

## THE IMPACT OF COVID-19 ON PARENTAL RELOCATION OF CHILDREN

*UYK v UYJ*

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In *UYK v UYJ*, the High Court (Family Division) provided useful guidance on how and to what extent COVID-19 should have an impact on parental relocation of children. This note argues that while the court's approach is sensible in recognising the fast-evolving nature of COVID-19, caution should be taken in ensuring that the effects of COVID-19 on the child's health and the child's loss of relationship with the left-behind parent are not overlooked.

### I. INTRODUCTION

At the Law Society Family Conference 2020, Sundaresh Menon CJ observed that COVID-19 has exacerbated the difficulties faced by international families due to the disruption in international travel.<sup>1</sup> Indeed, cases concerning parental relocation of children are a testament to the truth of this observation. Even before COVID-19, courts had already lamented that relocation cases are “never easy to decide”<sup>2</sup> and are “some of the most painful decisions they face”.<sup>3</sup> And with “the gravest crisis the world has faced in a century”<sup>4</sup> (*viz.*, COVID-19) in the mix now, the courts' task has been made even more difficult.

In *UYK v UYJ*,<sup>5</sup> the High Court (Family Division) provided useful guidance on how and to what extent COVID-19 should have an impact on parental relocation of children. This note argues that, while the court's approach is sensible in recognising the fast-evolving nature of COVID-19, caution should be taken in ensuring that the

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<sup>1</sup> Sundaresh Menon, “From Family Law to Family Justice” (Keynote Address delivered at the Law Society Family Conference 2020, 14 September 2020) at para 42.

<sup>2</sup> *BNS v BNT* [2015] 3 SLR 973 (CA) at para 2 [*BNS v BNT*]. See also Patrick Parkinson & Judy Cashmore, “When Mothers Stay: Adjusting to Loss After Relocation Disputes” (2013) 47(1) Fam LQ 65 at 95.

<sup>3</sup> Theresa Glennon, “Still Partners? Examining the Consequences of Post-dissolution Parenting” (2007) 41(1) Fam LQ 105 at 143.

<sup>4</sup> Lee Hsien Loong, “Written Statement by PM Lee Hsien Loong at the Extraordinary Virtual G20 Leaders' Summit” (26 March 2020).

<sup>5</sup> [2020] 5 SLR 772 (HC) [*UYK v UYJ*].

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## II. FACTS AND DECISION

In *UYK v UYJ*, the father and the mother of a five-year-old child were both British citizens but were not legally married to each other.<sup>6</sup> While the child resided with the mother in the United Kingdom from 2014 to 2018, the father left the United Kingdom for Monaco in 2014.<sup>7</sup> In 2017, the father and the mother decided to move to Singapore with the child.<sup>8</sup> Unfortunately, the relationship between the father and the mother broke down shortly after they moved to Singapore.<sup>9</sup> Subsequently, the mother filed an application to relocate to the United Kingdom with the child, which was allowed by the Family Court at first instance.<sup>10</sup> Dissatisfied, the father appealed.<sup>11</sup>

Debbie Ong J, delivering the judgment of the High Court (Family Division) and dismissing the father's appeal, refused to give "inordinate weight" to the evidence relating to COVID-19 adduced by the father.<sup>12</sup> This was elaborated upon by Ong J as follows:

The COVID-19 situation is fast-evolving, and depending on whether the situation improves or deteriorates, travel may or may not be allowed in the near future. The court should not be making orders on relocation depending on the COVID-19 situation at each specific point in time, as these orders would quickly become outdated as the global situation changes.<sup>13</sup>

In line with this analysis, Ong J held that COVID-19 should not hold the child back from relocating if the balancing of all the considerations pointed to the conclusion that relocation is in the child's best interests.<sup>14</sup> In particular, Ong J agreed with the mother that "relocation ultimately concerned the child's long-term interests with ramifications that would last far beyond this pandemic".<sup>15</sup> Conversely, Ong J was not persuaded that the father would have difficulties travelling to the United Kingdom for access with the child and opined that the father could manage with "a one-off move back to the [United Kingdom]" if his medical condition prevented him from travelling frequently.<sup>16</sup> On the facts of the case, Ong J concluded, after balancing all relevant considerations, that it was in the child's best interests to relocate to the United Kingdom with the mother.<sup>17</sup>

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<sup>6</sup> *Ibid* at para 16.

