S & V (Children : Leave to Remove) [2018] *EWFC 26 (27 April 2018)*

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**IN THE FAMILY COURT SITTING AT THE ROYAL COURTS OF JUSTICE**

*Before :*

**MR JUSTICE MOSTYN**

**Deborah Eaton QC and Stephen Jarmain (instructed by Charles Russell Speechlys LLP for the Applicant**
**Ruth Kirby and Michael Edwards (instructed by Sears Tooth) for the Respondent and Cross Applicant**

**Hearing dates: 16-19 April 2018**

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**Mr Justice Mostyn :**

1. In *Re G (Leave to Remove)* [2008] 1 FLR 1587 at para 19 Lord Justice Thorpe stated: "These cases are particularly traumatic for the parties, since each of them conceives so much as being at stake. They are very, very difficult cases for the trial judges. Often the balance is very fine between grant and refusal. The judge is only too aware of how heavily invested each of the parents is in the outcome for which they contend. The judges are very well aware of how profoundly the decision will affect the future lives of the children and how difficult it will be for the disappointed parent to adjust to the outcome."

So here. The parties have invested vast amounts of emotional (as well as monetary) capital in their respective cases. Having had the advantage of reserving judgment for a week and having carefully considered all the evidence, written and oral, as well as the very extensive written and oral submissions by counsel I have come to the clear conclusion that the best interests of these children requires that the mother's relocation application is dismissed and that the children resume their life in London under their mother's primary care, but with very frequent contact to their father. This outcome is aligned with the recommendation of the Independent Social Worker Ms Sandrini. It also is aligned with the opinion of the mother's own mother as well as that of the children's nanny VV.

2. The legal test to be applied is now very straight-forward. It is the application of the principle of the paramountcy of the children's best interests, as taxonomised by the checklist in section 1 (3) of the 1989 Act. That principle is not to be glossed, augmented or steered by any presumption in favour of the putative relocator. Lord Justice Thorpe's famous "discipline" in *Payne v Payne* [2001] 1 FLR 1052 is now relegated to no more than guidance, guidance which can be drawn on, or not, as the individual case demands. In fact, most of the features of that guidance are statements of the obvious. Obviously, if the applicant's case is not well thought out and is not supported by evidence it will likely fail. Obviously, if the applicant's case, or the respondent's defence, is not advanced in good faith but rather is driven by an unworthy ulterior motive, then that case, or defence, will fail. Obviously, the court must consider the impact on the mother if the application is refused as well as the impact on the father if it is granted.

3. It is said that in trying these cases the court must undertake a "global" or "holistic" or "360 degree" exercise, which again to my mind is to state the obvious. Plainly, the court is not going to undertake a partial or superficial or limited or incomplete survey of the case.

4. In many of these cases the applicant places very great weight on the disappointment she (for it is usually she) will feel if her application is refused. In this case the mother says she is "absolutely desperate to go home to Kiev" and that she will be "devastated" and "profoundly affected" if her application is refused. Miss Eaton QC says "the prospect of her hiding her disappointment is remote". In my view this sort of argument should be treated very circumspectly. In *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577, [2010] 3 FCR 131, I stated at para 12:

"The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocator is always "how would you react if leave were refused?" The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically."

Eight years on, during which time a lot of relocation water has flowed under the jurisprudential bridge, I remain firmly of the same view.

5. The court's function in a relocation case is one of evaluation rather than a pure exercise of discretion (see *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, [2010] NZFLR 884). Inevitably, the court will have to resolve disputed facts and there is a burden of proof on the party alleging the facts in issue. But once the facts are established there is no formal legal burden of proof on the applicant: see *Payne v Payne* at para 25 where Lord Justice Thorpe stated: "I do not think that such concepts of presumption and burden of proof have any place in Children Act litigation where the judge exercises a function that is partly inquisitorial." However, common sense dictates that where one parent seeks that a well-functioning status quo should be changed she has to make the running in terms of the evidence and argument to show that change would be more in the children's interests than no change. Notwithstanding the partly inquisitorial function of the court to my mind the maxim *affirmati non neganti incumbit probatio* should loosely apply to the case for change.

