---

http://www.incadat.com/ ref.: HC/E/NZ 495
[30/10/2002;High Court (Wellington, New Zealand);Superior Appellate Court]
El Sayed v Secretary for Justice, [2003] 1 NZLR 349

El Sayed v Secretary for Justice

AP 209/02

High Court Wellington

9, 30 October 2002

Before: Hammond and Goddard JJ

COUNSEL: J D Howman for Mrs E.S.; J H Daniell for the Central Authority. SOLICITORS: Solicitors for Mrs E.S.: Gibson Sheat (Lower Hutt). For the Central Authority: Donald F C Fuller (Wellington).

HAMMOND J.:

[1] This is an appeal against a decision of a Family Court Judge in a Hague Convention case, ordering the return of two young children from New Zealand to Australia.

[2] The central issue on the appeal is whether the Judge was correct in holding that a defence that ordering the return of the children to Australia would give rise to a grave risk of exposure of the children to physical or psychological harm, or otherwise place them in an intolerable situation, had not been made out. Courts in New Zealand and elsewhere routinely (and with respect correctly), note the difficulties in the way of a defendant to an application for summary return of children on the basis of this statutory defence; and that the defence is rarely made out. But having given the matter anxious consideration, in this instance we are of the view that the Judge was wrong. The burden of this judgment is therefore to explain why we take that view.

The facts

[3] R.E.S. (nee W.) is a New Zealand citizen. She is 32 years old. Some years ago now she went to Australia where she met B.E.S., also now 32 years of age. B. is apparently commonly referred to as "B." in Australia. For convenience, we will refer to the parties as R. and B.

[4] These two persons formed a de facto relationship in 1991. They married in 1994. There were two children of their union. M. was born on 2 May 1997. He is now five and-a-half years old. A. was born on 20 December 2000. She is therefore now nearly two years of age.

[5] R. and B. separated in July of 2000 in Australia, when R. was approximately five months pregnant with A.

[6] R. and the children travelled to New Zealand on 24 October 2001, ostensibly on a three-week holiday. R. had given a written undertaking to return the children to Australia. In fact she did not do so. It was that non-return that gave rise to the present proceeding by the New Zealand Central Authority.

[7] R.'s case is essentially that she had left a relationship which was abusive of her and the children; that abuse was ongoing; and that it would be quite inappropriate, and more importantly for the purposes of the present proceeding, that it would infringe the statutory criteria, for the children now to be returned to Australia for the purpose of allowing B. access to them.

[8] R.'s concerns arose in this way. Her evidence was that B. worked only intermittently in the course of their relationship (her estimate was about one- third of the time), and that he was a heavy gambler. He began making demands on her for money and in sexual matters.

[9] R. had begun working in the area of child care. Eventually she attained a tertiary qualification in the form of a Diploma in Social Sciences, Child Studies. She then acquired her own day care centre, called "Smart Kids Child Care".

[10] For a period of perhaps a year prior to the separation, R. claims there was an increasing incidence of violence aimed at her and the children. She detailed incidents of actual physical violence to herself (including one incident of a knife wound to the face) and being dragged by the hair, and struck. As to the children, there was evidence from R., which was corroborated, of B. having struck out at M. As to A., R. claimed that B. had tried to harm the child she was carrying by throwing objects (such as shoes) at her stomach when she was pregnant.

[11] After one incident on 23 July 2000, R. took formal steps to obtain what in New South Wales is known as an apprehended violence order (AVO). An order of that character functions in much the same manner as a protection order under the relevant New Zealand legislation. An AVO was in fact granted by a Magistrate on 11 August 2000. But it was not served for over 15 months by the Australian authorities. It is not clear why this was. However it was common ground that it was not R.'s responsibility, or that of her advisers, to serve the order. This notwithstanding that R. was told by the presiding Magistrate, when the order was made (the Court record was exhibited in this proceeding):

"Madam, if you go into the court office you will get a copy of that order, carry it with you. If you have got any problems with the defendant, ring the police, show them the order and they will take him away."

[12] On R.'s evidence, on 22 October 2001 B. threatened (whilst visiting her and the children) to stab her and take the children. It was only after that incident that the Australian AVO was served on him by the police.

[13] R. came to New Zealand on 24 October 2001 with the two children. Neither she nor the children have since returned to Australia. R. stayed with her mother (who is described in her affidavit as a minister of religion) until January 2002. Thereafter she was able to take rented accommodation. She is now residing near Wellington, and receiving support from, in particular, her mother and her sister (who also has qualifications in child care).

[14] R. further alleged that when B. discovered that she was not returning to Australia he trashed her former residence; that he "vandalised" her day care centre (which apparently had a value of $15,000) thereby effectively rendering worthless the only asset she had; and that he then made a series of appallingly abusive phone calls via her mother in New Zealand.

