---

http://www.incadat.com/ ref.: HC/E/AU 68
[07/11/1996; Full Court of the Family Court of Australia (Sydney); Appellate Court]
Director General, Department of Community Services Central Authority
v. J.C. and J.C. and T.C.(1996) FLC 92-717

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Sydney

BEFORE: Barblett DCJ, Ellis and Lindenmayer JJ

7 November 1996

Appeal No. EA69 of 1996 No. SY5160 of 1996

BETWEEN

Director-General Department of Community Services

(Appellant/Central Authority)

-and-

J.Y.C. and J.A.C.

(First and Second Named Repondents/Grandparents)

-and-

T.C.

(Third Named Respondent/Father)

REASONS FOR JUDGMENT

APPEARANCES:

Mr Anderson of counsel (instructed by The Crown Solicitor's Office), appeared on behalf of the Appellant/Central Authority.

Mr Batey of counsel (instructed by Aitken McLachlan and Thorpe, Solicitors), appeared on behalf of the first and second named respondents/grandparents.

Mr Trench of counsel (instructed by Aitken McLachlan and Thorpe, Solicitors), appeared on behalf of the third named respondent/father. Barblett DCJ, Ellis and Lindenmayer JJ:

JUDGMENT: Barblett DCJ, Ellis and Lindenmayer JJ.

This is an appeal by the Director-General of The Department of Community Services (hereinafter referred to for the sake of convenience as "the Central Authority") against the order of Cohen J made on 23 July 1996. His Honour dismissed the application of the Central Authority filed on 15 May 1996 brought on behalf of H.L. (hereinafter referred to for the sake of convenience as "the mother"), for an order for the return to New Zealand, pursuant to the provisions of the Family Law (Child Abduction Convention) Regulations (hereinafter referred to for the sake of convenience as "the Regulations"), of the only child of the mother and of the third named respondent, T.C. (hereinafter referred to for the sake of convenience as "the father").

BACKGROUND

The following information, as to the background to the proceedings, is taken from the trial judge's judgment as none of the background facts were challenged at the hearing of the appeal.

The mother and the father were both born in New Zealand and married in April 1986. C, the only child of the marriage, was born in New Zealand on 27 May 1988 and was thus aged eight years at the date of the hearing before the trial judge. At the date of C's birth, the mother and the father were living with C's paternal grandparents (the first and second named respondents to the appeal), and continued to do so until January 1989 when they separated. At that time, the mother left the grandparents' home taking C with her. Thereafter, the father had contact with C each weekend.

In August 1989, the mother, who had been suffering from depression for some time, requested the grandparents to take C and care for her, the child then being some 14 or 15 months old. This the grandparents did and they claimed that they, and thus C, did not see the mother from the date on which they took the child into their care for a year or more and that thereafter, the mother visited C relatively infrequently.

In October 1989, the mother moved to Taupo while the grandparents were then living at Mt Wellington.

On l9 July 1990, the father, through his solicitors, requested that the mother consent to his having the custody of C. The mother replied through her solicitors to the effect that the then current informal custody and access arrangements for C were adequate and that she was more than satisfied for the father to have the day to day care of C and for her to have contact as agreed.

That request was not pursued further. No orders were made or have been made by any court in relation to the guardianship and custody of or access (contact) to C.

In 1991, the mother commenced seeing C more frequently than she had in the past and spent weekends with her.

In 1993, the grandparents moved to Hillsborough where the father, who by then had remarried, was living. Thereafter, the father and his wife, the grandparents and C resided in the one house.

In May 1993, the father was working only casually and thus spent more time than he had previously with C. The father and the grandparents, (hereinafter referred to for the sake of convenience collectively as "the respondents"), asserted that the mother saw C on but two or three occasions in 1993 and did not maintain much telephone contact with the child. This, the mother denied. She asserted, as set out in her affidavit, that: . . . over 1990, 1991, 1992, 1993 and 1994 I saw C each year for one or two weeks during the May and August school holidays, Easter and labour weekends and 2 to 2 1/2 weeks at Christmas plus another two or three weekends per year when I was in Auckland. Prior to C being taken to Sydney, the longest period we had been apart was four months. Throughout the time, however, and particularly since C was four years of age, I have telephoned her every Saturday and still do.

In 1994, the grandparents moved to Whangaparaoa to commence a new business. The father accompanied them. The move was a financial disaster for the grandparents and by mid 1995, having lost their assets, they had moved to Auckland. Two months later, they moved to Taipa where they found employment. Neither the grandparents nor the father consulted with the mother in relation to any of these moves, each of which involved C.

The grandparents' employment in Taipa terminated on 23 November 1995, about which time their son R. requested them to spend the imminent Christmas holiday period with him in Australia where he lived. They notified the mother of their plans in mid November 1995. On 26 November 1995, the mother wrote to the grandmother saying, inter alia:

> **Thank you for ringing me on Thursday to let me know about your holiday however I was disappointed to find out that C already knew about the trip. Her time with me is very important for both of us but when you are 7 1/2 years old two weeks in Taupo comes a poor second to a holiday overseas. I feel that any possible options that I might have had to see her over the Christmas break (eg C flying back earlier than A. and you yourself for her "Taupo time" were really lost to me as she knows how long she will be away and is very excited about her trip. As you know I wasn't able to see C as I usually do over Easter this year as she was in the States. I have no problem with her travelling overseas but this trip coupled with her Christmas trip to Australia have bitten into my usual access time with C to quite a large degree and I am not happy about losing this time with her.**

Further, the mother complained in that letter about the unsatisfactory access arrangement made for Christmas Day 1994, set out her proposal for access on subsequent Christmas Days and went on to say:

We would like to offer to have C here to live next year, to help you get back on your feet. The arrangements at the end of this time would be open ended at this stage but again C's well-being would be the primary concern in any future discussion.

On 4 December 1995, the grandparents took C to Australia. They were due to return to New Zealand on 15 January 1996. They had return air tickets for that day and had advised the mother accordingly. However, they delayed returning to New Zealand and informed the mother for the first time of that delay on 16 January 1996. On 17 January 1996, the grandmother wrote to the mother informing her that they would return to New Zealand on 17 March 1996.

On 25 January 1996, the mother wrote to the grandmother stating that she was looking forward to seeing C on her return, that she would like to make arrangements for Easter access and sought an additional week of access at that time.

The father's business failed at the end of December 1995. In February 1996, the father's brother had purchased a 100 acre property at ** and offered the grandparents the opportunity to live on and manage that property, an offer they were considering. This information was conveyed to the father who then decided to look for work in Australia. Subsequently, he made arrangements to enter into a business partnership with a friend in Australia and arrived in Australia on 26 February 1996. Thereafter, a family conference was held and in late February or early March 1996, the respondents decided to keep C in Australia.

At the date of the hearing, no orders had been made in any court relating to the guardianship, custody or residence of C.

On 15 May 1996, the Central Authority commenced the proceedings in this court pursuant to the Regulations at the request of the Central Authority of New Zealand. By their answer filed on 7 June 1996, the grandparents and by his answer filed on 18 June 1996, the father, sought an order, inter alia, that the application of the Central Authority be dismissed.

The application of the Central Authority was heard by the trial judge on 12 July 1996. He delivered his judgment dismissing the application on 23 July 1996 and it is against that order of dismissal that the Central Authority has appealed.

THE JUDGMENT OF THE TRIAL JUDGE

After referring to certain of the background material, the trial judge said:

Whether or not the mother, as a matter of New Zealand law, has the status of C's guardian and custodian, she has not been exercising any rights which are attached to what is ordinarily understood in Australia as guardianship. The same can be said in relation to what is ordinarily understood here as custody.

