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AB v CB

[2012] EWHC 3841 (Fam)

FAMILY DIVISION

Mr Justice Bodey

10 October 2012

Divorce - Jurisdiction - Objection to jurisdiction - Parties being involved in divorce proceedings - Both parties Indian nationals - Husband bringing proceedings in India - Wife bringing proceedings in United Kingdom - Issue arising as to whether proceedings to be heard in England or India - Whether English court retaining discretion to stay properly constituted English divorce proceedings in favour of proceedings in foreign jurisdiction - Whether India to be preferred as location for instant proceedings - Whether, if English divorce proceedings stayed, wife's applications for interim relief and maintenance pending suit to be allowed to remain - Matrimonial Causes Act, 1973, ss 22, 27.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR JUSTICE BODEY:

A. Introductory.

1. There are before the Court essentially 2 main issues: (1) whether English divorce proceedings instituted here by the wife AB ("the wife") should be stayed to enable Indian proceedings for divorce instituted there earlier by CB ("the husband") to proceed; and (2), if the English divorce proceedings are stayed, what should happen to the wife's proceedings against the husband in England under S27 MCA 1973 ('neglect to maintain')? These issues have given rise to far-reaching argument. As it was put in the Position Statement of James Turner QC (then leading counsel for the wife) and Ms Chokowry for a hearing before Charles J on 29.2.12: "... the case has a complicated background history, involving proceedings in both India and England, and seems to have lost focus". It has generated 4 lever arch files, including one of authorities. I have read a significant portion of these as requested by the parties. The hearing has been conducted by Ms Chokowry for the wife, acting pro-bono together with her solicitors Dawson Cornwall. The court is grateful to them for the time and effort they have devoted. The husband has been represented by Mr Wilkinson. Both sides have put in written presentations, supported by oral submissions. Many points have been raised in argument, more than can be dealt with in a Judgment of reasonable length. Whilst considering them all, I have concentrated on those which seem to me the most important. One particular issue in the forefront of Ms Chokowry's submissions is that the English Court does not have any discretion to stay the wife's English divorce petition and must therefore let it proceed to a decree. If that is right, then the divorce would be obtained by whichever party could obtain a Decree Absolute first from his or her chosen forum (as regards the wife, England; as regards the husband, India).

B. Factual Background.

2. Both parties were born in India and are Hindu. They are both Indian nationals. Both are living in India. The husband is aged almost 38 and the wife 34. Neither is in work. They were married in India on [date stated] 2003 and their only child D was born in India on [date stated] 2004 (now 8). Both are educated individuals, the husband being an electrical engineer and the wife having a Masters Degree. According to one of the husband's statements, she also has a qualification in Nursery Teacher Training. She is presently a full time mother to D.

3. From the date of the marriage in 2003 until about October 2006, the parties lived together in India. The husband then came to the UK, presumably to better his work prospects. The wife and D joined him here in February 2007 and they all lived in rented accommodation in North West London.

4. In June 2009, the family went to India for a holiday with return tickets for 4th September 2009. In the event, however, the husband travelled back to England in July 2009 and cancelled the wife's return ticket. He also gave notice to surrender the tenancy of the property in North West London. In late August 2009, the husband travelled back to India. On 31.8.09 he caused divorce proceedings to be issued there, at the local court in [town stated], Uttar Pradesh, under No. ZZZ/2009.

5. On 3.9.09, when the wife sought to confirm her flight back to the UK with D for the following day, she was told that the tickets had been cancelled. With financial help from her family, she secured tickets for 8th October 2009 and arrived at Heathrow. There she was interviewed and informed that the husband was no longer supporting her as sponsor and had started divorce proceedings in India. In those circumstances, she was given only temporary permission to remain in the UK. The contemporaneous documents show that the husband was in communication with the UK Boarder Agency encouraging them not to permit the wife to remain here. As it turned out, the wife's subsequent immigration appeal was unsuccessful and she was required to leave the UK with D, which she did on 14.8.10. Since then, she and D have lived with her family in India.

