

Family Law in the UK Supreme Court

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Lord Hope

From the point of view of the Scots family law practitioner the UK Supreme Court, where I work, must seem rather remote. Very few Scottish cases find their way to London. Appeals in Children's Hearings cases cannot go there because the statute tells us that the Court of Session is the court of last resort¹. And much of modern Scottish family law has been laid down by statute, following years of detailed work by the Scottish Law Commission. The policy choices that have been made for us are relatively recent, and you might well think that there is no need to look to the other UK jurisdictions for guidance or even for inspiration. You might indeed wonder why I am here at all.

I should like to suggest however, with all due modesty as it is many years since I was in active practice here, that there are good reasons for keeping an eye on what is happening in London. There is much about the Scottish system that we can be pleased with. But no system of law can ever be perfect and, as time moves on and life's patterns change, solutions that seemed right, say, 20 years ago may not seem quite as right as all that today. Also there has been a very significant increase in the number of family cases reaching the Supreme Court in comparison with the number that the House of Lords was dealing with when I first went there in 1996, 15 years ago.

¹ Children (Scotland) Act 1995, section 51(11).

As it happens, three of the Scots appeals in the 1996-1997 session were in family law cases: *Brixey v Lynas*², *Jacques v Jacques*³ and *Sanderson v McManus*⁴. The first two were appeals against decisions in the Inner House in which I was involved while I was sitting as Lord President. The question in *Brixey* was whether it was in the best interests of a child to be with her mother, although the sheriff had held that she had a better opportunity to have a stable background and a successful future with the father. Lord Jauncey delivered the leading speech in the House of Lords. He rejected the sheriff's approach, on the view that practical experience and the workings of nature showed that the welfare of the child would be more effectively promoted by her living with her mother. I am not at all sure that we would have reached the same decision today. In *Jacques* it was a dispute about whether there were special circumstances that justified a departure from an equal sharing of the matrimonial property on divorce. In *Sanderson*, in which I was able to sit, the question was whether an unmarried father should have access to his child. Rather to my relief, as this is certainly in line with current thinking, I find on re-reading the case that I said that questions as to the child's welfare had to be looked at from the point of view of the child⁵. But the source then dried up, and there were no more Scots family law appeals until *Principal Reporter v K*⁶ which was heard last December in the Supreme Court. That too was a case where an unmarried father was seeking parental responsibilities and parental rights in relation to his child. But the case had gone to a children's hearing, as allegations that he had been

² 1997 SC (HL) 1.

³ 1997 SC (HL) 20.

⁴ 1997 SC (HL) 55.

⁵ *Ibid*, p 64.

⁶ 2011 SC (UKSC) 91.

sexually abusing her had been made against him. The question for us was whether he was entitled to participate in a children's hearing at which his case was being discussed. We held that he was, although the statute read without the assistance of section 3 of the Human Rights Act had excluded him.

Appeals in family law cases reaching the House of Lords from England and Wales were not all that many more than those from Scotland: just 11 during the seven years from 1997 to 2003. There were none from Northern Ireland. Then on 12 January 2004 Baroness Hale of Richmond arrived. It may just be a coincidence, but since her arrival the number and variety of family law cases has more than doubled during the period from 2004 to 2011. Now we have Lord Wilson too, another very distinguished family lawyer. It is perhaps not very surprising that their presence on our court is generating work of a kind coming from the Family Division that previously we did not see and which, in truth, we were much less well equipped to handle until they joined us. For example, as I have already said, I am not at all sure that we would have reached the same decision as to whether the child should remain with the mother that the House of Lords did in *Brixey v Lynas* if, with their assistance, we had been looking at the same issue today. In the first family law case to come before us in the Supreme Court, *In re B (A Child)*⁷, we made it clear that all consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in what is in the child's best interests. There is no question of a parental right where the welfare of the child is in issue. It is only as a contributor to the child's welfare that parenthood assumes any significance.

⁷ [2009] 1 WLR 2496, drawing on Baroness Hale's speech in *In re G* [2006] 1 WLR 2305.

