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[28/04/1994; High Court of New Zealand at Wellington; Appellate Court]
B. v. B. [1994] 12 FRNZ 517

B v B

High Court Wellington AP 49/94

28 April 1994

Doogue J

Introduction

This is an appeal regarding the application of the provisions of the Hague Convention embodied in Part I of the Guardianship Act 1968 ("the Act"). The appeal is from a decision of Judge P J Keane in the Family Court of 25 February 1994 ordering that the two children of the parties, a boy aged eight years old, and a girl aged six years old, be returned to France under the provisions of s 12(2) of that part of the Act.

Jurisdiction in respect of appeal

The appeal is brought under the provisions of s 31 of the Act. Pursuant to subs (2) of that section the appeal "shall be by way of rehearing of the original proceedings as if the proceedings had been properly commenced in the High Court". The basis upon which the appeal should be dealt with has been the subject-matter of dicta by Hammond J in A. v W. [1994] NZFLR 132, at 136. The appeal proceeded by agreement in accordance with those dicta, which read:

I think it appropriate to note here also the position of an appellate Court on an appeal from the Family Court. That Court is of course a specialist Court, with particular expertise and a distinct jurisdiction in Family Court matters. In my view the normal appellate principle applies: it is not open to me simply to substitute my judgment, even if I were to disagree with the Family Court Judge, for that of the learned Judge. No authority was cited to me upon this point by counsel, but it seems to me that I should proceed on the footing that I should not interfere unless it can be demonstrated that the learned Judge erred in law; or that there is no or no reasonable evidence (having regard to the usual civil standard of proof) upon which the learned District Court Judge could have exercised or refused to exercise his discretion. The result is that it will normally be very difficult to overturn a decision of a Family Court Judge where what was involved was essentially the exercise of a discretion.

I will return briefly to this topic after dealing with the provisions of the statute under consideration in this case.

The relevant legislation and its background

The Hague Convention on the Civil Aspects of International Child Abduction was adopted into law in New Zealand by the Guardianship Amendment Act 1991, which came into force on 1 August 1991. The Convention is a schedule to that amending Act. The Convention sought to provide an appropriate forum to determine custody disputes between parties to a marriage. It was based on rights to custody. The amending Act, with certain reservations which are irrelevant in the present case, reflects the language of the Convention. France became a "Contracting State" with New Zealand in respect of the application of the Convention on 1 January 1992.

There is no dispute as to the objects of the legislation, which was succinctly stated by Judge Inglis, QC, in Re J E [child abduction] (1993) 11 FRNZ 84, at 85:

"The 1991 statute was enacted to give effect to the Hague Convention on the Civil Aspects of International Child Abduction. The objective of that international convention was to combat what had for many years been seen as the evil of children being taken from their normal home and transported across international borders in an attempt to defeat the other parent's guardianship rights or to evade the orders of the Courts of the country of the child's normal residence, and in the expectation that the Courts of the country to which the child had been taken would allow the abducting parent to profit from the abduction."

In the present case it is common ground that the children had been removed from France to New Zealand and that, subject to the matters relied upon by the appellant before the Family Court and this Court, the children must be returned to France because of the provisions of s 12(2) of Part I of the Act.

That subsection reads:

(2) Subject to section 13 of this Act, where-

(a) An application is made under subsection (1) of this section to a Court; and

(b) The Court is satisfied that the grounds of the application are made out,-

the Court shall make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order.

The appellant, both before the Family Court and before this Court, has relied upon the provisions of s 13 of Part I of the Act. The relevant parts of that section read:

13 Grounds for refusal of order for return of child - (1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court-

(a) ...

(b) That the person by or on whose behalf the application is made -

(i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or

(ii) Consented to, or subsequently acquiesced in, the removal; or

(c) That there is a grave risk that the child's return -

(i) Would expose the child to physical or psychological harm; or

(ii) Would otherwise place the child in an intolerable situation; or

(d) That 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;...

(e) ...

Section 15 of Part I of the Act provides:

15 Interim powers - Where an application is made under section 12(1) of this Act to any Court, the Court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.

Section 25(1) of Part I of the Act provides:

(1) ...This section applies where any District Court Judge or, if no District Court Judge is available, any Registrar (not being a member of the Police) is satisfied that there are reasonable grounds for believing that any person is about to take a child out of New Zealand with intent to defeat the claim of any person who has made, or is about to made, an application under section 10 or section 12 or section 20 of this Act, or to prevent any order made under section 12(2) of this Act from being complied with.

(2)...

