

**M v M (STAY OF PROCEEDINGS:
RETURN OF CHILDREN)
[2005] EWHC 1159 (Fam)**

Family Division

Wilson J

27 May 2005

Children – Stay of proceedings – Welfare the first consideration

Application for summary return under inherent jurisdiction – Paramountcy of welfare

The South African parents of two girls, now aged 6 and 4, had lived in England with their daughters for nearly 2 years. The father's work permit expired in December 2004. The evidence suggested that, prior to that date, the parents had been undecided as to whether they should return to South Africa or remain in England. They had taken steps preparatory to both eventualities, viz buying a property in South Africa with a view to using it as a family home on their return, whilst also applying for an extension to the father's work permit in the UK. In November 2004 the father told the mother that he wanted the family to return permanently to South Africa, that the marriage was over, and that once back in South Africa they should divorce. The father had, allegedly without the mother's knowledge, given notice to quit in relation to the family's rented accommodation. The father returned to South Africa in December 2004, but the mother decided at the last minute to remain in England with the children. The mother issued proceedings in South Africa for divorce, custody, property division and financial provision. The father made cross-applications. The mother then issued proceedings in England under the Children Act 1989 and was granted an interim residence order and an interim order prohibiting the father from removing the children from her care or from England and Wales. These proceedings were subsequently stayed on an interim basis. The father applied to the High Court for an order that the English proceedings be stayed on an indefinite basis and for an order for the summary return of the children to South Africa.

Held – staying the English proceedings and ordering the return of the children to South Africa –

(1) The sole principle of law applicable to the determination of the father's application for the return of the children to South Africa was that the children's welfare must be the paramount consideration. By way of contrast, in relation to his application for a stay of proceedings, the welfare of the children was an important, but not a paramount, consideration. The two applications must, however, stand or fall together, and the correct approach was to decide whether, applying the paramountcy principle, it was in the children's interests to return to South Africa, and then, if so, to cross-check whether the criteria for a stay were satisfied (see paras [8]–[9]).

(2) Notwithstanding the fact that the mother and children were habitually resident in England and Wales, the case was fundamentally a South African one: the family were South African citizens, their first language was Afrikaans, they were domiciled in South Africa and every member of the wider family was resident there, the parents had always intended to return to South Africa at some stage, and it was to the South African courts that the mother first turned for legal assistance. The more real and substantial connection of the case was with the courts of South Africa rather than with the courts of England and Wales and it was in the interests of the children to return to South Africa to enable the South African courts to determine their future (see para [41]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Family Law Act 1986, s 5(2)

Children Act 1989

Hague Convention on the Civil Aspects of International Child Abduction 1980

Council Regulation (EC) (No 2201/2003) of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (repealing Council Regulation (EC) (No 1347/2000)) (Brussels IIA)

Cases referred to in judgment

H (Child Abduction: Mother's Asylum), Re [2003] EWHC 1820 (Fam), [2003] 2 FLR 1105, FD

K (Abduction: Consent: Forum Conveniens), Re [1995] 2 FLR 211, CA

S (Residence Order: Forum Conveniens), Re [1995] 1 FLR 314, FD

Spiliada Maritime Corp v Cansulex Ltd The Spiliada [1987] AC 460, [1986] 3 WLR 971, [1986] 3 All ER 843, [1987] 1 Lloyd's Rep 1, HL

Timothy Scott QC for the plaintiff father

Charles Geekie for the defendant mother

WILSON J:*Section A: introduction*

[1] These applications relate to two girls, one who was born on 17 July 1998 and so is aged 6, and the other who was born on 19 June 2000 and so is aged 4. They presently live with the mother on Tyneside.

[2] The family is South African. The father, the mother and the two girls are all South African citizens. The lingua franca within the family is Afrikaans, although of course the parents and the girls also speak very good English. The parents, who are married, came with the girls to England and set up home on Tyneside in March 2003. The marriage finally broke down on 15 December 2004 when the father returned to live in South Africa. The mother and the girls, however, have remained living on Tyneside.

