http://www.incadat.com/ ref.: HC/E/UKe 419
[19/12/2000; Court of Appeal (England); Appellate Court]
T.B. v. J.B. (Abduction: Grave Risk of Harm) [2001] 2 FLR 515

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

19 December 2000

Laws, Hale and Arden L.JJ.

T.B. v. J.B.

HALE LJ (giving the first judgment at the invitation of Laws LJ):

1. This is an appeal against the order of Singer J who on 27 October 2000 dismissed the plaintiff father's application under the Child Abduction and Custody Act 1985 and the Convention on the Civil Aspect of International Child Abduction 1980 (set out in Sch 1 to the Child Abduction and Custody Act 1985) (the Hague Convention) for the return of his three children to New Zealand. The judge based his decision on art 13(b) of the Convention:

'. . . the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation . . .'

2. The father appeals on the ground that the judge was wrong to hold that ground made out, or if it was, that it was wrong so to exercise the discretion thus conferred upon him as not to order the children's return. The mother wishes to uphold the decision, not only on the grounds given by the judge, but also on wider grounds related to the objections and risks to the oldest child, K.

History

3. The facts of this case are unusual, in that the source of the alleged risk to the children is not their father, the mother's first husband, but the mother's second husband, the father of her youngest child, who is not the subject of any proceedings. It is important to remember, however, that the Convention is concerned with the return of the children to the country of their habitual residence, and not with their return to any particular person. The relief sought is an order for their return to New Zealand. The risk of harm must stem from that return, but not necessarily from the person who seeks it. The fact that he is not to blame for the situation facing them is not strictly relevant to art 13(b), although it may be relevant to the exercise of the court's resulting discretion.

4. The father is a New Zealander, now a senior sergeant in the police force. The mother is British but emigrated with her parents to New Zealand in 1964 at the age of 6. The parties married in 1979. Their oldest child K was born on 1 June 1986, and is now aged 14 and a half. Their second child A was born on 21 December 1987, and is now nearly 13. Their youngest child KI was born on 13 May 1990, and is now aged ten and a half. All were born and brought up in New Zealand.

5. The parents separated in July 1990, soon after KI's birth. The father has not seen KI since and at one stage wished to be reassured as to his paternity, although he has paid child support for all three children since the New Zealand equivalent of our Child Support Act was implemented. The mother left the former matrimonial in W (on the North Island) and afterwards lived with MH, another police officer, at various places, all a considerable distance away from the father's home and from 1991 to 1993 on the South Island.

6. The parents made a separation agreement dated 30 August 1991. They agreed to joint custody, with the mother as principal caregiver and the father to have day to day care at times to be agreed between them during the school vacations. They acknowledged that both remained guardians. The mother was not to 'take the children overseas for other than holiday purposes during school vacations except with leave of the husband' (cl 2.02).

7. K and A spent the second half of their 1991 Christmas holidays with their father. This was the last time K saw him: she says that something happened then which made her refuse to go on any more visits. In December 1992 the father applied for a warrant to enforce their agreement. This was referred to mediation, culminating in agreed orders for defined access between the father and both K and A, made on 17 November 1993. In fact only A has continued to see his father regularly, for about four weeks each year, and obviously has a good relationship with him. K for whatever reason has unhappy memories of him and KI has no memories at all.

8. The mother and MH married in June 1994. Their son B was born 26 October 1994, and is now aged six. They moved to their last matrimonial home, at O on the western side of North Island in 1995.

9. In about February 1997, the mother and MH separated. The mother's case is that MH is an abusive and unpredictable person, who maltreated both her and the children, and whose behaviour was in many ways bizarre. He went into a psychiatric unit for a short time when they separated. She and the children received professional counselling for some time afterwards. She remained very frightened of him and what he might do. He continued to cause them trouble after the separation, last visiting the home in February 2000 and having an altercation with the estate agent who was trying to sell the house.

10. The mother had finished a course of training as a teacher in December 1999 and was offered work here. She decided to take it. She says that her primary motivation was to get away from MH although she also had financial worries and believed that her creditors would not pursue her here. She wanted a 'breathing space'. Her case throughout has been that she was too frightened of what MH might do to bring proceedings against him. Now that he has been brought into this case by the father, she is too frightened to go back at all.

11. She did not ask either the father or MH to agree to her bringing the children here or make an application to the court for permission to do so. She kept her plans a secret. The father's case is that he would have agreed to a trip here to work for few months provided that there were safeguards to ensure their return. Even now he is prepared to wait for their return until the end of January, in time for the new school year.

12. They came to this country at the end of March 2000. The father was very upset when he found out and launched these proceedings by originating summons on 30 May 2000. Affidavits were filed, by the father's solicitor, the father, MH, and two by the mother.

13. On 30 June 2000, Sumner J directed that a court welfare officer interview the three children, and their half brother B, 'to determine whether they object to being returned to New Zealand and whether they have reached an age and degree of maturity at which it is appropriate that the court should take account of their views'. Mr R interviewed them on 27 July 2000. His report, dated 31 July 2000, bears witness to 'just how profoundly upset they were'. K objects to returning and is, in the court welfare officer's view 'of an age and maturity at which it is appropriate to seriously take into account her views'. He would say the same of A, but A was confused about having to choose between his parents. KI was clear that he did not want to go back but his maturity was more difficult to assess.

14. On 14 July 2000, Sumner J gave leave for the mother to obtain expert evidence of her present mental health and the impact upon her of a return to New Zealand. She was seen by a consultant psychiatrist, Dr Y, on 1 August 2000. In his report dated 3 August 2000, he found the mother to have symptoms of mild to moderate depression, with features of post-traumatic stress disorder, which seemed to have recurred with the instigation of the proceedings. If returned, the depressive illness would become more profound. The risk of suicide would be heightened but the children would not be at risk from their mother (which I take to be a reference to the risk of extended suicide).

The judge's decision

15. Three objections to return were raised on behalf of the mother. First, she accepted that the father had rights of custody by virtue of his guardianship and her agreement not to take them overseas without his consent. But she argued that he was not in fact exercising those rights in relation to K and KI, not having seen K since 1991 and KI since 1990. Thus, under art 13 the requested state was not bound to order their return because '(a) the person, institution or other body having the care of the child was not actually exercising the custody rights at the time of removal'. However, the judge held that it was clear from the correspondence that the mother kept the move secret from the father deliberately lest he took steps to delay or frustrate it. There was every reason to suppose that had he known he would have exercised his right to prevent the removal. Hence, in accordance with the reasoning in the New Zealand case of Ryan v Phelps [1999] NZFLR 865, she cannot pray in aid a failure to exercise rights which she has by her very action in removing the children prevented him from exercising. There is no appeal on her behalf against that holding.

16. Secondly, the mother relied upon K and KI's objections to return. Article 13 also provides, independently of (a) and (b), that:

'The judicial or administrative authority may also refuse to order the return of the child if it finds 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 his views.'

17. Mr R's evidence in support of the conclusions already mentioned is quite striking. K had been happy here until she learned of the father's application:

'. . . she had absolutely no wish to return, nor ever to see her father again. She cried and cried. She could not understand why he would do such a thing . . . She . . . said she hated him . . . with tears streaming down her cheeks, told me that her father had "touched" her when she was about five or six. It happened on a number of occasions and she did not know what to do . . . She said that she had told her mother, but had felt her mother had not

believed her at the time . . . She described [MH] as a violent man, whom she remembered hitting all of them, particularly her mother and brothers . . . She thought he had brought nothing but violence and unhappiness to the family and caused a great deal of stress . . . I explored with her what it might be like to return to New Zealand and K was horrified at the prospect. She thought it would really upset her, that she would be unable to think or concentrate and that it would be going back to an unhappy, stressful existence . . . It was clear to me that K had a good grasp of her circumstances and had spoken compellingly about her wishes and feelings.'

18. As to A:

'In marked contrast to his brothers and sisters, A really wants to see his father . . . A was firm in his view that "no one likes M . . . we all hate M". He described being regularly hit by him and that if his mother was out . . . he would "starve them", sending them to bed with only bread and water . . . He described M regularly beating his mother, banging her head against a door and how he hated him for it . . . Suddenly and quite unexpectedly as far as I was concerned, A began to cry in a most distressed manner. He said he felt terrible for lying to his father . . . He was distraught that he had not been honest with his father. A said that he would like to go back to New Zealand but did not really know what was best for him . . . He really misses the country and would like to be back with his father. As a result of his unhappiness he says he believes he is the centre of all the arguments and fights at home, between him and his siblings :'

19. As to KI:

'When I started to explore the possibility of them all returning to New Zealand, KI defiantly said "Well, never!" to such an idea . . . Although KI said he missed his grandparents, his friends and cats, and sounded sad as he said this, he was clear and firm in his assertion that he did not want to go back to New Zealand. As KI cried a lot during our meeting, I asked him at one point what was causing him so much distress. Quietly and simply, he said, "It's remembering the bad times".'

