Neutral Citation Number: [2004] EWCA Civ 417

Case No: B/2003/2378/2378A

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
Mr Justice Hughes
FD03D03022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2004

Before:

LORD JUSTICE THORPE
LORD JUSTICE WALL
and
MR JUSTICE GAGE

- -

Between:

J (A Child)
Application for return of a child to Saudi Arabia, non convention country

- -
- -

Mr H Setright QC & Mr I Lewis (instructed by **Dawson Cornwell**) for the **Appellant**
Mr M Everall QC & Miss C Murfitt (instructed by **Boodle Hatfield**) for the **Respondent**

Hearing dates : 8th March 2004

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Judgment

Lord Justice Thorpe:

1. This is an Appeal from the order of Mr Justice Hughes dated 31st October 2003 refusing the father's application under Section 8 of the Children Act 1989 for a specific issue order for the return of his four year old son F (born 5th April 2000) to the Kingdom of Saudi Arabia. This is the judgment of the Court to which we have all contributed.

2. Hughes J refused permission to appeal and an application was made to this Court on the 6th November by Counsel and solicitors who did not appear below. The skeleton argument in support settled by Mr Henry Setright QC and Mr Ian Lewis was sufficiently persuasive to lead to the grant of permission on the 4th December 2003. A direction was given for expedition. In response to the grant of permission the mother's solicitors instructed Mr Mark Everall QC to advise and to settle a respondent's notice. Under the rules the notice should have been filed by 24th December. It was in fact filed on the 17th February. Even allowing for the intervention of the Christmas vacation that is unacceptable delay in an international children's case. In anticipation that the respondent's time might be extended each side prepared further expert evidence relating to issues raised by the respondent's notice. All this was done in the knowledge that the appeal was fixed for 8th March, a date fixed for Counsel's convenience. Where expedition is directed in international child cases the Court's expectation is that the appeal will be listed within approximately six weeks of the direction. In future Counsel should not expect that their convenience will result in deviation from that timetable.

3. Given that the refusal of the extension would have emasculated Mr Everall's case, the Court had little option but to grant it and to rely on Counsel to compress the expanded case within the time estimate of one day allowed for the determination of the issues raised by the Appellant's Notice. In those circumstances we indicated to Mr Setright at the outset that we did not need oral argument in support of his skeleton. We proceeded to hear Mr Everall in response to the father's appeal and in support of the issues raised by the Respondent's Notice. We did not call on Mr Setright to reply on the Appeal but only to respond to Mr Everall's submissions seeking to support the Judge on alternative grounds. Finally we heard Mr Everall in reply.

4. This account of the course of the Appeal demonstrates that the ultimate question is whether Mr Everall can succeed in supporting the Judge's conclusions on grounds raised in his Respondent's Notice. Before coming to that essential question it is necessary first to give a brief account of the history and background, and then to explain shortly why we reject the Judge's reasoning for his conclusion.

5. First we would pay tribute to the clear and concise way in which the Judge recorded the background and the relevant facts in the course of his extempore judgment. His account is interspersed with his findings on issues that had been disputed. It is important to emphasise at the outset that the Judge had not only the written evidence but also oral evidence from the parties, the mother's uncle and from Mr Ian Edge, an expert in Islamic Law called on the mother's

behalf. We could not improve on the Judge's narrative and accordingly we borrow from his judgment paragraphs 5 – 32 which read as follows:

> "5. Father is 42. He is of Saudi Arabian nationality. Although he was born in Egypt, he lived in Saudi Arabia from the age of seven onwards. His own father was a servicing army officer in the Saudi Arabian army. The paternal grandparents live in Saudi Arabia though at some distance from Riyadh which has been the home of the parties. Father has brothers and sisters who have their own families. They also live in Saudi Arabia. Father is himself a consultant plastic surgeon. He practices at a hospital and other clinics in Riyadh. At present he is a doctor serving as an officer in the army, but he is on what amounts to demobilisation leave as he is, within the next month or so, to leave the army. He will continue in private practice, in exactly what capacity he does not yet know. Father's postgraduate training was done in Canada and he was there for seven years. He holds an honorary fellowship of the Royal College of Surgeons in Edinburgh through a connection between the Riyadh hospital and Edinburgh, which was forged by mother's father. It is an honour but it is no indication of any intention to practice in the United Kingdom. Father is experience in international travel. He clearly could work abroad but he has no plans to do so. He is firmly based in Saudi Arabia.
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> 6. Mother is 31. She comes from medical family. Her parents were Kurdish refugees who came to England from Iraq in 1972. They lived for a few years in England and very early on in that period mother was born. It is accepted, accordingly, that mother has, by birth and through her father's then domicile, an English domicile of origin. Mother's family then went to Saudi Arabia in 1979, and both her parents practised there as doctors, in her mother's case part-time. Mother and her parents all have dual Saudi Arabian and British nationality. Mother's parents own land in Saudi Arabia. They have also kept a flat in London and it has been their practice to visit it for a number of weeks each year. Mother lived in England until she was nearly seven and then in Saudi Arabia until she was about 16. Her education in Saudi Arabia was at a Saudi Arabian school but she was entered for English Ordinary Level examinations, having studied at that school. She then spent the academic year, 1988 / 89, the lower sixth year, at two English boarding schools, and in the second A-level year she studied at a private London college, living at her parents' flat. A statement in a recent job application made in Saudi Arabia to the effect that she had studied for her A-levels at the Saudi Arabian school is simply wrong. It is

not easy to se how she could have forgotten that her sixth form studies had been in England. The probable explanation is that for the purposes of the application she felt the need to emphasise her Saudi Arabian background. After A-levels she went to Kings College London in October 1990 or perhaps 1991 it matters not – and she was there until 1997 when she emerged with a degree in nutrition and dietetics. After that she has worked, comparatively unusually for a woman in Saudi Arabia, without significant interruption since then except for no more than six or seven months during her pregnancy and immediately after F's birth. F was born in 5th April 2000. He was born in America for medical reasons. Accordingly he was entitled to American nationality. The parents took steps to undertake the necessary paperwork before they left. There is no reason to read into that the least intention to make their home anywhere other than Saudi Arabia. Mother continued to work in Saudi Arabia until she left for England at the end of July 2002.

7. The parent's matrimonial history is a little unusual because they have been married to each other twice. They met at the hospital where they both worked. There were discussions between father on the one hand and mother's parents on the other to determine his suitability. At one point mother intervened on father's behalf. It is clear that it was a love match and not an arranged marriage. I find that father must have been told that mother had dual nationality as well as that she had lived in London for some years as a student. I do not accept his evidence to the contrary.

8. They were betrothed at a social ceremony in London in December 1998 and married in Saudi Arabia in April 1999. They lived in a house in Riyadh which was made available through the good offices and influence of mother's parents.

