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[28/05/1999; High Court of New Zealand at Auckland; Appellate Court]
S. v. S. [1999] NZFLR 625

S v S

High Court at Auckland

AP 39/SW99

12, 28 May 1999

Fisher J

FISHER J. The appellant Mr S appeals from a decision of the Family Court at Waitakere dismissing his application for a "Hague Convention order" under the Guardianship Amendment Act 1991 to return his three children to Australia. The appeal involves an unfortunate clash between one's sympathies for Mrs S and the requirements of the Hague Convention.

Factual background

Mr and Mrs S married in Fiji on 30 January 1982. They had three children, a girl whom I will refer to as B, born on 4 January 1984 (now 15), a girl whom I will refer to as T, born on 3 January 1986 (now 13) and a boy whom I will refer to as M, born on 27 April 1988 (now 11). Mr S was and is a successful businessman with business interests in various parts of the Pacific.

In January 1988 Mr and Mrs S and their children moved from Fiji to Australia. They lived initially in Melbourne and then settled in Sydney. Mr S had some relatives in Australia and his parents also made frequent visits from Fiji. Mrs S had no close relatives in Australia but two brothers, her mother, and other relatives in New Zealand. The children were enrolled in private day schools in Sydney. They led outwardly normal and successful lives there.

The problem was that Mr S frequently struck and abused Mrs S. Eventually in about 1994 she summoned up the strength to leave. He asked her to return on a promise to mend his ways. She did so but he did not keep his promise. In 1998 she resolved to leave again, taking the three children with her. She did not tell either Mr S or her children of her plan.

The plan was put into operation in late 1998. Mr S agreed that she could take the three children on a holiday to see their paternal grandparents in Fiji. They would travel via New Zealand where they would meet Mrs S's relatives. In fact the arrangement was a subterfuge. On arrival in New Zealand Mrs S proceeded no further. From early December 1998 down to the present she and the children have resided with her mother and two brothers in West Auckland.

On 9 December 1998 Mrs S obtained an ex parte interim custody order and an ex parte order preventing removal of the children from New Zealand. Since then Mr S has periodically visited New Zealand to see the children pursuant to interim access orders.

Hague Convention proceedings in the District Court

Mr S applied for a Hague Convention order returning the three children to Australia. Affidavits were filed by Mr and Mrs S, members of their respective families, and Mr Boswell, a Sydney neighbour. Most of the deponents were cross-examined.

In addition there were reports by, and evidence from, two psychologists. Ms Tanner was appointed by the Court to report on the risk of harm to the children if returned to Australia; their wishes, age and maturity; and influences possibly affecting those wishes. The gist of her report was that Mr S had indirectly affected the children by exposing them to the sight of violence against their mother. He had not physically abused the children, and there was no immediate danger of his doing so, but he was a controlling parent who might resort to violence against them in the future if crossed. Dr Ratcliffe was engaged by Mrs S to report on the relationship between the two parents and its significance for the Convention application. The gist of her evidence was that Mrs S had been subjected to a battering relationship over a lengthy period and in consequence now suffered from post traumatic stress disorder. For her to return to Australia, even temporarily in order to conduct custody proceedings, would involve major risks to her health and wellbeing.

In his judgment the learned Family Court Judge accepted that Mr S had satisfied the preliminary requirements for an order under s 12 of the Guardianship Amendment Act. The children would have to be returned unless the case came within one of the special exceptions in s 13. Section 13(1)(d) was not available as the children wanted to return. The sole question was whether there was a grave risk that return would expose the children to physical or psychological harm or otherwise place them in an intolerable situation for the purposes of s 13(1)(c). He recognised that the issue was not the best interests of the children per se but the choice of the forum where those interests were to be determined. He accepted that the onus was on Mrs S, that she faced a "formidable task", and that the statutory presumption for return was "strong".

The Judge found that a grave risk stemmed from Mr S's history of, and propensity for, physical and psychological abuse. He had been abusing Mrs S throughout the marriage. The children had been harmed by their exposure to that sight. Their tolerance of it was unhealthy. Although Mr S had not been physically violent towards them, there was a risk that during their teenage years they might rebel with violent consequences.

The Judge found that because of her mental fragility Mrs S could no longer take an effective part in any custody proceedings in Australia. Even had she been able to return to Australia she would be unable to stand up to Mr S over custody matters, certainly not without the immediate personal support of her brothers. The two brothers had families and businesses in New Zealand. They would not be available to provide the necessary support in Australia. It would not be practicable for her to launch Australian proceedings from New Zealand, visiting Australia only for necessary hearings. Assessments requiring her presence would be called for by the Family Court of Australia. Her prospects of gaining custody would also be prejudiced by the delays of an Australian custody hearing and the likelihood that the children would see little of her in the interim. Although the children's wishes would be important in a custody context, the wishes could not be determinative on a Convention application unless objecting to return. Whereas Mr S had the means and ability to participate in a New Zealand custody hearing, Mrs S could not reciprocate in Australia.

The Judge concluded that there was a grave risk that to return the children would expose them to physical or psychological harm. It would also place the children in an intolerable situation to have issues concerning their future custody and access determined in Australia without effective input from Mrs S. Both parents could effectively contribute to a hearing in New Zealand. To allow custody to go to Mr S by default would risk future physical abuse to the children if they rebelled against his rule. It would also involve loss of adequate contact with their mother. These risks were sufficient to bring the case within s 13(1)(c). The overriding discretion should be exercised against a return.

Appeal principles

In this Court Mr S begins with all the handicaps associated with an appeal against the exercise of a statutory discretion following the hearing of oral evidence before a specialist tribunal: Herewini v Ministry of Transport [1992] 3 NZLR 482, 490, 492; Adams v Wigfield (1993) 11 FRNZ 270, 274; Swayne v Lush [1999] NZFLR 49, 56. The first instance Judge had obvious advantages on matters of credibility. In addition his views stand unless vitiated by error of principle, reliance upon irrelevant considerations, disregard of relevant ones, or an outcome which was plainly wrong. "Errors of principle" include procedural errors substantially likely to have affected the outcome. "Reliance upon irrelevant considerations, and disregard of relevant ones" includes material errors of fact. In all these respects particular regard must be paid to the specialised skills and experience of Family Court Judges.