The trial judge later referred to the following extract from the letter dated 26 November 1995 written by the mother to the grandmother:

> **We would like to offer to have C here to live next year, to help you get back on your feet. The arrangements at the end of this time would be open ended at this stage but again C's well-being would be the primary concern in any future discussion.**

and went on to say:

> **This is the closest the mother came before she left New Zealand to assert any right other than access relating to C. I do not think it is an assertion of any right to custody or of guardianship. It seems to be an acceptance that the mother does not have these rights. That is why there is both a request and an attempt to argue in its favour.**

He then noted that the grandparents were then living in the ** area with C. The father was living in Sydney but apparently seeing C regularly, although not frequently for a child of her age. According to the claim of the grandparents, the longest period during which the father had not seen C was from 4 December 1995 to 26 February 1996. However, they gave evidence that during that period, he often spoke to C on the telephone. It was claimed that the longest period that the mother had spent with C since 1989 was ten days. The trial judge also noted that the father and the grandparents claimed that they do not have the funds or prospects in New Zealand for them to return to that country and that, if C were returned, it was suggested that they would not follow. He later said:

I am satisfied that the grandparents will not return to New Zealand if C is forced to return. They are at an age where they do not have a lot of options in finding appropriate employment and will have difficulty in meeting the cost of appropriate accommodation if they do not remain where they are.

He then dealt with the evidence of the father, the grandmother and both grandparents as to what was said by C about returning to New Zealand on 31 May, 4 and 5 June 1996.

The trial judge next considered the evidence of Ms Charmaine Redding, a psychologist and Dr Waters, a consultant psychiatrist. He noted that Ms Redding's report suffered from inherent deficits, the main deficit being that she saw C only with the grandparents and did not meet either parent. However, the trial judge noted:

While C was with Ms Redding, and her grandparents were not present, she told Ms Redding

> **". . .the worse thing if I have to live with Mummy all my life and not go back home to Australia to live with Grandma and Pop, best if just stays how it is."**

Ms Redding concludes that C has the reading and comprehension of an average ten year old. She assesses her maturity age at about nine to ten years. It is her opinion, based upon the tests which

were given, the interviews with C and interviews with C and the grandparents, that there is a strong bond between C and the grandparents. She also concluded that C's bonding with the father is strong. She noted that C indicated that she did not want to live with her mother but would enjoy little trips to see her. Most importantly, Ms Redding formed the opinion that the consequences of removing C from her grandparents and father's care would "more than likely" have a serious emotional effect on C. Her already existing significant symptoms of anxiety would increase, leaving long-term consequences. Despite the shortcomings of the report, I accept the opinions of Ms Redding. It is noteworthy that the applicant could have called or attempted to call expert evidence but failed to do so.

In relation to Dr Waters, the trial judge noted that his report was limited by the fact that he did not speak to or see C with the mother, although he spoke to the father and the grandparents as well as C and saw the child separately and with the father, the grandfather and the grandmother. He went on to say:

Dr Waters did not find C to be a happy, carefree, confident child, as the respondents had described her usual attitude. She was morose, withdrawn, somewhat down and near to tears. Significantly, she told Dr Waters that she does not want to go to New Zealand, but would love her mother to visit her in Australia. She also told him that she had some recent nightmares about the plane upon which she was going to live with her mother in New Zealand crashing. She did not seem frightened about the prospect of having to go to live with her mother, but was adamant that it was not her preference.

Dr Waters' opinion is that C is of above average intelligence and has a maturity level at least a year, and possibly two, more than her age. He said that C's views about not wanting to live in New Zealand "must carry some weight" . He compared them with the situations of a six or seven year old child, whose views would not carry much weight and a fourteen year old child, who could fully appreciate most of the issues involved in deciding where to live.

Because of the consistency between her statements to the experts and those alleged by the respondents, I am satisfied that C said what the respondents and the experts allege about being returned to New Zealand.

It is Dr Waters view that C is closely bonded to all three respondents, but particularly to her grandmother. Her relationship with the mother is of a subsidiary nature when compared to the three other significant people in her life. He said ". . . at the very least there would be an immediate and profound adverse psychological impact" if she was taken to New Zealand and away from the respondents and her other attachments. As a result, with the passage of time, C's symptoms which are of anxiety and insecurity, would become more marked and she will probably develop symptoms of depression and a poor sense of self-esteem. He thought that if she is unable to make a substitute attachment for the respondents to the mother, there will be a lasting change in her personality. This will manifest itself in loss of ability to experience pleasure and be sociable or to perform well at school, and she will become more labile and withdrawn. Resentment towards her mother may increase and lead to a deterioration in their relationship. This could be associated with oppositional behaviour, aggressiveness and getting into trouble at home, at school and in the community. In Dr Waters opinion, the likelihood of this train of events is "particularly high".

The trial judge then considered the matters referred to in reg l6(3)(b). He concluded that consideration by saying:

I am satisfied that the level of psychological harm to which C would be exposed by her return to New Zealand is also very high, so high that it should not be permitted to arise. I accept Dr Waters opinion on this. Ms Redding's opinion is much the same. In fact, Dr Waters is predicting that C could become a disturbed and anti-social child, adolescent and adult. This is a very serious state of affairs and should be regarded as an intolerable situation for C to be put into. I so regard it. I

think it can also be properly said to be intolerable that C should be put into a situation where she is isolated from the major carers and attachments she has had throughout her conscious life and for most of her whole life, the grandparents.

I am satisfied that the grandparents will not return to New Zealand if C is forced to return. They are at an age where they do not have a lot of options in finding appropriate employment and will have difficulty in meeting the cost of appropriate accommodation if they do not remain where they are.

Thereafter, the trial judge referred to the matters relevant to a consideration of reg 16(3)(c). He concluded by saying:

Even though Dr Waters seems to express C's objection as a preference in one part of his report, because he also interpreted C's words as amounting to an objection, as did Ms Redding, and the words which she used to the respondents are also consistent with this and amount to an objection, I am satisfied that C "objects", within the meaning of that word in the Regulations, to being returned to New Zealand. That it is also C's preference to stay in Australia does not mean she does not object to going to New Zealand. Generally in this context, an expression of preference would not necessarily involve an objection, but an objection necessarily involves a preference.

I find that C has attained an age and degree of maturity which makes it appropriate to take account of her views. Dr Waters said, in effect, that her views should not be ignored. The mere fact of her objection is not enough to warrant a refusal to make an order for her return to New Zealand. The court ought to exercise its discretion, by weighing her degree of maturity, her age, the strength of her objection, her reasons for objecting and all other matters relevant to discretion.

Here, I am satisfied that C's objection is strong and is based upon her subconscious needs rather than conscious choice. C's primary attachment to her grandmother and attachments to her grandfather and father are the source. Because the objection is based upon C's psychological needs, although she has attained an age and level of maturity where her wishes should not be ignored, her young age and lesser understanding give her objection more, rather than less, weight. I am satisfied that it is appropriate to regard her objection as being a very substantial one and sufficient on its own to refuse to make an order under reg 16(1).