6. Meanwhile on 1.2.10, the wife had issued an application under S27 MCA 1973 ('neglect to maintain') seeking periodical payments for herself and D. At that time, the husband was living and working in England, earning a reasonable income. When it became clear to the District Judge that the husband was challenging the English court's jurisdiction, the case was transferred up to the High Court where it was listed on 24.2.10, but not reached. On that occasion, the husband's solicitor served the wife with the husband's Indian divorce petition dated 31.8.09, which had also been sent to her by her immigration solicitors at the beginning of February 2010. She says that that was the first time she had ever seen that petition. The husband says that she was sufficiently served with it in India back in September 2009.

7. On 30.3.10 Charles J ordered effectively by consent that the husband pay the wife £844 a month by way of interim maintenance under S27, with credits for sums already voluntarily paid. This sum was lower than the wife wanted and higher than the husband wanted; but there was no court time for a contest. The husband paid in full under that order until 14.8.10 when the wife and D had to return to India. After that, his payments became sporadic and were made at a lower rate, it being his case that the cost of living in India is very much lower than here. It has been calculated (and there is little dispute as to this) that from September 2010 to November 2011, when the maintenance order was stayed, the husband paid on average about £350 pm, a shortfall of some £500 per month, creating current arrears of some £6,000 plus interest. The wife says she has therefore had to live with her brother and his family in his small apartment near Delhi, supported by the generosity of her family.

8. In early 2011, attempts to mediate a financial solution took place between the parties' families in India, but were unsuccessful. The parties disagree as to what lump sum was agreed and as to whether the husband paid the wife any part of it. He says he did: she says he did not. It led to the wife instructing her solicitors not

to proceed with her English proceedings, an instruction withdrawn when it became clear that the parties were not in agreement as to what they had agreed.

9. In July 2011, the wife solicitors warned the husband that an application would be made to enforce the S27arrears. He issued an application to discharge the S27 order and remit those arrears. The wife applied for an attachment of earnings order. When those cross applications came before Charles J on 9.11.11 with a T/E of only 1hr, they were adjourned to 29.2.12 and the S 27 interim maintenance order of 30.3.10 was stayed, as it has remained to date.

10. On 21.12.11, the wife issued her English divorce petition and Form A, relying for jurisdiction on the husband's habitual residence in this country. There could be no realistic challenge to the fact that the husband was then habitually resident here.

11. On 19.1.12, before Parker J, terms were reached and recorded (amongst other things) that the wife would not until further order take any steps to progress her English petition; that the husband would pay the wife £350pm (being about the average rate at which he was actually paying) without prejudice to each party's case as to the correct figure; and that he would pay her £400 as a one-off payment for advice and representation at a forthcoming hearing in the Indian proceedings. Later, the wife became anxious that the husband might be about to proceed swiftly and covertly to obtain a decree in the Indian proceedings and therefore went ex-parte to Moor J on 15.2.12 for a 'Hemain' injunction, which was granted, restraining the husband from progressing his Indian divorce suit there.

12. On 29.2.12, a raft of applications came before Charles J, with insufficient time to resolve them. Cutting a long story short, over three hearings between 29.2.12 and 23.3.12, (i) he rejected the husband's application to dismiss the wife's English petition for want of jurisdiction; (ii) he stayed the wife's English petition pending resolution of the husband's application under S5(6) of the Domicile and Matrimonial Proceedings Act 1973 ('DMPA 1973') for a stay of it (effectively 'forum non conveniens'); (iii) he continued the 'Hemain' injunction against the husband; and (iv) he conducted an FDR, which came close to reaching a solution but ultimately failed to do so. He adjourned the following to a District Judge on 30.11.12 (t/e 1 day): (v) the wife's application to lift the stay dated 9.11.11 on her S27 interim maintenance order of 30.3.10 (£844pm); (vi) her application to enforce the arrears under that order; (vii) her application for increased maintenance, whether under S27 MCA 1973 (neglect to maintain) or S22 MCA 1973 (maintenance pending suit); and also (viii) the husband's application to strike out the wife's S27 application; (ix) the husband's application to discharge the S27 order of 30.3.10 and (x) the husband's application to remit the arrears. During those hearings, the husband made it known that due to the asserted stress and pressure of these proceedings, together with the ill health of his mother in India (he is an only son) he might well return to India. During April 2012 he did so, having been released by his English employers from his employment. He has lived in India ever since, separately from the wife and D.

