HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 40

on appeal from: [2004] EWCA Civ 417

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re J (a child) (FC)

Appellate Committee:

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel:

Appellants:
Timothy Scott QC
Debbie Taylor
(instructed by Percy Short and Cuthbert)

Respondents:
Henry Setright QC
Ian Lewis
(instructed by Dawson Cornwell)
Hearing dates:
4–5 May 2005

ON
THURSDAY 16 JUNE 2005

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LORD NICHOLLS OF BIRKENHEAD

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would allow this appeal.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I too would allow this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

3. I am in full agreement with the opinion of my noble and learned friend Baroness Hale of Richmond, which I have had the privilege of reading in draft. For all the reasons given in her opinion I too would allow this appeal.

BARONESS HALE OF RICHMOND

My Lords,

4. The issue of principle in this case is the proper approach to applications for the summary return of children to countries which are not parties to the Hague Convention on the Civil Aspects of International Child Abduction. But it is also another example of intervention by the Court of Appeal in the exercise of discretion by a trial judge despite the fact that he had, in the view of the appeal court, properly directed himself on the law. I believe that the Court of Appeal were wrong on both points.

The factual background

5. These proceedings are about a little boy, F, who was born in the United States on 5 April 2000. He is a citizen, not only of the United States, but also of the United Kingdom and of Saudi Arabia. His mother was born in the United Kingdom in 1972 to Iraqi Kurdish parents who had come here as refugees. The family moved to Saudi Arabia when she was six and she has dual citizenship. Her father is still working there as a doctor but her mother has already returned to live in this country where they have always kept a home and both plan to retire. The mother returned here aged 16 to study for her A levels and then for a degree. In 1998 she went back to work in Saudi Arabia where she met the father, who is a Saudi citizen. They were legally married there according to Shariah law in December 1998. Their son was born in the United States for medical reasons but was soon taken to Saudi. However, marital difficulties arose in 2001, and the mother brought the child to this country for a while, but she returned to begin divorce proceedings in the Shariah court. The father agreed to divorce the mother later that year, and it was a term of the divorce agreement that the mother would not remove the child from Saudi Arabia without the father's consent. However, the parents remarried in accordance with Shariah law in January 2002. At the end of July 2002, the mother and child came here again with the father's consent, initially for a holiday but he later agreed to their staying on while she pursued a one year master's degree course. The father visited them here in October 2002 and their marital difficulties returned. The mother decided that she did not wish to return to Saudi Arabia when her course was over. Technically, had this been a Hague Convention case, this would probably have amounted to a

wrongful retention of the child, albeit far removed from the popular picture of a kidnapping or even an abduction.

The proceedings

6. On 7 May 2003, the mother presented a divorce petition in the Principal Registry of the Family Division, relying for jurisdiction upon her domicile of origin in this country together with six months' habitual residence. She also applied to the Muslim Council in London to obtain a divorce according to Shariah law. On 26 June 2003, the father applied for a specific issue order under section 8 of the Children Act 1989 that the child be summarily returned to Saudi Arabia. He also applied for a stay of the English divorce proceedings so that matters could be dealt with in the Shariah courts there.

7. His case was that he accepted that the marriage was at an end, and that the child should continue in his mother's care, but that they should both return to live in Saudi Arabia. The mother applied for a residence order under the Children Act 1989. Her case was that following the breakdown of her marriage, she wished to remain in this country and that as she was the natural carer of the child, he should remain here with her.

8. The applications came before Mr Justice Hughes in October 2003. The principal issue was whether he should direct the summary return of the child to Saudi Arabia. Accordingly he dealt with that first. He identified six principles from the authorities. He regarded the decision as a difficult one (para 69). On balance, were it not for one factor, he would have found it in the child's best interests to be returned to Saudi Arabia for his future to be decided 'according to the norms of his own society' (para 67). The factor tipping the balance the other way, however, was that the father had raised and then withdrawn allegations about the mother's association with another man. The judge had heard expert evidence about, among other things, the effect of such allegations in Saudi Arabian Shariah law. He was 'seriously concerned that an occasion will arise in which [the child'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' (para 64). Hence he declined to order that the child be summarily returned to Saudi Arabia. As the father had always taken the view that the child should be looked after by the mother, he agreed that

if F was not to be summarily returned to Saudi Arabia, a residence order should be made in her favour with reasonable contact to him.

