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[30/09/1997; Family Court of Australia (Brisbane); First Instance]
Director-General, Department of Families, Youth and Community Care v. Thorpe (1997) FLC 92-785

**FAMILY LAW ACT 1975**

**IN THE FAMILY COURT OF AUSTRALIA, Brisbane**

**BEFORE: Lindenmayer J.**

**September 30, 1997**

**BETWEEN**

**Director-General, Department of Families, Youth and Community Care**

**v.**

**Thorpe**

**REASONS FOR JUDGMENT**

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**JUDGMENT:**

**Introduction**

**This is an application by the Director-General of the Queensland Department of Families, Youth and Community Care, as State "Central Authority", under the Family Law (Child Abduction Convention) Regulations, for an order, pursuant to reg.15 of those Regulations, that H., a child born in New Zealand on 8 May, 1988, be returned to New Zealand. H. is the child of the relationship between M.W. ("the mother") and T.T. ("the father"). The mother resides in New Zealand and is the applicant in that country under the Convention on the Civil Aspects of International Child Abduction ("the Convention"). The father resides in Australia and is the respondent to the current application by the Director-General.**

**Historical Background**

**The mother was born in New Zealand on 12 July, 1970, and is a New Zealand citizen and resident. She is currently aged 27.**

**The father was born in New Zealand on a date which is not revealed by the material, but from the evidence it appears that he is also currently aged about 27. He too is a New Zealand citizen, but he has been a permanent resident of Australia since April, 1989.**

**The father and mother commenced an association in New Zealand when they were both aged about 15, and commenced cohabitation about a year later, that is in about 1986. As a result of that relationship H. was born to the mother on 8 May, 1988. He is therefore now aged 9.**

**The mother and father first travelled to Australia in search of employment in about August, 1988. They remained here together until November of that year when they returned to New Zealand. In the intervening period of about three months, H. was in the care of the father's mother, C.T. (hereafter referred to simply as "C."), in New Zealand. She, along with all other relevant members of the families of both parties, has continuously resided in New Zealand.**

**Upon the return of the mother and the father to New Zealand, in November, 1988, the mother, father and H. lived with C. in her home for a few months until January, 1989, when they obtained separate rented accommodation nearby. At that time, the father was employed and the mother was H.'s primary care giver, although the couple received considerable assistance, both practical and financial, from C., who is a social worker by occupation.**

**On 23 April, 1989, the mother and father travelled to Australia with H. intending to settle here permanently. C. travelled with them to assist them in securing suitable accommodation, and to settle into the new environment in Australia. From that time until late 1990, or early 1991, the mother, father and H. resided together in Australia, but with a number of trips home to New Zealand to visit family members. In that period the members of the father's family (particularly C. and the father's sister, R.) also made trips across the Tasman to visit the parties, and on some such occasions H. travelled in the company of one or other of those persons and without his parents.**

**In about November, 1990, the father was involved in a motor vehicle accident as a result of which he suffered some injuries which caused him some considerable, at least temporary, disability. He lost his employment as a consequence. During this period the relationship between the mother and the father deteriorated, and, at the same time, the father began to develop a relationship with the woman, P.T. (hereafter referred to only as "P."), whom he subsequently married.**

**As a result of all these and perhaps other factors, the father and mother separated, whereupon the mother, by agreement between the parties, returned to New Zealand with H., intending to reside there permanently with him. She and H. took up residence with C. in her home.**

**In May, 1991, the mother and H. returned to Australia for a visit, the purpose (according to the father) being to attempt a reconciliation with him. No reconciliation was effected, and she and H. returned to New Zealand, with the father's agreement, on or about 12 June, 1991.**

**On 27 July, 1991, the father married P., and they have cohabited to this date.**

**The mother and H. visited Australia again in November, 1991, during which the father enjoyed contact with the child. This trip was financed, like many others, by C. At this time the mother informed the father that she was pregnant to B.N. (whom I shall hereafter refer to only as "B."), with whom she had at that time commenced a de facto relationship in New Zealand from about July, 1991.**

**On 9 June, 1992, the mother gave birth to J., the child of her relationship with B., and H.'s half-sister. J. is now aged 5.**

**In January, 1993, H. travelled again to Australia in the company of the father's brother, M., for a period of agreed contact with the father, which was for a period of two weeks, at the end of which he was returned to his mother in New Zealand.**

**In May, 1995, once again H. travelled to Australia to spend an agreed contact period of two weeks with the father. On this occasion he travelled unaccompanied. At the end of the agreed period he was again returned to his mother in New Zealand.**

**On 29 December, 1995, H. again travelled unaccompanied from New Zealand to Australia for the purpose of an agreed contact visit with the father. Although there is some issue between the mother and father as to whether the initial agreement was for a period of two weeks or four weeks, it is clear that when he left New Zealand, H.'s return ticket, which the mother saw, indicated the date of his return as being 26 January, 1996, so that the period of his visit, agreed to by the mother (at the latest on the date of his departure from New Zealand) was four weeks. C. had, in fact, also travelled to Australia from New Zealand, but ahead of H., to spend the contact period there with her son and grandson.**

**It seems from all the evidence before me that prior to H.'s departure from New Zealand for Australia on this occasion the mother's relationship with B. had either broken down or was in the process of breaking down, and she had begun a relationship with one G.K. Although there is considerable conflict as to many of the details, it is, I think, common ground that the mother's living circumstances in New Zealand were at that time far from ideal, due, at least in substantial part, to her involvement with and addiction to illegal drugs. There seems little doubt, on all the evidence, that she and her friend G.K. were then fairly heavily involved in the drug "scene" in New Zealand, and that her capacity to care for, provide adequately for, and even appropriately house her children was at lest significantly impaired by that involvement, and her personal drug addiction.**

**There is also little doubt on all of the evidence that the mother's involvement in the drug "scene", her probably related relationship with G.K., and her general lifestyle were a cause of considerable concern to members of her family, and the father's family in New Zealand, both with respect to the mother's own health and welfare, and also, but more importantly, with respect to the welfare of the children, H. and J.**

**Lest it be thought that I overlook it, I should mention that, on the mother's evidence, and indeed I think the father's admission, he is a not a clean-skin in this respect either, in that he, in the past, has had involvement in the use of illegal drugs. But there is certainly no evidence that he has been in any way so involved in the last couple of years, at least.**

**I should also mention, in passing, that the evidence establishes that, perhaps beginning in 1994, but with more enthusiasm in later years - 1995 and 1996 - the mother has involved herself in drug rehabilitation, and has certainly made some considerable progress in that respect. The evidence before me, in the form of the most recent report, indicates that she is being maintained on a very low dosage of methadone.**

