

**B v EL-B (ABDUCTION: SHARIA LAW:
WELFARE OF CHILD)**

Family Division

Peter Hughes QC
(sitting as a deputy High Court judge)

10 December 2002

Child abduction – Non-Convention country – Welfare of child – Sharia law

The mother and father of two children, aged 5 and 3, were Lebanese in origin and resident in Lebanon, although both had British nationality and had lived in England. On the breakdown of their relationship, the father issued a petition for judicial divorce and applied for custody of the children. He also obtained an order restraining the mother from taking the children out of Lebanon or leaving the country herself. The mother subsequently left Lebanon and brought the children to England. The father sought an order in wardship proceedings for the return of the children to Lebanon where their future would be decided according to Muslim Sharia law. The mother alleged that she came to England because she feared that she would lose her children and not receive justice in Lebanon. It was argued on behalf of the father, however, that the mother was motivated by a desire to obtain a divorce and financial settlement according to the principles applied in English rather than Lebanese law.

Held – subject to the father confirming on oath that he would not pursue any criminal allegations against the mother, ordering the return of the children to Lebanon – it was well established by cases decided before the ratification of the Hague Convention on the Civil Aspects of International Child Abduction 1980 that the welfare of the child was the paramount consideration in considering an application for return of the child. Subsequent cases did not reveal any departure from that approach. An assessment of the best interests of the child, taking due account of the child's religious, ethnic and cultural background, was the decisive factor in non-Convention cases. The approach of the courts of the competing jurisdiction was an important feature, but was not conclusive (see paras [42], [43], [47], [49]).

Statutory provisions considered

Human Rights Act 1998

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Hague Convention on the Civil Aspects of International Child Abduction 1980, Art 13
Quadri Pasha's Code, Arts 332–434

Cases referred to in judgment

Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951, CA

C (Minors) (Wardship: Jurisdiction), Re [1978] Fam 105, [1977] 3 WLR 561, [1978] 2 All ER 230, CA

E (Abduction: Non-Convention Country), Re [1999] 2 FLR 642, CA

F (A Minor) (Abduction: Custody Rights), Re [1991] Fam 25, sub nom *Re F (A Minor) (Abduction: Jurisdiction)* [1990] 3 WLR 1272, [1991] 1 FLR 1, [1990] 3 All ER 97, CA

Islam and Secretary of State for the Home Department; R (Shah) v Immigration Appeal Tribunal and Another [1999] 2 AC 629, sub nom *R (Shah) v Immigration Appeal Tribunal and Another (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 All ER 545, HL

JA (Child Abduction: Non-Convention Country), Re [1998] 1 FLR 231, CA

L (Minors) (Wardship: Jurisdiction), Re [1974] 1 WLR 250, [1974] 1 All ER 913, CA

M (Abduction: Peremptory Return Order), Re [1996] 1 FLR 478, CA

P (A Minor) (Child Abduction: Non-Convention Country), Re [1997] Fam 45, [1997] 2 WLR 223, sub nom *Re P (Abduction: Non-Convention Country)* [1997] 1 FLR 780, CA

R (Minors) (Wardship: Jurisdiction), Re (1981) 2 FLR 416, CA

S (Minors) (Abduction), Re [1994] 1 FLR 297, CA

James Turner QC for the mother

Philip Cayford QC for the father

PETER HUGHES QC:

Introduction

[1] This case concerns two small children, N, who is 5, and K, who is 3. They came to this country with their mother from Lebanon on 28 July 2002. Their father seeks an order in wardship proceedings for their return to Lebanon to enable their future welfare to be decided there in accordance with Muslim Sharia law. Their mother submits that it would be inimical to their welfare to return the children and that their future ought to be decided here by the English courts.

[2] This is not a Hague Convention case (Hague Convention on the Civil Aspects of International Child Abduction 1980). Mr James Turner QC, who has appeared for the mother, contends that there is an irreconcilable conflict of Court of Appeal authority in non-Convention cases, which has led to a departure from the principle that it is the welfare of the children that should be the paramount consideration. In his submission the case raises important issues, which go well beyond the facts of this individual case, in part relating to the correct approach in non-Convention cases to applications for summary return, and in part to the very different approach of Sharia law to questions concerning the upbringing of children from that adopted in our own jurisdiction. On this aspect, I have been assisted by the expert evidence of Mr Ian Edge to whom I am grateful.