13. On 22.5.12, on a short application before me, Ms Chokowry sought an order releasing the stay on the wife's English divorce proceedings, on the basis that the husband might be progressing his divorce in India. I declined such an order for lack of evidence of this and gave directions for the hearing of the agreed ' forum conveniens' issue before the end of the summer term 2012. I was then unaware of the time-consuming submission that the English court now has no discretion to exercise in circumstances such as these. On 26.7.12, Holman J rightly concluded that there was insufficient time to deal with the issues and set up this hearing on 3 and 4th October 2012. Recording that the husband had failed to make three payments of £350 as per the agreed recital to the order dated 19.1.12 (above), he ordered him to pay interim maintenance pending suit (not interim maintenance under S27) at the rate of £350 p.m. for the months of July August and September 2012, i.e. up to this hearing.

C. Oral evidence.

14. I have heard this case on submissions. Ms Chokowry did at first raise a wish for there to be oral evidence and cross examination, which would have had to have been by telephone to each of the husband and the wife in India. I was told that a video link would be prohibitively expensive. When I asked Ms Chokowry which issues required cross-examination, she specified: the manner in which the husband came to strand the wife in India; the manner in which he went about issuing his divorce petition in India; his conduct in underpaying maintenance; the issue about service on the wife of the Indian petition; and how he got indefinite leave to remain in the UK in January 2012, as he did. Mr Wilkinson did not require to cross-examine the wife and disagreed that there should be any oral evidence. I gave a preliminary indication that I was unlikely to regard cross-examination as proportionate, given the considerable extent to which the husband admits the facts said to make it unfair to stay the wife's divorce petition. There are numerous allegations and counter-allegations about the state of the parties' relationship when they went to India in June 2009 and about who behaved unreasonably during the marriage. It would be very difficult to contain such allegations once the husband started to justify stranding the wife in India, viz. on the basis of her alleged violent and difficult behaviour towards him, which she denies. To try to embark on any sort of 'fact finding' with all the evidence taken over the telephone from India would be an unsatisfactory exercise and would, incidentally, have taken the case beyond its time estimate, requiring an adjournment part-heard. On the second morning of the hearing, having reflected further, Ms Chokowry realistically did not pursue her application for oral evidence.

D. Does the English Court retain a discretion to stay properly constituted English divorce proceedings in favour of proceedings in a foreign jurisdiction?

15. Against the above background, I deal first with the husband's application to stay the wife's English divorce proceedings, so as to enable him (with the Hemain injunction lifted) to progress his Indian suit to a decree of divorce. S5 (6) of the DMPA 1973 reads: "Schedule 1 to this Act shall have effect as to the cases in which matrimonial proceedings in England and Wales are to be, or may be, stayed by the Court where there are concurrent proceedings elsewhere in respect of the same marriage ...; but nothing in the Schedule ... (b) prejudices any power to stay proceedings which is exercisable by the Court apart from the Schedule."

16. Under the heading "discretionary stays", Schedule 1 paragraph 9 then sets out the way in which the court is required to exercise its discretion as follows: "(1) Where before the beginning of the trial or first trial in any matrimonial proceedings [other than proceedings governed by the Council Regulation] which are continuing in the Court it appears to the Court (a) that any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and (b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in the Court ... the Court may then, if it thinks fit, order that the proceedings in the Court be stayed ....(2) In considering the balance of fairness and convenience for the purposes of sub paragraph 1 (b) above, the Court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed." (Square brackets added by me, as explained at paragraph 20 below). This statutory relative of common law 'forum conveniens' has been applied in many cases and considered in several reported authorities, including as regards the court's taking account of any important personal or juridical advantage which one party might lose as a result of a stay.