**It is also appropriate to note that she more recently had a third child to her de facto husband, G., and the indications are that that child is well and progressing satisfactorily.**

**Reverting to the narrative of earlier events: C. says in her affidavit that whilst she was in Australia with her son and grandson over the December-January period of 1995/96, she received several frantic telephone calls from the mother's mother, C.W., in New Zealand, in which Ms W. indicated that she was desperate for C.'s assistance in relation to the problems confronting the mother in New Zealand, particularly in relation to the care of her children arising from her drug problems. C. says that C.W. told her that B., J.'s father, was begging family members to assist him to have the children removed from the mother's care because of the level which her drug taking had reached, and its effects upon her parenting abilities.**

**Although C.W. and her husband (R.B.) have sworn a joint affidavit in which they challenged much of what C. says in her affidavit, I note that it contains no denial of the fact, or content, of Ms W.'s several telephone calls to C. in Australia, as deposed to by the latter in her affidavit.**

**It is also beyond dispute from all of the affidavit material that, as deposed to by C. in paragraph 35 of her affidavit, C.W.'s telephone calls were instrumental in her cutting short her own stay in Australia and returning to New Zealand for the purpose of conferring with the various family members there about what should be done in relation to the mother's drug problem, and about the welfare of her children.**

**It is common ground that after C.'s return there was a family meeting held, in late January, 1996, which was attended by a number of people including the following: C., C.W. and her husband, R.B. - that is the mother's mother and step-father; B., J.'s father; B.'s mother, L.N.; T.N. - who is B.'s brother; M.T. - who is the father's brother; and R.T. - who is the father's sister. Notable absentees from that meeting were the mother and her then current boyfriend, G.K., although their absence is hardly surprising in the circumstances. I have little doubt that they were not appraised of it by anyone.**

**There is a clear dispute between C. and M.T. on the one hand, supported in part by L.N., and C.W. and R.B. on the other, as to precisely what was agreed to by the parties who attended that family meeting in January, 1996. C., M.T. and L.N. all say that it was agreed that steps should be taken immediately to remove the children, H. and J., from the mother's care until she had successfully completed drug detoxification and rehabilitation. C. and M.T. also say that it was agreed for this purpose that an immediate application be made to the New Zealand Court to have J. removed from the mother's care and the mother placed in a drug rehabilitation centre, and that H. should remain with his father in Australia.**

**C.W. and R.B., on the other hand, say that no such agreement was reached. They say that the only agreement reached was that the mother be encouraged to enter a drug rehabilitation program, which she subsequently did. They specifically deny any agreement that H. should remain in Australia with his father, or that J. should be removed from her mother's care.**

**Whilst it is generally undesirable, if not impossible, for a Court to attempt to resolve contested issues of fact on affidavit evidence alone and without cross- examination of the various deponents, I have to say that the denial by C.W. and R.B. of any agreement to seek to remove either child from the mother's care does not appear consistent with the fact, as revealed by exhibit 3, that on 30 January, 1996, C.W. joined with L.N. and C.T. in filing, in the Family Court of New Zealand, an application for guardianship orders in respect of both children.**

**On the date of filing of that application, that is 30 January, 1996, an interim order was made by the Court granting L.N. interim custody of the child J., and a warrant was issued to give effect to that order. No interim**

**orders were made then, nor have they been made since, in respect of H. The interim order in favour of Mrs N. in relation to J. continues in operation to this day, and J. has lived with and been cared for by her, pursuant to that order, since the execution of the warrant issued to give effect to it. The mother has, it seems, regular contact with the child.**

**In the meantime, between the date of the family meeting and the date of that order, the mother was not informed about what was proposed by family members in relation to her children. The father, however, was informed by his mother, C., about the outcome of the meeting, as she understood it, and she accordingly advised him not to return H. to New Zealand and his mother at the end of the agreed contact visit, namely on 26 January, 1996, as previously arranged. Accordingly, the father retained possession of H. in Australia rather than send him back. He said that he was initially uncertain about the legalities of the situation and so arranged, through his brother, M., who was the travel agent who had arranged H.'s flight details, to extend his return flight date for a period before ultimately cancelling it.**

**The mother became aware of H.'s retention in Australia by his father only when he failed to turn up in New Zealand on the original return date, 26 January, 1996. She says that thereafter she telephoned the father "repeatedly" to ask when H. would be coming back, and that "there were always excuses made" for the further delay in his return. She says that vague promises, such as that he would be returning "very shortly" or "next month" were made to her, which kept her hopes alive, but also kept her "on a string". She specifically denies ever agreeing to H.'s stay in Australia being extended, let alone made permanent.**

**The father says, in paragraph 89 of his principal affidavit, filed on 22 August, 1997, that the mother did not telephone to inquire about H.'s non-return until approximately one week after the original return date, which would make it after the order of the New Zealand Family Court on 30 January, 1996, granting interim custody of J. to L.N. He says that she then acknowledged that, "she had problems with her life and that (J.) had been taken from her and was living with L.N.". He says she also, "agreed that she could not, at that time, care for (H.)". He claims that she did not ask him to return H., but acknowledged that if he were returned to New Zealand, he would have to be placed in care other than hers. He does not assert that she expressly agreed to his retaining H. in Australia, but only that he was sure, at the conclusion of the conversation, that H. was to stay with him "indefinitely".**

**The father further asserts that, despite having full knowledge at all times of his address and telephone number, the mother telephoned him, "on only several occasions", up to the end of 1996, and not at all during 1997, and that on no occasion did she ever request H.'s return to her in New Zealand - or to New Zealand. By contrast, as I have said, the mother states that she telephoned the father "repeatedly", after the first call, to ask when H. was coming back.**

**C. swears, in paragraph 59 of her affidavit, that she provided the mother with her Personal Identification Number so that she could make telephone calls to the father in Australia on her, that is C.'s, account, and at her expense. She adds that, despite that facility provided to her, which is acknowledged by the mother in paragraph 21 of her affidavit, the mother has made, "only several calls, the last being on 25 December 1996". She says further, and this is not denied by the mother, that she provided the mother with a quantity of stamped envelopes addressed to the father in Australia for her to correspond with him and/or H.**

**The mother has not denied C.'s evidence about the telephone calls, other than, as I have already indicated, in a general sense.**

**On 20 March, 1996, the mother filed in the Family Court of New Zealand applications for the custody of both H. and J. A separate representative (one Vivian Ullrich) has been appointed for both children in those proceedings and in the associated proceedings for guardianship of both children initiated by the triumvirate of grandmothers, C., Mrs N. and Ms W., on 20 January 1996.**