As it transpires, those calls were recorded and transcribed. They were introduced in evidence in this proceeding and also formed the basis for a formal protection order obtained by R.'s mother against B. in New Zealand.

[15] After R.'s departure with the children for New Zealand, B. at some point formed a relationship with another woman in Australia. He began living with her and her children. An Australian police report suggests there was a further domestic violence incident between B. and the new partner. When that relationship came to an end B. went to live with a sister. He is now looking for a place to live. In his most recent updating affidavit it is said that the children, if returned to Australia, would go and live with his parents - their grandparents - until he sets himself up in a new residence.

[16] However, it is not entirely clear just what B. does propose. In a June 2002 affidavit (made whilst he was still living in the de facto relationship with the Australian woman and her children) he said that he did not wish to take the day- to-day care of his children away from R. He did wish them to have regular contact with him, and for them to have regular contact with his family. In a September 2002 affidavit, he deposes that he is "willing to take [his] children into his care on a day to day basis pending any future decision of the Family Court of Australia on matters of residence and contact". He said he was living with his sister, but he had arranged with his parents for the children to go to them, if returned, whilst he found suitable accommodation.

[17] For his part, B. flatly denied the allegations of abuse towards R., or the children. He claimed that, in effect, R. had schemed to return to New Zealand, and thereby deprive him of contact with his children.

The course of proceedings in the Family Court

[18] The Australian Commonwealth Central Authority forwarded an application under the Hague Convention (1980) from Mr E.S. to the relevant officer of the Department of Courts in New Zealand on 29 November 2001.

[19] The statute which implemented the Hague Convention on the Civil Aspects of International Child Abduction (1980) in this jurisdiction was the Guardianship Amendment Act 1991, which came into force on 14 April 1991.

[20] Under s 14 of the New Zealand statute, where an application of this character is made to the Court (which in New Zealand means the Family Court or a District Court, see s 8 of [*11] the Act) it is required to be dealt with expeditiously. Indeed, "so far as is practicable", such applications are to be given "priority", in order "to ensure that they are dealt with expeditiously". If an application is not determined within a period of six weeks commencing on the date on which the application is made the Registrar of the Court may be requested to supply a statement of the reasons why the application has not been determined within that period, and a copy of the statement of reasons must be supplied to the central authority of the relevant contracting state. In that respect, the New Zealand statute (see s 14(2)(b)) follows the provisions of art 11 of the Convention.

[21] The key conceptual feature of the Hague Convention, as so enacted, is that functionally it separates the issue of "return" from the custody issues relating to a given child or children. The leading monograph on the Convention (at least in the English language) is Beaumont and McEleavy, The Hague Convention on International Child Abduction (1999). According to those authors, the special commission of the Hague Conference on Private International Law which considered how this Convention might be structured, considered four possible approaches to the problem of international child abduction: recognition and

enforcement of custody orders; summary return of the child; harmonisation of jurisdictional rules; and increased administrative cooperation (see p 18). What can for shorthand purposes be referred to as a "summary return" was thought to be the preferred option.

[22] It was against that background that art 11 was developed, and eventually it found its way into s 14 of the New Zealand statute. And it is against that background that the procedure adopted in a number of jurisdictions is truly "summary". These applications are determined "on the papers", and without ado.

[23] The need for expedition in disposal of the proceedings is further reinforced by a concept of "habitual" residence which applies in various ways in the Act. It is, for instance, a specific ground to refuse an order for return of the child that the application was made more than one year after the removal of the child, and that "the child is now settled in his or her environment" (s 13(1)(a) of the Guardianship Amendment Act 1991). This because the physical and psychological orientation of children who have become "resettled" is not lightly to be disturbed.

[24] Against these requirements, the delays which have occurred in New Zealand Courts in this case are very unfortunate. The formal request to the New Zealand authorities was made on 29 November 2001. But a formal application was not lodged in the Family Court at Lower Hutt until 28 January 2002 - some two months later. On 18 March 2002 Judge Ellis gave directions for a fixture in May. After that hearing a judgment (number 1) was delivered on 11 June 2002. That was a 25 page decision. The Judge concluded by seeking further information as to what the position of these children would be, if they were to be returned to Australia. Then a further (contested) hearing was held on 29 July 2002. Again judgment was reserved. Judgment number 2, ordering the return of the children, was delivered on 12 August 2002. Notice of appeal was given timeously on 20 August 2002.