[3] At present there are substantial long-term issues between the parents as to the optimum arrangements for the girls. They do not fall for resolution by me today. Presently the father is claiming that the girls should reside with him. It is far from clear to me that he really intends to prosecute that claim. It may be only a forensic posture. If so, he ought to abandon it because ill-considered claims for residence of small children are notoriously provocative and damaging. The long-term issue of real weight relates to the father's wish that the girls should return to live permanently in South Africa and the mother's wish that they should continue to live permanently with her on Tyneside.

[4] Presently there are proceedings pending both in South Africa and in England relating wholly or partly to the girls:

- (a) On 24 December 2004, by South African lawyers, the mother issued proceedings for divorce in the High Court of South Africa, Cape of Good Hope Provincial Division, which for this purpose means the divorce court in Cape Town. In the proceedings she claimed not only a decree of divorce but also an order for custody of the girls, for division of matrimonial property and for

periodical payments for the girls and herself. On 7 February 2005, by his South African lawyers, the father cross-petitioned for divorce and sought orders for division of matrimonial property and orders to be made against himself for maintenance for the girls and short-term rehabilitative maintenance for the mother. In that pleading he conceded that, provided that he was afforded an equal voice in significant decisions relating to them and reasonable contact with them, the girls should reside with the mother. On 10 May 2005, however, the father amended his cross-petition so as to claim that the girls should reside with him under a custody order. No order has yet been made in the proceedings in Cape Town in relation to any of the issues raised.

- (b) On 3 March 2005, by English lawyers, the mother issued proceedings under the Children Act 1989 in the Sunderland County Court. Although her claim in the South African proceedings for custody of the girls was not being actively pursued there, the mother was wrong to state in the Sunderland proceedings that in South Africa there were no proceedings in relation to the girls; and I believe that she must have known otherwise. At all events in the Sunderland proceedings the mother claimed orders that the girls should reside with her and that the father should be prohibited from removing them from her care or outside England and Wales. On the date of issue of the proceedings, interim orders were made to that effect without notice to the father. The Sunderland proceedings currently stand stayed pending resolution of the present applications.

[5] The applications before me are two-fold, yet closely linked. They are both made by the father. The engine behind both applications is his contention that it should be for the judge in Cape Town, rather than for a judge in England, to determine the issues between him and the mother not only in relation to divorce and, to the extent that they are still live, to property and maintenance, but also and in particular to the girls. To that end, his two applications are as follows:

- (a) for an order that I should continue the stay of the Sunderland proceedings on an indefinite basis; and
- (b) for an order for the summary return to South Africa of the girls, whom, of course, the mother would, as she has made clear, in that event elect to accompany.

The father contends that, were those orders made, the judge in Cape Town, with the benefit of the presence there of the girls, who would be interviewed by the 'Family Advocate' for the purpose of reporting to the court, and of the mother, who would, of course, be a central protagonist, could determine all long-term issues relating to the girls and in particular any application by the mother for permission to remove them to live in England.

[6] In relation to the application for a stay, Mr Scott QC, on behalf of the father, concedes that seemingly the court's statutory jurisdiction to grant it, ie that set out in s 5(2) of the Family Law Act 1986, does not apply, with the

result that he invokes the inherent jurisdiction of a superior court to grant it. I have to say that, in preparing to give this judgment, I have developed some doubt as to whether, in that today I can without difficulty stand in the shoes of a judge of the Sunderland County Court, Mr Scott's concession about the inapplicability of the statute was rightly made. But, whether the jurisdiction is statutory or inherent, the same principles apply. Counsel agree that, written in terms of the facts of this case, they are as follows:

- (a) the burden is upon the father to establish that a stay of the Sunderland proceedings is appropriate;
- (b) the father must show not only that England is not the natural or appropriate forum but also that South Africa is clearly the more appropriate forum;
- (c) in assessing the appropriateness of each forum, the court must discern the forum with which the case has the more real and substantial connection in terms of convenience, expense and availability of witnesses;
- (d) if the court were to conclude that the South African forum was clearly more appropriate, it should grant a stay unless other more potent factors were to drive the opposite result; and
- (e) in the exercise to be conducted at (d), the welfare of the girls is an important, but not a paramount, consideration.