Many grounds of appeal have been advanced on behalf of Mr S. In terms of the foregoing principles the more significant ones might be expressed as follows: (a) assumptions as to Mr S's violence, the harm which he would cause the children, and Mrs S's inability or refusal to return to Australia, were irrelevant in law; (b) the assumptions were also ill-founded in fact; (c) even without such errors, the decision would have been plainly wrong having regard to the principal objects of the Act; (d) the Judge disregarded a relevant consideration, namely the wishes of the children; and (e) there were critical procedural errors in the treatment of evidence from Dr Ratcliffe and Mr Boswell. I have not found it necessary to embark upon the procedural errors ground. Before traversing the others I will summarise the legal principles to be applied.

Legal principles

The Guardianship Amendment Act incorporates the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980 and incorporated as a schedule to the Act. The preamble to the Convention records that the signatory States entered into it:

. . . 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 attention 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. .

From those premises the objects of the Convention are stated in art 1 to be:

> **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.

The objects are in turn attained through the detailed articles and their local statutory equivalents. For present purposes the key statutory provisions are ss 12 and 13 which materially provide:

12. Application to Court for return of child abducted to New Zealand –

(1) Where any person claims –

(a) That a child is present in New Zealand; and

(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) That the child was habitually resident in that Contracting State immediately before the removal, –

that person, or any person acting on that person's behalf, may apply to a Court having jurisdiction under this Part of this Act for an order for the return of the child.

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

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

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

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

Grounds for refusal of order for return of child –

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

(a) That the application was made more than one year after the removal of the child, and the child is now settled in his or her new environment; or

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

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

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

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

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

i. Would otherwise place the child in an intolerable situation; or

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

(e) That the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

The core principles for applying ss 12 and 13 were settled long ago overseas and more recently, to the same effect, in New Zealand. Local decisions include D. v D. [1993] NZFLR 548; Clarke v Carson [1996] 1 NZLR 349; A. v Central Authority for New Zealand [1996] 2 NZLR 517 (CA); and D. v C. [1999] NZFLR 97 (CA). As the Convention preamble and objects suggest, primary emphasis is placed upon prompt return of children wrongfully removed or retained. The Court of the country of the child's habitual residence is presumed to be the appropriate forum for determining custody and access issues. The strength of that presumption has been emphasised on many occasions both here and overseas, most recently in the English Court of Appeal decisions in In re C (abduction: habitual residence) (The Times 23 February 1999) and In re C (a minor) (child abduction) (The Times 14 May 1999).

Underlying the presumption for return is the Convention premise that the interests of children are of paramount importance. In giving effect to that premise, it will usually be in the interests of particular abducted children that they be returned. That is the Convention acting remedially. But it would be easy to overlook its equally important nominative role. There is the future of other children to consider. Their interests will be promoted by demonstrating to potential abductors that there is no future in inter-state abductions. A firm attitude to the return of children, in other words, discourages those parents who might otherwise be tempted to contemplate unilateral removal. And as Judge Ryan recently added in Secretary for Justice ex parte S. v R. (District Court, Kaikohe FP 027/13/98, 12 March 1998, at p 8) such an approach also addresses the inhibitions there might otherwise be over allowing children to visit a Convention country on a voluntary basis. In New Zealand's case a firm implementation of the Convention is an assurance to overseas custodial parents that it is safe to allow their children to come here for access and other temporary purposes.

Those broad objectives are relevant both to the scope of the s 13 exceptions and to the exercise of the discretion once an exception has been established. In the case of s 13(1)(c) in particular, the presumption is strengthened by its restrictive wording. The restrictions stem from the placing of the onus upon the party opposing return ("establishes to the satisfaction of the Court"), the gravity of the required risk ("there is a grave risk"), the use of the word "intolerable" (s 13(1)(c)(ii)), and the way in which the word "intolerable" indirectly qualifies the phrase "expose the child to physical or psychological harm" in s 13(1)(c)(i) (see retrospective significance of the word "otherwise" in s 13(1)(c)(ii)).

The presumption is also reinforced by the distinction which has to be drawn between choice of forum on the one hand and custody and access merits on the other. So long as the country of habitual residence makes the best interests of the child paramount, and provides mechanisms to achieve that end, it will normally be appropriate to leave that country to protect the interests of the abducted child (A. v Central Authority, supra, at p 523). One should also be slow to criticise overseas legal systems in this respect, given

New Zealand's agreement "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States" (Convention Art l(b)). So it will never be sufficient to show merely that allowing custody or access to the applicant parent would involve grave risk of exposure to physical or psychological harm or an intolerable situation. The party resisting return must go further and show why the legal system of the country of habitual residence can not be entrusted to safeguard the interests of the child pending the outcome of custody and access issues there.

Those considerations together underpin the stringency of the "grave risk" test in s 13 (1)(c). On the other hand the grave risk exception would not have been inserted in the Convention and Act in the first place unless it were intended to have a meaningful role. An overseas legal system might lack the necessary principles or resources to protect the child; military, political or social unrest might be too dangerous; the child might be subject to immediate arrest on return; the applicant parent might be so dangerous that even suitably warned state agencies would be unable to provide sufficient protection. These are simply examples of situations in which the overseas country might be incapable of protecting the interests of the child, as distinct from situations in which custody or access should be withheld from the applicant parent.