Thereafter, he found ". . . by New Zealand law, the mother has what in Australia would normally be understood as rights of guardianship and custody of C for the purpose of proceedings under s 111B of the Act and the Regulations" and that the mother did not consent or acquiesce in C being retained in Australia. He went on to say:

I am satisifed [sic] that the respondents have established that the mother was not actually exercising "rights of custody" when C was removed to Australia nor was she exercising those rights when C was first retained in Australia. I am also satisfied that those rights would not have been exercised if the child had not been removed or retained. On the establishment of this ground, in the exercise of my discretion, for the reasons I have already referred to relating to the seriousness of the harm which might befall C if she is removed from the day-to-day care of those to whom she is most attached and because C has, for most of her life, been in the actual care of and been living with the grandparents, and because there are no substantial countervailing reasons except those based on the policy of the legislation, which for reasons similar to those already discussed on policy are insufficient here, I shall refuse to make an order under subreg (l) of reg 16 in the application of subreg (3)(a)(ii).

It is my view that, pursuant to reg l6(2)(a), I must refuse to make an order under reg l6(1), in any event. Regulation 16(2)(a) provides that a court must refuse to make an order for return of a child if it is satisfied that the removal or retention of the child is not a removal or retention within the meaning of the Regulations. "Removal" is defined by reg 3(1) as being removal in breach of the rights of custody of a person if, at the time of removal, those rights were actually exercised,

either jointly or alone, or would have been so exercised but for the removal of the child. As I have already said, those rights were not actually exercised by the mother at the time that C was removed to Australia. Nor would they have been exercised if she had not been removed. The mother had by agreement given away her right to exercise legal right to custody, so there was no breach of that right. A claim is not the exercise of a right. At best, the mother indicated that she would like to have C live with her for a year. By this request, she did not assert her right nor did she assert any right which would be, in Australia, associated with the word guardianship. There was no breach of her right of guardianship because she had consented to waive it. Therefore, there was no breach of her "rights of custody".

Pursuant to reg 16(2), I shall refuse to make an order for C's return to New Zealand. Pursuant to reg 16(3), in the exercise of discretion, I refuse to order C's return to New Zealand on three separate grounds; namely those set out in subregs 3(a)(i), 3(b) and 3(c). Naturally, any combination of these three grounds simply strengthens the basis upon which I ought to refuse to make a return order.

GROUNDS OF APPEAL

The grounds of appeal are:

1. That his Honour erred at law in finding that the mother was not exercising "rights of custody" at the time of retention of the child in Australia.

2. That his Honour erred at law in finding that the mother would not have exercised "rights of custody" if the child had not been retained in Australia.

3. That his Honour erred at law in finding that the ground for refusing to return the child to New Zealand under cl 16(3)(c) of the Family Law (Child Abduction Convention) Regulations had been established by the parties opposing return of the child to New Zealand in that:

3.1. the child did not "object" within the meaning of the Regulations to being returned to New Zealand;

3.2. the child has not attained an age and degree of maturity at which it is appropriate to take into account the child's views.

4. That his Honour erred at law in finding that the parties opposing return of the child to New Zealand had established to the requisite degree that return of the child to New Zealand would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

5. That his Honour erred at law in attaching any significance to the fact that the Central Authority did not provide expert evidence to contradict the evidence of Dr Waters.

6. That his Honour erred in finding the risk of harm to the child by returning the child to New Zealand equated to a risk of harm to the child by returning the child to the permanent custody of the mother.

7. That his Honour's discretion to order the return of the child notwithstanding that a matter in cl 16(3) of the Family Law (Child Abduction Convention) Regulations may have been established by the parties opposing return of the child to New Zealand miscarried in circumstances where his Honour failed to give any or any proper weight to the following factors:

7.1. the Regulations are to ensure the prompt return of the child to the jurisdiction of habitual residence without the Australian court deciding custodial/residence issues;

7.2. an order for return of the child is an order to return the child to the country of habitual residence and not an order to return the child to the custody of a particular person;

7.3. the grandparent respondents had retained the child in Australia without approval of the mother or the courts of the country of habitual residence of the child;

7.4. the child has an attachment to her mother;

8. His Honour erred at law in that his Honour acted upon erroneous principles.

However, at the hearing of the appeal, no submissions were advanced in support of ground 8 which thus, for practical purposes, was abandoned.

It should also be noted that it is not disputed that both Australia and New Zealand are, and at all relevant times were, convention countries as defined by the Regulations. Further, it was not disputed that the Central Authority is, and at all material times was, the State Central Authority for New South Wales appointed pursuant to reg 8 and that it acted in the proceedings in accordance with its obligations under reg 5 as applied to it by reg 9. Further, it has not been suggested that C was not, at the relevant time, habitually resident in New Zealand before her retention in Australia.

THE REGULATIONS

Before dealing with the submissions, it is convenient to refer to certain of the relevant Regulations. Regulation 2(l) defines the meaning in the Regulations of certain expressions therein referred to "unless the contrary intention appears".

For the purposes of this appeal, the following expression defined in reg 2(1) is relevant:

"rights of custody" has the meaning given in regulation 4.

The following Regulations are of particular relevance to this appeal:

> **Regulation 3**
>
> **(1) A reference in these Regulations to the removal of a child is a reference to the removal of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of removal, those rights:**
>
> **(a) were actually exercised, either jointly or alone; or**
>
> **(b) would have been so exercised but for the removal of the child.**
>
> **(2) A reference in these Regulations to the retention of a child is a reference to the retention of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of retention, those rights:**
>
> - **were actually exercised, either jointly or alone; or**
> - **would have been so exercised but for the retention of the child.**
>
> **Regulation 4**
>
> **(1) For the purposes of these Regulations, a person, an institution or another**
>
> **body has rights of custody in relation to a child, if:**
>
> **(a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and**

(b) rights of custody in relation to the child are attributed to the person, institution or other body, either jointly or alone, under a law in force in the convention country in which the child habitually resided immediately before his or her removal or retention.

(2) For the purposes of subregulation (1), rights of custody include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child.

(3) For the purposes of this regulation, rights of custody may arise:

(a) by operation of law; or

(b) by reason of a judicial or administrative decision; or

(c) by reason of an agreement having legal effect under a law in force in Australia or a Convention country.

Regulation 13

(1) If the Commonwealth Central Authority:

(a) receives an application in relation to a child who has been removed from a Convention country to, or retained in, Australia; and

(b) is satisfied that the application is in accordance with the Convention and with these Regulations;

the Commonwealth Central Authority must take action under the Convention to secure the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention.

(2) The Commonwealth Central Authority may refuse to accept an application received by it if it is satisfied that the application is not in accordance with the Convention.

(3) As soon as possible after the Commonwealth Central Authority refuses under subregulation (2) to accept an application, it must inform the applicant, or the Central Authority through which the application was made to the Commonwealth Central Authority, of the refusal and of the reason for the refusal.

(4) For the purposes of subregulation (1), action that must be taken by the Commonwealth Central Authority includes seeking:

(a) an amicable resolution of the differences between the applicant and the person opposing return of the child in relation to the removal or retention of the child; and

(b) the voluntary return of the child; and

(c) an order under Part 3.

Regulation 14

(1) In relation to a child who is removed from a Convention country to, or retained in, Australia, the responsible Central Authority may apply to a court in accordance with Form 2 for:

(a) an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention; or

(b) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:

(i) stop, enter and search any vehicle, vessel or aircraft; or

(ii) enter and search premises;

if the person reasonably believes that:

(iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and

(iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or

(c) an order directing that the child not to be removed from a place specified in the order and that members of the Australian Federal Police are to prevent removal of the child from that place; or

(d) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body to secure the welfare of the child pending the determination of an application under reg 13; or

(e) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention.