17. Ms Chokowry's argument is that, by virtue of Council Regulation (EC) 2201/2003 (Brussels 2 Revised) ("BIIR") and of the civil case of *Owusu v Jackson and others* 2005 QB 801 (and certain cases decided thereafter) the discretion given by paragraph 9 of Schedule 1 no longer exists. If the grounds for jurisdiction under Brussels 2 Revised are met, then she submits that this court must hear the petition and cannot decide that some other jurisdiction is more appropriate. In *Owusu* the Court of Justice of the European Communities held that Article 2 of the relevant Brussels convention (viz. that "... persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state") applies to circumstances involving relationships not only between the courts of contracting states *but also* between a contracting state and a non-contracting state. The rationale is legal certainty, by preventing any discretionary overview un-

dermining the predictability of Convention rules on jurisdiction. Whilst in *Owusu* itself, there were no parallel or competing proceedings in any other jurisdiction (which distinguishes that case factually from the instant case) it has been followed several times at first instance in civil cases in England, for example in *Catalyst Investment Group Ltd v Lewinsohn* 2010 2WLR839, where it was considered that the same reasoning applies in cases where there are parallel proceedings here and in a non-Convention country.

18. In the family sphere, the submission that there no longer exists any Schedule 1 paragraph 9 discretion to stay a petition was addressed by Lucy Theis, QC, as she then was, in *JKN v JCN (divorce: forum)* [2011] 1FLR 826. There, the wife, who had issued divorce proceedings in England, resisted the husband's application for a stay of them, after he had issued later divorce proceedings in New York. It was argued on her behalf that the decision in *Owusu* had removed the 'forum non conveniens' discretion set out in paragraph 9 of Schedule 1, so that if she could establish jurisdiction under Article 3 of Brussels II Revised (as she could on the facts) then the English court had to hear her case. In a masterly judgment, Miss Theis rejected that argument. In the process she surveyed all the then authorities in both the civil and family sphere and considered in depth all the arguments for and against the wife's proposition. She noted the refusal of the Court of Appeal in *Cook v Plummer* [2008] 2FLR 989 to grant permission to appeal in the family sphere where the proposed Appellant wanted to argue that *Owusu* applies in a situation where the competing jurisdiction is a non-Convention country; and she considered the Supreme Court child case of *Re I (Child: contact application: jurisdiction)* 2010 1FLR 361, upon which Ms Chokowry relies. Miss Theis found in it no support for the argument now addressed to me, stating (about jurisdiction over children) that "....*Re I* makes it clear that forum non-conveniens is not an anathema to BIIR". Her fully reasoned overall conclusion at paragraph 149, albeit expressed "not without some hesitation", was that it is "....neither necessary nor desirable to extend the Owusu principle to cases where there are parallel proceedings in a non-member state." Alternatively, if that were too widely expressed, she decided it was "... neither necessary nor desirable for the doctrine to be extended to BIIR" - i.e. to proceedings for divorce or nullity.

19. The submission of Mr Turner QC (when he represented the wife) and Ms Chokowry is that *JKN v JCN* was 'wrong or distinguishable'. I do not however agree. In my judgment it was right and I adopt its reasoning. It would, as Jacob LJ said *Lucasfilm, Ltd v Ainsworth* [2009] EWCA (Civ) 1328, be "an oddity" that, whilst there is a clear 'lis pendens' rule for parallel proceedings within EU states, whereby (for example under Article 19 of the BIIR) the court 'second seized' must stay its proceedings until the jurisdiction of the court 'first seized' is established, there can be and is no such mechanism for parallel proceedings where the competing jurisdiction is a non-EU state. The consequence, as Miss Theis noted in *JKN*, would be a lacuna, with both sets of proceedings continuing 'competitively', creating duplication, uncertainty, unnecessary expense and the risk of irreconcilable decisions - the very converse of the stated aims of the European Conventions under discussion. Such a lacuna could not have arisen in *Osuwu* itself because in that personal injury case, arising from an accident, there were no competing proceedings in any other jurisdiction.