Authority for the first four principles derives from *Spiliada Maritime Corp v Cansulex Ltd The Spiliada* [1987] AC 460. Authority for the fifth derives from *Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR 314 at 325B per Thorpe J (as he then was).

[7] Until the beginning of the second day of the hearing the father cast his application for an order for the summary return of the girls to South Africa in alternative ways. He applied either under the Child Abduction and Custody Act 1985 for an order for their return pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) or under this court's inherent jurisdiction. The application pursuant to the Hague Convention could succeed only if the father could establish that the girls were habitually resident in South Africa when, in December 2004, the mother refused to return them there and, so the father alleged, wrongfully retained them in England. In that the girls, with the parents, had lived in England since March 2003, the allegation of their habitual residence in South Africa in December 2004 was always tenuous. But when, on the morning of the second day, the father at my request produced documentation which showed that in September 2004 he had, in effect, represented to the Home Office that his habitual residence was in England, Mr Scott elected to withdraw the application pursuant to the Hague Convention and to proceed only with the attempt to persuade me to exercise the inherent jurisdiction to order the girls to return to South Africa.

[8] It is agreed between counsel that there is only one principle of law applicable to my determination of the father's application, as it now stands, for an order for the return of the girls to South Africa, namely that their welfare shall be my paramount consideration.

[9] Thus I arrive at a mildly curious situation in which, in respect of the application for a stay, the welfare of the girls is important but not paramount

but in which, in respect of the application for an order for return, their welfare is paramount. I am grateful to both counsel for not seeking to present this dichotomy as raising any significant conundrum. Neither of them disputes that these applications stand or fall together. Unless Mr Scott persuades me that it is in the interests of the girls to be returned in the short term to South Africa so that their future can there be decided, the father will not secure an essential part of the relief which he seeks, namely the order for their return. I propose to look at the case first in terms of the girls' welfare and then, if I am satisfied that, judged by that paramount principle, it is indeed in their interests to return, I will, before directing a stay, cross-check that, in reaching that determination, I have in effect concluded, or alternatively that I should proceed to conclude, that the criteria requisite for a stay are satisfied. Of the authorities cited by counsel, the most helpful seems to me to be the decision of the Court of Appeal in *Re K (Abduction: Consent: Forum Conveniens)* [1995] 2 FLR 211. It is clear from the judgment of Waite LJ at 217F and 219C that, in determining that proceedings referable to the child in Texas should continue, that similar proceedings in England should be stayed and that accordingly the child should be returned to Texas, the Court of Appeal primarily, or perhaps even solely, analysed the issues in terms of the result which would best promote his welfare.

[10] The hearing before me has proceeded for 2 days, exclusive of today. Oral evidence has been given only by the parents, although a number of supporting witnesses on each side have given evidence in writing. It has not been appropriate for me to receive detailed evidence. Thus any comments which I make about the conduct of the parties are provisional and, following the more profound analysis which my colleague, whether in England or in Cape Town, will conduct, may unfortunately turn out to be misplaced or unfair.

Section B: current circumstances

[11] The girls live with the mother in accommodation on Tyneside which she has recently begun to rent on a 6-month, short-hold, extendable tenancy. Both girls go to a local school, at which they are extremely happy. Since their arrival in England in March 2003, when they spoke only Afrikaans, the girls have become fluent in English and indeed are beginning to develop a Geordie accent.

[12] The mother is aged 31. She qualified in South Africa as a microbiologist and worked in the food business there in that capacity. She has not worked since the family's arrival in England other than, apparently very successfully, as a mother and homemaker.

[13] Until December 2004 the family was present in the UK pursuant to the father's work permit. On 16 December 2004, having decided not to return to South Africa, the mother applied for, and in due course obtained, a visa entitling her and the girls to remain in the UK as visitors. This visa expires on 30 June 2005. No doubt the mother could secure an extension of it. But, were she to remain here only as a visitor, the mother would not be permitted to work. On any view she would be likely to need to work in order, together with maintenance from the father, to maintain herself and the girls. So, if the girls are permitted to remain living even in the short term in England, the mother has in mind to apply for a student visa or for a prospective student visa. Under a student visa she could study part-time, in the form of medical research by

which she would brush up or enlarge her skills as a microbiologist and obtain a UK qualification, and at the same time she could work part-time. Meanwhile the mother is supporting herself and the children with a small and dwindling amount of capital and with a contribution by the father to the support of the girls agreed on an interim basis by the South African lawyers on each side which, on conversion from rands, amounts in all to about £6,000 pa.