(2) In relation to a child who is removed from Australia to, or retained in, a Convention country, the responsible Central Authority may apply to a court in accordance with Form 2 for:

(a) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:

(i) stop, enter and search any vehicle, vessel or aircraft; or

(ii) enter and search premises;

if the person reasonably believes that:

(iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and

(iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or

(b) an order that the responsible Central Authority considers to be necessary or appropriate to give effect to the Convention in relation to the welfare of the child after his or her return to Australia; or

(c) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention.

(3) A person on whom a copy of an application is served by a responsible Central Authority may file an answer, or an answer and a cross application, in accordance with Form 2A.

(4) If an answer, or an answer and a cross application, is made, the responsible Central Authority may file a reply in accordance with Form 2B.

Regulation 15

(1) If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under regulation 14:

(a) make an order of a kind mentioned in that regulation; and

(b) make any other order that the court considers to be appropriate to give effect to the Convention; and

(c) include in an order to which para (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention.

(2) A court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows.

(3) If a court is satisfied that there is an appreciable possibility or a threat that a child will be removed from Australia, the court may order the delivery of the passport of the child, and of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police, or such other person as the court considers appropriate, on such conditions as the court considers to be appropriate to give effect to the Convention.

(4) If an application made under regulation 14 is not determined by a court within the period of 42 days commencing on the day on which the application is made:

(a) the responsible Central Authority who made the application may request the Registrar of the court to state in writing the reasons for the application not having been determined within that period; and

(b) as soon as practicable after a request is made, the Registrar must give the statement to the responsible Central Authority.

Regulation 16

(1) Subject to subregulations (2) and (3), on application under regulation 14, a court must make an order for the return of a child:

(a) if the day on which the application was filed is less than 1 year after the day on which the child was removed to, or first retained in, Australia; or

(b) if the day on which the application was filed is at least 1 year after the day on which the child was removed to, or first retained in, Australia unless the court is satisfied that the child is settled in his or her new environment.

(2) A court must refuse to make an order under subregulation (1) if it is satisfied that:

(a) the removal or retention of the child was not a removal or retention of the child within the meaning of these Regulations; or

(b) the child was not an habitual resident of a Convention country immediately before his or her removal or retention; or

(c) the child had attained the age of 16; or

(d) the child was removed to, or retained in, Australia from a country that, when the child was removed to, or first retained in Australia, was not a Convention country; or

(e) the child is not in Australia.

(3) A court may refuse to make an order under subregulation (1) if a person opposing return establishes that:

(a) the person, institution or other body making application for return of a child under regulation 13:

(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or

(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or

(b) there is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

(4) For the purposes of subregulation (3), the court must take into account any information relating to the social background of the child that is provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately before his or her removal or retention.

(5) The court to which an application for the return of a child is made is not precluded from making an order for the return of a child to the country in which he or she habitually resided immediately before his or her removal or retention only because a matter mentioned in subregulation (3) is established by a party opposing return.

SUBMISSIONS ON APPEAL

Grounds 1 and 2

The relevant findings of the trial judge appear at pp l0 and 13 of the appeal book and are as follows:

Whether or not the mother, as a matter of New Zealand law, has the status of C's guardian and custodian, she has not been exercising any rights which are attached to what is ordinarily understood in Australia as guardianship. The same can be said in relation to what is ordinarily understood here as custody.

. . .

"We would like to offer to have C here to live next year, to help you get back on your feet. The arrangements at the end of this time would be open ended at this stage but again C's well-being would be the primary concern in any future discussion."

This is the closest the mother came before she left New Zealand to assert any right other than access relating to C. I do not think it is an assertion of any right to custody or of guardianship. It seems to be an acceptance that the mother does not have these rights. That is why there is both a request and an attempt to argue in its favour.

In the second of those passages, the trial judge is quoting from the letter of the mother to the grandmother dated 26 November 1995.

In addition, at p 22 of the appeal book, the trial judge said:

I have found that, at the time of C's removal to Australia, none of the rights which are ordinarily understood as being attached to the word custody or the rights which are ordinarily understood as being attached to the word guardianship were being actually exercised by the mother. Nothing had changed in this respect by late February or early March, 1996 when the grandparents decided not to return with C to New Zealand and the father supported this decision. The highest the mother can put her case on the facts is that, if C had been returned, she would have exercised access in New Zealand and she might have attempted, or was in the process of attempting, to regain custody, including what has been known in Australia as guardianship, and exercise the rights which goes with it in New Zealand .

Finally, as far as these grounds are concerned, the trial judge found at p 24 of the appeal book:

I am also satisfied that those rights [the rights of custody] would not have been exercised [by the mother] if the child had not been removed or retained.

In support of these grounds of appeal, it was submitted, correctly, that the fact that C was habitually resident in New Zealand at the time of retention in Australia was never in issue. Our attention was drawn to the finding of the trial judge that by operation of New Zealand law and in the absence of an order of an appropriate court, both the mother and the father are guardians of C. Also, by New Zealand law, the mother has what in Australia would normally be understood as rights of guardianship and custody of C, for the purpose of proceedings under s 111B of the Family Law Act and the Regulations. This, it was put, equates to the meaning of "rights of custody" pursuant to reg 4(1)(b). It was then submitted that the mother, as a guardian, has a right to determine where the child should live and that there is no evidence that she has ever abandoned that right. Thus, it was submitted, it was not open to the trial judge to find that at the time of C's retention in Australia, the mother was either not actually exercising her rights of custody or that she would not have exercised those rights but for the retention.

In support of the submission, we were initially referred to Police Commissioner of South Australia v Temple (1993) FLC 92-365 where at 79,827, Murray J said:

Therefore I must look at the husband's rights of custody arising by operation of the law in England and then ascertain whether he was actually exercising them either jointly or alone, or would have exercised them but for the retention.

Counsel for the Central Authority tendered various extracts from the Children Act 1989 already referred to with some textbook commentary thereon. Section 3 of this Act defines "parental responsibility" as "all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". It is agreed that each party had shared parental responsibility at all relevant times during the parties' separation. Each party still has shared parental responsibility. It would also appear that "parental responsibility" properly encompasses the prima facie duty to allow the child to have contact with other persons having parental responsibility (Re KD (A Minor) (Ward: Termination of Access) [1988] AC 806) .

Section 1 of the Child Abduction Act 1984 as amended provides criminal sanctions should one, eg a child's mother, remove that child from England without the consent of the father if he has parental responsibility.

The husband, therefore, as a person with parental responsibility has the right under English law to give or withhold consent to S's removal from England. It follows that the husband has a right to determine the child's place of residence (C v C (Minor: Abduction: Rights of Custody Abroad) [1989] 2 All ER 465 at 471), and I hold accordingly.

I am further of the view that as at the date of S's retention, the husband had not abandoned that right although he took no steps to alter the status quo. Without abandonment of that right, I am of the view that the husband must be actually exercising it. The Macquarie Dictionary defines "actually" as "an existing fact; really". The husband's right to determine S's removal from England was an actual or existing fact at all relevant times. I do not see how, in any event, he could abandon that right without the knowledge of the wife's decision to retain S permanently -- something which did not occur until the 31st July.

While there was an appeal against the orders of Murray J in that case, her finding that the child's retention in Australia was wrongful was not challenged on that appeal.

We were next referred to Re Bassi; Bassi and Director-General, Department of Community Services (1994) 17 Fam LR 571 FLC 92-465 where at Fam LR 575; FLC 80,825 Johnston JR said:

It was submitted by learned senior counsel on behalf of the wife that the removal of the children was not wrongful within the meaning of the Convention because at the time of removal of the children the husband was not actually exercising any rights of custody. This was on the alleged basis that the husband had had little contact with the children in terms of him being responsible for them and the only contact he had had for quite a long time had been when they went to visit their paternal grandparents and he happened to see them on such occasions. The submission was also on the basis that the husband had disregarded his responsibilities by reason of his violence and harassment and particularly the fact that he has paid no child maintenance.