20. It also seems to me, as it did to Miss Theis, that if it had been intended to abolish the DMPA statutory discretion when the competing jurisdiction is a non-Convention country, then primary legislation would have made this clear in terms. Instead of that, all Statutory Instrument SI 2001/310 did was to add into paragraph 9 of Schedule 1 of the DMPA the words which I have put in square brackets in paragraph 16 above, "...other than proceedings governed by the Council Regulation". But for that addition, paragraph 9 was left intact. The addition of those words has founded a submission to me by Ms Chokowry that the 'forum conveniens' discretion in paragraph 9 of Schedule 1 was thereby expressly excluded, leaving the court unable to exercise any discretion. However, I agree again with Miss Theis about the proper construction of those added words: namely that, given the overall context, they call for a ' narrow' construction, such that the proceedings which are excluded from the discretionary exercise required by paragraph 9 are proceedings between two Convention countries and not proceedings where the competing jurisdiction is that of a non-Convention country. The rationale for this conclusion is the existence of the 'first seized' mechanism in Art. 19 of Brussels II Revised, which applies to Convention countries and resolves conflicts of jurisdiction between them, but which does not apply to and plainly cannot bind a competing non-Convention country, so leaving a lacuna requiring resolution. Ms Chokowry's argument would require the court to 'disapply' primary legislation, which was not the

case in *Owusu*, where the discretion (in the event held not to exist) would have been one created by common law and not one created by statute.

21. I am fortified in the conclusion that *JKN v JCN* was rightly decided by the recent commercial case of *Ferrexpo A G v Gilson Investments Ltd* [2012] EWHC 721 (comm), where from paragraph 117 onwards, Andrew Smith J considered in detail the up to date *Owusu* jurisprudence, concluding at paragraph 165 that: "....I should depart from [the general rule of preferring the most recent of conflicting first instance decisions] only if convinced that Miss Theis [in *JKN v JCN*] was wrong. I am not. On the contrary I agree with both her decision and her reasoning."

22. For these reasons, I reject the submission that this court has no discretion to exercise when determining the husband's application to stay the wife's English divorce petition.

E. Exercise of 'forum conveniens' type discretion regarding the divorce.

23. As regards the exercise of discretion required by paragraph 9 of Schedule 1, the main authorities are *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 and *de Dampierre v de Dampierre* [1988] 1AC 92. In the latter, it was said that the court applies a two stage test, firstly whether the applicant for a stay (here the husband) has shown that there is a forum which is more appropriate where proceedings have been started. If not then a stay would not be granted. Second, if there is such a forum, then a stay would normally be granted unless there were circumstances by reason of which justice required otherwise. It goes without saying that, in determining fairness, all the circumstances have to be considered, both separately and in the round: "... fairness depends on the facts of each case and there is no short cut", per Lord Templeman in *de Dampierre* at page 102(e).

24. There can be little doubt here on the first question, namely whether there is a forum which is more appropriate, one with which the case has a more substantial connection. Both parties are Indian nationals. Both are Hindu. Both live in India, as does D. The families of both parties live in India. The Indian divorce petition was by far and away the first in time, although I accept Ms Chokowry's submission that the weight to be attached to that factor is not so great as it might have been, given the surreptitious way the husband went about it. There are, the husband says, proceedings in India for Guardianship and contact relating to D. The parties have no assets in this country, or elsewhere. They have no continuing connection with this country, except to the extent that as from January 2012 the husband has indefinite leave to remain here. The wife does not allege that the husband has undisclosed assets. So the only 'asset' is the husband's earning capacity which (although he is not apparently using it at present) is in India.

25. Moving on, in addition to both parties being in India, all the evidence is there too. Some of it is in Hindi, and would need translating for an English Judge. There are big issues between the parties as to the wife's claimed cost of living (assuming the husband were back in work) for example for such things as property rental. The cost of living of both parties has to be measured by an Indian yardstick, which would be second nature to the Indian court but on which an English Judge would need to be informed. There are factual issues as to certain bills relied on by the wife, which it is suggested on the husband's behalf are forged; also about the terms of the alleged compromise in early 2011 and whether or not the husband paid the wife anything under it. All this would require cross examination: extremely difficult by telephone from India. There is a big cultural dispute as to whether the wife should be expected to work at all (as the husband says she should, but she says she should not) which would be readily understood by an Indian Judge, but on which an English Judge would need to be educated. In addition the wife says her English is not good and that she needs an interpreter. One attended to interpret for her at this hearing, when it was thought there might be oral evidence by telephone from India. If the divorce and consequential financial proceedings went ahead in England, both parties would be remote from their lawyers. All considerations of 'closest connection', ex-

pense, convenience and the practicalities of litigation call for the divorce and financial proceedings to take place in India.