Section 9A(1) of the Act provides:

(1) ...A Family Court may, upon application made in the course of any proceedings relating to the custody of, or access to, a child, order that the child be placed under the guardianship of the Court, and may appoint any person to be the agent of the Court either generally or for any particular purpose.

Section 20(1) of the principal Act provides:

(1) ...Any High Court Judge or District Court Judge or, if no High Court Judge or District Court Judge is available, any Registrar of the High Court or of a District Court (not being a constable) who has reason to believe that any person is about to take a child out of New Zealand with intent to defeat the claim of any person who has applied for or is about to apply for custody of or access to the child, or to prevent order of any Court (including an order registered under section 22A of this Act) as to custody of or access to the child from being complied with -

(a) May issue a warrant directing any constable or Social Worker to take the child (using such reasonable force as may be necessary) and place it in the care of some suitable person pending the order or further order of the Court having jurisdiction in the case; and

(b) May, in addition, order that any tickets or travel documents (including the passport) of the child, or of the person believed to be about to take the child out of New Zealand, or of both, be surrendered to the Court for such period and upon such conditions as the Court thinks fit.

Jurisdiction of this Court

Given that statutory background, it was mandatory upon the Court to make the order under s 12 unless the appellant established to the satisfaction of the Court one of the grounds for refusal of an order under s 13(1) relied upon by the appellant. One would expect the appeal from the Family Court Judge's determination of the s 13(1) matters to be dealt with in accordance generally with what was said by Hammond J in A. v W., subject to the following. First, that there could be such a change of circumstances between the hearing in the Family Court and the hearing in this Court that this Court may be justified in reaching a different decision from the Family Court. Secondly, that, where in a case such as the present the Family Court Judge but not the Judge of this Court has had the opportunity of seeing and hearing the witnesses, that may be relevant in respect of the Family Court Judge's determination in respect of facts as this Court would be reluctant to interfere with a determination of facts dependent upon an assessment of the witnesses. Thirdly, it is only if the Family Court reaches a finding upon the evidence that a ground for refusal of an order is established that the Family Court has a discretion to exercise.

Thus in the first instance in a case such as the present, where there has been no exercise of the discretion, this Court is not in fact considering the exercise of a discretion. That would only arise if the Family Court had refused to make an order under s 12(2) because a ground of opposition to the order had been established to the satisfaction of the Family Court. I do not treat the appeal therefore as one which relates to the exercise of a discretion.

The appeal

The provisions of the section upon which the appellant relies in the present case are the provisions of s 13(1)(b)(ii) and (c) and (d). The appellant has properly accepted that the burden under the provisions of that section is upon the appellant to establish her case and that the burden is not a light one. The appeal is brought because the appellant submits that the Family Court Judge misdirected himself in his determination of the facts and the applicable law relevant to the provisions relied upon by the appellant.

Factual background

The judgment under appeal carefully traversed the factual background to the dispute, and I do not intend to refer to it in any particular detail. It is preferable that I set out briefly the principal factors relating to the history of the marriage of the parties and then deal with other factual matters as they are relevant to the issues in dispute between the parties.

The parties met in the United States of America in May 1985. They are both highly qualified scientists, with the respondent husband having a French background and the appellant wife having a New Zealand background. They married in France in March 1986, having moved earlier that year from the United States to Toulouse. They lived in that area until February 1989, when they returned for a little less than two years to the United States of America. In December 1991 they had a second move to France, with an intention of living there. Once

again they lived in the Toulouse area, having a farmhouse outside the city where the respondent lived and worked during the week.

The marriage slowly disintegrated through escalating conflicts between the parties. Understandably each party gives different reasons for that. They are set out in the Family Court decision. From the appellant's perspective there was violence and abuse within the relationship to the extent that the appellant feared for the lives of herself and her children. From the respondent's perspective there was behaviour by the appellant which had brought the conflicts into being. Except to the extent that it is relevant to the points at present relied upon by the appellant, it is unnecessary to refer in any detail to the not unusual conflicts between the parties.

In February 1993 the appellant filed a divorce petition in France after the parties had had counselling from a therapist. The French system provided for a formal reconciliation hearing. That was postponed on a number of occasions. From the appellant's perspective it did not take place because of the actions of the respondent.

In July 1993, after the parties had been essentially living apart but having regular and necessary face to face communications between themselves, the appellant decided that matters could continue as they were no longer. She left France with the children and came to New Zealand. The parties thereafter communicated between themselves and the respondent also communicated with the children. He took legal advice. On 3 August 1993 he applied to the relevant French Court for a divorce. There is some dispute as to whether he also sought sole parental authority of the children under French law. The appellant's French lawyer appears to acknowledge that that was implicit in the application but states that it was not explicit. The appellant herself wrote to the Court on 23 December 1993.