9. The Court of Appeal held (*Re J (Child Returned Abroad: Human Rights)* [2004] EWCA Civ 417; [2004] 2 FLR 85, para 6) that there could be no criticism of the judge's 'impeccable direction' on the applicable legal principles. Nevertheless, they allowed the father's appeal on the ground that the judge had 'elevated this specific anxiety above a level that the evidence justified' (para 19). Accordingly it should not have had such a decisive effect in what had earlier been described as 'an otherwise balanced judgment' (para 16).

Should the Court of Appeal have intervened?

10. The Court of Appeal appears to have intervened on the basis, first, that the judge's conclusion on the risk was not justified by the evidence and second, that he had given it too much weight in his overall conclusion. Yet the assessment of the risk depended entirely on the judge's evaluation of the father's present intentions and likely future behaviour and its impact upon the child. There was objective evidence of the risk in the fact that the father had made the allegations in writing and then withdrawn them when he saw that they were damaging rather than helping his case. Whether he might do so again depended crucially on the judge's evaluation of his oral evidence. The judge was the only person who could do this. He concluded that, while the father was sincere in his current intention not to raise such allegations again, there was a serious risk that if disputes arose in future, as they might easily do, he would resurrect them. These were findings of credibility and primary fact with which, for all the reasons explained by Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360, at pp 1372-3, an appeal court is not entitled to interfere.

11. Furthermore, once the judge has made such a finding, it becomes a factor to be weighed in the balance in the exercise of his discretion. To say that it should not have tipped the balance in a case such as this, which the judge regarded as a difficult one, is tantamount to saying that it should not have been taken into account at all or that the other considerations were so strongly in favour of return that it should not have been allowed to outweigh them. But even the brief account of the facts given above shows that this was not a case in which all other considerations pointed only one way. The age of the child, the length of

time he had lived here and the substantial connection of both mother and child with this country were all relevant.

12. If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is also a matter for the trial judge. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere: see *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647. Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful, as this judge undoubtedly was, in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter. On that ground alone, and even assuming that the principles applied by the judge were indeed correct, I would allow this appeal.

The issue of principle

13. But were those principles correct? The mother takes issue, in particular with the judge's fourth, in para 38:

> ". . . [an order for summary return] will not necessarily be confined to a return 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."

14. The issue, therefore, is how, if at all, it is relevant that the laws and procedures in the country to which the child is to be returned are very different from those which would apply if the child's future were to be decided here. Competing views have been expressed in the Court of Appeal. One view is encapsulated in the judgment of Lord Justice Ward in the case of *Re JA (Child Abduction: Non-Convention Country)* [1998]

1 FLR 231, the other in the judgment of Lord Justice Thorpe in the case of *Osman v Elasha* [2000] Fam 62.

15. In *Re JA*, at pp 241-3, Lord Justice Ward (with whom Lord Woolf MR and Lord Justice Mummery agreed) accepted a submission that 'the court cannot be satisfied that it is in the best interests of the child to return it to the court of habitual residence in order that that court may resolve the disputed question unless this court is satisfied that the welfare test will apply in that foreign court'. In practice, however, as foreign law is presumed to be the same as English law, it will be for the party resisting return to show that there is a difference which may be detrimental to the child's welfare. In the case before him, it was the lack of any process whereby the mother might gain the right to return to this country with the child, with the result that she and the child might be 'locked in' to a life there, which would put at risk the mother's health and the child's care.