[14] Both the mother's parents are alive. They live near Cape Town. Until weeks ago the mother's twin sister, who is expecting to give birth to her first child in September, lived with her husband near Durham. Indeed, for about 3 months after 16 December 2004, the mother and the girls stayed with them there. Very recently, however, the sister and her husband have returned to live permanently in South Africa, namely in a northern suburb of Cape Town.

[15] Thus the mother now has no relations in England. She does, however, have a large number of close friends. There is in her part of Tyneside a tight-knit professional South African community. Three members of it have signed statements in her support. They are clearly of the view that during the marriage the father behaved badly towards the mother and in particular that he behaved shabbily towards her at its end. As I will explain, there are, even at this provisional stage, grounds for concluding that their view of him has a solid foundation. Since the father's departure, the mother has also developed a relationship with another man, being a bachelor aged 40 with a 12-year-old child with whom he has regular contact and being also apparently a man of some means. The mother says that she met him in January 2005 and that, although they are not living together, the relationship has developed to the stage at which they both want to get married once she is free to do so. Clearly, however, the romance is in its first flush and only the passage of time will reveal the extent of its significance.

[16] The father is aged 34. He qualified as a psychiatrist in South Africa and the main purpose of the family's move to England was to enable him to earn a substantial salary with which he could repay his student debt as well as provide comfortably for the family. His work in England was as a locum consultant psychiatrist at a hospital on Tyneside. He has explained that locums are paid far more than those on the permanent roll. Since his return to South Africa he has not found further work but he is confident that he will be able to establish a successful private psychiatric practice in a town near Cape Town.

[17] The father is presently living on the farm of his parents near Cape Town. He has two brothers, who also live on the farm and of whom one is married with two small children. His only sister lives, like the mother's sister, with her husband in a northern suburb of Cape Town.

Section C: the relevant history

[18] The parties were married in South Africa in 1996. In 1997/1998 they spent a year in England and liked staying here. Then they returned to South Africa, where the girls were born and where the father undertook a 4-year course in psychiatry. By March 2003 the family was back in England and they set up home on Tyneside. Although the father had initially secured a work permit only for 6 months, the parties clearly wished, even from the outset, to stay in England for longer than that and indeed for at least a year. In fact, to the parties' surprise and delight, an extension of the father's permit was secured for a period of about 18 months, ie to 31 December 2004.

[19] The evidence now strongly suggests that in 2004 the parties were undecided as to whether they would return to South Africa in December 2004; or, if a further extension could be secured, in 2005; or indeed significantly later. Their plans in that regard were fluid. Nevertheless, until the second day of the hearing, there was a fierce contest between the parties, upon which much was thought to turn, as to whether the family was habitually resident in England in December 2004. I am sorry to say that the contest led both parties to make false assertions in these proceedings as to their intentions: the father's being to the effect that the parties definitely intended to return to South Africa in December 2004 and the mother's being to the effect that they definitely did not intend to do so. Thus the father has sworn that in May/June 2004 they intended to return, ie permanently, in December 2004; and the mother has sworn that 'it had always been our intention to permanently reside in the UK'. Both averments are false, as, in effect, each now admits. I am surprised that educated, professional people should have lied on oath.

[20] In about May 2004 the parties purchased from the father's uncle in their joint names a property near Cape Town. I am clear that it was intended for their occupation at such time, whenever it might be, as they might return permanently to South Africa. Meanwhile they permitted the uncle to continue to occupy it rent-free. When, in November 2004, the father, as I will explain, unilaterally decided that the family would return to South Africa, he asked his uncle to vacate the property. Very recently, following negotiation between the parties' South African lawyers, the house, being the only substantial item of matrimonial property, has been sold; and each party's share has amounted to the equivalent of about £50,000. To date the mother has been unable to remit her share to England; but she says that, once she became able to prove to the South African fiscal authorities that she was resident in England, she would be able to remit it; and, so she says, it would then become another source of support for the family.