20. The judge rejected this argument:

K's objections are clear, although based upon what may be the false premise that return entails contact with her father or at least pressure to commence it. If this were the only basis for not making a return order in her case I would, if it were necessary, as a matter of discretion regard the policy of the Convention as carrying more weight than her views. For if the real basis of her objections is anxiety concerning parental contact, there can be no better and [more] appropriate forum to resolve any such issue than the New Zealand courts.'

21. He expressed no view about KI's objections, presumably because he felt it unnecessary to do so in the light of his conclusions about K and on art 13(b). The mother appeals against that holding in respect of K.

22. Thirdly, the mother relied upon the grave risk of harm to the children or of their being placed in an intolerable situation. The judge took from the court welfare officer's report all the children's fear of MH and Mr R's view that 'the children need the love and support of the mother in order to thrive and that "her ability to provide that appears to be genuinely under threat if she is made to return"'. Hence he concluded:

'I have no doubt that any serious or sustained diminution or breakdown in the continuity of her ability to provide for these children would indeed expose them to psychological harm and constitute an intolerable situation for them.'

He went through the mother's history of her problems with MH (to which I must return) and concluded:

'I have to say that I do regard it as having an underlying consistency. What comes across clearly, in my view, is a pattern of domestic abuse which can and which in this mother's case more likely than not did produce enduring sensations of anxiety, lack of achievement, loss of self esteem and powerlessness :'

Thus:

I believe her to be seriously vulnerable to the impact of these heightened anxieties should she be obliged to return to New Zealand to care for the children. The problems she will then encounter are the problems that she left . . . She will face the same potential housing and financial problems, the same difficulty in securing suitable and suitably paid employment, and anxieties of the same nature about MH's potential for dominating, subjugating, manipulating and controlling her and the children by his psychologically damaging activity. She will, in short, and the children will, face the same risk as previously she and they ran, but she might cease to be able to cope. They are dependent upon her coping . . . I do not regard the risk of that as slight, nor the damage that could result. I view those risks as grave.'

24. He was fortified 'to a degree' in that conclusion by the evidence of Dr Y already referred to. He rejected the doctor's oral evidence that the mother was in a high risk category for suicide, but 'the view I hold of that very unexpected part of his evidence does not, to my mind, detract from the reliance I feel safely able to place on his prediction of more profound depressive illness' if the mother were obliged to return against her will to New Zealand.

25. Hence he concluded that the requirements of art 13(b) were made out. He proposed to exercise his discretion to decline to order the children's return. No relevant consideration militated against that result, which on the basis of his findings was consistent with the policy of the Convention.

The appeal

26. Mr Kirk, on behalf of the father, argues that the judge was wrong to reach that conclusion. He is prepared for the sake of argument to accept that events around the separation in 1997 were as the mother describes them. But that was some three years before the flight. The contemporaneous evidence does not indicate that she was fleeing from a currently intolerable situation but rather for financial reasons, to escape from her creditors, to earn some money and gain herself a breathing space.

27. Normally, this court would be most reluctant to disturb the trial judge's findings of fact. But Hague Convention cases are summary proceedings in which the judge has to do the best he can to apply the terms and principles of the Convention largely on the basis of the affidavit evidence put before him: see Re AF (a minor) (child: abduction) [1992] 1 FCR 269. The whole point of the procedure is that the parent left behind should not be obliged to travel to the country to which his children have been taken in order to give the evidence needed to secure their return. This is a difficult exercise but one in which the trial judge is only a little better placed than an appellate court. It is necessary, therefore, to look at the evidence adduced in support of the mother's case in rather more detail.

28. The main allegations about her life with MH which emerge from the mother's affidavits and accompanying documents are these. (1) He has an abusive and unpredictable personality; initially his abuse was predominantly verbal and emotional, but as time passed it became more centred on physical violence; they lived in daily fear of his violence and his temper. (2) He frequently made very derogatory remarks towards the children and her, and engaged in violent or bizarre behaviour, flinging dinner plates across the room, throwing his wedding ring in the rubbish, eventually smashing it to pieces with a hammer insisting that the children watched, making dramatic threats to kill himself in front of the children. (3) In December 1994, he took B to the top of the stairs and threatened to throw him downstairs if he did not stop crying. (4) In May 1995, when they moved into their O home, he blamed the mother for the lights fusing, dragged her off her feet and smashed her head against the wall, insisting that the children watched, splitting the skin on her scalp. (5) In February 1997, he committed anal rape upon the mother, after which she had anal injuries; this was not the first time, on her case, that he had raped her. (6) Probably in March 1997, he assaulted K in the garage, standing on her foot, and threatened to kill her, after which K was both hurt and upset; K herself complained to the police of at least two assaults around this time, being punched in the ribs and hit on the head. The mother had been in touch with the police welfare authorities who eventually, according to her, gave him a choice of admission to a psychiatric ward for observation or arrest. He chose the former and left the police force soon afterwards.

29. The father is in some difficulty responding to the mother's allegations against MH, particularly as the mother was reluctant for him to involve MH in these proceedings for fear of what he might do. Nevertheless, the father has been in touch with him, and he denies or puts a different slant on much of the mother's case. But the mother's allegations draw some considerable support from contemporary events and from the children's own accounts.

30. The mother saw a psychologist, Ms F, in April 1997 under the auspices of the Accident Rehabilitation and Compensation Insurance Act 1992, which covers counselling for 'mental and nervous shock' resulting from sexual abuse and sexual assault. Ms F says that 'when I first met J she was extremely traumatised by her husband's violence'. In her report to the ACC (Accident Compensation Corporation) in April 1997 she records the mother's allegation that MH had raped her four times during the last year, but that she 'Felt unable to lay charges. Has such low self esteem feels she deserved what she got. Recurrent events occurred because of violent threats made against J's children'. The consequences of the abuse were 'Mild to moderate reactive depression. Not sleeping, eating, weapy [sic]. Lowered ability to make decisions, concentrate, short tempered with children. Low self esteem, feels worthless, a failure'. But there were 'no current fears of self harm'. The report predicted that 20-25 sessions of counselling would be needed in order for her to be able to function within normal limits. The ACC granted 15 interim sessions but these were not completed because of problems of distance and travel. Her notes suggest that they had six sessions in 1997, two in 1998 and the last one in April 1999:

'I would have to say that J was still suffering a considerable degree of PTSD [post-traumatic stress disorder] throughout the two year period and felt only a little safer when I last saw her than she did at the start . . . throughout our period of contact I feared for the safety of this family, but also doubted that the legal and police system could really protect her.'

She also supports the mother's complaint of continuing harassment after the separation:

'The process of counselling continued to be hampered by her former husband's harassment, initially with unexpected visits, and later continuing phone calls and letters. They were still continuing when I last spoke to J.'

31. Both Ms F and the mother's New Zealand solicitor had tried to persuade the mother to get a protection order against him: a letter from Ms F to the solicitor dated 5 March 1998 lists those 'incidents which have a possibility of substantiation from sources other than J'. Even then there was a possibility of her losing her home, the pressure she was under was having a very negative effect upon her studies with the risk that she would fail her course and consequently her hopes of employment and security for her family.

32. There is also evidence of the adverse impact upon the children. A consultant paediatrician referred KI and B to a clinical psychologist, MR FT, in November 1996. In a letter to the paediatrician, Mr FT states that

'I believe there are much more significant issues regarding the presentation of both KI and B, and incidentally their older siblings, E [sic] and K. It appears that there are some very significant domestic issues which are certainly impacting upon the children's behaviour and emotional well being.'

He also took the 'rather unusual' step of writing in March 1997 to the consultant psychiatrist who was due to see MH:

'Reports by J and independently by the children indicate that he adopts a very threatening manner toward them, commenting that they are "brain dead", "idiots", and that if they do not behave he will "slice them up". He has also apparently recently taken to lying on the floor in the family home and saying that he is going to die in front of the children. He has also indicated to J that if she ever tells anyone about these events, or if she were to leave him, he would "hunt her down and slice her up" . . . J has been physically assaulted in front of the children, an event which they have talked about freely, but with some degree of distress. While J claims that MH does not physically abuse the children, the children themselves indicate that they have been kicked and hit by MH on numerous occasions in the past.'

From his notes it is clear that he was seeing the mother and children for most of 1997. The mother was also reporting financial worries and harassment from MH, including threats of self harm.

33. In April 1997, the police conducted evidential interviews with K and A. K disclosed physical assaults, specifically being punched in the ribs in the garage the previous Tuesday, also being hit on the head while putting things in freezer. She also mentioned the assault on the mother when they moved into O and threats to kill himself, running scissors up and down his arms, pretending to cut his wrists. A disclosed 'less minor' physical abuse. The mother also made a statement but said that she did not want him prosecuted: she just wanted him to get better and receive the help he needed.

34. As already noted, K and A have also complained of MH's violence to them and to the mother to the court welfare officer, Mr R, when they were interviewed for the purpose of these proceedings.