9. Unhappily, by April 2001 they had separated. There had been a very unfortunate row a few days before the separation. Mother received a small cut to her forehead from a videotape. Father had lost his temper and either thrown it at her or hit her with it. Mother did not sustain any serious injury and the assertion of mild concussion is over-stated. The injury, which was undoubtedly present, does not show up on a photograph taken next day. Father did not take mother to hospital, no doubt partly because he did not want what he had done to become public knowledge. Her parents did. She was treated in casualty and she returned home. Mother says that this was the most serious of several other occasions when father lost his temper and that he had slapped or punched her in the past.

To anticipate, she says that since April 2001 he has also one or twice raised his hand to her, although not struck her. The incident with the videotape was not pleasant; no incident of domestic violence is to be brushed off. However, the losses of temper alleged by mother, which otherwise father denies, are, taken at their highest, not such as to weigh significantly on the question of whether F should be returned to Saudi Arabia or not.

10. After the videotape incident, the parties lived apart. About two months later, on 10th June 2001, father left for Europe on medical business. On either 11th or 14th June (in either case within a very few days) mother flew out of Saudi Arabia taking with her F and two nannies or maids. She had not told father of her intention to leave. Ordinarily, a wife in Saudi Arabia needs to show the airport authorities her husband's consent to travel outside the kingdom. This mother was able to do that because from the outset father had endorsed a general consent on her passport. What she did not have was consent to take F out of Saudi Arabia. She was able to travel because she, or her father, had, without consulting the father, obtained a special authority from the Ministry on the basis that father was out of the country. She may have been assisted in her departure because she was able to travel in a private place belonging to a Prince of the Saudi Royal Family, and very likely was not subjected to the same controls as ordinary flights.

11. Mother's case is that she had to obtain the Ministry authority because neither she nor her family could get in touch with father. I am afraid I find it impossible to accept that. Mother's father, plainly a man of some seniority and influence, was a respected surgeon at the same hospital as father. Whether they worked in the same building or not, it is simply not plausible that he could not find father or have him found. Substantially the mother conceded this in evidence, as she had to . She suggested that she would not let her father find her husband; it was a matter of pride or principle. I am afraid I do not accept that either. On her own evidence, her father was put to the trouble of making daily visits to the Ministry time after time after time. It would have been a great deal easier to have found father.

12. In addition, on mother's own evidence, the first approaches to the Ministry were made on 2ne June, that is to say over a week before father left the country. She cannot have thought that he was then out of the country, and I am quite satisfied that she made the decision to act unilaterally and surreptitiously because she feared that father would object if he was asked.

13. When the father did learn of this, he did object. He sought out mother's father in Saudi Arabia and spoke to him. At or about the same time mother told father, through a colleague at the hospital, that she wanted to be divorced. Father wanted them to stay together. I accept that father also called for mother and son to come back to Saudi Arabia. Mother's suggestion that he did not is not plausible.

14. However, mother did return and not under compulsion. She went back at the end of July with F. Her own case is that she had always intended to return, having merely taken the sort of summer holiday that was her practice. It is likely that, in addition to that consideration, a promise had been made by her father when obtaining her consent to travel that she would return, and father of course remained in Saudi Arabia and would be expected to honour the promise.

15. At all events, mother returned, although contemplating divorce. She does not suggest that she was under any kind of compulsion and her actions demonstrate that she plainly accepted the regime and culture applicable in Saudi Arabia, as she very properly should , having chosen to make her home there and bring up her son there.

16. Mother then brought proceedings in the Shariah court. As is well known, a wife does not have the unilateral power of divorce by talaq which a Muslim husband has by long tradition. A wife is in a significantly weaker position. But she is not wholly without remedy. She can petition the Shariah court. That court sets in train a process which we should call either mediation or conciliation, involving the families on both sides. The object is, if not reconciliation, an g=agreement under which the husband is persuaded to divorce his wife by talaq. Failing that, if satisfied of irretrievable break down, the court itself can pronounce a judicial divorce. It is perfectly clear that the husband's bargaining position at this stage is appreciably the stronger of the two but, by one route or another, a divorce is often achieved, and so it was here.

17. The parties reached agreement. Mother had to give up some financial claims for reimbursement of wedding expenses in sums which the husband contended were unreasonable. The husband was persuaded to grant a talaq. The agreement was recorded in the court on 15th October 2001. It provided for maintenance of F by the father and set out the terms of his contact. The agreement also stipulated that mother should not leave the country with F without father's written permission. I accept father's evidence that although that would be the rule in any event,

without any specific order, this figured in the negotiations and the court order because of father's complaint about the departure to England that summer. The court order assumes, but does not specifically order, that F would remain with his mother in her care. Father had not contended otherwise.

18. Within two months of this divorce, the parents resumed cohabitation. Neither of them will now own to taking the initiative but ii is perfectly clear that it can only have happened by common consent. They were re-married before a judge in Riyadh on 12th January 2002. They embarked on the purchase of their own family home which stretched them financially. Father has in the past offered the suggestion that mother went through this process of divorce, reconciliation and re-marriage in order to be able in the future to leave Saudi Arabia with F and to stand in a stronger position to stay away than she had in 2001. I recognise that it is sometimes easy when enmeshed in a dispute to attribute deep-laid cynical plans to the other party, but I do not think that that analysis is likely. On the contrary, by submitting to the Shariah court and re-marrying in Saudi Arabia, mother demonstrated her commitment to that country. Had she been calculating her tactical position, which I do not think she was, she would have been likely to appreciate that she somewhat weakened it.

19. At the end of July 2002, mother travelled again to England with F and two nannies or maids, and went again to her parent's London flat. This time she came with father's consent. Within about a month she had enrolled for a one-year Masters degree in nutrition in London. She had made enquiries about this possibility before leaving Saudi Arabia. I do not think it is likely that she had told father about it before she left. If she had, I think that he would have had misgivings about her leaving Saudi Arabia with F, particularly in view of what had happened the previous year. It is much more likely that, so far as he was concerned, this 2002 trip was a holiday.

20. Even if I am wrong about that, I am quite sure that mother did not, as she now assets, tell father that she was unhappy with him and that her departure should be treated as a trial separation. If she had said anything like that, father would have been yet more anxious about F, because I am satisfied that he has always wanted F to live in Saudi Arabia, and I do not think that after the previous year's experience he would have agreed to their going on that basis.

21. Moreover, he had just completed the purchase of the new family house, which is not readily consistent with an extended trial separation.

22. Certain it is that there had been arguments and disagreements between them on topics which do not now matter. It may be that mother was growing more unhappy but I do not believe that she avowed her unhappiness and asserted a trial separation when coming to England.

23. It is, however, clear that quite soon they were, by telephone and email, discussing mother's proposal to stay for a year on the course. Some of the emails have survived, although they are unlikely to be all of them. Mother made out a good case for the course and she persuaded father to agree. In agreeing, father said explicitly that he would accept it providing that it was for no more than one year. In asking, mother expressed herself in affectionate terms and there is no hint of the now professed unhappiness or trial separation. What she did say was that she could not stand life in Saudi Arabia. There was no hit in her communications of impending separation or divorce and, if there had been, I do not think that the consent which she was seeking would have been given. In that event, the question which I am now confronting would have arisen a year ago.