[3] Mr Philip Cayford QC, who has appeared for the father, by contrast submits that the law is consistent and clear, and that this is a case where the children should be returned to Lebanon at once.

[4] The submissions, on both sides, in writing and orally, have been made with skill and persuasion. In deference to them and conscious that my decision may not be the end of the matter, I reserved judgment at the end of the hearing.

Background

[5] The father is 58 years of age. He was born in Lebanon, but in 1978, at the time of the civil war in his homeland, moved to England. He remained here until 1992 and acquired British nationality and a British passport during

that period. The mother is 37 years of age. She was born in Egypt, to Lebanese parents, but at various times during her life has lived in Lebanon, England, France and Switzerland, where she went to university.

[6] Between 1986 and 1992, at a time of strife in their homeland, the mother and her family lived in London and ran a chocolate confectionery business. In 1991, she was granted indefinite leave to remain in the UK, but elected to return to Lebanon the following year with her mother to re-establish the business there.

[7] Whilst she was living in London the mother met the father. They met again in Beirut in 1996, quickly became engaged and were married on 15 April 1996. N was born precisely 1 year later, on 15 April 1997, and K on 10 August 1999. Both children hold dual Lebanese and British nationality and passports. N was born in Lebanon. K was, though, born in London, the family having come to London in anticipation of the birth and spending a total period of 8 months here. The decision to do this appears to have been motivated, at least in part, by a desire to ensure that he should acquire British nationality at birth.

[8] Unlike her husband and children, the mother did not hold a British passport, but was anxious to acquire one. The father made efforts on her behalf in this regard, but without success, and there was suspicion on the mother's behalf that he could have done more to further the application. She, accordingly, took matters into her own hands and, it is not in dispute, did so behind her husband's back. In January 2002 she told him that she was going to stay in the mountains with a friend for a few days, but in fact travelled to London to swear documents in connection with her application. In April she came to Europe, ostensibly on business and to do some shopping, but unbeknownst to her husband, also to complete the process of obtaining British nationality and a British passport.

[9] She returned home to Beirut, and making no secret of it, proudly informed the father of what she had done. He was, and remains, deeply suspicious of how she managed it, and although there are allegations of past marital unhappiness, it appears to have been this event that triggered the final breakdown of their relationship.

[10] Both parties come from affluent Lebanese families. They have enjoyed a high standard of living together with homes in Beirut and in the country, supported by a complement of domestic staff, and the father is an undoubtedly wealthy man. The mother describes him as an important and powerful person, and says that he is someone whom she believes is treated preferentially by the courts in Lebanon, although nothing has been put before me in support of that assertion.

Proceedings in Lebanon

[11] On 11 May 2002 the father issued a petition for judicial divorce, known as *Tafriq*. In addition he applied for custody of the children. Three days later he obtained an order restraining the mother from taking the children out of Lebanon or leaving herself. The order was obtained *ex parte*, but the mother was notified of its terms and instructed Lebanese lawyers to act for her.

[12] The mother saw a sinister purpose in the use by the father of *Tafriq* proceedings rather than *Talak*, seeing it as evidence that he wished to be released from his duties as a husband, but still maintain control over her.

Tafriq is a procedure for termination of marriage under Sharia law by judicial divorce. Mr Edge told me that it is a relatively unusual procedure for a husband to adopt, and tends to be used more by wives but that there are various reasons why it might be preferred. It can be with a view to establishing that the wife was solely to blame for the breakdown of the marriage and thereby limiting his financial obligations, but it can also be with a view to fostering a reconciliation, or in the case of devout Muslims to avoid the stigma which attaches to divorce by Talaq. I do not think that it would be right to attach any sinister ulterior motive to the father's choice of this procedure.