The problems relating to partners and their families that reach us are not confined to the familiar ones about parental responsibilities and parental rights and financial provision on divorce. The right to respect for the family which is guaranteed by article 8 of the European Convention on Human Rights has an important part to play in immigration cases. In *ZH (Tanzania) v Secretary of State for the Home Department*⁸, for example, the question was about the weight to be given to the best interests of the children where they were affected by a decision to deport one or both of their parents from the UK. They had been born here and were citizens of this country and had the right to remain here. Did this mean that it was permissible for their non-citizen parent, without whom they could not be expected to live, to be deported? We held that that, while the fact that the children were British citizens did not trump all other considerations, it will hardly ever be less than a very significant and weighty factor against moving them to another country with a parent who has no right to remain here. The more significant and far-reaching point, perhaps, was our rejection of the Secretary of State's argument which had been upheld by the Court of Appeal that, as the mother knew full well that her immigration status was precarious before her children were conceived, her decision to have them here was motivated by a belief that the fact that they were born here would make it more difficult for the authorities to remove her. There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, their best interests must be a primary consideration. But we held that suspicions about the mother's motives could not be held against the children in that assessment. After all, it was not

⁸ [2011] 2 WLR 148.

their fault that they had been conceived and born here. Their best interests, which lay in their being allowed to remain in this country, had to prevail. They could not be devalued by something for which they could in no way be held responsible. This was, you may think, a rather bold decision. But it is an indication of the way the Supreme Court is going when faced with issues as to the weight to be given to the children's best interests.

Article 8 of the ECHR played an important part in *Principal Reporter v K*⁹ which I mentioned earlier. The problem about the right of the unmarried father to attend a children's hearing at which allegations against him were being discussed ought not to have come to us at all, because it was an issue arising under Part II of the Children (Scotland) Act 1995 which excludes any right of appeal to the Supreme Court¹⁰. But the reporter had raised an ordinary action in the Court of Session seeking the suspension of an order by a sheriff granting the father parental rights and responsibilities as incompetent, and there was right of appeal under the Court of Session Act 1988¹¹ from the interlocutor of the Inner House which had granted him the order which he sought. By a happy chance this opened up for us the whole issue as to whether the provisions of the relevant section of the Act, which had omitted to give him the status of a relevant person with a right to attend the children's hearings, were compatible with the article 8 right of a parent whose family life with his children was at risk in such proceedings. Having had the pleasure of listening to some excellent advocacy by some of Scotland's leading family law practitioners, we held that the section should be read and given effect compatibly with article 8 so as to give the unmarried father the right to attend. Here

⁹ See fn 5.

¹⁰ See fn 1.

¹¹ 1988 Act, s 40(1).

again we found ourselves giving greater weight to the article 8 right than the court below had done.

Another case which raised an issue about Convention rights which was not concerned with parental responsibilities and parental rights or financial provision on divorce was *In re W (Children)*¹². The underlying facts were not all that different from those in *Principal Reporter v K*. A step-father who wanted to have contact with his step-children had been accused of sexual abusing one of them. Care proceedings had been instituted and he applied for that child to be called to give evidence. The current approach in England and Wales was that there was a presumption against calling children in care proceedings which would rarely be rebutted¹³, and the Court of Appeal held that it was bound to dismiss the appeal. The Supreme Court held however that the presumption could not be reconciled with the jurisprudence of the European Court of Human Rights which required a fair balance to be struck between the competing Convention rights of those involved and that the proceedings overall be fair. To meet this test, a party normally had to be given the right to challenge the allegations that were being made against him. The test that should have been applied was whether justice would be done to all parties without further questioning of the child. The advantages which calling the child would bring to a determination of the truth had to be weighed against the damage that this might do to the welfare of that or any other child. The question was remitted to the fact finding judge to determine.

¹² *In re W (Children) (Family Proceedings:Evidence)* [2010] 1 WLR 701.

¹³ *LM v Medway Council* [2007] 1 FLR 1698, para 44.