35. The mother complains of continued harassment after the separation: telephoning regularly immediately after the separation, at all hours of the day and night, later less frequently but still continuing, making threats to kill her, talking of his 'spies'. She also complains of visits to the house: one breaking in at 2 am in August 1998, another in January 1999 when he tried to coax B into his car, and another in February 2000, when he threatened to rip out the 'For Sale' signs, and confronted the estate agent. Since being involved in these proceedings, he has taken to visiting her parents frequently but uninvited.

36. Her financial problems featured in her contacts with professionals from the start. She was studying for a degree and working as a teacher's aid. They had not separated their finances. In 1999 she learned of MH's overdraft and credit card debts which were added to the joint mortgage liability. Ms F refers to her fear of losing her home and to the problems she was having with her course in the letter to the solicitors of 5 March 1998; and to the prospect of a mortgage sale in her notes of their last appointment in April 1999. The mother first saw a student counsellor, MA HW of the University of W, H, in June 1999. They later corresponded by e-mail. They discussed her sister's death from cancer in July 1999, and her problems in her relationship with her own mother. The bank was due to take over the house. The fall in the market and the additional debt resulted in an apparently negative equity. She was also having trouble with her studies. On 26 October 1999 she wrote:

'I have just had a ring from my husband telling me that he is back up in the North Island, in P North in fact so not far away at all. It has given me the creeps again even with orders to stop him coming to the house.'

The advice given was to change her lawyer and plan what to do if he tried to make contact. He did make contact in February 2000.

37. The mother wrote a letter which the father received on 7 April 2000, after they had arrived here, apologising for not telling him 'but I just could not run the risk of MH finding out'. He was 'right to have warned me about him and he is still very sick'. She explains her financial problems and how she feels trapped. 'I feel boxed in by MH's control and interference and I need space to work out best way out of this spot.' She has been offered a job here which lasts until Christmas. He can have an extra long visit at Christmas to make up for it. The mother's parents also wrote apologetically that the mother wanted to get away from MH's harassment and went on to describe her financial problems. She talks of a 'breathing space' in her first affidavit, and in her second says that she sees this Christmas as 'something of a staging post' and has not ruled out the prospect of returning to New Zealand, although the circumstances would have to improve dramatically for this to be realistic.

38. Hence Mr Kirk argues that by the time the mother left New Zealand, any immediate risk from MH had passed. Her worries were mainly financial, the impending sale of the house with a possible negative equity, the difficulties which this would cause, and her problems in finding work after finishing her course. That this was uppermost in her mind is borne out both by her own letter to the father and by her parents' letter to him. Furthermore at that stage she was also indicating that she only wanted a breathing space. She was either intending to go back at Christmas or ambivalent about it. Finally, although we have no evidence of New Zealand law on this, others were urging her to obtain a protection order in 1998 but she had not done so. Either this indicates that her fear of MH was not as great as she now claims, or it indicates that the courts of this country should be able to rely upon the courts of New Zealand to give her the protection she requires.

Principle

39. The policy of the Convention is that disputes about children should be determined in the courts of the country of their habitual residence. Children should not be uprooted and placed beyond their jurisdiction. It is for them to determine where the best interests of the children lie. Article 13(b) is the one exception to this. No requested country can be expected to return children to a situation where they will be at serious risk, but this must not be turned into a substitute for the welfare test, usurping the function of the courts of the home country.

40. Hence the courts in this country have always adopted a strict view of art 13(b). The risk must be grave and the harm must be serious. As Lord Donaldson of Lymington MR said in Re C (a minor) (abduction) [1989] FCR 197 at 208, [1989] 2 All ER 465 at 473: 'the words "or otherwise place the child in an intolerable situation" . . . cast considerable light on the severe degree of psychological harm which the Convention has in mind.' The courts are also anxious that the wrongdoer should not benefit from the wrong: that is, that the person removing the children should not be able to rely on the consequences of that removal to create a risk of harm or an intolerable situation on return. This is summed up, after a review of the authorities, in the words of Ward LJ in Re C (abduction) (grave risk of psychological harm) [1999] 2 FCR 507 at 517, quoted by the judge in the present case:

'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability, which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'

41. Thorpe LJ has taken matters a step further in the now oft-cited passage from another Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510 at 520, also quoted by the judge:

'In testing the validity of an art 13(b) defence trial judges should usefully ask themselves what were the intolerable features of the child's family life immediately prior to the wrongful abduction? If the answer be scant or non-existent then the circumstances in which an art 13(b) defence would be upheld are difficult to hypothesise. In my opinion art 13(b) is given its proper construction if ordinarily confined to meet the case where the mother's motivation for flight is to remove the child from a family situation that is damaging the child's development.'

42. It is important not to take this too far. It is not an addition to the statutory text. It is merely guidance on what is more likely to surmount the high hurdle presented by art 13(b). It is a useful way of distinguishing those cases where the abduction itself has caused the problems feared from those cases where it has not. But it is possible to hypothesize circumstances in which events since the departure have created such a risk: obvious examples are the outbreak of civil war or the destruction of the children's home and livelihood. And concentrating on how things were before they left brings with it particular difficulties for the courts of the requested state in assessing such evidence as is available of events in the home country. But the judge in this case, having done that, concluded that it fell within this dictum.

43. As Mr Nicholls on behalf of the mother points out, when the Hague Convention was first drafted, the paradigm abductor was not the children's primary carer, but the other parent who 'snatched' them away from her. Hence a deliberate distinction was drawn between rights of custody and rights of access. Summary return was not the remedy to protect mere rights of access. Now, however, in 72% of cases, the abductor is the primary carer: the parent who has always looked after the children, upon whom the children rely for all their basic needs, and with whom their main security lies. The other parent is using the Hague Convention essentially to protect his rights of access. He can do this because 'rights of custody' include the right to veto travel abroad, and most such parents now enjoy that right. But return to the home country may be a sledge hammer to crack a nut, because however much the children need contact with the other parent, they need a secure happy home with a competent and caring parent even more. There is often good reason to believe that the home country will allow them all to emigrate. It is therefore regarded as a real risk by the Hague Conference that spurious art 13(b) defences will be raised in such cases: there is equally a

real risk that the courts of the requested states will either succumb too readily to such defences, out of the kindness of their hearts and a natural reluctance to do anything which does not appear to them to be in the best interests of the children, or alternatively become unsympathetic and fail to recognise those few which should succeed.

44. It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the 'left behind' parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it. This case is, however, particularly difficult to assess, not so much because of the ill-treatment, but because of the lapse of time since the separation.

Article 13(b)

45. Mr Kirk makes some very powerful points on behalf of the father. There are however some very powerful points to be made on the other side. Mr Nicholls argues that the suggestion that her motives in coming here was primarily financial is highly selective. It was all part and parcel of the enduring consequences of a disastrous relationship. This is a case in which there is not only evidence of abuse and maltreatment of the mother from which she suffered and is still suffering harm; there is also evidence of harm to the children.

46. There is ample evidence to support the judge's conclusions about the maltreatment of the mother. The rape allegation is very serious indeed. Although the alleged perpetrator was not prosecuted, the mother was provided with counselling under a scheme for victims of sexual assault, which indicates that the authorities also took it seriously. However, had that been all I would have been inclined to say that enough time had gone by for the mother to have recovered sufficiently to be able to give the children the care and support they need.

47. But that is not all. There is also ample evidence to support the judge's conclusion that the pattern of abuse in this case produced 'enduring sensations of anxiety, lack of achievement, loss of self esteem and powerlessness'. Her counsellor provides great support for the fear that the mother was under as late as April 1999, two years after the separation. The mother cannot be accused of having manufactured her fears then in order to build a case to support an eventual abduction. There is also support for the diagnosis of post-traumatic stress disorder in the past and continuing psychological damage in the present in the evidence of Dr Y Although his evidence of the risk of suicide was contradictory and thus rightly rejected by the judge, the judge was entitled to draw support for his principal conclusions from Dr Y's evidence of the mother's present mental state. Dr Y was careful not to suggest that she was suffering now from post-traumatic stress disorder: he said that she had features of it. It is well known that victims of abuse can suffer such symptoms for a long time afterwards: and that it can result in reactions which to people who have not had such experiences can appear irrational. It is also well known that victims of domestic abuse are often too afraid to escape or take proceedings which to others are the rational and sensible response to their situation. This particular mother was on the face of it intelligent and articulate: it is very odd indeed that she did not do more to protect herself, her children, their home and their financial situation, unless she was indeed as fearful of MH's reaction as she told both her solicitor and her counsellor.

48. MH claims that this was the result of ambivalent feelings towards him. He suggests that they continued to meet and even share a bed until the end of 1997. This is difficult indeed to reconcile with the contemporary accounts given by Ms F and Mr FT. His behaviour since the separation shows the familiar signs of aggressive possessiveness. His involvement in these proceedings, understandable though it is from the father's point of view, can only have made matters worse.