[13] The initiation of proceedings was followed by a series of meetings and discussions between the father and representatives of both his and the mother's families. The purpose was to try and reach agreement on arrangements for the future welfare and financial support of the mother and the children. I understand that such family mediation is customary in Muslim countries, and Mr Edge confirmed in evidence that the emphasis in Tafriq proceedings is on conciliation and mediation. The court will take positive steps to encourage this process, and, if necessary, keep adjourning the proceedings for it to take place.

[14] At an early stage, in a document prepared by her lawyer and handed to the father on 16 May 2002, the mother made it clear that she wanted a divorce and was seeking a commitment by the father to provide her and the children with appropriate accommodation and maintenance.

[15] On 1 July 2002, the mother left home taking the children with her and went to live with her mother. The father responded by applying to the court for an order that she return home and the mother issued her own application for maintenance at a minimum level of 3 million Lebanese pounds per month. The family negotiations continued, and the father says that he believed that he had reached agreement on the terms of the divorce with the mother's cousin and brother-in-law on 25 July 2002.

[16] On the following day, though, he saw the children by prior arrangement at the British Embassy in Beirut. The children were accompanied by their mother. The meeting was not a happy occasion and it was quickly apparent that the parties were far from concluding an agreement.

[17] The mother left Lebanon the next day, bound for England, via Syria and Amsterdam, taking the children with her, arriving here on 28 July 2002. It is noteworthy that in the family negotiations it was not suggested that the mother might wish to live with the children outside Lebanon, and indeed she discloses in her affidavit of 15 November 2002 that she did not tell her own mother what she was doing, telling her that she was taking the children to stay in the north of the country for a time.

The mother's decision to come to England

[18] In fact the mother had been carefully considering the possibility of coming to England for some time.

[19] By no later than mid-June, she had consulted a Middle Eastern law consultant working in London. He sought advice on her behalf from a firm of solicitors here, by letter of 19 June. He described her objectives as 'to divorce her husband in an English court where the children will be with her and not separated from her at the ages of 7 and 9 ... and to obtain a suitable financial settlement'. He went on to refer to her being held against her will in Lebanon

(presumably a reference to the order restraining her from leaving the country), and posed the question – ‘If she escapes, with or without the children, and comes to London, would her “unlawful” departure from Lebanon be used against her?’.

[20] The request for advice was passed to a specialist matrimonial practitioner, Miss S. In a letter of 3 July 2002, in which she dealt with other queries about whether a *Tafriq* pronounced in Lebanon would be recognised by the English courts and whether, if so, the mother could still apply here for financial relief, she also dealt with the question of whether the English courts would hold her departure from Lebanon against her. She answered in these terms – ‘I do not believe that the English court will have an adverse view of Mrs B breaching an order of the Lebanon court which in effect keeps her prisoner in Lebanon’. She went on to express the conclusion that the mother ‘must consider coming to England and taking two courses of action’; first to obtain an order refusing to recognise the *Tafriq* and secondly to take divorce and financial relief proceedings.

[21] Mr Cayford argues that the mother was quite plainly ‘forum shopping’ and what was uppermost in her mind was having her marriage dissolved here and obtaining a financial settlement under the principles applied in English law, rather than the welfare of her children. Whatever view one takes of the mother’s motives, it has to be said that she received positive encouragement to come here from the advice that she was given.

[22] Both counsel have expressed critical amazement at what she was told about the attitude that the English courts would take to an order of a foreign court. I described it as breathtaking during the hearing. Even though Lebanon may not be a Hague Convention country, no thought whatsoever appears to have been given to the fact that the mother would be abducting the children and the potential consequences of that, or to the welfare interests of the children. It is most unfortunate and deeply regrettable that the mother was given such advice.

[23] I should make it clear that the mother has since changed advisers and is represented in these proceedings by other solicitors.

Proceedings in England

[24] The mother commenced divorce proceedings on 7 August 2002 on the basis that she was now domiciled in England. On 14 August 2002, Bennett J granted her orders restraining the father from removing the children from the jurisdiction and freezing certain of his assets. The orders were obtained without notice to the father. When he learnt of them, he instructed English solicitors and on 17 September 2002 initiated wardship proceedings to enable him to apply for an order that the children be returned forthwith to Lebanon.