I reject this submission. Subsection 2(1) of the (United Kingdom) Children Act 1989 provides as follows:

"Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child."

Subsection 2(7) of the Act provides as follows:

> **"Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child."**

Section 3 of the Act defines "parental responsibility" as:

> **". . . all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."**

In addition, in my view, there is a right given to the husband as a parent of the children, to determine that their residence shall not be outside the United Kingdom by s 1 of the Child Abduction Act 1984. This provides that it is an offence for one parent to remove a child from the United Kingdom without the consent of the other parent. In my view, the husband is a person who pursuant to the Children Act has parental responsibility for the children and in my view this responsibility carries with it the responsibility to determine the children's place of residence. As I have said, he also has the responsibility provided by the Child Abduction Act. There is no evidence that the husband has ever given up this responsibility to determine the children's residence and therefore, in my view, at the time of removal of the children he was exercising "rights of custody" within the meaning of the Convention.

We were then referred to McCall and McCall; State Central Authority (Applicant); Attorney-General (Intervener) (1994) 18 Fam LR 307 (1995) FLC 92-551 where at Fam LR 321; and FLC 81,515 the Full Court said:

Turning now to Mr Dwyer's argument that the reference in the Regulations to "rights of custody" is inconsistent with s 63E(2) of the Act, we think that this argument must also fail for the reasons already given.

However we do not think that there is any inconsistency in any event. The expression, "rights of custody" is defined in Art 5(a) of the Convention and that definition is incorporated into the Regulations by reg 2(1). As Dr Griffith pointed out, Art 5(a) is merely descriptive of the types of rights arising under the domestic law of a contracting State that are encompassed within the expression "rights of custody" as used in the Convention.

It must be remembered that the Convention is an international instrument couched in language that is intended to cover a wide variety of rights in relation to children as defined in the domestic legislation of states that are members of the Convention and cannot be expected to mirror the language used in the domestic legislation of those states.

The protection that the Convention affords clearly extends beyond the rather narrow definition of custody contained in the Family Law Act to include the incidents of guardianship as defined in the Act. This does not however mean that the Convention is in any way inconsistent with the Act, but rather that the expression "rights of custody" as used in the Convention encompasses a broader range of rights than is contemplated by the expression "custody" as defined in Australian domestic law.

In this regard, it is of interest to note para 9 of the Overall Conclusions of the Special Commission of October 1989 on the Operation of the Convention as follows:

"The first point to be clarified was that 'rights of custody' as referred to in the Convention on the Civil Aspects of International Child Abduction constitutes an autonomous concept, and thus such rights are not necessarily coterminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction thereof. Thus, for example, in Australia it is customary for 'custody' to be granted to one parent, but even in such cases Australian law leaves 'guardianship' of the child in the hands of both parents jointly; the parent who has not been awarded 'custody' under this legal system nonetheless has the right to be consulted and to give or refuse consent before the child is permanently removed from Australia.

It was pointed out that this is largely a matter of education for the Central Authorities and judges of other countries which do not have the Australian two-tier system in which co-guardians have 'rights of custody' within the meaning of the Hague Convention; therefore the Australian Central Authority should, when forwarding an application for return of a child from abroad, include specific information as to the rights of such a co-guardian which fall within the contemplation of the treaty.

Nonetheless it was hoped that the inclusion of this description of the Australian system in the Overall Conclusions of the Special Commission will serve to sensitise Central Authorities in other countries to the fact that the award of what is called 'custody' to only one parent under domestic law, does not necessarily mean that all 'rights of custody' within the intent of the Hague Convention have been granted to that parent. Since each domestic legal system has its own terminology for referring to rights which touch upon the care and control of children, and even some English-language systems do not employ the term 'custody', it is necessary to look to the content of the rights and not merely to their name."

In a paper delivered to the conference of the International Family Law Association at Cardiff entitled "Case Law and Co-operation as the Building Blocks for the Protection of International

Families" on 28 June 1994, Adair Dyer, Deputy Secretary General of The Hague Conference on Private International Law commented as follows at p 4:

> **"Another term which takes on its own gloss under the 1980 Convention is the term 'rights of custody' itself. This is a term which may be used as a term of legal art in many systems, although the trends of the past twenty years are towards scrapping the traditional terms custody and access (or visitation) in favour of more shaded terms which may reflect a less rigid division of rights between the child's parents. 'Rights of custody' under the Hague Convention, however, are partially defined in Art 5 so as to put emphasis on the right to determine the child's place of residence, the issue which is usually most critical when the main issue is one of 'wrongful' removal or retention. Thus "rights of custody" as referred to in the Convention have been found to differ from those covered by the same term in any particular national or provincial legal system."**

In any event, as Dr Griffith pointed out, so far as children removed to Australia from another contracting State are concerned, the Convention is not concerned with rights of custody under Australian law, but with rights of custody under the law of the country from which the child has been removed and with the return of that child to that country.

In this case, it was submitted that the retention of the child in Australia was in breach of the mother's parental right to determine where the child should live, a right the mother had never abandoned. It was put that, in the passage at p 13 of the appeal book to which we have referred, the trial judge acknowledged that the mother's letter dated 26 November 1995 does not abandon that right. He construed the letter as "an acceptance that the mother does not have these rights", that is, the rights to custody or guardianship contrary to his later finding that "by New Zealand law, the mother has what in Australia would normally be understood as rights of guardianship and custody of C for the purpose of proceedings under s 111B of the Act and the Regulations."

On behalf of the respondents, it was submitted that it was open to the trial judge to find that the mother has rights of custody in relation to C but that she was not exercising those rights. In support of the submission, we were referred to the judgment of Millett LJ in Re F (Minor: Abduction: Rights of Custody Abroad) (1995) 3 All ER 641 at 650 where he said:

In order to invoke Art 12, the deprived parent must establish three matters: (i) that before the removal or retention he or she enjoyed rights of custody within the meaning of the Convention; (ii) that the other parent's conduct in removing or retaining the child was in breach of those rights; and (iii) that at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention. The last is a pure question of fact; but the expressions "rights of custody" and "breach" involve legal concepts, so that the others are questions of mixed law and fact.

It was then submitted that the evidence showed that the mother did not have the possession of the child and was not exercising a right of control over the upbringing of the child at the relevant time. Thus, it was put that the Central Authority had not satisfied the trial judge that the mother was exercising rights of custody at that time.

In order to determine, for the purposes of the Regulations, whether a person has rights of custody in relation to a child who immediately before his or her retention was habitually resident in a convention country other than Australia --in this case New Zealand -- one must have regard to the law of that other convention country at the relevant time. The relevant law at that time in New Zealand is referred to in the affidavit of Mr Collis, an Auckland barrister and solicitor. He referred to s 3 of the Guardianship Act 1968 (NZ) which provides:

Definition of custody and guardianship -- For the purposes of this Act:

> **"Custody" means the right to possession and care of a child:**

> **"Guardianship" means the custody of a child (except in the case of a testamentary guardian and subject to any custody order made by the court) and the right of control over the upbringing of a child, and includes all rights, powers, and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the sole guardian of a child; and "guardian" has a corresponding meaning.**

In addition, Mr Collis referred to s 6(1) of that Act which provides that, subject to the provisions of the Act, the father and the mother of a child shall each be a guardian of the child. He deposed that "the mother had the right to determine where the child lived by virtue of her legal status as the child's guardian . . ." Clearly, the father equally had that right.