I do not understand there to be any serious debate over the legal principles thus far. However two further questions were more controversial. First, Mr Pidgeon submitted that as a matter of law an absconding parent's inability or refusal to return must be disregarded under s 13(1)(c). He sought to illustrate this principle in action in C v C [1989] 2 All ER 465, 471 (CA); N. v N. (District Court, Whakatane FP 087/155/97 14 October 1997, Judge Neal); Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433 and L. v L. (District Court, Wellington FP 085/354/94, 29 June 1995, Judge Carruthers). Although it may make little difference in the long run, I do not think that disregard of an inability or refusal to return can be elevated to a legal principle. Any inclination to penalise parents in that position must give way to the greater imperative of safeguarding the interests of the child. In circumstances where the grave risk test in s 13(1)(c) were otherwise satisfied, unavailability of a parent would not seem legally fatal. That is not to say, however, that parents who have to rely upon an inability to return are likely to succeed under s 13(1)(c) when it comes to the merits. In that situation the factual foundations for invoking s 13(1)(c) would usually be lacking, let alone the foundations for a favourable exercise of the discretion. And of course the task would be virtually insuperable if a parent's refusal to return were voluntary. This would seem to involve not so much a principle of law as an unpromising set of facts with which to face the stringent requirements of s 13.

The other legal question this case raised was the way in which the Court should treat a mature child's wish to return. The effect of s 13(1)(d) is that the Court has the power to give effect to a mature child's objection to return. There is no express articulation of the converse. Should the Court be influenced by a mature child's wish to return in circumstances where it might otherwise have been inclined to allow the child to remain? The answer seems to be yes, for the following reasons.

First, the contrast between the express statutory reference to a wish to remain and silence on the corresponding question of a wish to return is not surprising given the scheme of ss 12 and 13. Once the threshold requirements of s 12 have been satisfied return will presumptively follow in any event. The sole purpose of s 13 is to single out exceptions to that presumption. One is the mature child's wish to remain. But the

drafter could well have thought it redundant to expressly articulate additional reasons for supporting a presumption which is already there in s 12.

Secondly, there is the significance expressly afforded to the child's wishes in s 13(1)(d) itself. It is difficult to see why more weight would be given to a mature child's wish to remain than the same child's wish to return. Either a mature child's wishes are to be respected on Hague Convention applications or they are not.

Thirdly, the framers of the Hague Convention assumed that a mature child's wishes would be taken into account without distinction between a wish to remain and a wish to return. The background to the Convention is outlined in the Explanatory Report on the Convention published by the Permanent Bureau of the Conference in 1982. The Report was prepared by Professor Elisa Perez-Vera. She had been the Reporter of the Hague Conference on Private International Law where the Convention was prepared. In D. v C., supra, at 103 and 104 the Court of Appeal relied upon it as a guide to the ideas and principles underlying the Convention. As to the wishes of the child, the Report said this at para 30:

In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests.

The Report went on to refer to the dangers of direct questioning of young people in a way which might force them to choose between two parents and the difficulty of defining a minimum age for taking into account the views of the child. What matters for present purposes, however, is that the child's wish was seen as a matter of real importance without distinction between remaining and returning as its object.

Finally, art 12 of the United Nations Convention on the Rights of the Child requires member states to respect the wishes of mature children in matters of this kind. In particular, Article 12(1) provides:

States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

New Zealand ratified that Convention in March 1993. On an application under the Hague Convention resort may be made to the United Nations Convention on the Rights of the Child where not inconsistent with the former: see M. v Director of Family Services, ACT (1993) SLC 80,243; 80,257 to 80,259 (FCt); Secretary for Justice v P. (1995) 13 FRNZ 264, 272 and S. v B. (District Court Auckland FP 004/1580/92, 8 April 1998 at p 15). There is in fact a tension between the principal anti-abduction thrust of the Hague Convention and respect for a mature child's wish to remain as a subsidiary consideration under the same Convention. But there is no such difficulty where the wish is to return. In the latter situation the anti-abduction thrust of the Hague Convention, and the United Nations Convention support for the child's wishes, reinforce each other. A mature wish to return is therefore inherently likely to give real impetus to the presumption already created by s 12.

Of course as a matter of degree the weight to be attached to the wish will turn upon all the surrounding circumstances. "Age and degree of maturity" are expressly referred to in s 13(1)(d) and para 30 of the Report on the Convention quoted earlier. Other

considerations will include the cogency of any reasons given by the child and the possible role of external influences. As Elias J said in C. v C., supra, at p 669:

The position at which it is right to take into account the views of children seems to me in the normal course to be the time when they are able to reason. That is a position supported by the convention on the rights of the child. Here, on the whole, the reasons put forward by the children for their objections are reasonably held. Even though there are indications that some reasons are affected by their lack of maturity and even though I have doubts as to their capacity to see the whole picture (so that I would not accept that their views should be determinative), I accept that both children are of an age and degree of maturity which makes it appropriate to take their views into account.

Summary of appeal principles

I make no attempt to provide a comprehensive summary of all the considerations which need to be taken into account on applications of this kind. However for the purposes of the present case I would summarise the apparent principles as follows:

(a) The Hague Convention has both normative and remedial roles. The interests of children are nominally promoted by demonstrating to potential abductors that inter-state abductions are futile and by promptly returning children who have already been abducted.

(b) Once it is shown that a child has been removed from a Convention country in the circumstances described in s 12(1) of the Guardianship Amendment Act 1991, the Court must order a return unless the case falls within one of the s 13 exceptions and also warrants the exercise of a discretion against return.

(c) In assessing both the scope of the s 13(1)(c) exception, and the proper approach to the discretion conferred by the introductory wording of s 13(1), there is a strong presumption in favour of returning the child.

(d) The Convention is concerned with the appropriate forum for determining the best interests of children, not with determining their best interests per se. Consequently, where the legal system of the country of habitual residence can be relied upon to give paramountcy to the interests of the child, a Convention application may not be used as an occasion for rehearsing those matters which would be relevant if and when custody and access issues fell to be determined.

(e) Nevertheless the Convention would not have included the s 13(1)(c) exception unless it were contemplated that in some exceptional cases it would be in the greater interests of the child that return should be refused.

(f) It will not be sufficient to satisfy s 13(1)(c) that allowing the applicant parent custody of, or access to, the child would gravely risk physical or psychological harm or otherwise place the child in an intolerable situation. The absconding parent must go on to show why the legal system of the habitual residence country would fail to protect the child against that risk pending the outcome of custody and access issues there on their merits.