16. In *Osman v Elasha* [2000] Fam 62, on the other hand, Lord Justice Thorpe (sitting with Lords Justices Stuart Smith and Pill) commented (at p 70) that 'the further development of international collaboration to combat child abduction may well depend upon the capacity of states to respect a variety of concepts of child welfare derived from differing cultures and traditions. A recognition of this reality must inform judicial policy with regard to the return of children abducted from non-member states.' Accordingly (at p 72) he emphasised 'the importance of according to each state liberty to determine the family justice system and principles that it deems appropriate to protect the child and to serve his best interests.' As we made no investigation and permitted no criticism of the family justice systems operating in states parties to the Hague Convention, he was extremely doubtful of the wisdom of permitting such criticism of non-member states, 'save in exceptional circumstances, such as those therein defined by Lord Donaldson of Lymington MR in *Re F (A Minor)(Abduction: Custody Rights)* [1991] Fam 25, 31, where he referred to persecution, or ethnic, sex, or any other discrimination.' He distinguished *Re JA* on the basis that the expert evidence showed a risk of harm to the child if return was ordered.

17. Both judgments were based on what their authors saw as a consistent line of previous authority, on the one hand expecting that the foreign system of law would be broadly comparable to our own and on the other hand assuming that it will be in the child's best interests to return to his home country even if its system of family law is very

different from our own. As this is the first time that the issue has come before this House, it seems right to remind ourselves of first principles.

The principles

18. Three points can be readily agreed. First, since 1925, any court which is determining any question with respect to the upbringing of a child has had a statutory duty to regard the welfare of the child as its paramount consideration. Before that, the principle that the welfare of the individual child might outweigh any other considerations had been developed by the Chancery judges in the exercise of their inherent jurisdiction over children. The statutory duty was first laid down by section 1 of the Guardianship of Infants Act 1925 and later consolidated in section 1 of the Guardianship of Minors Act 1971. It applied to 'any proceedings in any court' and the court was expressly instructed to disregard whether from any other point of view the claim of the father was superior to that of the mother or vice versa. That proposition was regarded as too obvious to require repetition when the welfare principle was re-enacted in section 1(1) of the Children Act 1989. It applies in any proceedings where the court has jurisdiction to determine a question concerning a child's upbringing, whether on an application for an order under the 1989 Act itself, as in this case, or in the inherent jurisdiction of the High Court.

19. It is not disputed that our courts have jurisdiction in this case. As it happens, there are pending divorce proceedings: see Family Law Act 1986, ss 2(1) and 2A(1); but even if there were not, the English courts would have jurisdiction on the basis of the child's presence here, unless it were excluded by the existence of matrimonial proceedings in another part of the United Kingdom: see Family Law Act 1986, ss 2(2) and 3(1),(2). (Under the new regime introduced by Council Regulation (EC) No 2201/2003 of 27 November 2003 the court only has jurisdiction if it has jurisdiction under the Regulation or under the old rules where the Regulation does not apply: see the 1986 Act, as amended with effect from 1 March 2005 by SI 2005/265, s 2(1)(a).) If our courts have jurisdiction, then the welfare principle applies, unless it is excluded, and our law has no concept of the 'proper law of the child'.

20. Secondly, however, the application of the welfare principle may be specifically excluded by statute; one example is the Child Abduction and Custody Act 1985, passed to give effect in domestic law to two international treaties, the Hague Convention on the Civil Aspects of

International Child Abduction and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children. Both treaties were motivated by the belief that it is in the best interests of children for disputes about their future to be decided in their home countries, and that one parent should not be able to take a child from one country to another, either in the hope of obtaining a tactical advantage in the dispute or to avoid the effects of an order made in the home country. Instead of deciding the dispute itself, therefore, the country to which the child was taken agreed that with very few exceptions it would either send the child back or enforce the order made in the home country. This necessarily meant that the receiving country might on occasion have to do something which was not in the best interests of the individual child involved. The States which became parties to these treaties accepted this disadvantage to some individual children for the sake of the greater advantage to children in general. Parents would be deterred from moving their children across borders without consent. States which sent other countries' children back could expect that other States would send their own children back in return. The obligations were mutual and reciprocal.

