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[25/07/2003; Family Division of the High Court (England and Wales); First Instance]
Re H (Child Abduction: Mother's Asylum) [2003] EWHC 1820, [2003] 2 FLR 1105

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

25 July 2003

Wilson J

Re H (Child Abduction: Mother's Asylum)

COUNSEL: Henry Setright QC and Ian Lewis for the plaintiff father; Michael Horowitz QC and Indira Ramsahoye for the defendant mother.

SOLICITORS: Dawson Cornwell for the plaintiff; Kingsley Napley for the defendant.

WILSON J: Section A: introduction:

[1] These proceedings concern H, a boy who was born on 14 July 1995 and so has just attained the age of 8. He is presently a ward of this court. His father seeks a summary order for his return to the Republic of Pakistan in order that the issues between the father and the mother in relation to his future can be determined by the courts there. The mother vehemently opposes the application.

[2] Each of the parents and H are citizens of Pakistan. They all lived together there until either September or October 2001. Since October 2001 the mother has been resident in London. In December 2001 the father brought H to London on a temporary basis. In January 2002 the mother assumed his sole care contrary to the father's wishes. The father thereupon returned to Pakistan. During the ensuing 18 months H has remained living with the mother in London.

[3] The mother's case is that it would be seriously detrimental to the interests of H to be returned to Pakistan. She says that the father is a man of violent, unstable and ruthless disposition who repeatedly perpetrated acts of violence, as well as of other forms of cruelty, upon her; that in October 2001 she was driven to escape his brutal conduct towards her by coming to London, albeit at the expense, in the short term, of her continued care of H; that, when the father brought him to London in December 2001, she took the opportunity to be reunited with H and to resume his care; and that for the last 18 months she and H have been living, for the first time, in a stable household, namely with her father in London.

[4] Pakistan has not acceded to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Convention) and accordingly the father's application for a summary return cannot be cast under Part I of the Child Abduction and Custody Act 1985. In the course of excellent submissions by leading counsel on each side there has been focus upon the

relationship between the despatch of an application for an order for summary return under Part I of the Child Abduction and Custody Act 1985 and the despatch of the present application. Mr Setright QC contends on behalf of the father that my consideration of H's welfare, being my paramount concern under s 1(1) of the Children Act 1989, is to be informed by study of what he says are the welfare principles which underpin the Convention. Mr Horowitz QC, on the other hand, contends on behalf of the mother that my duty to consider H's welfare requires a wider and indeed bolder enquiry. Outside the tramlines of the Convention there are, according to him, powerful factors indicative of detriment to H in the event of a return to Pakistan, which I should have the courage to recognise and by reference to which to dismiss the application.

[5] In January 2003 the President of the Family Division and the Hon Chief Justice of Pakistan signed a protocol of agreement on behalf of the judicial authorities of our two states. It is set out at p 2528 of the Family Court Practice 2003. Counsel agree that the central provisions of the protocol are not engaged in the present case. Set out in cls 2 and 3, they in effect provide that, if a child with habitual residence in one of the two states is removed to or retained in the other, contrary either to 'the consent of the parent with a custody/residence order' or to an order of the court of the child's habitual residence, the court in the other state will not ordinarily exercise jurisdiction over the child save to direct his return to the state of habitual residence. It appears that the intention behind the provision that the non-consenting parent should have an actual order for custody/residence is to obviate a possibly complex enquiry in each of our two states as to whether that parent had rights of custody, or at least a right to object to the child's removal, according to the law of the other. At all events the father has never had the benefit of a custody/residence order relating to H; nor has there been any relevant order in a court in Pakistan. It follows that those clauses do not in terms apply to this case. Nevertheless I regard it as important for me to bear in mind both the first clause, which I will set out in para [29] below, and the four recitals to the agreement. The recitals express, first, a common desire to protect the children of the two states from the harmful effects of wrongful removal from one to the other or wrongful retention in one as against the other; secondly, a common recognition that our two states share a heritage of law and a commitment to the welfare of children; thirdly, a common aspiration to promote judicial co-operation, enhanced relations and the free flow of information between our respective judiciaries; and fourthly, a common acceptance of the importance of negotiation, mediation and conciliation in the resolution of family disputes. The ninth clause is also worth noting: it provides for each state to nominate a judge of each superior court to work in liaison in order to advance the objects of the protocol. The nominated judge in England and Wales is Thorpe LJ. Without acknowledging any need for them, the father offers undertakings to this court to put into place a raft of temporary protective measures for the mother and H in the event of their return to Pakistan; and he suggests that, were I to have any concern about their efficacy, I might seek to engage the assistance of Thorpe LJ in liaising with the nominated judge in Pakistan with a view to ensuring it.

[6] An unusual and important feature of the case is that the mother has secured a grant of asylum, and accordingly of indefinite leave to reside, in the UK. In 2002 she applied for asylum on the basis that she was a refugee within the meaning of Art 1A(2) of the United Nations Convention Relating to the Status of Refugees 1951, as amended. Omitting irrelevant words, the Article defines a refugee as any person who:

'. . . owing to a well-founded fear of being persecuted for reasons of . . . membership of a particular social group, is outside [her] country of nationality and is unable or, owing to such fear, is unwilling to avail [herself] of the protection of that country . . .'