On 11 January 1994 orders were made in favour of the respondent in respect of his application, including an order granting him sole parental authority in respect of the children. The appellant first learned of those orders at the time of the hearing of the proceedings which have led to this appeal. There is some dispute, to which I will turn hereafter, as to the respondent's position in relation to his awareness of his rights to bring the application which led to the present appeal, and indeed the relevance of that. There is no dispute that the present application was brought on 16 December 1993 after the respondent had activated his rights under the Convention by an application dated 22 November 1993.

At the same time as the respondent applied to the Family Court under the provisions of s 12 of Part I of the Act he purportedly applied ex parte to the Family Court for an order preventing the removal of the children from New Zealand in reliance upon s 25 of Part I of the Act and s 20 of the Act. On the same day an order was made in terms of the ex parte application purporting to place the children in the care of the Director-General of Social Welfare and ordering that the appellant was restrained from removing them from New Zealand and that they remain in the Wellington, New Zealand, area until the further order of the Court. In addition, an ancillary order was made in respect of the passports of the children.

On 27 January 1994 the appellant applied to set aside that part of the order which placed the care of the children with the Director-General of Social Welfare upon the grounds that there was no jurisdiction for such an order and that there was no evidence that it was necessary for the children to be placed under the guardianship, custody or care of any person other than the appellant. She sought an interim custody order in her favour.

Issues

It is convenient to deal with the issues in the manner raised before me and the Family Court Judge. They were dealt with in the following order:

(1) That the Family Court Judge erred in his analysis of the interim orders made by the Court on 16 December 1993.

What is said is that the Family Court by that decision had accepted New Zealand as the proper forum to determine matters of care or custody for the children and that accordingly the respondent could not seek assistance from the Hague Convention in Part I of the Act.

(2) Acquiescence

What is said for the appellant is that the Judge approached his determination of the issue of acquiescence relevant to the provisions of s 13(1)(b)(i) of Part I of the Act upon wrong legal principles or, in the alternative, that his findings were contrary to the evidence before the Court.

(3) Grave risk of harm or intolerable situation

In reliance upon the provisions of s 13(1)(c) of Part I of the Act, it is said that the Family Court Judge failed to make findings of fact in relation to the crucial issues or, in the alternative, that his findings are contrary to the evidence that was before the Court.

(4) Undertakings

It was submitted for the appellant that the Judge wrongly took into consideration certain undertakings and that they necessarily tainted his findings in respect of the proceedings before him. It is further submitted that he should have addressed the fact that undertakings from the respondent were unenforceable in France and accordingly were irrelevant for any determination by him.

(5) Children's objections

In reliance upon s 13(1)(d) of the Act it is said that the Judge applied wrong legal principles in finding that the children did not wish to return to France and that there was evidence to satisfy the requirements of the section.

In substance, therefore, it was the submission for the appellant that because of these errors by the Family Court Judge the order should be set aside and there should be no order that the children be returned to France.

In the event of any of those points of appeal being upheld, it would be necessary for this Court to determine whether the discretion vested in the Court under s 13(1) of Part I of the Act should be exercised.

Interim Orders Dated 16 December 1993

The essence of the appellant's submission is that there was no jurisdiction under s 25 of Part I of the Act and s 20 of the Act to make the orders applied for but that, as the orders had been made, they must be treated as having been made within jurisdiction and that the only source for that jurisdiction would be s 9A of the Act.

The Family Court Judge accepted, as does the respondent, that there may well have been no jurisdiction to make the orders applied for under s 25 of Part I of the Act or s 20 of the Act and that they were open to attack. He held, and the respondent relies upon his decision, that,

regardless of that, that was not a basis upon which he could properly decline jurisdiction under s 12 of the Act. When the applications were made under s 25 of Part I of the Act and s 20 of the Act he took the view that they could not be treated as orders akin to wardship. He stated:

One only has to ask why [the respondent] might possibly wish to apply for interim orders, to frustrate rather than advance his substantive application, or why the Court might wish to assist him in that way, to see how difficult the logic becomes.

