Neutral Citation Number: [2019] EWHC 466 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2019

Before :

MR JUSTICE WILLIAMS

- -

Between :

V — **Applicant**

- and -

M — **Respondent**

- -
- -

(A Child: Stranding: Forum Conveniens: Anti-Suit Injunction)

Maria Scott-Wittenborn (instructed by **Dawson Cronwall**) for the **Applicant**
Claire Renton (instructed by **Ammal Solicitors**) for the **Respondent**

Hearing dates: 6 February 2019

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Approved Judgment

I direct that pursuant to FPR 27.9 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE WILLIAMS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Williams :

1. On 23 January 2019 Deputy High Court Judge Gupta QC gave judgment in respect of one part of a dispute between the applicant mother V (the mother) and the respondent father M (the father). They are engaged in litigation in England and in India in respect of their son K (born August 2015). The English limb of the proceedings is the mother's application for wardship which was issued on or about the 16 October 2018, and which includes within it application for the summary return of the child from India to England.

2. On 25 October 2018 Mr Justice Francis made the child a Ward of court. The father challenged the jurisdiction of the English court to make any orders in relation to the child, he maintaining that the courts in India were already seized of proceedings concerning the child. At a further hearing before Mrs Justice Gwynneth Knowles on 14 November 2018, a hearing was timetabled for the 21 – 22 of January 2019 in order to determine:

    i) the issue of jurisdiction,

    ii) the mother's application for summary return of the child

    iii) the father's application for a stay of the proceedings.

3. Both parties filed evidence and Deputy High Court Judge Gupta QC heard evidence from the parties on the 21 – 22 January 2019 and on 23 January 2019 he delivered an extempore judgment.

4. By his judgment and order Deputy High Court Judge Gupta QC made the following findings against the father:

    i) the child has at all times been habitually resident in the jurisdiction of England and Wales since birth,

    ii) the father intentionally deprived the mother and child of their passports as alleged by the mother,

    iii) the father intentionally stranded the child in India,

    iv) the father's stranding of the mother and child in India was premeditated.

5. The judge consequently made a declaration in the following terms:

'The child was habitually resident in the jurisdiction of England and Wales on 16 October 2018 and continues to be habitually resident and by reason thereof this court has jurisdiction to determine issues in relation to the welfare of the said child'.

6. Due to the time it had taken to resolve the issue of habitual residence it was not possible to determine the mother's application for summary return of the child or the father's application for a stay of the English proceedings. Deputy High Court Judge Gupta QC gave directions in respect of those remaining issues together with the issue of whether any other welfare orders should be made in respect of the child and the matter was listed for a two hour hearing on 6 February 2019.

7. One of the directions he gave was that the parties should lodge with the court an agreed bundle of law and authorities the day prior to the hearing. Regrettably the parties did not comply with that direction. Both parties did file updated statements which addressed in particular the treatment that would be available to the child by the NHS were he to return to England.

8. The matter came before me at 2pm on 6 February with its two-hour time estimate. I was provided with a bundle of some 640 odd pages together with practice direction documents and position statements or skeletons on behalf of both parties and a number of authorities. The essential reading list helpfully identified about 100 pages of reading although unfortunately the approved transcript of Deputy High Court Judge Gupta QC did not become available until about 4:45pm and prior to that I had access only to a somewhat scrambled note taken by the parties on 23 January 2019. The mother attended in person, she having returned from India in July 2018 with the child remaining in India with her parents. She had been unable to obtain a passport for the child and so was unable to bring him back with her. She was represented by Ms Scott-Wittenborn, counsel. The father attended the hearing by video link from India, he having returned to India in about June 2018. He was represented by Ms Clare Renton, counsel. Over the course of the afternoon I heard submissions on behalf of each party on the facts and the law. It emerged that there was an issue between the parties as to the availability of an 'Hemain' anti-suit injunction in relation to proceedings concerning children. The mother argued that if I concluded that the English court should exercise its jurisdiction over the child, and rejected the father's application for a stay of the English proceedings that I should in tandem with the exercise of the English jurisdiction injunct the father from further progress in the Indian proceedings, save to the extent that it was necessary to give effect to any English orders relating to the child. The father argued that 'Hemain' injunctions were not permissible in actions concerning children. In the circumstances the two-hour time estimate that had been given to the case proved to be wholly inadequate given the volume of reading, the non-compliance with the direction as to an agreed summary of the law and authorities, the range of submissions and the need to consider the law relating to 'Hemain' injunctions. I therefore was obliged to reserve both my decision and judgment overnight. Further written submissions were made by the parties on the 7 February 2019.

Factual Background

9. The judgment of Deputy High Court Judge Gupta QC sets out a detailed account of the factual background to this dispute. He heard oral evidence from both parties and clearly delved deep into the documentary evidence. No appeal has been lodged

against the order that arose from that hearing. I do not intend to repeat that judgment in this judgment but it needs to be read in conjunction with this. For my purposes some of the most significant matters which provide the context to this judgment are as follows:

i) The mother was born in India. She is an Indian citizen.

ii) The father was also born in India. He relocated to England in March 2011 and has lived and worked in the UK for the majority of his life since. He became a British citizen in July 2018 and I believe in consequence is obliged to relinquish his Indian passport.

iii) The parties married on 10 November 2014. The mother moved to live in the UK in February 2015 entering on a Visa as a dependent of the father.

iv) The child was born on 10 August 2015. He has suffered from speech and developmental delay. The child has UK citizenship and a British passport.

v) In February 2018 the family travelled to India with Deputy High Court Judge Gupta QC concluding that it was only a temporary visit. The purpose of it appears to have been to secure assessment and treatment for the child from the All India Institute for Speech and Hearing (AIISH) in order to ensure the child was receiving therapy whilst they waited for the NHS to make progress in providing appropriate treatment for him. On the 21 May 2018, the child had a paediatric appointment with the NHS but the father cancelled this without the mother's knowledge.