In her application for asylum the mother presented to the immigration authorities the same history of repeated violence on the father's part towards her and relied upon the alleged inability of women in such a position in Pakistan to secure effective protection in the courts, at any rate while married to the violent perpetrators. She relied on the authority of the House of Lords in R v Immigration Appeal Tribunal and Another ex parte Shah (United Nations High Commissioner

for Refugees Intervening); Islam and Others v Secretary of State for the Home Department (United Nations High Commissioner for Refugees Intervening) [1999] 2 AC 629 for the proposition that, in the light of the evidence adduced in that case to the effect that in Pakistan women were not properly protected by the state against severe physical and emotional abuse at the hands of members of their community, women in Pakistan represented a 'social group' for the purpose of Art 1A(2). The mother did not mount a claim for H to be granted asylum in his own right; instead she appended him as her dependant to her own application. It follows that one arm of the UK authorities, namely the immigration authority, has recognised that the mother is unable or unwilling to avail herself of the protection of the Republic of Pakistan owing to a well-founded fear of persecution there because she is a woman. What effect does that recognition of the mother's likely position in Pakistan have upon the despatch of this application? In this regard I will have to address the analogous, but not identical, situation which arose in Re S (Child Abduction: Asylum Appeal) [2002] EWCA Civ 843, [2002] 1 WLR 2548, [2002] 2 FLR 465. I can say at this stage that I have no doubt that, were I to order H to return to Pakistan, it would be in his interests for the mother to accompany him. To her credit, the mother in this case is not declaring that, in the event of an order, she would definitely not accompany him. She might have tried to use the grant of asylum to cloak a refusal to go back with him; but, so it appears to me at this initial stage, she is too committed a mother to take that line. At this stage she leaves that decision until, if at all, she is confronted with it.

[7] How, then, is the mother's refugee status to figure in the legal analysis of this application? Article 33(1) of the United Nations Convention Relating to the Status of Refugees 1951 provides:

'No contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

It is agreed that for practical purposes the articles of the United Nations Convention Relating to the Status of Refugees 1951 have been incorporated into our law. Lord Keith of Kinkel said so in R v Secretary of State for the Home Department ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees intervening) [1988] AC 958 at 990H; and in R v Uxbridge Magistrates' Court ex parte Adimi; R v Secretary of State for the Home Department ex parte Sorani; R v Crown Prosecution Service ex parte Sorani; R v Secretary of State for the Home Department and Another ex parte Kaziu [2001] QB 667 at 686D Simon Brown LJ explained its presence as part of our law in terms of the developing doctrine of legitimate expectation. Mr Horowitz does not go so far as to say that, in the light of Art 33(1), I cannot make the order sought by the father. He concedes that, strictly speaking, I would not thereby be expelling or returning the mother to Pakistan. But he asks me to conduct my overarching enquiry into H's welfare realistically and to have at the forefront of my mind that, for practical purposes, an order would be tantamount to enforcing the mother's return contrary to rights which flow from a refugee status lawfully established by her.

Section B: the facts, whether agreed or disputed

[8] The mother is aged 34. She was born and brought up in Pakistan. Her father, now aged 76 and in poor health, came to live in England in 1988 and has acquired UK citizenship. Her mother lives in Islamabad. The mother is one of seven sisters: one sister lives in London and her other five sisters live in Islamabad.

[9] The mother is an intelligent and educated woman. She acquired a law degree at the University of Punjab and, although she never practised law, she was enrolled as an advocate by the Punjab Bar Council. During the latter part of the marriage she worked in a legal capacity for a public company in Islamabad. Recently, following the grant of asylum, she has begun work in London.

[10] The father is 33 years old and was born and brought up in Pakistan. His parents live in Rawalpindi, which is little more than one hour's drive from Islamabad; and for a significant part of the marriage the parties resided with them. The father has a brother who is a prominent advocate of the Supreme Court in practice in Rawalpindi and who has represented the father in a number of pieces of litigation in Pakistan. The father is qualified as a general medical practitioner but seems during the marriage primarily to have worked as a deputy manager in the claims department of an insurance company in Rawalpindi, in charge in particular of the appraisal of the medical aspects of claims.

[11] The parties were married in August 1994. The mother alleges, but the father disputes, that the marriage was arranged between their parents. Soon after the marriage they obtained their own accommodation and the mother became pregnant with H.

[12] The mother alleges that the father's violence began in March 1995, namely in the middle of her pregnancy. She says that during the next 6 years his violence towards her occurred at least every few weeks and involved hitting her, slapping her, punching her, pulling her hair and bending her wrists back. She also alleges that he threatened her with knives and guns. She alleges that many of these assaults took place in the presence of H. It is inappropriate to go into further details of these allegations for they are totally denied by the father; and, save in respect of a few selected areas of the history, Mr Horowitz does not suggest that I am able to resolve the stark factual issues in relation to them.

[13] In March 2001, learning that her father in London was seriously ill, the mother decided to visit him. She alleges that the father refused to allow her to take H with her: he denies that she ever canvassed taking H with her. At all events the mother came to England in March 2001 and left H in the home of the paternal grandparents in Rawalpindi, with whom the family was then residing. The mother alleges, and the father denies, that while she was in London, he told her by telephone that H was ill and that, if she ever wished to see him again, she should return to Pakistan immediately. At all events, after a week, she returned to Pakistan and resumed family life.

[14] It seem that during the marriage the parties seriously entertained the possibility of the family's movement to live in England. At some stage, for example, the father wrote to the General Medical Council in order to enquire what extra qualifications, if any, he would need in order to practise medicine in the UK. Also, shortly after the mother's return to Pakistan, she and the father attended the British High Commission in Islamabad in order to explore the grant of visas in order that the family might come to the UK.