The appellant points out that, notwithstanding this, the Family Court Judge did not deal with her application to set aside the ex parte order and nor did the Family Court Judge direct himself as to the possible jurisdiction for such an order. The appellant accordingly submits that, as the Family Court by its decision on the ex parte application had accepted New Zealand as the proper forum to determine matters of custody for the children, the respondent cannot have the advantage of Part I of the Act and the Hague Convention. It is said for the appellant that the order goes well beyond the powers which the Family Court could have exercised under s 15 of Part I of the Act.

With all respect to that latter submission, it would appear to me that the order made was within the ambit of s 15 of Part I of the Act. Whether or not the Court would have felt it necessary or obligated to make such an order if the application had been on notice may indeed be questionable, but where an ex parte order was made effectively to preserve the status quo, and that was the clear intention of the application, addressed, as it was, to the Court under s 25 of Part I of the Act and s 20 of the Act, the Court would have had power to give interim directions "as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application". To achieve that objective it may well have been appropriate for the Court to have made the order that was made in the present case, notwithstanding that the Court did not achieve it under the provisions of s 15 of Part I of the Act. The basis upon which the Court did not have jurisdiction under s 20(1) of the Act was because the relief applied for did not comply with the provisions of that subsection. The relief applied for could, however, have been given under s 15 of Part I of the Act.

More importantly, perhaps, as the Family Court Judge found, there is no basis upon which he could have determined that the respondent had, by making an invalid application in terms of s 20(1) of the Act, elected a forum in respect of the care and custody of the children when that application was lodged on the same day and in the same Court as the substantive application seeking relief under Part I of the Act and when that application would have been before the Judge making the ex parte order. The substantive application was the clear election as to forum and the ex parte application merely sought ancillary relief until the substantive application as to forum could be determined.

I accordingly reject the submissions made on behalf of the appellant on the first issue raised before both Courts.

Acquiescence

13 Grounds for refusal of order for return of child - (1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court –

(a) ...

(b) That the person by or on whose behalf the application is made -

(i) ...

(ii) Consented to, or subsequently acquiesced in, the removal;...

The appellant submits that in rejecting her arguments that the respondent had actively or passively acquiesced in her bringing the children to New Zealand the Family Court Judge had applied wrong legal principles or, in the alternative, that his findings were contrary to the evidence.

The first submission under this head is readily dealt with. In the course of his judgment at p 21 the Judge said:

He [the respondent] did take advice, and the advice was wrong or incomplete. He can only become accountable for any inactivity, therefore, I think, once he learnt through friends of his Convention remedy.

This statement is made in the context of the factual nexus of the present case and dicta from English authority which the appellant recognises correctly set out the relevant law in respect of acquiescence.

It is quite apparent, reading his judgment as a whole, that the Family Court Judge was well aware that the respondent's state of knowledge of his Convention remedy was not in itself determinative of whether the respondent had acquiesced in the appellant's bringing of the children to New Zealand. He had cited authority that made it plain that he appreciated that there may be enough to show acquiescence even where the parent does not know his or her precise rights under the Convention.

The part of the judgment under attack has to be read in the context of the facts found by the Family Court Judge in respect of this part of the case. He carefully analysed the evidence. In the course of that analysis he found that at the time that the appellant took legal advice he was wrongly advised. As a result of that wrong advice, he applied in the French Court for relief. He corresponded with his family not in any form of acquiescence, and I will deal with a particular aspect of this in a moment, but in a manner which made plain that he sought custody of the children. The Family Court Judge took the view that once the respondent had any awareness that he had rights he pursued them without delay by initiating the present proceedings in November 1993 after he had been unable to obtain action by the appropriate Convention authority in France.

I am entirely satisfied, therefore, that the Family Court Judge applied correct legal principles to the facts of the matter and that the only issue can be whether he reached a finding of fact that has no justification on the evidence.

The appellant's submissions under this head are built upon a somewhat rickety factual basis. The evidence establishes that somewhere about April/May of 1993 the respondent took legal advice and knew of the possibility that the appellant might leave France. The appellant submits that when, therefore, the appellant left France the respondent was aware of his rights; that he took action in the French Court not explicitly for custody but only for divorce. He corresponded with his family, and critical to the appellant's argument under this head is the content and context of that correspondence. In letters to the children he says that he will see them again "when their mother decides it" or language to that effect. In one letter of 13 August 1993 there was a sentence:

But in this case I am going to defend the right of my children to have access to their father. (The legal procedures are very long but one gets there in the end.)

Upon the use of the word "access" and the expression of expectation that he will see his children again when the appellant decided it, an expression in correspondence over several months in 1993, it is submitted that there was express acquiescence, or, at the very least, passive acquiescence, by the appellant in the bringing of the children to New Zealand, when the respondent took no steps in France to prevent the children being brought to New Zealand and took no earlier steps in New Zealand to have them returned to France.