24. I do accept that what mother said about her feelings about life in Saudi Arabia became increasingly important for her. She has lived quite a lot of her time outside Saudi Arabia and it is perfectly plain that she finds the restrictions of life there for a woman confining, even though this husband was comparatively westernised and liberal and did not require strict adherence to traditional laws. For example, mother pursued her own career throughout the marriage, even very soon after the birth of F. She had the general freedom to travel, but there is no doubt that the general rules of Saudi society did increasingly irk her, for example, the inability to drive or go out alone or to associate freely with whomsoever she chose. I have no doubt that the longer she has stayed in London, the worse the prospect of Saudi Arabia has seemed to her.

25. The distance between them grew and communication was increasingly sparse. Each complains about this. Mother says that he rarely called. He says he tried but could rarely find her in. The landline at the London flat was cut off and the telephone number changed and father was not given the new number. Mother's very late suggestion, appearing for the first time in cross-examination, that this was because she thought father had made some nuisance calls, was not,

to me, at all convincing. On the other hand, she had a mobile telephone. Father did sometimes call it. He could certainly have called it a good deal more often that he did, and he undoubtedly could have visited much more than he did. It is likely that they were simply growing apart; she increasingly reluctant to forsake a western lifestyle and he increasingly disenchanted with her and reluctant to make time in what was undoubtedly a very busy professional life.

26. Father did visit England once for just over a fortnight in October 2002. Sadly, the visit was not a success. Each saw things with which they were dissatisfied in the other and there was a nasty row at the end. There is no need to rehearse the details for, in the end, this represents no more and no loess than the sadly familiar signs of a fracturing relationship. Nothing in either of the competing histories helps me to decide the question which I have to resolve here.

27. There was a suggestion of a weekend together in Paris in December. That did not materialise. It seems to me that there was a lack of enthusiasm on both sides.

28. In the end, father did not see F between the October 2002 visit and last week, October 2003, when he was able to see him on several occasions having travelled here for this hearing. I find that he did not press, as it would have been reasonable to expect a father to do, and that mother made little or no effort to encourage him, as it would have been reasonable to expect her, in F's interests, to do. The loser is F.

29. However, although father may have been open to criticism in the past for not finding as much time in a busy professional life for his son as would have been desirable, that is a criticism which has to be borne by a very large number of parents. There is no sign at all that he did not and does not love F, nor that their relationship is other than perfectly satisfactory, or at least will be once normal contact is resumed. In her own email mother said in September 2002: "I feel you only miss F. You always ask about him and not me". Although there are great differences between the parties, and mother has not shrunk from at times emotional responses, there has been no hint of criticism of the quality of last week's contact.

30. At the same time, it is plain that F has been dutifully and well looked after by mother. Although she has of course had the help of staff, there is no reason to think that she has not given his care proper priority. To anticipate, father's case is that the proper primary carer for F is his mother.

31. The only observation I make at this stage is that, whatever happens, both parents need, as many separating parents do, to understand the importance of putting in a good deal more effort to bolstering with F the position of the other.

32. In May 2003 the mother launched her English petition for divorce. It is now agreed on both sides that there must be a divorce. Mother's pleaded grounds are sufficient, no doubt, but they are certainly no more than that, and they afford no assistance on the question which I now have to resolve. Sometime after learning of that, father referred the case to the Shariah court in Riyadh, referring back to the previous divorce. It seems that he offered a brief narration of events, the principal of which was the fact that mother and son were now in London."

6. We come now to Mr Setright's successful attack upon the Judge's reasoning, which requires some analysis of the judgment. Between paragraphs 33 and 40 Hughes J directed himself carefully as to the law. He referred to all the significant decisions on applications for return to non-convention countries and drew from them six basic principles. There can be no criticism of that impeccable direction. In particular we endorse this statement which embodies his fourth principle:

> "A return order will not be confined to a country where society and its laws operate in a way broadly similar to our own. The principle extends to those countries whose idea of child welfare is based on propositions which would not find a place in our practice. This includes Muslim countries which rely significantly on the concept of a family unit with a single responsible head of the family in the father. The Sharia practice is one in which father has unquestionably the stronger hand of the two parents. It has, however, as its object what is thought to be right for children, and it is a more flexible system than is sometime asserted. Whatever the strict rules may be, there is no general practice of removing children from mother's care in every case at a milestone age. The emphasis on family mediation gives opportunity for concentration upon child welfare. In short, it may well be in a child's best interests for his future to be determined according to a concept of child welfare quite different from our own, if that is the concept applied in the society of which he is part."

7. In paragraphs 41 and 42 the Judge summarised the mother's case, including these sentences:

> "She points to complaints made in these proceedings about her personal conduct. She says, rightly, that if repeated in Saudi Arabia, they would have very serious consequences for her and indirectly have a serious adverse impact on F's care."

8. Between paragraphs 43 and 50 the Judge summarised the father's case in eight propositions. The fourth is recorded thus:

> "He tells me that he wishes to make no complaint about her conduct and will not do so in any negotiations or proceedings."

Of the father's case as he had analysed it, the Judge then said this:

> "51. As I said, most of this he told me in evidence on his oath. Through Counsel he advances the suggestion that I should make any order for return effective only when talaq had been pronounced, and he offers to register at the Shariah court both the talaq and the various assurances which he has given me. At the centre of this case is the question of how far I can properly rely on those expressions of intention. The question of course is not limited to whether he means it now, but whether one can be assured that the situation will remain the same."

9. The Judge then answered that question, considering in depth the nature of the allegation of misconduct, the manner in which it was made and withdrawn and the evidence said to support the allegation – all that between paragraphs 51 and 54.

10. The remainder of his judgment explains his conclusions that:-

i) The father's present intention was to obtain F's return to Saudi Arabia with his mother rather than F's removal from his mother's care.

ii) He could not exclude the possibility that the father would raise the allegation of the mother's misconduct in future litigation in Saudi Arabia if hostilities flared up between the parents.

iii) Apart from that concern he would have ordered return, balancing all relevant considerations going to F's welfare.

11. Since this is the crux of the judgment, in fairness to the Judge we set out in full paragraphs 56 to 69 inclusive:

> "56. Can I therefore safely reach a confident conclusion that this complaint, or something like it, will never figure so that the danger to F will never materialise? First, father's assurances are given on oath on the Koran. He is a practising Muslim, though, as he very frankly told me, not deeply committed to his religion. It is not a case where I am satisfied that the mere fact of his oath by itself gives me sufficient confidence. I do not under-estimate the potential force of an oath. I have in an appropriate case accepted assurances on oath in order to enable a holiday visit to a Muslim country to be made when otherwise it could not be. But I cannot say that the oath by itself is sufficient in many cases, and it is not in this.

57. Mr Edge warned against undertakings generally in the context of a return to a Shariah country. The point that he was making was that they cannot bind except in conscience. He also observed that if they were given here and the subsequently raised in a Shariah court, there might easily be the suggestion that they had been obtained under duress in the sense that they had been the price in England of securing the release from England of the son to whom in Saudi Arabian eyes father is simply entitled. It is common ground that it is not possible to obtain a mirror order in Saudi Arabia.