[15] It seems that by the summer of 2001 the mother had resolved to bring the marriage to an end. She applied for, and obtained, a visitor's visa to enter the UK. She alleges, and the father denies, that, when he discovered the visa stamped upon it, he confiscated her passport and that later she discovered where he had hidden it and recovered it.

[16] It is common ground that it was on 18 October 2001 that the mother finally came to England and began to live with her father in London. But there is a perplexing issue as to the family's circumstances for the preceding 6 weeks. The mother's account is that by 4 September 2001 she had become in effect a prisoner in the home of the father's parents and that she then managed to escape, even at the expense of separation from H; that she spent the next 3 days hiding in the home of a friend; that she spent the weeks between 7 September and 13 October at a shelter organised for her by a charity, namely the Ansar Burney Welfare Trust, directed by Mr Burney from Karachi; that an officer of the trust arranged her flight for England; that she funded it; and that ultimately, on 18 October, she fled from Pakistan.

[17] The father's account is starkly different. He alleges that he and the mother remained living together until her travel to England on 18 October; that, in the weeks until 18 October, they and H lived together at a specified address in Islamabad (being an address which, as the mother

retorts, they used only for postal purposes and at which they never resided at all); that it was he who purchased the mother's ticket for travel to England; and that their mutual plan was that he and H should join her in England for a period in the event that he was to secure substantial leave of absence from his work. As it transpired, the father's employers were later to reject his request for substantial leave of absence, whereupon, represented by his brother, he sued them for an allegedly unlawful refusal of leave.

[18] Little is known of the arrangements for the care of H between either September or October 2001 (whichever be the true version of events) and December 2001. Presumably he was looked after by the father with substantial assistance from the paternal grandparents. The mother asserts that he did not attend school that term; that assertion has not been addressed by the father.

[19] In December 2001 there was a telephone conversation between the parties. The mother's account is that the father said that he wanted to come with H to England with a view to persuading her, and her father, that she should return to live with him in Pakistan; but that, were she to refuse to do so, he would leave H in her care in England. Having studied the father's affidavit in reply with care, I see no clear refutation of the allegation that he then indicated that, absent reconciliation, he would be content for H to live in England with the mother. It must be said, however, that, insofar as the father said on the telephone that in the absence of a reconciliation he would countenance H's life with the mother in England, such was not a stance which thereafter he ever again adopted.

[20] On 28 December 2001 the father and H arrived in England. They went to live with the mother and the maternal grandfather in London. The mother alleges, and the father denies, that H appeared thin and drawn and, on arrival at the airport, even lacked shoes and socks. The parties and H remained living together at the home of the grandfather only for one week. Then they moved to a hotel. It is the mother's case that, soon after his arrival, the father had become increasingly abusive and aggressive, particularly in the light of her refusal to entertain reconciliation, and that it had been too stressful a situation to continue to impose upon the grandfather. The family remained living in the hotel for only 2 days. The mother alleges, and the father denies, that he was violent towards her there. What is agreed is that the mother took H from the hotel to return to live at the home of the grandfather. It is incontrovertible that on 8 January 2002 the mother complained to the police of threats by the father to kill her and the grandfather and that on 10 January the father was interviewed by a police officer at Paddington Green and was given a formal warning about his future conduct. The father protests that the warning was wholly unwarranted. In the following months he was to make a formal complaint about the conduct of the officer. At all events, on 13 January, the father left England and returned to Pakistan. The mother's long period of sole care of H thus began early in January 2002.

[21] On 31 January 2002, assisted by his brother, the father set in motion a divorce in Pakistan. He appears to have pronounced talaq three times and then executed a 'divorce deed', which he presented to the chairman of the Municipal Corporation in accordance with the well-known Ordinance of 1961. It is important to note that, within the deed, the father specifically demanded the immediate return of H to Pakistan. Not long after service of the deed upon her, the mother consulted solicitors in London in relation to the claim for asylum, which was lodged by them on her behalf on 15 April 2002. The 3 months of iddat expired on 2 May 2002 but no 'divorce effectiveness certificate' was ever issued. It appears, albeit from a slightly later document, that the father had prevented the divorce from being thus certified by representing to the authorities that he and the mother had agreed to reconcile. The mother wholly denies any such agreement and alleges that the father's obstruction of the divorce was unilateral.

[22] On 30 July 2002 a UK immigration officer interviewed the mother about her application for asylum; and on 2 September it was upheld and the consequential grant to her of indefinite leave to remain in the UK was extended to H. Meanwhile, on 3 August, the father had consulted

English solicitors. On 16 September, shortly after public funding was granted to him in respect of it, the originating summons in the present proceedings was issued. I have been most concerned to discover a delay of 10 months in the despatch of an application for a summary order. The substantial hearing was fixed to take place first in January and then in May 2003. The first date was adjourned because, in the meantime, the mother had, by letter to the Legal Services Commission, represented that the father's means did not entitle him to public funding. In due course the commission rejected that representation. The second hearing was adjourned, I am sorry to say, for lack of a judge available to hear it. There is no doubt that the father has not been responsible for the serious delay since September 2002. Mr Setright argues that, in making an unjustified complaint to the commission, the mother was responsible for part of it: I feel unable to conclude that she had no ground to make that representation. At all events Mr Setright contends that it would be 'unfair' to the father to take account at any rate of this second period of delay, namely from September 2002 onwards, even if some account falls to be taken of his apparent delay, particularly in the light of his ostensible access to top quality legal advice in Pakistan, in respect of the first period, namely from January until September 2002. But, brutal though it may sound, I do not accept that fairness, whether to the father or to the mother, comes directly into the equation: my eye must be kept, from first to last, upon H's welfare; and I cannot ignore the fact that it is not just for the 8 months until September 2002, but rather for the 18 months until today, that H has been living in apparently settled circumstances, attending school and winning plaudits there for his efforts in class and for his success in integrating with his peers.