The Family Court Judge was satisfied that there was no substance in those submissions. He read the letters, as do I, in the manner that at no stage did they show that the respondent abandoned the notion that the children should return to France. They show rather that the respondent sought to see the appellant take the children back to France of her own accord. As the Family Court Judge says, that is not an indication of acquiescence; nor is the critical letter from which I have cited using the word "access". The Family Court Judge found, as he was entitled to do after hearing and seeing the witnesses and, in particular, the cross-examination of the respondent, that the respondent did not intend, when he used the French equivalent of the word "access" in the particular letter, to speak just of visiting rights. That is in itself a finding which this Court would have to be reluctant to interfere with, given the Family Court Judge's advantages in seeing and hearing the witnesses. In any event, however, having read the correspondence as a whole, it is taking one word translated into English, although admittedly the French word is to the same effect, out of context. It is impossible for me to read the correspondence as an indication other than that the respondent intended to pursue his parental rights in respect of the children without limitation to the issue of access.

This is a case far removed from the case relied upon by the appellant where there was a clear election by the particular applicant to limit the applicant's rights to access.

The same comments hold good in respect of any inaction by the respondent in respect of his rights either in France or in New Zealand, and I fail to see how the Family Court Judge could have reached any other conclusion than he did on the totality of the evidence. It was apparent from the totality of the evidence that the respondent sought to exercise his rights in France in respect of the children, if not explicitly, by applying to the Court for a divorce, with the implicit, as the appellant's own French lawyer acknowledges, consequence that he would obtain sole parental authority. He took that course in reliance upon his legal advice.

Upon the evidence the respondent understood he could take no steps to prevent the children leaving France until after the requisite orders were made in France. The appellant had left France before that course could be adopted.

Given the overall facts, it could not be suggested that there was any acquiescence by the respondent in respect of the appellant's actions after the appellant had arrived in New Zealand with the children. The Family Court Judge was entitled on the totality of the evidence to accept, as he did, that the respondent was unaware that he had rights in New Zealand under Part I of the Act and the Convention but that once he became aware at all of those rights he immediately took steps to initiate them. There is nothing in his conduct prior to that which indicates any passive acquiescence by him in respect of the state of affairs brought about by the action of the appellant. To the contrary, as already indicated, his correspondence indicated a wish that the appellant would return to France with the children and that the position in respect of the children should be resolved between the parents in France.

I accordingly reject the submissions made on behalf of the appellant in respect of the subject-matter of acquiescence.

Grave risk of harm or intolerable situation

13 Grounds for refusal or order for return of child - (1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court -

(a) ...

(b) That the person by or on whose behalf the application is made -

(c) That there is a grave risk that the child's return

(i) Would expose the child to physical or psychological harm; or

(ii) Would otherwise place the child in an intolerable situation;...

From any point of view this is undoubtedly the most important issue before the Court, as it was before the Family Court, because, whilst the Convention is concerned with forum and not expressly with the welfare of children, this particular provision is clearly directed towards the welfare of the children in the event that the selection of forum would expose them to a grave risk of harm or of being placed in an intolerable situation in the manner predicated by the section.

The appellant has first submitted that the Family Court Judge erred in failing to make findings of fact in relation to crucial issues. Specifically it is said he misdirected himself by not reaching findings on the evidence as to whether the children would be exposed to a grave risk of harm or an intolerable situation if they were returned to France. In particular, it is said the Judge has not stated his conclusion on the extent to which he believes that the respondent is violent, despite setting out at the beginning of the judgment that he would do so. Nor does the Judge say whether he believes, as asserted by the appellant, that the respondent made suicide threats and threats to kill the appellant and the children.

Once again it is submitted in the alternative that in any event the Judge's findings were contrary to the evidence that was before the Court.

In respect of this issue it is appropriate to look at the alternative submissions in an omnibus fashion rather than individually. The appellant in her evidence had painted a stark picture of violence, threats and irrational behaviour by the respondent. There was, to some extent, some support for that evidence from expert witnesses in France and New Zealand, the respondent's responses to cross-examination and, perhaps to a more limited extent, statements made by the children to the New Zealand expert witness.

The Judge directed himself to the law, and there is no suggestion that he improperly directed himself. He then directed himself to the three possibilities which were put to him on behalf of the appellant.