26. The points taken by Ms Chokowry to the contrary and favouring this jurisdiction are these. She relies on the husband's unfair tactical manoeuvring when he cancelled the wife's return ticket from India to England in 2009 and contacted the UK Boarder Agency to encourage them to keep the wife out of the country. But for that, the wife would have been able to litigate in England, where the parties had made their married life for just over 2yrs. She relies on his surreptitiously starting the Indian divorce proceedings and on his failing to comply fully with the S27 maintenance order of 30.3.10, once the wife and D had begun to live in India. She further relies on his having obtained indefinite leave to remain here in January 2012, which he did not disclose to the wife. Mr Wilkinson counters this by saying that, as the husband's right to live here was about to run out, he (the husband) naturally applied to extend it, and that the husband was not under any duty to disclose the fact in any event.

27. On the strength of the husband's past tactical behaviour, Ms Chokowry asks me to conclude that the husband is likely to return to the UK as soon as these proceedings are over. She expresses concern that the wife would be disadvantaged by having to litigate the divorce and finance in India, because she would or might find it very difficult to get representation there, so there would not be a 'level playing field'; whereas there would be one here (if and for so long as the wife's pro-bono representation continues). It is also said there can be very long delays in the Indian courts. As a final point, Ms Chokowry submits that, as a matter of policy the court should set its face against letting a husband achieve his ends when he has created a situation in which the wife was unable to return from India into England.

28. There is force in Ms Chokowry's points about how the husband conducted himself. Even on his own case, and even if the marriage had seen on the rocks when the couple went to India in June 2009 (as he says it was and the wife says it was not) he plainly did not behave fairly by her, in circumstances where her ability to remain in this country was dependant upon his continuing to sponsor her. That certainly goes into the balance against him on the question of fairness. I do not however consider that I should go on to draw an inference that his returning to India in April 2012 was purely tactical and that he is therefore likely to return to England once this litigation is over. He might do; he might not. He could for example go to America: or back to the Middle East, where he worked from June 2010 to October 2011 making much better money than he made when working in England. The husband's past unfair behaviour was relied on before me in May 2012, when the wife sought to get the stay on her petition lifted on the basis that the husband could not be trusted not to progress his divorce speedily in India in breach of the 'Hemain' injunction; yet there is no evidence that he has done so. Even if one assumed he would come back to this country, there is no knowing when it might happen. It would not be right to continue to "freeze" the divorce proceedings in both jurisdictions indefinitely, in case the husband came back here to work. Further, if he ever did decide to resume 'habitual residence' here, then the wife could apply under part III of the Matrimonial and Family Proceedings Act 1984 for financial relief after a foreign divorce.

29. On the question as to how the wife would fare litigating in India (the lost juridical advantage in England point) the evidence of the joint expert MR, put shortly, is this. He says that Indian law provides for all the remedies which the wife could obtain here, except it seems a lump sum order (which would not in any event be relevant here on the facts). There is provision for maintenance pending suit and for the husband to be ordered to pay 'upfront' the wife's expenses of the proceedings. The test in India is to enable a wife to sustain generally the same lifestyle as that to which she was accustomed. The provision of accommodation is a particular part of the right to maintenance, whether in the matrimonial home, or in a separate residence. As to practicalities, however, MR does say that such maintenance claims can be protracted and time-consuming, sometimes leading to inordinate delay, even though the Indian court itself has spoken of the need for pending suit maintenance to be dealt with swiftly. As to public funding, he says that needy persons are entitled to legal aid at the expense of the state, although in practice it is very difficult to obtain it. A national legal service authority is established in every state and district and at village level, the intention being to provide access to justice for all, although with so many people in the country he describes this as a monumental task. He does

refer to it as a "likely possibility" in a case like this that the wife "... could well be assigned a public lawyer at the discretion of the court, who would then contest the proceedings on her behalf without charging any fees of his own". However the quality speed and efficiency of such a service "cannot be guaranteed at all". On any view "the process is certainly cumbersome, and sometimes fraught with delay on account of frequent adjournments". Mr Wilkinson refers to the several hearings which there have been in India this year as showing that the system there is not necessarily slow at all and says that if the wife had not declined to participate in the Indian proceedings (which she says she could not afford to do) there would have been a divorce there long ago. The husband himself points out in a statement that the English Court has hardly moved at the speed of sound.