**Apart from the interim hearing in relation to the latter application, which resulted in the interim order and warrant relating to J. to which I have referred, there has been no further interim application initiated in New Zealand in either of those proceedings. There are no existing orders of a Court, either in New Zealand or Australia, in relation to the guardianship or custody of H.**

**A hearing date for the proceedings relating to the guardianship and custody of J. has been set by the Court in New Zealand, namely 20 October, 1997. No hearing has yet been set for the proceedings relating to the custody of H.**

**Mrs Ullrich, the children's separate representative, reports in exhibit 3**

**that:-**

> **"We would be able to have an urgent interim hearing in respect of (H.) if necessary, but his mother is the only one in New Zealand who currently has a custody right to (H.)."**

**However, Ms Ullrich concludes that report with this statement:-**

> **"If (H.) is to be returned, I would support an interim custody order in favour of C.T. until a full hearing can be held."**

**For reasons which remain largely unexplained (except for the mother's references to being kept "on a string" by the father's vague promises to return H. "soon" or "next month", etcetera), the mother's application to the New Zealand authority to initiate proceedings under the Convention was not signed by her (and presumably lodged contemporaneously) until 18 December, 1996.**

**For further reasons which remain totally unexplained, the application to this Court under the Regulations was not filed until 10 July, 1997, almost seven months later. Thus, the application was not filed within one year after the day (26 January, 1996) on which H. was first retained in Australia by the father. That has some significance, as I shall subsequently explain.**

**Issues**

**There is no issue that immediately prior to the father's retention of H. in Australia, H. was habitually resident in New Zealand and that at that time the mother had "rights of custody" in relation to him under New Zealand law, within the meaning of that term as defined in reg.4 of the Regulations. It is also common ground that New Zealand is a "convention country" and was so as at 26 January, 1996.**

**Mr Westbrook, counsel for the father, submitted that the father's retention of H. in Australia, on and from 26 January, 1996, was not a "retention", within the definition of that term in reg.3 of the Regulations because, at that time, the mother was not actually exercising her rights of custody, nor would she have done so, but for the father's retention of the child in Australia.**

**I reject that submission. I have no doubt, and I find, that if the mother was not actually exercising her rights of custody at the time of the retention, she certainly would have done so but for that retention. Accordingly, I find that the father's retention of H. in Australia on and from 26 January, 1996, was a "retention" within the meaning of the Regulations, and thus a "wrongful retention" as defined in Art. 3 of the Convention.**

**The father's response to the Director- General's application, and the submissions of his counsel, raise four issues for the Court's determination under the Regulations in these proceedings. Those issues are these:-**

> **(1) It being clear that the Director- General's application was filed more than one year after the day on which the child was first retained in Australia, whether the child has "settled" in his new environment within reg.16(1)(b);**
>
> **(2) Whether the mother acquiesced in the father's retention of the child in Australia, in accordance with reg.16(3)(a)(ii);**
>
> **(3) Whether there is a "grave risk" that the return of H. to New Zealand would expose him to "physical or psychological harm, or otherwise place (him) in an intolerable situation" within reg.16(3) (b); or**
>
> **(4) Whether H. "objects" to being returned to New Zealand, and, if so, whether he has "attained an age and a degree of maturity at which it is appropriate to take account of (his) views", within reg.16(3) (c).**

**It is further to be noted that it is common ground that if I am satisfied that any of the matters referred to under (2), (3) and (4) above is established, it remains a matter of judicial discretion for me as to whether or not the return of H. to New Zealand under the Regulations should be ordered.**

**In relation to the matter identified under (1) above, Mr Green, for the Director-General, submitted that even if I am affirmatively satisfied that H. has settled into his new environment in Australia, I nevertheless have a discretion to order the child's return to New Zealand under the Regulations (specifically reg.15(1)(a)). Mr Westbrook, for the father, on the other hand, submitted that, in that event, the Regulations have no further application to the case and there is no residual discretion in the Court to order the child's return to New Zealand under the Regulations.**

**I propose now to deal with each of the issues which I have identified in turn, and in so doing I shall have occasion, as required, to refer to further factual matters disclosed by the evidence, to the extent that I think it necessary to do so, having regard to the need to determine these proceedings speedily.**

**Issue (1): Whether H. is settled in a new environment**

**The application before me is made by the Director-General pursuant to reg.14 of the Regulations. Regulation 14(1) provides:-**

> **"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".**

**Regulation 15(1) then provides:-**

> **"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". There are other parts of that regulation to which I need not, at this point, refer.**

**Regulation 16(1), so far relevant to this application, then provides:-**

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

**The question for my determination, then, in this case is whether H. is settled in his environment on the Gold Coast and of course, in addition, whether that is a "new environment", within the meaning of that regulation.**

**Counsel for the Director-General handed up to me quite detailed and very helpful written submissions in relation to all aspects of this matter, and I shall have occasion, from time to time, to refer to those submissions.**

**Beginning at p.14, in paragraph 64, Mr Green submitted that the respondent carries the onus of establishing that the child was settled in his new environment at the relevant time, and, in support of that proposition, he cites cases including Gsponer v. The Director- General, Department of Community Services, Victoria (1989) FLC (partialdiff)92-001 at 77,158-9, and Graziano and Daniels (1991) FLC (partialdiff)92-212 at 78,436 and 78,437. He also cites the case of Director-General, Department of Community Services v. Apostolakis (1996) FLC (partialdiff)92-718 at 83,649. I have no doubt of - and I accept - that submission as to the onus.**

**He also submits that the relevant time is the date the proceedings were commenced - that is the relevant time for considering whether the child is "settled" in the new environment - is the date when the proceedings were commenced, rather than the date of the hearing. And again, in support of that proposition, he cited the case of The Director-General, Department of Community Services v. Apostolakis, previously cited.**

**I do not propose to go through all of that in detail. I simply say I do not agree with that proposition. In my view, the better interpretation of the Regulations is that the relevant date for consideration of whether the child is "settled", is the date of the hearing but, in any event, in this case I think it is an academic question because there is no reason to conclude that the child's position in that respect would have been any different, as at 10 July 1997 when this application was filed, as against his position at the date of the hearing, as revealed by the evidence to which I shall refer. Indeed I think, with the exception of the Family Report, to which I will refer in a moment, all of the other evidence would support a finding equally as at the date of the commencement of the proceedings as it would at the date of the hearing.**

**Another issue which arose in the course of submissions in relation to this question is whether the environment provided by the father for the child on the Gold Coast of Queensland is a "new environment", within the regulation. Mr Green submitted, effectively, that it is not and, in support of that submission, he relied again**