[25] On 10 October 2002, Bracewell J gave directions for the hearing of the father’s application. She declined to give the mother leave to adduce expert evidence on Sharia law as applied in Lebanon.

[26] On 23 October 2002, Mr Turner applied to Kirkwood J, without notice for a *Hemain* injunction to restrain the father from pursuing the Lebanese proceedings. Following the disappearance of the mother with the children at the end of July, the father had switched from the *Tafriq* divorce proceedings to *Talak* and pronounced a first revocable *Talak* on 8 August 2002. On 16 September 2002, he issued an application to renounce the *Tafriq* proceedings, and there was fear that he was about to finalise the dissolution of

the marriage by Talak. Kirkwood J granted the application but fixed a further notice hearing for the next day, when the father was represented by Mr Cayford.

[27] The hearing on the 24th was again before Bracewell J, who refused the application, and subsequently the father pronounced a second irrevocable Talak, which effected the immediate dissolution of the marriage under Lebanese law.

[28] On the 25th, Bracewell J dealt with a further application by Mr Turner to reconsider her refusal to allow expert evidence, or alternatively to give leave to appeal. The application was not successful but the application for leave to appeal was pursued to the Court of Appeal, and on 25 November, Thorpe LJ, sitting with Munby J, granted leave and went on to hold that leave to adduce expert evidence had never been required in the first place. To that extent the appeal was allowed. I will need to refer again later to the judgment of Thorpe LJ for his helpful observations on Mr Turner's submissions on the interpretation of the line of authorities in non-Convention cases, which were set out in his skeleton argument.

[29] Finally, to complete the history of the proceedings in this country to date, on 15 November 2002 the mother's divorce petition and application for ancillary relief was dismissed by Deputy District Judge Gill, on the basis that the marriage had already been dissolved by Talak, and on 18 November 2002 Bennett J discharged the asset freezing order. The only extant application the mother has before the court is her application for residence.

The approach to the upbringing and welfare of children under Sharia law in Lebanon

[30] The approach to the welfare and upbringing of children, where the relationship between their parents breaks down and they are unable to agree on what is in the best interests of the children, is very different in Muslim countries from our own approach. It does not necessarily follow, though, that it is not child-centred. Simply, that Muslim countries, which apply Sharia law, have different philosophies, customs and practices to our own.

[31] There are variations between Muslim countries in the way in which Sharia law is interpreted and applied. In Lebanon the traditional Hanafi rules of custody and guardianship still apply. They are codified in Art 332–434 of Quadri Pasha's Code. The person with first claim to the custody (hadana) – that is day-to-day care and control – of a child until the age of 7 in the case of a boy, and 9 in the case of a girl, is the mother. These dates may be extended with the consent of the father, but will only rarely be extended by a Sharia court as a matter of discretion, where the court is satisfied that the child would otherwise suffer serious harm.

[32] It is the mother's duty to look after the child properly. Amongst traditional Muslims she may be regarded as not a fit mother if she engages in certain types of work outside the home or even if she works at all. The father is the child's guardian (wali) from birth. It is his duty to provide maintenance to ensure that they are properly accommodated and financially supported.

[33] The mother can be deprived of custody if she is found to be disobedient in relation to her motherly duties or unfit to care for the child. She also loses her right of custody if she remarries outside the extended family or prevents the father from having contact by moving away from the area. If she loses custody, day-to-day care passes not to the father but to other female

members of the extended family, the first person to be considered for the role being her own mother.

[34] Similarly, if the mother is dead or unable to care for the child the claim to custody passes first to her mother and from her to other female family members but not the father.

[35] It can be seen, therefore, that the approach is very different to our own, but it would not be right, simply by reason of that fact, to conclude that it is not concerned with the welfare of the child.

[36] Mr Edge told me in evidence that although Sharia law as applied in Lebanon is more traditional than in some other Muslim countries, the philosophy of Sharia law is to encourage the parents to resolve matters themselves with the assistance of their families, and that Muslim families feel shame in having to go to court. He said that often, in practice, parents will agree to extend the period of the mother's hadana, or agree to children spending time with both parents.