[23] I was taken aback to hear Mr Setright say, in his preliminary remarks, that, although of course the mother was present in court, the father was not present because he had no permission to enter the UK. Although it had never been suggested that oral evidence should be given at this hearing, I would have wanted Mr Setright to be in a position to take instructions from his client as easily as could Mr Horowitz. Not even Mr Setright, on instructions, was able to clarify the history of the father's past entitlement to enter the UK. At one point he told me that in October 2001 his client had been granted a visa valid for 2 years. Whether, after January 2002, that visa was revoked or whether it was an authority to enter which, once used, needed for some reason to be re-activated by a prior entry clearance never subsequently given, is unclear. At all events it is a profoundly unsatisfactory feature of the case that, whatever may be the ultimate decision as to with whom and in which country he should live, H has not had contact with the father, even in England, for 18 months. I enquired of Mr Setright whether, at any of the several interlocutory hearings, the advocates for the father had pressed the court to order interim contact and to articulate requests designed to help the father to secure readmission to the UK for that purpose; his answer was negative.

Section C: findings in relation to disputed facts

[24] I sense, if I may be frank, almost a political dimension to this case. Whether there should be such a dimension is another matter. The mother's case, set out in affidavit drawn (I expect) before Mr Horowitz had the opportunity to winnow it, is in terms that the courts in Pakistan favour fathers; discriminate against mothers; fail to protect women against abuse by men; and, in the case of a party whose brother is a prominent lawyer, may be unable to act impartially. These assaults upon the law and practice relating to the protection of women and upon the resolution of issues in relation to children in Pakistan, Mr Horowitz unequivocally disowns. He puts the point in a much more limited way; namely that, in the circumstances of a father allegedly so violent, so ruthless and so well-connected, an otherwise satisfactory legal system will fail to serve the welfare of the child in the middle of the dispute. To this end it is important for Mr Horowitz to persuade me to accept some of what the mother has said about the father's conduct, even though it is strongly in issue. In those circumstances, with the assistance of counsel, I have studied the guidance given to judges about making findings in summary proceedings of this type, without oral evidence, upon disputed issues of fact. In Re H (Abduction: Grave Risk) [2003] EWCA Civ 355, [2003] 2 FLR 141, the Court of Appeal reversed

the decision of the trial judge to refuse, pursuant to Art 13(b) of the Convention, to direct the return of the children to Belgium. It seems that there were assertions of fact in the affidavits filed on behalf of the plaintiff father which seemed to the trial judge to be so improbable, indeed perhaps so preposterous, as to entitle him, even in the absence of oral evidence, to make certain findings in favour of the defendant mother. In reversing his decision the President of the Division, Dame Elizabeth Butler-Sloss, who gave the only substantive judgment in the Court of Appeal, said at para [32]:

'The assessment of the judge may be true but, in my judgment, he was not entitled to make those findings on contested and untested allegations.'

[25] I am convinced that those strong words ('not entitled') are specific to the facts of the case and that the substantial guidance to trial judges is to be collected from an earlier decision of the President, then Butler-Sloss LJ, in Re F (A Minor) (Child Abduction) [1992] 1 FLR 548 at 553G-554A:

'If a judge is faced with irreconcilable affidavit evidence and no oral evidence is available or, as in this case, there was no application to call it, how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision, thus not requiring a determination. If the issue has to be faced on disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it.'

[26] Mr Horowitz suggests that in effect there are five areas of factual dispute in which compelling extraneous evidence or inherent improbability should lead me to the confident conclusion that the mother's account is to be preferred. His first example is a conflict relating to an incident in February 2001 in which the mother received a nasty cut to her chest. Her account of the circumstances in which she sustained it is consistent with her account of serious violence on the father's part towards her virtually throughout the marriage; at first sight the father's contrary account is, as I consider, unconvincing. But, as I will explain, Mr Setright proposes that, if the mother were to elect to return to Pakistan in the wake of any order for the return of H, she should return as a divorced woman and contends that, whatever the level, if any, of past matrimonial violence, she would in future enjoy effective protection in the courts of Pakistan. I am not persuaded that identification of the true circumstances of the incident in February 2001 is crucial to my decision. My verdict is the same in relation to three of Mr Horowitz's other invitations to me to resolve disputed facts. But, after careful thought, I do feel that I not only can but should reach a conclusion in relation to the other of his identified factual issues. It relates to the part of the history which, in its alternative versions, I described in paras [16] and [17] above. Between 7 September and 13 October 2001 where was the mother living and who organised her subsequent flight to England? Mr Burney, the chairman of the Ansar Burney Welfare Trust, has deposed to the fact that, according to the records of, and information given by, his officers in Islamabad, the mother was accommodated in a shelter organised by them between 7 September and 13 October and that it was they who arranged for her to travel to England thereafter. His apparently independent and authoritative evidence drives me to conclude, on the balance of probabilities, that the mother's account relating to the weeks prior to her departure for England is true and that the father's account is correspondingly false.