**particularly upon the judgment of Moss J in the case of Apostolakis (supra), to which I have previously referred.**

**In that case, Moss J had occasion to refer to some statements by Bracewell J in England in the case of Re N (1991) 1 FLR 413 and, having done so, he said this at paragraph 26 of his judgment:-**

> **"I respectfully agree with Bracewell J that the word 'new' is significant in this context. Where a relevant child merely exchanges one environment for a similar one, as will often be the case where all that happens is that the child moves from one modern city to another, particularly if the language spoken remains the same, the fact that it can be demonstrated that the child is managing quite well in the more recent environment, may amount to no more than establishing that the child has adjusted to different but similar surroundings."**

**His Honour then went on to deal with the facts of the case before him, and he made the point that the environment to which the child had been moved in that case, namely metropolitan Sydney, was fundamentally different in kind from the environment in Crete from which he had been removed, and he therefore had no difficulty in applying his view of the law to the circumstances of that case.**

**With respect, I do not share his Honour's view about that. I think the effect of his Honour's reasoning is to treat the word "new" as involving, necessarily, an element of a fundamental difference in type, from the previous environment. I do not see any justification for adopting that interpretation of the word "new" with reference to "environment" in the regulation. I prefer the simple and ordinary meaning of the words "new environment": that is to say, an environment which is new to the child, meaning not the same as the previous environment. In my view, there is no necessity to establish some fundamental difference in the underlying nature of the two environments, but only that they are different, as, clearly, the two environments in this case are.**

**Whilst there are many similarities between the Gold Coast, Australia, and Paraparaumu in New Zealand, I do not have any doubt at all that, from the perspective of the child H., the environment of his father on the Gold Coast is a new environment, as against that from which he came in New Zealand; and I think to place other glosses upon the meaning of those words in the regulation is ultimately to do them a disservice.**

**The High Court, I think, has said, in the cases of De L (1996) FLC (partialdiff)92-706, in a slightly different context, that the ordinary meaning of the words used in the Regulations ought to be adopted, in the absence of some clear indication to the contrary, and I do not find any indication to the contrary. They were speaking, in that context, I think, about the meaning of the word "objects" to which I shall refer later.**

**However, as I have said, I have no difficulty in this case in concluding - and I find - that the father's home on the Gold Coast, and all that accompanies it, is a "new environment" for H., as compared with his mother's home and environment at Paraparaumu in New Zealand.**

**I therefore turn to address the question whether H. has settled in that environment.**

**The question of settling, again, is, of course, a matter of degree, and the cases to which Mr Green has referred me indicate that it is not sufficient, really, just to look at how the child is behaving in the home or how the child is fitting into the immediate environment of the home. One needs to look beyond that at how the child is fitting into the society, in general, outside the home: the making of friends; the development of ties with school; and all sorts of matters of that kind. Now, in this case, there is a good deal of evidence from both the father and P., in their affidavits, and from the child's school teacher, Ms Tricia McKenzie, which, to my mind, indicates fairly strongly that he has settled into the new environment on the Gold Coast very well.**

**It is appropriate to say that he has been there, now, for something like 20 months, and he has been going to school there, I think, since the beginning of the 1996 school year or at least soon after. He has clearly progressed quite well at school and developed significantly in his schooling, both academically and behaviourly, in that period as is deposed to by Ms McKenzie's affidavit.**

**Other aspects of his social life are dealt with in the affidavits of the father and P., as I have indicated. All of that material seems to indicate a child who is well integrated, not just into his immediate home environment, but into the whole environment of the Gold Coast where he lives. He is involved in surfing activities; he is involved in football; he is involved in singing in a choir; and all matter of that kind, as well as the activities associated with his schooling.**

**Whilst he may well have been engaged in many of those activities, also, in New Zealand, had he remained there, the fact is that he is engaged in all of those activities, and they all demonstrate, in one way or another, a settling into the new environment and the putting down of roots by this child in the Gold Coast.**

**That environment, as I have said, very much and very importantly, includes his father and, no doubt, P. It does not include his mother and his half-sibling, J., and there would be no doubt - and I think there is evidence -that he is missing, to some extent, his sister, J. But the mere fact that he is missing part of his earlier environment does not, in my view, lead to a conclusion that he is not "settled" in his new environment. On all of the evidence, I have no doubt that he has, and I find that he has "settled" into his "new environment", within the meaning of the regulation.**

**Further support, I think, for that conclusion is to be found in the Family Report, which was not prepared for that purpose and which does not strictly address the question of his settlement - and I will have more to say about that report later, which was specifically commissioned for the purpose of placing some evidence before the Court as to whether or not the child " objects" to being returned to New Zealand. But it is, I think, not without significance that in paragraph 1 of that report the reporter, Ms Longmore, says this:-**

> **"(H.) has now been in his father's care for some 20 months and, as he appears well settled in this environment, any interruption of this may well be regarded as unwelcome."**

**As I say, that report was not to address that issue, but I think it states the obvious, and it certainly gives further support to my conclusion, based on the other evidence which is before me.**

**That brings me, then, to the question whether, having found that the child is settled in his new environment, the Court nevertheless retains a discretion to order his return under the Regulations.**

**As I have already said, Mr Westbrook, for the father, submitted that there is no such discretion. I think he relied on one decision, at least - a single judge decision - to support that contention, namely the decision of Kay J in The State Central Authority v. Ayob (1997) FLC (partialdiff) 92-746.**

**Mr Green in his submissions deals with this, at pp.19 to 20, in paragraphs 77 to 86:**

> **"77. This issue remains the subject of a (sic.) conflicting Australian authority, but is (sic.) submitted that there remains a discretion to order the return of the child.**
>
> **78. Moss J. in the case of Director-General, Department of Community Services -v-Apostolakis (1996) FLC 92-718, having found that in the circumstances of that case the children were settled in a new environment and (sic.) went on to state:-**
>
> > **'28. The consequence of that finding is only that I am no longer bound to order the return of these children but rather I have a judicial discretion whether or not to do so, which must be exercised in the context of the policy of the Convention referred to above: see in Re A (1992) FAM 106, per Lord Donaldson MR at 122...' (My emphasis)**
>
> **79. However, in State Central Authority -v- Ayob (1997) FLC 92-746, Kay J stated when considering the same question:-**
>
> > **'I digress for a moment to say that whilst there is some suggestion in some English cases that a finding of "settled in a new environment" still leaves a discretion in the Court to order the return of a child, I must respectively (sic.) disagree with those views.' (His Honour then goes on to consider two English decisions, where the Convention itself is the law, which support a discretion to return the child even where it has been found to be settled in a new environment based upon the provisions of Article 18 of the Convention) 'In my view, if I concluded that this was a Hague child who had been wrongfully removed or retained, and that more than one year had passed prior to application being made, and I was satisfied that the child was settled in her environment, that would be the end of the matter under the Hague Convention and under the Regulations.' (My emphasis)**
>
> **80. Whilst referring to the Regulations in the closing stages of the above quotation, His Honour does not analyse the specific wording of Regulation 16(1)(b).**