Thus, under the law of New Zealand, both the father and the mother were each a guardian of the child and each had the rights referred to in s 3 of the New Zealand legislation. In the absence of a court order to the contrary, either party could remove the child from New Zealand and determine that the child should live in Australia. However, such a removal and determination by one parent would not bring to an end the rights of the other parent. The retention of C in Australia interfered with the rights of the mother in that she was thus prevented from exercising her rights as a guardian in New Zealand. The mother had rights of custody according to New Zealand law immediately before C's retention. Whether those rights of custody are rights of custody within the meaning of the Regulations and whether there has been a breach of those rights are matters to be determined in accordance with Australian law.

Rights of custody for the purposes of the Regulations are set out in reg 4 thereof and include the right to determine the place of residence of the child. Thus, the rights of custody which the mother had under New Zealand law were rights of custody within the meaning of the Regulations. However, there would only be a breach of those rights if, at the time of retention, the rights of custody were actually being exercised, either jointly or alone, or those rights would have been so exercised but for the retention of the child.

The question is not, as the Central Authority put, whether there is any evidence that the mother abandoned her rights of custody but rather whether, at the relevant time, the rights were actually being exercised or would have been but for the retention.

The mother, in this case, in August 1989, made proper arrangements to have the grandparents care for C. By so doing, she was arranging to have them discharge, on her behalf, her duty to C. It would not have been open to the trial judge, in our view, to find that by so doing, she was surrendering, abandoning, waiving or giving away her rights to custody or conferring such rights upon the grandparents, nor would it have been open to him to find that she was conferring such rights upon the father. Thus on this basis, in our view, the mother was, at the time of the retention, actually exercising rights of custody in relation to C.

Additionally, at the date of retention, the mother had rights of custody within the meaning of the Regulations and those rights included the right to determine the place (including the country) of residence of C. The father had an equal right. The exercise of that right by the father does not, however, bring to an end the equal and separate right of the mother. The retention of C in Australia interfered with the right of the mother to determine the place of residence of C and was an interference with another incident of the mother's rights of custody which would have been exercised but for the retention of the child. That the mother would have exercised that right, but for the retention, is clear beyond doubt from her letter to the grandmother of 26 November 1995, to which we have earlier referred.

Thus, in our judgment, C was retained in Australia in breach of the mother's rights of custody under the Regulations. It follows that, in our view, the trial judge erred in finding that, at the time of the retention, the mother's rights of custody were not actually exercised and in finding that they would not have been exercised but for the retention.

In addition, by parity of reasoning, we are not satisfied that the ground for refusing to return C to New Zealand under reg 16(3)(a)(i) has been established by the respondents.

Ground 3

The trial judge considered the application of reg 16(3)(c) at pp 20 and 21 of the appeal book. He found "that C 'objects', within the meaning of that word in the Regulations, to being returned to New Zealand". He further found that she had "attained an age and degree of maturity which makes it appropriate to take account of her views". He was satisfied that C's objection was strong and was based upon her "subconscious needs rather than conscious choice". He was satisfied that it was appropriate to regard her objection as being a very substantial one and sufficient on its own to refuse to make an order under reg 16(1).

Part of the material before the trial judge was a report prepared by Dr Waters which appears at pp 120 to 125 of the appeal book. That report was prepared pursuant to an order made on 4 June 1996 as follows: 1. Orders in accordance with 1, 2 and 3 of the Application filed by the respondent on 31 May 1996:

Those Orders are as follows:

1. That pursuant to O 3OA of the Family Law Rules, Professor Brent Waters be appointed as court expert to inquire into and report on the following issues arising from these proceedings:

(a) level of maturity of the child the subject of these proceedings;

(b) any wishes that the child may express in respect of her future residence;

(c) relationship and bonding, if any, between the child and paternal grandparents;

(d) relationship and bonding, if any, between the child and her father;

(e) perceived role and relationship of the child's mother through the child's own eyes;

(f) short and long term consequences to the child if removed from;

(i) her paternal grandparents and father; and

(ii) from her current home environment and school;

(g) any observations or conclusions you may draw in respect of whether "There is a grave risk that the return of the child to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

2. That the first, second and third respondents bear the costs of obtaining the said expert's report.

3. That the parties be at liberty to provide copies of the pleadings in this matter to Professor Waters and any other material which is relevant to the preparation of the report.

2. Order that Professor Waters also inquire into and report on any observations or conclusions he might draw in relation to whether or not the child objects to being returned to New Zealand and has attained an age and degree of maturity which it is appropriate to take account of the child's views.

We note that, in the preparation of the report, Dr Waters interviewed the father, the grandparents and C together and separately on 6 June 1996 but that he did not interview the mother. Whether this was an appropriate procedure and whether the form of the order of 4 June 1996 was appropriate, we leave open given that neither the Central Authority, the father nor the

grandparents accepted our invitation to address us on that issue. It was, however, clearly appropriate to obtain a report for the purpose of ascertaining whether or not C objected to being returned to New Zealand.

In support of the ground, it was submitted by the Central Authority that the report, in so far as it attempted to address the enquiry specified in Order 2 of 4 June 1996, deals with no more than "what the child 'wants'" and "her preference" for a permanent custodial relationship and thus does not support the findings of the trial judge.

We were then referred to the decision of the High Court in De L v Director General, Department of Community Services (NSW) (1996) 136 ALR 201 and, in particular, to the majority judgment at pp 11 to 14 under the heading "Objects to being returned". The court was there considering the Regulations as they were before the 1995 Amendment, although for present purposes, nothing turns on that fact.

Their Honours therein referred to the approach adopted by the majority of the Full Court of the Family Court of Australia that there should be a "strict and narrow reading" of what that court identified as the exceptions to the obligation imposed upon the court to order the prompt return of the abducted child to the jurisdiction of habitual residence. They also referred to the acceptance by the Full Court of the proposition found in Re R (A Minor: Abduction) [1992] 1 FLR 105 at 108 that "[t]he word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute", to Art 13 of the Convention on the Civil Aspects of International Child Abduction and went on to say:

In this setting there is no particular reason why reg 16(3)(c) should be construed by any strict or narrow reading of a phrase expressed in broad English terms, such as "the child objects to being returned". The term is "objects". No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition. No "additional gloss" [S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 at 499 per Balcombe LJ] is to be supplied.

The judgments of the Court of Session in Urness v Minto [[1994] SLT 988] are in point. Section 1 of the Child Abduction and Custody Act 1985 (UK) relevantly provided that the provisions of the Convention, set out in a Schedule to the statute, were to "have the force of law in the United Kingdom". Accordingly, the court was construing directly the terms of Art 13. At first instance, Lord Penrose said [[1994] SLT 988 at 993]:

"The expression ['the child objects to being returned'] is to be applied in its ordinary literal sense. The child must object to returning to the country from which it was wrongfully removed in the circumstances envisaged at the time. The questions were whether the child objected to being returned and whether the child had attained an age and degree of maturity at which it was appropriate to take account of its views, these being matters of fact to be determined in the light of the information before the court."

A reclaiming motion was dismissed. The opinion of the court was delivered by the Lord Justice-Clerk, Lord Ross. His Lordship [[1994] SLT 988 at 998] applied the following statement of the principle by Balcombe LJ in S v S (Child Abduction) (Child's Views) [[1992] 2 FLR 492 at 499]:

["As was made clear by the President in Re M (above)"]:

"[T]he return to which the child objects is that which would otherwise be ordered under Art 12, viz, an immediate return to the country from which it was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom it should live . . . There is nothing in the provisions of Art 13 to make it appropriate to consider whether the child objects to returning in any circumstances."