<sup>7</sup> *Ibid* at para 17.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* at para 19.

<sup>10</sup> *Ibid* at para 21.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* at para 70.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at para 71.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid* at para 66.

<sup>17</sup> *Ibid* at paras 72–78.

### III. ANALYSIS

The Singapore courts have emphasised in no uncertain terms that the child's welfare is the court's paramount concern in relocation cases.<sup>18</sup> As the Court of Appeal put it in its landmark decision of *BNS v BNT*:

[T]here is *only one fundamental*—indeed, *critical*—legal principle upon which everything else. . . depends. And it is this—in considering relocation applications, *the welfare of the child is paramount and this principle ought to override any other consideration*.<sup>19</sup>

While the welfare principle is simple in its expression, it is by no means easy to apply in practice,<sup>20</sup> especially when COVID-19 is taken into account. The decision of the High Court (Family Division) in *UYK v UYJ* is, therefore, significant as it provides useful guidance on the impact of COVID-19 on relocation cases, and raises several issues which merit comment and further reflection.

#### A. Fast-evolving Nature of COVID-19

*UYK v UYJ* serves as a timely reminder that relocation cases should not be brought to a standstill simply because of COVID-19. As Ong J perceptively pointed out, the rapidly changing global situation coupled with the fast-evolving nature of COVID-19 mean that it is difficult to predict whether international travel will be allowed in the near future.<sup>21</sup> Furthermore, given that “[COVID-19] may never go away”,<sup>22</sup> the child's long-term interests should not be subsumed by COVID-19.<sup>23</sup> In other words, if relocation is in the child's best interests, then COVID-19 should not prevent the child from relocating.<sup>24</sup>

Notably, the approach in *UYK v UYJ* is consistent with those taken in other jurisdictions. For instance, in the Hong Kong District Court decision of *JTMW v NAV*,<sup>25</sup> the mother opposed the father's application to relocate with their children from Hong Kong to Denmark on the basis that Denmark was dangerous as it had more COVID-19 cases than Hong Kong.<sup>26</sup> Wong J held that the court's focus should

<sup>18</sup> See eg, *BNS v BNT*, *supra* note 2 at para 19; *TAA v TAB* [2015] 2 SLR 879 (HC) at para 7 [*TAA v TAB*]; *UFZ v UFY* [2018] 4 SLR 1350 (HC) at para 7 [*UFZ v UFY*]; *UXH v UXJ* [2019] SGHCF 24 at para 10. The welfare principle is also embodied within section 3 of the *Guardianship of Infants Act* (Cap 122, 1985 Rev Ed Sing) and section 125 of the *Women's Charter* (Cap 353, 2009 Rev Ed Sing).

<sup>19</sup> *BNS v BNT*, *supra* note 2 at para 19 [emphasis in original]. See also Leong Wai Kum, *Elements of Family Law in Singapore*, 3d ed (Singapore: LexisNexis, 2018) at para 7.132; Debbie Ong, *International Issues in Family Law in Singapore* (Singapore: Academy Publishing, 2015) at para 9.2.

<sup>20</sup> See Ong, *supra* note 19 at para 9.2.

<sup>21</sup> *UYK v UYJ*, *supra* note 5 at para 70.

<sup>22</sup> Gan Kim Yong, Lawrence Wong & Ong Ye Kung, “Living normally, with Covid-19: Task force ministers on how S'pore is drawing road map for new normal” (24 June 2021), online: *The Straits Times* <<https://www.straitstimes.com/opinion/living-normally-with-covid-19>>.

<sup>23</sup> *UYK v UYJ*, *supra* note 5 at para 71.

<sup>24</sup> *Ibid.*

<sup>25</sup> [2020] HKFLR 784 (HKDC).