Section D: the law

[27] The despatch of this application is governed by s 1(1) of the Children Act 1989 which provides that, when a court determines any question with respect to the upbringing of a child, his welfare shall be its paramount consideration.

[28] This section of my judgment, however, cannot end at that point. I need to look at recent analyses of a child's welfare articulated in this type of case by the Court of Appeal. Propositions emanating from any quarter as to the factors which affect a child's welfare in this -- or any other -- context deserve a judge's consideration. But, if they emanate from the Court of Appeal, they deserve respect and loyal application, without which his judgment will be flawed. The problem arises when the guidance from the Court of Appeal appears either to elevate a factor to a status where, instead of informing the survey of a child's welfare, it erodes it or to introduce a factor not obviously related to the child's welfare at all. At that stage the trial judge, bound by s 1(1), finds himself in an awkward position. In other areas of family law the Court of Appeal has recognised the need not to encroach upon s 1(1) by, in particular, the articulation of 'presumptions'. In the area of contact, namely in Re L (A Child) (Contact: Domestic Violence); Re V (A Child) (Contact: Domestic Violence); Re M (A Child) (Contact: Domestic Violence); Re H (Children) (Contact: Domestic Violence) [2001] 2 WLR 339, sub nom Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) [2000] 2 FLR 334 at 370 and 364F respectively Thorpe LJ said:

'There is a danger that the identification of a presumption will inhibit or distort the rigorous search for the welfare solution.'

And in the area of a residential parent's relocation abroad, namely in Payne v Payne [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052 at para [25], he acknowledged that previous reference to a 'presumption' in favour of the endorsement of that parent's reasonable proposals had been misplaced.

[29]

'In normal circumstances the welfare of the child is best determined by the courts of the country of the child's habitual/ordinary residence.'

As it happens, this formulation of the proposition is set out in cl 1 of the protocol of January 2003 which, although not directly engaged, is of particular interest because of its date and the identity of its signatories. Mr Horowitz does not -- cannot -- dispute that the proposition is placed by the law as a central consideration in any analysis of a child's welfare in this type of case. It came to prominence there in the classic judgment of Buckley LJ in Re L (Minors) (Wardship: Jurisdiction) [1974] 1 WLR 250 at 264F-265A and has been repeated and refined in dozens of decisions of the Court of Appeal in the following three decades. But it is no more than a factor which must always be placed in the scales of welfare: if it outweighs other factors, it follows a conclusion at the end of the enquiry that the countervailing circumstances relevant to welfare are (as they normally are) less strong; it does not create a presumption at its inception which drives an enquiry into whether the circumstances are abnormal. The difference is subtle but, I believe, rather more than jesuitical and is indeed, in the light of s 1(1), not unimportant.

[30] What is the basis for the proposition that in normal circumstances it better serves the welfare of a child for his future to be determined by the courts of the state of his habitual residence? Unless the question is squarely answered, the proposition is an empty mantra. The primary answer, so it seems to me, is that the optimum programme for a child's future will substantially be identified by reference to past events; to the personality, abilities and needs of the child, and of those around the child, whether parents, siblings or others, and to the relationships between them, as illumined by past events; and to the physical, emotional, social and cultural milieu in which the family lived; and that all these matters, including in particular any resolution of factual disputes relating to past events, are more satisfactorily addressed in the courts of that state.

[31] A second answer, adverted to by Charles J in Re Z (Abduction: Non-Convention Country) [1999] 1 FLR 1270 at 1285D-E, is that it is preferable for a child that his future should be determined in the absence of unilateral relocation achieved by one parent. Charles J described it

as 'in some ways . . . an intangible benefit' but considered it to be an advantage for the child in later life to know that his future had not been determined in such a context. I wonder whether the benefit becomes slightly less intangible by mounting an argument that the decision upon his long-term future is more likely to be in his interests if it has not been distorted by the attempted -- and unreversed -- imposition by one parent of a fait accompli.

[32] My personal view is, however, that there is a third answer which buttresses the validity of the proposition or, to be specific, of a slightly wider proposition. It relates not to the preferable exercise of jurisdiction in one particular state rather than in another but to the general advantage to the child that, where two states might exercise jurisdiction over a child, one of them should, as early as possible, cede jurisdiction to the other. In my experience the advantage to the child of early, definitive recognition by one state that the other state should make the substantive decisions and that the former state will in principle enforce them can hardly be over-stressed. An even rule of law across both jurisdictions is thereby achieved for him; and in particular he can travel between his families in the two states without the risk that each state will use his arrival in order to impose contrary arrangements upon him.

[33] What is the degree of correlation in the court's approach to applications for a summary order for a child's return abroad under the Convention and in a non-Convention case such as the present? In general terms the answer is found in Re P (Child Abduction: Non-Convention Country) [1997] Fam 45, sub nom Re P (Abduction: Non-Convention Country) [1997] 1 FLR 780, in which the Court of Appeal overturned a decision to make a summary order in a non-Convention case which had been based upon a literal application of the Convention's principles. At 56 and 789D-E respectively Ward LJ said:

'In my judgment the judge, in approaching the case in the way in which he did, expressly excluded an overall consideration of welfare when he was required to consider it. He literally applied Art 13 when what was required was to look at the spirit of the Convention in the context of welfare overall. To elevate Art 13 into the test which governs return (or rather no return) is to fly in the face of the established authority because . . . one does not proceed upon a basis that it is necessary to establish that the child would be in some obvious moral or physical danger if returned. That is not the criterion: welfare, wide-ranging a concept as it is, is the only criterion.'