Balcombe LJ had continued [[1992] 2 FLR 492 at 499-500]:

"Thus, to take the circumstances of the present case, it may be that C would not object to returning to France for staying access with her father if it were established that her home and schooling are in England, but that would not be the return which would be ordered under Art 12."

In New Zealand, it has been said, dealing with the equivalent provisions in ss 12 and 13 of the Guardianship Amendment Act 1991 (NZ) [Clarke v Carson [1996] 1 NZLR 349 at 351. This passage was accepted without challenge by the New Zealand Court of Appeal in ; Andersen v Central Authority for New Zealand unreported, 11 June 1996 at 8]:

"Section 13 sets out the only circumstances which constitute grounds for the refusal of the order for return. Where those grounds are made out to the satisfaction of the court by the person resisting the order for return (here, the mother), the consequence is not that the order will be refused but that the court is no longer obliged to return the child but has a discretion whether or not to do so. That discretion must be exercised in the context of the Act under which it is conferred and the convention which it implements and schedules. (See Re A (Minors) (Abduction: Custody Rights) [[1992] 2 WLR 536 at 550 per Lord Donaldson of Lymington MR].) It therefore requires assessment of whether decisions affecting the child should be made in the court from the country from which the child has been wrongfully removed or the country of the court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other."

Further, as was pointed out by Nicholson CJ in the present case, the policy of the Convention is not compromised by hearing what children have to say and by taking a literal view of the term "objection". That is because it remains for the court to make the critical further assessments as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised [(1996) FLC 92-674 at 83,017].

Regulation 16(3)(c) fell for application in this case upon the construction indicated by Nicholson CJ and in the authorities, to which we have referred above, from Canada, Scotland, England and New Zealand. It follows that the majority of the Full Court misconstrued what had been the task of the primary judge in applying reg 16.

In relation to the statement of principle expressed by Balcombe LJ in S v S (Child Abduction) (Child's Views), above, and applied by Lord Ross in ; Urness v Minto, above, there is, in our view, nothing in the provisions of reg 16(3) to make it appropriate to consider whether the child objects to returning in any circumstances.

In Urness v Minto, above, Lord Ross, after reviewing the findings of the Lord Ordinary, said:

Moreover, although the present proceedings do not relate to the custody of or access to the children, and this court does not require [sic] to consider the welfare of the children as paramount, this does not mean that the court must disregard any objections put forward by the child simply because the objections raise issues which may require to be considered at a later stage by the competent court in the United States of America which will have to determine issues of custody and access. In the present case the Lord Ordinary had to determine whether the child had attained an age and degree of maturity at which it was appropriate to take account of the child's views. It appears to us that the Lord Ordinary did consider these matters; he concluded that the child did object to returning, and he was also satisfied that the child had the necessary degree of maturity. It is clear that the Lord Ordinary was also satisfied that J had put forward valid reasons for his objections. In the course of his opinion, the Lord Ordinary expressed his conclusion in relation to J as follows [p 994C-D, above] "I was left in no doubt at all about the genuine and heartfelt character of his objection to returning to the United States of America."

The Lord Ordinary also explained that he was particularly impressed by the strength of J's feelings because when it was put to him that the court might order his return, he replied "I would

say 'I don't want to go there and how are you going to make me?' Something like that." Thereafter he explained his answer further by saying "You cannot force someone to go somewhere, well, you can but you cannot really." When the Lord Ordinary asked him why he should have said these things he replied "Because I don't want to go back there."

In these circumstances we are quite satisfied that the Lord Ordinary was fully justified in concluding that J had a genuine and heartfelt objection to returning to the United States of America. Not only that, but J gave adequate reasons for his objection and the Lord Ordinary was satisfied that he was sufficiently mature to make it appropriate for the Lord Ordinary to take his views into account. At [sic] the Lord Ordinary put it [at p 994G-H, above]: "I had no doubt that J had achieved a level of maturity and was sufficiently intelligent to form the firm views he expressed and that those were views which ought to prevail in this case over any countervailing consideration."

In S v S (Child Abduction) (Child's Views), above, Balcombe LJ noted that:

In the present case C objected strongly to being returned to France. Her reasons, as given to Mrs Varley, had substance and were not merely a desire to remain in England with her mother.

As Lord Ross pointed out in Urness v Minto, above:

Thus in S v S (Child Abduction) the child's objection to being returned to France was clearly related to the child's earlier experience of France where she had suffered from severe stammering, thought to be brought on by language confusion. Again in ; Re M (Minors) (Abduction) the children's objection to returning to the United States of America was based upon their earlier experience there when they claimed to have sustained ill treatment from their American father.

We also note that the authority for the proposition that no additional gloss is to be applied in relation to "objects" is S v S (Child Abduction) (Child's Views), above, where at 499, in considering the construction of Art 13 of the Convention, Balcombe LJ said:

(a) It will be seen that the part of Art 13 which relates to the child's objections to being returned is completely separate from para (b), and we can see no reason to interpret this part of the article, as we were invited to do by Miss Scotland, as importing a requirement to establish a grave risk that the return of the child would expose her to psychological harm, or otherwise place her in an intolerable situation. Further, there is no warrant for importing such a gloss on the words of Art 13, as did Bracewell J in Re R (A Minor: Abduction) [1992] 1 FLR 105 at 107-108:

"The wording of the article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word "objects" imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

Unfortunately Bracewell J was not referred to the earlier decision of Sir Stephen Brown P, in Re M (Minors) 25 July 1990, unreported, in which he rightly considered this part of Art 13 by reference to its literal words and without giving them any such additional gloss, as did Bracewell J in ; Re R.

In the present case, the trial judge commenced his consideration of the application of reg 16(3)(c) by saying, inter alia: To determine whether or not a child actually objects does not appear to me to involve the reasons for the objection. The exercise of discretion involves weighing these with whatever other factors should, in the circumstances, affect discretion. Thus, it does not matter, in deciding whether or not there is an objection, that the objection is frivolous or a serious one based upon factors like unfamiliarity with language or customs, social circumstances, unpleasant weather, or isolation from friends, pets, sporting facilities or those to whom the child is most attached. These matters are, nevertheless, relevant to the exercise of discretion to refuse to make

an order. It is not enough that the child merely has a preference, there must be an objection. To act on it, if the child has attained an age and degree of maturity which warrants taking its views into account, the objection must be a very substantial one in the circumstances.

In our view, the reasons advanced by a child who objects to being returned are material and may well assist in determining whether the return to which the child objects is that which would otherwise be ordered under the Regulations.

Having considered not only the evidence of Dr Waters but also that of Ms Redding, the grandmother, the grandfather and the father in the light of the observations of the High Court, we are of the view that the trial judge erred in finding that C objected to being returned to New Zealand within the meaning of reg 16(3)(c) . In our view, he erred in the approach he adopted in his consideration of the application of reg l6(3)(c) in that he did not consider whether the return to which C objected was the return which would otherwise be ordered, namely an immediate return to New Zealand so that the courts of that country could resolve the merits of any dispute as to where and with whom she should live. Further, neither Dr Waters nor Ms Redding reported on the question whether the return to New Zealand, to which C objects, was an immediate return so that the courts of that country could resolve the relevant dispute. However, the orders of 4 June 1996 did not make that aspect clear.