(g) The Court must pay regard to the wishes of a mature child whether the wish be to stay or return. The weight to be attached to such wishes will turn upon age and

maturity, the reasons given by the child, possible influences upon the child, competing considerations and all the surrounding circumstances.

(h) Even where the case falls within one of the s 13 exceptions there is a discretion to make or refuse an order for return.

(i) The discretion to make or refuse an order is not unfettered. It must be exercised in the context of the Convention and the Act in which it is incorporated.

With that background I return to the particular grounds advanced in support of the appeal.

Ground one: irrelevant considerations relied upon

I would interpret the Judge's decision as one which proceeded through a sequence: (i) it was in the interests of the children that there be a custody hearing capable of producing the outcome which would best meet their needs; (ii) such a hearing would be possible only where both parents could play a full and effective part; (iii) such a hearing could be held in New Zealand, since both parents could play a full part here; (iv) such a hearing could not be held in Australia, since Mrs S would be incapable of participating there; (v) to return the children to face an ineffective custody hearing in Australia would inevitably confer custody on Mr S by default without satisfactory access to Mrs S; (vi) Mr S's record of exposing the children to his physical abuse of Mrs S, excessive control of the children, and the risk of his physically abusing them in the future, constituted a grave risk of physical and psychological harm and would otherwise place them in an intolerable situation; and (vii) when it came to the discretion the primary statutory objective of returning abducted children was not strong enough to outweigh those concerns for the children.

For myself I do not see in that sequence any flaw as a matter of technical principle or logic. It correctly seeks to further the interests of the children through choice of forum. It is not an attempt to derail the Convention process into a custody dispute per se. Any challenge has to come from an evaluation of the various assumptions upon which it rests.

Ground two: factual errors

Mr Pidgeon and Ms Southwick understandably had a great deal to say for and against the various factual premises upon which the scheme of the judgment rested. For reasons which will shortly emerge, I do not find it necessary to traverse the evidentiary basis for the factual findings. I am content to proceed on the assumptions that Mr S physically abused his wife repeatedly and severely throughout his marriage; that this was psychologically harmful to the children; that he has an over-controlling attitude towards them; and that there is the risk that this could spill over into physical violence towards them at some unspecified time in the future. Nor could I question the Judge's conclusions that the history of sustained physical and psychological abuse towards Mrs S has had devastating consequences for her; that she now suffers from battered woman's syndrome and post-traumatic stress disorder; and that at least in the absence of special and burdensome forms of support from her family, she is now incapable of mounting an effective challenge to his custody and access proposals in Australia. The question is whether this provides a sufficient foundation for resisting return.

Ground three: plainly wrong

It could not be suggested that this is one of those extreme situations in which a dangerous parent is poised to strike as soon as he can get his hands on the children, in which the children are liable to arrest, in which their country is in a state of civil unrest, or anything of that drastic nature. The opposition to return rests on the contentions that the mother is incapable of taking an effective part in any defended custody dispute, that custody will go to the father by default, that future access to the mother is likely to be inadequate, and that the father is an undesirable parent.

Those are valid reasons for thinking that returning the children to Australia would expose them to the risk of physical or psychological harm. Whether this could be elevated to a grave risk, and whether the risk includes a situation which might prove intolerable, is more questionable. The general tenor of decisions in New Zealand and overseas tends to suggest otherwise. On the other hand a broad value judgment has been exercised by an experienced Family Court Judge after days of oral evidence. Sitting on appeal without those advantages one should be slow to intervene. But I am relieved of the need to determine that issue in isolation because the decisive factor, to my mind, is the wishes of the children.

Ground four: wishes of the children

Even if the case could be brought within the grave risk exception under s 13(1)(c) there remained an overriding discretion. Under that heading regard had to be paid to the children's wishes. On that subject the Judge said this:

> **Given their ages, the children's wishes are clearly important in terms of any decision as to custody and access. They may have some relevance in some situations in terms of the exercise of the Court's discretion, if one of the s 13 grounds is made out, but they cannot to my mind be a determinative factor in terms of forum, save in the situation of their objecting to return which of course is not how it is in this case.**

In my view it was at this point that a critical error of principle occurred. The children's wishes were devalued in two ways. One was the contrast with custody and access proceedings. Rather than "clearly important" in that context it was thought merely that in these proceedings "they may have some relevance". The other was the unfavourable contrast with objections to returning. Only in the latter situation might they be "determinative". It is a reasonable inference that as a matter of principle the Judge thought that little, if any, significance should be attached to their wishes. This gains strength from his subsequent comment:

I have come to the view that there is a grave risk that the return of the children might well expose them to physical or psychological harm but that it would in any event place them in an intolerable situation. Not from their perception of course, but from mine.

I agree that the children's wishes were not "determinative" in the sense that all other considerations must be disregarded. To be weighed in the balance was an objective assessment of the undesirable consequences of return identified by the Judge. Also to be considered were their reasons and the influences which might have affected them.

However the children's reasons seem outwardly rational, namely a wish to return to their settled lives and home in Sydney. They have probably underestimated the

domestic consequences of the separation between their parents but they are probably right in their assumption that they can largely pick up their wider lives outside the home where they left off. One cannot criticise them for wanting to do so.

As to influences upon them, the two psychologists explained that children placed in an abusive home often tend to side with the aggressor. That can be due to the fact that they "identify with the person who appears to be right because they get their own way" (Ms Tanner) or because it is "part of the submission to control of the dominant and aggressive parent" (Dr Ratcliffe). I see no reason to question those principles. I am more cautious about Dr Ratcliffe's further view that "The fact that they have reported that they wish to go back to Australia with their father is very definitely an indication of his influence on them". I can see that expressed preferences as between the two parents should be discounted to some extent for the psychological reasons explained but it would surely be going too far to suggest that their expression of a wish to return is another nail in the father's coffin. That cannot be right. Still less could it be a catch 22 situation in which their wish to return is treated as another reason for requiring them to stay. The children's return to Australia would have repercussions for them extending well beyond personal preferences as between the two parents.