vi) The father unilaterally decided that the mother and child should remain in India and he removed the mother's passport with her visa and the child's passport and prevented the mother and child from returning to the UK. He kept his options open by renewing his own UK passport. Thus the mother and child became 'stranded' in India by June 2018. Deputy High Court Judge Gupta QC found that the father's actions were premeditated and deliberate. He also concluded that in 2017 the mother and child were kept in India and the father made her agree to certain things before she was allowed to return to the UK.

vii) On 10 June 2018, the father wrote to the Home Office to say the marriage was over. In June the mother managed to obtain a replacement Indian passport and a replacement UK Visa but she was unable to obtain a replacement passport for the child without the father's consent. She returned to England on 11 July 2018 leaving the child with her parents.

viii) The father then commenced litigation in India. He appears to have issued a petition on 4 July 2018 for the restitution of conjugal rights which was followed by a habeas corpus petition in the High Court of Madras on 14 August 2018. The High Court decided to exercise its parens patriae jurisdiction and took Custodianship over the child; Deputy High Court Judge Gupta QC understood the Indian court's jurisdiction to be based on the child's presence and akin to an emergency jurisdiction. The judge concluded that the mother's participation in those proceedings did not amount to her accepting the Indian court's jurisdiction or ceding the English court jurisdiction but were

rather her needing to deal with the applications as they arose in India. Subsequently the father issued further petitions in respect of the child continued treatment at AIISH and seeking custody.

ix) On 10 September 2018 the Madras High Court ordered that the child should remain in the care of the maternal grandparents but be produced for treatment at AIISH; that treatment having ceased on 4 May.

x) As a result of the father's letter to the Home Office on 4 August 2018 the mother was informed that her Visa was being curtailed on 20 October 2018 as she no longer met the requirements under which leave to enter was granted.

xi) On 31 October 2018 in response to the father's application for an interim order prohibiting the child leaving India, the mother's Indian lawyers gave an undertaking on her behalf that the child would not be removed from India. On 9 November 2018 the court itself directed that the child cannot be removed without order of the court in India.

10. Subsequently it has emerged that there are other proceedings underway in India. The child welfare committee in the town of S (which is where the child lives with his maternal grandparents) received a complaint by the father on 16 October 2018. Subsequently a petition was filed by the father with the Child Welfare Committee on 25 December 2018. In the petition the father makes some very serious allegations in respect of both the mother and the maternal grandparents treating the child abusively and the mother neglecting his welfare. Of course, he does not identify that he stranded the mother and child in India and the inference from the petition is that the mother returned to England of her own volition effectively abandoning the child with her parents.

11. The prayer in the petition [D148] states

> *prayer to transfer the physical custody [to father] of my son [name] for his welfare and treatment of child with mild autism*

12. In his recent statement the father describes the Child Welfare Committee as a statutory body with the same powers as a metropolitan magistrate but on further exploration in court it seems they also perform a quasi Cafcass function, they being responsible for making enquiries and recommendations as to the child's welfare. The father says that he has seen them in their office on a number of occasions and they have apparently seen him with the child at their office. The mother says she has spoken to them on approximately three occasions by telephone.

13. In his recent statement the father exhibits a translation of an order made by the Child Welfare Committee on 30 January 2019. That order refers to an investigation report of 9 January 2019 which has not been produced by either party. The order records that

> *it is decided and ordered that the said minor child be handed over into the care of his father[…] And the child welfare committee hereby so orders.*

The maternal grandparents are directed to appear before the committee on 4 February 2019 to receive the order and handover custody of the child to the father. Not having seen the report I do not know the basis upon which the order was made.

14. However on 5 February 2019 the Honourable Mr Justice K Ravichandrabaabu, sitting at the High Court of Judicature at Madras, made an order on the application of the maternal grandfather which provided:

'...since the connected Habeas Corpus Petition is still pending before the Division Bench of this court and in the meantime, the present order is passed by the impugned first respondent, that too, without notice to the petitioner, this court is of the view that the petitioner herein is entitled for an interim order of stay of the impugned proceedings. Accordingly there will be an order of interim stay of the impugned proceedings...'

The proceedings number seem to be WP3461 of 2019 and WMP 3763 of 2019 and the order states that the writ petition is to be posted along with HCP No 1757 of 2018. That case reference relates to the original Habeas Corpus Petition issued by the father on 14 August 2018.

15. Those proceedings are I understand listed for further directions on 4 March.

16. In addition to those two sets of proceedings in different courts Ms Renton informed me in the course of the hearing that the father has issued further proceedings in the court in S seeking custody of the child. The father has not provided a copy of the application issued in that court nor could I follow why it was that he has now seised three courts with applications all seeking custody of the child. As far as anyone has been able to identify the orders themselves do not expressly identify the basis upon which the courts in India are exercising jurisdiction over the child but the consensus appeared to be that it was on the basis of the child's presence. This view was supported by the father's English solicitor who I believe is also a qualified Indian lawyer.

17. Neither Ms Renton nor her instructing solicitor were able to assist me with understanding the interplay of the various proceedings or what process will now be followed to determine the various applications or what the timeframes are for final decisions to be reached including any appeals. Neither party has sought to adduce any evidence from their Indian lawyers, which would assist me in identifying the likely progress of the Indian litigation. Such evidence is commonplace in forum non conveniens applications but it is not available and thus I will have to determine the issues on the evidence as it stands before me.

18. Thus, as matters currently stand the child remains living with the maternal grandparents in S and is undertaking something like a 16 hour round trip three days a week to attend AIISH. At present the order of the High Court in Madras prevents the child returning to the UK although he has a passport which would enable him to do so were the Indian order not in place.