58. Rather stronger are three other arguments for father. The first is that father has not raised any such accusations yet, although he has referred the matter to the Shariah court and indeed whilst F is being kept here in England. Nor did father show any sign of attempting to remove F from his mother or of making any complaint about mother's behaviour or care when the opportunity did arise, i.e. at the time of the June 2001 departure, and at the time of the hearings at the end of 2001 which led to the first divorce.

59. Secondly, says Miss Lister on father's behalf, he has no reason to raise a complaint of this kind. He is likely to be able to obtain the removal of F, if, contrary to his assurances, he want to, by insisting on his strict Shariah rights at any rate from the age of about seven onwards.

60. Thirdly, if an accusation is made, it is a serious offence in the accuser unless it is made good and, because of the gravity of the consequences, the standard of proof is high, and, it is said, unlikely to be available.

61. There is, I am satisfied, some force in these arguments. I am inclined, on balance, to accept the view that father's present intention is to obtain the return of F to Saudi Arabia, with mother if at all possible, rather than to remove F from mother's care. Although that is my finding, my concern remains two-fold.

62. First, father's evidence displays a very worrying ability to live comfortably with saying one thing in one court and another in another, as the needs of the moment dictate. This complaint about mother's conduct was there to support his case and the moment he saw that it might have the reverse effect, he sought firmly to remove it. It was quite apparent that he was comfortable with this casuistry. He – and I think I should add mother as well – displayed at a number of points in their evidence a tendency to rely on fine distinctions rather than addressing the meat of the

issue raised for answer. That does not give confidence that one can rely on his assurance.

63. Secondly, it does seem to me that there is no doubt that there is a considerable risk that if mother does return with F future disputes will arise. Contact is an obvious occasion for dispute. It caused quite some considerable difficulty during the previous separation. I am not concerned to allocate responsibility. It may well be that there was, on both sides, absence of the understanding of the importance of effort at co-operation which alone makes contact work. Having seen and heard mother, I think it is plain that she did not actively promote contact as a custodial parent should. By way simply of example, she told me, revealingly, apropos of the long time without contact in the last year, "What am I to do? Beg?" But disputes there are likely to be. Apart from contact, mother's likely wish to re-marry and to develop a relationship or relationships is another obvious point of likely dispute. It is, I am afraid, only too likely that father will disapprove of her choice and it may be that he would disapprove of her behaviour. One does not have to contemplate his reversion to an old fashioned version of a Saudi Arabian controlling male in order to foresee that very real risk.

64. At the end of this case, if I ask myself, am I seriously concerned that the occasion will arise in which F's interests are seriously damaged by a dispute between the parents in which father deploys complaints of this kind and they have the dramatic effects that they would have in Saudi Arabia, I can only answer that question 'yes'. Father clearly believes the complaint and, for all I know, it may be true. I am afraid I do not accept that the complaint found its way into his affidavit without his realising its likely significance. True it is, I daresay, that and English solicitor will have taken down the story related by the client and drafted an affidavit on the basis of what he was told without addressing the potential significance of this paragraph in it for Muslim society. What I do not accept is that father himself was not aware of its significance. He was not aware, clearly, that it might not have the hoped-for effect in <u>this</u> court, but I am, I am afraid, unable to accept that he could have said what he did as a Muslim man without appreciating its significance in his homeland.

65. The only possible conclusion is that his decision to insert it and then to remove it were both tactical. There may

have been an element of impulsiveness in one or other of the decisions, but the same thing may happen again.

66. In the absence of this factor, I think that the balance of the welfare considerations in this case would favour return. True it is that mother says that she will not go back. Mothers in her situation are of course in a very difficult position. If they say they will go back, they may think they are weakening their case. If they say they will not, they may be criticised for holding a pistol to the head of the court. I would hope that if a return had been ordered, her duty to her son would have prevailed over her personal preference for life in London. So far as she relies on the proposition that F has been in London for a year, that has been in part because she, for whatever reason, took some time to launch her petition, leaving it towards the end of the academic year which she had negotiated. I do not accept that she was committed to divorce as early as she says, which was October last year, but it is clear that she was by the new year.

67. It may be helpful if I say that, in brief, absent the factor that I have set out above, I would take the view that this is a Saudi Arabian boy, brought up in a Saudi Arabian system to which mother had committed herself in the various ways that I have explained, and that it would be, on balance, in his best interests to be returned there for a decision about his future to be made according to the norms of his own society. In saying that, I recognise that Saudi Arabian law does not offer any prospect of a mother with custody obtaining leave, against the wishes of the father, to relocate abroad. That means that such a mother becomes "locked-in" – to use the expression employed by Ward LJ in Re: JA. That will undoubtedly have been the case in a number of the cases where return has been ordered. For "locked-in" one might also say "committed to remain in the country where the other parent is whilst caring for the child of both of them", Whilst in this country we generally adopt a different approach to applications to relocate, and one which is a great deal more accommodating to the parent with custody, I do not believe that it is possible to say that a rule requiring the parents to remain in the country in which they have chosen to live so that the child is close to both is a rule which does not serve the welfare of the child. And English judge is certainly given pause by the fact that a custodial father is not subject to the same restriction but, nevertheless, it is not for this court to attempt to impose its own standards on a foreign system.

> 68. Had I ordered a return, I should have made it conditional upon talaq being pronounced by father and registered at the Shariah court. That is because it would not be in F's interests that mother should be required to return as a wife. I would not, however, have made a return conditional upon the registration of father's various undertakings at the Shariah court, not because that might not inhibit him from departing from them but because it might be seen as an English court seeking to impose a fetter on a foreign court, and indeed might be an invitation to attempt to escape on the grounds that they had been extracted as the price of return. It would be more appropriate, in my view, for the English order simply to record on the face of it the assurances given on oath so that in an appropriate case mother can rely on what the father has said. On the evidence of Mr Edge, that might be a factor for a Shariah court.
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> 69. I regard the decision in this case as a difficult one. In many ways, if the decision rested upon what each parent deserved, according to their conduct, the balance would be for return to Saudi Arabia. I am, however, required to focus on the welfare of F, rather than an assessment of the conduct of the parents. For the reasons that I have explained, the factor that has troubled me and which I have set out does, as it seems to me, tip the balance and the inevitable conclusion is that the order which father seeks must, in this case and on these facts, be refused."

12. Mr Setright in his skeleton argument raises a number of criticisms of the Judge's reasoning. Before considering these criticisms it is essential to settle the question of what precisely the Judge was deciding. At the outset of his judgment he records:-

> "I have before me three Applications. They relate to the upbringing of a boy of three and a half, F, and to the matrimonial dispute of his married parents.
>
> The principal issue is whether I should direct F's summary return to Saudi Arabia . . .
>
> The three Applications then are these. First, father's application for summary return, second, mother's cross-application for a residence order, third, father's application to stay mother's English divorce petition."

13. In paragraph 33 Hughes J reviewed the authorities governing "summary return to countries where the legal system differs significantly from our own." From the authorities the Judge drew out the six basic principles, the first of which he stated thus:-

> "One, in a non-Convention case, the paramount consideration is the welfare of the child, Section 1 of the Children Act 1989."