The relevant objection is an objection to being returned to the country of habitual residence for the purposes of the Regulations, not to live with a particular parent. There may be cases where those two matters are so linked that they cannot be separated but this is not such a case.

In considering the evidence, the following observations of Nicholson CJ in Director General, Department of Community Services v De Lewinski (1996) FLC 92-674 are apposite at 83,016: . . . in my view, a court should not expect children to necessarily express their views within adult formulations. While courts may appreciate notions of forum, comity and jurisdiction, and that an objection to meet the terms of reg 16(3)(c) must as a matter of law be with respect to the place of habitual residence rather than the person with rights of custody, this is not the stuff of children's concepts and nor should it be expected that children will speak in such terms unless rehearsed.

We do not consider that it is necessary to set out the relevant evidence but we do note that Dr Waters reported:

She [C] nevertheless told me that if she had to go to her mothers [sic] she would, and she did not seem frightened by this outcome, although she was adamant that it was not her preference.

The totality of the evidence does not, in our view, establish that C objects to being returned to New Zealand within the meaning of reg 16(3)(c) and thus it is not necessary for us to consider whether she had attained an age and degree of maturity at which it is appropriate to take account of her views.

Grounds 4, 5 and 6

We have already referred to the findings and conclusions of the trial judge in relation to the application of reg 16(3)(b). On behalf of the Central Authority, it was submitted, correctly in our view, that the respondents to the appeal bear the onus of establishing that the return of C to New Zealand would expose her to physical or psychological harm or otherwise place the child in an intolerable situation.

Dr Waters reported, inter alia:

Having had the experience of extremely close attachments to her grandparents and father, if a substitute attachment was not made to the mother, then it is my opinion there would be a lasting change in her personality. She would be reduced in her ability to experience pleasure, to be sociable, to perform well at school, and she would cry easily and would generally be more

withdrawn. She may also become extremely resentful of her mother from having removed her and if this became marked, it may lead to a deterioration in the relationship with her mother which could be associated with oppositional behaviour, aggressiveness, and getting into trouble at home, at school and in the community.

In my opinion, the likelihood of this sequence of events is made particularly high because she also went through a period last year when family life was thrown into considerable turmoil by the failure of her grandparents business (and she was clearly distressed by this although her family tried to protect her from it) and family life has only just now started to develop some sense of security to it. In other words, about twelve months ago her family life was destabilised in a dramatic way and the outcome of a successful application by the mother at the present time would have the effect of a further but much more dramatic destabilisation of her life. The first destabilisation would sensitise her to a more adverse outcome from the second than might otherwise have occurred, and is probably contributing to the very obvious signs of insecurity which she has been showing from as soon as she found out about the current litigation.

There was, however, no evidence before the trial judge that C would be unable to form a substitute attachment to her mother and, in this regard, we accept the submission of the Central Authority. Moreover, the Regulation directs attention to a return to New Zealand not to the mother. The evidence was that C loved her mother but did not want to live with her in New Zealand and that if she had to go "to her mothers [sic]", she would and that she did not seem frightened by this outcome. In those circumstances, the factual basis on which the opinion was based was not established and no weight can be attached to this aspect of Dr Waters' opinion. Much of the evidence of Dr Waters related not to the question of where the custody proceedings should be heard but related to the question of custody itself. In addition, in our view, the return envisaged by the Regulation is the return which would otherwise be ordered under the Regulation, viz an immediate return to the country from which the child was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom the child should live.

C clearly has symptoms of anxiety and insecurity as one would expect but there was no evidence before the trial judge from which he could infer that a grave risk of psychological harm to the necessary degree would occur if she were returned to New Zealand within the meaning of reg 16 (3)(b), that is, to enable the New Zealand courts to resolve the merits of any dispute as to where and with whom she should live.

As Lord Donaldson of Lymington MR said in C v C (Abduction: Rights of Custody) [1989] 1 WLR 654 :

I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the state to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, ie, the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country -- Australia in this case -- can resume their normal role in relation to the child.

The trial judge was satisfied that the grandparents will not return to New Zealand if C returns to that country and it would seem he took that fact into account in reaching his decision that the ground referred to in reg 16(3)(b) had been established.

As Butler-Sloss LJ said in C v C (Abduction: Rights of Custody), above, at p 661:

The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create a psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent. As Balcombe LJ said in Re E (A Minor) (Abduction) [1989] 1 FLR 135, 142:

"the whole purpose of this Convention is . . . to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or, having taken the child, with the agreement of any other party who has custodial rights, to another jurisdiction, then wrongfully to retain that child."

If this mother will not accompany the child, despite the knowledge that his rightful place is in New South Wales, then, on the facts before this court, I am not satisfied that Art 13(b) applies and, in my judgment, the child should return to his father.

See also Director General of the Department of Family and Community Services v Davis (1990) 14 Fam LR 381 FLC 92-182 at 78,228.

We would, with respect, adopt those observations.

It was not open to the trial judge, on the facts of this case, to be satisfied that the grounds for refusing to return the child to New Zealand under reg 16(3)(b) were established.

Ground 7

We have concluded that the respondents have not established that the grounds for refusing to return the child under regs 16(3)(a)(i), (b) or (c) have been established and accordingly, it is not necessary for us to consider this ground.

Ground 8

No submissions were put to us in support of this ground.

CONCLUSION

We are satisfied that C was retained in Australia in breach of the mother's rights of custody under the Regulations and that the trial judge erred in finding that the mother was not exercising rights of custody in relation to the child at the time of retention and that she would not have exercised such rights at that time if the child had not been retained. We are also satisfied that the grounds for refusing to return the child under regs 16(3)(a)(i), (b) and (c) were not established.

Accordingly, the appeal should be allowed, Orders 1 and 2 made on 23 July 1996 set aside and in lieu thereof it should be ordered that C be returned forthwith to New Zealand. No submissions were made in relation to Order (2) sought by the Central Authority in the Notice of Appeal if the appeal were allowed but, in the whole of the circumstances, we consider that to be appropriate. We will reserve, however, liberty to the grandparents and to the father to apply to a single judge

or a judicial registrar on 24 hours notice for a variation of that order provided such application is made within three days of this date.

COSTS OF THE APPEAL

At the completion of the hearing of this appeal, we heard submissions as to the costs of the appeal. In the event that the appeal was successful, the Central Authority sought an order either that the respondents to the appeal pay its costs or that the court grant a certificate pursuant to the provisions of s 9 of the Federal Proceedings (Costs) Act 1981. In the event that the appeal was allowed, the respondents submitted that there should be no order as to costs and that they should be granted a costs certificate pursuant to the provisions of s 6 of the Federal Proceedings (Costs) Act 1981.

Having regard to the matters referred to in s 117(2A) of the Family Law Act, we are not satisfied that the circumstances justify the making of an order for costs. Thus, there will be no order as to costs.

We do not consider that this is an appropriate case to grant certificates pursuant to the Federal Proceedings (Costs) Act 1981.

ORDER

Orders

(1) That the appeal be allowed.

(2) That Orders 1 and 2 made on 23 July 1996 be set aside and in lieu thereof order:

"(1) That the child C born 27 May 1988 be returned forthwith to New Zealand

(2) That for the purpose of return of the said child to New Zealand, the mother, Honor Lymburn, be permitted to remove the said child from Australia.

(3) That the respondents or any of them have liberty to apply within three days of this date on 24 hours notice to the Central Authority to a single judge or a judicial registrar for a variation of Order (2) hereof.

(4) That there be no order as to costs of and incidental to the appeal."

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]