6. Unlike financial remedy cases there is no principle in Children Act litigation that a new spouse takes subject to the claims of the old one (see, for money cases, *Vaughan v Vaughan* [2010] EWCA Civ 349, [2011] Fam 46). However, if someone forms a relationship with a woman who has children from a prior relationship where the father of those children is enjoying a stable regime of contact, then the new partner must surely be taken to enter the relationship, with all its incumbrances, with his eyes wide open. On the other hand, the father of those children must surely recognise the prospect of his former wife re-partnering and in that event a case for change being advanced. The weight to be attributed to these two general propositions will depend on the facts of the case in hand.

7. I now turn to the facts of this case. The mother applies for permission to relocate the parties'

two children from the UK to live in Ukraine. The application is strenuously resisted by the father. I heard oral testimony from four witnesses: Elena Sandrini, the independent social worker; the mother; the father; and VV, the nanny. The mother did not file a witness statement from her new husband, nor did she call him to give oral evidence, notwithstanding reasonable demands from the father that she should do so.

8. The mother is a native of the Ukraine. She has Ukrainian and British passports. The father is a native of Russia. He has Russian and British passports. The application concerns the children of the marriage: S, born on [a date in] 2013, aged five and V, born on [a date in] 2015, aged two.

9. The parties met in Vienna in 2010, married in Ukraine in 2012 (having previously entered into a pre-nuptial agreement there), and lived together in Hampstead until 2016. There is no evidence that the mother was homesick during the marriage let alone that she was agitating to return to her homeland. The marriage ended in the autumn of 2015, when the father announced that it was over. The mother was very upset by this unilateral decision by the father and wished the marriage to be retrieved if possible. Had it been, she would now still be living with the father in Hampstead.

10. The father remained in the former matrimonial home and the mother and children of the marriage moved out in February 2016 to a valuable property a 7-minute walk away, which was purchased by the mother in her own name for £9 million (plus stamp duty of over £1 million) on 29 January 2016 with funds provided by her mother. The purchase of such a valuable and substantial property, as a long-term home for her and the children, is hardly consistent with the mother's present asserted case that she was at all times isolated and homesick and wished to return to her native land.

11. The parties divorced in accordance with their Ukrainian prenuptial agreement. Both parents being wealthy, money is not a concern in this matter. The child arrangements were intended to have been settled by a Ukrainian parenting agreement dated 16 May 2016. Among other matters, the parenting agreement contains a term that the children are to live with their mother permanently in the UK, meaning at least 180 days a year. A further term provided that that the residence of the children can be changed by written consent of their father which must not be unreasonable withheld. The mother remains primary carer of their daughters though the father continues to have regular contact. Both parties are devoted, committed and loving parents.

12. Myriad opinions surfaced in oral evidence as to the meaning of the parenting agreement. The mother explained that although it says London was the permanent residence of the children there was provision that envisaged they may move. The agreement was that they could relocate with the father's consent which would not be unreasonably withheld. The father had not understood the agreement to envisage that, and said that he believed it was just a term like any other found in a contract. I prefer the mother's interpretation. The children were not fixed in London. The parents recognised that they could move with the mother provided that the father gave his consent. But such consent should not be unreasonably withheld.

13. Following the move in February 2016 the mother adhered to informal contact arrangements in London at the father's convenience. In the father's oral evidence, he accepted that he worked long days and would have been away for periods of time; the mother said for up to a month. The father and Ms. Sandrini describe the father's work as not being as busy as it once had been. The father explained that he can delegate and that there are 120 workers in his business now. Nevertheless, his business has AUM of $1.5 billion and remains highly pressurised.

14. The father has three children from a previous marriage aged 18, 15 and 12 whom he sees regularly. He married his third wife I, a Russian national, in July 2016, having met her on a beach in St Bart's in January 2016, and now lives with her and her 5-year-old son, M, in the former matrimonial home, they having moved here in January 2017.

15. The mother met S in December 2016. S works in IT – in cybersecurity and, latterly, gaming. Like the father's this new relationship developed very quickly. The mother became pregnant by S, in a planned way, in June 2017. Their son, IV, was born 6 weeks ago on [a date in] 2018. The couple married on [a date in] 2017 in Ukraine.