These three cases were all concerned with Convention rights. In each of them the Supreme Court saw the weight to be given to a Convention right differently from the lower courts. This is worth noting, if only to make the point that they had this in common with the decision in *Cadder v HM Advocate*¹⁴ in which, disagreeing with the High Court of Justiciary, the Supreme Court held that a detainee was entitled to access to a lawyer before being questioned by the police while in custody. It is, of course, easier for us to give the right more weight as we are not constrained in the same way as the lower courts are by previous authority. But I also think that our experience in dealing with cases in this field makes us just a bit more conscious of the particular responsibility which we have as the court of last resort to maintain the standards set for us by international instruments such as the ECHR and the Convention on the Rights of the Child, and of the need to consider how the matter would likely to be viewed if the United Kingdom were to have to defend its position in Strasbourg.

It is worth mentioning one other case which lies outside the mainstream of family law to illustrate the kind of problems we sometimes have to grapple with. This was *Moncrieff v Jamieson*¹⁵, in which the parties were in dispute about whether the right to park a motor vehicle was a necessary part of a servitude right of access. The property in question was in Shetland. It was situated just above the foreshore, and the only access to it from the public road was by means of a fairly steep track about 150 yards long over ground which was in the ownership of the neighbouring proprietor. The issue was whether the family who lived in the property could park their car at the bottom where the

¹⁴ 2011 SC (UKSC) 13.

¹⁵ 2008 SC (HL) 1.

house was, or had to leave it at the top of the hill and walk up or down the hill as the case might be whenever they wanted to use it. Convention rights did not come into it, and it was really a question of property law. But the test was what the owner of the property at the bottom of the hill might reasonable be expected to do in the exercise of his servitude right of access. Views differed as to whether the property was reasonably capable of comfortable enjoyment without there being a right to park vehicles at the bottom of the hill beside it.

Lord Rodger, no doubt recalling his own experiences of life in the New Town in Edinburgh¹⁶, said that he found it hard to ignore some very ordinary facts of modern life¹⁷:

“Especially in cities, there are many flats or houses without any adjacent land on which cars can be parked. That feature is often a significant factor for people when deciding whether to buy the flats or houses and, if so, at what price. Those who own such properties can get to them by car, but are very familiar with the need to drop off their shopping and their passengers before trekking off to search for a resident’s parking space some streets away. Those with young children and no-one to watch them have to take the children to the parking place and trail them back home, whether up or down a steep hill, whether through icy rain or in blistering sun. These are simply the inevitable everyday consequences of the owners’ decision to buy the house or flat in question. If they find the situation intolerable, they have only themselves to blame.”

Bearing in mind the open, sloping hillside on which my cottage in Perthshire is situated and my own family, which at one time consisted of three children under three, I saw the situation differently¹⁸:

“For the owners, use of their own vehicles would involve walking a distance of about 150 yards, in all weathers and in times of darkness as well as in daylight, over what the sheriff has described as a significantly steep descent or climb in

¹⁶ His house was in Dublin Street, which was built on a fairly steep hill.

¹⁷ 2008 SC (HL) 1, para 85.

¹⁸ Ibid, para 34.

open and exposed country. In the case of a mother with very young children, for example, this would mean leaving them unattended and unsupervised in the house while parking or collecting her vehicle, or alternatively taking her children with her on foot in such conditions to and from the place where she had to park her vehicle. Owners who had no difficulty in driving but found walking difficult because they were elderly or disabled would have to do this too, as the restriction on parking for which the defenders argue applies to everyone. The situation in this case, it hardly needs to be said, is far removed from the urban situation to which Lord Rodger refers where people who buy flats or houses without adjacent car parking just have to put up with it. In my opinion it is impossible to reconcile such hardships with the use that might reasonably be expected to be made of the servitude right of vehicular access for the convenient and comfortable use of the property.”

The result of that case does not matter so much for present purposes as the vigour of the debate that took place between us as to what, from our different perspectives, were the ordinary facts of modern life. These things can influence the way judges think and the decisions they take where, as so often happens in our court, there is no previous binding authority to turn to for guidance. Lady Hale is, of course, very conscious of the different perspective which she brings to bear on the work of the court, both as a woman and in view of her experience as a law commissioner. That, as I have said, makes her contribution to the work of the court particularly valuable. Sadly, we have lost the unique perspective which Lord Rodger was able to bear on the work of our court in view of his experience as a law officer at the heart of the government at Westminster.