30. Towards the end of the hearing, both sides put in evidence from Indian lawyers of their likely fee scales. Predictably, those put in by the wife are higher than those put in by the husband. Her choices of lawyer however are not in the X area, one being from Lucknow and two from Delhi. It is clear that the fees in India are in a wholly different league from those charged in this jurisdiction, being hugely less. The husband's quotes, which are from lawyers in X itself, show a range of between 10,000 and 30,000 rupees (£120 to £360) although it is not entirely clear what this would be for. The husband's own lawyer provided the husband with an invoice in February 2012 "for legal advice and representation of complete case No 897 of 2009" in the sum of 16,000 rupees, or £190. Back in January 2012, the husband agreed to pay the wife £400 for legal advice and representation and he now offers a further £200 so that she can get initial advice and representation in India, if the divorce and any financial proceedings are to go ahead there.

31. The wife has not made any attempt to obtain legal aid in India and so no one can say how she would get on. There is nevertheless I accept some underlying concern about how she would fare in securing representation in divorce and in financial litigation there, always assuming that the husband were back in work and had an income. It may well be that her family would help her further, just as they are currently supporting her financially; but that is speculation. I do weigh firmly in the balance both this potential 'lost juridical advantage' and the husband's unfair behaviour back in 2009, when carrying out the paragraph 9 exercise required of me. Even having done so, however, it is clear for the above reasons that India is very much the preferable jurisdiction to determine both the divorce and the financial claims and that, striking the overall balance, it is fair that that is what should happen. I shall therefore direct that, when the wife's solicitors are in funds to the tune of £300 (adding a small margin for error to the amount offered by the husband) the English divorce petition be stayed. The husband will consequently be released from the current English 'Hemain' injunction. If the matter does not go forward at a reasonable pace in India, the wife can apply here on ordinary principles to release this stay on her English petition and, it would follow, on her S22 application.

F. Does the wife's S.22 application survive the stay of the petition?

32. Ms Chokowry submits that the answer is 'yes' and so the wife can still pursue her application for maintenance pending suit in this jurisdiction. She relies on the fact that there are now separate European Council Regulations, covering (i) divorces and (ii) maintenance obligations; divorces being dealt with by BIIR, which came into force in England and Wales on 1.3.05; and maintenance being dealt with by Council Regulation 4/2009 ('the Maintenance Regulations') which came into force in England and Wales on 18.6.11 (long after the issue of the wife's S27 application, but before the issue of her divorce petition and Form A). Recitals 8 and 11 of BIIR state that it does not cover maintenance obligations, nor other measures ancillary to the divorce, whilst Recital 11 of the Maintenance Regulations states that they cover 'all maintenance obligations arising from a family relationship, parentage, marriage or affinity.' Both Regulations contain a similar provision whereby jurisdiction can be based on, amongst other things, the Respondent's habitual residence. Ms Chokowry's submission is that, since maintenance obligations are dealt with under a different Council Regulation from the divorce itself, it follows that free-standing maintenance pending suit rights must exist under S22 independently of the divorce. She says there is thus nothing to stop the Indian court dealing with the divorce but the English court dealing with the maintenance pending suit application (and she submits that this court has an inescapable duty under the Maintenance Regulations to do so) even though the wife's petition is stayed. I cannot however accept that argument. It is trite law and practice that financial applications

ancillary to a divorce depend on the continuation of the petition. S22 states that the term of an order made under it shall be "... such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable". So if a petition is dismissed, maintenance pending suit comes to an end (although any arrears remain: *Moore v Moore* 2010 1 FLR 1413). If the petition is stayed, it follows in my view that any application for maintenance pending suit is stayed with it, as the latter has no independent life. This is a matter of substantive English family law / practice / procedure, not one of jurisdiction, nor of failing to accept jurisdiction. The Maintenance Regulations go to jurisdiction, recognition and enforcement (and it is undisputed that they do give this court jurisdiction here) but they do not in my judgment create a free-standing substantive right and remedy as submitted for.