19. The mother is living in rented accommodation in England and is working as a senior database administrator for a company which provides IT support to the NHS. She currently has an application for a Visa outstanding with the Home Office. Her Indian

passport is lodged with the Home Office. The evidence seems to confirm that she could retrieve her passport from the Home Office and travel to India. However her application would then be closed and because her previous Visa expired in October 2018 she would be unable to return to England and would have to make an out of country Visa application, which would require her to remain in India pending its determination. She says that given her employment and her housing she cannot realistically therefore travel to India until her application is determined. She has been led to believe that it should be determined within about six months. Although there was some dispute between Ms Renton and Ms Scott-Wittenborn about the mother's immigration situation the position outlined above ultimately did not seem to be disputed. The father's English lawyer has some specialisation, I'm told, in immigration and she did not appear to dissent from the position outlined by Ms Scott-Wittenborn.

20. The father is living in Coimbatore and says that he has quit his job in the UK. I'm not sure whether he is working in India. He says he intends to rent a property near to AIISH and that he will live there with the paternal grandparents and staff. As a British passport holder, he can travel freely to the United Kingdom. It seems that he is not having contact with the child. I note from paragraph 8 of Ms Renton's skeleton that the father saw the child on 24 December 2018 when he attended with the child welfare committee on a visit to the grandparents' home. As far as I can tell no court order is in place dealing with his time with the child.

The Parties' Cases

21. The mother's position is set out in her witness statement of 1 February and the position statement filed by Ms Scott-Wittenborn and supplemented by a further note dealing with Hemain and anti-suit injunctions. She had not addressed the forum conveniens issue in her position statement but boldly asserted that the court's primary task was not to determine forum conveniens but rather to consider whether under its inherent powers it should order the child's summary return on the basis that he was wrongfully retained there.

22. In one sense I can understand why Ms Scott-Wittenborn would make such a bold assertion. Although the judgment and order of Deputy High Court Judge Gupta QC do not express themselves in these terms it is clear that the effect of the findings made are that the child was wrongfully retained in India by the actions of the father. That being so and as in the case of *Re H (abduction: jurisdiction) [2014] EWCA Civ 1101, [2015] 1 FLR 1132* one might argue that a retained jurisdiction under article 10 BIIa (either independently of or in addition to the article 8 jurisdiction Deputy High Court Judge Gupta QC found) was one which is not susceptible to a stay on forum non-conveniens grounds. It might also be argued that an Article 8 BIIA habitual residence jurisdiction is not susceptible to a stay on forum non conveniens grounds; see paragraph 59 of Re H (above). The Court of Appeal declined to determine the 'Owusu-v-Jackson' arguments and the Supreme Court had suggested in *A v A (children: habitual residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, [2014] 1 FLR 111 that the point might require a reference to the Court of Justice of the European Union. However the case proceeded before Deputy High Court Judge Gupta QC on the basis that the jurisdiction to stay

proceedings did exist and I cannot find any suggestion in any earlier order that the existence of the courts ability to stay proceedings was challenged. Given the need to avoid delay in these proceedings and given that the point was not raised on behalf of the mother I do not propose to attempt to address it. As it happens the trend of authority in relation to the 'Owusu-v-Jackson' points towards the conclusion that the power to stay proceedings on forum non-conveniens grounds continues to exist in respect of countries which fall outside the scheme of BIIa or the 1996 Hague Child Protection Convention. See Rayden and Jackson on Relationship Breakdown, Finances and Children, Volume 2 [31.326-328] and the cases cited there. For the purposes of this case therefore I work on the basis that the court retains the ability to stay these proceedings on the basis of forum non conveniens.

23. In the course of her submissions though I required Ms Scott-Wittenborn to address the various factors which the court must consider in forum non conveniens applications. She submitted:

i) The court's jurisdiction here is based on habitual residence. The generation of evidence in India has arisen as a result of the father's wrongful actions. It would be wrong to allow him to profit jurisdiction the from this.

ii) There is relevant evidence here in respect of the child's medical condition as well as his welfare. These derive from the hospitals and his nursery.

iii) The mother is present here. She cannot travel freely to and from India. Her ability to participate in proceedings in India is limited. The father can travel here freely. Both can speak the language in each country. Both appear to be able to access lawyers in each country.

iv) Any witnesses from India could give evidence by video link which works well. It is not known whether the same would be possible for witnesses here giving evidence in India.

v) Evidence as to the child's medical treatment in India can be provided in report form.

vi) There is a multiplicity of proceedings in India and there is no indication of how they will be resolved what processes involved and what the timescale is.

vii) It is not clear how advanced the evidence gathering process is in India as the mother has not had sight of a report from the child welfare committee.

viii) England is clearly the more appropriate forum to determine these matters. The child can return to England pursuant to a summary return or an interim return order provided the Indian court order prohibiting his removal is removed. A Cafcass officer here will be able to assess the mother and the father and their ability to care for the child. At present as a result of the mother's inability to travel to India she cannot be assessed there.

24. In respect of the anti-suit injunction Ms Scott-Wittenborn submits that:

i) The test for a permanent anti-suit injunction is whether England is the natural forum and whether pursuit of the foreign proceedings would be vexatious or oppressive.

ii) Although the threshold for a permanent anti-suit injunction is a high one the father is frustrating the proceedings here by litigating in India and obtaining orders contrary to orders made in this court.

iii) The indication is that he will continue to litigate on multiple fronts in India if he is not restrained. That is vexatious or oppressive. The father was responsible for the child welfare committee issuing its order on 30 January which was in contradiction of the indication given by Deputy High Court Judge Gupta QC on 23 January 2019.