The question whether it is ever worth looking across the border for guidance in a Scottish case is always a matter for lively debate. I recall from my own experience in practice, not all that long ago, that one could survive for a very long time without ever looking at any English authorities at all. The fact that modern Scottish family law is largely the creature of comparatively recently enacted statutes tends to perpetuate this

impression. One of the jewels in the Scottish crown is the children's hearing. I once remarked in one of the cases that came before me in the First Division under what was then the Social Work (Scotland) Act 1968 that the separation of the welfare aspects of dealing with children in need of care from adjudication by the sheriff on the grounds of referral which lies at the heart of this system was a work of genius¹⁹. It is unlikely that we have much to learn from the way care proceedings are conducted in the English courts. And, as a result of work painstakingly conducted over many years by the Scottish Law Commission, we now have a comprehensive code of family law that, on the surface at least, leaves no room for different choices on grounds of policy inspired by what goes on elsewhere. We do not need to struggle with the problem as to how to deal with the rights of cohabiting partners which, in its judgment in *Jones v Kernott*²⁰, the Supreme Court has done its best to resolve by adapting principles drawn from the law of equity, as the rights of former cohabitants are set out for us in legislation enacted in 2006²¹. The framework which it contains provides them with much greater certainty than is the case in England.

But I think that it would be wrong of us to rejoice in our ability to stand on our own feet. We live in an increasingly globalised society. This is a reality, as European directives, proposals for directives and international conventions encroach more and more on areas that were once governed exclusively by Scots law. And in the broadminded field of family law, surely, there is no room for the rather corrosive anti-Englishness that affects some other aspects of our legal system. So I think that it is worth

¹⁹ *Sloan v B* 1991 SC 412 at p 438.

²⁰ [2011] UKSC 53.

²¹ Family Law (Scotland) Act 2006, sections 25-29.

mentioning some of the cases in the field of family law where we have had to deal with the problems that you may have to deal with, but under a different system.

First, the antenuptial (or prenuptial) marriage contract. It has always seemed to me that the position in Scots law was that the validity of such an arrangement was to be determined according to the ordinary rules of the law of contract. Lord Cameron summed the matter up in *Thomson v Thomson*²² when he said that parties to a marriage contract being of full age are entitled to make such terms as they think fit, including the right to discharge any claim to legal rights on the part of one spouse on the dissolution of the marriage, whether caused by death, divorce or other cause. The contract in that case was entered into before the marriage. But there is no hint here that this made any difference. So the starting point for any consideration of the effect of section 16(1)(b) of the Family Law (Scotland) Act 1985, which allows the court to make an order setting aside or varying the agreement or any term of it if the agreement was not fair and reasonable at the time it was entered into, is that these agreements are construed and enforced on precisely the same principles as any commercial agreement.

The position in England, as can be seen from the decision of the Supreme Court in the *Radmacher* case²³, is quite different. At one time it was thought to be contrary to public policy for a couple who were about to get married to make an agreement that provided for the contingency that they might separate because this might induce the

²² 1982 SLT 521 at p 524.

²³ *Granatino v Radmacher* [2010] 3 WLR 1367.

husband to consent to the parties living apart and to refuse to resume conjugal rights²⁴. This reasoning is founded on equitable principles which never caught on in Scotland and is now, quite rightly, regarded as obsolete²⁵. But the English public policy objection remains in another guise. It is that the power of the court to make provision for a spouse in the event of dissolution of the marriage is a necessary incident of the power to decree such a dissolution, which the spouse cannot by his or her own covenant preclude the court from exercising²⁶.

The issue in *Radmacher* was what effect, if any, the couple's pre-nuptial agreement had on the court's power to make orders for the making of periodical payments or a lump sum under section 23 of the Matrimonial Causes Act 1973 to a party to the marriage who had agreed not to make any such claims on the property of the other party during the marriage or on its termination. The case attracted a great deal of interest in England, assisted no doubt by photographs of Katrin Radmacher outside the court looking extremely glamorous in a remarkably short white coat beneath which, as it was invisible, one could not help imagining there was an even shorter day dress. It was also of great interest because Lady Hale made it clear, in a powerful dissenting speech, that she did not agree with the majority view that the court should give full effect to a nuptial agreement, whether entered into before or after the marriage, if it was entered into freely by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.²⁷ She objected to

²⁴ *Cartwright v Cartwright* (1853) 3 De GM & G 982 at p 990.