49. Furthermore, although the principal source of the risk of harm to the children is returning them to a situation in which the mother on whom they depend for their every need is unable to provide for those needs, it is compounded by the harm that the children themselves have already suffered and are suffering now.

50. The events of 1997 involved abuse of the children as well as the mother, although it appears that the mother herself was not aware of the extent of this at the time. There is the evidence from Mr FT that the younger children were suffering significant psychological harm from something in their lives and that they independently supported the claims of domestic unrest. There is evidence of harm to K and A from the police interviews at the same time. Most troubling of all is the evidence of Mr R as to the children's present situation. These children were unusually and deeply upset. He was not asked to report upon the risk of harm, but he was so impressed in particular by K's distress that he commented that 'I would be concerned as to the effect on her if she was to return to New Zealand. It might put her at risk of suffering psychological harm, because of the circumstances in which it would place her'.

51. K's situation deserves particular consideration. She is 14 and a half. She is clearly of an age and maturity where it is appropriate to take account of her views. She clearly does object to returning to New Zealand. The judge felt able to counter this because he felt that it was based on a false premise. Mr Nicholls argues that it is worrying how often the clearly expressed views of mature children are discounted for such reasons when we do not have a precise record of the questions asked. But in any event, K's objections were based on more than a fear of reintroduction to her father. She was concerned about why her father was bringing these proceedings, given the length of time since he had seen both her and KI. Above all, she was afraid of MH and horrified at the thought of going back to the unhappy stressful existence in New Zealand. K's objections are therefore relevant, not only in themselves as objections, but also as a further indication of the harm that she will suffer if forced to return against her will.

52. A's situation is even more difficult. Mr R was concerned that if he returned to New Zealand on his own:

'. . . there is a real risk of him becoming isolated from the rest of his immediate family. Separating him from his mother and siblings could be counter-productive, considering how they have been closest to him through his formative years. I wonder whether the court making the decision for him will, in effect, ease him of the burden of carrying his divided loyalties.'

KI needs a competent coping mother most of all. The fact is that if any of the children are at grave risk of harm if they are returned to New Zealand, then they all are.

53. This was not an easy case but it was essentially an issue of fact. The judges of the Family Division need no reminding that the application of art 13(b) is quite different from the application of the ordinary welfare test in children's cases. Nor do they need reminding of the high threshold it presents. They have a record second to none in complying with this country's obligations under the Convention and returning children to their home countries.

The judge in this case was quite well aware of the law and directed himself properly upon it. The factual issue concerned the assessment of risk to these children. Judges of the Family Division are highly skilled and experienced in assessing risk to children. It forms a large proportion of their work. They know a great deal about family relationships and how they work. Their decisions on matters of fact, even if reached largely on the papers, should not readily be overturned by this court. In my view there was sufficient here for this very senior and experienced judge to conclude that art 13(b) was satisfied in respect of all three children. K's objections independently triggered the discretion under art 13 in relation to her.

Discretion

54. Mr Kirk argues that the Judge did not adequately address the factors relevant to the exercise of his discretion, as first suggested by Waite J (as he then was) in W v W (child abduction) [1993] 2 FCR 644 and later adopted by him in the Court of Appeal in Re H (minors) (abduction: acquiescence) [1996] 3 FCR 425 at 429-430. Apart from (c), the consequences of the acquiescence, which is irrelevant here, these were (a) the comparative suitability of the forum to determine the child's future in the substantive proceedings; (b) the likely outcome (in whichever forum) of the substantive proceedings; (d) the situation which would await the absconding parent and the child if compelled to return; (e) the anticipated emotional effect upon the child of an immediate return (a factor which is to be treated as significant but not paramount); and (f) the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.

55. Assuming, without deciding, that these factors are also relevant in art 13(b) cases, (d) and (e) are already encompassed in the finding that art 13(b) is made out. As to (a) and (b), the substantive dispute in this case is not about who should have the primary care of these children. It is about whether the mother should be allowed to bring them to this country to live. In the absence of evidence to the contrary we are entitled to assume that New Zealand law would approach this in the same way that we would do here. This would be to respect and endorse the reasonable plans of the primary carer unless these are outweighed by the interests of the child. It is relevant in this case that two of the children have not seen their father for many years and are as likely to change their views of him if allowed to get on with their lives in the way that they wish as they are to do so in response to these or any other proceedings. The biggest objection to the mother's application would be the need to preserve Al's relationship and contact with his father. This is an acknowledged fact, and we already have the evidence of Mr R about this. The question is basically one of practicalities rather than principle. That can as readily be decided here as in New Zealand. It is likely that had the mother applied for permission to bring the children here permanently, or were she to return and do so, then that permission would be granted, subject to satisfactory safeguards for A's contact with his father.

56. As to (f), the policy of the Hague Convention undoubtedly weighs heavily in respect of the children's objections. In my view, expressed in Re HB (abduction: children's objections to return) [1997] 3 FCR 235, it weighs particularly heavily in those cases where children come to visit a parent living here and wish to remain: unless their objections are very cogent indeed, they should return to their primary carer for the dispute about a change in primary care to be settled in their home country. It weighs rather less heavily when the children wish to remain with their primary carer, particularly where, as here, the child has had no contact with the other parent for such a long time. The difficulty in this case, as in Re HB, might have been in treating the children differently from one another.

57. But it cannot be the policy of the Convention that children should be returned to a country where, for whatever reason, they are at grave risk of harm, unless they can be adequately protected from that harm. Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. But in this particular case, it is the totality of the situation in which the children found themselves, a combination of serious psychological and economic pressures, which creates the risk. A protection order, were it to be readily available, would not solve all their problems. And MH has clearly indicated his intention to make it difficult for the mother to secure a solution.

58. It has been suggested that the court might order a return but revisit that decision should it prove impossible for the mother to secure adequate protection from the courts in New Zealand before returning by the end of January. Re C (a child) [1999] CA Transcript 1785 was a sequel to the case of Re C(B). The court had ordered the return of a little boy to Cyprus, but accepted a series of undertakings from the father. The dilemma in the case was presented by the mother's older daughter, who had not been well-treated in her step-father's home, and was resolutely opposed to returning to Cyprus. There was further evidence about her situation and the harm which a return might do to her. The court declined to revisit its earlier decision about the little boy: the President was quite satisfied that it would be wrong to do so, even if the court had the appropriate jurisdiction. It was therefore not necessary to consider whether such a jurisdiction existed: there was a serious question mark over that. But the court inevitably has a continuing jurisdiction for the purpose of implementation, but particularly in family cases.

59. We have not heard detailed argument about the existence and extent of any such continuing jurisdiction. I am content at present to assume that, where the court has ordered a return, particularly a return subject to undertakings designed to prevent harm or an intolerable situation for the child, the court can revisit the case in the light of whether or not those undertakings have been forthcoming and have been observed. It may also be necessary to revisit the case if a child adamantly refuses to return and for one reason or another the object of speedy return is thus frustrated: see the outcome in Re HB (abduction: children's objections to return) (No 2) [1999] 1 FCR 331. But that is not this case. The question before us is whether to order a return at all. It would require more than a simple protection order in New Zealand to guard the children against the risks involved here; there is little if any reason to suppose that the mother could obtain such an order from this country against a person who opposed it; and it is difficult to see how an undertaking from the father would solve the problem. That is why this is such an unusual case.

60. Hence, I agree with the judge that the outcome is consistent with the policy of the Convention and would dismiss this appeal.

ARDEN LJ:

61. The question which Singer J had to consider arose under the Convention on the Civil Aspect of International Child Abduction 1980 which was incorporated into the law of the United Kingdom by the Child Abduction and Custody Act 1985 (and is set out in Sch 1 thereto). Article 12 of that Convention provides:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the

preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.'

62. Article 13 provides

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds 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 its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

63. It will be noted that art 12 imposes an obligation on the courts of a contracting state to order the prompt return of a child who has been wrongly removed from another jurisdiction or retained. Under art 13, the court of the requested state has a discretion not to order the return of the child in certain specified circumstances including where 'there is a grave risk that his or her return would expose the child to physical or psychological harm' or where 'the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views'. In the former case, the onus is on the party opposing the child's return.

64. Article 13 had been considered by the courts on a number of occasions. In particular in Re C (abduction) (grave risk of psychological harm) [1999] 2 FCR 507 at 517, Ward LJ, with whom Auld and Nourse LJJ agreed, held:

'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability, which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'

65. It follows that not only must the harm be substantial but the risk of it occurring must be serious. This follows from the qualification in art 13 of the risk as 'grave'. It is thus not sufficient that it is just a possible risk. It must also be a present risk, as opposed to one that previously existed, of harm occurring on return. In addition, the harm must be caused by the return, not be the mere continuation of an existing state which would have continued in any event.