25. In respect of the welfare orders that the mother seeks Ms Scott-Wittenborn submits:

i) The mother has been unable to obtain a detailed written proposal as to the assessment and treatment that the NHS (or a private provider) would provide to the child where he to return to this jurisdiction. The evidence of the mother has been able to obtain points to the likelihood that the mother would be covered by private health insurance and that the child would be able to access treatment at the Chelsea and Westminster Hospital Paediatric Department through that route. The mother has been told that an assessment could be conducted within three weeks of the child's arrival and that would follow a referral arising from an urgent GP appointment.

ii) The mother accepts that until he has been assessed by them the package of support cannot be evaluated.

iii) If he were returned he could continue to access support from the AIISH via Skype.

iv) As an alternative to a permanent return Ms Scott-Wittenborn acknowledged that it might be that an interim return for the purposes of assessment at the Chelsea and Westminster Hospital might be more appropriate. At my suggestion Ms Scott-Wittenborn accepted that it may be appropriate for a Cafcass officer of the High Court team to be appointed either to provide a report or to represent the child's interests in these proceedings. They would then be able to advise on interim welfare issues.

v) Ms Scott-Wittenborn acknowledged that an application would need to be made to the Indian courts to discharge the order which currently prevents the child from leaving the jurisdiction of India.

26. The father's case is set out in his witness statement of 4 February 2019 and in Ms Renton's skeleton argument and her supplemental note on 'Hemain' injunctions.

27. In respect of forum non-conveniens the father's case in summary is:

i) The jurisdiction of the Indian court is based on the child's presence. In addition and notwithstanding the habitual residence finding the child has a significant connection with India based on the following;

a) the significant periods of time he has spent in India,

b) his mother is Indian, his father was Indian, his extended family is Indian,

c) his first language is Tamil and given his speech delay his communication in Tamil is his primary form of communication,

d) he is currently living in India and has done so for nearly a year. He is integrated in Indian life in particular his medical treatment and his household.

ii) All matters arising since February 2018 are in South India. The Indian proceedings are substantial and well advanced and a welfare report has been prepared. Orders have been made for the child to continue to be treated, for custody to be handed to the father and preventing the child's removal from India. The High Court in Madras has made time available to the parties to determine disputes between them. A further hearing is listed for 4 March.

iii) The relevant evidence is now largely in India; in particular in respect of his current medical needs but also in respect of a welfare evaluation.

iv) The mother can travel to India to participate in proceedings. She could retrieve her passport and travel back now and remain there. She has engaged lawyers and she has filed evidence.

v) The costs of the Indian proceedings are far less than the costs in England.

vi) The mother has complained that the father is manipulating the Indian court process and she has suggested that she will not receive a fair hearing. There is no evidence to support this.

vii) The Indian courts exercise a paramount welfare jurisdiction.

viii) An English court order cannot be enforced in India.

28. In respect of the 'Hemain' injunction application the father submits that

i) it has not and should not be deployed in children cases. Overnight Ms Renton altered her stance slightly as a result of reviewing H v H (nos 1 and 2) [1993] 1 FLR 958 and accepted that that case was an example of such an injunction being made but she rightly points out that the basis of the jurisdiction was not considered in that case.

ii) It would be Draconian and wrong to prevent the father accessing the Indian courts. That court should be free to exercise its custodianship as it sees fit in the light of local evidence and submissions of the parties.

iii) The Indian court was first seized and it has made appropriate welfare orders.

iv) It cannot be said that the mother has a right not to be sued in India nor can it be said she has an interest in preventing the father relitigating matters in India which are res judicata between the mother and father as a result of the English judgment. Ms Renton refers me to Mustafa-v-Ahmed [2014] EWCA Civ 277.

29. In respect of interim welfare matters the father's case is

i) The child has been living in India for nearly a year.

ii) The father is able to offer better care arrangements in India than the mother can in England given she is working full-time.

iii) The child has been receiving treatment at AIISH from February until May 2018 and since November 2018. It would not be in his interests to cease that treatment, particularly if there is no equivalent in place in England.

The Law

Stay applications and forum non-conveniens

30. The statutory jurisdiction in respect of the father's application for a stay of the wardship proceedings derives from Section 5 of the Family Law Act 1986. Which in so far as it is material says

'5 Power of court to refuse application or stay proceedings

(1) A court in England and Wales which has jurisdiction to make a Part I order may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside England and Wales.

(2) Where, at any stage of the proceedings on an application made to a court in England and Wales for a Part I order, or for the variation of a Part I order, it appears to the court—

(a) that proceedings with respect to the matters to which the application relates are continuing outside England and Wales,

(b) that it would be more appropriate for those matters to be determined in proceedings to be taken outside England and Wales,

(c) that it should exercise its powers under Article 15 of the Council Regulation (transfer to a court better placed to hear the case), or

(d) that it should exercise its powers under Article 8 of The Hague Convention (request to authority in another Contracting State to assume jurisdiction),

the court may stay the proceedings on the application or (as the case may be) exercise its powers under Article 15 of the Council Regulation or Article 8 of The Hague Convention.

31. The wardship application falls within part one of the Family Law Act 1986 and so falls within section 5 (2).

32. The principles to be applied are those deployed in the exercise of the inherent jurisdiction to stay non-family proceedings. In the Matter of *Re K (a child) (international child abduction: forum conveniens) [2015] EWCA Civ 352, [2015] All ER (D) 100 (Apr),* per Mcfarlane LJ at [27. The leading authorities remain

    i) Spiliada Maritime Corpn v Cansulex Ltd *[1987] AC 460, [1986] 3 All ER 843,* HL, and

    ii) De Dampierre v De Dampierre *[1988] AC 92, [1987] 2 All ER 1*, HL

33. In *Lubbe v Cape plc [2000] 4 All ER 268, [2000] 1 WLR 1545*, HL., the principles were summarised by Lord Bingham of Cornhill:

''... the court's first task is to consider whether the defendant who seeks a stay is able to discharge the burden resting upon him not just to show that England is not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is had to the fact that jurisdiction has been founded in England as of right (see the Spiliada case [1986] 3 All ER 843 *at 855,* [1987] AC 460 *at 477). At this first stage of the inquiry the court will consider what factors there are which point in the direction of another forum (see the Spiliada case* [1986] 3 All ER 843 *at 855,* [1987] AC 460 *at 477; Connelly v RTZ Corp plc*[1997] 4 All ER 335 *at 344,* [1988] AC 854 *at 871). If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, that is likely to be the end of the matter. But if the court concludes at that stage that there is some other available forum which prima facie is more appropriate for the trial of the action it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this second stage the court will concentrate its attention not only on factors connecting the proceedings with the foreign or the English forum (see the Spiliada case* [1986] 3 All ER 843 *at 856,* [1987] AC 460 *at 478; Connelly's case* [1997] 4 All ER 335 *at 344–345,* [1988] AC 854 *at 872) but on whether the plaintiff will obtain justice in the foreign jurisdiction. The plaintiff will not ordinarily discharge the burden lying upon him by showing that he will enjoy procedural advantages, or a higher scale of damages or more generous rules of limitation if he sues in England; generally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum (the Spiliada case* [1986] 3 All ER 843 *at 859,* [1987] AC 460 *at 482; Connelly v RTZ Corp plc*[1997] 4 All ER 335 *at 345,* [1988] AC 854 *at 872). It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused (the Spiliada case* [1986] 3 All ER 843 *at 859,* [1987] AC 460 *at 482; Connelly v RTZ Corp plc*[1997] 4 All ER 335 *at 345,* [1988] AC 854 *at 873). This is not an easy condition for a plaintiff to satisfy, and it is not necessarily enough*

to show that legal aid is available in this country but not in the more appropriate foreign forum.''

34. The decision is not a paramount welfare decision but the child's best interests are a relevant consideration: *Re S (residence order: forum conveniens) [1995] 1 FLR 314*; *Re V (forum conveniens) [2004] EWHC 2663 (Fam), [2005] 1 FLR 718*, Munby J. It is arguable that the best interests of the child are a primary consideration pursuant to UNCRC, Art 3.1 *[2016] UKSC 15*. Having regard to the logic of the decision of the Supreme Court in *Re N* in relation to the meaning of 'best interests' in Article 15 BIIa transfer cases it is likely that 'best interests' in the forum context should also be applied broadly so as to encompass not only 'procedural' best interests but also substantive best interests.

35. Drawing those threads together the approach that the court needs to take in a forum conveniens situation is it seems to me as follows;

i) the burden is upon the applicant to establish that a stay of the English proceedings is appropriate;

ii) the applicant must show not only that England is not the natural or appropriate forum but also that the other country is clearly the more appropriate forum;

iii) 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. In evaluating this limb the following will be relevant;

a) the desirability of deciding questions as to a child's future upbringing in the state of his habitual residence and the child's and parties' connections with the competing forums in particular the jurisdictional foundation;

b) the relative ability of each forum to determine the issues including the availability of investigating and reporting systems. In practice judges will be reluctant to assume that facilities for a fair trial are not available in the court of another jurisdiction but this may have to give way to the evidence in any particular case;

c) the availability of witnesses and the convenience and expense to the parties of attending and participating in the hearing;

d) the availability of legal representation;

e) any earlier agreement as to where disputes should be litigated;

f) the stage any proceedings have reached in either jurisdiction and the likely date of the substantive hearing;

g) principles of international comity, insofar as they are relevant to the particular situation in the case in question. However public interest or

public policy considerations not related to the private interests of the parties and the ends of justice in the particular case have no bearing on the decision which the court has to make;

h) it has also been held that it is relevant to consider the prospects of success of the applications.

iv) If the court were to conclude that the other forum was clearly more appropriate, it should grant a stay unless other more potent factors were to drive the opposite result; and

v) In the exercise to be conducted above the welfare of the child is an important (possibly primary), but not a paramount, consideration.

[For more authority supporting these propositions see Rayden and Jackson volume 2 [31.334]

Hemain or Anti-Suit Injunctions

36. The basis for the court's jurisdiction to grant injunctions to restrain a party pursuing proceedings in another jurisdiction derives from three principal cases

i) *Socieìtie Nationale Industrielle Aerospatiale v Lee Kui Jak and Another [1987] 1 AC 871,*

ii) *Airbus Industrie GIE v Patel and Others* [1999] 1 AC 119,

iii) *Turner v Grovit and Others* [2001] UKHL 65, [2002] 1 WLR 107,

37. According to Lord Goff of Chieveley in *Airbus* at 133D:

'The broad principle underlying the jurisdiction is that it is to be exercised when the ends of justice require it.

38. In S-v-S [2010] 2 FLR 3224 Baker J (as he then was) noted the difference between a 'Hemain' injunction and an anti-suit injunction. The former being designed to hold the ring whilst the competing courts determine whether or not they have jurisdiction; it thus being an interim remedy. The latter is a permanent remedy. An anti-suit injunction will only be granted where it can be shown: (a) that England is the natural forum; and (b) that the pursuit of the foreign proceedings would be 'vexatious or oppressive': per Munby J in *Bloch v Bloch, [2002] EWHC 1711 (Fam).*

39. The proper approach was further considered by the Court of Appeal in *Mustafa v Ahmed [2014]* EWCA Civ 277 [2015] 1 FLR 139 where McFarlane LJ (as he then was) said:

12. Before this court there was no controversy as between counsel concerning the law relating to anti-suit injunctions.

13. In South Carolina Insurance Co. v Assurantie Maatschappij "De Zeven

Provincien" NV [1987] AC 24 the House of Lords held that, although the power of the High Court to grant injunctions under [Senior Courts] Act 1981, s 37(1) was very wide, it was, in effect, limited to two situations:
i) Where one party to an action can show that the other party has either invaded, or threatened to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court;
ii) Where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable to the prejudice of the other party.

14. Relying upon the Court of Appeal decision in the case of Masri v Consolidated Contractors International (UK) Limited and ors (Number 3) [2009] QB 503 Mr Southgate submitted, and Miss Cooper agreed, that, in the context of anti-suit injunctions, the two situations described in South Carolina Insurance Company can be characterised as:
a) An injunction to enforce a right of party A not to be sued in the foreign jurisdiction by party B;
b) An injunction to prevent party B from re-litigating matters in a foreign jurisdiction which are res judicata between himself and party A by reason of an English judgment, i.e. because it would be unconscionable for him to be permitted to.