16. In January 2017 the mother met the father and revealed the new relationship to him. She explained that she had met a man who had an IT business in California and that she wished to move to live permanently with him there. This is quite a significant point in favour of the father's present case as it shows that the mother's initial proposal had nothing to do whatever with a burning desire to return home to her native land; rather it was a wish to relocate to the place of residence of her new partner.

17. The father did not say yes or no, but he told me that he would have agreed to the children moving to California if a fair proposal for contact was put forward by the mother. He told me that California was a civilised place and that he trusted the legal and education system there. His response to the mother's proposal must have been sufficiently positive for her to have believed that he actually agreed to it, for on 3 February 2017 the mother's recently instructed solicitors wrote to the father: "I understand that you and G have discussed G's plan to relocate and you have given G your consent to take S and V to live in the USA indefinitely". I am satisfied that the father did indeed agree, in principle, to the proposed move to California provided that reasonable contact arrangements were proposed by the mother and agreed by him. This is quite a significant point in favour of the mother's case as it demonstrates that the father's opposition is not to a move from London in any circumstances but rather, as the case has developed, to a move to Kiev.

18. On 21 March 2017 the mother's solicitors wrote a detailed letter setting out her plans to move to California. By this stage the mother had become engaged to S. Her solicitors wrote:

"G wishes to relocate with the children to California in order to live with her fiancé who is a Ukrainian national but has lived in California for the last five years and runs a business there. G and her fiancé intend to rent a family home in Los Angeles. G plans to relocate in summer 2017 before the start of the new school year."

The letter went on to make proposals for the father's contact which on any view were unreasonably restricted. She proposed two weeks of summer contact; five days at Christmas; and day visits (but not overnight) in Los Angeles. Not very surprisingly these were not agreed by the father. At a round-table meeting on 4 May 2017 the father withdrew his agreement in principle and signified his opposition to relocation in California. This seems to have provoked a major and rapid change of direction in the mother's planning.

19. On 27 June 2017 the mother's solicitors wrote to the father's solicitors and stated:

"I reported to G after our meeting [on 4 May 2017] and confirmed to her that R's position is that he would not consent to the children relocating to California. G has given the matter careful thought since our meeting and there have also been personal developments for G and her fiancé which are relevant to their choice of country of residence. After much thought, G and her fiancé

have decided that they wish to live in their home country, Ukraine. Indeed, G's fiancé has already returned to the Ukraine where he is now based.

I am instructed that G wishes to return to Ukraine to live permanently with her fiancé and to be closer to her family and friends and her support network for G wishes to have more children and to start her family with her fiancé soon. She will be able to continue to run her business remotely from Ukraine, just as she would have from California. G's fiancé has an office for his business in Ukraine and is able to run the business from there as he is from California. In addition, G's fiancé's mother has been unwell and he wishes to return to be close to her during the next few years. G very much wishes to support her fiancé in this, and also wishes to return to her home country and to be close to her parents and other family members."

In fact, as mentioned above, the mother and S had by then already embarked, as it happens successfully, on achieving a planned pregnancy. The letter enclosed a copy of the application for permission to relocate which had been issued on 23 June 2017.

20. When the mother was asked in cross-examination what was the reason for this dramatic change of plan she stated "[S] was getting more keen on gaming. It was even better for us". She did not mention that she had developed a burning wish to return to her homeland.

21. The father's reaction to this letter was to issue on the following day an application for a child arrangements order and a prohibited steps order.

22. The first hearing was on 20 July 2017 before HHJ Brasse. Both parties undertook to return their children to this jurisdiction at the end of any holiday. The parties agreed that S would commence her education at [redacted] School in September 2017. It was agreed, importantly, that should either parent wish to take the children on holiday they would give seven days' notice to the other parent with flight details, address of accommodation and contact details. It was also agreed, importantly, that each would inform the other 48 hours before any relevant school day when they would otherwise take the children to school if he or she were outside the UK and unable to, so that the other could do so.

23. As will be seen, on 25 November 2017 the mother breached these agreements.

24. In the order, specific periods of time during which the children should spend with their

father were agreed and set out. There was no formal 'live with' order but it was understood and went without saying that the mother would remain the children's primary carer.

