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[24/12/1998; Full Court of the Family Court of Australia at Sydney; Appellate Court]
Director-General, Department of Community Services v. M. and C. and the Child Representative (1998) FLC 92-829; (1998) 24 Fam LR 178

FAMILY LAW ACT 1975

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

BEFORE: Nicholson CJ, Holden and Dessau JJ.

HEARD: 18 December 1998

JUDGMENT: 24 December 1998

Appeal EA 103 of 1998

No. PA 2794 of 1997

BETWEEN:

DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES

Appellant

- and -

M

First Respondent

- and -

C

Second Respondent

- and -

CHILD REPRESENTATIVE

APPEARANCES: Ms V. Hartstein of counsel, instructed by Crown Solicitor's Office, DX 19 Sydney, for the Central Authority.

Mr P. Anderson of counsel, instructed by Harman & Co, Solicitors, DX 8052 Penrith, on behalf of the First Respondent Mother.

Ms R. Druitt of counsel, instructed by E. M. Grajewska, Solicitor, Suite 607, 185 Elizabeth Street, Sydney NSW 2000, on behalf of the Second Respondent Grandmother.

Ms J. Stephenson of Counsel, instructed by Legal Aid Commission of NSW, DX 5 Sydney, on behlaf of the Children's Representative.

JUDGMENT:

INTRODUCTION

1. This is an appeal by the Director General of the Department of Community Services in New South Wales in the capacity of the Central Authority appointed pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) against the decision of Baker J delivered on 1 December 1998 whereby his Honour dismissed an application by the Central Authority for an order for the return of the children the subject of these proceedings to Poland.

2. The maternal grandmother ("Mrs C") opposed the application under the Convention initiated by the mother ("Ms. M"). The father was not directly involved in these proceedings. A Child Representative was appointed by the Court.

3. The application by the Central Authority was not filed until 25 November 1998. On that day, competing residence applications under the Family Law Act between the maternal grandmother and mother had been set down for hearing before Baker J. As a result of the application by the Central Authority those proceedings were adjourned to await the outcome of the Convention application.

4. The children in question are "AM" born 10 November 1987 (a girl aged 11 years) and "BM" born 18 July 1989 (a boy aged 9 years). 5. The mother is presently in Australia. Her original visa was due to expire on 20 December but we were informed that the Department of Immigration and Ethnic Affairs has issued a "bridging visa" to her which will enable her to remain in this country until the conclusion of the legal proceedings relating to the disposition of the children.

GROUNDS OF APPEAL IN THE AMENDED NOTICE

6. These may be conveniently grouped as follows - Errors as to:

1. Findings that the children were settled in the new environment of Australia; [Grounds 1-7];

2. Findings as to the children's objections [Grounds 8-10];

3. Findings as to expert evidence [Grounds 11-14];

4. Findings as to the harm that would be occasioned by return [15-18];

BACKGROUND

7. Baker J's judgment states:

"2. The husband and wife were married in Poland on 7 July 1987. AM was born* [in] *1987 whilst BM was* [in] *1989. Both children were born in Poland and lived in that country with their parents until those parents separated amidst allegations that the father had sexually abused AM and possibly BM. Both children attended counselling for a period of some 18 months during the years 1994 and 1995 and following the separation of their parents they lived with their mother and had some contact with the father which appears, however, to have been on a supervised basis. The mother then issued divorce proceedings against the father in Poland which, as far as I am aware, have not yet been finalised.

3. It appears that the father may have attempted to abduct the children on one occasion, which prompted the mother to obtain, in Poland, what was called "a preliminary order for custody." These

orders apparently allowed the father to have unsupervised access to the two children but the mother nevertheless accompanied them on each access visit in order, presumably, to protect them.

4. It then appears that on the advice of the children's psychologist the mother permitted the children to travel to Australia for a period of six months to enable them to have a holiday with her mother, Mrs C, who was visiting Poland at that time. The grandmother has lived in Australia for a number of years and apparently it was decided that the children should be taken out of the abusive situation in which they were then living, travel to a far country, in order to assist them in rehabilitation. At all events the appropriate immigration documents were obtained and the children arrived in Australia on or about 20 November 1995 and have lived here ever since. The mother followed the children to this country for a holiday a month later but was only able to obtain a three-month visa and she returned to Poland without the children immediately upon its expiration.

5. The mother left the children, it appears, in the care of the grandmother for a further period of two months then upon the grandmother having suggested that she leave the children with her for a further three months until the beginning of the school year on 1 September 1996 as she, that is to say, the mother, had not yet settled into her new home, said to be some 300 kilometres from the father nor had she arranged suitable employment. It was at all times the mother's case that she had stipulated that the children were to be returned to her by the grandmother in Poland by that time. As September 1996 approached the mother requested the grandmother to return the children to Poland but the grandmother refused to do so informing her daughter that the children "wanted to stay in Australia."

6. Whilst the children were in Australia it appears that they were interviewed by a psychologist and/or therapist in order that the extent of the sexual abuse which had occurred in Poland could be fully investigated and the children assisted in overcoming the trauma which that abuse undoubtedly caused to them. It appears that at the very time that the abuse, which occurred in Poland, was being investigated by experts in this country, AM was being sexually abused by the grandmother's then husband. It also appears that at the time that the investigations in relation to the abuse in Poland were taking place no disclosure was made by AM to any of the investigators or therapists of abuse by the grandfather. Although this aspect of the case was not considered in any great detail before me it does appear that AM may have been under considerable pressure by the grandfather not to disclose anything negative about their relationship. The mother, it must be said, was not informed by the grandmother at this time of the sexual assaults upon her daughter by the grandmother's then husband.