All three children (the youngest rather less emphatically) have given a clear and consistent indication of their wish to return. They have maintained their position after a substantial period of custodial separation from their father and in the face of their mother's attempt to persuade them to the contrary. As at the date of the first instance hearing they were respectively aged fifteen, thirteen and ten years. As children go, they had to be regarded as mature, particularly the older two. No one has suggested that the three be separated. All the indications are that they are well adjusted, intelligent, and well qualified to express a meaningful view.

The children have expressed clear views to the Court-appointed psychologist, to counsel appointed for the child, and to the Judge. There was no suggestion that they feared their father. They wish to return to his care. It was never their wish that they be brought to New Zealand. They wish to return to their friends, relatives, schools and settled lives in Sydney. In my view it would be patronising in the extreme, and contrary to the international conventions and legislation to which I have referred, to fail to give substantial weight to their wishes.

<u>Other discretionary considerations</u>

Ms Southwick submitted that returning the children to Australia would flout the lead given by Thomas J in the Court of Appeal decision of W. v Attorney-General (Court of Appeal CA 239/98, 6 May 1999 at p 28). Thomas J had castigated male-dominated Courts for insensitivity to a number of feminine concerns including the consequences of battering relationships. For myself I would have thought that the scientific foundation for recognising the debilitating consequences of such relationships is unanswerable, as is the need for the Courts to give that recognition practical consequence wherever legally possible. The underlying ideas are intrinsically powerful; they require no support from argumentum ad hominem or for that matter ad feminam. But the challenge, of course, is to find legal contexts in which they can be given effect. The present appeal is a case in point.

I have no reason to question this Judge's conclusions over Mr S's behaviour towards Mrs S over a very long period, nor the seriousness of the disability which is his legacy. The fact is, however, that the Hague Convention and its statutory adoption in New

Zealand leaves no room for judicial intervention for the purpose of restoring some kind of justice between husband and wife. The focus has to be kept firmly upon children – the interests and wishes of these children in particular, and the interests of other children in general in the future. Although it would be insulting to suggest that it is any kind of substitute, there may well be other legal contexts in which some form of redress may yet be open to Mrs S arising directly from the disability which he caused. What is plain, however, is that redressing wrongs between parents is not the purpose of a Hague Convention application.

The current impact of the Hague Convention upon battered wives may change. The Australian Law Reform Commission recognised the predicament of female victims of violence who take refuge elsewhere in its report "Equality Before the Law" paras 9.39-9.46. The Commission recommended that the Australian legislation be amended to provide that in deciding whether there is a grave risk that a child's return would "expose the child to physical or psychological harm or an otherwise intolerable situation" regard might be had to the harmful effects on the child of past violence or of violence to the abductor likely to occur if the child is returned. More significantly, it recommended a provision that the child should not be returned if there is a reasonable risk that to do so would endanger the safety of the parent who has the care of the child. Perhaps there will be similar developments in New Zealand. Plainly, however, this is a matter which could be addressed only by Parliament which in turn would no doubt wish to consult more widely within the international community. It is not an area in which the Courts can defy Parliament by departing from the legislation as it presently stands.

On another matter Ms Southwick was concerned that whereas Mr S brought his application in the Family Court on a private basis he was assisted in this one by the New Zealand Central Authority. Arrangements for representation in this Court are a matter for the parties. However I agree that it was unhelpful to be told that the New Zealand Central Authority views "with some concern" the precedent which the first instance decision would represent. I mean no disrespect to the Central Authority when I assure Mrs S that in this forum the Authority's opinions are of no moment whatsoever and they have been disregarded.

Conclusions

On the legal principles outlined earlier there must be considerable reservations about the Judge's conclusion that the circumstances he described could create a grave risk for the purposes of s 13(1)(c). However, that issue need not be addressed in isolation. At its highest, the case could have scraped into s 13(1)(c) on only the most marginal of bases. At that point the principal anti-abduction objectives of the Act, in combination with the clear wishes of the children, required an order for return. There was an articulated error of principle. The decision was also plainly wrong on the merits.

Form of order and costs

Having been invited to address on the form which any order for return should take, Ms Southwick did not seek any particular conditions or undertakings. Having regard to s 31B of the Guardianship Act 1968 there should be a brief deferment before the orders come into effect. There have been no applications for legal costs or removal expenses under s 28 of the Guardianship Amendment Act 1991.

Result

The appeal is allowed. There will be orders as follows:

> **(1) That the three children B, P and M, be returned on the first available flight to Australia.**
>
> **(2) That the children's passports be released in the first instance to Mr C R Pidgeon QC who will in turn use and release them in such manner as will best secure the return of the children to Australia.**
>
> **(3) That the order preventing removal dated 2 March 1999 and the CAPPS listing are varied to allow the children to return forthwith to Australia.**
>
> **(4) A warrant is to issue authorising any member of the police or a social worker to take possession of the said children and deliver them to a person nominated by the appellant for the purposes of returning the said children to Australia, such warrant to be held by Mr Pidgeon and not executed unless the need arises.**
>
> **(5) Leave is reserved to all parties to apply for costs and removal expenses under s 28 of the Guardianship Amendment Act 1991.**

The orders are to lie unsealed in the High Court at Auckland for three full working days after the date upon which this judgment is delivered. When sealed, the orders are to state the full names and dates of birth of the three children.

****

S. Applicant (Respondent in the court below)

v.

S. Respondent (Applicant in the court below)

In the Court of Appeal of New Zealand

CA 132/99

Hearing 3 June 1999

Coram: Keith, Blanchard and Tipping JJ.