25. Directions were made, including for a report from an independent social worker, and a final hearing with a four-day estimate was listed for 4 December 2017.

26. On 10 November 2017 Ms Elena Sandrini, the independent social worker, wrote her first report. She opined that it was in the best interests of the children for them to remain in the UK. In this report Ms Sandrini explained that S had conceded in his discussions with her that he would move to London if required.

27. The next hearing was a dispute resolution appointment before HHJ Tolson QC. In his order dated 17 November 2017, HHJ Tolson QC recorded the mother's agreement to produce S's passport, and his old passports, if available, or, in default, to contact the US embassy for information as to visas granted to him. The mother did not comply with her agreement in respect of contacting the US embassy or producing S's passport. On 7 December 2017 the obligation to produce S's passport was made an order. That order was not appealed nor was any application made to discharge it yet the mother flatly refused to comply with it, for no good reason. Her contemptuous disregard for the authority of the court is very concerning. S did show Ms Sandrini his Ukrainian passport and what she noted raises a number of questions to which I have had no answers. His passport was issued on 9 March 2016. It had a USA combined B1-B2 visa issued on 15 September 2017 valid to 13 September 2027. This visa is a combined Visitor for Business (B1) and Visitor for Pleasure (B2) visa. There was no visa in that passport which appeared to allow him to be legitimately in the USA before 15 September 2017, let alone showing that he had been resident there for 5 years as was asserted by the mother's solicitors on 20 March 2017. Ms Sandrini noted a UK visitor's visa dated 30 August 2017 expiring 28 February 2018. S had told her that he had visited the UK in the spring of 2017, yet there was no visa in that passport which appeared to allow him to do so. These uncertainties are very concerning.

28. On Thursday 23 November 2017 the mother booked return flights to Kiev for herself and the children. The outward flight was on Saturday 25 November 2017; the return on Tuesday 28 November 2017, so the children would miss two days of school on the Monday and Tuesday. Her evidence is that she arranged this trip in order to be with her father's mother who was unwell. It is not seriously disputed that her relationship with her father is remote and with his mother

virtually non-existent. The mother did not tell the father that she had booked these flights. She did not tell the nanny VV. She did not tell the school. She did not tell her own solicitors. She flew to Ukraine with the children on the Saturday. In so doing she plainly violated both agreements reached on 20 July 2017. She did not give the father 7 days' notice of the trip; nor did she give him 48 hours' notice of her inability to take the children to school on the Monday. Her argument that the former agreement did not apply as the trip was not a holiday is hopeless, as is the suggestion that the standard warning notice on the order somehow absolved her from the plain terms of her agreement. Her suggestion that she did not inform the school because it was an emergency situation is, frankly, absurd.

29. Again, the mother's arrogant disregard for court-endorsed precepts is most concerning. Had the mother duly returned on the Tuesday her conduct might have been excused, but she did not and I am satisfied, having heard the parties' oral evidence (unlike Lord Meston QC), that her reasons for not doing so were cynically contrived.

30. At the time the mother was about 5½ months pregnant. In a previous pregnancy she had suffered gestational diabetes. According to the NHS website this is high blood sugar that develops during pregnancy and usually disappears after giving birth. It does not usually cause any symptoms.

31. In her written evidence the mother claimed that on 27 November 2017 she experienced acute abdominal pains and "extremely high" blood pressure. She called an ambulance to take her to hospital. She has produced two medical certificates from the hospital. The first is dated 29 November and merely states that the mother is undergoing inpatient treatment at the obstetric department of the maternity clinic from 28 November 2017 until the current date. It goes on to state that "it is recommended to continue in-patient treatment. No flights are allowed till birth". The certificate says nothing about the mother suffering abdominal pains or of having high blood pressure. It does not even confirm that the mother was brought to the hospital on 27 November 2017 but rather suggests that she arrived the following day. The second certificate is dated 5 December 2017. It states:

"This is to certify that GT (hereinafter referred to as the patient) was an inpatient at the [redacted] maternity hospital between 28.11.2017 and 30.11.2017 inclusive, diagnosed with: pregnancy III, 26 – 27 weeks. Threat of premature birth, positive somatic history (gestational

diabetes, mellitus, euthyroidism). During this time, complete examination took place (clinical and biochemical), consultations with the therapist, psychiatrist and midwife. Based on this, the patient is recommended protective regimen (limited physical exercise, consultation with a psychologist), psychoemotional calm, appointments with the midwifery section of the [redacted] maternity hospital at least once a week. Flying is counter indicated until the birth."