The first of those was that it would be psychologically harmful to the children if they were separated from their mother. Understandably that possibility has not been put at the forefront of the appellant's submissions before me as the cases make clear that it is an

inevitable consequence in respect of Hague Convention cases that there is likely to be harm to a child as a result of separation from the parent having primary care.

Secondly, the allegations of violence were pursued, with allegations not only in respect of the appellant but in relation to the son, and of inappropriate sexual behaviour in respect of the daughter.

Thirdly, it was submitted that the French Courtswould be unable to appropriately protect the welfare of the children and that the children would be placed in an intolerable situation with grave risk of harm to them if they were forced to return to France without the continuing care by the mother who would herself be at risk in France legally because of the actions already taken by her.

The Family Court Judge carefully dealt with each of those different points. Indeed, it should be said that his judgment is an extremely careful and caring judgment. It is apparent that his concern was to ensure the proper application of the law and, if it were shown to be necessary, the protection of the children. He, having considered all the evidence in respect of the subject-matter of violence, came to the conclusion that in the end the matters upon which he had heard evidence other than that from the parties themselves were untested statements of contextual value at most and that the only appropriate forum in respect of which the issue could properly be determined was France. He certainly did not proceed regardless of the appellant's allegations of violence. Indeed, he was clearly sympathetic to those allegations and decided that he was satisfied that the pattern of violence described by the appellant might be substantially true. He was prepared to contemplate that the respondent had threatened suicide or to kill the appellant or the children. He then asked himself, however, what that meant now in the context of risk for the children. He posed the questions whether the daughter was at risk of sexual abuse or the son of physical abuse. He faced up, after quoting a statement by the appellant of a fairly extreme kind, to the question of what was the immediate risk for the children. He may have, contrary to the submissions for the appellant, been prepared to accept that the situation of the marriage was a result of an underlying conflict between the parties rather than brought about solely as a result of the intemperance and violence of the respondent. It is plain, however, that he accepted that it was possible that what the appellant said might be substantially true. Viewing that evidence, however in the light of the present situation, he concluded that, whilst there were charged periods within the marriage when the parties were together, that was no longer the case and that there was no evidence to establish any risk to the children from the respondent when the parties were separated. Indeed, he reached the view that neither of the children was obviously fearful of the respondent and that the children looked to both parents for love and security. He concluded that the children were unlikely to be at risk if the parties lived apart and that he saw no reason to exclude the respondent from their care.

With all respect, therefore, to the submissions on behalf of the appellant, I am satisfied that the Family Court Judge fairly and squarely faced up to the allegations which were before him and made determinations in respect of them not in the manner in which the appellant might have wished but in a manner which makes clear his views upon all the issues raised in front of me.

The issue arises of whether those findings were justified on the evidence before the Family Court Judge. The appellant has pointed to nothing expressly which would entitle me to reach a different finding. There is plainly evidence upon which the Family Court Judge could have considered that there may have been a risk of some kind to the children. There plainly was not evidence, unless the evidence of the appellant was accepted in its entirety and inferences made from it that the state of affairs of which she spoke would continue despite

the separation and that violence would be meted out to the children, fulfilling the onus on the appellant to establish a grave risk of harm or an intolerable situation. As the Family Court Judge found, there was no justification for him to have reached that decision. It would be speculation.

There certainly was insufficient evidence upon which the admittedly high duty upon the appellant to make out a grave risk to the children could be substantiated. The Family Court Judge properly respected the fears and views of the appellant but upon the evidence before him, which is substantially the evidence before this Court, there was no basis upon which he could appropriately have found that the appellant had made out the children were at grave risk in the manner contemplated by the section.

The appellant has relied on certain specific aspects of the evidence to establish that the Judge's findings are contrary to the evidence. The first of those aspects is a statement by the Family Court Judge that the respondent seemed to admit to him "at least tacitly, that he had acted towards [the appellant] in ways of which he was ashamed". With all respect, there is simply nothing in this particular submission. The Family Court Judge reached a finding upon his seeing and hearing the respondent favourable to the appellant. It is simply not one which would give any justification for interfering with the Family Court Judge's determination. Indeed, the Family Court Judge referred to matters which justified his conclusion and there would be no basis at all to interfere with it.

The second specific aspect of the evidence with which the appellant takes issue is that the Family Court Judge said:

I imagine that if an order is made for the children's return to France [the appellant] will accompany the children. She has said as much.

It is true that the appellant did not specifically state that she would accompany the children, although it was perhaps reasonable for the Family Court Judge to infer that she was likely to, notwithstanding that at the time she had not decided that she would do so if the children were to be returned to France. In any event, nothing can turn upon that particular aspect of the Judge's decision as it plainly was not determinative in any respect of the conclusions reached by him in respect of the issues under s 13(1)(c).