The mother's case

[37] During the course of his submissions it became clear that there are essentially two strands to Mr Turner's argument. First he seeks to mount a broadly based attack on the Sharia law as applied in Lebanon and other Muslim countries, in particular on what he would say is the arbitrary transfer of custody from the mother to the father without reference to specific welfare considerations, as inimical to the welfare of the child. He contends that welfare must be the paramount consideration, and that it cannot be said that it would be in the best interests of the children to be returned to Lebanon for their future to be resolved there under such a system of law. In the way of his submission is the recent authority of the Court of Appeal, in the case of *Re E (Abduction: Non-Convention Country)* [1999] 2 FLR 642, which he submits conflicts with earlier authorities. He invites me to hold that the case was decided in disregard of either binding authority and not to follow it.

[38] If he is right in his first line of argument, it has very far-reaching consequences that go way beyond this particular case. His second line of argument is discreet to the facts of the case. He submits that it would be wrong to return the children because of the potentially serious consequences the mother may face if she returns to Lebanon. He argues that if she returns she is liable to prosecution and possible imprisonment. He put his case on welfare grounds because of the potential harmful consequences for the children of separation from the mother, and by analogy with Art 13 of the Hague Convention, on the basis that if this were a Hague Convention case, the mother would be able to bring herself within Art 13(b) on account of the grave risk that returning the children 'would expose them to physical or psychological harm or otherwise place them in an intolerable situation'.

[39] The origin of the second line of argument stems in part from the potential consequences of the mother's flagrant breach of the order of the Lebanese court in coming to this country with the children, but it is not confined to that. It appears that the father has made a complaint to the police of the theft of a ring and the abduction of the children. Although he has indicated in correspondence that he intends to withdraw his complaint if she returns to Lebanon, she does not trust him to keep his word and, in any event, he cannot bind the hands of the police and the prosecuting authorities.

[40] Mr Edge was able to assist me on the potential consequences for the mother of the threat of criminal proceedings only to a limited extent as such proceedings, being criminal in nature, would not be dealt with by a Sharia court. He felt that the mother would be unlikely to lose her liberty for the breach of the court order if she had returned the children and if the father was not seeking her committal. If the father withdrew his complaint to the police, he doubted whether the matter would go any further, but he did agree that loss of liberty was the likely consequence of a conviction for theft or kidnapping.

Mr Turner's submissions on the authorities

[41] Mr Turner supported his first line of argument by reference to a large number of decided cases, both in the Court of Appeal and first instance. The authorities fall into three broad categories:

- (a) There is the pre-Hague Convention line of cases – *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, *Re C (Minors) (Wardship: Jurisdiction)* [1978] Fam 105, and *Re R (Minors) (Wardship: Jurisdiction)* (1981) 2 FLR 416.
- (b) A series of non-Convention cases decided since the introduction of the Hague Convention – *Re F (A Minor) (Abduction: Custody Rights)* [1991] Fam 25, sub nom *Re F (A Minor) (Abduction: Jurisdiction)* [1991] 1 FLR 1, *Re S (Minors) (Abduction)* [1994] 1 FLR 297, *Re M (Abduction: Peremptory Return Order)* [1996] 1 FLR 478 and *Re P (A Minor) (Child Abduction: Non-Convention Country)* [1997] Fam 45, sub nom *Re P (Abduction: Non-Convention Country)* [1997] 1 FLR 780, and *Re JA (Child Abduction: Non-Convention Country)* [1998] 1 FLR 231.

[42] I do not intend to undertake an extensive review of the authorities, as I do not believe it to be necessary. Suffice it to say that the pre-Hague Convention cases clearly establish that the welfare of the children is the paramount consideration. In *Re R (Minors) (Wardship: Jurisdiction)*, Ormrod LJ said at 425F:

‘It follows that the strength of an application for a summary order for the return of the child to the country from which it has been removed, must rest, not on the so-called “kidnapping” of the child, or an order of a foreign court, but on the assessment of the best interests of the child. Both, or either, are 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. It might remove some of the confusion of thought which bedevils these cases if “the kidnapper” was allowed to join “the unimpeachable parent” in forensic limbo.’