32. It is noteworthy that this certificate does not record the mother as having suffered acute abdominal pains or high blood pressure. Indeed, in her text to VV on 28 November 2017 she said that she was merely experiencing a stomach ache.

33. It was not until 28 November 2017 that the mother informed her solicitor of her trip to Kiev and her admission to hospital. The mother sent a message to the father and the mother's solicitors wrote a letter relaying the information and explaining that they awaited urgent instructions. The father's solicitors responded that this removal from the jurisdiction had taken place without his knowledge or consent. He insisted that the children be returned immediately. On 29 November the mother's solicitors explained that mother was undergoing further tests and that the children were safe with their maternal grandmother where they would remain. In correspondence between the parties' solicitors the father suggested that an application for the children's return ought to be heard on 4 December 2017 when the final hearing had been listed.

34. On 1 December 2017 the mother texted VV to ask that the great majority of the clothes of herself and the children be boxed up and couriered to Kiev. VV estimates that 90% of the children's clothes and 85% of the mother's clothes were sent to Kiev. On 2 December 2017 she asked VV to prepare her jewellery pouch to be collected by her father who was coming to the house that day.

35. Ahead of the hearing listed for 4 December 2017, the mother's solicitors wrote to the court to explain the mother's health position and to seek an adjournment. The father resisted the adjournment and pursued an application for the children's immediate return. The hearing at the Central Family Court before Recorder Green was transferred to Ms Justice Russell. She was asked to consider:

i) The mother's application for adjournment of the substantive hearing;

ii) The mother's application for interim order providing for temporary removal of the children, allowing their retention in Ukraine until the substantive hearing;

iii) The father's application under the inherent jurisdiction for the immediate return of the children;

iv) The father's application to freeze the mother's London property.

36. Neither of the father's applications were granted by Mr Justice Russell who refused to deal with matters summarily and the mother's applications were adjourned to a further hearing listed before HHJ Lord Meston QC on 6 December 2017. Ms Justice Russell's order contained a direction requiring the mother to file and serve full medical evidence and reports in support of her claim to be unable to travel and her proposals for interim contact.

37.The mother filed a detailed statement on the 5 December 2017, to which was exhibited the medical evidence to which I have referred. A remarkable omission from that statement was the fact that on that very day the mother and S gave official notice of their forthcoming marriage to be celebrated the following day 6 December 2017.

38. HHJ Lord Meston QC heard the applications on 6 December 2017 and gave judgment the following day. He held that the medical evidence provided from the maternity clinic did not comply with the order of 4 December 2017. This non-compliance has continued. Nonetheless, HHJ Lord Meston QC found that the mother "did intend to return on the flights which she had bought" but that this was prevented by a "genuine medical emergency".

39. The mother was permitted to retain the children temporarily in her care in the Ukraine until this final hearing before me. The judgment required the children's return by no later than 9 April 2018 and required the children to be made available to spend time with their father for up to five days each in December, January, February and March. Provision for indirect contact via Skype or Facetime were to be made and indeed were made use of. The father was given the opportunity for further contact in Ukraine, but he did not take this opportunity for he said it was unsafe for him to travel there. The father asserted that it is dangerous for him to travel to Ukraine both because he is Russian and because he has an acrimonious relationship with the mother's father. He explained that the mother's father could easily harm him in the Ukraine by paying a proxy to do so, giving as an example the planting of drugs. He believed the mother's father wanted to

hurt him, citing as evidence the fact that the mother's father rang up his hostile former business partner to ask for his home address, despite having visited that address before. I do not accept any of this. It is of a piece with the forensic coercion to which the mother has sought to subject the court by claiming that were her application to be refused she would be unable to contain her disappointment to the detriment of the girls.