21. The Convention is widely regarded as a great success, particularly in combating the paradigm case which its authors had in mind: the child who was living with one parent but snatched or spirited away by the other. Currently the Convention is in force between the United Kingdom and the 74 Contracting States listed in Schedule 2 to the Child Abduction and Custody (Parties to Convention) Order 1986 (SI 1986/1139), as amended. The two most recent entrants are Brazil and Lithuania. In at least three Contracting States, Turkey, Turkmenistan and Uzbekistan, the predominant religion practised by their populations is Islam. Obviously, the cultures and legal systems of the Contracting States will differ widely from one another. All are prepared to accept these differences for the sake of the reciprocal benefits which membership can bring. But one group of States is conspicuous by its absence. These are States which adopt some form of Shariah law.

22. There is no warrant, either in statute or authority, for the principles of The Hague Convention to be extended to countries which are not parties to it. Section 1(1) of the 1989 Act, like section 1 of the Guardianship of Infants Act before it, is of general application. This is so even in a case where a friendly foreign state has made orders about the child's future. This was explained by Morton J in *Re B's Settlement, B v B* [1940] Ch 54, 63-64:

> "I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country."

23. Despite some critical initial comment by authors on private international law, that view has now become orthodox. It was expressly approved by the Judicial Committee of the Privy Council in *McKee v McKee* [1951] AC 352, which emphasised that there was a choice open to the trial judge:

> "It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. It is, however, the negation of the proposition . . . that the infant's welfare is the paramount consideration, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow on order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case."

24. This House, in the leading case of *J v C* [1970] AC 668, regarded it as clearly decided by *Re B's Settlement* and *McKee v McKee* that the existence of a foreign order would not oust the jurisdiction or preclude the operation of the welfare principle. This applies *a fortiori* where the foreign court would have had jurisdiction to make an order but has not done so, so that no question of comity arises: see Lord Guest at p 700G-701B, Lord MacDermott at p 714F-G, and Lord Upjohn at p 720C-E.

25. Hence, in all non-Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual

child. If they do decide to return the child, that is because it is in his best interests to do so, not because the welfare principle has been superseded by some other consideration. This was so, even in those cases decided around the time that the Hague Convention was being implemented here, where it was held that the courts should take account of its philosophy: see, for example, *G v G (Minors) (Abduction)* [1991] 2 FLR 506. The Court of Appeal, in *Re P (A Minor)(Child Abduction: Non Convention Country)* [1997] Fam 45 has held that the Hague Convention concepts are not to be applied in a non-Convention case. Hence, the first two propositions set out by Mr Justice Hughes in this case were entirely correct: the child's welfare is paramount and the specialist rules and concepts of the Hague Convention are not to be applied by analogy in a non-Convention case.

26. Thirdly, however, the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits. In a series of cases during the 1960s, these came to be known as 'kidnapping' cases. The principles were summed up by Lord Justice Buckley in *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, at p 264, rightly described by Lord Justice Ward in *Re P* and *Re JA* as the *locus classicus* :

> "To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country."

27. He went on to emphasise that in doing so, the court was not punishing the parent for her conduct, but applying the cardinal rule. The

same point was made by Lord Justice Ormrod in *Re R (Minors)(Wardship: Jurisdiction)* (1981) 2 FLR 416, at p 425: the 'so-called kidnapping' of the child, or the order of a foreign court, were relevant considerations,

> "but the weight to be given to either of them must be measured in terms of the interests of the child, not in terms of penalising the 'kidnapper', or of comity, or any other abstraction. 'Kidnapping', like other kinds of unilateral action in relation to children, is to be strongly discouraged, but the discouragement must take the form of *a swift, realistic and unsentimental assessment of the best interests of the child, leading, in proper cases, to the prompt return of the child to his or her own country*, but *not* the sacrifice of the child's welfare to some other principle of law." (first emphasis mine)

28. It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child.

Making the choice

29. How then is the trial judge to set about making that choice? His focus has to be on the individual child in the particular circumstances of the case. The policy considerations which have led this country to enter into international treaties for the good of children in general are irrelevant. *A fortiori*, the hope that countries which have not yet become parties to such treaties might be encouraged to do so in future is irrelevant. There may be good reasons why those countries are unable to join the club. They may well believe that it would be contrary to the fundamental principles of their laws to accept the reciprocity entailed. As my noble and learned friend, Lord Hoffmann, pointed out in the course of the argument, they may have no incentive to join if their children are returned to them without their having to return other children to a system which is so completely different from their own. This is all pure speculation and has nothing to do with the welfare of the little boy whose future has to be decided in this case.