<sup>26</sup> *Ibid* at para 126.

be on the long-term best interests of the children instead of the infection rates in Hong Kong and Denmark alone.<sup>27</sup> As Wong J observed pithily, “[t]hings should not be mired in stalemate simply because of the pandemic”.<sup>28</sup>

A similar approach was adopted by the England and Wales High Court (Family Division) in *Re A*,<sup>29</sup> which concerned the relocation of a child from England to Slovakia. While Poole J was mindful of COVID-19 and accepted that there would likely be difficulties in international travel,<sup>30</sup> he was of the view that the restrictions caused by COVID-19 were not sufficient to delay the court from making a decision on the mother’s relocation application.<sup>31</sup>

While the above cases have shown that COVID-19 should not bring relocation applications to a standstill, the courts should not be too quick to rule out the possibility of postponing the relocation of a child if the global COVID-19 situation ever reaches a point where it simply becomes too dangerous to travel. In such a scenario, the courts should be prepared to delay relocation until the situation gets better in the interests of the child’s health. This should not be a cause for too much concern since the courts have made clear that “[a] refusal to allow relocation at the time of application does not necessarily mean that a future relocation can never be possible”.<sup>32</sup>

### B. Effect of COVID-19 on Child’s Health

In performing the balancing exercise in *UYK v UYJ*, Ong J placed little emphasis on the burden of international travel caused by COVID-19 on the child’s health.<sup>33</sup> It is submitted that the child’s health is a vital aspect of his welfare<sup>34</sup> and therefore more weight should have been given to the father’s submission that there were risks of infection to the child posed by international travel.<sup>35</sup> There are two ways in which this could be done.

First, the courts could take judicial notice of the travel advisories issued by the government in determining the risks involved in international travel. This was the approach taken by the England and Wales High Court (Family Division) in *Re PT*,<sup>36</sup> which concerned the father’s application for a return of the child from the United Kingdom to Spain. Although Rees QC, sitting as a deputy judge of the High Court, did not hear any evidence on the risks presented by COVID-19, he took judicial notice of the advice from the United Kingdom government and accepted that international travel was likely to increase the risk of the child contracting COVID-19.<sup>37</sup> Given

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<sup>27</sup> *Ibid* at para 127.

<sup>28</sup> *Ibid*.

<sup>29</sup> [2021] 1 FLR 1385 (EWHC).

<sup>30</sup> *Ibid* at para 91.

<sup>31</sup> *Ibid* at para 92.

<sup>32</sup> *TAA v TAB*, *supra* note 18 at para 20.

<sup>33</sup> See *UYK v UYJ*, *supra* note 5 at paras 72–78.

<sup>34</sup> The Singapore courts have ruled that the term “welfare” must be construed in a wide sense and includes the child’s physical well-being: see *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 (CA) at para 25.

<sup>35</sup> *UYK v UYJ*, *supra* note 5 at para 42.

<sup>36</sup> [2020] EWHC 834 (Fam).

<sup>37</sup> *Ibid* at para 47. That said, Rees QC noted that limited international flights between the United Kingdom and Spain were permitted for essential travel and therefore inferred that the risk of infection caused by

that it would be difficult to “show concrete evidence that [one’s] health would suffer until it actually does, by which point it may be too late”,<sup>38</sup> taking judicial notice of government advice on COVID-19 is a sensible approach.

Secondly, the courts should only grant leave for relocation if they are satisfied that the relocating parent will adhere strictly to COVID-19 precautionary measures and that the child’s health will not be compromised. In *UYK v UYJ*, Ong J “[left] it to the [m]other to exercise reasonable care in making the travel plans and setting up home in the [United Kingdom]”<sup>39</sup> but did not explicitly require the mother to detail the steps that she would take to ensure that the child’s health is not compromised when relocating to the United Kingdom.