[34] But can one discern any more precisely the extent of the difference between the two enquiries? Much may turn on it because Mr Horowitz concedes that, had Pakistan acceded to the Convention, his defence to an application thereunder would have been 'difficult'. Mr Setright prefers the word 'impossible'.

[35] Mr Setright argues that the jurisdiction under the Convention is welfare-based. To the extent that it is based on the proposition that in normal circumstances the welfare of a child is best served by the determination of his future in the courts of the state of his habitual residence, Mr Setright is correct; and to that extent the two enquiries overlap. To the extent, however, that an admirable, yet wider, policy underpins the Convention, namely that its existence will act as a deterrent against the wrongful abduction of children generally, then in my view a dichotomy between the two enquiries begins to emerge. For, whereas in the non-Convention case the focus is on the welfare of an individual child, the wider policy behind the Convention serves the interests of children generally even if, as I believe, such occasionally conflicts with service of the welfare of an individual child. I ventured an analogous observation in Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433 at 442B-C.

[36] Mr Setright proceeds to stress the existence in the Convention of Art 13(b), which he describes as 'the welfare defence': in the event that the defendant establishes a 'grave risk' that a return would expose the child to 'physical or psychological harm' or otherwise place him in an 'intolerable situation', the article confers a discretion upon the court, albeit exercisable in the light of the objects of the Convention, whether to order his return. Mr Horowitz responds that it is almost impossible to mount a successful defence under Art 13(b) in our courts. He refers to the

terminology of the Article, which is on any view very restrictive, and to its interpretation here under the direction of the Court of Appeal. Tempting though it may be for a court in an individual case, interpretation cannot be allowed substantially to relax restrictive terminology. One of the most striking developments in the interpretation of Art 13(b) is, however, to be collected from the judgment of Thorpe LJ in Re C (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478 at 488B:

'In my opinion Art 13(b) is given its proper construction if ordinarily confined to meet the case where the mother's motivation for flight is to remove the child from a family situation that is damaging the child's development.'

I accept that, in any event but particularly insofar as the focus of Art 13(b) has now been turned upon past adult motivation rather than directly upon the child's likely future situation, an enquiry under the Convention lies several leagues away from any general enquiry into welfare.

[37] No general difficulties -- only a judge's private pangs of concern for a few individual children -- arise from the intrusion of wider policy into the despatch of Convention cases. The difficulties arise from any such intrusion into the despatch of non-Convention cases because of the potential for conflict with s 1(1) of the Children Act 1989. A good example of the difficulty, and of the court's attempt to resolve it, is Re E (Abduction: Non-Convention Country) [1999] 2 FLR 642 in which the Court of Appeal dismissed a mother's appeal against a summary order that three children, aged 10, 8 and 6, whom she had brought to England from the Sudan, should be returned there. The Sudan has not acceded to the Convention and the evidence was that, in the light of her remarriage, the mother was disqualified under Sudanese law from being allowed to care for them. Was it in the interests of the children to be returned to a state in which, whatever the mother's qualities, they had no chance of being allowed to live with her? Both counsel agree that the court's affirmative answer was harsh, albeit (adds Mr Setright) correctly so. At 647B-D Thorpe LJ said:

'The welfare principle as paramount has been the cornerstone of the family justice system in this jurisdiction for many years . . . But what constitutes the welfare of the child must be subject to the cultural background and expectations of the jurisdiction striving to achieve it. It does not seem to me possible to regard it as an absolute standard. It would be quite unrealistic to suppose that the concept of child welfare is equally understood and applied throughout the 57 Member States [of the Convention]. 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.'

No one could cavil at the suggestion in that interesting passage that the welfare of a Sudanese child will take its colour from his cultural background. But that suggestion is based upon our concept of his welfare. Thorpe LJ then, however, seems to imply that our concept of his welfare can, for the purpose of s 1(1), be surrendered in favour of another concept of his welfare prevalent in the other state. He ends the passage with an express reference to 'policy', indeed (if I may be permitted to say so) a very important policy that, particularly in the case of a non-Convention state, it is desirable to build such bilateral understanding between its judiciary and ours as will in the future lead to the swift return of all children who may be wrongly removed thither from England and Wales as well as vice versa.

[38] But the intrusion of policy into this area became even clearer in Re E-B (Children) [2002] EWCA Civ 1985 (unreported) 17 December 2002. The decision of the Court of Appeal -- on notice -- was to refuse permission to appeal against an order for the return to the Lebanon (a non-Convention state) of two small children brought to England by the mother. Her counsel had sought permission on the basis that arguably the trial judge had lost sight of his duty to serve their welfare. At para [6] Thorpe LJ said:

'. . . the approach of this court in the 21st century has to reflect important efforts that have been made internationally to bridge the gap between the Judaeo-Christian block, who sign up to the Convention, and the Islamic states, who do not. It is the policy of this court to build bridges . . . The sort of submissions that [counsel for the mother] has sought to advance are contrary to what is modern policy. I think that this is an absolutely hopeless application . . .'

[39] The clash between the welfare of the individual child and important policy relating generally to children could not have been more brightly illumined than in that significant, if ex tempore, judgment. But, in my slightly invidious position as a trial judge, I consider, with respect, that I would be wise to concentrate only on H's welfare and thus on considerations of policy only to the extent that they are informed by factors which impinge upon his welfare.