30. Nevertheless, it was urged upon us by Mr Setright QC, for the father, that there should be 'a strong presumption' that it is 'highly likely' to be in the best interests of a child subject to unauthorised removal or retention to be returned to his country of habitual residence so that any issues which remain can be decided in the courts there. He argued that this would not mean the application of the Hague Convention principles by analogy, but the results in most cases would be the same.

31. That approach is open to a number of objections. It would come so close to applying the Hague Convention principles by analogy that it would be indistinguishable from it in practice. It relies upon the Hague Convention concepts of 'habitual residence', 'unauthorised removal', and 'retention'; it then gives no indication of the sort of circumstances in which this 'strong presumption' might be rebutted; but at times Mr Setright appeared to be arguing for the same sort of serious risk to the child which might qualify as a defence under article 13(b) of the Convention. All of these concepts have their difficulties, even in Convention cases. For example, different approaches have been taken in different countries to the interpretation of the vital concept of habitual residence. By no means everyone shares our view, which is based on the exercise of parental authority: see R Schuz, "Habitual residence of children under the Hague Child Abduction Convention – theory and practice" [2001] 13 CFLQ 1. There is no warrant for introducing similar technicalities into the 'swift, realistic and unsentimental assessment of the best interests of the child' in non-Convention cases. Nor is such a presumption capable of taking into account the huge variety of circumstances in which these cases can arise, many of them very far removed from the public perception of kidnapping or abduction.

32. The most one can say, in my view, is that the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed, in this or any other case, that allowing a child to remain here while his future is decided here inevitably means that he will remain here for ever.

33. One important variable, as indicated in *Re L*, is the degree of connection of the child with each country. This is not to apply what has become the technical concept of habitual residence, but to ask in a

common sense way with which country the child has the closer connection. What is his 'home' country? Factors such as his nationality, where he has lived for most of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far will all come into this.

34. Another closely related factor will be the length of time he has spent in each country. Uprooting a child from one environment and bringing him to a completely unfamiliar one, especially if this has been done clandestinely, may well not be in his best interests. A child may be deeply unhappy about being recruited to one side in a parental battle. But if he is already familiar with this country, has been here for some time without objection, it may be less disruptive for him to remain a little while longer while his medium and longer time future is decided than it would be to return.

35. This brings me to the question of different legal conceptions of welfare. The first reported cases in this area which came after *Re L* [1974] 1 WLR 250 and *Re R* [1981] 2 FLR 416 were concerned with removals from countries in the common law or western European traditions: *G v G (Minors: Abduction)* [1991] 1 FLR 506 (Kenya); *Re F (A Minor) (Abduction: Custody Rights) (Jurisdiction)* [1991] Fam 25 (Israel); see also *Re M (Abduction: Non-Convention Country)* [1995] 1 FLR 89 (Italy). It is not surprising that the courts here were prepared to assume or accept that the approach in those countries would not differ significantly from that of the English courts.

36. Nevertheless, in *Re F* [1991] Fam 25, at p 31H, Lord Donaldson MR referred to 'whether the other court will apply principles which are acceptable to the English courts as being appropriate'. There followed cases from other countries in which principles which were not necessarily the same as those applied here were considered 'appropriate' because of the family's close connection with that country: see *Re S (Minors)(Abduction)* [1994] 1 FLR 297 (Pakistan); and *Re M (Abduction: Peremptory Return Order)* [1996] 1 FLR 478 (Dubai), in which the court went so far as to refuse to admit evidence of the legal system in the other country and assumed that the wife would receive a fair hearing there. These culminated in the difference of view expressed in *Re JA (Child Abduction: Non-Convention Country)* [1998] 1 FLR 231 (United Arab Emirates), *Osman v Elasha* [2000] Fam 62 (Sudan), and again in the present case.