[25] The appeal was first called in this Court on 10 September 2002, at which time, by consent, Wild J gave various directions including a consent direction for further affidavits and even for a memorandum dealing with objections taken as to admissibility of some of the evidence heard by the Family Court (notwithstanding that the Family Court has very wide powers as to the kind of evidence it can receive). A fixture for the hearing of the appeal was confirmed, that day, for 9 October, counsel for the appellant having requested a Full Court in this Court. The disposition of the appeal in this Court was slowed by that request for a Full Court. Normally an appeal of this kind could be heard the following week; but assembling a Full Court is, practically speaking, more difficult.

[26] The overall result, as to the time taken over this case, has to be entirely unsatisfactory. It is quite outside the scheme of the Convention, and the New Zealand Act. Effectively the return application is not being finally determined until nearly a year after the initial request was made. It must be stressed that neither R. nor B. is responsible for this - each of those persons appears to have responded promptly enough with respect to affidavits and required material. The problem is that there has been systematic delay in the New Zealand Court system: the case has just not "moved along" as it should have. Applications of this character are amongst the classes of cases which are entitled to priority of disposition, even over other proceedings and appeals. They need to be seen as being of the same order of priority as (for instance) habeas corpus applications, and urgent appeals relating to persons in custody. And if the circumstances of the case require closer consideration, any extended or ongoing hearing should be the subject of firm judicial control.

The disposition of the application in the Family Court

[27] The issue before the Family Court was a narrow one. No issue was taken in that Court (nor has it been taken in this Court) that the jurisdictional requirements in s 12 of the Guardianship Amendment Act 1991 are present for the return application.

[28] For the sake of completeness, and for the benefit of any other parties who may have to have recourse to this judgment, it may be wondered how s 12(1)(c) was met in this case, for there was no custody or access agreement between R. and B. The short answer is that the state of Australian law is such that, in the circumstances of this case, both parents are responsible for the wellbeing of these two children. It was accepted by Mr Howman that this satisfied that jurisdictional element. And A. was "habitually resident" in Australia "immediately before the removal" even although the concept of "habitual residence" may seem somewhat odd when applied to an infant less than a year old.

[29] This being so, the "defence" to a summary return was simply a reliance on the statutory ground that there is "a grave risk" that returning these two children to Australia would expose them to physical or psychological harm or otherwise place the particular child in an intolerable situation (see s 13(1)(c) of the Act).

[30] In judgment number 1 the hearing Judge made specific and very strong findings against B. He said:

"I have not reviewed the whole of the evidence in detail. This is not the appropriate forum for a decision as to custody of and access to the children to be made on the merits. It was nevertheless necessary to consider that evidence going to the heart of the matters raised in defence to the application and to make such findings as to character and credibility on such evidence as is before the Court as are necessary to determine the present proceedings.

Having reviewed that evidence I am left in no doubt that the applicant father is a violent, vindictive and abusive man. His violence appears the more threatening because he simply denies that it has occurred. He allows no room whatever for interpretation or explanation of some of the worst events described by the mother. He simply denies that they ever occurred. There is no question therefore of him accepting any responsibility for his behaviour or appreciating in any way the effects of his behaviour on his wife and children. There is no suggestion of him having taken any remedial action to address his behaviour and he offers no plan or suggestion as to how the physical and emotional safety of the mother and children would be recognised, respected and safeguarded were they to return."

[31] It may be as well to note a portion of the evidence from R. which the Judge accepted:

"I would endure all types of abuse whilst resisting to give him money. This included severe physical abuse usually to the head region with the intention not to leave visible injury. Although I would often have scratch marks, severe bruising behind the ears and to my forehead, which was caused by banging my head on a ceramic tile floor and stomping on my head whilst I was on the ground. He would drag me around by my hair which resulted in me having to get my hair cut off, as after one incident it was pulled cleanly from my skull leaving three wounds on my head and my hair unable to be combed because of the knotted hair, skin, and dried blood that had formed a mass at the back of my head. He would also present knives in front of me and threaten to kill us all if I did not comply with his request. This type of abuse would often happen in front of our children and during working hours. As the childcare centre was situated at the back of the house, staff, the other children in the centre and their families, also heard this abuse. The abuse was also expressed with total disregard to the presence of the children. Witnessing this abuse has affected my son greatly."

[32] We emphasise that this sort of evidence was solidly corroborated by evidence which the Judge accepted. Kelly Workman, the appellant's sister (a professional social worker with 15 years' experience) was able to corroborate this sort of evidence and the trauma for the children as a result of B.'s behaviour. Likewise, Ms Kirk, a one-time neighbour, and an acquaintance of the parties for years, generally confirmed R.'s evidence, and gave direct of having seen B. hitting M. "to the extent of bruising him", and of M. saying he "did not ever wish to go home" because his father would hit him. The Karitane organisation which assisted R. when (unsurprisingly) she became depressed, confirmed the effect of this behaviour on R., and also the detrimental effect on M. of B.'s behaviour to him.