[40] I turn to the effect of the grant to the mother of refugee status. A general consideration of the point, untrammelled by authority, could give rise to opposite conclusions. It might well seem inconsistent that, on the one hand, the UK should allow the mother to reside here because of her well-founded fear of persecution in Pakistan and that, on the other, its courts should make an order which, by reason of her commitment to H, might well drive her to return there. Against that, however, one must not forget that the grant of refugee status was based only on the mother's written presentation of the allegations against the father, linked to published material about lack of state protection in Pakistan, followed by one interview between her and an immigration officer. The process gave no opportunity to the father either to dispute the allegations against him or to question the mother about them. Its unilateral nature is, submits Mr Setright, unexceptionable, provided that the mother's resulting status is not to precipitate decisions adverse to the interests of others than herself (ie H and the father) and to the rights of those others including under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. There is no doubt that the mother's refugee status would not preclude her from returning voluntarily to Pakistan with H in the event that she viewed their return as in his interest. Such is not her view but, were it nevertheless to be the court's view, should she be in any stronger position to resist its order than any other parent? Mr Setright also points out that many defendants in proceedings of this type are UK citizens who, indeed with rights wider than those of refugees, cannot be ordered to leave the UK at all but that their protection from deportation does not inhibit the making of an order for the return of a child which may place great pressure on them to do so.

[41] In Re S (Child Abduction: Asylum Appeal) [2002] EWCA Civ 843, [2002] 2 FLR 465 a mother unsuccessfully appealed against a summary order for the return to India, being another non-Convention country, of two small boys whom she had wrongfully retained in England at the end of a holiday. The Secretary of State had refused her application for asylum but had granted her and the boys exceptional leave to remain in the UK for 4 years; and, at the time of the court hearings, her appeal to an adjudicator against the refusal of asylum remained outstanding. The trial judge had found (Re S (Child Abduction: Asylum Appeal) [2002] EWHC 816 (Fam), [2002] 2 FLR 437 at para [119]) that her claim for asylum and her institution of the appeal each strongly suggested a design to defeat the prompt return of the children to India. One might instinctively consider, prior to reference to specific provisions, that the argument of a defendant who was only in the course of appealing against a refusal of refugee status would be less strong than that of a defendant who has already secured it. If so, one's instincts may, I suspect, lead one astray. The truth is that the mother in Re S might in theory have qualified as a refugee and that the procedures in place for recognition thereof for the purposes of UK law had not been exhausted. It is, I consider, wrong in principle to distinguish between a person who may be a refugee and may still be able to establish it and one who has already established it.

[42] At all events the Court of Appeal in Re S (Child Abduction: Asylum Appeal) dismissed the appeal primarily on a narrow basis referable to the provisions of the Immigration and Asylum Act 1999 and the Statement of Changes in Immigration Rules (HC 395) which protect applicants for asylum and their dependants from removal pending adjudication of the claim. Laws LJ, who

gave the leading judgment, declined fully to address the interface between the essential protection against return afforded to those ultimately recognised as refugees by Art 33(1) of the United Nations Convention Relating to the Status of Refugees 1951, set out in para [7] above, and the powers of the Family Division under the Convention or in wardship. At para [25] he said:

'There is potentially a separate question which . . . is not in my judgment before us . . . That separate question is: how far the family court, acting under the Hague Convention or the wardship jurisdiction, is obliged to take account or comply with Art 33 seen as a freestanding instrument. That question raises issues as to the scope and the context of the incorporation of the 1951 Convention into our municipal law which are not without some sophistication. We are not required, and for my part I would not choose, to express anything like a concluded view on such issues. I would go only so far as this. Having regard to the rule as to the paramountcy of the child's interests arising under s 1 of the Children Act 1989, I would respectfully suppose that a family judge would at the least pay very careful attention to any credible suggestion that a child might be persecuted if he were returned to his country of origin or habitual residence before making any order that such a return should be effected.'

[43] In the present proceedings concessions -- in my view, realistic -- on each side have obviated the need for me to wrestle with the sophisticated issues to which Laws LJ referred. Mr Horowitz argues only that substantial weight should be placed upon the grant of asylum to the mother; and Mr Setright argues only that little weight should be placed on it. Neither takes the extreme position that the grant is conclusive or irrelevant respectively. In the event I propose to pay significant regard to the decision of the Secretary of State that the mother has a well-founded fear of persecution in Pakistan; for I take the view that it would be unrealistic for me to divorce the mother's situation in Pakistan from that of H. Nevertheless more relevant than the grant of asylum to the mother is the material presented by her which underlies it: I must look independently at it; note both that it is largely disputed and that I cannot resolve the dispute; and consider the probable efficacy of the raft of protection which is now volunteered.

Section E: discussion

[44] In the absence of parental agreement in respect of them, are the future arrangements for H more likely to be in his interest if made in the courts of Pakistan or of England and Wales? In the light of H's habitual residence, which, in the absence of the father's clear consent to a change, I find even now to remain in Pakistan, there are strong arguments for choosing Pakistan: see paras [30]-[32] above.

[45] But there are arguments which run the other way.

[46] First, as already discussed, is the fact that the mother enjoys asylum in the UK, namely the right not herself to be deported to Pakistan.