66. In the same case Ward LJ referred to Re C (a minor) (abduction) [1989] FCR 197 at 205, [1989] 2 All ER 465 at 471, where Butler-Sloss LJ held:

'Is a parent to create a psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of

the jurisdiction and refused to return. It would drive a coach and four through the Convention :'

67. In addition Ward LJ was doubtful whether even where there was a probability, 'if not the certainty', that the children who had been removed would in due course be permitted by the courts of the place of habitual residence to return, it was appropriate for this court to engage in that speculation. In his judgment, 'to do so would usurp the function of the courts of habitual residence'. He added: 'The purpose of the Convention is to ensure that that decision is taken by the courts where the children are habitually resident.'

68. In the later case of Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510 at 516 Butler-Sloss LJ held:

'Article 13(b) is invoked only when the removal is found to be unlawful and the child must otherwise be returned under art 12 to the state of his habitual residence. As has been said on many occasions the spirit of the Convention requires that the best interests of a child should be determined by the courts of the state of habitual residence. Article 13(b) is an exceptional remedy intended to deal with unusual issues of welfare of the child which take the case outside the normal provisions of the Hague Convention.'

69. Butler-Sloss LJ quoted a passage from the judgment of Sir Christopher Slade in Re F (a minor) (abduction: risk if returned) [1996] 1 FCR 379 at 391, [1995] Fam 224 at 238, in which Sir Christopher Slade said 'I understand that the courts of this country are only in rare cases willing to hold that the conditions of fact which give rise to the court's discretion under Article 13(b) are satisfied'. He added: 'They are in my view quite right to be cautious and apply a stringent test. The invocation of Article 13(b), with scant justification, is all too likely to be the last resort of parents who wrongfully remove their child to another jurisdiction.'

70. In the same case Thorpe LJ stated ([1999] 3 FCR 510 at 520):

In testing the validity of an art 13(b) defence trial judges should usefully ask themselves what were the intolerable features of the child's family life immediately prior to the wrongful abduction? If the answer be scant or non-existent, then the circumstances in which an art 13(b) defence would be upheld are difficult to hypothesise. In my opinion, art 13(b) is given its proper construction if ordinarily confined to meet the case where the mother's motivation for flight is to remove the child from a family situation that is damaging the child's development.'

71. This is helpful guidance to the courts. However I agree with Hale LJ, for the reasons that she gives, that this should not be taken too far.

72. The explanatory report on the Convention published with the Convention, explains the background to the Convention. In this regard it makes a number of points. It observes that the recourse by national authorities to the legal standard 'the best interests of the child' involves a risk their expressing particular cultural, social or other attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been removed (see para 22). The report states that there are two objects of the Convention- the one preventative, the other designed to secure the immediate reintegration of the child into its habitual environment and states that both correspond to a specific idea of what constitutes the 'best interests of the child' (para 25). It also states that it is necessary to have exceptions to the duty to secure the prompt return of children. Having reviewed the exceptions in the Convention the report states:

'34. To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only as far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them-those of the child's habitual residence-are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of the mutual confidence which is its inspiration.'

73. I have no doubt but the policy of the Convention was well-known to Singer J and at the front of his mind when reaching his decision even though he does not amplify that policy in his judgment. Singer J has considerable experience in matters such as this, and his conclusions on the evidence carry weight.

74. Hale LJ has already set out in detail the facts of this matter. Singer J and this court were greatly assisted by the careful report dated 31 July 2000 by Mr R, court welfare officer. He found that all three children were troubled and upset. In K's case, he records that she was very distressed at the prospect of seeing her father or her stepfather, MH. She thought it would do harm to her mother and siblings to return to New Zealand. On the other hand, she missed New Zealand and her maternal grandparents. Mr R concluded that a return to New Zealand 'might put her at risk of suffering psychological harm, because of the circumstances in which it would place her'. Mr R found KI to be confused. However he noted that KI did not want to go back to New Zealand, but missed his maternal grandparents. He observed that A 'felt terrible for lying to his father' about coming to England, and really missed New Zealand. I would add that it seems most likely that A was under pressure to lie from his mother. He was anguished and upset. He did not think an annual visit was viable. In any event Mr R considered that if he did visit New Zealand on his own he was liable to become isolated from his mother and siblings. Mr R also concluded that the mother's ability 'appears to be genuinely under threat if she is made to return to New Zealand'.

75. In addition, I consider that particular attention should be given to what the mother has said in her evidence in these proceedings. At an early point in her first affidavit, she refers to harassing telephone calls which she received from MH in the night (throughout 1999 and 2000) in which he made threats to kill her. She explained that she had not applied for a protection order because she genuinely feared for the lives of her children and herself if she did so. There were also difficulties in finding MH's address for service. However the police at her request did proceed to serve a trespass notice under the Trespass Act 1980. When one such notice expired, he visited her house (in February 2000) and threatened to tear up 'For Sale' notices outside her house (in which he claims an interest) but there is no evidence of any threat to, or actual violence to, the mother or the children on that occasion. The mother says he breached the trespass notice on at least one occasion, including an occasion when he arrived at the house at 2 am in the morning. But he was not violent and did not threaten violence and he said he thought she was out. MH clearly had suffered, and apparently continues to suffer, from a mental illness which causes him to act irrationally. There is no recent evidence, however, of his having exhibited violence to the mother or the children of

the totally unacceptable and traumatic kind that occurred prior to her separation from him in February 1997.

76. The mother's first affidavit also states:

'52. My immediate response to arriving in England was a feeling of profound freedom, within days of our arrival. Although the debts and financial difficulties in New Zealand remained, my New Zealand lawyer had advised before I left it was highly unlikely that our creditors would pursue me internationally for repayment, and would instead concentrate on MH. I felt that being removed from MH and from New Zealand gave me some perspective that I would look at the problems I had left behind and begin to deal with them, in addition to bringing up the children to the best of my ability.

53. The most profound sense of relief came from the distance between MH and us. First, MH had no idea where we had gone. Secondly, even if he were able to trace us to England, he was unemployed as far as I knew at the time we left. I therefore doubted he would be able to afford a flight to England :

77. The practical reality is that there is very little for me to go back to in New Zealand, in terms of emotional or other ties, or by way of work opportunities . . .

78. In the absence of paid employment, I would therefore be dependent upon social security to provide for the family :

79. We will also need to find somewhere to live :

80. My instinctive reaction as a mother is that to be forced to return to New Zealand would be to return to the real emotional mess from which we escaped. We would be going directly back into the problems we left behind in March 2000. Not only would we have the difficulties I have referred to above, in terms of my finding employment and the family being able to obtain suitable accommodation, I would also need to find a way to continue to pay £500.00 rent to my English property until December. The children would also be returning without most of their belongings and toys, which were shipped to England shortly after we left New Zealand, and which I cannot presently afford to ship back.

81. In some ways, I fear that the environment now might be worse, because of how MH might react to my having left with B. I have absolutely no way of knowing in advance how he might react or how violent his reaction might be. I know what he has been capable of before; I have outlined a number of incidents above. Knowing what he has done in the past, the prospect of returning when he has perhaps for the first time palpable reason for wanting to harm the children and me (ie, because we moved to England) fills me with dread :

83. I can speak firsthand of how the constant anxiety about what MH might do impacted upon my life previously. I was always on edge and never able to relax. This was affecting me both mentally and physically. Were I to have to return with the children to an environment where I was living in constant fear regarding similar (or worse) conduct on MH's part, I fully expect that this anxiety would return, and that my health would suffer as a result.

84. I have believed for some time that MH's behaviour might abate if our marriage were formally to be dissolved and the final ties between us were severed. Certainly, this would assist my peace of mind, and provide a sense of closure to this part of my life. However, because of my concern now as how MH would react upon service of divorce proceedings (following on from our travelling to England), I do not feel that I am able to commence proceedings against him if I have to return to New Zealand.

85. In addition to my fears about MH's reaction and the impact of those fears on my ability to care for the children, I am genuinely concerned as to how a return to New Zealand will affect me in terms of my own feelings of self-worth. In my more depressive moments, I sometimes feel my life is something of a failure. I have lived through two unsuccessful marriages, and doubt at times whether I will meet anybody else.

88. . . . Of course I will continue to do my very best to provide as good a home as I am able for the children, and do my best for them generally . . . However, I fear that my ability to provide may in an appreciable way [be] affected by my own feelings of inadequacy and pointlessness :

100. I would also ask this court to have regard to the risk presented by MH to the family in returning to New Zealand. We have absolutely no way of predicting how MH will react to my having taken B and the children abroad, but given his propensity for violence I genuinely fear the worst. I am concerned as to how a return will impact upon my own mental and emotional well-being and in turn on my ability to make a home for the children to the best of my abilities. I consider that the children are also in immediate physical and emotional danger from MH :'

77. These passages express the mother's concerns about financial problems brought on by MH's expenditure, and the mother's anxiety about the effect on her health if MH continues to harass her. She also expresses concern about loss of self-worth due to diminished employment prospects. She does not, however, currently suffer from any illness requiring treatment or indicate that there has been any actual threat from MH since February 2000, even though he has been visiting her parents regularly in New Zealand.

