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# O v P [2014]

## [2014] EWHC 2225 (Fam)

04/07/2014

**Barristers**
Henry Setright QC
Stephen Lyon

**Court**
High Court (Family Division)

**Practice Areas**
Financial Remedies
International Children Law

**Summary**
Application by mother for financial provision under Schedule 1 to the Children act 1989; and application by father for stay of proceedings. Stay refused and award of circa £182,000 made.

**Facts**
This is an application by a mother made on 29 February 2000 for an order pursuant to Schedule 1 to the Children Act 1989. In an interlocutory judgment the court had found that it had jurisdiction under Schedule 1, in accordance with the Brussels I Regulation, to determine the mother's application: [2011] EWHC 2425 (Fam).

The complex background to this case involves child abduction proceedings in England and Australia, criminal proceedings, and proceedings concerning the welfare of the child and maintenance for her in Australia. In 2001, the father was convicted of incitement to murder the mother in Australia, and will remain in prison there until 2018. At the time of the mother's application to the court, the child 'S' was habitually resident in England and Wales. However, in 2002 the mother was granted permission to remove the child from the jurisdiction, and she relocated to Australia where she remains to date. The fact that the mother and the child had relocated to Australia had not been disclosed to the father. The father discovered this in 2013.

The mother did not actively pursue her application under Schedule 1 until 2008, when the father was divorced from his wife and a capital sum became available as a result of a property jointly owned by the father and his wife being sold. After deduction of the father's wife's share from the net proceeds of sale, Singer J granted a freezing order in respect of the remaining sum.

In 2010, the father applied to Child Support (the relevant agency in Australia) seeking an assessment of his liability to pay child support for S. In July 2010, that agency initially assessed his liability at 30 Australian dollars per month, but later reduced the assessment to nil. An Australian lawyer, instructed as

an expert to report in these Schedule 1 proceedings, advised that the Australian court had no power to make an award which pre-dates the assessment of child Support, as a result of which the mother could not recover arrears in Australia.

In March 2010, the father sought the equivalent of child arrangements orders in the family court in Australia. His application was dismissed, inter alia, on the ground that the English court was seised and was exercising jurisdiction.
There were a number of adjournments in the English proceedings for various reasons. At a hearing in April 2013, the father sought to revive his argument that the proceedings should be stayed on grounds of forum non conveniens.

On 28 June 2013, the father filed further applications in the family court of Australia, among which was an application for a financial order in respect of S, specifically seeking child support and lump sum orders be made against him and assessed at nil. These proceedings were stayed, but the Australian expert advised that as a matter of law these proceedings remained "pending" in Australia.

The final hearing in the mother's application under Schedule 1 was heard by Mr Justice Baker 14 and ½ years after it was instigated. The father was unable to participate in the final hearing as, despite requests and orders, it had not been possible to set a video or telephone link to permit him to attend. Baker J adjourned the matter following the mother's evidence to enable a note of her evidence to be sent to the father, and instructions to be taken from him.
The application for a stay involved consideration of two issues: (1) whether as a matter of law the court has power to order a stay, having regard in particular to European regulations and case law, in particular the decision of the European Court of Justice in *Owusu v Jackson* (Case C-281/02) [2005] QB 801; (2) if so, whether the court should in the circumstances of this case grant such a stay.

The mother argued that a stay was precluded in this case by virtue of the ECJ's decision in *Owusu*, which it was argued applied to all areas of litigation. The father argued that *Owusu* had no application in this case. Further, it was argued on his behalf that there is discretion within Brussels I to stay proceedings, and that as Australia is not a Member State, Brussels I had to be applied reflexively. Baker J considered the legal framework and the case law concerning the stay of proceedings on forum non conveniens grounds at paragraphs 52 to 90 of his judgment.

Relying on the decision of Miss Lucy Theis QC (as she then was) in *JKN v JCN (Divorce: Jurisdiction)* [2011] 1 FLR 826, and the recent Court of Appeal decision in *Mittal v Mittal* [2013] EWCA Civ 1255, Baker J held that the decision in *Owusu* does not apply in proceedings for financial provision for a child where there are parallel proceedings in a non-Contracting State, such that the court had the power to grant a stay. The judge found that it was unnecessary to consider whether the principle in *Owusu* had no application even where there was no parallel proceedings in a non-Member State.

In determining whether a stay should be granted in this case, Baker J considered the father's arguments which mainly concerned the child support regime in Australia, the position of the Australian court to better obtain and assess the evidence of income, earning capacity and expenditure. It was also argued that the father would be hampered in taking part in these proceedings as a result of his incarceration in Australia. Further, concerning the delay in the father's application for a stay being made it was said that the landscape in the case changed in 2013 when the mother revealed her location.

The mother argued that England was the better forum as the Australian court would not consider the mother's claim between 2000 to 2010; Australia was being put forward purely for tactical reasons; the English court is used to dealing with cases where there is less than full disclosure; the father's approach

to the litigation indicated that he would be obstructive regardless of which jurisdiction heard the case; the case was ready to be heard in this country; the late application for a stay was an example of the father's litigation tactic; the Australian court had itself stayed the maintenance proceedings in favour of England; the father's absence from the hearing was not insuperable.

## Held

Baker J refused the application for a stay for the following reasons:

(a) a substantial aspect of the mother's claim – that part dating back prior to 15th July 2010 – could not be litigated in Australia;

(b) the application for a stay was made at a very late stage;

(c) although there were undoubted gaps in the documentary evidence, they were not so serious as to lead the court to think that the mother's claim could not be determined fairly to both sides;

(d) while accepting that conducting the trial on behalf of the father presented considerable challenges for those representing him, they were not insuperable.

In considering the quantum of maintenance, the judge found in favour of the mother's argument that "the overwhelming influence over her life for the past fourteen years has been the threat to her safety posed by the father. That threat has profoundly affected her life and that of her child." Baker J found that it would be impossible to disregard the father's conduct. Consequently, the judge also accepted the mother's case that the unsatisfactory disclosure and the delay in pursuing her claim were the result of her fear of the father which had put her in an "impossible position". Her income capacity was said to have also been affected by her fear of the father finding her.

In respect of the father, the judge found that "it is the father, by his various ploys and manoeuvres, both here and in Australia, who has conducted this litigation unfairly – in fact, with cynicism and deviousness".

The mother sought a lump sum of £399,000. The father argued that this sum was grossly inflated. Having considered the evidence and arguments in respect of the various heads of claims, Baker J awarded the mother £182,757, from which interim payments were deducted. In addition, an award was made for S's tertiary education costs.

## Permission