[47] Second is the fact that, by virtue of whatever combination of circumstances, H has now lived in London for 18 months and has settled into a routine which it would to some extent be damaging to disturb. For example, there is a glowing report dated April 2003 about his progress in primary school in London. An order for his return to Pakistan would prove particularly disruptive in the short term if, as might indeed turn out to be the case, my judicial colleague there were ultimately to permit his removal with the mother back to England. Mr Horowitz has sought, albeit faintly, to suggest that since January 2002 the father has 'acquiesced' in H's residence in England. To my mind, however, the notion of 'acquiescence', as a term of art, is a red herring, which it would be wrong to import from Art 13(a) of the Convention into what Mr Horowitz himself rightly argues is the different enquiry in a non-Convention case. For the record, however, I find that the mother has not established that the father has thus 'acquiesced', whether as interpreted for the purposes of Art 13(a) in Re H (Abduction: Acquiescence) [1998]

AC 72, [1997] 1 FLR 872 or otherwise. H's life in England for that length of time, particularly at his young age, nevertheless remains very relevant.

[48] Third is the alleged likely failure of the authorities in Pakistan to protect this mother from this father. Here Mr Horowitz seeks on any view to tread a narrow line. But is it a tightrope from which, despite his agility, even he must fall? He concedes that he cannot criticise the substantive or procedural laws in Pakistan referable either to issues between parents relating to children or to the protection of women from violence. His argument is that, at least in relation to the protection of women, it is outside the court door that the system in Pakistan breaks down. His expert, Ms Malik, gives a literal illustration, namely the recent murder of a woman by her husband in the precincts of the High Court in Lahore following a decision in her favour. More widely Ms Malik says:

'One major problem is the police. Reputed to be corrupt and inefficient, they are most unreliable and do not offer effective protection. It would be very difficult to get any co-operation or immediate protection in a case of domestic violence from the police as it is generally viewed as a domestic issue which should be resolved by the families.'

Mr Horowitz also relies on a report by Amnesty International dated April 2002 entitled 'Pakistan: Insufficient Protection of Women' and the up-to-date report of the Country Information and Policy Unit (CIPU) of the UK Home Office on Pakistan, the gist of both of which is that fine aspirations by that Government to improve protection for women are proving hard to translate into improvements on the ground in that the culture of tolerating ill-treatment of women runs so deep.

[49] The argument of Mr Horowitz is that, if the court marries the general evidence of police apathy with two factors specific to this case, namely the level of violence in the father's personality and the absence in Pakistan of any male protector for the mother, such as a father or a brother, it is confronted with a picture of real danger for this mother in Pakistan which more than justifies her refugee status and contraindicates the benefit to H of any return there.

[50] Mr Setright's response to the argument is, I think, five-fold: first that, however much Mr Horowitz claims to disown criticism of the legal system in Pakistan, he is criticising part of it, namely its enforcement procedures, and that such is an avenue down which it is inappropriate for this court to proceed; secondly, that the argument is predicated upon a conclusion about the father's violence towards the mother at which it is impossible for this court, at this stage, to arrive; thirdly, that, insofar as the general evidence establishes any culture in Pakistan of control by a husband of a wife, with any concomitant opportunity for abuse, it is irrelevant to a situation where, as the father proposes, he and the mother should be divorced prior to any return of H with her; fourthly, that the mother is an educated member of the middle class, indeed trained as a lawyer, who is well able to assert her rights to effective protection; and fifthly, that the father offers a set of undertakings to this court, also to be carried into the courts of Pakistan, the effect of which this court would have no basis to disparage. The principal undertakings offered by the father are:

(a) to divorce the mother, and provide evidence thereof, prior to her return to Pakistan with H;

(b) to institute proceedings in Pakistan under which he and, by cross-application, the mother would seek orders relating to the residence of, and to other arrangements for, H;

(c) to invite that court forthwith to accept these undertakings as equivalent to its own orders;

(d) not to assault, molest or harass the mother;

(e) to allow the mother to care for H unless and until the court in Pakistan should, on notice, direct otherwise;

(f) to provide financial support for them (including the cost of renting accommodation) until that court should, on notice, permit otherwise; and

(g) not to seek the disclosure of their address in Pakistan until that court should, on notice, direct it.

[51] After anxious thought I have concluded that, taken cumulatively, Mr Setright's response draws much of the impact from Mr Horowitz's portrait of so real a likelihood of substantial, unchecked ill-treatment of the mother in Pakistan as would infect the welfare of H. After balancing what remains of that argument, coupled with the mother's status as a refugee and the substantial period now spent by H in England, against the advantages to him that his future be directed by the courts of his own state, my conclusion is to order his return to Pakistan upon the basis of the undertakings summarised above.

Section F: postscript

[52] A scheme for mediation of a dispute which arises from one parent's unilateral removal or retention of a child to or in a state other than that of the family's habitual residence might seem ambitious: for mutual parental trust will probably be non-existent. But it is becoming clear that mediation does have a role in a significant minority even of these cases; and it seems to me that the present is one in which, even after my decision in favour of a return to Pakistan for the determination there of all the difficult issues, parental mediation might be valuable to H. On 12 November 2003 Reunite will publicly launch a pilot scheme for mediation in international abduction cases; and Singer J and I happen currently to represent its judicial arm. The pilot will involve the Family Division's automatic consideration of the possibility of mediation, arranged by Reunite, in respect of children brought to England and Wales only from Ireland, Germany and Sweden. But, outside the limits of the court's automatic consideration, Reunite offers its services to parents of all children abducted by one of them to England and Wales. I invite each counsel to take instructions as to whether, were the father to secure the right to enter the UK, each parent would be prepared, even at this stage, to engage in an attempt at mediation by Reunite, prior to H's return to Pakistan, of the long-term issues referable to him which still await determination.