Comparisons with Canadian case law may be made on this point. The first case is the Ontario Superior Court of Justice decision of *Le v Norris*,<sup>40</sup> where the mother cited COVID-19 as a reason for refusing to comply with a court order for access between the father and the child.<sup>41</sup> While Conlan J held that COVID-19 cannot justify non-compliance with the court order,<sup>42</sup> he emphasised that concerns about COVID-19 could be addressed through the responsible adoption of precautionary measures and ordered that the parties must not do anything that will expose the child to an increased risk of contracting COVID-19.<sup>43</sup>

The importance of adhering to COVID-19 precautionary measures was similarly highlighted in the Alberta Court of Appeal decision of *Oslanski v Oslanski*.<sup>44</sup> Here, the mother, who wanted to return to Texas with the child (who was in Calgary with the father), undertook to take “all necessary precautions to protect her family” and even listed specific measures that she would adopt.<sup>45</sup> Although Wakeling JA was satisfied that “the COVID-19 pandemic ha[d] swept over Texas and threaten[ed] the welfare of Texans”, he found that the likelihood of the child being adversely affected by COVID-19 in Texas was no higher than in Calgary because the mother “ha[d] adopted and will continue to follow common sense precautionary measures that reduce[d] the risk the pandemic will harm [the child]”.<sup>46</sup>

Looked at in this light, the decision in *UYK v UYJ* would have been better if it had given more weight to the burden of international travel on the child’s health and had exercised control over the mother’s adherence to COVID-19 precautionary measures. Doing so would not only send a strong signal that the child’s health is an important aspect of his welfare, but also mitigate the father’s concerns regarding the child’s safety. With the advent of COVID-19, the courts should indeed do more to ensure that “the relocation is well planned and considered so that the major adverse uncertainties are foreseen, avoided or eradicated as much as possible”.<sup>47</sup>

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air travel was “not so high that either government ha[d] felt necessary to end flights altogether”: *ibid* at para 47.

<sup>38</sup> *ULA v UKZ* [2018] SGHCF 19 at para 35.

<sup>39</sup> *UYK v UYJ*, *supra* note 5 at para 86.

<sup>40</sup> 2020 ONSC 1932.

<sup>41</sup> *Ibid* at para 8.

<sup>42</sup> *Ibid* at para 9.

<sup>43</sup> *Ibid* at paras 11, 13.

<sup>44</sup> 2020 ABCA 297.

<sup>45</sup> *Ibid* at para 22.

<sup>46</sup> *Ibid* at para 43.

<sup>47</sup> *VE v VRJ* [2015] HKCU 1625 (HKDC) at para 156.

### C. Effect of COVID-19 on Child's Loss of Relationship with Left-behind Parent

In *UYK v UYJ*, Ong J held that the child's loss of relationship with the father could be mitigated by virtual access and physical access involving international travel.<sup>48</sup> However, it is submitted that the extent to which the loss of relationship could be mitigated is significantly diminished in the age of COVID-19 due to the challenges posed by COVID-19 on access orders.<sup>49</sup>

In the landmark Court of Appeal decision of *BNS v BNT*, Andrew Phang JA highlighted the importance of giving sufficient recognition to the child's loss of relationship with the left-behind parent when considering the child's welfare.<sup>50</sup> On the facts of *BNS v BNT*, while the mother tried to downplay the children's loss of relationship with the father (*viz*, the left-behind parent) by suggesting that "he could have frequent access to [the children] with the aid of modern communication tools",<sup>51</sup> Phang JA was not persuaded by this suggestion and ruled instead that it would be preferable for the children to have personal contact with the father.<sup>52</sup> With virtual meetings being the new normal in the age of COVID-19,<sup>53</sup> the courts should be even more careful not to allow the ubiquity of virtual access to replace personal contact<sup>54</sup> nor to justify the relocation of a child.<sup>55</sup> Indeed, as one commentator aptly observed, "there is a difference between virtual and in-person contact".<sup>56</sup> In this regard, *UYK v UYJ* could have paid closer attention to the Court of Appeal's caution in *BNS v BNT* about the unsatisfactory nature of virtual access in mitigating the child's loss of relationship with the left-behind parent.<sup>57</sup>

