as he can given his conditions. Periodic contact with his father four times per year will be a loss for this child. However I do not consider that the mother will seek to exclude the father but rather will promote his involvement.

Conversely if the child moves to live in India the child's relationship with the mother will be limited or lost for significant periods of time. Not only is there the obvious loss simply arising from the fact that the child would be living in a different country to his mother, unless and until she were able to join him, but more importantly is the risk that the father will seek to relitigate matters in India and that the child will find himself in limbo yet again only this time perhaps in the care of his father and with little or no relationship with his mother. The father's stranding of the mother and his continued litigation in India together with the degree of antipathy which he still holds towards the mother leads me to conclude that this is a real and present risk if the child lives with the father.

The mother will support contact in England or in India. Her proposals for a phased increase are supported by the Guardian and appear to me to be child centred and realistic. She will promote the father's relationship whether in India or in England if the child lives with her.

I consider that there is a significant risk to the child of travelling to India unless and until absolute clarity is achieved that no further litigation is ongoing in India and that further applications by the father will not be made or if made will be rapidly resolved. I believe this is likely to be only achievable if the father withdraws all proceedings in India and submitting any order I make to the Indian courts to be mirrored.

- vi) The capability of the parents, how capable each of them are and any other person in relation to whom the court considers the question to be relevant is of meeting the child's needs.

The evidence demonstrates that the mother is more than capable of meeting all of the child's needs. The support of the maternal grandmother is a significant part of her plan. If the maternal grandmother's Visa is not extended it will have a detrimental impact on the mother's ability to provide for the child and

will have an adverse impact on the child himself as she is a very familiar part of his daily life. However I am satisfied that the mother's contingency plan will enable her to continue to meet the child's needs. I'm also satisfied that she is sufficiently objective in her evaluation of her position and that of the child that she would move to India if that were the best way of promoting the child's welfare.

The father has not been tested as a primary carer but I am satisfied that in many respects he would be capable of meeting the child's physical emotional and educational needs. Although he does not have the same degree of appreciation or attunement as the mother does he has good enough parenting skills to do so at present and probably for some time to come though his capability will be at a lower level than the mothers who has acquired her skills through being the child's primary carer and through her dedicated focus on his needs. The father's appreciation of the child's needs is also to some extent clouded by his emotions which are still powerfully hostile to the mother. Notwithstanding his statements that he would promote the relationship with the mother his emotional lability and his enduring hostility to the mother and perhaps her success in securing the child's return to England lead me to conclude that there is a real risk of him being unable to meet the child's emotional need for a relationship with his mother and the maternal family, were he to be living with the father.

- vii) The range of powers available to the court under this act.

At present it seems to me that a Prohibited Steps Order is needed to prevent the child being taken to India whether by the mother or the father whilst the risk of him becoming embroiled in further litigation in India remains.

Conditions on contact both as to its nature and the costs can be imposed.

58. In my holistic evaluation of the merits of the competing options I am satisfied that the mother's proposal will best promote the child's welfare in the short medium and long term. Although there are some negatives or uncertainties both now and into the future the totality of the plan presents the best overall balance in terms of meeting his needs and minimising risks. The stumbling block in the father's proposal is not only the uncertainty over how a transition would be achieved but also the particular risks to the relationship between the child and the mother were the child to go to live in India.
59. I will therefore make an order that
- i) the child will live with the mother
  - ii) the child will spend time with the father in England and in in due course in India (provided the obstacles identified below have been adequately addressed) on a phased incremental plan to be agreed between the parties.
  - iii) The child shall not travel to India either with the mother or the father until such time as all Indian litigation over the child has ceased and a mirror order is in place in India.

- iv) I shall list the matter for review in four months' time to consider progress in the time the child is spending with the father and whether it is then possible to contemplate the child travelling to India. That is my judgment.