40. Permission was given for the children to attend nursery in Ukraine and mutual prohibited steps orders were made. The father's applications for further evidence in relation to mother's health and that of her paternal grandmother were rejected, as was father's attempt to compel a statement from S (although a recital was included which recorded the father's wish that he should do so). It was directed that Ms Sandrini should provide an addendum report. The order contained a recital in the following terms:

"This decision is made without prejudice to the court's consideration of the mother's substantive application for leave to remove the children from the jurisdiction and the father's application for a child arrangements order, which will be determined at the hearing in April 2018. The court's conclusions as to any matters of fact as set out in the judgment of 6 December 2017 (*sic, recto* 7 December) are a summary assessment on the papers before the court made for the purposes of the decisions required to be made by the court today. Those conclusions were based upon reading the documents in the court bundles, and upon the written and oral submissions advanced by leading counsel for each party. It is not intended that any such findings should in any way restrict or constrain a further examination of these matters at a full hearing upon oral evidence."

41. At this stage of my judgment it is necessary to pause and take stock. The mother had received Ms Sandrini's report on 10 November 2017. That report was very positive about the mother – it found that she (as well as the father) met the girls' physical and emotional needs to a very high standard, with the assistance of nannies. It was largely positive about S also. It recorded a concession by him (at paragraph 5.33), and by the mother (at paragraph 7.15) that he could move to London, even if it might cause some impediment to the conduct of his new computer gaming business.

42. Yet, the recommendation was adverse to the mother. This was because there were too many uncertainties attaching to the mother's new relationship and her proposal to live anew in Kiev. The objections are summarised in paragraph 8.10 of which the most prominent are that the mother and S have never lived together; their relationship is in its infancy and neither can really know how it will work; S has no experience of living with children; and the mother and S have no experience of being parents together.

43. From a forensic point of view these formidable obstacles would be well on the way to being overcome if a situation could be contrived whereby the mother was granted interim leave to remove for an appreciable period prior to the final trial. In that way, provided that contact was scrupulously complied with, it would likely be proved that the uncertainties and risks highlighted by Ms Sandrini were in fact groundless. An experimental period when all were on best behaviour would demonstrate the solidity of the relationship and therefore the reasonableness of the proposals.

44. Having considered the matter extremely carefully I have concluded on a strong balance of probability (indeed my conclusion does not admit of any serious doubt at all) that this is exactly what the mother by highly manipulative conduct set out to do, and succeeded in achieving. There is no other plausible explanation for her furtive flit to Kiev. The medical evidence, as Lord Meston QC rightly pointed out, does not comply with the court's order for the fullest possible exposition. It could scarcely be more spare, and even it does not bear out the mother's own account of her condition. I am not saying, of course, that the clinicians were complicit in the mother's plan and I can entirely understand why they wrote what they did; but it was a situation contrived by the mother nonetheless.

45. Since the hearing before Lord Meston QC there have been a number of important evidential developments. These relate to S, to the mother's own mother, and to the nanny VV.

46. S agreed to be re-interviewed by Ms Sandrini. In para 8.12 of her supplemental report she states:

"I have not been able to gain an accurate measure of S. He has availed himself to be interviewed and has been courteous but he has been reluctant, resistant and evasive about his past business involvement in about his finances, his demeanour changing to borderline aggression to any questions he considered to be personal. He has also been reluctant to consider the implications of the court refusing G's application to relocate"

I note from paragraph 6.5 that S has now changed his position to one of refusal to relocate to London in any circumstances. It is noteworthy that in this paragraph and in paragraph 6.3 he now appears to be saying that he would separate from the mother, and even seek to retain custody of Ivan, were her application to be refused. His reluctance to provide proper information about his business is very striking. It is clear that he still retains his interest in the American cybersecurity business for which he will have to travel every three months to the USA. He was not able to explain why it would be impossible to run his new gaming business remotely even in circumstances where he will have to travel great distances from Kiev to his artistic designers who are based nearly 500 km away in Kharkov.