Judgment on application for leave: 3 June 1999

Reasons and judgment on costs: 21 June 1999

Appearances:

M J Southwick and J McCormack for applicant

C R Pidgeon QC and R S Pidgeon for respondent

REASONS FOR JUDGMENT REFUSING LEAVE AND judgment ON COSTS of the court delivered by KEITH J

The proceedings and result in this Court

1. **We heard and decided this application for leave to appeal on a point of law as a matter of urgency. At the end of the hearing, which had also entered into the substance of the appeal, we refused leave to appeal. We now give our reasons for that refusal and make an order on an application for costs.**

2. **The application and appeal related to a judgment of Fisher J in the High Court in which he reversed the decision of the Family Court and made orders for the return to Australia of the three children, aged 11, 13 and 15, of the parties to the proceeding. Those orders were made in favour of the father of the children under the Guardianship Amendment Act 1991 which implements in the law of New Zealand the Hague Convention on the Civil Aspects of International Child Abduction.**

3. **The High Court judgment was given on Friday, 28 May 1999, and Fisher J, referring to the appeal provision, s31B, of the Guardianship Act 1968, directed that the orders for return were to lie unsealed in the High Court at Auckland for three full working days, that is until the end of Wednesday, 2 June 1999. Section 31B requires the application for leave to be made to this Court but it was mistakenly made to the High Court where Fisher J, on Wednesday 2 June, held, plainly correctly, that he had no jurisdiction to grant leave. He refused to delay further the effect of the orders, noting, first, that virtually all of the proposed questions of law appeared to involve value judgements about the way in which legal principle is applied, and, second, that, in addition to finding an error of principle, he had also concluded that the decision was plainly wrong on the merits.**

4. **Arrangements were made for the children to fly back to Sydney at 8.30am on Thursday, 3 June. Three Judges of this Court in a telephone hearing at 9pm the previous evening decided to adjourn the hearing of the mother's application for leave until 2.15pm on 3 June and to stay the effect of the orders in the meantime. The timetable was seen as consistent with the emphasis in the Hague Convention on matters being handled promptly : see the references to prompt return, expedition and acting without delay in its preamble and articles 1(a), 2, 7, 9 and 11.**

5. **This proceeding is a limited one, although we try to give some sense of the abuse which Mrs S has undoubtedly suffered in our summaries of the judgments given in the Family Court and the High Court. Mr and Mrs S were married in Fiji in 1982. They moved to Australia in 1988. In December last year Mrs S brought the children from Sydney to Auckland, her arrangement with her husband being that she and the children would stop over there where most of her close family live and then go on to Fiji, where Mr S's parents live, for a holiday. In fact Mrs S's intention was to stay in Auckland as she in fact did. On 9 December 1998 an interim custody order and an order preventing the children being removed from New Zealand were made in her favour on ex parte applications. The basis for the applications was that she was seeking to break free of the highly abusive relationship which was damaging for the children as well for herself.**

   The Convention and the legislation

6. **Mr S replied by seeking the return of the children under the Hague Convention to what was quite plainly their country of habitual residence. It is now common ground that Mr S has satisfied the preliminary requirements for an order under**

s12 of the Guardianship Amendment Act, which gives effect to article 12 of the Convention. The children would have to be returned unless the case came within one of the exceptions provided for in s13 which is designed to give effect to articles 13 and 20 of the Convention. Section 12 in general requires that children who have been wrongly removed from their place of habitual residence or retained away from it be returned to that place:

12. APPLICATION TO COURT FOR RETURN OF CHILD ABDUCTED TO NEW ZEALAND —

(1) Where any person claims —

(a) That a child is present in New Zealand; and

(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) That the child was habitually resident in that Contracting State immediately before the removal,—

that person, or any person acting on that person's behalf, may apply to a Court having jurisdiction under this Part of this Act for an order for the return of the child.

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

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

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

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

…

"Removal" or "removed" is to be interpreted as including retention : s2.

7. **Section13 provides the exceptions to an order for return. The only ones in issue in this case were those in para (c) of subs (1); para (d) was also relevant to part of the argument before us:**

13. GROUNDS FOR REFUSAL OF ORDER FOR RETURN OF CHILD—

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

…

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

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

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

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

8. **The word "may" in the introductory part of s13(1) makes it plain that the Court can make an order for return even although the party resisting the order has established one of the exceptions. That interpretation is supported by article 13 which provides that the requested state "is not bound" to order the return if a ground is made out. That residual discretion was critical in this case.**

9. **The provisions of the Act and Convention also make it clear that the issue before the Court is not the best interests of the children as such, but rather the choice of the forum where those interests are to be determined. The general principle or presumption of the Convention and the implementing statute is that the children are to be returned to their place of habitual residence; it will be for the courts of that place to make any determination about the best interests of the children. The legislation is to be interpreted so as not to undermine that presumption.**

The Family Court judgment

10. **In the Family Court, Judge Aubin, following a four day hearing in which extensive evidence was given by the parents, family members, a psychologist called by the mother and another appointed by the Court, and others, refused to make the order for return. The Judge said that "it is plain from the statutory provisions and from the authorities that Mrs S faces a formidable task … in opposing the return of the children to what is clearly their country of habitual residence at the relevant time". But he decided that she had satisfied that burden. Following a detailed review of the evidence the Judge came to these critical conclusions:**

I have come to the view that there is a grave risk that the return of the children *might well* expose them to physical or psychological harm, *but* that it would in any event place them in an intolerable situation. Not from their perception of course, but from mine. (emphasis added)

11. **That is to say, as he later made explicit in his judgment, the ruling was that subpara (ii) of s13(1)(c), rather than subpara (i), had been satisfied. Having come to that conclusion, he had to consider whether as a matter of discretion the children should nevertheless be sent back to Australia. He declined to make such an order. "Given the factors that have led me to find the ground established, I could hardly do otherwise."**

12. **The basis for the Judge's ruling that the children would be "in an intolerable situation" followed from his conclusion, based on the evidence, that "there are difficult parenting issues which need to be resolved for these children, and which need to be resolved in a manner in which the mother has an ability effectively to participate." He concluded that there was a strong probability that the mother**

did not have capacity and competency to participate effectively in the processes in the Family Court of Australia, because "she has been psychologically damaged by years of abuse and cannot, and in my view with good reason, bring herself to go back to where that abuse occurred, and where separated or not, her perception is that she would have to deal with the abuser and without having significant family support available to her".