14. Thereafter the Judge conducted a conscientious welfare enquiry. What dominated that enquiry was the Judge's consideration of whether the father's allegation against the mother of sexual misconduct would be deployed in the Sharia court to destroy the dependent relationship between F and his mother. But that the Judge carried out a comprehensive review of all relevant welfare factors is demonstrated by the first sentence of paragraph 66 of his judgment, explained by the opening sentence of paragraph 67.

15. We cannot accept Mr Everall's submission that the Judge was simply determining a hot pursuit application for swift return to enable welfare decisions to be made by the judge in the foreign jurisdiction. Clearly the reality was that Hughes J was deciding competing Section 8 applications which raised the single issue, in which jurisdiction should F live in his mother's care, unless she chose to surrender care to some other member of the family. The mother's residence order application was not formally conceded until after the Judge had rejected the father's application for F's return. But there were obvious tactical reasons for deferring that concession. As was appropriate on a trial of welfare issues the Judge heard the oral evidence of the parents, as well as the oral evidence of the mother's uncle and expert witness.

16. On that analysis of the principal issue determined, the questions for this court are:-

    i) did the Judge give excessive weight to what he identified as the critical factor: or

    ii) was his conclusion plainly wrong?

    Given that the weight attached to the critical factor is the only arguable flaw in an otherwise balanced judgment, it is in effect the only question that the court has to address.

17. In his grounds of appeal Mr Setright characterises the critical factor as an anxiety:

    a) unsupported by any finding of fact as to a contingent and indefinite future event.

    b) inconsistent with the Judge's finding that the father had no present intention of relying on allegations of the wife's misconduct in the Sharia court.

    c) amounting to an implied criticism of the capacity of the Saudi Arabian judicial system to protect the mother from false allegations and to deal appropriately with true allegations.

18. There is undoubted force in these criticisms. Nor are they the only criticisms. We add these:-

i) Although the critical factor was advanced by the mother as "the principal of her reasons why she could not return to Saudi Arabia", the Judge found that her principal reason "is simply that she does not like life there very much or at least not nearly as much as she likes life in London." Clearly that factor weighs light in the scale that balances F's welfare.

ii) We are doubtful of the Judge's strong criticism of the father for withdrawing the allegation of the mother's misconduct during the trial. Hughes J labelled it "casuistry". It led the Judge to observe in paragraph 65 that if the father had done it once he might do it again. That analysis seems to us harsh. Experience of bitterly fought family disputes demonstrates that parties seldom display much moderation in the deployment of their cases in written statements. Particularly is that so in the case of a spouse who at some level feels rejected and needs to find some acceptable explanation for the rejection. Moderation, or at least some reduction in scale, often comes when the adults face each other and the Judge at the trial. Parties are to be encouraged in that direction and, accordingly, when achieving it, are usually commended rather than criticised.

iii) What was the identifiable foundation for the Judge's concern? The nature of the allegation was implicitly one of adultery substantiated by association, inclination and opportunity. However, those ingredients were not supplied by the father but by "staff". The Judge investigated written evidence from the staff, which the father did not seek to introduce, in case it was relevant to the father's credibility. It seems to us significant that the maids' statements, when read by the Judge, did not contain any evidence of sexual misconduct, although critical of the mother's care of F.

iv) The judgment reveals:-

a) the conclusion was finely balanced

b) absent the factor that caused the Judge's concern "the balance of the welfare considerations in this case would favour return."

c) as to parental conduct "If the decision rested upon what each parent deserved, according to their conduct, the balance would be for return."

19. Having regard to Mr Setrght's submissions amplified by the additional considerations which we have identified, we conclude that Hughes J elevated this specific anxiety above a level that the evidence justified. In its proper perspective it should have not have had such an impact on outcome. On the grounds of appeal alone the Appellant is entitled to succeed.

20. However Mr Everall's Respondent's Notice requires careful consideration. It is convenient to deal first with his fourth ground simply because it asserts a

flawed exercise of the balance of factors relevant to welfare by a failure to give sufficient weight to the three following considerations:-

a) The strength of F's and the mother's links with England.

b) The relatively liberal and non-traditional lifestyle that the family enjoyed in Saudi Arabia.

c) The effect on F of the time in England.

21. It does not seem to us that there is any force in this criticism of the Judge. The mother's links with England might go to explain her preference for London life. F's links with England were his passport and such periods as he had spent here, either briefly as a two year old or substantially as a three year old. His links in reality are with his mother, and her preferences cannot be assumed to be shared by F. The liberal lifestyle of successful medical professionals as much as anything mitigates the effects on the mother of a return order. The third consideration is little more than a repetition of an element of the first. Therefore we conclude that this is the least impressive ground in the Respondent's Notice.

22. The first and second grounds are inter-linked. The first asserts that Hughes J was wrong to hold that the mother's inability to apply in Saudi Arabia for permission to relocate was not a factor which was contrary to the welfare of F. The second ground asserts that Hughes J was wrong in law in holding that he could not take into account the discrimination to which the mother would be subject in proceedings relating to F in Saudi Arabia.

23. The discrimination point has to be put in this way given that the Judge considered the argument carefully in paragraph 67 of his judgment. Accordingly Mr Everall's essential submission is that Hughes J's treatment of this submission was contrary to authority. Mr Everall identifies the classic statement of the law in the judgment of Lord Donaldson MR in the case of Re F (A Minor) (Abduction: Jurisdiction) [1991] FAM25 in which he said at 31:

> "There is no evidence that the Israeli courts would adopt an approach to the problem of B's future which differs significantly from that of the English Courts. It is not a case in which B or his father are escaping any form of persecution or ethnic, sex or other discrimination. In a word, there is nothing to take it out of the normal rule that abducted children should be returned to their country of national residence"

Mr Everall submits that this dictum has been consistently applied in subsequent cases, that the absence of the right to apply to relocate was crucial to the refusal of a return order in the case of Re JA (Child Abduction: non-Convention country) [1998] 1FLR231 and, finally, that there is no reported case of a return order that would lock the mother into the foreign jurisdiction without a right of application to relocate. There lies the discrimination that takes the case outside the normal rule.

24. Whilst this argument is skilfully presented it should not in our judgment succeed. We remind ourselves that return orders have been made in cases where the mother had an outstanding application for asylum and even in a case where the mother's asylum application had been granted: see Re S (Child Abduction : Asylum Appeal) [2002] 1WLR 2548 and Re H (Child Abduction : Mothers Asylum) [2003] 2FLR 1105. Equally it is obvious, if implicit, that the mother would have had no effective right of application to relocate in either the case of Re S (Minors) (Abduction) [1994] 1FLR297, or in the case of Osman v Elasha [2002] 2 WLR 1036

25. As Hughes J rightly pointed out in paragraph 67 there is no international accord in the area of relocation. The liberal or permissive approach adopted in this jurisdiction is not even uniform in the common law world. In our judgment neither the reasoning nor the conclusion of Hughes J on this submission is inconsistent with authority.