7. The mother, at this time applied for a visa to visit Australia but her application was refused. The mother purchased air tickets for the children to fly back to Poland in December 1996 but the children were not permitted to leave this country by the grandmother. Indeed, the mother did not become aware that AM had been sexually abused by the step-grandfather until he wrote a letter to her on 19 February 1997. The mother was not aware of The Hague Convention in relation to child abduction, however she did write a number of letters to authorities both in Poland and Australia seeking their assistance to have her two children returned to her.

8. The mother finally obtained a visa to visit Australia in September of 1998 and she arrived in this country on the 12th of that month. The grandmother still refused to allow her to take the children back with her to Poland and on 24 September 1998 the grandmother obtained an ex-parte interim order which prohibited the mother from taking the children out of the country pending further order of the court. The mother instituted proceedings for residence without any knowledge that The Hague Convention may have application to the facts in the present case and eventually that application was fixed for hearing before me on 25 November 1998 but did not proceed because of the institution by the Central Authority of the proceedings under The Hague Convention as I have already indicated. The factual situation at the present time is, therefore, that the grandmother has an order for interim residence of the children whilst the mother has an order for interim contact. The residence application, as I have said, is in the list for hearing and will be heard once these present proceedings have been determined depending upon the result."

8. Baker J also recorded that:

"11. It was never argued by Ms Druitt, for the grandmother, that at some point in time after the children arrived in Australia that they had become habitually resident in this country. Indeed, the evidence from the mother is quite to the contrary. I accept that it was never the mother's intention, as it were, to abandon the children in Australia with their grandmother but rather for them to remain in Australia until (a) she had been able to conclude the current divorce proceedings against her husband, the children's father; (b) the children had recovered from the trauma of having been sexually abused by their father and were in a safe environment; and (c) that she had obtained suitable work in her new place of residence. 12. The mother thereafter made several attempts to have her mother, the grandmother, return the children to Poland without success. The availability of proceedings pursuant to The Hague Convention on International Child Abduction did not become apparent until late this year which resulted in the present application I have already indicated not being filed until last Wednesday. I am nevertheless satisfied that since the end of 1996 the mother has been endeavouring to have the grandmother return the children to her in Poland."

FINDINGS OF THE TRIAL JUDGE

9. Before Baker J, the following matters were common ground:

(a) at the time of their removal to Australia the children were habitually resident in Poland;

(b) that the mother was exercising rights of custody or would have exercised those rights if the children had not been retained in Australia;

(c) that the mother did not subsequently consent or acquiesce in the children being retained in Australia;

(d) that neither child has reached the age of 16 years. (Reasons for Judgment para 9).

The issue of whether the children were settled in their new environment.

10. His Honour referred to Graziano and Daniels (1991) FLC 92-212 in concluding that the onus of establishing that the children were settled in their new environment lay with the party opposing return, namely the grandmother.

11. As to the meaning of "settlement", his Honour held, following that decision, that the test was "more exacting than that the child is happy, secure and adjusted to his surroundings".

12. He held, following the decision of Bracewell J in Re N (Minors) (Abduction) (1991) 1 FLR 413 at 417- 418, which was cited with approval in Graziano's case, that there were *"two constituent elements...a physical element of relating to, being established in a community and an environment. Secondly...it has an emotional constituent denoting security and stability".*

13. As to the meaning of "new environment" he again adopted the definition of Bracewell J in Re N -

"The word `new' is significant and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not per se the relationship with mother, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings."

14. Applying these tests his Honour then referred to the evidence of a number of witnesses.

15. These included Sister S, Pastoral Carer, of the school, which the children have attended since their arrival in Australia. She said that when the children first arrived at the school in June 1966 AM spoke virtually no English while BM had a limited English vocabulary and they required special assistance to settle into their new environment. In their first two months at school they experienced difficulty and AM was very restless in class.

16. Following the disclosure by AM that her step grandfather had abused her, Sister S accompanied her to the police interview where she noted that the child was direct with her answers and mature in her attitude. During the period which followed Sister S witnessed a growth in the child's confidence and the trust that she placed in her grandmother.

17. Throughout 1997 and 1998, AM was observed to be more confident academically and had developed a broader circle of friends. Sister S observed that the child did regress from time to time during periods of stress when she became fearful of returning to Poland.

18. The Sister referred to conversations with AM in which she referred to the impossibility of returning to Poland and to the fact that her mother did not believe what had happened in Poland.

19. As to BM, the Sister said that he picked up English very quickly and worked very hard. Although he had a tendency to stutter this disappeared with time and only recurred when he was distressed.

20. She said that she had noticed that his confidence had developed through the later months of 1997 and 1998. She said that he was committed to remaining in Australia irrespective of the mother's intentions for him.

21. She said that he competed successfully in a school public speaking contest this year in which he came a narrow second and spoke with great confidence. She also said that both children had developed trusting relationships with their teachers and that the grandmother had been involved in the children's schooling and education throughout.

22. She observed the children relating to their grandmother during visits to the school and after Mass on Sundays and they appeared to her to have a close and trusting relationship with their grandmother. They expressed gratitude for all that their grandmother has done for them.

23. Mr. F, Principal of the school gave evidence to similar effect. He said that BM in particular had excelled at mathematics, had established peer relationships with a wide variety of children and was well accepted in a group situation. He considered that he had settled well into the school environment.