Furthermore, the child's loss of relationship with the left-behind parent takes on a heightened importance in the age of COVID-19 as physical access involving international travel becomes severely disrupted.<sup>58</sup> It is an unfortunate truth that COVID-19 has led to the "lockdowns of cities and entire countries, physical distancing and quarantines, border controls and shuttered air terminals".<sup>59</sup> In light of these challenges, it is arguable that Ong J's expectations of the father in *UYK v UYJ* were overly optimistic and could have been tempered. It will be recalled that Ong J took the view that "more can be expected of [the father]" on account of the past history of where he had worked and lived.<sup>60</sup> However, it is submitted that the father's pre-COVID-19 travel history should not be given undue weight. In this regard, *UYK v UYJ* can be distinguished from *UFZ v UFY* (a case that was decided before COVID-19), in which it was held that the children's loss of relationship with the father could be mitigated

<sup>48</sup> *UYK v UYJ*, *supra* note 5 at para 64.

<sup>49</sup> See Menon, *supra* note 1 at para 42.

<sup>50</sup> *BNS v BNT*, *supra* note 2 at para 25.

<sup>51</sup> *Ibid* at para 33.

<sup>52</sup> *Ibid* at para 34.

<sup>53</sup> See Jay L Lebow, "Family in the Age of COVID-19" (2020) 59(2) Fam Process 309 at 310.

<sup>54</sup> See Ong, *supra* note 19 at para 9.39.

<sup>55</sup> See David Welsh, "Virtual Parents: How Virtual Visitation Legislation Is Shaping the Future of Custody Law" (2008) 11(1) JL & Fam Stud 215 at 220.

<sup>56</sup> Lebow, *supra* note 53 at 310. See also Menon, *supra* note 1 at para 25.

<sup>57</sup> *BNS v BNT*, *supra* note 2 at para 34.

<sup>58</sup> See Menon, *supra* note 1 at para 42.

<sup>59</sup> Victor V Ramraj & Matthew Little, "A Short History and Thematic Overview" in Victor V Ramraj, ed, *COVID-19 in Asia: Law and Policy Contexts* (New York: Oxford University Press, 2021) at 3.

<sup>60</sup> *UYK v UYJ*, *supra* note 5 at para 66.

because it was “feasible” for the father to travel to the United Kingdom to meet the children given his frequent business trips to Europe.<sup>61</sup> By contrast, the feasibility of international travel by the father in *UYK v UYJ* was highly questionable in light of the realities of COVID-19,<sup>62</sup> perhaps particularly more so when one considers the fact that the father’s medical conditions put him at a higher risk of suffering complications from COVID-19.<sup>63</sup>

Ultimately, given that access orders play an important role in mitigating the child’s loss of relationship with the left-behind parent,<sup>64</sup> the courts should bear in mind that virtual access and physical access involving international travel in the age of COVID-19 have limitations<sup>65</sup> which significantly reduce the mitigatory effect on this loss of relationship. Only by doing so will the child’s loss of relationship with the left-behind parent not be overlooked, as cautioned by the Court of Appeal in *BNS v BNT*.<sup>66</sup>

#### IV. CONCLUSION

COVID-19 has unfortunately complicated the manner in which the courts balance all the relevant considerations in deciding whether relocation is in the best interests of the child. While *UYK v UYJ* provides useful guidance in this respect, there are certain aspects of the decision which warrant further reflection, particularly in light of the high stakes that are involved in cases concerning parental relocation of children.<sup>67</sup> As COVID-19 continues to evolve, its impact on relocation cases may well need to be reconsidered and refined.

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<sup>61</sup> *UFZ v UFY*, *supra* note 18 at para 45.

<sup>62</sup> See Menon, *supra* note 1 at para 42.

<sup>63</sup> *UYK v UYJ*, *supra* note 5 at para 66.

<sup>64</sup> *UFZ v UFY*, *supra* note 18 at para 46.

<sup>65</sup> See Menon, *supra* note 1 at para 42.

<sup>66</sup> See *BNS v BNT*, *supra* note 2 at para 25.

<sup>67</sup> See Menon, *supra* note 1 at para 25.