26. In Mr Everall's third ground he asserts that the judge's conclusions breached the mother's Convention rights under Article 6 and Article 14. Mr. Everall sought to persuade us that the Human Rights Act 1998 (HRA 1998) and three Articles of ECHR were engaged on the facts of this case in a manner which was directly relevant to, and supported the judge's decision not to make an order returning F to Saudi Arabia. As far as HRA 1998 itself was concerned, Mr. Everall argued that since the judge was hearing cross-applications under the Children Act 1989 (CA 1989), he had a duty under HRA 1998 section 3(1) to read and give effect to CA 1989 in a way was compatible with Convention rights. In addition, HRA 1998 section 6(1), rendered it unlawful for the judge to act in a way which was incompatible with her Convention rights.

27. The three Articles of ECHR which Mr. Everall argued were engaged are; (a) Article 6 (the right to a fair trial); (b) Article 14 (prohibition of discrimination) taken with Article 6; and (c) Article 14 taken with Article 8, (the right to respect for private and family life). These Articles are well known, and we do not need to set them out.

28. It is only fair to the judge to point out that although Miss Murfitt's skeleton argument in the court below made a passing reference to the mother being "justified in her anxiety to protect her basic human rights and not to be discriminated against", the arguments addressed to us by Mr. Everall on the applicability of ECHR were not addressed to the judge. We nonetheless decided to allow Mr. Everall to develop them for the same reason that we decided to admit the Respondent's notice, namely that the principal point taken in the Appellant's Notice appeared to us at first blush – and has proved after argument - to be well-founded, and that without the arguments set out in the Respondent's notice the mother might well be left with no answer to the appeal.

29. We also took the view that the proposition that HRA 1998 and ECHR applied in a Non-Hague Convention application raised an important issue, and should be argued. We are grateful to Mr. Setright for his pragmatic approach and for responding to Mr. Everall's arguments without having had the opportunity to prepare a skeleton argument.

30. Mr. Everall's first proposition was that the inability of the mother as primary carer of F to apply in Saudi Arabia for permission to relocate back to the United Kingdom was a breach of her rights under Article 6 and Article 14 taken with Article 6. An order returning F, he argued, would deny her access to a court where she would be able to have a fair hearing of the determination of the relocation issue. Mr. Everall argued that if such a restriction were sought to be imposed on the mother in England, it would undoubtedly constitute a breach of her rights under Article 6, which, of course, include a right of access to a court: - see ***Golder v United Kingdom*** (1975) 1 EHRR 524 at paragraphs [35] – [36] (***Golder)***.

31. It followed, Mr. Everall argued, that a judicial decision that F should be returned to Saudi Arabia would constitute a breach of both the mother's and F's right to a fair trial of the issue, and that as part of the process of deciding whether or not to make an order for F's return the judge would need to satisfy himself that the mother would have a fair trial of the relocation issue in Saudi Arabia. In this part of his argument, Mr. Everall relied on ***Pellegrini v Italy*** [2002] 35 EHRR 2 (***Pellegrini***); and ***Soering v United Kingdom*** [1989] 11 EHRR 439 (***Soering***).

32. In relation to Article 14 taken with Article 8, Mr. Everall submitted that the jurisprudence emanating from the European Court of Human Rights (ECtHR) on Article 14 had been succinctly summarised by Hale J (as she then was) in ***Re W (Minors) (Abduction)*** [1999] Fam 1 at 24D-G

> The concept of discrimination was explained in the ***Marckx*** case, at p. 343, para. 33 and repeated thus in ***Rasmussen v. Denmark*** (1984) 7 EHRR. 371, 379, paragraph 38:
>
> For the purposes of Article 14, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised.

33. Mr. Everall argued, firstly, that family life exists between the mother and F; and secondly, that the mother, as a woman, would be treated differently to the father in Saudi Arabia. She could not apply to relocate back to the United Kingdom. Furthermore, in the event of any dispute in relation to F, she had the disadvantages which the father did not have and which clearly emerged from the expert evidence. Mr. Everall submitted, accordingly, that by analogy with ***Pellegrini*** the judge should have satisfied himself that the mother's right to respect of family life would be secured in Saudi Arabia without discrimination on the ground of sex. In failing to do so, he fell into error.

34. Elegantly as these arguments were advanced, we are unable to accept them. There are, we think, several reasons why Articles 6, 8 and 14 are not engaged in what may loosely be called an extra-territorial sense on the facts of this case. The first, and simplest, is that the applicable ECHR rights (Articles 6, 8 and 14) apply only to those who are within the United Kingdom jurisdiction. To put the matter another way, the fact that the mother in this case may experience in Saudi Arabia what in England would be regarded as breaches of her rights under

Articles 6, 8 and 14 of the ECHR does not render the English Court in breach of those Articles if it returns F to Saudi Arabia.

35. There is no authority directly on the point in any child or family case in either the English or the Strasbourg jurisprudence. However, the proposition that F's removal to Saudi Arabia would not be a breach of his mother's Article 6, 8 and 14 rights seems to us to be consistent with the decision of this court in the conjoined asylum cases of ***Ahsan Ullah and Thi Lien Do v Secretary of State for the Home Department*** [2002] EWCA Civ 1856.

36. Mr. Ullah was a citizen of Pakistan and an Ahmadi: Miss Do was a citizen of Vietnam, and a Roman Catholic. Both sought asylum in the United Kingdom on the basis that they were unable freely to practice and to proselytise their religion in their respective home countries. The Immigration Appeal Tribunal had found that there was evidence of discrimination, but that it did not amount to persecution. The two questions for the Court of Appeal, accordingly, were; (1) whether HRA 1998 and Article 9 of the ECHR (the right to freedom of thought, conscience and religion) required the United Kingdom to give refuge to immigrants who were prevented from freely practising their religion in their own countries; and (2) to what extent does HRA 1998 inhibit the United Kingdom from expelling asylum seekers who fall short of demonstrating a well-founded fear of persecution under the 1951 Refugee Convention?

37. The Court of Appeal firstly made the point that in construing HRA 1998 Section 6, the courts of England and Wales have proceeded on the basis that the obligations which it imposes apply only to persons within the jurisdiction of the United Kingdom, as provided in Article 1 of the ECHR itself. The question, accordingly, was the manner in which the applicability of ECHR to persons "within their jurisdiction" limited the obligations of the contracting parties to ECHR and of public authorities under HRA 1998.

38. In relation to Article 8, this Court commented in paragraph 42: -

> Article 8 has been quite often invoked in support of a submission that an immigration restriction infringes the Convention. We believe, however, that it has only successfully been invoked where removal or refusal of entry has impacted on the enjoyment of family life of those already established within the jurisdiction.