[43] Despite the power and skilfulness of Mr Turner's argument, I am unable to accept that subsequent cases reveal any departure in principle from that approach. In non-Convention cases, the best interests of the child remains the decisive factor, but it must be remembered that each case is decided on its own facts. The outcome hinges on the judge's assessment of the best interests of the child balancing all relevant competing considerations.

[44] Mr Turner relies heavily on *Re JA (Child Abduction: Non-Convention Country)* in which the Court of Appeal refused to order the return of a child to the United Arab Emirates (UAE). Ward LJ having referred to the law applied in the UAE said at 244B:

'From that review of the law to be applied in the UAE, it seems clear that the court's powers are limited and there is no indication that welfare is the test. If the mother returns to Sharjah with the child, there is no power in the court to permit her to return to this country with the child if the father objects to that move, whatever the best interests of the child dictate. Once the mother and child return to the Emirates, they are effectively locked in there. Those facts are not disputed.'

Earlier he had expressed reservations about the outcome in the earlier case of *Re M (Abduction: Peremptory Return Order)*, saying that if driven to it, he would reluctantly say that it had been decided per incuriam at 243E.

[45] It is important to have regard to the facts of the two cases which differed in some significant respects. In *Re JA (Child Abduction: Non-Convention Country)* the court was concerned with a father whose background was Muslim and Arabic and a mother whose background was English. They were married by a Shariate court in 1994 and their one child, a daughter, had been born in Sharjah in February 1995. Following the child's birth the mother spent significant periods in England with the father's consent. In 1996 the marriage broke down and the mother refused to return to the UAE. There was evidence before the Court of Appeal from a consultant psychiatrist that it would be harmful to the mother's health and her ability to care for her daughter were she forced to return. Similarly, in *Re M (Abduction: Peremptory Return Order)* the father's background was English, but in contrast to the facts of *Re JA (Child Abduction: Non-Convention Country)*, they had lived together in Dubai for 11½ years and brought up their two children there, who were aged 10 and 2½ by the time of the proceedings. Waite LJ said at 481A:

'This is a case of a British woman who married in a country where Islamic law prevails, who made a home there, who has friends there, who has family there, and who must be deemed to have accepted in principle, when she undertook that obligation, that she was going to live in a country where she would receive a fair hearing, if, unfortunately, matrimonial trouble broke out.'

[46] What appears to have concerned Ward LJ is that there was no evidence of the relevant law before the court in *Re M (Abduction: Peremptory Return Order)* and that the Court of Appeal was prepared to assume that the mother would be afforded facilities for a fair hearing if ordered to return to Dubai. It is that assumption and the absence of enquiry into the legal system in Dubai,

which I believe prompted Ward LJ to question the decision in *Re M (Abduction: Peremptory Return Order)*, but I do not believe that he was seeking to say that Sharia law was necessarily and intrinsically inimical to the best interests of children.

[47] I respectfully agree with what Connell J said at first instance in *Re E (Abduction: Non-Convention Country)* at 645G:

‘I cannot conclude that Ward LJ’s view was that the courts in this jurisdiction would never make an order for return when Sharia law applied, particularly if the children’s best interests required that solution. Each case must be decided on its own circumstances. The approach of the courts of the competing jurisdiction is an important feature but is not conclusive. In my view the courts in Sudan will apply Muslim law which is appropriate to this Muslim family.’

[48] Ward LJ’s reservations about *Re M (Abduction: Peremptory Return Order)* were considered by the Court of Appeal in *Re E (Abduction: Non-Convention Country)*. Thorpe and Pill LJ each specifically rejected the notion that *Re M (Abduction: Peremptory Return Order)* was decided per incuriam. In the course of his judgment, Thorpe LJ reviewed the authorities and emphasised that whilst the welfare principle is the paramount consideration in non-Convention cases, what constitutes the welfare of the child in an individual case is subject to the cultural background and expectations of the State in question. It does not follow from the fact that, as a Muslim State, it has a different concept of child welfare to our own, that it is necessarily inappropriate to return a child for its future to be resolved in accordance with Muslim law.