24. Ms. F, a teacher at the school also deposed to AM's progress following her early difficulties. She had joined the school choir and had taken up gymnastics following the example of another Polish girl at the school with whom she had become friendly.

25. She had however, observed some regression since her mother had come to Australia. As to this his Honour observed: -

"It was submitted that AM's recent behaviour would suggest that in fact she has not become settled in Australia. I have no doubt however that the mother's visit to Australia and her attempts to take the children back to Poland with her have caused the children, and particularly AM, to become unsettled and perhaps fearful of what the future has in store for them. In comments made to various witnesses the children have compared life in Australia with life in Poland and they have expressed a preference for life in Australia. This must be regarded as evidence that they have become settled in this country."

26. His Honour then referred to the report of a Court Counsellor who had interviewed the children, the mother and the grandmother and whom none of the parties sought to cross examine as to her report, which was in evidence before his Honour.

27. His Honour said:-

"It is clear from comments made by both children to the counsellor, that they enjoy living in Australia and want to remain in this country. Statements made by the children in relation to their schooling and other activities again clearly indicate that they have become settled in this country."

28. Before expressing his final conclusion that the children were settled in their new environment his Honour referred to and relied upon the conclusion of the counsellor as follows: -

"*Both AM and BM are contented and settled in Australia with Mrs C, who is their preferred carer. Both children are particularly happy at school where they excel. The children appear to have good social networks and are connected to the Polish community."*

29. Baker J concluded this issue by saying: -

"In my opinion and for all the above reasons the children have become settled in Australia and therefore the criteria referred to in the reasons for judgment of the Full Court in Graziano and Daniels (supra), that is to say that the children have become well established environmentally in the Australian community and emotionally attached to their grandmother who has been their primary care giver over the past two years."

Findings as to the children's objections to return

30. Baker J referred to the meaning of the term "objects" as held by the majority of the High Court in De L v Director-General, New South Wales Department of Community Services (1996) 20 Fam LR at 399. It was there held that no *"additional gloss"* should be applied to the ordinary meaning of the term and that *"it remains for the court to make the critical further assessments as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised"*.

31. The evidence as to "objection" before his Honour on this issue was provided by:

*** Ms. A, registered clinical psychologist adduced for the grandmother;**

*** Ms. W, sexual assault counsellor from a clinic treating children who have been the subject of sexual abuse;**

*** Sister S, supra;**

*** The Court Counsellor, Ms. Gail Passier, supra;**

32. The evidence went to the following matters:

*** Fear of a further kidnap by the father in Poland and feeling of greater safety with their grandmother and in Australia;**

*** BM being worried that he may be forced to return to Poland;**

*** BM not liking his mother's fiancée;**

*** AM preferring police in Australia;**

*** AM's fear of further sexual assault by the father and her mother's inability to protect her;**

*** Suicidal intimations by both children if they were to be returned to Poland;**

*** AM's belief that the mother and others in Poland do not believe that she was sexually assaulted;**

*** Statements by the children that they do not wish to go to Poland;**

*** Comparative ratings of Poland and Australia favouring Australia by BM;**

*** AM saying she didn't feel good in Poland because of the mother's care as compared with the grandmother's.**

33. The Court Counsellor also noted that:

"BM informed the counsellor that he was aware that his mother thought that he had been influenced by the grandmother. However, he maintained that this was not the case and said: "I just want to stay here. I know what I want."

34. His Honour found: -

"that the above expressions of opinion constitute an objection by both children to returning to Poland."

35. Baker J then considered *"whether or not the children are of sufficient maturity to understand the consequences of what they are saying".*

36. On this issue, his Honour accepted the evidence in the Counsellor's report as to the children being "brighter" than peers and further found that *"no witness has suggested that the children lack any understanding of the issues facing them or that any opinions expressed by them are as a result of either undue influence or pressure."*

Findings as to whether there was a grave risk that a return to Poland would expose the children to physical or psychological harm or otherwise place them in an intolerable situation.

37. It is unnecessary to consider the evidence in relation to this ground in any detail as Baker J did not find that it had been established. After noting that the mother's case was that she was aware of the risks to the children if they were to be returned to Poland and would take all necessary steps to protect them, his Honour said: -

"As best as I can make out from the evidence, the present risks for the children if returned to Poland would appear to be (a) sexual abuse by the father, (b) sexual abuse by the paternal grandmother (c) sexual abuse by the mother's present boyfriend. Although there are always risks associated with life, I doubt that the children's father would pose any real threat to them if for no other reason that the mother herself is aware of the risks and I believe would have the capacity to protect the children.

As to the grandmother and boyfriend it is difficult to say whether in fact any such risk exists. In any event, I am satisfied that the mother would ensure that the children are at all times safe and would enlist the aid of the Polish Child Welfare authorities to enable that to occur. Applying the principles of law espoused by the Full Court in Laing and the Central Authority, (1996) FLC 92-709 and the authorities referred to therein I am satisfied that if the children were returned to Poland that they would not be exposed to physical or psychological harm or otherwise placed in an intolerable situation."

EXERCISE OF DISCRETION

38. His Honour clearly took the view that despite his findings as to the children having settled into their new environment and as to their objection to return to Poland, he still had a discretion as to whether he should nevertheless order their return. As to the finding as to settlement, we will discuss the question as to whether there was any such discretion at a subsequent stage of these reasons. If his Honour's decision had rested solely on the issue of the children's objections there is no doubt that such a discretion exists, as is made clear by the Regulations.