²⁵ *MacLeod v MacLeod* [2010] 1 AC 298.

²⁶ *Hyman v Hyman* [1929] AC 601 at p 614.

²⁷ fn 20, para 75.

dealing with pre- and post-nuptial agreements on the same basis. She insisted that there might be important policy reasons which would justify a different approach as between agreements made before and after a marriage²⁸. In her view the object of an ante-nuptial agreement was to deny the economically weaker spouse the provision to which she – and in her view it was usually she – would otherwise be entitled. Referring to the precedents available in recent textbooks, she protested:

“Would any self-respecting young woman sign up to an agreement which assumed that she would be the only one who might otherwise have a claim, thus placing a limit on the claims that might be made against her, and then limit her claim to a pre-determined sum for every year of the marriage regardless of the circumstances, as if her wifely services were being bought by the year? That is what these precedents do. In short, there is a gender dimension to the issue which some might think ill-suited to decision by a court consisting of eight men and one woman.”

I did not write a separate judgment in that case. It was quite easy for me, in view of my background in Scots law, to agree with the majority view that there were no good grounds for treating pre-and post-nuptial agreements differently. Nor do I think that we in Scotland have ever seen this as an issue in which there is a gender dimension, any more than there is in any other contract. Lord Atkin once said that there is no caste in contracts²⁹. I would have been willing to go further and hold that this principle should apply to all nuptial agreements, whether entered into before or after the marriage and that both kinds of agreement should, subject to the court’s power to vary, be treated as contracts just like any other. But everyone was agreed that a decision on that point was not needed in view of the wide powers which have been given to the ancillary relief courts in England. I might have been tempted to say something about the approach to

²⁸ Ibid, para 162; see also para 138(3).

²⁹ *Hyman v Hyman* [1929] AC 601 at p 625.

marriage contracts in Scots law, but it seemed to me that it was enough in an English appeal to say, as the majority did, that the approach in Scotland is significantly different³⁰.

Are there nevertheless lessons to be learned from *Radmacher* about how ante-nuptial marriage contracts should be treated in Scotland? Well, I think that we have to bear in mind, as indeed that case itself illustrates, that the issue as to how they should be treated is not one that can be confined within our own borders. People move about. People who marry in Scotland may move to England to live there after they have married, and people who have married elsewhere may come and settle here. This is just a fact of life. So those who are advising people who are about to get married in Scotland whether or not they should enter into one of these agreements should tell them that they may not have the same force in England as they have here. And people who come and settle here must accept that, if the marriage breaks down and a remedy is sought in the Scottish courts, an ante-nuptial agreement made in England will be regarded as having contractual force here, subject only to the court's power to set it aside or vary it under section 16(1)(b) of the 1985 Act.

It is worth noting too that the formulae which have been used in England and Scotland to describe the powers of the court to override such agreements are different. The formula which the English courts must adopt, as laid down in *Radmacher*, is whether it would be fair to hold the parties to their agreement³¹. Weight will be given to the fact

³⁰ fn 20, para 3.

³¹ *Ibid*, para 76.

that when they entered into it the parties intended it to take effect. Its weight will be reduced if it was unfair from the start, but the overriding question of fairness is to be determined having regard to the circumstances prevailing at the time of the breakdown of the marriage³². The Scottish approach, of course, is quite different. As far as we are concerned, the parties to a marriage can oust the jurisdiction of the courts to make financial provision on divorce if they want to. Assuming that their agreement was not reducible on the contractual grounds of force and fear, facility or circumvention, the only question is whether it was fair and reasonable when it was entered into³³. This is a fairly broad test, as it allows all the circumstances when the contract was entered into to be examined³⁴. But it is plainly less generous to the party who seeks to challenge the agreement than that which applies in England. An argument which looks only to the fairness of the result at the time of the divorce which might have succeeded in England will not do here. But I think that the decision in *Radmacher* that the needs of the husband, as seen at the time of the divorce, did not make it unfair for him to be held to his agreement, which was entered into willingly and with a complete awareness of the consequences, has done much to narrow the difference between the English and the Scottish approaches.