The third aspect upon which the appellant relied is that already referred to, namely the difference which the Family Court Judge predicated in the situation between the parties living together and the parties living apart. It is said for the appellant that, contrary to the Judge's conclusion, that would support the contrary conclusion that the risks for the children would continue, particularly when it is submitted that in the light of recent contemporaneous documents it appears that violence to a spouse is likely to coincide with family violence.

I see no reason to repeat, however, what has already been said by me. The point is that there was insufficient evidence for the Family Court Judge to determine that the children would be at risk if the parties were apart. The onus under the section was upon the appellant. The evidence before the Family Court, as the evidence before this Court, simply does not satisfy that onus. I should not also that, whilst there was reference to inappropriate behaviour by the respondent in respect of the children, there is no evidence upon which the Family Court Judge or this Court could properly have reached a conclusion that this was made out to the standard that would have entitled the Court to find that there was a grave risk that returning the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation.

Perhaps the only other aspect of the appellant's case under this head which requires specific mention is that there is the risk if the children are returned to France, given the respondent's sole parental authority, that the children will not have the benefit of their mother's care if she elects to return to France. If she does not elect to return to France, that is, of course, a matter for her. If, however, she elects to return to France, on the state of the present evidence there is some risk that she would not have the necessary parental access to the children. That topic, however, was also dealt with in the context of the case under the subheading of "Undertakings", and I will touch upon it again there.

There is certainly nothing in the material before the Court which would entitle the Court to reach the grave conclusion that the issues could not be appropriately dealt with under French law or that the children would not have the appropriate protection under French law that their safety and welfare might require. There is nothing to substantiate a grave risk of an intolerable situation in respect of the appellant's position under French law.

The respondent raised different matters in respect of this particular issue which I do not find it necessary to address in any detail. Evidence was equivocal about the extent of the violence in the marriage. That is plain from what I have already said. As I have already said, it is plain that there is no evidence that the French Courts cannot provide the necessary protection for the children. The respondent sought to suggest that the conduct of the appellant had led to the conflict between the parties and that in that event it would require a very high standard of proof of serious detriment to the children before they would be returned to their home. I put that submission to one side. I appreciate that the appellant cannot by her conduct create a situation which enables her to take benefit of the exceptions contained within s 13(1). This is not a case, however, given the findings reached by the Family Court Judge and by me, which requires any examination of that issue. What is clear is that the appellant has failed to substantiate a grave risk that returning the children would expose them to physical or psychological harm or would otherwise place them in an intolerable situation.

Undertakings

The submissions for the appellant under this issue are based upon the provisions of undertakings by the respondent, the second of which was tendered after the conclusion of the hearing. It is submitted that the Judge must have had his approach to the issues relating to s 13 tainted by the presence of such undertakings and his findings in respect of them, and that in any event he did not properly address the important question of the enforceability or reliability of such undertakings in France.

The respondent gave certain undertakings during the course of the hearing. They were criticised as lacking precision and the Family Court Judge was unclear what they meant. He did not himself pursue undertakings. The respondent sought to put more express undertakings before the Court after the case was closed. The Family Court Judge decided that, subject to the appellant having a right to make submissions in respect of those undertakings, he should accept them. The undertakings included inter alia undertakings that the children should spend not less than half their time with the appellant so long as both parties were living in France; that upon the respondent's return to France he would apply for an amendment of the order made in the French Court to ensure joint rights of parental authority, and that he would consent to any application which the appellant made for an order for joint rights of parental authority.

The Family Court Judge made plain that the undertakings were not essential to his decision. Indeed, upon the evidence I fail to see how he could have reached conclusions other than he

did in respect of his decision, regardless of the undertakings. Furthermore, the Family Court Judge was clearly aware and acknowledged that he had no knowledge of what weight, if any, a French Court would give to the undertakings or whether they would assist the appellant in any respect. He merely, to assist the appellant, as I read his judgment, was prepared to refer to the undertakings within his judgment to give such limited protection as he was able, knowing that the undertakings were not binding upon the French Court, to assist the appellant before that Court. If he had rejected the offering of the undertakings, which is the manner in which the case is put for the appellant, it would not have made any difference to his decision, as is apparent from his decision and is apparent from what I have already said, but the appellant would have lost what at the very least could be useful evidential material available to her in the French Courts in respect of any dispute with the respondent if he fails to honour the undertakings.