78. In her second affidavit, the mother repeats her concerns. She says she no longer feels hunted. She also says that she feels that she has some worth outside the home through her career. She adds that she dreads the idea of returning to New Zealand. She says that she is certain that she would not be able to cope (para 13), but concludes in somewhat less definite terms, accepted by the judge, that she does not know how she will cope 'without the security that MH is thousands of miles away, the knowledge that the children are safe, and the security and boost to my self-esteem that my work brings'. I make further reference below to the mother's evidence in these proceedings.

79. The mother expresses concern that the father has shown MH her evidence on her application. Counsel has assured the court that this has not occurred. For my own part, I accept the assurances given through counsel. Even after this hearing it will continue to be the case that the father must not disclose the mother's evidence on this application to MH except with the prior permission of this court.

80. The crucial findings of Singer J are in my judgment as follows. He accepted the mother's evidence as to MH's conduct towards her. He also in effect accepted that MH had been stimulated into visiting her parents since being involved by the father in these proceedings. The judge found the mother to be 'seriously vulnerable to the impact of these heightened anxieties should she be obliged to return to New Zealand for the care of the children'. He considered that she would face the same potential housing and financial problems, the same difficulty in securing suitable and suitably paid employment and anxieties of the same nature about MH's potential for dominating, subjugating, manipulating and controlling her and the children by his psychologically damaging activity. He held that 'she might cease to be able to cope' and that the children were dependent upon her coping. He concluded: 'They would, in my judgment, be in an intolerable situation if her ability to care, and if the quality of that care, faltered and failed they could indeed suffer physical and/or psychological harm.

I do not regard the risk of that as slight, nor the damage that could result. I view those risks as grave.'

81. Singer J correctly directed himself as the burden of proof:

'Mr HZ recognises the high degree of cogency, to which in this area the mother's case must persuade me on the balance of probabilities. Authority is multiple in this jurisdiction for the proposition that this art 13(b) defence represents a high hurdle for an abducting parent to clear in order to open the door to the discretion not to order return.'

82. He also considered the guidance given by Thorpe LJ in Re C(B), and cited the passage from the judgment of Ward LJ in the earlier case of Re C (abduction) (grave risk of psychological harm) set out above. He found, without however giving reasons, that the mother's motivation for flight was to remove the children from a family situation that was damaging to their development. He was fortified in his conclusions by the evidence of Dr Y, which has been summarised by Hale LJ. Singer J accepted Dr Y's evidence that the mother was suffering from mild to moderate depression and that this would become more profound if she and the children returned to New Zealand. However he did not consider that she was a suicide risk. Singer J concluded that there was a grave risk that the mother would be unable to safeguard the children from the damage described in art 13(b) and that in those circumstances he proposed to exercise the discretion under that article to decline to order the children's return, adding 'no relevant consideration militates against my discretion providing that result'. He held that on the basis of his findings, that outcome was consistent with the policy of the Convention.

83. At the hearing before Singer J, and in this court, the mother also relied on K's wishes. As to these Singer J found that K wished to remain with her mother and to continue to have no contact with her father or MH, and that while she was opposed to returning to New Zealand, her views were affected by her misunderstanding that this would involve reintroduction to her father. He would not therefore exercise his discretion against return on the basis of her wishes. He found that A wished to return to New Zealand. He held that KI's views were unclear.

84. As Hale LJ has already stated, Dr Y gave oral evidence at the hearing before Singer J The court has a transcript. Subject to the fact that this court has not heard Dr Y give oral evidence, the evidence before this court is in the same form as that before the trial judge.

85. The mother gives detailed evidence about the abuse and harassment that she has received from her second husband. I have no reason to doubt her painful recollections of his conduct. She explains that she was constantly 'living on knife-edge', and had had nightmares at night wondering what MH might do with the family. She had herself suffered extensive physical and sexual abuse. She is also concerned about her second husband's likely reaction to her return. She believes that he would want to punish her for taking B abroad without asking his permission. She says 'I feel that having only recently escaped from him the children and I will now be returned so that he can continue his campaign against us. The prospect leaves me sick with fear'. On the other hand it was her intention on leaving New Zealand in April 2000 to return to New Zealand in December 2000. However her plans have now changed and it is now likely that she and the children will (subject to any order of the court) remain in England after December 2000. The mother explains that the nightmares she had been having in New Zealand have returned with the commencement of these proceedings and that she cannot face the prospect of returning to New Zealand. She states 'without the security of knowing that [my second husband] is thousands of miles away, the knowledge that the children are safe, and the security and boost to my self esteem my work

brings, I do not know how I will cope'. There is also evidence from the children that they have been kicked and hit by her second husband on a number of occasions in the past.

86. There is no issue as to the wrongfulness of the removal of K, A and KI from New Zealand. Accordingly art 12 of the Convention applies.

87. Mr Kirk on behalf of the appellant father made the following submissions. First he submitted that the removal of the children was a plain and wrongful breach within art 3 of the Convention. As I have said there was no dispute about this. Second he submitted Singer J was wrong to elevate the mother's mild to moderate depression, which according to the evidence would worsen if there was an order for return having an adverse impact on her capacity to care for her children, into an art 13(b) defence. In addition even if Singer J was justified in holding that the defence was established he failed to consider properly or at all how the discretion should be exercised in all the circumstances of this case.

88. Mr Kirk relied on what the mother had herself said about her reasons for leaving the jurisdiction and in particular on the letter which she had written to the father stating that she felt boxed in by her second husband's control and interference and needed space to work the best way out of the financial problems she was in. He submitted that it was significant that the mother intended to return to New Zealand in due course. He submitted that that was not consistent with the mother being in an abusive situation. He stressed that no problems had been caused by the father who was seeking to support the children financially. He pointed out that the relationship between the mother and her second husband had come to an unpleasant end in the spring of 1997 when the mother complained to the police about the manner in which she was subject to sexual violence by her second husband. She underwent part of a course of counselling and in addition the family as a whole had six counselling sessions.

89. In other words (on Mr Kirk's submission) the mother was having financial difficulties and problems. At the time of her departure from New Zealand with the children, she was not complaining about the behaviour of her second husband. Nor, according to Dr Y, was there any significant risk of self-harm. He accepted however that Dr Y's evidence was that the mother had a depressive illness and that this would become more profound. In Mr Kirk's submission however this did not amount to a defence for the purposes of art 13. There was no evidence that the mother's ability to care for the children was impaired in a way which would amount to serious harm for the children. If it was asked whether any of the children were at risk of psychological harm when the mother brought them here, the answer would be that the mother was dissatisfied with her employment prospects and was anxious about the summons that she had received in relation to the mortgage debt. She was coping in a situation that her second husband had put her in. There had been serious stress and anxiety for her and indeed previously for the children. But as of March 2000 these factors did not predominate. If she was genuinely fearful, she could have obtained protection orders. The judge on his submission erred in not expressing himself content and trusting that the legal system in New Zealand could afford protection from the husband. He stressed that although the father had contacted MH, this was merely to ask him about what the mother had said in her letter to him and not about the contents of any of her affidavits. In addition none of the medical evidence has in fact been revealed to the father. The position was that the mother would have to face up to the consequences of removing B from the jurisdiction without the consent of the father (the second husband).

90. Mr Kirk relied on Re M (abduction: psychological harm) [1998] 1 FCR 488 as showing that the courts of this country are entitled to rely on the courts of New Zealand to provide protection to the mother and her children if required to return. In addition he submitted

that the question whether there was a risk of physical harm from the father should be judged subjectively: see Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510 at 515-516 and 520. As respects K's objections to return, he rejected the respondent's submission that Singer J took no account of her objections. Mr Kirk submitted that K is in a condition of distress and misapprehension because she thought that her return would be linked to renewal of contact with her father. However the mother had always intended to return in December 2000 and there was evidence in the report of the court welfare officer that K missed New Zealand. A's distress was equal to that of K although his distress was [due to] the guilt he felt for having deceived his father about their departure from New Zealand. He was clearly a deeply distressed child. The third child KI was confused but did refer to a loving relationship with his maternal grandparents.

91. On the question of discretion, he submitted that Singer J ought to have taken into account that the connection with this jurisdiction was slight and that all connection was with the jurisdiction of the country of habitual residence. He accepted however that the courts of New Zealand may well permit her to return to the United Kingdom provided that access to the children was safeguarded. As I have already noted, he stressed that her original intention had been to return.

92. Mr Nicholls for the mother concentrated on two principal submissions. First he submitted that Singer J was right to conclude that the children were at grave risk of psychological harm because the second husband's behaviour would adversely affect the mother's capacity to act as a parent. His second main submission was that K's position had not properly been explored. Her objections to a return were dismissed because of her misapprehension that returned was linked to a renewal of a relationship with her biological father. But in any event she had a fear of both her father and her mother's second husband sufficient to found a valid objection to her return.