There is one other point. The contracts to which the statutory formula applies are described by the statute as agreements entered into by “the parties to a marriage”. There is, perhaps, room for the view that the power to set aside or vary in our statute applies only to post-nuptial agreements. But I think that the context suggests that these words are

³² Ibid, para 73.

³³ Family Law (Scotland) Act 1985, section 16(1)(b).

³⁴ *Gillon v Gillon* 1995 SLT 678.

directed to the parties' relationship at the time when the divorce is being sought. It would seem very strange if the power to vary could be excluded completely if the agreement was entered into before the marriage but not if, perhaps only a few days later, it was entered into after the parties were married. This not an issue which either the Supreme Court or the Court of Session have yet been called on to decide. But Sheriff Principal Dunlop has held that the power extends to all marriage contracts irrespective of when they were entered into³⁵. I think that his decision is so obviously sensible that it would be hard to persuade a higher court that he was wrong.

Lady Hale said in *Radmacher* that the law of marital agreements was in a mess³⁶. That may still be so in England, and the Law Commission will be looking at the issue very soon. But I do not think this is true of our law, which is firmly rested on the contractual principle. The effect of our statute is to add the test of fairness to the very limited list of grounds on which a contract may be set aside. This was a welcome step forward. But I do not think that it needed to, or could, do more than that if the contractual principle was to be respected. My view that our law is where it should be on this point assumes, of course, that Sheriff Principal Dunlop was right to say what he did about the reach of section 16(1) of the 1985 Act.

Next, the clean break principle. I have already gone on record in expressing my unease about the rigidity of the way this principle has been applied to the power of a Scottish court to make an order for financial provision under section 9(1)(d) of the 1985

³⁵ *Kibble v Kibble* 2010 SLT (Sh Ct) 5.

³⁶ fn 20, para 133.

Act. I was taken to task for doing this by Professor Kenneth Norrie in an article that he wrote for the Journal of the Law Society of Scotland shortly afterwards, but I remain unrepentant. As I see it, this truly is – if I may adopt Lady Hale’s telling phrase – a gender issue. Let me explain.

The case which led me to make these remarks was the high value divorce case of *McFarlane v McFarlane*³⁷. The circumstances were unusual, but not exceptionally so. The husband was a very successful chartered accountant who had developed a high level of earnings and was likely to continue to be a high earner for many years. The wife had had a successful career as a solicitor, earning as much as her husband. But she gave up her career to look after the children. The parties’ capital assets were insufficient to make an immediate clean break possible. But the husband’s net income was far in excess of the needs of both parties, even after they had separated. There was no doubt that this was the result of the parties’ joint efforts at the earlier stages of the husband’s career. The judge made an order for the husband to support the wife for the parties’ joint lives, the amount to be paid by way of what we would call a periodical allowance being reviewed on proof of a change of circumstances. Applying the clean break principle, the Court of Appeal reduced this to a period of five years. But this decision was reversed by the House of Lords on the ground that a five year order was most unlikely to be sufficient to achieve a fair outcome for the wife.

The position in Scotland, as we all know, is that the maximum period for the award of a periodical allowance is three years. It is plain, on the facts of that case, that if

³⁷ [2006] 2 AC 618.

the McFarlanes had been divorced in Scotland this would have been very unfair on the wife. Of course, one can say that the fair break principle is paramount, that she would just have to adjust her lifestyle to the change in her circumstances, that this was just bad luck and that three years ought to have been more than enough for this. But that would not remove the obvious unfairness, given that the husband's successful career was due to their joint efforts at the expense of hers and her difficulty, much later in life, in resuming her high earning career as a solicitor. I said that this result operated harshly in cases where a high earning wife or the highly qualified wife with the prospect of high earnings – and, as Lady Hale was to remark some years later in the *Radmacher* case, I said that it is almost always the wife, not the husband, who gets into this kind of difficulty – gives up a promising and demanding career in the interests of the family. I also said that many more women were reaching the ranks of those who are highly paid – and what a good thing this is – than was envisaged in 1981 when the reforms that led to the 1985 Act were being promulgated. So I suggested that the time had come for a fresh look to be taken at this problem, and that the length of the period for which a periodical allowance could be awarded should no longer be confined to an absolute maximum of three years.