39. Commenting on the decision of the ECtHR in ***Bensaid v United Kingdom*** [2001] 33 EHRR 205 (in which an illegal immigrant who was a schizophrenic argued that a return to Algeria would breach both his Article 3 and Article 8 rights), this court said:

> 46. Part of the reasoning of the court suggests that the treatment that a deportee is at risk of experiencing in the receiving state might so severely interfere with his article 8 rights as to render his deportation contrary to the Convention. The more significant Article 8 factor was, however, the disruption of private life within this country. There is a

> difference in principle between the situation where article 8 rights are engaged in whole or in part because of the effect of removal in disrupting an individual's established enjoyment of those rights within this jurisdiction and the situation where article 8 rights are alleged to be engaged solely on the ground of the treatment that the individual is likely to be subjected to in the receiving state. In ***Bensaid*** the court considered that the right to control immigration constituted a valid ground under article 8(2) for derogating from the article 8 rights of the applicant in that case.

40. This Court in ***Ullah*** summarised its analysis of the European jurisprudence by pointing out that (with the possible exception of ***Bensaid***) the application of the extension of the scope of ECHR to the apprehended treatment of a deportee in a receiving state was restricted to Article 3 cases; that to apply the principles to other articles where the apprehended treatment would fall short of Article 3 was likely to constitute a further exception; that whilst the ECtHR had contemplated the possibility of such a step it had not yet taken it; and that the obligations in HRA 1998 sections 3 and 6 did not require the Court of Appeal to take it.

41. This court in ***Ullah*** then examined the English jurisprudence in the immigration context. Its conclusion was that there was no domestic authority which required it to hold that where an alien is removed to a country where his rights to practice his religion is inhibited, Article 9 will, or can, be engaged. It held, accordingly: -

> 63. For these reasons we hold that a removal decision to a country that does not respect Article 9 rights will not infringe the HRA 1998 where the nature of the interference with the right to practice religion that is anticipated in the receiving state falls short of Article 3 ill-treatment. It may be that this does not differ greatly, in effect, from holding that interference with the right to practice religion in such circumstances will not result in the engagement of the Convention unless the interference is "flagrant".
>
> ***Other Articles***
>
> 64. This appeal is concerned with Article 9. Our reasoning has, however, wider implications. Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English court is not required to recognise that any other Article of the Convention is, or may be, engaged.

42. Mr. Everall did not suggest that the treatment which the mother was likely to be subjected in Saudi Arabia came within Article 3 ("no one shall be subjected to torture or to inhuman or degrading treatment"). In these circumstances, in our judgment, the decision of this Court in ***Ullah*** provides powerful support for the

proposition that Articles 6, 8 and 14 are not engaged in so far as they relate to prospective breaches of those Rights in Saudi Arabia.

43. The cases which Mr. Everall cited to us, namely ***Golder, Pellegrini***, and ***Soering*** do not, in our judgment, advance his case. ***Golder*** establishes that Article 6 includes a right of access to a court. Mr. Everall is plainly right in submitting that any prohibition against the mother making an application to an English court to relocate abroad would offend all three Articles which he prays in aid. ***Golder*** is not, however, in our judgment, authority for the proposition that a return of F to Saudi Arabia would constitute a breach of the mother's Article 6 rights because she does not have the ability in that country to apply for a relocation order. In our judgment, the correct analysis of the law is that the mother's Article 6 and 14 rights have not been breached because she has manifestly been able to make an application to the English court for a residence order.

44. ***Soering*** is an Article 3 case, which is fully discussed in ***Ullah***. Mr. Everall relies on paragraph [113] of the judgment of the ECtHR which reads: -

> 113. The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society…The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.

45. For the reasons we have already given, however, it seems to us that this argument is covered by the decision of this Court in ***Ullah***

46. ***Pellegrini*** is an Article 6 case. We do not, however, think it assists Mr. Everall. The facts of the case are extremely complex. The essential point, however, was that the Applicant had made an application in the Italian secular courts for a judicial separation from her husband and maintenance which she eventually obtained in October 1990. However, in November 1987, and without knowing what it was about, she had received a summons to attend the ecclesiastical court in Rome, which she did on 1 December 1987. She was informed her husband had petitioned to have their marriage annulled, and was examined by the court. The ecclesiastical court then annulled the marriage on 10 December 1987 on the grounds of consanguinity, and the Italian secular courts subsequently recognised and enforced the ecclesiastical court's judgment, thereby depriving the applicant of her order for judicial separation and maintenance. Since the ecclesiastical court had not ratified ECHR, her case was that the secular Italian courts had acted in violation of her Article 6 rights by failing to check that the proceedings in the ecclesiastical court had satisfied the guarantees contained in Article 6. That claim was upheld by the ECtHR.

47. Mr Everall relies on the following passages in the judgment of the ECtHR

> 40. The Court notes at the outset that the applicant's marriage was annulled by a decision of the Vatican courts which was declared enforceable by the Italian courts. The Vatican has not ratified the ECtHR and, furthermore, the application was lodged against Italy. The Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article six of ECtHR, but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the ECtHR. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties.

48. Mr. Everall places particular reliance on the final sentence of paragraph 40 of the judgment in ***Pellegrini***. He also relies on paragraph 47 of the judgment, which reads: -

> In these circumstances, the court considers that the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota's judgment, that the applicant had had a fair trial in the proceedings under canon law.

49. Mr. Everall argued that the principle in ***Pellegrini*** must apply not only to situations where the domestic courts are being asked to give effect to a past judicial decision in a non-Convention country; it must also apply *mutatis mutandis* to prospective proceedings in such a country. With respect, we do not think this follows. There is nothing in ***Pellegrini*** to support the proposition that Article 6 has any extra-territorial application. ***Pellegrini*** is an example of a contracting state examining its own procedures to ensure that they are Article 6 compliant when dealing with the enforcement of an order of a non-contracting state.

50. We are therefore of the view that nothing in either the Strasbourg or the English jurisprudence supports the proposition that to return F to Saudi Arabia would constitute a breach of the mother's Article 6 and Article 14 rights taken in conjunction. Furthermore, if, as we believe to be the case, the mother's convention rights are engaged because she is within the jurisdiction of the courts of England and Wales, then it is manifest, in our judgment, both that she had a fair hearing before the judge, and that she was not the victim of discrimination. She had the same status in the proceedings as her husband; she had the same rights as he did: she was represented by counsel, she was able to put in written evidence, to instruct an expert and to give oral evidence. Indeed, she succeeded before the judge. Accordingly, to the extent Articles 6 and 14 were properly engaged in the proceedings, there was, in our judgment no breach of either.

51. We do not think that Article 8 adds anything to the argument. As is now trite law, every application to the English courts under CA 1989 involves an actual or potential interference with the right to respect for the family life of the participants, including the child or children concerned. The court's function is to balance those rights and achieve a result which is in the best interests of the child or children.

52. Assuming (without for present purposes deciding) that a parent who has abducted a child from a non-Hague Convention country where he is habitually resident to England (or who has wrongly retained such a child in England) has a family life to which respect must be accorded under ECHR, an application for a order under section 8 of the Act returning the child to the country of his habitual residence will be no exception to the general approach set out in the previous paragraph. The application of the welfare principle in such a case, however, will plainly be influenced by the circumstances of the abduction or retention, as the cases cited earlier in this judgment demonstrate.