**81. Read as one continuous sentence, Regulation 16(1)(b) reads:-**

> **'Subject to sub-regulations (2) and (3); on application under regulation 14, a court must make an order for the return of the child: if on (sic.) the day on which the application was filed is at least one year after the day on which the child was.. first retained in, Australia unless the Court is satisfied that the child is settled in his or her new environment'**
>
> **82. The word 'unless' is clearly meant to qualify the word 'must'. It follows clearly and without ambiguity, that the plain meaning of the section is that the Court no longer must order the return of the child if it is satisfied the child is settled in its new environment.**
>
> **83. The power to make an order for the return of the child is found in Regulation 15(1), not Regulation 16 (quoted at paragraph 8 above). That section empowers the Court 'if the Court is satisfied it is desirable to do so' to make orders of the type set out in Regulation 14 (which includes an order for the return of the child).**
>
> **84. Where the Court has found that a child is settled in his or her new environment, then it is clear that the mandatory requirement to order the return set out in Regulation 16(1) is inapplicable. However, it does not take away the power of the Court to order the return of the child granted in Regulation 15 which is unfettered by any finding that the child is settled in Australia, although it is accepted it would remain a factor to be considered.**
>
> **85. In order for a finding of settlement in a new environment to end the matter, further words would need to have been added to Regulation 16(1)(b) to the effect that the Court must not order the return of the child when there is a finding that the child is settled in his or her new environment.**
>
> **86. Given that the wording of the Regulations is clear and unambiguous, it is submitted it is not necessary to have to refer to the Convention to assist in its interpretation or meaning."**

**I think it will suffice if I say that I accept those submissions, and I conclude that I retain a discretion to order H.'s return to New Zealand, notwithstanding my finding that he has settled in his new environment.**

**Issue (2): Whether the mother acquiesced in the father's retention**

**So, the next issue that I turn to is that of acquiescence.**

**Regulation 16(3)(a)(ii) relevantly provides as follows:-**

> **"A court may refuse to make an order under sub-regulation (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:**
> >
> > > **(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia".**

**That regulation, and consideration of it, gives rise to a consideration of the meaning of " acquiescence", as used in it. Mr Green in his written submissions deals with this issue, beginning at p.23, in paragraph 97 and following.**

**In paragraph 98 he quotes a passage from the decision of Jordan J in Emmett v. Perry; Director-General, Department of Family Services and Aboriginal and Islander Affairs; Attorney-General (Cth) (Intervener) (1995) FLC (partialdiff)92-645 at 82,523. That learned Judge there said this:-**

> **"In my view, essential components of any relevant acquiescence must include, firstly, an acceptance of the course of conduct of the other party and, secondly, such acceptance must be communicated to the other party. The acquiescence must also be unequivocal."**

**I shall say a little more about that in a moment.**

**Mr Green also referred to and relied upon a statement by Kay J in the case of The Department of Health and Community Services v Casse (1995) FLC (partialdiff)92-629 at 82,311, where that learned Judge said this:-**

> **"I would adopt the views of the Court of Appeal in Re R (Child Abduction) (1995) 1 FLR 716 at 727 that there needs to be clear and unequivocal words and conduct which could properly be interpreted as acquiescence on the part of the father. In my view there cannot be true acquiescence where the parties are in a state of confusion and emotional turmoil (as identified by Stewart-Smith LJ (sic.) in Re A (Abduction: Custody Rights) (1992) Fam 106 at 121)."**

**Now, in relation to that quotation, firstly, I must say that, with respect to Kay J, I think he has misquoted the case of Re R (supra), particularly when he says what is required is "unequivocal words and conduct" (emphasis added), suggesting that both are required. In Re R (supra), the Court of Appeal said that acquiescence may be evidenced by clear words or conduct, not necessarily both.**

**In relation to the words of Jordan J, in Emmett v. Perry (supra), I say firstly, that his Honour was there clearly speaking about active acquiescence and not about passive acquiescence which might be inferred from conduct. And in my view, the cases of Re R (Child Abduction: Acquiescence) (supra) (to which Kay J referred in Casse's case (supra)), and Re A (Abduction: Custody Rights) (1992) 1 All ER 929; (1992) Fam 106, are very good authority for the proposition that acquiescence may be passive, by conduct, as well as active by words.**

**Going, firstly, to the case of Re R, properly cited as Re R (Child Abduction: Acquiescence) (1995) 1 FLR 716, a decision of the Court of Appeal; I go first to the judgment of Balcombe LJ at 725, where his Lordship deals with, or begins to deal with the question of acquiescence. He refers to the fact that there are a number of authorities in the English courts dealing with what that means, and the first to which he refers is the case of Re A (Abduction: Custody Rights) (supra). His Lordship first refers to and quotes from the judgment of Stuart-Smith LJ, in that case, at 119 to 120, where he said this:-**

> **"A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the convention: but, he must be aware that the other parent's act in removing or retaining the child is unlawful. And if he is aware of the factual situation giving rise to those rights, the court will no doubt readily infer that he was aware of his legal rights, either if he could reasonably be expected to have known them or taken steps to obtain legal advice."**

**And I, then, emphasise the following passage from the same judgment:-**

> **"If the acceptance is active, it must be in clear unequivocal words or conduct, and the other party must believe that there has been an acceptance."**

**Balcombe LJ, in Re R (supra), then refers to a statement by Lord Donaldson, MR, also in Re A (supra), to which I need not refer. His Lordship then refers to and quotes the following passage, from the judgment of Sir Donald Nicholls, V-C, in Re AZ (A minor) (Abduction: Acquiescence) (1993) 1 FLR 682 at 691:-**

> **"If the person who had care of the child consented to the removal or retention he cannot afterwards, when he changes his mind, seek an order for the summary return of the child pursuant to convention. Likewise if he acquiesces. It seems to me that the underlying objectives of the convention require courts to be slow to infer acquiescence from conduct which is consistent with the parent whose child has been wrongly removed or retained perforce, accepting as a temporary emergency expedient only, a situation forced on him and which in practical terms he is unable to change at once. The Convention is concerned with children taken from one country to another. The Convention has to be interpreted and applied, having regard to the way responsible parents can be expected to behave. A parent whose child is wrongly removed to, or retained in, another country is not to be taken as having lost the benefits the Convention confers, by reason of him accepting that the child should stay where he or she is for a matter of days or a week or two. That is the one edge of the spectrum.**