47. All of this gives rise to very profound questions which needed to be explored in oral evidence, even if such evidence perforce had to be given by video-link in circumstances where S remains in Kiev looking after the baby IV. I have already adverted above to the very serious questions that arise from the failure of the mother and S to produce a copy of his current and old passports. Yet, no witness statement has ever been produced by S and he has not been proffered for cross-examination. In my experience, it is unprecedented in a case where a new relationship is relied on as the reason for relocation, for the new partner not to engage in the proceedings and offer him or herself for cross-examination. In *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34 at para 44 Lord Sumption approved the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 where Lord Justice Brooke held that a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action; and if a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. This principle is very apt here. The flat refusal of the mother to comply with the order for production of S's passports coupled with his refusal to enter the witness box and face cross-examination leads me to infer that he (and the mother) have

something serious to hide. That inference has weighed heavily in the decision I have reached. The suggestion by Miss Eaton QC that it was not necessary to provide written or oral evidence from S because the first report was positive about him just does not wash given the serious criticisms made about him and his candour in the second report. That report arrived a week before the trial in which time it would have been possible to have taken a statement from him and to have arranged a video-link.

48. The mother's mother is NT. Until recently she and the mother could not have been closer. It will be recalled that she gave the mother in January 2016 well in excess of £10m to buy the new property and to pay the stamp duty. In her first witness statement the mother described in glowing terms the strength of her relationship with her mother. She stated at para 75:

"I am lucky to have a very close relationship with my mother the children absolutely adore her and call her "[redacted]". We often holiday together and in fact she came to see us in London this August when we returned from our holiday in Turkey. It brings me great pleasure to see the enjoyment my mother gets from doting on her granddaughters who in turn adore her."

Yet, in recent times a deep fracture has arisen in this relationship so much so that the mother has had virtually no contact with NT for months; the girls have not seen their grandmother in Ukraine with their mother; and remarkably NT has not met her new grandson IV. Equally remarkably, NT was not informed of the marriage of her daughter to S. Apart from one occasion when the nanny VV allowed the girls to meet their grandmother in Kiev the only contact between her and her grandchildren has been during the father's periods of contact in London. Although the mother said all the right things about her hope for reconciliation I have my serious doubts whether this will happen as the rupture seems very deep and the hostility very fierce. The upshot of this view is that Natalia now very firmly supports the father's case. She has been interviewed by Ms Sandrini and the supplemental report records NT saying that "she made a fundamental error of judgment by endorsing S and believing that it would be in S's and V's interest to move from London to Kiev." She explicitly blames S as the cause for the estrangement. She explains that her contact with her daughter decreased rapidly as soon as she and S began to live together. She described S as an egotist, and spoke of her fear of the consequences for her daughter and the children from a man who is self-centred and controlling. I have to say that these statements have reinforced the inference I have drawn that S and the mother have

something serious to hide.

49. Very late in the day the father's solicitors produced a witness statement from VV. I admitted it because in an inquisitorial hearing relevant evidence, even if produced very late, should not be excluded. However, I do record my disquiet at what seems to have been a tactical manoeuvre. VV explains how although she has not been completely dismissed she has effectively been side-lined as nanny to the girls because she allowed them to see their grandmother in a cafe in Kiev on 16 February 2018. When the mother found out about this she was very displeased, and the strength of her reaction gives insight into the depth of hostility that has erupted between her and her own mother. VV too is critical of S. She described how he pays little attention to the children preferring to allow them to watch television and on occasions raises his voice to V. VV was not challenged on this evidence. Her opinion is that the children should return to London. She stated in her oral evidence:

"If the children stay in Kiev they are not as happy because they are restricted in every way. They don't communicate with other children. They only see children in kindergarten … They have no proper social life they don't see any other children."

50. The mother's oral evidence assured the court that the family would not be isolated in Kiev because this is where all her family lived and where she held friendships stretching back 20 years. She expressed how different these relationships are to the ones she has in Hampstead which were acquaintances and S's friends' mothers. When the mother was challenged regarding having no friends in California she said that she could build friendships in California. She said that at least in California she would have S.

51. As prefigured above the mother laid heavy emphasis on her uncontainable frustration and disappointment were her application to be dismissed. I place little weight on this factor for the following reasons:

i) There is no evidence that the mother was homesick when married to and living with the father. She did not want the marriage to end, and had it not ended the life she now describes as lonely and isolated would be continuing. I cannot see why it would be different if she lived in her new home with her daughters, S and IV.

ii) The purchase of a £9 million home in January 2016 in London is not a step you would expect someone desperately homesick to take.

iii) The mother's first proposal was to relocate to California, not her native Ukraine.

