4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

In Re J (A Child) (Child returned Abroad: Convention Rights) (2005)

[2005] UKHL 40; (2006) 1 AC 80 : (2005) 3 All ER 291 : (2005) 2 FLR 802 : Times, June 17, 2005

16/06/2005

Court
House of Lords

Summary
In considering whether a child ought summarily to be returned to his home country for a decision to be made as to his future residence, the fact that the family laws and procedures of that country were different from those of the United Kingdom was a relevant consideration, but the extent of its relevance depended on the facts of the particular case.

Facts
The appellant mother (M) appealed against a decision ((2004) EWCA Civ 417, (2004) 2 FLR 85) that the child (J) should be summarily returned to Saudi Arabia to live with his father (F). The couple had married in Saudi Arabia but, having lived there for some time following J's birth, M had moved with J to the United Kingdom, leaving F behind. M had dual citizenship. Having begun divorce proceedings in the UK, M had applied for a residence order in respect of J. F had applied for a specific issue order directing J's summary return to Saudi Arabia. The trial judge had concluded that although an order for summary return would not necessarily be confined to countries whose family law and procedures were broadly similar to those in the UK, the fact that F had made and withdrawn allegations about M's association with another man tipped the balance in favour of J remaining in the UK. Having heard evidence about the effect in Sharia law of such allegations, his decision had been made on the basis of his concern that such allegations would be made in the future and would seriously damage J's interests. The appellate court had overturned his decision on the basis that such a risk was not borne out by the evidence and the judge had given it too much weight. The issues were whether the appellate court ought to have interfered with the judge's discretion, and as to the proper approach to be taken in applications for the summary return of children to countries which were not parties to the Hague Convention on the Civil Aspects of International Child Abduction 1980. F argued that there was a strong presumption that it was highly likely to be in the best interests of a child subject to unauthorised removal to be returned to his country of habitual residence so that issues as to his future could be decided there.

Held
HELD: (1) Assessment of the risk of F making similar allegations in the future about M's relations with another man depended entirely on the judge's evaluation of F's intentions and likely future behaviour, and its impact on J. In that respect the judge had made findings of credibility and of primary fact with

which the appellate court was not entitled to interfere. Once the judge had made such a finding about risk it became a factor to be weighed in the balance in the exercise of his discretion. The evaluation and balancing of those factors was a matter for the judge, and the appellate court could only interfere if he had been plainly wrong. Too ready an interference by the appellate court risked robbing the trial judge of the discretion entrusted to him. (2) The judge had been correct in holding that the child's welfare was paramount and the rules and concepts of the Hague Convention were not to be applied by analogy in a non-Convention case. However, whilst summary return was not the automatic reaction to any unauthorised taking of a child from his home country, there were also circumstances where it could well be in his interests. Judges might find it convenient to start from the proposition that it was likely to be better for the child to return to his home country for disputes about his future to be decided there. A case against their doing so had to be made. Nevertheless, the weight to be given to that proposition would vary enormously from case to case. Important variables were the connection of the child with each country and the length of time he had spent in each. It was not the case that the future of a child within the jurisdiction of the UK courts had to be decided according to a conception of child welfare which exactly corresponded to that adopted in the UK. That the legal system of another country was different from that of the UK could not be irrelevant to the issue of summary return. However, the extent to which it was relevant depended on the facts of the particular case, JA (A Minor) (Child Abduction: Non-Convention Country), Re (1998) 1 FLR 231 approved, Osman v Elasha sub nom Re E (Children) (Abduction from Non-Convention Country) (2000) 2 WLR 1036 disapproved. There was nothing in the welfare checklist in the Children Act 1989 s.1(3) which prevented the court from giving great weight to the culture in which a child had been brought up. However, the absence of a jurisdiction in the home country enabling the mother to return the child to the UK without the father's consent had to do more than give the judge pause, and might be a decisive factor. In the instant case the judge had been wrong to leave out of account the absence of a relocation jurisdiction in Saudi Arabia, but the mere fact that he might have made different findings about the foreign law was not a basis for remitting the decision to him and his orders were restored. (4) The legal system in the foreign country was, by virtue of Art.20 of the Hague Convention, relevant to the issue of summary return.