**At the other edge of the spectrum the parent may, again through force of his circumstances, accept that the child should stay where he or she is for an indefinite period, likely to be many months or longer. There is here a question of degree. In answering the question the court will look at all of the circumstances and consider whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return. That is the concept of underlying consent and acquiescence in Art 13. That is the touch stone to be applied."**

**Balcombe LJ then refers, finally, to, and quotes a passage from, the judgment of Waite LJ, in Re S (Minors) (Abduction: Acquiescence) (1994) 1 FLR 819 at 831, as follows:-**

> **"There is a common thread that runs through all of those passages. It can be stated in this way. Acquiescence is primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent. This does not mean, however, that any element of subjective analysis is wholly excluded. It is permissible, for example, to inquire into the state of the aggrieved parent's knowledge of his or her rights under the Convention; and the undisputed requirement that the issue must be considered 'in all the circumstances' necessarily means there will be occasions when the court will need to examine private motives and other influences affecting the aggrieved parent which are relevant to the issue of acquiescence but are known to the aggrieved parent alone. Care must be taken by the court, however, not to give undue emphasis to the subjective elements: they remain an inherently less reliable guide than do inferences drawn from overt acts and omissions viewed through the eyes of an outside observer. Provided that such care is taken it remains within the province of the judges to examine the subjective forces at work on the mind of the aggrieved parent and give them such weight as a judge considers necessary in reaching the overall conclusion in the totality of the circumstances that is required of the court in answering the central question: has the aggrieved parent conducted himself in a way that is inconsistent with his later seeking a summary return?"**

**Balcombe LJ then returned to the facts of the case before him, and referred to the contents of a letter which was relevant to the issue before him. His Lordship then says, in relation to that:-**

> **"I find no clear and unequivocal words or conduct which could properly be interpreted as acquiescence on the part of the father." (emphasis added)**

**In Re A, to which I have already referred, Stuart-Smith LJ, at All ER 939 said this:-**

> **"Acquiescence means acceptance and it may be either active or passive. If it is active it may be signified by express words of consent or by conduct which is inconsistent with an intention of the party to insist on his rights and consistent only with an acceptance of the status quo. If it is passive it will result from silence and inactivity in circumstances in which the aggrieved party may reasonably be expected to act. It will depend on the circumstances in each case how long a period will elapse before the court will infer from such inactivity whether the aggrieved party has accepted or acquiesced in the removal or retention."**

**His Lordship then uttered the passage which was subsequently quoted by Balcombe**

**LJ in Re R (supra) which I have already quoted, above.**

**In a later part in the same judgment, Stuart-Smith LJ said this:-**

> **"It is not open to a parent who in clear terms says to the other that he accepts what has been done to come to the court and say that it was all a sham to deceive the other parent, because he did not mean what he said, and his actions in consulting his lawyer show that to be so."**

**And then a little further on he said:-**

**"The change of mind cannot alter the fact that he had acquiesced."**

47. **Now that, of course, was a statement relevant to the facts of the case before him, but it is significant so far as the latter statement is concerned, to the effect that a change of mind cannot overcome the fact of acquiescence.**

**There are other passages in the judgment of Lord Donaldson MR, which, in my view, are to the same effect in that case.**

**So, my conclusion on the authorities is that acquiescence may be either passive or active. If it is active then, of course, there must be clear indication of it, and there must be some communication of it to the other party. However, it may also be passive, and acquiescence may be inferred by the Court from a course of conduct by the party now seeking to rely upon the Convention or the Regulations, without any words expressed to the other party such as might otherwise be thought to be involved, at least in a consent.**

**In this case, there is evidence, in paragraph 7 of the affidavit of C.W. and R.B., that at least they knew of the availability of proceedings under the Convention, and they were supporting and assisting their daughter, who is the mother in this case. In addition, the mother says, in paragraph 28 of her affidavit, that she thought of**

**applying under the Convention in June, 1996, which indicates that she knew of her right to do so no later than that date.**

**There is also the fact that the mother instituted custody proceedings in relation to H. in New Zealand in March, 1996, and although I cannot find with absolute assurance that the solicitor, Mr Harrison, was acting for her at that time, there is an inference reasonably open, from all of the evidence, that he probably was. But, in any event, the mother's own evidence clearly establishes that she was aware of her rights under the Convention at latest by June, 1996, yet she let another six months pass before she did anything to initiate proceedings under the Convention, which she did by signing her application to the New Zealand authority on 18 December, 1996.**

**In my judgment, the only proper inference from her inordinate delay is that in fact she did acquiesce in the husband's retention of H. in Australia, from at least June, 1996 up until December of that year, if indeed she had not already acquiesced prior to June. Accordingly, for that reason also, I conclude that I have a discretion under reg.16(3)(a)(ii) as to whether or not H.'s return to New Zealand should be ordered.**

**Issue (3): "Grave Risk"**

**The next matter raised in the respondent's case is that numbered (3) above, namely, "grave risk". Regulation 16(3) (b) provides as follows:-**

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

**Mr Green, in his helpful written submissions, deals with this issue beginning at p.27, in paragraphs 110 and following. Again, I do not find it necessary to refer, in detail, to those submissions, or to the cases which he has cited and the quotations from them which he has set out. In general, essentially, I accept those submissions, and, without going into the evidence in any detail, I am not satisfied on the evidence that to order the return of H. to New Zealand for the purpose of having the question of his custody determined by the Court there, poses any grave risk of the kind to which that subregulation refers.**

**All of the evidence which was put forward by the father, in support of that ground, really goes to custody issues, that is as to whether or not it would be in the interests of H. to be placed back in the custody of his mother. But that is not the issue for this Court on this application. It has been accepted that the purpose of the Convention, and, in this country, the Regulations, is to ensure, where appropriate, the prompt return of children to the country of their habitual residence for the purpose of the courts of that country deciding issues about the custody and/or guardianship of those children. So, an order for the return of the child is not an order for the return of the child to the custody of the mother, but only to the country of New Zealand for the purpose of having the issues of custody resolved there. I think that is clear from the decision of the Full Court, of which I was a member, in the case of Director-General, Department of Community Services v. Crowe (1996) FLC (partialdiff)92-717, which is referred to in Mr Green's submissions. Accordingly, no exercise of discretion is called for by me under paragraph (b) of this subregulation.**

**Issue (4): Whether the child "objects" to being returned**

**The fourth and final matter to be considered is that arising under reg.16(3)(c), which provides as follows:-**

> **"The court may refuse to make an order under subregulation (1) if a person opposing return establishes that:**
>
> > **(c) the child objects to being returned and has attained an age and degree of maturity at which is it appropriate to take account of the child's views".**