39. In exercising his discretion to refuse to return the children, His Honour took account of the children's *"real fear of what might happen if they return to Poland* ...[and their] *negative view not only of their mother's ability to protect them but also of her commitment to their care on a full-time basis."*

40. He found there to be a risk of psychological harm which he described as *"unacceptable"* and said *"I am satisfied that for them to be returned may cause them irreparable psychological damage which in the long term would be in all probability be irreversible* [sic].*"*

41. As hereafter appears, these findings were attacked as inconsistent with his Honour's finding on the grave risk issue and were said to be unsupported by the evidence.

ORDERS SOUGHT IN THE AMENDED NOTICE OF APPEAL

42. The following orders were sought by the Central Authority:-

"1. That the children AM and BM be returned to Poland forthwith in the company of such person and upon such conditions as this court deems necessary pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child abduction.

2. Such further or other order as the Court deems fit."

FRESH EVIDENCE APPLICATION BEFORE THE FULL COURT

43. On 15 December 1998, the Children's Representative filed an application seeking that the Full Court receive additional evidence to the evidence in the Court below, and short service.

44. The additional evidence was contained in an affidavit by Mr. Wiblin, Department of Immigration and Multicultural Affairs, Acting Manager, Residence concerning the laws and regulations which govern the granting of visas to non-citizens such as the children in this case.

45. The grandmother opposed the application but we exercised our discretion to admit the evidence and permitted Mr Wiblin to be called and cross-examined. We shall deal subsequently with the effect of this evidence.

THE APPEAL

46. The mother supported the appeal of the Central Authority.

47. The Child Representative maintained a neutral position save that she addressed submissions to what she said were deficiencies in his Honour's judgment relating to his failure to refer to the influence of the grandmother on the objections taken by the children, his alleged failure to make any finding as to the maturity of the children and the failure of the Court Counsellor to do so and the alleged bias of the psychologist, Ms. A.

48. The Child Representative also invited the Court to consider the effect of the children's immigration status as outlined by Mr Wiblin.

Regulation 16 of the Family Law (Child Abduction Convention) Regulations

49. The key regulation in respect of the application before Baker J and the appeal to this Court is reg 16 which is in the following terms:-

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

(a) if the day on which the application was filed is less than 1

year after the day on which the child was removed to, or first

retained in, Australia; or

(b) if the day on which the application was filed is at least 1 year

after the day on which the child was removed to, or first retained in,Australia unless the court is satisfied that the child is settled in

his or her new environment.

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

(a) the removal or retention of the child was not a removal or

retention of the child within the meaning of these Regulations; or

(b) the child was not an habitual resident of a convention country

immediately before his or her removal or retention; or

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

(d) the child was removed to, or retained in, Australia from a

country that, when the child was removed to, or first retained in

Australia, was not a convention country; or

(e) the child is not in Australia.

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

(a) the person, institution or other body making application for

return of a child under regulation 13:

(i) was not actually exercising rights of custody when the child

was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed orretained; or

(ii) had consented or subsequently acquiesced in the child being

removed to, or retained in, Australia; or

(b) there is a grave risk that the return of the child to the

country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or

psychological harm or otherwise place the child in an intolerable

situation; or

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

(d) the return of the child would not be permitted by the

fundamental principles of Australia relating to the protection of

human rights and fundamental freedoms.

(4) For the purposes of subregulation (3), the court must take into

account any information relating to the social background of the child that is provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately before his or her removal or retention.

(5) The court to which an application for the return of a child is

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

Settlement

50. The first seven grounds of Appeal relate to his Honour's finding that the children were settled in Australia.

51. Ms Hartstein for the Central Authority argued that the trial judge did not apply the appropriate test in determining this question and relied upon the view expressed in Graziano and Daniels (supra), which was followed by Kay J in State Central Authority and Ayob (1997) 21 Fam LR 567 that the test must be more exacting than that the child is happy, secure and adjusted to his surrounding circumstances.

52. As was pointed out in the course of argument, it is doubtful whether this is the correct test. In De L's case, the High Court pointed out that there was no warrant for reading more into the term "objects" appearing in the Regulations than its ordinary meaning. In our view similar considerations apply to the expression "settled" appearing in the Regulations. Graziano's case was decided before De L and we doubt whether the statement relied upon by the Appellant remains good law.

53. In any event, it is apparent from his judgment that Baker J did apply the Graziano test. It appears to us that the real complaint of the Central Authority is that the evidence did not support such a finding and/or that he did not consider evidence that pointed in a contrary direction.

54. In relation to the first four grounds, Ms Hartstein conceded that there was evidence before his Honour that there was evidence that the children are adjusted "at least to a certain extent" to their school and that they take part in extra curricular activities, but she said that he had not considered factors which suggested that the children were no more than merely adjusted if that to their new environment.

55. She said that these factors were, first, that the children are bright and would always do well in school and that AM had shown that despite the abuse that occurred in Australia she had still been able to adjust.

56. Secondly she said that the children and AM in particular was still sufficiently unsettled as to require counselling from Ms W.

57. Thirdly she said that there was evidence that AM had trouble sleeping prior to the mother obtaining a visa to travel to Australia and fourthly that AM had only one close friend and she was a Polish speaker. Finally she argued that Baker J had not considered the premises or locality in which the children lived with the grandmother.