40. Counsel have been unable to locate any reported cases in the field of children in which the use of the jurisdiction has been argued. In Hallam v Hallam *[1992] 2 FCR 197*, sub nom H v H (minors) (forum conveniens) (Nos 1 and 2) *[1993] 1 FLR 958* and Hallam v Hallam (No 2) *[1992] 2 FCR 205*, Waite J made an anti-suit injunction to prevent the father continuing to litigate in the USA after Waite J had determined England was the appropriate forum. He assumed the jurisdiction existed.

41. I have not heard anything like full argument on the availability of the remedy of an anti-suit injunction in children cases; nor indeed on the availability of a 'Hemain' injunction in children cases. The discussion and tentative conclusions that follow must be viewed in that light.

42. It is self-evident from the international instruments in the field, for instance Brussels IIa and the 1996 Hague child Protection Convention, that concurrent proceedings in two jurisdictions concerning the same matter of parental responsibility is a well-recognised ill. Hence provision is made for stays of second seized proceedings. I see no reason in principle why the ill of concurrent proceedings in England and Wales and another country which is not a party to those international instruments is any less. The risk is of the parties and the children being exposed to the stress and cost of two sets of litigation. In particular there is the risk of conflicting judgments being issued by the two courts which may have profound consequences for the children in terms of their relationship with their parents and their ability to travel between two countries both of which they may have significant connections with including family. Thus if the 'ill' is the same and if a stay might issue to remedy the ill as between signatories to international instruments I see no reason in principle why the court should be unable to deploy the other tool of an anti-suit injunction where a non-signatory state is involved. However the identification of the ability of the court to grant such an injunction in principle is quite different to the grant of an injunction in practice.

43. Issues such as comity and respect for the processes of another court are a component of the discretionary evaluation in determining whether to make an anti-suit injunction.

Part of that component of the evaluation will probably incorporate consideration of whether the applicant for the injunction either has or can make an application to the other court to seek to stay those proceedings; if such a remedy is open to them that might lead this court to conclude that an anti-suit injunction was premature, albeit no doubt each case will turn on its own facts. It seems clear that the High Court in Madras has an ability to stay the operation of orders and it may well have the ability to stay proceedings in India on the basis of forum non conveniens. In the absence of evidence as to Indian law, I approach it on the of the general principle of English law to the effect that foreign law is the same as English law until the contrary be proved: see, for example, *Mansour v. Mansour* [1989] 1 F.L.R. 418, CA, at p. 419. Where it seems probable that a court has its own jurisdiction to stay proceedings, acting in accordance with the principle of comity it seems to me that before granting an anti-suit injunction the court would expect the applicant in England to make an application in the other jurisdiction for a stay of those proceedings.

44. I note that in respect of a country which is not a signatory to those international conventions, neither country is bound by those rules and the highest courts in this country have ruled against importing Convention principles into non-Convention cases. A country such as India has its own jurisdictional criteria, a well-established and respected court system and judiciary and in particular where the court itself has established Custodianship over a child it has rendered its own welfare determination. Thus any step taken in this court which has the effect of inhibiting or restricting the ability of the Indian High Court to determine the welfare of a child in its jurisdiction, even through the vehicle of an injunction directed at a party, would potentially be a significant interference with the judicial process of that country. It seems reasonably clear that, like England, the court acts upon application made by party rather than of its own motion. Thus an injunction restricting a party's access to a court indirectly restricts the courts ability to exercise its jurisdiction.

45. I also have to recognise that in respect of a child who is present in another jurisdiction, that there is a particular issue to be grappled with which is the potential need for emergency relief from a local court in respect of a matter which could not be resolved by an enforceable order made by the English court. Thus some care would need to be taken in ensuring that any anti-suit injunction in respect of proceedings relating to a child did not place the respondent in a position where he could not engage the local court to deal with an urgent matter which could not be determined by the English court in an effective way. The provisions of Article 20 BIIA and Articles 11 and 12 of the 1996 Hague Convention are of course in part designed to address this sort of issue where both countries are a party. Ultimately if the issue is one of 'securing the ends of justice' which in a case where the child's welfare is at issue the general principles outlined which support the 'securing the ends of justice' are fortified by the best interests of the child at least as a primary consideration.

46. Thus whilst I accept that this court has the jurisdiction to grant an anti-suit injunction in an application concerning a child, the court would need to consider:

    i) Whether England is the natural forum for the determination of the dispute.

    ii) Whether the applicant fits into a category identified by the Court of Appeal in Mustafa; namely a) An injunction to enforce a right of party A not to be sued in the foreign jurisdiction by party B; b) An injunction to prevent party B from

re-litigating matters in a foreign jurisdiction which are res judicata between himself and party A by reason of an English judgment, i.e. because it would be unconscionable for him to be permitted to.

iii) Issues of comity including (not exhaustive) the existence of remedies in the other court to prevent parallel litigation, the nature of the issues before the other court and thus the extent to which the order would represent an interference with the other courts ability to exercise its own welfare jurisdiction over the child.

47. The principles which might apply in a situation of a party rushing towards a welfare judgment in another court whilst seeking to delay this court progressing to a welfare determination by taking jurisdictional points or otherwise (i.e. a true 'Hemain' injunction) might be somewhat different to an anti-suit injunction. We are no longer in this situation.

Evaluation

48. Turning then to consider how those principle apply in this case. Firstly addressing the application for a stay and forum non conveniens:

i) The burden is upon the applicant to establish that a stay of the English proceedings is appropriate.

ii) The applicant must show not only that England is not the natural or appropriate forum but also that the other country is clearly the more appropriate forum.

iii) 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. In evaluating this limb the following will be relevant;

a) The desirability of deciding questions as to a child's future upbringing in the state of his habitual residence and the child's and parties' connections with the competing forums in particular the jurisdictional foundation.