37. Like everything else, the extent to which it is relevant that the legal system of the other country is different from our own depends upon the facts of the particular case. It would be wrong to say that the future of every child who is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not inevitably to be preferred to another. Indeed, we do not have any fixed concept of what will be in the best interests of the individual child. Once upon a time it was assumed that all very young children should be cared for by their mothers, but that older boys might well be better off with their fathers. Nowadays we know that some fathers are very well able to provide everyday care for even their very young children and are quite prepared to prioritise their children's needs over the demands of their own careers. Once upon a time it was assumed that mothers who had committed the matrimonial offence of adultery were only fit to care for their children if the father agreed to this. Nowadays we recognise that a mother's misconduct is no more relevant than a father's: the question is always the impact it will have on the child's upbringing and wellbeing. Once upon a time, it may have been assumed that there was only one way of bringing up children. Nowadays we know that there are many routes to a healthy and well adjusted adulthood. We are not so arrogant as to think that we know best.

38. Hence our law does not start from any *a priori* assumptions about what is best for any individual child. It looks at the child and weighs a number of factors in the balance, now set out in the well-known 'check-list' in section 1(3) of the Children Act 1989; these include his own wishes and feelings, his physical, emotional and educational needs and the relative capacities of the adults around him to met those needs, the effect of change, his own characteristics and background, including his ethnicity, culture and religion, and any harm he has suffered or risks suffering in the future. There is nothing in those principles which prevents a court from giving great weight to the culture in which a child has been brought up when deciding how and where he will fare best in the future. Our own society is a multi-cultural one. But looking at it from the child's point of view, as we all try to do, it may sometimes be necessary to resolve or diffuse a clash between the differing cultures within his own family.

39. In a case where the choice lies between deciding the question here or deciding it in a foreign country, differences between the legal systems cannot be irrelevant. But their relevance will depend upon the facts of the individual case. If there is a genuine issue between the

parents as to whether it is in the best interests of the child to live in this country or elsewhere, it must be relevant whether that issue is capable of being tried in the courts of the country to which he is to be returned. If those courts have no choice but to do as the father wishes, so that the mother cannot ask them to decide, with an open mind, whether the child will be better off living here or there, then our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction must do more than give the judge pause (as Mr Justice Hughes put it in this case); it may be a decisive factor. On the other hand, if it appears that the mother would not be able to make a good case for relocation, that factor might not be decisive. There are also bound to be many cases where the connection of the child and all the family with the other country is so strong that any difference between the legal systems here and there should carry little weight.

40. The effect of the decision upon the child's primary carer must also be relevant, although again not decisive. A child who is cared for by nannies or sent away to boarding school may move between households, and indeed countries, much more readily than a child who has always looked to one parent for his everyday needs, for warmth, for food, clean clothing, getting to school, help with homework and the like. The courts are understandably reluctant to allow a primary carer to profit from her own wrong by refusing to return with her child if the child is ordered to return. It will often be entirely reasonable to expect that a mother who took the risk of uprooting the child will return with him once it is ordered that he should go home. But it will sometimes be necessary to consider whether it is indeed reasonable to expect her to return, the sincerity of her declared refusal to do so, and what is to happen to the children if she does not.

41. These considerations should not stand in the way of a swift and unsentimental decision to return the child to his home country, even if that home country is very different from our own. But they may result in a decision that immediate return would not be appropriate, because the child's interests will be better served by allowing the dispute to be fought and decided here. Our concept of child welfare is quite capable of taking cultural and religious factors into account in deciding how a child should be brought up. It also gives great weight to the child's need for a meaningful relationship with both his parents. It does not follow, therefore, that a Saudi Muslim boy who is mainly cared for by nannies and nursery schools will be better off living with his mother and maternal grandparents in multi-cultural London than with his father or some other female relative in his home country.