58. Mr Anderson of counsel for the mother supported these arguments and also argued that his Honour's finding that the children had recently become unsettled and fearful as to what the future had in store for them was inconsistent with a finding that they were settled into their new environment within the meaning of the Regulations.

59. We do not regard these submissions as having any substance. They face the initial difficulty that they seek to challenge findings of fact by his Honour, which in our view were more than supported by the evidence before him.

60. It is obvious from the evidence that the children have made a remarkable adjustment to life in Australia. They have been here for nearly three years and have progressed and are well settled in their school and in their command of the English language. His Honour would also have been

entitled to conclude on the evidence that they were living in a settled and loving environment with their grandmother.

61. Ms Hartstein sought to draw some comfort from the absence of evidence from outside the school and home environment as to the children's adjustment. However, as was pointed out in argument by Ms Druitt of counsel for the grandmother, both school and home environment are the two most important aspects of the life of most young children and in this regard the evidence was all one way.

62. We regard the suggestion that because the children still needed counselling they were therefore not settled to be similarly untenable. These children and AM in particular had been severely abused by persons that they were entitled to trust. It is obvious that they will need counselling and assistance to overcome the effects of this abuse and will probably do so for many years wherever it is that they live. In our opinion it is wrong to suggest that this means that they cannot be settled into their new environment within the meaning of the Regulations. A person can be settled into an environment and still experience severe problems. Indeed it may well be that to remove them from that environment may well exacerbate such problems, as his Honour in fact found in this case.

63. Similarly, the argument that the fact that they have become unsettled as a result of the threat to remove them from Australia is unacceptable . We should have thought that it in fact provided evidence that they were settled into their present environment and did not want to leave it.

64. Ms Hartstein's submission that AM had only one friend was not in fact supported by the evidence of Sister S who referred to AM having developed a broader circle of friends.

65. As to the grandmother's premises and locality, we have difficulty in understanding the relevance of this in considering whether the children have become settled in their new environment.

66. The fifth and sixth grounds of appeal sought to attack his Honour's finding that the fact that the children had expressed a preference for life in Australia was evidence that they had become settled and also attacked his Honour's reliance on statements made by the children in relation to their schooling and other activities.

67. In support of these grounds Ms Hartstein sought to rely upon statements made in Graziano's case that the wish of a child to remain in a new place, while relevant is not determinative for it may indicate an attachment to the abductor rather than to the new environment. She also relied upon the statement made in that case that it is not determinative that the child objects to being returned to the former residence or lacks attachment to it.

68. While we would not differ from these statements, they must be looked at in the context of the particular case under consideration. When this is done in the present case, it is apparent that while the children have an obvious attachment to their grandmother, they have also made very real ties through their school with Australia as such. In any event, his Honour was clearly entitled to take these statements by the children into account, along with the other evidence and we are unable to detect any error on his part in doing so.

69. The seventh ground was to the effect that Baker J was in error in finding that the children were settled in Australia without considering the future of the children in Australia and without considering issues relating to the anticipated release of the grandmother's former husband from gaol in three years time, the fact that her house is guarded by a German Shepherd dog and evidence as to the grandmother's poor state of health.

70. We shall consider the issue as to the future when we deal with the argument in relation to the children's immigration status. However as to the specific matters raised by this ground we are unable to discern their relevance to the issue of whether the children are settled in their new environment. The grandmother's state of health is no doubt relevant to the proceedings for

residency as, to a lesser extent would be the situation with her former husband. For the purposes of this application we think that they are merely speculative future problems.

71. We would add that there is no reason to suppose that his Honour did not take them into account in any event. His Honour gave judgment the day after the conclusion of the hearing and these issues were canvassed before him. Proceedings of this nature are essentially summary proceedings, which of necessity must be decided quickly. In relation to such proceedings a trial judge is not required to exhaustively deal with each issue that has been raised and the fact that he or she does not do so cannot be taken as leading to a conclusion that the issue has been overlooked.

72. In conclusion, on the issue of whether the children were settled into their new environment, we would point out that his Honour had the benefit of the report of the counsellor, to the effect that the children were in fact settled in their new environment. The counsellor was not cross examined on her report, nor was any application made to do so. In these circumstances we consider that this evidence of itself was sufficient to enable his Honour to conclude that the children were settled in their new environment.

Further Evidence in Regards to "Settlement"

73. We now turn to the evidence of Mr Wiblin as to the children's immigration status. As we understand it, the argument advanced by the Central Authority, supported by the mother and to some extent by the child representative is that the children are unlikely to be permitted to remain in Australia and thus cannot be regarded as settled within the meaning of the Regulations.

74. Mr Wiblin said in his affidavit that the children had been living in Australia since 22 November 1995 holding temporary residence visas and are current applicants for an extension of those visas. In the meantime it appears that they hold bridging visas, which will remain valid until the conclusion of the proceedings relating to their eventual disposition.

75. The substance of his evidence was to the effect that the children would not qualify for permanent visas unless they fell into the category of a dependent child of an Australian citizen, Australian permanent resident or eligible New Zealand citizen and were nominated by such a person.

76. He said that the effect of the Migration Regulations was that the grandmother would have to adopt the children for them to obtain permanent visas as a dependent child is defined in Reg 1.03 as meaning the natural or adopted child of a person.

77. During the course of his viva voce evidence before us, he said that it was possible for the children to continue to obtain temporary visas, but he also said that even if this Court was to eventually order that the grandmother should have sole parental responsibility for the children, this would not be sufficient to enable them to obtain visas for permanent residence in Australia.