There is some evidence from the respondent's French lawyer that steps have been taken to honour the undertaking as to joint parental authority. That evidence is challenged but upon a basis which would require me to find that the respondent's French lawyer is a liar. I am not prepared to reach any such finding. I do not consider that the position has basically changed since the hearing before the Family Court. The position is simply one where, as a result of the procedure permitted by the Family Court Judge, the appellant is in a better position than she would have been in if the Family Court Judge had not acceded in that procedure.

It is true that the weight to be given to the undertakings, if any, is entirely a matter for the French Courts, as the Family Court Judge acknowledged. That does not mean, however, that they are of no value to the appellant. It is apparent that, regardless of the undertakings, the Family Court Judge had reached the conclusion that the children's position was not at grave risk if they were returned to France. There is certainly no evidence before this Court which would entitle me to set aside that determination of the Family Court Judge as being contrary to the evidence.

The issues raised in respect of the undertakings do not, in my view, advance the appellant's case either under s 13 or otherwise. I find against the appellant in respect of this issue also.

Children's objections

13 Grounds for refusal of order for return of child - (1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court -

(a) ...

(b) ...

(c) ...

(d) That 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;...

Understandably the appellant's submissions under this head were restrained. It was submitted that the Family Court Judge had applied wrong legal principles in finding that the children did not wish to return to France.

It is apparent, however, from his decision that he was applying the very principles which the appellant urged upon me. In the course of his application of those principles, however, he said the following:

But, that apart, the children did not tell Mrs Keith that they opposed returning to France.

This was after a statement where he said that this case did not seem to him to be exceptional.

The children are young, and it may be questionable whether their views, if they have any, should be treated as decisive.

He found that the evidence did not disclose that the children objected to being returned to France. He plainly did not reach a conclusion that the children had attained an age and degree of maturity at which it was appropriate to take account of their views.

The use of the word "opposed" is not the language of the statute. Whilst it was suggested that the son had expressed views contrary to returning to France, upon my reading of the evidence that is very much in a particular context, a context unhelpful to the appellant, because, as the Family Court

Judge found it was in the context of wanting the conflict between the parents to cease and that he would not mind going back to France when the fighting was over.

I am entirely satisfied that there was evidence upon which the Family Court Judge could find, as he did, that the children did not object to being returned and that in any event there was insufficient evidence to establish that they had attained an age and degree of maturity at which it was appropriate to take account of their views when the older child is eight and the younger child is six. This is not a case such as the cases put before me where the children had reached such an age and a degree of maturity and put valid reasons before the Court that there were grounds for upholding an objection. It is a case where upon the evidence the Family Court Judge's conclusion was almost a foregone conclusion.

Result

The appellant has failed to make out any of the points of appeal relied upon by her. In particular, she has failed to establish the onus upon her to make out that upon the evidence the Family Court Judge was required to establish that some one or more of the points relied upon by the appellant were made out and to exercise his discretion under s 13(1) of Part I of the Act. Like the Family Court Judge, I am satisfied that there is no basis upon which I could appropriately turn to exercising the discretion under s 13(1) of Part I of the Act. I must therefore confirm the order made by the Family Court Judge under s 12(2) that the children be returned forthwith to France.

Miscellaneous

I also confirm the view of the Family Court Judge that it is very much in the children's interests that the appellant should accompany the children to France and continue to take an interest in their welfare and that the respondent should ensure that he meets his undertakings and puts the welfare of his children before the corrosive and continuing dispute between himself and the appellant which has led to this unfortunate and sad litigation.

There is nothing before the Court to indicate that the appellant's sincerely held concerns cannot be appropriately and properly dealt with within the French Courts. Indeed, one of

the decisions put before this Court through the appellant's own French lawyer indicates quite clearly the concerns of the French Courts to ensure the welfare of children.

I am grateful to both counsel for their assistance in the matter. These cases are necessarily emotionally charged.

At the cost of emotional disturbance to the appellant I made plain to her what my decision would be in this case at the end of the hearing. I did not think it appropriate that a decision with such sad consequences for her should be kept hanging in the air for any time at all when the decision to be reached was, in my view, entirely clear-cut.

Costs

Whilst I appreciate that Ms Bathgate has appeared on instructions from the New Zealand Central Authority, I do not think it appropriate that there be any costs awarded in respect of the hearing in either Court by this Court. It is more appropriate, if the ultimate welfare of the children is to be put at the forefront of the parents' minds, that a further possible issue of dispute should not be introduced into the arena.

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