Fundamentally, I agree with Ms Sandrini when she said that in her opinion the mother's case was 90% about S, not about Kiev.

52. The mother did not seriously argue that were her application to be dismissed S could not join her in London. I am completely satisfied, given the means of the mother, that a spousal visa would be granted to S. His evasiveness about his businesses leads me to infer that he could easily operate his new gaming venture remotely just as he operates his American business. That business requires him to visit the USA four times a year. There is no reason to suppose that his Ukrainian business could not be similarly serviced from London. Why was I not given chapter and verse directly from him about this new Ukrainian gaming business? The fact that I have to pose this question, to which I have never had an answer, speaks volumes.

53. When questioned about why he did not want the children in the Ukraine the father gave the following reasons:

i) The children will have a better life in London, there is better schooling, a social infrastructure and cultural opportunities like museums and theatre. They are able to see their friends after school in Hampstead because everyone is nearby unlike the school proposed in Kiev.

ii) He is not confident the mother will comply with the decision of the court. He believed she only complied with the order following the FHDRA because it was in her short-term interests to do so.

iii) He said that S is a mystery.

iv) He said that if there are problems with S in London he will be more readily available to remedy them.

v) He also relied on the reduction of contact because he would not contemplate any mid-term week-end contact either in London or Kiev. In my judgment those reasons were spurious and I place no weight on them.

vi) He said under cross-examination: "The most important thing is the happiness of my children. They would not be happy in Kiev."

54. Ms. Sandrini's supplemental report of 9 April 2018 sets out new concerns she has for the children. Ms. Sandrini expressed concern that the mother had fallen out with the maternal grandmother who lived in Kiev and who had been very close to the children. Ms Sandrini also expressed concerns about S's influence on the mother and the effective dismissal of VV.

55. In her oral evidence, Ms. Sandrini reiterated her concerns about S. Ms. Sandrini explained that she believes that S is controlling the mother; she is left with a deep sense of concern.

56. One of the biggest concerns in Ms Sandrini's first report was how little was known about how the children would adjust to Kiev but it is fair to observe that in Ms Sandrini's addendum report she records that the children have demonstrated an ability to adjust and have coped well with the change. In her oral evidence, Ms. Sandrini confirmed that the girls' happiness was unaffected by their move to Kiev and that they were integrated and secure. Ms. Sandrini explained that the contact arrangements with the children's father had been complied with and had gone well. However, Ms Sandrini's recommendation that the children remain in London was maintained, since there were now new concerns namely:

i) The requisite travelling was very tiring for the children. She explained that this level of travelling was not child focused.

ii) Any contact with their father in an agreed location like Kiev or Vienna will not be of the same quality as contact in London where the children can be around the father's family.

iii) Contact with their father "little and often" is very important and that infrequent but long visits will not foster the same relationship.

iv) The reduced role of the children's nanny, VV. The children had been very close and she would have been a protective part of the move.

v) The fractured relationship between the mother and the maternal grandmother. She had been one of the closest people to the children in Kiev and they now were completely estranged.

I accept Ms Sandrini's evidence and recommendation. However, that is not the only basis on

which I make my decision. An important reason for refusing the application is that I am satisfied that I have been presented with a manipulative and contrived case which is wanting in candour, as I have explained above, and that there has been an arrogant and contemptuous disregard for the court's authority. This has led me to have very serious concerns as to the likelihood of the mother's compliance with orders for contact in favour of the father in circumstances where she is within the sphere of influence of S who plainly has an extremely negative view of the father. I have no reason to think that contact enforcement litigation in the Ukraine would be any more fruitful or efficient than it is in this country.

57. In the circumstances I am not satisfied that the mother has demonstrated that it would be more in the children's interest for the change she proposes to be allowed than it would be for the familiar life of the girls in London to be resumed. I am satisfied that the father's consent to the move to Kiev has not been unreasonably withheld.

58. I confirm that in reaching this decision I have taken into account, and carefully weighed, all of the matters specified in section 1(3) of the Children Act 1989.

59. Therefore, the application is dismissed. The father's contact will resume in London as it was before 25 November 2017.