93. In amplification of the first submission, Mr Nicholls submitted that the mother was concerned about the co-operation that had taken place between the father and her second husband (I have dealt with this above) and that this was the cause of her changing her plans about a possible return in December 2000. He submitted that the reasons for her flight to the United Kingdom were not primarily financial. The court should not expect her to disclose details of her relationship with her second husband [to] her first husband. She left because of her fear of her second husband. It appears however that her last meeting with MH was in August 1998 or possibly January 1999. Mr Nicholls submitted that the children had suffered physically at the hands of her second husband. He further submitted that the test of harm to the mother was a subjective test. He accepted that there was no risk of suicide. He relied on the assessment of a previous psychologist who had seen the mother first in 1997 that two years later she was not much better. He relied also on the evidence of Dr Y that the mother was still suffering from a mild to moderate depressive illness and would suffer further if she returned. He also submitted that it was doubtful whether she would obtain credit if she return to New Zealand even for the purpose of rented property in the light of the mortgage re-possession proceedings taken by the mortgagees in New Zealand.

94. As respects K, Mr Nicholls submitted that her views constituted a self standing exception to the duty of immediate return under art 13. He accepted that the objections of a child were often overridden. He submitted that there was a risk to her because of suffering psychological harm and that there was a real risk of this. It was common ground between the parties that art 13 provided an exception if the child objected to return to the state, not to a particular parent. Mr Nicholls also informed the court that his instructions were that K's views had changed since Singer J made his order. She is now saying that she will not return to New Zealand with A and KI if they are ordered to return. That would put the

mother in the position of having to make a choice. At the date of the hearing the mother had not made a decision. In those circumstances it might be difficult to make an order for the return of KI if the mother chose to stay with K. Hitherto the mother's position was that she would wish all the children to stay together.

Conclusions

95. It is clear that harm for the purposes of art 13 is capable of including harm caused in the way found by Singer J, that is by the deterioration in the mother's condition and consequently in her ability to care for her children. The issue as it seems to me is whether he was correct in his conclusion about the gravity of the risk of such harm. As I see it, the Convention requires an assessment of the factors relevant to that risk, and an evaluation of the likelihood of its occurring. As I see it, the judge formed the view that the risk was grave on a consideration of (a) the history of the abusive relationship between the mother and MH and; (b) the reoccurrence of the same risk that she could not cope because of financial and employment position and harassment by MH; and (c) the prediction by Dr Y that the mother would suffer a more profound depressive illness if she returned to New Zealand.

96. The next issue, as I see it, was whether there were matters material to the assessment which the judge did not consider. It would appear that the judge did not consider (a) whether the courts of New Zealand could offer protection from MH and (b) whether she would be assisted as regards her depressive illness by medical help in New Zealand.

97. Of course it can be said that the mother might not wish to avail herself of any protection that the courts of New Zealand could give. She had decided not to do so in the past. Indeed by implication, Singer J proceeded on the basis that the mother was likely to make this choice in the future as he does not refer to the availability of protective measures in New Zealand in this context. (At an earlier point in his judgment he rejects the protection offered by the police and the courts as unlikely to be sufficient, given MH's apparent irrationality but he did so without reviewing the evidence and on the basis that he could not be confident that the mother was wrong. This in effect imposed the burden of proof on that issue on the father.) The policy of the Convention as set out above seems to me to require that the evaluation of risk is carried out on the basis that the abducting parent will take all reasonable steps to protect herself and her children and that she cannot rely on her unwillingness to do so as a factor relevant to risk. The onus would thus be on the mother in this case to show that, even if she took all reasonable steps, she would not be adequately protected from Mr H in New Zealand.

98. In this context, in my judgment, the court is entitled and bound to take the view in the absence of evidence to the contrary that the courts of New Zealand can make appropriate protective orders, extending if necessary to a full prohibition of any form on contact or entering the area where the family live, and can effectively punish any non-compliance. (In this country if there was persistent non-compliance, there might be a custodial sentence.) The position is also assisted by the father's agreement not to seek compliance with the order until the end of January 2001, which affords the mother an opportunity to apply for protective measures in advance. Moreover the decision of this court in Re C (a child) [1999] CA Transcript 1785, establishes that the court continues to have control over the return of the children until implementation of the order. While I would not wish to give encouragement for any further application, I would add this. Should the mother in this case adduce proper evidence before implementation takes place which explains to the satisfaction of the court that, contrary to the basis on which I proceed, the protection of the courts in New Zealand does not afford either in practice or theory adequate protection from MH to the children to be returned or to herself (assuming she continues to be their primary carer),

then I for one would consider that this court has adequate jurisdiction to entertain an application for the review of the order for return. That jurisdiction would extend to requiring further undertakings from the father that appeared to the court to be appropriate. Before taking this step the mother should of course consider all options reasonably available to her and seek from the father any assistance that the father can provide. The application would be on notice to the father.

99. In my judgment it is reasonable to expect the mother to make all appropriate use of orders of the New Zealand courts for her protection and that of her children. Indeed there is a letter in the bundle which fortifies the assumption which the court is entitled to make from a firm of lawyers to Ms F, another psychologist, stating that it would be possible for a representative to apply for a protection order on the mother's behalf. That application would be made on the grounds that the mother is unwilling or unable to apply for the protection that she needs. In my judgment that factor can be taken into account.

100. No reliance was placed on the possibility of harm to the children through having witnessed domestic violence in the past and, in the light of the protective orders available in New Zealand, I do not consider that such harm would be relevant for the purposes of the mother's art 13 defence.

101. With the exception of the difficulty about the mother obtaining credit in New Zealand, Mr Nicholls has not pressed any objection to return on the grounds that the mother would suffer financial problems or be unable to obtain suitable employment. The fact that the mother had intended to return indeed militated against those factors. As regards therapeutic help (counselling) for herself and her children, the mother did not seek to suggest that appropriate assistance of this kind is not available in New Zealand.

102. An assessment of the gravity of harm is an exercise which involves an overall assessment of the evaluation on the basis mentioned. Since Singer J made his evaluation without taking into account measures that the mother could reasonably be expected to take in New Zealand to protect herself and her children from MH, this court must re-evaluate the gravity of the risk of harm.

103. I will proceed in the mother's favour on the basis that MH will harass her by telephone and visit her at her home. If she satisfies the New Zealand courts that this is likely to harm her or the children, the New Zealand courts will make adequate orders to protect her and the children. Provision may require to be made for MH to have access to B but I do not see why this cannot be done without the mother or her other children having to come face to face with MH if that is thought dangerous. In those circumstances, I cannot see that there would be a sufficient basis for saying that the mother's capacity to care for her children would be endangered by her return to New Zealand. Accordingly, I conclude that the evidence does not show a 'grave risk' of harm justifying the court in not making an order for the immediate return of the children.

104. There is force in the argument that the mother had a clear economic incentive to leave New Zealand in March 2000. That was clearly in part her reason for leaving. However, for my own part, I would prefer not to make any finding as to whether this was her predominant motivation for leaving in the absence of cross-examination. It is unnecessary to do so for the purpose of my conclusion. Certainly the fact that to remain in the United Kingdom might be beneficial to her career and bring economic benefits cannot be taken into account.

105. I note that there is reason to believe that there has been a change in the profile of abductors since the signing of the Hague Convention, but our attention has not been drawn

to any modification to the Convention to take account of this despite the fact that reviews of the operation of the Convention are held. In those circumstances, I consider that the court should apply the Convention as it stands and in accordance with this court's established jurisprudence in it.

106. On my conclusion, the question of discretion under art 13(b) does not arise. Had it arisen, I would, in view of the policy of the Convention, have had some doubt as to the desirability of forming a view as to the attitude of the New Zealand courts to an application for return to the United Kingdom (see Ward LJ Re C (abduction) (grave risk of psychological harm) cf, Re H (minors) (abduction: acquiescence) [1996] 3 FCR 425. However I would regard as relevant the convenience of the same court dealing with all matters in dispute between the parties, including the disputes between the parties as to emigration, child support (on the evidence, it would appear this probably has to be dealt with in New Zealand), access and KI's paternity. Indeed in my view the courts of New Zealand are better placed than the English courts to determine those issues since both parents will be in the jurisdiction and available for cross-examination. I also regard it as relevant that the children's grandparents and extended family are in New Zealand, and are clearly able to provide some, perhaps small, but nonetheless valuable, measure of moral support for these children.