[49] I am unable to accept Mr Turner’s proposition that Thorpe LJ was there developing some novel or unorthodox principle that offends the reasoning of previous authorities. The court has always had to consider the best welfare interests of the child, taking due account of the child’s religious, ethnic and cultural background, in reaching its decision on the facts of the case.

[50] In the earlier case of *Re S (Minors) (Abduction)*, which is not referred to in *Re M (Abduction: Peremptory Return Order)*, Nolan LJ said at 305B:

‘But it is implicit in s 1(1)(a) [of the Children Act 1989] that the paramountcy of the child’s welfare is to be observed consistently with the law to which the child is subject ... No one suggests, nor could it be suggested, that summary return can only be justified when the law of the country of previous residence is the same as that of England.’

[51] In the later case of *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, which was concerned not with whether to order the return of a child but the question of whether the court had jurisdiction in wardship proceedings, Thorpe LJ referred to the need for understanding of other systems, and referring to Sharia law, said at 970G:

‘Of course no court in this jurisdiction would have ordered a transfer of residence from the mother to the father on the application of the paramount welfare test. The fact that that was the outcome in Dubai,

even the fact that that would have probably been the outcome in Dubai without compromise, does not mean that the welfare of the child is not the first consideration for the judge of the Sharia court. Both systems are child centred. It is the interpretation of child welfare, governed as it is by different religions, cultures and traditions that produces such starkly different outcomes.'

[52] On 25 November 2002, when the Court of Appeal allowed the mother's appeal against the refusal of Bracewell J to grant her leave to adduce expert evidence, Mr Turner's skeleton argument on the relevant authorities was before the court. Although not essential to the outcome of the appeal, Thorpe LJ took the trouble to set out his views for the possible benefit of whoever had to deal with the main hearing, and I have been assisted by what he said. Referring to Mr Turner's analysis of the authorities and criticisms of *Re E (Abduction: Non-Convention Country)*, he said:

'First of all, I want to make it plain that I do not accept for one moment that analysis of the relevant authorities. My only disagreement with the judgment of Ward LJ in the case of *Re JA (Child Abduction: Non-Convention Country)* is as to the status of the prior decision of this court in *Re M (Abduction: Peremptory Return Order)*. In *Re JA (Child Abduction: Non-Convention Country)* Ward LJ suggests that the judgment of Waite LJ in *Re M (Abduction: Peremptory Return Order)* was delivered per incuriam. That, as I made plain in my judgment in *Re E (Abduction: Non-Convention Country)* I simply cannot accept. It seems to me that the judgment of Waite LJ in *Re M (Abduction: Peremptory Return Order)* is an entirely orthodox application of the prior decision of this court in *Re F (A Minor) (Abduction: Custody Rights)*. So for me the orthodox stream of authority post the arrival of the Hague Convention is *Re F (A Minor) (Abduction: Custody Rights)*, through the case of *Re S (Minors) (Abduction)*, through the case of *Re M (Abduction: Peremptory Return Order)*. Insofar as I have any other criticism of the judgment of Ward LJ in *Re JA (Child Abduction: Non-Convention Country)*, it is only that he does not seem to have regard to the link between *Re F (A Minor) (Abduction: Custody Rights)* and *Re M (Abduction: Peremptory Return Order)*, namely *Re S (Minors) (Abduction)*.'

[53] For the sake of completeness, I should add that Mr Turner referred me to the House of Lords extradition case of *Islam and Secretary of State for the Home Department; R (Shah) v Immigration Appeal Tribunal and Another* [1999] 2 AC 629, a refugee case, but that was concerned with very different circumstances, where the applicants had been falsely accused of adultery by their husbands and feared persecution and possible death by stoning in accordance with Sharia law, if returned to Pakistan, and I derive no assistance from it in considering what should happen in this case.

[54] He also sought to reinforce his submissions in his skeleton argument by reference to the Human Rights Act 1998. He did not develop this submission at any length in oral argument, and it seems to me that if the decision on whether or not to order the return of a child is made on welfare grounds according to a proper assessment of the child's best interests, and if

one is also satisfied that the parents will both receive a fair hearing in the country to which the child is returned, in accordance with the law of that country, such a decision is compatible with the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

Conclusions on the facts of this case

[55] I have come to the firm conclusion that it is in the best interests of the children for them to return to Lebanon, and for their future to be decided there.