78. He indicated that there were a number of avenues of appeal against a refusal to grant a visa, both internally within the Department and also to a Review Tribunal and in some circumstances to the Federal Court of Australia.

79. He also said that the Minister had the power to waive compliance with the Regulations but he was unable to recall the Minister having done so.

80. It was argued by Ms Hartstein and Mr Anderson that on the basis of this evidence we should be satisfied that the children probably will not be able to remain in Australia and Mr Anderson further argued that the onus was on the grandmother to show the contrary.

81. Ms Stephenson for the Child Representative argued that the question of the children's immigration status was relevant to both the issue of whether they should be regarded as "settled" and to the question of the exercise of discretion.

82. As to the former, she said that two approaches would appear to be open.

83. She said that one might be that if the children have no continuing legal right to remain in Australia then the Court could not regard them as "settled" in this country. She argued that a person asserting the "settled" defence should be required to show that the child has a legal right to reside in Australia.

84. She said that if there is evidence which tends to show that the children are unable to continue to reside in the country the person opposing their return must call cogent evidence which shows that it is very highly probable that the children have a continuing right to reside in Australia.

85. As to the issue of discretion, she said that the children's migration status was relevant but would need to be balanced against other considerations and especially the welfare of the children.

86. The issue of migration status did not loom large in the course of the proceedings before his Honour. There was mention of it towards the end of the submissions by Mr Anderson, when his Honour commented that he assumed that whatever the Court did, the Department would follow. Mr Anderson replied that that assumption might not be correct and that what happened would be entirely at the Government's discretion. Thereafter, apart from a passing mention during Ms Druitt's submissions, the matter seems to have been left to rest. Nevertheless it is clear that his Honour approached the matter upon the basis that the children's immigration position was uncertain and no doubt took this into account in making his decision.

87. We do not think that the evidence before us takes the matter much further. In a sense the argument is circular and may depend upon the outcome of the residence proceedings if this appeal is dismissed. If, for example, the Court in those proceedings was to decide that the grandmother should have sole parental responsibility for the children, we would find it a startling result if the Department was then to refuse to permit them to remain in Australia. If on the other hand the residence decision goes in favour of the mother, then it is probable that she and the children will be required to leave Australia and she wishes to do so in any event.

88. It was put by Ms Hartstein that the statement of principle by Bracewell J in Re N, approved by the Full Court in Graziano's case, meant that in considering whether children are settled within the meaning of the Regulations, it is necessary to look not only at the past and the present situation, but also into the future. She said that if this were done it would not be possible to find that the children were settled in Australia because of their uncertain immigration status. She in fact went further and submitted that it was probable that the children would be required to leave Australia and that this meant that the grandmother had failed to discharge the onus upon her of establishing that the children were settled in Australia.

89. In that case her Ladyship said at 417-418 that the word "settled" should be given its ordinary natural meaning. She said that it involved both a physical element of being established in a community and an environment and also an emotional constituent denoting security and stability. She then referred to the decision of Purchas LJ in Re S and then continued: -

"He (Purchas LJ) then referred to a `long term settled position' required under the article, and that is wholly consistent with the approach of the President in M v M and at first instance in Re S. The phrase `long term' was not defined, but I find that it is the opposite of `transient'; it requires a demonstration of a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent."

90. Apart from Graziano, this passage was also cited with approval by Moss J in Director General of the Department of Community Services (Central Authority) and Apostolakis 21 Fam LR 1 at 8.

91. In our opinion this statement does not represent the law so far as the Australian Regulations are concerned. As the majority of the High Court pointed out in De L's case it is the Regulations that must be applied. Nowhere in the Regulations are the words `long term' to be found and there

is in our view no warrant for importing them. The test, and the only test to be applied, is whether the children have settled in their new environment. That test is to be applied either at the time of the application being made or at the time of trial. It is unnecessary to consider which date is the relevant one in the context of this case, given the short period between the two dates.

92. At that time the children were lawfully in Australia, albeit pursuant to bridging visas. There is in our view no reason to find that the children will be required to leave Australia.

93. Even if this were the case, it would still in our opinion be arguable that the children were settled as at the relevant time, but we leave this question open for future consideration.

94. It follows that we see nothing in the additional evidence admitted before us that would operate to require an alteration to the finding made by his Honour as to settlement.

Additional Matters Relevant to "Settlement"

95. Before leaving this aspect of the appeal, we think it is necessary to draw attention to the *obiter* view taken by Kay J in Ayob's case as to whether in a case where one year has elapsed since the child's wrongful removal (or retention) and the filing of an application pursuant to the Hague Convention, a finding under reg 16(1) that a child is settled in a new environment, still leaves a discretion in the Court to order the return of a child.

96. At 84,072, his Honour respectfully differed from the approaches of Bracewell J in Re N at 417 and Purchas LJ in Re S (A Minor) (Abduction) (1991) 2 FLR 1 at 25 to the extent that those cases *"within the four walls of the Hague Convention there is room for discretion in respect of a child who has met the criteria of being more than one year away from the wrongful retention or removal and now settled in its new environment..."*. Although that set of circumstances was not found to be the case before his Honour, he said that had such facts been the case *"that would be the end of the matter under the Hague Convention and under the Regulations."* In his Honour's view, the matter would fall to be decided under common law or other statute.

97. While the factual aspects of the children's being "settled" was subject to a good deal of argument in this case, the consequences in respect of discretion under the Regulations was not. We therefore do not propose to deal with that issue which should await full legal argument.