The High Court judgment

13. **In the High Court Fisher J summarised the Family Court findings in the following passage:**

The Judge found that a grave risk stemmed from Mr S's history of, and propensity for, physical and psychological abuse. He had been abusing Mrs S throughout the marriage. The children had been harmed by their exposure to that sight. Their tolerance of it was unhealthy. Although Mr S had not been physically violent towards them, there was a risk that during their teenage years they might rebel with violent consequences.

The Judge found that because of her mental fragility Mrs S could no longer take an effective part in any custody proceedings in Australia. Even had she been able to return to Australia she would be unable to stand up to Mr S over custody matters, certainly not without the immediate personal support of her brothers. The two brothers had families and businesses in New Zealand. They would not be available to provide the necessary support in Australia. It would not be practicable for her to launch Australian proceedings from New Zealand, visiting Australia only for necessary hearings. Assessments requiring her presence would be called for by the Family Court of an Australian custody hearing and the likelihood that the children would see little of her in the interim. Although the children's wishes would be important in a custody context, the wishes could not be determinative on a Convention application unless objecting to return. Whereas Mr S had the means and ability to participate in a New Zealand custody hearing, Mrs S could not reciprocate in Australia.

The Judge concluded that there was a grave risk that to return the children would expose them to physical or psychological harm. It would also place the children in an intolerable situation to have issues concerning their future custody and access determined in Australia without effective input from Mrs S. Both parents could effectively contribute to a hearing in New Zealand. To allow custody to go to Mr S by default would risk future physical abuse to the children if they rebelled against his rule. It would also involve loss of adequate contact with their mother. These risks were sufficient to bring the case within s13(1)(c). The overriding discretion should be exercised against a return.

14. **It will be observed that the final paragraph overstates the Family Court finding in respect of subpara (i) of s13(1)(c).**

15. **Fisher J then noted the limits on his role in hearing the appeal against the exercise of a discretion following the hearing of oral evidence by a specialist tribunal: its views stand, unless among other things, vitiated by error of principle or an outcome which was plainly wrong. Continuing, he emphasised the principles and objects of the Convention. According to the preamble, the Convention is designed to protect children from the harmful effects of wrongful removal or retention and to establish procedures for their prompt return to the**

state of their habitual residence. The first object of the Convention is to secure the prompt return of children wrongfully removed to or retained in any contracting state. The Convention is designed not simply to protect the rights of the children immediately involved, but also to provide an assurance to overseas custodial parents that it is safe to allow their children to come to a Convention country for access and for temporary purposes. Those broad objectives, the Judge continued, are relevant both to the scope of the exceptions set out in s13 and to the exercise of the discretion once an exception has been established:

In the case of s13(1)(c) in particular, the presumption [of return] is strengthened by its restrictive wording. The restrictions stem from the placing of the onus upon the party opposing return ("establishes to the satisfaction of the Court"), the gravity of the required risk ("there is a grave risk"), the use of the word "intolerable" (s13(1)(c)(ii)), and the way in which the word "intolerable" indirectly qualifies the phrase "expose the child to physical or psychological harm" in s13(1)(c)(i) (see retrospective significance of the word "otherwise" in s13(1)(c)(ii)).

16. **The strength of the presumption of return had been emphasised on many occasions both here and overseas.**

17. **Fisher J did not accept an argument which Mr Pidgeon had made for the father that the mother's inability or refusal to return must be disregarded under s13(1)(c). But he did rule positively on the submission that the Court should be influenced by a mature child's wish to return in circumstances where it might otherwise have been inclined to allow the child to remain. He reached that conclusion notwithstanding the fact that s13(1), following article 13, refers only to a child of age and maturity objecting to being returned. He gave four reasons for that conclusion: (1) s13(1) set out the exceptions to the presumption of return; it might have been thought redundant to expressly articulate reasons supporting the presumption already stated in s12; (2) the mature child's wishes are to be respected in full or not at all; (3) the Conference report on the Convention referred generally to the wishes of the child; and (4) the obligation under article 12 of the Convention on the Rights of the Child to give due weight to the views of the child. It is convenient to note that that, in this Court, Ms Southwick for Mrs S did not challenge the conclusion that the children's views were relevant. Rather, her criticism went to the weight given to that factor.**

18. **The High Court Judge next rejected Mr Pidgeon's arguments that the Family Court had relied on irrelevant considerations or had made factual errors. On the latter he said this:**

Nor could I question the Judge's conclusions that the history of sustained physical and psychological abuse towards Mrs S had had devastating consequences for her; that she now suffers from battered women's syndrome and post traumatic stress disorder; and that at least in the absence of special and burdensome forms of support from her family, she is now incapable of mounting an effective challenge to his custody and access proposals in Australia. The question is whether this provides a sufficient foundation for resisting return.

19. **He then turned to the third ground of appeal, that the decision was "plainly wrong":**

The opposition to return rests on the contentions that the mother is incapable of taking an effective part in any defended custody dispute, that custody will go to the father by default, that future access to the mother is likely to be inadequate, and that the father is an undesirable parent.

Those are valid reasons for thinking that returning the children to Australia would expose them to the risk of physical or psychological harm. Whether this could be elevated to a grave risk, and whether the risk includes a situation which might prove intolerable, is more questionable. The general tenor of decisions in New Zealand and overseas tends to suggest otherwise. On the other hand a broad value judgment has been exercised by an experienced Family Court Judge after days of oral evidence. Sitting on appeal without those advantages one should be slow to intervene. But I am relieved of the need to determine that issue isolation because the decisive factor, to my mind, is the wishes of the children.

20. **It is convenient for the moment to move past the discussion of "the decisive factor" to Fisher J's "Conclusions":**

    At its highest, the case could have scraped into s13(1)(c) on only the most marginal of bases. At that point the principal anti-abduction objectives of the Act, in combination with the clear wishes of the children, required an order for return. That was an articulated error of principle. The decision was also plainly wrong on the merits.