**Mr Green deals with this issue in his submissions at the beginning of p.33, in paragraphs 140 and following.**

**The first issue, which he identifies there, is the question: at what point in time ought the evidence establish that the child holds the relevant objection? Mr Green cites, firstly, from Jordan J again, in Emmett v. Perry (supra) at 82,526 where his Honour said this:-**

> **"I accept the submission of the Commonwealth Attorney-General that the most relevant time for consideration of this issue is to examine the circumstances at the time of the wrongful retention (see Murray v. Director, Family Services (ACT) (1993) FLC (partialdiff) 92-416 at p. 80,253. In my view there would need to be cogent and telling evidence that the children's objection was so strong as to justify a wrongful retention of the children in March of 1995. ... It would be dangerous and unsatisfactory to place significant weight upon the subsequent development of the children's wishes in the background of one parent having made a unilateral decision in defiance of an existing custody order and with the children being under the sole influence of that competent parent who would necessarily be in a position to engage in active or passive manipulation of the children wrongfully retained."**

**Mr Green also refers to a passage from the judgement of the Chief Justice and Fogarty J, with whom Finn J agreed, in Murray v. The Director of Family Services (1993) FLC (partialdiff)92-416 at 80,253, although he points out that in the making the statement referred to, the Court there was looking at reg.16(3)(a) not reg.16 (3)(c), but he submitted that that the quotation applies generally to all defences set out in reg.16(3). The relevant quotation from that judgment was this:-**

> **"Remembering for the purpose of the Regulations that removal encompasses both removal and retention within the meaning of the Hague Convention, it is nevertheless clear that the Court is being asked by the sub-regulation in the case of removal, to look at the time when the removal occurred, and in the case of retention to look at the situation at the time the retention first occurred."**

**However, Mr Green also refers, quite properly, to a decision of O'Ryan J in the case of Director of Community Services v. Toomey, an unreported decision handed down by his Honour in this Court on 30 April, 1997, in which his Honour, at p.15, said this:-**

> **"It was submitted on behalf of the authority that the most relevant time for considering whether or not the child objects is at the time of wrongful removal (Central Authority and Perry; Attorney-General for the Commonwealth (Intervener) (1996) 20 Fam LR 380 at 388 per Jordan J). With great respect I do not accept that this is the relevant time. In my opinion, the relevant time to consider the defence is at the time of the hearing of the application, although, in doing so, it may be relevant to take into account what, if anything, was the objection at the time of the wrongful removal."**

**Needless to say, Mr Green submitted that I should prefer Jordan J's approach to that of O'Ryan J.**

**I must say that I prefer O'Ryan J's interpretation of the regulation. The regulation is dealing specifically with what a Court hearing an application should or should not do, and reg.16(1) firstly provides, as a general rule, that, subject to subregs. (2) and (3), on an application under reg.14, the Court must make an order for the return of the child. Subregulation (3) then contains a number of exceptions to that mandatory rule, that is to say it provides for circumstances in which the Court may, notwithstanding subreg.(1), refuse to make an order if the person opposing the return establishes certain facts. And one of the matters which such a person may establish, so as to invoke the Court's jurisdiction to refuse to make a return order, is:-**

> **" 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".**

**The ordinary language of the regulation seems to me to refer, quite simply and specifically, to the time of the hearing, not to some antecedent time. After all, the Court is called upon to exercise its discretion at the time of the hearing not at some other time, and it would appear to me to be artificial to interpret that as a requirement that, somehow or other, by some means which would escape me, a party were required to establish that at some point in the past - in this case almost two years ago - the child would have objected to being returned to New Zealand had he been asked. To me, that seems an impossible interpretation, and accordingly I adopt the interpretation to which I have referred. I therefore hold that the relevant time for considering whether the child objects, is the date of the hearing.**

**Now, there is before me some evidence about the child's attitude to a return to New Zealand, and, in particular, there is the Family Report of the Court Counsellor, Virginia Longmore, to which I have already made passing reference. That report was prepared pursuant to an order which was made by Smith JR on 28 July, 1997, and that order directed the person preparing the report to address specifically whether the child H. objects to being returned to New Zealand for the determination of the dispute about where and with whom he should live, and also the nature of any such objection and the issue of his age and maturity.**

**Because of the limited nature of the report requested by the Court, the report is of quite short compass. In paragraph 1 thereof, Ms Longmore reports this:-**

> **"(H.) told the counsellor that he did not want to return to New Zealand for the hearing of the dispute between his parents. He said that he enjoyed being with his father and spoke enthusiastically about many aspects of life with his father and stepmother. It was clear to the counsellor that (H.) felt secure and content in his father's care and viewed a disruption to this, such as returning to New Zealand for a determination of his future care, in negative terms. (H.) has now been in his father's care for some 20 months, and as he appears well settled in this environment any interruption of this may well be regarded as unwelcome."**

**In paragraph 2, the counsellor then records this:-**

> **"Another concern for (H. ) in returning to New Zealand for a determination of issues was his belief that he would be required to return to his mother's care, and that he would be required to care for his mother's new baby. (H.) described having cared for his younger sister, (J.), because his mother remained in bed for much of the day. (H.) was quick to add that he loved his younger sister, but it was clear to the Counsellor that (H.'s) responsibility for the day to day care of her was far beyond what should have been expected for a child of (H.'s) age."**

**In paragraph 3, then, the counsellor reports this:-**

> **"(H.) volunteered to the Counsellor that if he was required to return to New Zealand for a hearing he would prefer to live with either of his grandmothers, that is his paternal grandmother, Mrs C.T., or his half-sister, (J.'s), paternal grandmother, with whom his half-sister is currently residing." That is a reference to Mrs L.N.**

**The counsellor then addressed the question of the child's maturity and competence in formulating his objections. In paragraph 4 she said this:-**

> **"(H.) presented as a chatty and engaging 9 year old with a lively sense of humour. His demeanour, language skills, and his comprehension of the issues discussed with the Counsellor appeared to be age appropriate. At 9 years of age (H.) is at the concrete operations mode of cognitive development, which means that he is able to apply simple logic to solve problems. At one level (H.) understood that his return to New Zealand for a hearing relating to his welfare did not necessarily mean that his return would be permanent. However, in this concrete operational mode (H.) is more likely not to look beyond the immediate future and may therefore believe that a return to New Zealand would mean that he will never return to live in Australia. A return to New Zealand, therefore, even just for the determination of his welfare may therefore be particularly distressing for (H. )."**