Deputy High Court Judge Gupta QC concluded after a thorough review of the evidence that the child remained habitually resident in England and that he remained more integrated in this jurisdiction than in India. In contrast the Indian court's jurisdiction appears to be based on presence which in the hierarchy of jurisdictions undoubtedly indicates a lower level of connection with that country than habitual residence. However the child and the parties have a significant connection with India, both in terms of it being their country of birth, a country with which they are familiar from growing up and being educated there, and a country where they have significant family connections. Both appear to speak fluent English and both the mother and father have chosen to

make England their home in recent years albeit still spending some considerable periods of time in India. The choice that the family have made to opt for British citizenship for the father and for the child which I believe is also the aspiration of the mother indicate a significant connection with England and Wales. In relation to the jurisdictional connection I do not think one can ignore the fact that Deputy High Court Judge Gupta QC found that the father had stranded the mother and child in India by premeditated action on his behalf. He did so because he saw some advantage to himself in adopting that course of action; Deputy High Court Judge Gupta QC found that he had adopted a similar course previously in order to extract concessions from the mother on various matters. A significant part of the philosophy of courts approaching abduction situations is to return the child to the country of habitual residence in order to prevent the abductor or obtaining some jurisdictional advantage by wrongful action. That must also be factored in it seems to me. Thus overall the balance in respect of this aspect seems to fall clearly in favour of the English court exercising jurisdiction based on a combination of the factual matters which give rise to the habitual residence jurisdiction and which amount to a significant connection to this jurisdiction and which in my view outweigh the connection that the parties and the child have to India, in particular having regard to the fact that the child's presence and thus the Indian court's jurisdiction was secured by wrongful action on the father's part.

b) The relative ability of each forum to determine the issues including the availability of investigating and reporting systems. In practice, judges will be reluctant to assume that facilities for a fair trial are not available in the court of another jurisdiction but this may have to give way to the evidence in any particular case.

Although I have not had the benefit of evidence in respect of the approach of the Indian courts, I accept that the test the Indian court will apply will be a paramount welfare test and that the courts of India will conduct an enquiry and reach a determination that is fair to both parties. Although at the present time the Indian court may be better placed to determine matters relating to the child's health that would be relatively easily remedied if the child were to return to this jurisdiction for assessment and treatment. It seems that the Indian courts have access to a social work reporting process which may be broadly comparable to the function that Cafcass would undertake in this jurisdiction. The limitation that currently appears to exist is that because the mother cannot travel to India – the social work report there will be unable to assess her with the child. That is a significant limitation. The limitation on the English assessment is of course that the child remains in India and unless the English and Indian court are able to work together to allow the child to travel to England any Cafcass assessment will be seriously limited. That is a serious limitation at present on the English process. In respect of this

component the situation seemed broadly evenly balanced or perhaps marginally in favour of India.

c) The convenience and expense to the parties of attending and participating in the hearing and availability of witnesses.

The principal witnesses in the determination of the cross applications for custody or live with orders will be the mother and the father and any social work assessor. Any medical evidence is likely to be put before the court in the form of reports rather than live evidence. Thus this court could assess medical evidence from India and England and the Indian court could assess medical evidence from India or England. The significant difference at present is that the mother cannot travel to India without giving up her job and home in England and being restricted to living in India whilst her Visa application is processed. In reality that means she is unable to travel to India to participate in the court process or to give live evidence. That is a very significant disadvantage. With his British passport, the father is at liberty to travel to this country to participate in proceedings here and to be assessed by Cafcass. Clearly this court can hear video link evidence from India; that was demonstrated by the successful operation of the video link in the hearing yesterday. I have no evidence before me as to the availability of similar facilities to enable witnesses in England to give evidence to the Indian court. Documentary records from India or from England will be available to both courts; language does not appear to be a problem either way the child may be less able to express his wishes and feelings to a Cafcass officer. However given his young age and his speech and developmental delay there will be limits on ascertaining his wishes and feelings whether in India or in England.

Overall it seems to me that the balance in respect of evidence and witnesses lies in favour of the English court as a result of the position of the mother.

d) The availability of legal representation.

It seems that both parties are able to access lawyers in both jurisdictions. I accept that it is likely that instructing Indian lawyers will be less costly than London lawyers although I do not have evidence of the respective costs other than general assertion of the father. That marginally favours India.

e) Any earlier agreement as to where disputes should be litigated.

This is not directly relevant although but for the father's wrongful actions in stranding the mother and child in India there really would have been no argument as to where the dispute should be litigated.

f) The stage any proceedings have reached in either jurisdiction and the likely date of the substantive hearing.

The father has not adduced evidence as to the stage of the Indian proceedings. Clearly a report has been completed by the child welfare committee which in one sense puts the Indian process in advance of the English process where Cafcass have not been engaged yet. Nor has the father adduced evidence as to the likely timeframes or other matters relevant to determining how the Indian litigation will progress. I am concerned about the father's choice to commence multiple actions in India. The existence of three sets of proceedings started by the father in which a court has jurisdiction to make custody orders seems to me a recipe for complexity and delay. Because of the absence of evidence from the father (albeit the mother could have put it before me also but given the burden lies on the father tactically the onus would be on him) as to how each of those three sets of proceedings interface with the other and how contradictory decisions or parallel processes will be avoided I am left with an abiding and serious concern as to whether the father has chosen to pursue that course because he perceives some tactical advantage in multiple proceedings. As far as I can tell no timetable has been put in place for a final hearing of the applications nor have directions been given to consolidate them.

The process in England will be relatively straightforward. Cafcass would be appointed. They would report within 12 weeks or thereabouts. I could list a DRA at this stage and a final hearing in early summer.