21. **There may be some lack of clarity on the question whether the Family Court finding under s13(1)(c)(ii) of grave risk of the children being placed in an intolerable situation remains standing. We return to that question later.**

22. **Fisher J's discussion of "the decisive factor" begins with the proposition that even if the case could be brought within the grave risk exception there remained an "overriding discretion" and under that heading regard had to be paid to the children's wishes. He continued:**

    On that subject the Judge said this:

    Given their ages, the children's wishes are clearly important in terms of any decision as to custody and access. They may have some relevance in some situations in terms of the exercise of the Court's discretion, if one of the s13 grounds is made out, but they cannot to my mind be a determinative factor in terms of forum, save in the situation of their objecting to return which of course is not how it is in this case.

    In my view it was at this point that a critical error of principle occurred. The children's wishes were devalued in two ways. One was the contrast with custody and access proceedings. Rather than "clearly important" in that context it was thought merely that in these proceedings "they may have some relevance". The other was the unfavourable contrast with objections to returning. Only in the latter situation might they be "determinative". It is a reasonable inference that as a matter of principle the Judge thought that little, if any, significance should be attached to their wishes. This gains strength from his subsequent comment:

    I have come to the view that there is a grave risk that the return of the children might well expose them to physical or psychological harm, but that it would in

any event place them in an intolerable situation. Not from their perception of course, but from mine.

I agree that the children's wishes were not "determinative" in the sense that all other considerations must be disregarded. To be weighed in the balance was an objective assessment of the undesirable consequences of return identified by the Judge. Also to be considered were their reasons and the influences which might have affected them.

23. Fisher J might also have referred at that point in his judgment to the passage in the Family Court judgment quoted in para [11] above; while the Family Court Judge mentions the discretion to order return, notwithstanding that the ground is made out, he simply declined to exercise it in the terms indicated.

24. The High Court Judge then reviewed the evidence about the children's wishes and reached this conclusion:

The children have expressed clear views to the Court-appointed psychologist, to counsel appointed for the child, and to the Judge. There was no suggestion that they feared their father. They wish to return to his care. It was never their wish that they be brought to New Zealand. They wish to return to their friends, relatives, schools and settled lives in Sydney. In my view it would be patronising in the extreme, and contrary to the international Conventions and legislation to which I have referred, to fail to give substantial weight to their wishes.

25. He mentioned some "other discretionary considerations" and reached the "Conclusions" already set out in para [20].

The alleged points of law

26. Section 31B of the Guardianship Act 1968 (as enacted in 1998) confers a bare power on this Court to grant leave. It does not state any standard or criteria. We were referred to authorities on the grant of leave for a second appeal to this Court under s67 of the Judicature Act 1908. The same approach to s31B appears appropriate, with necessary changes, because s67 provides for general appeals and s31B for appeals on law alone. The appeal must raise some question of law capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of further appeal. Upon a second appeal this Court is not engaged in the general correction of error. While its function under s31B is to clarify the law, it is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already twice been considered and ruled upon by a court; *Waller v Hider* [1998] 1 NZLR 412, 413, applying *Rutherford v Waite* [1923] GLR 43 and *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343, 346-347. It will be seen that some of the alleged errors are not of any apparent negative consequence for Mrs S.

27. The first alleged error was that Fisher J was in breach of his obligation to make a clear finding that one of the exceptions in s13(1)(c) was made out before exercising his discretion . He had not adhered to the required two stage process. This submission relates to the possible lack of clarity mentioned above in para [21]. We read the judgment however as leaving standing the Family Court's conclusion that the exception had been made out. But, even had that conclusion been upset, as was possible in a general appeal, the position of Mrs S is not

helped. On the contrary. Such a decision would have been based on an appellate assessment of the evidence and it would not have presented any question of law for further review. Certainly no question of law was suggested to us. In any event, while we understand the argument for requiring the two stage process we do not see that it is compelled. If there are very strong reasons for ordering return and there is real doubt whether an exception is made out under s13(1), pragmatism may support going directly to the discretion.

28. **A related, second proposed ground turns on the use of the expression that "at its highest the case could have scraped into s13(1)(c) on only the most marginal of bases". That, it is said, sets the threshold at an inappropriate level. We cannot see that any alleged lessening of the standard is to Mrs S's disadvantage. In any event, as stated earlier, we read the judgment as leaving standing the finding that the exception is established; the appeal succeeded solely by reference to the so called "decisive factor" – the children's wishes. The principal proposed grounds for the second appeal relate to that discretionary element and we now turn to them.**

29. **They were that Fisher J had placed inappropriate weight on the expressed wishes of the children and that he wrongly gave their wish to return the same weight as a child's objection to return – an exception expressly provided for in s13(1)(d).**

30. **As noted earlier (para [17]), Ms Southwick accepted that the wishes of the children to return were relevant to the exercise of the discretion to order return if an exception were made out. We can see no error of law in the exercise by Fisher J of that discretion: the discretion exists; there appears to be no reason in principle to distinguish between the wishes of a sufficiently mature child to return or to stay; and, at best, the argument is that different Judges might have given different weight to the children's wishes as against the exception established on the facts of the particular case.**

31. **A related alleged error concerned the upsetting by Fisher J of the exercise of a discretion by the Family Court. There is a strong argument that the Family Court effectively denied itself that discretion (see paras [11] and [23] above). In any event there is the answer which Fisher J himself provides: that the Family Court Judge erred in his understanding of his discretion in the passage first quoted in para [22] above. That is the "articulated error of principle" to which Fisher J referred in his Conclusions.**

32. **The final alleged error of law is that there is no available forum except the New Zealand Family Court – because of Mrs S's inability to return to Australia – and the Hague Convention is about which available forum should be used. But while the cases often do speak about the choice of forum, the Convention is in its own terms concerned to ensure the prompt return of children to their place of habitual residence. It will often be the case that court proceedings will then take place there, but that is not essential to the Convention system.**

Conclusion

33. **For the above reasons, we concluded that no question of law had been proposed that required the grant of leave to appeal.**

Costs

34. No cost orders had been made at any earlier stage of this proceeding. Mr Pidgeon, on instructions, sought costs on the application for leave to appeal. Ms Southwick opposed, referring to her client's dire financial position and Mr S's affluence. In the circumstances, we make no order for costs.

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