[21] On 21 September 2004 the father applied to extend his work permit for one year beyond 31 December 2004. The father has sworn that the application was only 'to keep open our options' but I find that at that time there was a clear intention on the part of both parents to remain in England if the application were to succeed. In fact the application ran into technical difficulty in that requisite information was lacking. I am sure that the information could have been provided. But events were to supervene and the father was suddenly to decide that the family should return to South Africa. In the event, therefore, he withdrew the application.

[22] The marriage between the parents had been unhappy for some years and, as the father denied in affidavit but now admits, there was even an element of domestic violence on his part towards the mother, the extent of which remains in issue. It was, says the father, on 6 November 2004 that he began an affair with a nurse at the hospital at which he worked. There is no evidence with which to challenge that date. Naturally he did not tell the mother about the affair. Within about 2 weeks of starting it, the father reached a firm decision that the family should return forthwith to South Africa. He contends that the affair and the decision were unconnected; and that the decision was reached as a result of his conclusion that the primary purpose for having come to the UK, namely the repayment of his student debt, had been accomplished. His contention may, in another court, need to be tested. The mother's belief is that the father's plan was, and indeed may well still be, to

move the family back to South Africa, to get a divorce there and then himself to return to live on Tyneside so as to pursue in less complicated circumstances the relationship with the nurse.

[23] The parents are in dispute as to when the father told the mother that the family would be returning to South Africa. The father's case is that he told her so on 15 November 2004 and that on 23 November, after having been out all night, he told her, still without revealing the affair, that the marriage was at an end and that, once back in South Africa, they should get a divorce. The mother denies that there were those two stages in his making the announcements and contends that both the return to South Africa and the end of the marriage were announced to her by him on 23 November. There is no need for me to risk error by choosing between these two versions. I have in mind, however, that, for example, it was on about 15 November that the father gave notice to quit the family's rented accommodation on Tyneside with effect from 16 December 2004. The parties are in dispute as to whether the mother was initially aware that the father had given notice to quit. If the mother's case is correct that she then knew nothing about the notice or even the return to South Africa, the father's actions in that regard were seriously underhand; and so he might have a strong motive for falsely pushing back in time the date when he told the mother of the decision to return.

[24] The parties had planned to have a family holiday in South Africa between 16 December 2004 and about 5 January 2005. It is agreed that the father's announcement to the mother was to the effect that the outward tickets for 16 December would instead be used to achieve the family's permanent return.

[25] I find that the mother was shell-shocked by the father's announcements, whenever they were precisely made, that the family was immediately to return to South Africa and that thereafter there would be a divorce. The father's case is that the mother readily accepted at least the decision to return and willingly participated in making the necessary arrangements to achieve the return. It was certainly she who, for example, in the latter days of November 2004 contracted with a firm for the family's chattels to be shipped to South Africa; and she who enabled photographers to photograph the family cars with a view to their advertisement for sale. I find that for a few days the mother went along, albeit unwillingly, with the father's plans; but that she soon developed a view that she might refuse to accede to his demands and might instead remain for the time being with the girls in England. Conscious that she and they were in the UK only by virtue of the father's work permit expiring on 31 December, she made inquiries and at once ascertained that, as proved to be the case, she would be likely on compassionate grounds to secure, by way of extension, a visitor's visa for herself and the girls. At some stage, very late in November or early in December, she determined that she and the girls would stay in England for the time being. She did not, I believe, immediately communicate her decision to the father. But at some stage prior to 16 December she did so; for on 13 December English solicitors instructed by the father wrote to her, saying that she had indicated to him that she proposed to remain in the UK for some time before returning to South Africa but that he expected her to honour what he said had been previously agreed, namely that the family would return on 16 December. It was on the date when that letter was written that the mother cancelled the contract for shipment of the family's chattels.