[56] Although the parents may have the affluence to enjoy an international lifestyle, their religious, ethnic and cultural background is plainly Lebanese. They are both Muslim by birth and upbringing and the mother describes herself as a devout Muslim. Their main language is Arabic. The mother also speaks French and English, but she describes English as her third language. Arabic is the children's only language.

[57] In bringing the children to England at the end of July, she was not, in my judgment, acting in their best interests. She uprooted them from their home environment, prevented them from enjoying regular contact with their father, and took them away from the love and support of their extended family members. She brought them to a country with which they had no real connection, to live in a small one-bedroomed flat in London, in stark contrast to the life they were used to. N was expecting to start school in Beirut in October, a school selected as suitable for her by her parents. She has instead had to go to an English primary school since September. The last few months must have been desperately confusing for her and for her younger brother.

[58] In my judgment, the children need to be restored to their home environment without delay. Before the mother came to this country, she gave no indication that she contemplated a long-term future for herself and the children outside Lebanon. Recently, her lawyers, in correspondence with the father's lawyers, have been setting out her terms for returning to Lebanon, and at the beginning of this hearing I was provided with a handwritten document setting out her latest requirements for returning home. I conclude, on the information available to me, that she came here without any real intention of establishing a long-term future for herself and the children, but in the hope of obtaining more favourable terms than might be available in the country of her own domicile and habitual residence.

[59] She says that she came here because she was afraid that she would lose the children and not receive justice in Lebanon, and that she fears that were she to return she could be prosecuted and lose her liberty, which would have a harmful effect on the children and create an intolerable situation. It is an easy answer to say that she has brought her problems on herself, but I put that out of my mind and consider the welfare of the children.

[60] The assertion that she would be denied justice in Lebanon is a bare assertion that is unsupported by evidence. She has participated in the Lebanese proceedings and has lawyers acting for her in those proceedings, who no doubt will continue to represent her interests. I am satisfied that if she returns to Lebanon she will receive a fair hearing by the courts of that country in accordance with its legal system. I have seen a transcript of the judgment of Bracewell J refusing the application for a *Hemain* injunction on 24 October 2002. I respectfully agree with what she said on this aspect. I also

agree with her observation that there has been nothing vexatious or oppressive about the conduct of the father.

[61] The father has said in correspondence that he is agreeable to the children remaining with her if she returns to Lebanon, and that he will withdraw his police complaint. The mother has sought, as part of her requirements for returning to Lebanon, that a custody order in her favour should first be obtained in Beirut, but I do not consider that it would be right to delay the return of the children for this purpose. Indeed, although the father has intimated that he does not intend to pursue the issue of custody, in my judgment, it would be wrong for an English court to seek to fetter his access to the courts of his own country.

[62] The mother also seeks a solemn promise on oath that he will not seek to initiate or pursue any criminal proceedings against her. Again the father has intimated in correspondence that if she returns to Lebanon with the children he will withdraw his complaint and abandon the theft and abduction allegations he has made. Mr Cayford has informed me that he is prepared to confirm this promise to the court on oath. This ought to provide the mother with some added reassurance, and thereby be for the benefit of the children. I cannot bind the hands of the prosecuting authorities or courts of Lebanon, but I consider it highly unlikely in the circumstances that any action will be taken against her that would result in her loss of liberty. I am, accordingly, satisfied that ordering the return of the children to Lebanon will not expose them to harm, place them in an intolerable situation, or otherwise be detrimental to their best interests.

[63] Subject to the father confirming to me on oath that he will withdraw his complaint and not pursue any criminal allegations against the mother, I shall make an order that the children shall be returned to Lebanon as soon as reasonably practicable. I will discuss with counsel the arrangements for putting this order into effect in such a way as to best safeguard the children's welfare.

Order accordingly.

Solicitors: *Dawson Cornwell* for the mother
Alexiou Fisher Philipps for the father

ALISON PERRY
Law Reporter