It is also significant that this court has already embarked upon the process of hearing evidence and making determinations of fact. As far as I can tell the Indian court has not yet conducted the sort of hearing that Deputy High Court Judge Gupta QC conducted in January 2019.

In respect of this component I conclude that the English court is better placed to make progress the application to final determination.

g) Principles of international comity, insofar as they are relevant to the particular situation in the case in question. However public interest or public policy considerations not related to the private interests of the parties and the ends of justice in the particular case have no bearing on the decision which the court has to make.

The Indian court has of course embarked on reaching some welfare conclusions in respect of the child in respect of medical treatment, non-removal from the jurisdiction and custodianship itself. Deputy High Court Judge Gupta QC who has more experience than I of the courts of India, was optimistic in respect of constructive cooperation between this court and the Indian court having regard to his determination of habitual residence and his findings in respect of the father's actions. I fully respect the process which the Indian courts have embarked upon and the orders that they have made and anticipate that this court and the Indian court will be able to work collaboratively to reach an appropriate solution for this child. I do not consider that a determination that this court is the more convenient forum would in

any respect amount to a breach of the principles of comity between this court and the Indian court. In so far as the matter of the father's wrongdoing is relevant I have identified it above in respect of the jurisdictional foundations of the applications in this court and the Indian court. That wrongdoing does sound in the particular facts of this case; not least because it has contributed to a situation where the mother's ability to engage in the Indian litigation is hampered and where the presence jurisdiction in India was only gained by the child's wrongful retention there.

In this respect matters tend to support the English courts exercise of jurisdiction is the more appropriate forum.

h) It has also been held that it is relevant to consider the prospects of success of the applications.

I do not see any distinction between the two jurisdictions in this regard. Both will assess the parents' applications having regard to the paramount welfare of the child.

iv) If the court were to conclude that the other forum was clearly more appropriate, it should grant a stay unless other more potent factors were to drive the opposite result; and

v) In the exercise to be conducted above the welfare of the child is an important (possibly primary), but not a paramount, consideration.

It is in this child's welfare interests to determine his future with as little delay as possible. Given that I am able to assess with a fair degree of certainty the timeframe for English proceedings but am unable to determine at all the timeframe for Indian proceedings the balance in this respect favours England. It is also in his welfare interests to have as little disruption to his medical treatment as possible. This would favour India although a high degree of continuity could be achieved if he were to be assessed in England and only returned permanently once the treatment program was in place. It would also be in his welfare interests to be in a country where both of his parents could be present to support him. This would favour England at the present time. Confirming the exercise of the English court's jurisdiction will almost inevitably involve some disruption for the child as he would need to return to this country on either a temporary or permanent basis. However as things currently stand that would likely result in him resuming life either with his mother with his mother and father if the father chose to return to the UK also. Thus overall it seems to me that his welfare would tend to favour the English court exercising jurisdiction.

49. I thus conclude for all the reasons set out above taken in combination that the father has not discharged the burden upon him to establish that a stay of the English proceedings is appropriate. On clear balance England is the natural and appropriate forum and India is not clearly the more appropriate forum; albeit that it is not all one-way traffic. Thus the father's application for a stay of the English proceedings or their dismissal is refused. As I have reached the conclusion that the jurisdiction ought to be

exercised following my forum non-conveniens evaluation I am reinforced in my conclusion that I do not need to address the 'Owusu-v-Jackson' point in any event. On the facts of this case the outcome of the argument would make no difference. There may well of course be cases where it would make a critical difference. That case will have to await determination on another day

50. Having regard to the test for the deployment of a permanent anti-suit injunction outlined above I'm not satisfied that this case falls into a category where such an injunction could properly be made. I acknowledge that it could be argued that having regard to the issues surrounding the wrongful retention of the child in India that the mother could justifiably submit that she has a right not to be sued in India when that jurisdiction arose only through the wrongful act of the father. However the Indian court's jurisdiction is in respect of a child; this is not a commercial matter. Given the possible availability of a stay application in the Indian courts and given the issues of comity which arise when a court exercises a custodianship jurisdiction in respect of a child I do not consider it appropriate in the exercise of my discretion to grant an anti-suit injunction. Assuming that a stay application can be made and that some form of judicial liaison can be commenced to enable this court and the Indian court to work cooperatively to solve the riddle of competing applications in our respective courts, it is in my view wholly premature to grant such an injunction. That situation might fall to be reconsidered if no progress can be made and in particular if the father embarked upon a rear-guard action to play the Indian courts to delay the resolution of matters. However we are far from that position as yet.

51. In respect of interim welfare orders at the present time I'm not satisfied that it would be in this child's welfare to make an order for his summary return to this jurisdiction on a permanent basis. If he is to return on a permanent basis the arrangements for his care and the meeting of his medical needs will need to be in place immediately upon his return. That will need a more concrete care plan in respect of his medical needs which may only be capable of construction after he has been seen by a paediatrician in England. The arrangements for his care having regard to the mother's work commitments will also need to be considered. On a provisional basis it seems to me that it would be in his welfare interests to return temporarily to this jurisdiction to enable him to both be reunited with his mother for a short period of time, and possibly also with his father if he will travel to the UK, and for him to be assessed by a paediatrician in order to commence work on the construction of the care plan.

52. It seems to me that this child's situation falls within FPR 16.2 and PD 16A paragraph 7 (b), (c), (f) and (g) and where it is in his best interests to be joined as a party and a Guardian appointed. Thus I will invite the Cafcass High Court team to appoint one of their officers to represent this child's interests. Before I make an order for his temporary return I would value the input of the Guardian in respect of the orders that would best promote this little boy's welfare.

53. I will therefore timetable a further hearing within the next four weeks to enable the Guardian to consider the position. Whether this hearing should be prior to the next hearing in India on 4 March or afterwards I will allow the parties to make representations on. I consider the hearing should be after the 4th of March 2019 in order to enable the Mother to make an application to that court for a stay.

54. That is my judgment.