G. What about the wife's S.27 'neglect to maintain' application?

33. Last, there is the issue of the wife's S27 maintenance claim, currently stayed by the order of Charles J dated 9.11.11. In contrast to S22, it is a free-standing application independent from the divorce and it is by definition not the subject of the statutory 'forum conveniens' discretion enshrined in S5(1) and Schedule 1 paragraph 9 of the DMPA 1973. Unlike the divorce, there is currently no parallel financial application in India, although it is obviously open to the wife to start one there. At first blush - although I have not heard any significant argument on this - a S27 application would seem to be theoretically capable of standing alongside a S22 maintenance pending suit application, albeit that this would almost never happen in practice, since S27 adds nothing substantively to S22, and it would I daresay be theoretically vulnerable to a strike-out application as being mere duplication.

34. Ms Chokowry asks that I retain the one day hearing already fixed on 30.11.12 before a District Judge for consideration of the S27 arrears and for the court to revive and continue the wife's stayed S27 maintenance order and application, if appropriate, until Decree Absolute is pronounced in India. At that point, she realistically accepts it would come to an end. Deciding whether the S27 application should continue would encompass lifting the stay, always assuming the husband had some income. Mr Wilkinson asks that the November 2012 hearing be vacated as having no purpose and as being quite disproportionate to the resources in the case. He does not wish to use it to seek a retrospective reduction of the quantum of the S27 order nor remission of the arrears. He maintains that this litigation is oppressive and has become 'a blatant case of forum-shopping'. The husband is worn out by it, he says, and just wants everything tidied up and resolved, ideally with a dismissal of the S27 application as being an abuse.

35. As regards these submissions on S27, I am in spirit (if not in every detail) with Mr Wilkinson. It is purely fortuitous that the S27 application has remained extant, albeit stayed, alongside and in addition to the S22 application. This was implicitly recognised in Holman J's order of 26.7.12, where the periodical payment was expressed to be interim maintenance pending suit under S22, not interim maintenance under S27. As the S22 application for interim maintenance pending suit will be stayed with the staying of the divorce petition, it would not be logical, absent good reason, to perpetuate the S27 application now by removing the existing stay. To do so would give rise to the difficulty of litigating from England what is now essentially an Indian case, reviving all the practical and forensic problems which have formed part of the decision to stay the English divorce proceedings.

36. I do not think there is a completely satisfactory answer to the issue about S27 proceedings, as this court clearly could not remit the arrears, if it were right on the facts to do so, without up to date financial information and that is still pending under existing directions. As it stands, there is nothing to stop the wife enforcing the arrears right now, although it is effectively common ground that the husband has no assets or income against which to do so. What I propose to do is neither to dismiss the S27 application as the husband seeks, nor to remove the existing stay on it as the wife seeks. I am satisfied that there is an inherent jurisdiction to retain the stay as a matter of discretion when there is another jurisdiction, India, where the same issue could be more cheaply, conveniently, and efficiently resolved: see per Lord Goff in *de Dampierre* at 107H and 108B. The vexed question of whether this court still retains this discretion regarding matters of

free-standing maintenance in the light of the Maintenance Regulations, particularly Recital 15, does not arise here, as the wife's application under S27 was issued before they became applicable (see Articles 75 and 76).

37. In the result, the S27 application will remain theoretically 'in being', but stayed, on the basis that it will come to an end and be dismissed when Decree Absolute is pronounced in India. If there is unreasonable delay in India in dealing with such financial applications as the wife makes there, then she can theoretically apply here again for the stay to be lifted, if the then financial and other circumstances of the parties warrant it. It is very much to be hoped in fact that, in any financial proceedings brought by the wife in India, both the S27 arrears and the husband's argument for their remission could be taken into account and subsumed within whatever financial orders were made by the Indian court, thus avoiding further litigation in this jurisdiction.