It would be wrong to say that my remarks fell on deaf ears. As already mentioned, Professor Norrie said that he did not like this at all. Nor did Professor Eric Clive, who was the architect of the 1985 Act. But there were some voices in my support, and one tragic case was drawn to my attention where, in a blatant case of forum shopping, a husband whose matrimonial home was at Henley-on-Thames persuaded a Scottish court to grant him a divorce in Scotland. The wife, whose circumstances were

very like those of Mrs McFarlane, did not appreciate until it was too late the trap which she was being drawn into. I know that the economic circumstances in this country are such that we do not have high value divorce cases in numbers or values that are at all comparable with those in England. But I am suspicious of the one-size-fits-all regime that now operates here, and I worry about the rigidity which our carefully worked out statutory regime has created for us. The English system of ancillary relief, which adopted a more flexible approach, may be in need of some tidying up. But its virtue is that it has enabled the courts to keep pace with changes in society which, if I may respectfully say so, our legislation does not.

Lastly, I should like to say something about our decisions in relation to the relocation of children against the background of article 3(1) of the United Nations Convention on the Rights of the Child and article 8 of the ECHR. I have already mentioned *ZH (Tanzania) v Secretary of State for the Home Department*³⁸ in which the question was whether children who are British citizens should be affected by a decision to remove or deport one or both parents who have no right to remain in this country. We gave effect to the principle that the welfare of the children was paramount and to the right of the children to remain here as they were British citizens. The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood. So we held that, as living with their mother was an essential part of their

³⁸ See fn 7.

family life, and that if she were to be removed to Tanzania the children would have to go with her to live there too which as British citizens they should not be required to do, she should not be deported. That was not an easy decision, as there was a strong suspicion that she had conceived the children for very purpose of being able to remain here. But her actions could not be attributed to the children, whose interests came first.

A similar result was reached in *EM (Lebanon) v Secretary of State for the Home Department*³⁹. In that case the question was whether a divorced Muslim woman who had fled from Lebanon with her child and had been unable to establish her claim to asylum here should be sent back with him to that country. The crucial fact in that case was that under Lebanese law custody of a child of a divorced woman is given automatically to the father once the child reaches the age of seven, which this child had. So she would almost certainly lose contact with her child if she was sent back. The evidence was that she and her child had constituted a family for the whole of the child's life. His family life would be destroyed if she was sent back. So we held that in these exceptional circumstances she should be allowed to remain in this country.

Lebanon is not a party to the Hague Convention on International Child Abduction, so we did not have to concern ourselves in that case with difficult question of how the child's article 8 right to respect for his family life interacts with the rather strict rules that the Convention lays down for dealing with case where one parent has removed a child from the place of his ordinary residence. That issue did arise however in *In re E*

³⁹ [2009] 1 AC 1159.

*(Children) (Abduction: Custody Appeal)*⁴⁰. The children in that case, two little girls, had been removed by their mother from Norway and brought back to her home in England. The husband, who was Norwegian, wanted them to be returned to Norway. As so often in these cases, her complaint was that he had been abusing her psychologically and that the children would be exposed to a grave risk of physical or psychological harm or a situation which was intolerable if they were to be returned. But the judge had been in close contact with the Norwegian liaison judge and she was satisfied that appropriate protective measures could be put in place. A strong case was advanced for saying that their article 8 right pointed to their being allowed to remain here, but we took the view that the Hague Convention was designed with the best interests of children as its primary consideration and it should be given effect. We upheld the father's claim so that the decisions that had to be taken as to the children's future should be taken in Norway where they had been born and brought up.

You may have had the impression from what you read in the newspapers that the Supreme Court spends much of its time on devolution issues which, as some see it, enable us to interfere with Scots criminal law and procedure in a way that we should not be able to do. I hope that this brief survey of another part of our work will correct that impression. The fact is that cases raising issues of family law greatly outnumber the cases that come before us under the devolution jurisdiction. This part of our work is very varied, often rather difficult and always extremely interesting. I hope that this is true of the work that you do too and that I have shown that, although we sit in London and most

⁴⁰ [2011] 2 WLR 1326.

of our cases come from the English courts, at least something of what we do is relevant to what you are doing here.

17 November 2011

Lord Hope of Craighead