[26] For reasons which I need not explain, the father was constrained to travel to South Africa on 15 rather than 16 December. The mother did not follow with the girls on the following day. In a curious passage in her affidavit she says that she did not do so because she lacked the money with which to travel with them from Tyneside to Heathrow. That, as she now more or less admits, was not the reason for the failure to travel to South Africa. Perhaps for understandable reasons, she was simply refusing to do so. It had been one day earlier, namely 15 December, that, for her, another piece of the unpleasant jigsaw had fallen into place: for she had then been informed, not by the father, about his affair.

[27] On 16 December, by virtue of the notice to quit served by the father, the mother and the girls had to vacate the family home. It was then that they went to stay with her sister in Durham.

[28] The mother contacted solicitors in Cape Town who, on 24 December, issued the proceedings to which I have referred at [4](a) above. In the claim the mother averred, correctly, that both parties were domiciled in South Africa. Under South African divorce law, as under our former law, the court cannot generally grant a decree of divorce without having declared satisfaction about the arrangements for any child of the family. To that end, on 23 December 2004, she swore in South Shields an affidavit about the arrangements for the girls, which she sent to her South African lawyers.

[29] It was in and around February 2005 that the parties' lawyers in South Africa negotiated the agreement for interim maintenance payable by the father for the girls and for the sale of the house near Cape Town and the equal division of its proceeds. By letter dated 21 February, in regard to the maintenance, the mother's South African lawyers forwarded to the father's South African lawyers an unsworn copy of an affidavit which, so they said, the mother would swear and, so they implied, use if the claim needed to be placed actively before the South African court. In the present proceedings the mother has confirmed that she did indeed swear the affidavit, which is presumably now in the possession of her South African lawyers. By para 22 of the affidavit she said:

'I intend to return to South Africa when I think it to be in the children's best interests – when the divorce is finalised and the children and I can move into a secure environment, where the children can safely have access to the respondent with, if necessary, adequate supervision.'

In an earlier paragraph referable to the matrimonial history she had stated that late in 2004 the father had known full well that their mutual decision had been not to return to South Africa 'for another year'.

[30] Following his departure from England on 15 December 2004, the father made no contact, whether with the mother or with the girls, until 15 January 2005. He did not even telephone the girls on Christmas Day. He says that he did not trust himself to refrain from becoming emotional when speaking to them on the telephone. He now adds that he wanted at all costs to avoid speaking to the mother. Whether such are adequate explanations for his silence will be for another judge to decide. Nevertheless the father visited England between 10 and 24 January 2005 and, pursuant to arrangements reached between the parties' South African lawyers, he had contact with the girls on 3 separate days within that period. On 3 March 2005 he returned to

England to see the girls again. In that the mother's South African lawyers had indicated that, provided that he deposited his passport and air ticket, further contact with the girls could take place and in that such a condition was acceptable to him, he fully expected that the long and expensive journey would indeed result in contact. But it did not take place. By that time the mother was extremely nervous of his possible abduction of the girls to South Africa and she says that it was on the advice of her English solicitors that she refused to let him have contact. In the light of his offer to deposit his passport and of the fact that the mother already held the girls' passports, I doubt whether her refusal was reasonable. Whether, however, it bears the construction which the father now places upon it, namely that, were the mother to retain residence of the girls, she would always be obstructive about his contact, is another matter; and it is not a matter for me. The father says that it was in particular that incident in March which led him, by amendment of his South African pleadings, to add a claim there that the girls should reside with him. By agreement, the girls had staying contact with him last weekend, 21/22 May, but the father says that the mother's agreement was born of an intention to impress the court rather than, as she says, of a recognition that he should retain an active role, through contact, in the life of the girls wherever she should be residing with them.

Section D: arguments and conclusion

[31] Mr Geekie, to whose efficient and attractive conduct of the mother's case I would wish to pay tribute, relies heavily on the fact, belatedly conceded by the father, that in 2004 the family was, and that the mother and girls still are, habitually resident in England. Indeed I agree with him that the father's seemingly shabby conduct in November 2004 precludes any finding that the mother then gave any voluntary informed consent, however short-lived, to the family's immediate return to South Africa.