Human rights

42. The fact remains that the unchallenged evidence before the trial judge was that the law in Saudi Arabia treats fathers and mothers differently and in significant respects the mother is in a less favourable position than the father. Under articles 8 and 14 of the European Convention on Human Rights, the right to respect for family life is to be enjoyed without discrimination on grounds of sex. The Court of Appeal held, at para 34, that the fact that the mother might experience in Saudi Arabia what would be regarded here as breaches of her Convention rights did not render the English court in breach of those rights if it returned F to Saudi Arabia. In reaching that conclusion the Court relied principally on the decision of the Court of Appeal in *R (Ullah) v Special Adjudicator* [2002] EWCA Civ 1856; [2003] 1 WLR 770: our obligations were only engaged if the likely treatment in another state would engage the prohibition against torture and inhuman or degrading treatment or punishment in article 3 of the Convention. This House has since held that our obligations may be engaged where there is a real risk of particularly flagrant breaches of other articles in the foreign country: see [2004] UKHL 26; [2004] 2 AC 323. This is not a case of such a risk. In relation to article 8, however, a distinction has also been drawn between 'domestic' cases, where a family life established here may be disrupted by a forced return to another country, and 'foreign' cases, where the only breach would take place abroad: see Lord Bingham of Cornhill, at paras 7 - 9. In practice, this adds nothing to the welfare inquiry, once it is accepted that the strength of the child's connection with this country, and the effect upon his parent here, are relevant to whether a summary return will be in his best interests.

43. However, there is another way in which the human rights considerations might have been relevant. Article 20 of the Hague Convention provides that:

> "The return of the child under the provisions of article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

44. This was not included in the provisions incorporated into our law by the 1985 Act because at that time it would have been difficult to say what our fundamental principles relating to the protection of human rights and fundamental freedoms were. Now that we have incorporated

the European Convention on Human Rights, that is no longer a problem. Mr Setright acknowledged that had the Human Rights Act 1998 preceded rather than followed the 1985 Act there would have been no reason not to incorporate article 20.

45. The importance of article 20 is that it asks whether what might happen in the foreign country would be permitted under those fundamental principles were it to happen here. (It thus goes further than the principle under consideration in *Ullah*, which asks whether it is a breach of this country's obligations to send a person away to a country where his human rights may be violated.) In this country, it would not be acceptable to distinguish *automatically* between father and mother in their relationship with their children. Non-discrimination between the sexes is a fundamental principle of our law. Were article 20 of the Hague Convention to be incorporated, we would be entitled, though not obliged, to decline to return a child on that ground alone. If we were, therefore, to be applying the spirit of the Hague Convention in a non-Convention case, there would be no reason not to apply the whole of the Hague Convention, including article 20. Any discrimination in the foreign country which was contrary to article 14 of the Convention on Human Rights would allow, but not require, the court to refuse to return the child. This consideration serves to reinforce the view that the legal system in the foreign country cannot be irrelevant to the issue of summary return.

Conclusion

46. For all those reasons, I would hold that the Court of Appeal was wrong to interfere with the exercise of the trial judge's discretion in this case. But I would also hold that the trial judge was wrong to leave out of account the absence of a jurisdiction in the home country to enable the mother to bring the child back here without the father's consent. The approach adopted by Lord Justice Ward in *Re JA* [1998] 1 FLR 231 is to be preferred to that of Lord Justice Thorpe in *Osman v Elasha* [2000] Fam 62. It was, along with everything else, a factor to be weighed in the balance in deciding whether summary return to Saudi Arabia was in the best interests of this little boy.

47. I would therefore allow the appeal and restore the orders made by the trial judge. It has been suggested that we might remit the case to him on the ground that the evidence before him on Saudi law, although unchallenged by the father at the time because it also accorded with the

father's understanding of the position, may not have given the full picture. Mr Setright very properly acknowledges that he has no basis for inviting this court to admit fresh evidence which both could and should have been adduced before the trial judge. We cannot use the mere suggestion that he might have made different findings about the foreign law as a basis for asking him to make his decision on the application for summary return again. There is, of course, nothing to prevent the father from making another application about the child's future in which such evidence might be adduced. Whether it would be in F's best interests for him to do so is another matter.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

48. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would allow this appeal.