98. We should say however, that we are not necessarily persuaded that Kay J's view is correct.

99. The final matter relevant to this aspect of the appeal concerns the evidence presented to this Court pursuant to the Form 42A application. Mr. Wiblin gave *viva voce* evidence concerning the legislative requirement that a child be a natural or adopted child in order to satisfy the definition of a "dependent child" visa pursuant to reg 1.03 of the Migration Regulations. It would seem that an order made under the Family Law Act 1975conferring even sole parental responsibilities would not satisfy the current definition. `Adoption" as defined under applicable State and Territory law is the only alternative which satisfies the relevant provision.

100. If the definition is, in fact, restricted in the way that the witness indicated, we consider it is an inappropriately narrow definition to deal with the realities of children's circumstances, particularly where Hague Convention issues are relevant as is the case here. For example, the person who might otherwise adopt may not be eligible by virtue of age. Moreover, the specification of "adoption" would seem out of step with the trend away from the use of adoption in favour of parenting orders under the Family Law Act and the appreciation that *"*[a]*doption has a series of consequences which may or may not promote the welfare of the child in a particular case"* (per Chisholm J in Fogwell and Ashton(1993) 17 Fam LR 94 at 100).

101. We consider that the definition of dependent child for the purpose of the Migration Regulations is a matter which the relevant Minister should examine.

Objection

102. It is convenient to consider grounds 8 to 13 together as they all relate to the issue of the children's objection to return to Poland. No challenge was made to his Honour's finding that they did object to being returned. There was clear evidence that they did so and that they had maintained that position consistently since 1996.

103. What was argued was that for various reasons his Honour should have found, either that the children lacked the degree of maturity that required that there wishes be given weight, or that they had not been able to form an independent view concerning the matter because of the influence of the grandmother.

104. Ground 8 may be disposed of shortly. It asserts error in the finding that the children were brighter than other children of their age leading to a conclusion that their objections to return to Poland were independent views with full knowledge of the consequences and effects of those views.

105. We can see no error in this conclusion in the context of this case. His Honour expressed it after exhaustive consideration of statements made by the children to a number of different experts and to Sister S. The fact that both children were intelligent for their age obviously was relevant to the assessment of whether their objections were formed with insight and should be given weight. His Honour had to do his best with the material that was before him and we see no error in the fact that he assessed the statements of the children in light of the fact that they were of superior intelligence to most of their peers.

106. Ground 9 asserted error in that his Honour did not make a specific finding as to whether or not the children had attained a degree of maturity at which it was appropriate to take account of their objections.

107. This issue was clearly canvassed before his Honour in submissions and while his Honour did not use the words of the Regulations in making his finding it is clear that such a finding is to be implied from the reasons for judgment and from the orders that he in fact made.

108. He did find that *"their objections to returning to Poland are their own independent views which they have stated with full knowledge of both the effect and the consequences of having expressed them."*

109. It was argued that this is not a finding as to maturity. However it clearly would form part of a finding as to maturity. An examination of the transcript of the argument reveals that his Honour was singularly unimpressed with arguments that intelligent children aged 9 and 11 were not sufficiently mature for their objections to be given weight and we would respectfully agree with his Honour in this regard. It follows that this ground has no substance.

110. Similar considerations apply to grounds 11 and 12. Ground 11 seeks to attack the trial judge's reliance on the court counsellor's report as evidence of maturity upon the basis that she did not directly address the issue of maturity despite being requested to do so. His Honour was well aware of this as appears from the transcript of argument. However this did not mean that his Honour was not entitled to draw inferences from the report of the counsellor as to this issue as well as from the statements that the children had made to other witnesses.

111. Ground 12 asserts error on the part of Baker J in relying on the reports Ms. A, which, it is asserted, were based upon contaminated interviews and whose reports were so clearly biased in favour of the grandmother that she should not have been regarded as independent.

112. This attack was made at trial before his Honour and she was in fact the only witness to be cross-examined. In the circumstances it was very much a matter for his Honour as to what weight he gave to Ms A's evidence. She is a clinical psychologist, to whom the grandmother and the children were referred by a general practitioner in relation to the issue of sexual abuse.

113. Her first report of 25 May 1996 was a psychological assessment designed to ascertain if the children had been sexually abused prepared for the purpose of proceedings between the mother

and her husband in Poland. It is also apparent that Ms A later assisted the grandmother in relation to her own psychological problems arising from her then husband's treatment of AM and was also consulted in relation to the dispute between the mother and the grandmother concerning the children at a later stage. She gave a further written report on 21 October 1998 in which she set out details as to her interviews with the children and what they said to her on 16 October 1998 and at an earlier interview in 1997.

114. Ms A's methodology in relation to the first report was strongly criticised, as was her objectivity. However this may be, it is clear that his Honour was entitled to make such use of her evidence as he thought appropriate. In the event he made very limited use of it, that use being confined to the statements made by the children to her during the course of interviews. We can detect no error on the part of his Honour in this regard.

115. Grounds 10 and 13 reflect a theme that was fairly constant throughout the submissions of counsel for the Central Authority, the mother and to some extent the Child Representative; the alleged influence by the grandmother over the views being expressed by the children. These submissions were made strongly to his Honour and clearly did not find favour with him.

116. It is important to note that with the exception of Ms A, no witness was cross-examined and no application was made to do so. In such circumstances, we think that it would have been extremely difficult for his Honour to have arrived at a conclusion that the grandmother had unduly influenced the views held by the children as to the issue of return to Poland. What his Honour was entitled to and did take into account, was the fact that the children had made statements to a number of people in the absence of the grandmother indicating the fact that they objected to returning to Poland and that they had done this consistently over a number of years.