53. As we have already acknowledged, Mr. Everall is right when he argues that viewed from the perspective of the domestic law of England and Wales, the limitations imposed on the mother's freedom of action in Saudi Arabia are discriminatory and a potential breach of her Article 8 rights. However, this was not the issue, and the same arguments apply as those which we have identified in relation to Articles 6 and 14. The fact that the mother's Article 8 rights may be interfered with in Saudi Arabia in a manner with which an English court would not agree does not make it a breach of Article 8 for the judge to order F's return.

54. The bald proposition that Articles 6, 8 and 14 of ECHR are not breached by an order for F's return may not be as unattractive as it might appear at first blush. ECHR rights, in our judgment, must be seen not merely in the context of the individual case, but in the overall context of the jurisprudence relating to non-Convention child abduction cases.

55. Thus the first point to make is, of course, that both F, and F's father and mother all have the same Convention rights in English law. Whilst, as Mr. Everall points out, the welfare of the child remains paramount in the ECHR context, it is difficult to see how a return to the country of his habitual residence in the care of his mother (if she chooses to return) breaches F's Article 8 rights. Furthermore, Article 8(2) permits a proportionate interference by the State in the right to respect for family life where it is necessary for the protection of the rights and freedoms of others. Accordingly, in dealing with a non-Hague Convention abduction, Articles 6 and 8 are apt within the domestic context to ensure the provision of a framework within which the welfare question can be appropriately considered.

56. The logical consequence of Mr. Everall's submissions – and, indeed, a logical extension of the basis upon which the judge decided the case - would be that no child would ever be returned to a jurisdiction in which both parents, according to English concepts, did not have equal parental rights, and equal access to a system of law which administered what the English courts would perceive as justice. That, plainly, is not the law, nor should it be. The English courts are

astute to recognise that there are many legitimate alternative systems of law which approach the question of the custody of children in ways which are alien to the English concept of the equality of parental rights, and which do not embrace our criteria for resolving issues of residence and contact. No doubt millions of children are brought up under such systems of law. It is not, accordingly, for the English courts to refuse to return children to any such jurisdiction unless some powerful factor in the welfare equation makes it contrary to their best interests to do so. In this wider context, ECHR is an essentially domestic consideration, designed to ensure that we consider and apply its Articles within our domestic proceedings in order to ensure both parties have a fair hearing on equal terms, and that the welfare of the child or children concerned is properly considered.

57. We are, of course, conscious of the fact that the decision of this court in ***Ullah*** is shortly to be considered in the House of Lords. However, we venture to think that even if the decision of this Court is reversed, and prospective breaches of Article 9 are found to be a proper basis for a refusal to return asylum seekers to their country or origin, that decision will not affect the reasoning which we have identified as the basis for deciding that the welfare of particular children requires their return to the country of their non-Hague Convention habitual residence.

58. The principal reason we take this view is that the welfare equation in any non-Hague Convention abduction is both multi-factorial and highly fact specific. Thus it would, for example, be open to an English judge, as the law currently stands, to refuse to return a child if the evidence was that his welfare was likely to be compromised by factors such as those identified in ***Ullah***. Welfare is paramount: the fact that a return may or may not breach the Article 6, 8, 9 or 14 rights of the abducting parent is secondary.

59. For these reasons, in our judgment, Mr. Everall's arguments under ECHR do not assist the mother's case.

60. Finally, Mr. Everall referred us to various international treaties which the United Kingdom had ratified but not incorporated into domestic law. One of these, the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention) adopted and opened for signature, ratification and accession by resolution 34 / 180 of the General Assembly of the United Nations18 December 1979 seemed to us to exemplify juridical differences without providing any solution.

61. The Women's Convention was ratified by the United Kingdom on 7 April 1986. Article 16(1)(d) requires all States Parties to

> …… take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: -

> … (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children …..

62. Mr. Everall pointed out that Saudi Arabia had made a reservation to the Women's Convention, which states that: -

> In case of contradiction between any term of the Convention and the norms of Islamic Law, the Kingdom is not under any obligation to observe the contradictory terms of the Convention.

63. The Government of the United Kingdom has lodged an objection to the Reservation whilst stating that it would not preclude the entry into force of the Convention between the United Kingdom and Saudi Arabia.

64. As the Convention is not incorporated into English law, it neither falls to be considered by us, nor assists Mr. Everall's argument. It simply highlights the difference between the two jurisdictions, to which we make further reference below.

65. In reaching these conclusions on the Respondent's Notice we have not drawn on the additional expert evidence from Mr Ian Edge or the expert evidence from Mr Al-Qahtani. Obviously both experts have considerable experience and expertise, the differences in their statements are in part differences of emphasis and in part reflect differences in the considerations that they were requested to address.

66. It follows that, in our judgment, the additional grounds skilfully presented in Mr Everall's Respondent's Notice do not justify the Judge's refusal of the father's application.

67. In this difficult area of international law real progress will ultimately depend upon an expansion of states' recognition of:-

    a) Habitual residence of the child as the ordinary foundation of jurisdiction

    b) Reciprocity in the return on children.

    There is presently a great distance between the approach of the UK and the approach of Saudi Arabia to the return of children retained or abducted from their habitual residence. There is a justifiable objection to a rule of re-patriation which has no reflection in the law of Saudi Arabia. The United Kingdom is committed at the judicial, diplomatic and government levels to developing better co-operation with all Islamic states on child protection and welfare issues. Hence the strong support of the United Kingdom to the inter-country conference convened by the Government of Malta and arranged by the Hague Conference on Private International Law in March 2004.

68. Clearly the significant feature of the present appeal is that all three family members are predominantly Saudi Arabian. On the Judge's findings F has experienced an extended stay in London as a consequence of his mother's

preference for London life. Very different considerations would apply in a case where the mother's only connections with Saudi Arabia were consequent upon marriage to a Saudi Arabian and residence in Saudi Arabia during marital co-habitation.

69. In concluding this judgment we emphasise that the conflict between these parents threatens to rob F of the cross-cultural upbringing that he would otherwise have enjoyed. In his early years the pattern of long summers in England would have undoubtedly continued, enabling him to share his mother's attachment to both worlds. Later, his parents would no doubt have agreed an education programme with secondary and / or tertiary education in the western world. If the judgment below were confirmed it can safely be predicted that F would not return to Saudi Arabia until old enough to decide for himself. Once a return is ordered, the converse may not follow. It should be possible to provide sufficient safeguards to reassure the father that a summer holiday in this jurisdiction would not lead to another wrongful retention or to flight to some other jurisdiction of the mother's choice. Mediation in family disputes is central to the Koranic tradition and we can do no more than exhort the parents to recognise that a middle way that might be reached by mediation would better serve F's welfare, and probably their own interests in the long run, than an outcome imposed by this court.

70. In paragraph 68 of his judgment Hughes J spelt out the conditions that he would have set before granting a return order. We fully support his approach. The Appeal will be allowed and we will make the order sought by the father's application only on performance of the conditions identified by Hughes J. Practical arrangements for return thereafter will be remitted to the Family Division Judge, if not agreed.