**The report then concludes in the following paragraphs:-**

> **" Other features of children at (H.'s) developmental stage are that they are outgoing and curious, often self-confident and may have very close peer relationships. Also academic achievement may be very important for the child of nine years. These features were certainly evidence in (H.'s) discussion with the Counsellor. He spoke very positively about his school work, his friends at school and sporting and other interests which he has enjoyed in Australia for the past twenty months. With these aspects of life featuring so strongly at this stage of his development, it is understandable that (H.) is reluctant to interrupt these relationships and achievements to return to New Zealand, even in the short term. Given the significance of these tasks for a nine year old boy, any disruption to them may place at risk his developing self-confidence, peer relationships and school performance. Prior to the last twenty months, (H.) has lived all of his nine years of age in New Zealand and is obviously able to remember his life there. (H.) is therefore able to contrast his life in Australia with his former life in New Zealand."**

**Of most significance I think amongst those two paragraphs is paragraph 6, particularly the final sentence thereof, where the counsellor says this:-**

> **"It is the Counsellor's assessment that (H.) possesses sufficient maturity and comprehension to express a legitimate objection to returning to New Zealand."**

**In her oral evidence, the counsellor said that it certainly was her view that H. was expressing an objection to being returned to New Zealand, notwithstanding that there were also aspects of his current circumstances in**

**Australia which impinge quite heavily upon his having that view. Mr Green submitted that H.'s objection is not so much to returning to New Zealand as to leaving Australia. There is certainly an element of the latter, in the way he expressed his objection. But, in my view, these are but the two sides of the same coin and neither can be looked at in isolation from the other.**

**On all of the evidence I am satisfied that H. does object, in the relevant sense, to being returned to New Zealand for the purpose of having the issue of his custody determined there. I am also satisfied that he is of a sufficient age and maturity for account to be taken by the Court of his view, but his view is certainly not decisive. In the case of Re R (supra), to which I have already referred in another context, Balcombe LJ makes that point at 730 to 731.**

**Referring to the discretion to refuse to return a child who objects, his Lordship said this:-**

> **"In exercising that discretion it is clear that the policy of the Convention and its faithful implementation by the courts of the countries which have adopted it should always be a very weighty factor to be brought into the scales, whereas the weight to be attached to the objections of the child, or children, will clearly vary with their age and maturity. The older the child the greater the weight. The younger the child the less weight. If support be needed for that very obvious conclusion it is to be found in the judgment of the Master of Rolls in Re S (A Minor: Independent Representation) (1993) Fam 263."**

**Accordingly, I have concluded that there are three bases upon which it is open to me to exercise a discretion not to order the return of H. to New Zealand. In summary, they are: firstly, that in my view, a period of at least one year having elapsed since the retention, the child is settled in his new environment in Australia. The second is that in my view, and on my findings, the mother did acquiesce in the retention of H. in Australia, at least between June and December of 1996. That gives rise to the discretion under reg.16(3)(a) (ii). And, thirdly, I am satisfied that H. does object to being returned to New Zealand, and that he has attained an age and a degree of maturity at which it is appropriate to take account of his views.**

**Exercise of Discretion**

**I turn, then, to the exercise of discretion.**

**There are, of course, many relevant factors to be taken into account by a court in the exercise of the discretion arising under the Regulations. Perhaps the most important, and that is certainly emphasised by Mr Green in his submissions, is the underlying purpose and intent of the Convention, and therefore of the Regulations which have been adopted in this country as the means of giving effect to the Convention in this country. In that respect, Mr Green relied particularly on the preamble to the Convention which itself is contained in a schedule to the Regulations. That preamble is in these terms:-**

**"The States signatory to the present convention,**

**Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,**

**Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,**

**Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions".**

**And then Mr Green also would rely, particularly on Art.1, which is in these terms: -**

**"The objects of the present convention are-**

> **(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and**
>
> **(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."**

**I accept that that is a relevant matter to be taken into account, and perhaps the most significant, in many ways, of the matters to be taken into account in the exercise of this discretion. However, in my view, part of the underlying purpose and intention of the Convention is to be gleaned from other aspects of it as well. And**

**that includes the fact that the Convention, and the Regulations in this instance made for the purpose of giving effect to it, recognise that once a child has settled in a new environment it may no longer be appropriate to subject him or her to the summary procedure, provided for in the Regulations of an order to return him or her to the country from which he or she was taken or retained.**

**That is not only spelt out in the Regulations, but of course it arises from the articles of the Convention itself, particularly Arts.12 and 13. In the context of this case I think that the mother's acquiescence, over a period of at least six months, in the situation which arose after the retention of the child in Australia by the father, is also a very significant factor. In my judgment, she clearly tacitly accepted that the child might stay indefinitely with his father in Australia, without any detrimental effect upon his well-being, and, indeed, the evidence before me suggests that in that judgment she was perfectly correct.**

**The fact that she so acquiesced over such a period of time militates, in my view, against the implementation, now, at her belated request, of the procedures for summary return of the child to New Zealand. Fortunately, by all accounts, as I have said, the child is thriving in Australia, progressing well, with his education, his health, and his development and in other respects, and he clearly wishes to stay here with his father.**

**Another factor of relevance to the exercise of the discretion is that the father is amenable to the jurisdiction of the New Zealand Court in relation to the determination of the issue of custody of the child, without the necessity for the child to be returned to New Zealand. His counsel has conceded, in the course of his submissions to me, that New Zealand is the appropriate forum for that determination, and he has indicated that the father will abide the order of that Court as to the child's guardianship and custody, subject only to his having a proper opportunity to present his case to it. And there is no reason to suppose that he will not have that opportunity if he wishes to avail himself of it.**

**So, as I have said, whilst the underlying purpose and intent of the convention is highly relevant to this exercise of discretion, the other factors to which I have referred are also relevant, and the overwhelming feature of this case, it seems to me, is that there has been a very long period of delay by the mother in seeking to exercise her rights under the convention. Such delay occurred in circumstances which I have concluded amounts to acquiescence by her in the situation which had been created, not with her initial consent, by the other people involved in the saga. Having sat by for so long, and having allowed the child to remain with his father in Australia for so long, it simply appears to me that it would be a wrong exercise of my discretion under the Convention to now order his summary return to New Zealand. On the contrary, I think that the overwhelming feature or features of this case to which I have referred call for an exercise of the available discretion against the making of a summary return order under the Regulations. Accordingly, I propose to dismiss the application.**

**Are there any other orders, apart from dismissing the application? Should I discharge the orders of 28 July, 1997 in their entirety?**

> **(1) That the application of the Director-General be dismissed.**
>
> **(2) That the orders of the Court made by Judicial Registrar Smith on 28 July, 1997 be discharged.**
>
> **(3) That the passports of the father and the child, H., held by the Registrar pursuant to the said orders of the Judicial Registrar be returned to the father forthwith.**

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