117. In her submissions Ms Hartstein commented that having regard to the facts that the children had been living with the grandmother for three years, that she had been the only significant non abusive adult in their lives and that they had been unable to speak English when they came to Australia, it would not be surprising that they should adopt her way of thinking on any given subject.

118. While we have no difficulty with the proposition that the children may have been influenced by the views of the grandmother by these factors, we are not prepared to accept that this means that the views of intelligent children of this age are necessarily to be discounted because of it.

119. His Honour said in this regard: -

"No witness has suggested that the children lack any understanding of the issues facing them or that any opinions expressed by them are as a result of either undue influence or pressure."

120. As was pointed out in the submissions of the child representative, his Honour clearly had this possibility in mind when he made this statement. The child representative agreed that no witness had made such a statement but submitted that there were objective facts that gave support to such a proposition.

121. These were said to relate largely to the allegations of sexual abuse made against the mother's present boyfriend by AM, with whom she had had no contact since early 1966 and the fact that these allegations were also made by the grandmother. The child representative submitted that the grandmother laid the seeds of these allegations.

122. These submissions were also made to his Honour. He thought that there was no substance in them and we agree with him. AM was clearly old enough to remember any incident occurring at that time and given the unfortunate history of the matter, might well have placed a negative interpretation on actions by the mother's boyfriend, even if this was unjustified. The fact that the grandmother placed a similar interpretation upon it does not in our view necessarily lead to a conclusion that the grandmother had unduly influenced the children concerning the matter.

123. It is of interest to note that the child BM said to the court counsellor that he was aware that his mother thought that he had been influenced by his grandmother, but that this was not the case -*"I just want to stay here. I know what I want."* This was an insightful comment from a nine-year-old and supports both the strength of the views held by him and his objectivity and maturity.

124. Counsel for the mother also took issue with his Honour's statement that no witness had suggested that the grandmother had unduly influenced the children pointing to material in the mother's affidavit to this effect.

125. We think that when his Honour made this statement he was clearly referring to the independent witnesses rather than to the protagonists. His Honour was careful throughout his judgment to refer to the observations of people not directly involved in the contest rather than to the parties themselves and this was an entirely proper approach in the circumstances.

Grave Risk

126. We now turn to Grounds 14 to 18 that relate to what is said to be an inconsistency between his Honour's finding that no grave risk of exposure to physical or psychological harm had been established and his finding when considering the issue of the exercise of his discretion that there was an unacceptable risk of psychological harm if they were to be returned and that a return may cause irreparable psychological damage that would in all probability be irreversible.

127. These grounds confuse the differing functions that were being performed by his Honour at different stages of the decision making process. The distinction emerges clearly from the passage in the joint judgment of the majority in De L's case at Fam LR 403 as follows; -

"[I]t is to be noted that, if a child objects to being returned to the country of his or her habitual residence and has attained the age and degree of maturity spoken of in reg 16(3)(c), it remains for the judge hearing the application to exercise the an independent discretion to determine whether or not an order should be made for the child's return. The regulations are silent as to the matters to be taken into account in the exercise of that discretion and the "discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [regulations]" enable it to be said that a particular consideration is extraneous. **[footnote reference to Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492 at 505 per Dixon J]** ***That subject matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion."***

128. In considering the issue under reg. 16(3)(b) the test is an objective one, and was applied by his Honour from an objective point of view.

129. In exercising his discretion he examined the issue from the point of view of the children and their fears and concerns. He was faced with a situation where two children, whom he found to have become settled in this country and who objected to being returned to Poland, would be forcibly returned if he was to exercise his discretion to do so. He would no doubt have taken into account the damage that the children had already suffered as a result of sexual abuse from their carers. In our view he was perfectly entitled to conclude that a return of these children in these circumstances may cause them permanent psychological damage of an irreversible character, particularly as it would involve their separation from the one stable figure in their lives, namely their grandmother.

130. At the commencement of her submissions Ms Hartstein argued that the court was bound to take into the effect the purpose of the Hague Convention as stated by Nygh J in Director General of Family Services and Davis (1990) 14 Fam LR 697 at 703 as follows: -

"To discourage, if not eliminate, the harmful practice of unilateral removal or retention of children internationally; and secondly, to ensure that the question of what the welfare of children requires is determined by the jurisdiction in which they were habitually resident at the time of removal."

131. Ms Hartstein asserted that his Honour had ignored this purpose in refusing to make an order for the return of the children. We do not think that he did so. Regulation 16, which reflects Article 13 of the Convention, albeit not in precise terms, clearly contemplates that there will be circumstances where the passage of time and the march of events will mean that it would be unreasonable to further disrupt a child.

132. We might mention that the cause of the delay in the present case reflects little credit on the bureaucracies of both Australia and Poland. In Australia's case, the mother was consistently refused a visa to come to this country from 1996 until 1998 and was never informed of her rights under the Hague Convention. Similarly the Polish authorities never informed her of her rights in this regard or offered assistance in making a Convention application. She only became aware of the Convention after obtaining independent legal advice when she eventually came to Australia.

133. As his Honour pointed out in the course of argument, these are tragic cases, but there are some such as this one where it is just too late for the objects of the Convention to be achieved.

CONCLUSION

134. For the foregoing reasons we consider that the appeal must be dismissed and order accordingly.

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