107. However K is entitled to separate exception under art 13 by reason of the fact that she is able to express her wishes and objects to return. She is now 14 and a half years old. On the judge's reasoning it was unnecessary for him to consider the exercise of discretion which arises in her case. It is important that her wishes should be respected so far as possible but on the other hand since her brothers are to return, the court should consider whether it is right to respect those wishes in those circumstances. More importantly she is close to her brothers and her mother. She has been a source of strength to her mother in the past. Her mother says that at times she does not know how she could cope without K In my judgment, the likelihood is that her mother will return to New Zealand with A and KI. In those circumstances, despite some dislocation in her education, it is in K's best interest to return also. In so concluding, I reach the same conclusion as Hale J (as she then was) reached on the facts of the case in Re HB (abduction: children's objections to return) [1997] 3 FCR 235, referred to with approval on appeal allowed on another point [1998] 1 FCR 399). Other factors include the fact that she has grown up in New Zealand and has the benefit of her mother's extended family there. Having considered those matters, in my view, in the exercise of discretion effect should not be given to K's wishes and she too should be ordered to return. Unfortunately there is no documentary evidence of K's present wishes and no independent assessment of them. If the position had been less clear, I would have wanted to consider whether the court should have some formal and/or third party confirmation of the development of her views of which counsel has informed the court on instructions.

LAWS LJ:

108. I have had the advantage of reading the judgments of Hale and Arden LJJ in draft. I agree with Arden LJ that the father's appeal from the decision of Singer J should be allowed and that the court should order the return of the children the subject of the application to New Zealand. I agree also with the reasons which Arden LJ has given for this conclusion. However in view of the very great importance of our decision for those involved I add the following observations of my own.

109. In my judgment it is critical to recognise, and to bear in mind at every stage of the court's consideration of the case, the difference between the judicial exercise upon which we are here engaged in administering the Convention on the Civil Aspect of International Child

Abduction 1980 (set out in Sch 1 to the Child Abduction and Custody Act 1985) (the Hague Convention), and the task which family courts daily undertake (in care proceedings and otherwise) of deciding where the welfare of a child or children lies. In dealing with an application to return a child under art 12 of the Convention we do not apply a straightforward welfare test; if we did, we should risk frustrating the plain purpose of the Convention. In Re C (abduction) (grave risk of psychological harm) [1999] 2 FCR 507 at 515 Ward LJ described the following words of Lord Browne-Wilkinson in Re H (minors) (abduction: acquiescence) [1997] 2 FCR 257 at 261, [1998] AC 72 at 81 as '[t]he most authoritative statement of the purpose of the Hague Convention':

'The recitals and Article 1 of the Convention set out its underlying purpose. Although they are not specifically incorporated into the law of the United Kingdom, they are plainly relevant to the construction of an international treaty. The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence. This is to be achieved by establishing a procedure to ensure the prompt return of the child to the State of his habitual residence.'

But there will be situations in which, albeit a child has been wrongfully abducted from the state of his or her habitual residence, intolerable damage would be wrought by an order for return. Hence art 13(b), where the very word 'intolerable' finds its place; and the word lends determinative colour to the statement 'physical or psychological harm' appearing in the sub-article. I would with respect recall what was said by Lord Donaldson MR in Re C (a minor) (abduction) [1989] FCR 197 at 208:

'We have also had to consider article 13, with its reference to "psychological harm". I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognized by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the state to which the child is to be returned to minimize or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, i.e. the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country . . . can resume their normal role in relation to the child.'

110. Thus art 13(b) is there to relax the obligation to return under art 12 in a very exceptional class of case; and in my respectful view this underlies the dicta of Ward LJ in Re C (abduction) (grave risk of psychological harm) [1999] 2 FCR 507 at 517 (cited by Hale and Arden LJJ at paras 40 and 64 respectively), and of Thorpe LJ in Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510 at 520 (cited by Hale and Arden LJJ at para 41 and 70 respectively). The exceptional nature of the provision made by art 13(b) has been very frequently recognised; one example among many is to be found in Re M (abduction: psychological harm) [1998] 1 FCR 488. But in my judgment this aspect of the Convention marches with two other features of such proceedings as these. The first is the standard of proof which must be discharged by the abductor seeking to rely on art 13(b). The second is the summary nature of the proceedings.

111. As for the standard of proof, art 13(b) speaks of a 'grave risk'. There is much authority to the effect that a high degree of cogency is required to establish a case under art 13(b)-a 'high hurdle' has to be crossed (and, as Arden LJ observes (para 81), Singer J directed

himself correctly in this respect). This is not, in my judgment, a stand-alone rule, nor is it one which wholly depends on the familiar basis upon which the civil standard of proof is often stretched upwards so as almost to require proof beyond a reasonable doubt, namely that the standard to be applied in any given case must be commensurate with the gravity of the allegation to be proved. In this context, the rigour of proof required is in my judgment closely linked to the summary nature of the proceedings, which in its turn is a function of the Convention's very policy. In Re AF (a minor) (child: abduction) [1992] 1 FCR 269 at 274-275 Butler-Sloss LJ said:

'Proceedings under the Convention are summary in nature and designed to provide a speedy resolution of disputes over children and secure the prompt return of children wrongfully removed from the country of their habitual residence. The procedure set out in R.S.C. Ord.90, rr.32 to 47, is by originating summons. The parties may file affidavit evidence but there is no right to give oral evidence although the court has a discretion to admit it . . . In a number of cases oral evidence has been admitted and in others refused by the Judge in Convention cases . . . There is a real danger that if oral evidence is generally admitted in Convention cases it would become impossible for them to be dealt with expeditiously and the purpose of the Convention might be frustrated.'

One might usefully have regard also to the reasoning of Butler-Sloss LJ in Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510 at 515-516, which with respect I need not set out. In addition I would wish to express my very strong agreement with Hale LJ's observation in para 27 of her judgment in this case:

'The whole point of the procedure is that the parent left behind should not be obliged to travel to the country to which his children have been taken in order to give the evidence needed to secure their return.'

112. In summary, then, these following features of this jurisdiction are in my judgment interdependent functions of each other. (1) The Convention's policy is that substantive questions of a child's welfare should be decided by the courts of the state of the child's habitual residence. (2) A child unlawfully removed from the state of habitual residence will therefore be promptly returned unless it is shown, exceptionally, that an order of return would create grave risk of intolerable harm to the child. (3) The decision whether such grave risk is made out has to be assessed summarily, else (a) the policy stated at (1) might be undermined, and (b) otherwise the parent left behind in the home jurisdiction is potentially put to unjust disadvantage in seeking to make a case for the child's return. (4) The considerations set out at (3), the words of art 13(b), and the exceptional nature of what has to be demonstrated, show that 'clear and compelling evidence' (Re C (abduction) (grave risk of psychological harm) [1999] 2 FCR 507 at 517 per Ward LJ) is required if the obligation to return is in any particular case to give way in light of art 13(b).

113. Applying this approach, I find myself unable to accept on the facts that a grave risk of intolerable harm to any of these children is shown, to the requisite standard, to be likely to flow from their return to New Zealand. Every important strand in the evidence is canvassed in the judgments of Hale and Arden LJJ, and

I do not propose to travel through them again; though I should say that I have reconsidered the evidence after reading my Ladies' judgments in draft.

114. I would proceed on the footing, as do the other judgments, that the mother's account of physical and sexual abuse at the hands of MH before their separation in 1997 is true in its essentials and that the children's welfare was to say the least compromised; I have in mind in particular what is said by Hale LJ at paras 28 and 32-34 of her judgment. However, I have

been particularly influenced, on the facts of the case, by the following aspects. (1) The mother's motives for leaving New Zealand in March 2000 were at least largely financial: this seems to me irrefutable on the documents, not least her letter received by the father on 7 April 2000, which (given the summary nature of these proceedings which I have emphasised) is I think the best evidence of why she left. It is supported by the fairly copious e-mail correspondence she conducted with the student counsellor MA HW, in which the only reference to MH is in the mother's e-mail of 26 October 1999, quoted by Hale LJ at para 36. (2) When she left New Zealand for the United Kingdom in March 2000 it was her intention to return in due course: Mr Kirk for the father laid particular emphasis on this aspect of the case. (3) The mother's direct encounters with Mr H since their separation in 1997 were very infrequent. (4) Dr Y's evidence as to her posing a suicide risk was rejected by Singer J, so far as I can see plainly rightly. (5) The mother's parents in New Zealand are an obvious and important resource in the children's interests.

115. The relevance of the grandparents' position, moreover, serves in my judgment to emphasise another dimension of the case, namely, that in the particular circumstances the New Zealand courts are conspicuously best placed to decide all the issues relating to the welfare of these children. As I have indicated it is anyway the policy of the Convention that the courts of the state of habitual residence should decide such questions. Here it is emphatically so; given the distance and its obvious implications for the cost of travel it is highly unlikely, to put the matter generally, that all the testimony required to decide where these children's true interests lie would be available in London as it would certainly be available in New Zealand. More generally, I would with respect wish to underline what Arden LJ has said (paras 97-99) as to the primary position of the New Zealand courts, to which the abducting parent must be expected to make any necessary application for protection, and (at the end of para 99) as to the practicalities hereafter.

116. As regards the particular position of K, to which I have had anxious regard, I can do no better than express my agreement with what Arden LJ has said in para 103 of this judgment.

COUNSEL: Anthony Kirk and Richard Harrison for the appellant; Michael Nicholls and Debbie Taylor for the respondent.

SOLICITORS: Charles Russell; Kingsley Napley.

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