[32] Mr Geekie's primary submission is that a thread which runs through much of the jurisprudence, both directly relevant to my determination and indirectly educative, is that it is the court of a child's habitual residence which is generally best placed to determine issues relating to her or him. Such, says Mr Geekie, is the principle which not only informs exercise of the inherent jurisdiction invoked by the father but which also underpins the provisions of the Hague Convention and indeed the arrangements set by Council Regulation (EC) (No 2201/2003, 27 November 2003) Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (Brussels IIA) for the choice between competing jurisdictions within the European Union. He adds a most ingenious argument, namely that, if hypothetically the father had in March 2005 abducted the girls to South Africa, there can be little doubt that the court in South Africa would have directed their immediate return to England, whereupon this court would by now have embarked upon determination of the substantive issues. I have, however, to remind myself that a court considering an application under the Hague Convention is not guided by the considerations of welfare which now guide me.

[33] I hesitate to cite a passage in a judgment of my own, in particular one to which counsel themselves chose not to make reference. But in *Re H (Child Abduction: Mother's Asylum)* [2003] EWHC 1820 (Fam), [2003] 2 FLR 1105

there is, at [30], a passage which, rather than that I should now replicate my thinking in different words, I wish to quote:

‘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.’

[34] Without relying on that passage, Mr Geekie builds his case upon analogous thinking. He argues that the girls have spent a substantial part of their lives in England and that much of the evidence referable to the optimum future programme for them must, therefore, derive from the environment of their long-standing English home. He points, for example, to the three South African friends of the family resident on Tyneside who have already signed statements in support of the mother’s case.

[35] It is to be noted, however, that those friends, at least at present, speak primarily of the father’s physical ill-treatment of the mother during the marriage. This the father now mostly admits. And, in the light of the mother’s concession that, wherever she is to reside with the girls, the father should have substantial contact with them, it seems most unlikely that this will prove to be one of those cases in which, in order to determine a father’s application for contact, the court will have to make detailed findings in relation to past domestic violence.

[36] Mr Geekie concedes that the general principle in favour of the suitability of the court of habitual residence is able to be displaced, as for example it was in *Re K (Abduction: Consent: Forum Conveniens)* [1995] 2 FLR 211. Mr Scott argues that, on analysis, not much of the evidence relating to the likely issues referable to the girls is located in England. In particular, however, he argues that this case is South African in almost every relevant sense: in terms of citizenship; in terms of origin; in terms of primary language; in terms of domicile; in terms of at least the father’s current residence; and in terms of the residence of every single member of the wider family on each side.

[37] The mother argues, with great depth of feeling, that the girls are well settled in England and are receiving here a state education for which she has high praise and that, like herself, they have here a mass of friends. She protests that it would be deeply distressing for the girls to be uprooted from their environment and sent back to South Africa; and in particular that if, as she would hope, her application to a South African court for permission to remove the girls to England was to prevail, it would be unnecessarily damaging for them to have had their life in England interrupted by movement fro and to, like a couple of ping-pong balls.

[38] The mother's argument, however, has to be assessed in context. Even when united, this family was always intending to return to South Africa at some stage. That was why the house near Cape Town was bought. The mother was well aware that the family *might* have returned in December 2004 and, if not, might well have returned in or before December 2005. Moreover, in relation to her intention following the breakdown of the marriage, she has to confront the considerable problem set by para 22 of her affidavit sworn in February 2005 in the South African proceedings, which I have quoted at [29] above. In her oral evidence the mother said, eventually and unconvincingly, that the contents of that paragraph did not, even when sworn, reflect her true feelings. I believe, however, that, until the battlelines of the present proceedings were drawn, she was intending to return with the girls to South Africa in the relatively near future. It is hard, nay impossible, even for Mr Geekie to persuade me 3 months later that the return of the girls to South Africa would be substantially damaging to them.

[39] Then there is, to my mind, the clinching argument in favour of the return of the girls, in their interests, to South Africa at least in the short term so that their future may be decided by the judges of the country to which they primarily belong. I refer, of course, to the pendency of the South African proceedings. These were proceedings launched not by the father but by the mother. She asserts that, in the turmoil of events in December 2004, she gave no thought to the choice between proceedings in England, for which in the light of her habitual residence there would have been jurisdiction, and proceedings in South Africa. I unreservedly accept that assertion: to my mind it is highly significant that, intelligent though she is, it was instinctively to the South African court rather than to the English court that the mother, then in crisis, turned. In her suit for divorce she applied, again, of course, without realising its future significance, for an order that the girls should be placed in her custody. Presently the father cross-applies in that regard. South African lawyers are instructed on each side. The mother's South African lawyers have already done so much work for her that recently she had to pay their fees in a sum equal to about £3,500. In particular the respective lawyers there have successfully negotiated not only the division of matrimonial property but the level of interim child maintenance payable by the father and arrangements for the father's contact with the girls in January and March 2005. The lawyers in South Africa are thus already fully in the saddle – as a result of the mother's initiative.

[40] There has been discussion in court about the rival costs of litigating the likely issues referable to the girls in London and in Cape Town. Although in this court each parent is currently in receipt of publicly funded legal services, there is certainly some doubt whether, in the light of their respective interests in the proceeds of sale of the house, they would continue to receive public funding in future proceedings here. Furthermore it seems, from evidence filed in these proceedings by South African advocates on each side, that legal costs in South Africa are likely to be lower than in England and that, therefore, depletion of each party's share of the proceeds of sale by virtue of costs might well be less if the issues were to be determined there. Nevertheless I place no significant weight on that point in reaching my decision. But, although I accept that it can be invidious for this court to survey the way in which a foreign court would determine an issue relating to a child, I cannot help placing some weight upon, and deriving some comfort from, the extremely

high reputation which the South African justice system enjoys in England. It seems clear that my colleagues there will determine issues of residence, relocation and contact fairly, by reference to the interests of the girls, and in principle no less swiftly than would we here. I also have no doubt that, in weighing a mother's application to relocate with children out of South Africa, the South African judge will survey their interests by reference in part to the effect on the mother, and thus on them, of thwarting her aspirations, as well as to the depth or otherwise of the effect on their relationship with the father of acceding to them.

[41] Notwithstanding my development of considerable sympathy for the mother in relation to the events of the last 6 months, I have come to the firm conclusion that it is in the interests of the girls for their future to be determined by the courts of South Africa and for them, with the mother, to return to South Africa so that such a determination can take place. I record that, in reaching that conclusion, I have determined that the more real and substantial connection of the case is with the courts of South Africa rather than with the courts here and that it is clearly more appropriate for the issues relating to the girls to be decided there, with the result that the criteria for a stay of the Sunderland proceedings are satisfied. It may – here I speak purely hypothetically and without subtext – turn out to be only a relatively brief interlude for the girls and the mother in South Africa prior to return to England. In that event, as Mr Scott has submitted, it will be able to be regarded as having been in the nature of an extended holiday and as a chance for the girls to develop their relationships with the members of the wider families on each side and indeed hopefully to celebrate at close quarters their maternal aunt's birth of their first cousin.

[42] Mr Geekie seeks to argue that it may prove extremely difficult for the mother to subsist, even in the short term, in South Africa. The argument fails to convince me. Indeed there are grounds for concluding that, as things presently stand, it is the mother's immigration and financial position in England which renders her home here the more precarious. As an intelligent woman with a highly supportive family and assets equal to about £50,000, the mother will encounter no such serious difficulties, particularly in the light of a raft of short-term provisions, to be operative only until altered by the South African court at the request of one or other party, which, by a letter from his solicitors dated 23 May 2005, the father now proposes. The mother adds that in South Africa there is no state education for children of the age of the younger girl and perhaps even of the older one. But among the provisions offered by the father is an offer to pay for school fees; and I cannot accept that in or near Cape Town no good schools for girls of their ages can be located on a paying basis.

[43] Accordingly I make the two orders sought by the father.

Order accordingly.

Solicitors: *Dawson Cornwell* for the plaintiff
Southern Stewart and Walker for the defendant

ALISON PERRY
Law Reporter