[33] In relation to the abusive phone calls to New Zealand, the Judge said:

"Katrina Ng, a clerk employed in the chambers of the mother's counsel transcribed the recorded messages left by the father. The transcript fills some 15 pages of typing recording 22 separate messages. It was not necessary for me to listen to the recording to appreciate the violent force and the virulent, vituperative obscenity of these messages. Despite the limitation of his crude vocabulary there is no mistaking the vehement menace of the extreme and repeated threats conveyed in those messages. No Judge with any experience of domestic violence cases could fail to be impressed by the sustained emotional violence of these messages. These are considerably more than 'some threatening calls out of desperation'. They reflect a deep seated anger, an uncompromising focus of blame and a lack of control and rationality (given that he knew the messages were being recorded) which is truly alarming."

[34] Having traversed the evidence, the Judge then reviewed a number of the leading authorities in this jurisdiction, and the recent decision of the High Court of Australia in DP v Commonwealth Central Authority [2001] HCA 39. The Judge held that it must be an "exceptional case" in which the abducting parent can resist the return of a child to the "home" jurisdiction.

[35] Mr Howman had submitted that this was just such a case, and that the risk to the children in this case was "as bad as it could get". Miss Daniell's position in the Family Court, and indeed in this Court, was that whilst it could not be said that there is no risk, the statutory threshold still had not been met.

[36] In the result, the Judge held:

"I have already observed that I accept that the return of these children with their mother, unprotected, into a situation such as that from which she removed them, could well expose them to grave risk of physical and psychological harm. It has not however been proved that an order for return to Australia itself would bring about such a result . For that fundamental reason I cannot find the s 13(1)(c) defences established." (Emphasis added.)

[37] This was a direct holding on the part of the Judge that it had not been proved to his satisfaction that Australia, as such, or more accurately, the Australian legal system, would not or could not protect these children. It might be said in passing that for an applicant to clear off that burden in quite such raw form, would be literally impossible.

[38] In any event, having reached that point, the Judge, relying on the reasoning in the High Court of Australia decision already cited, said:

"What still troubles me however, is that I cannot and should not ignore the welfare and interests of the children in this particular case."

[39] In this instance he thought the question which required to be answered was:

"What will happen to these children when the return is ordered?"

[40] The Judge then noted that in the view of some authorities (to which he referred), and without imposing conditions, his Court was nevertheless entitled to inquire into the conditions attendant on the return of the children, being careful to restrict itself to the "minimum amount of involvement" necessary to this inquiry into what he perceived to be his duty to consider the interests of the children. We should perhaps add that, in this instance, there was evidence of "serious concern" on the part of the legal advisers to the Australian Central Authority regarding the prospective situation of these children on a return.

[41] It was in then in this context that the Judge adjourned the proceedings "to a date to be set and notified by the Registrar" (not being more than one month from the date of the number 1 judgment) for consideration of such further evidence and argument from the parties as they might submit in response to the number one judgment. What the Judge was patently seeking was evidence as to the situation which might await R. and the children were they to return, the circumstances of such a return, and the safeguards that might be put in place.

[42] Prior to delivering judgment number 2, the Judge received further affidavits. An affidavit from a Ms Muirhead (an Australian solicitor with significant experience in this area of the law) indicated that R. had no assurance that accommodation or financial assistance would be provided to her by the state or community agencies, were she return to Australia "with the intention of applying to relocate with the children to New Zealand". In her further affidavit, R. said "I am not prepared to risk my life to travel with [the children] and will not do so". Unfortunately, much of the further evidence which was lodged was evidence which would normally go to the merits of a custody dispute.

[43] In the result, the Judge said:

"Ultimately, I am driven to conclude that the purpose of adjourning these proceedings, while making inquiry into the conditions on the return of the children, have not been helpful to the parties or to the children. That is not unfamiliar territory for a Family Court and it will no doubt be instructive for the future."

[44] The Judge particularly reminded himself of the decision of the New Zealand Court of Appeal reported as A v A [1996] NZFLR 529 to the effect that it is the function of the relevant central authority, not of the Court, to ensure appropriate arrangements for children ordered to be returned. A v A is a decision of a Full Court of the New Zealand Court of Appeal. It was a case in which a mother had made allegations of neglect and incest by a Danish father, which a Danish Court had found to be unsubstantiated, yet the mother had continued to persist in her concerns. In that context, the result was quite uncontroversial.

[45] In the event, Judge Ellis ordered the return of these two children where it was known (at the time he delivered his second decision) that the father was not then seeking custody, but was only seeking access for himself and his parents. The order for return was without any conditions or restrictions.

The arguments of counsel

[46] We do Mr Howman's extensive and forceful submissions no injustice if we note that they really come to this. He said that his client could not have had stronger findings of fact in her favour. He noted that the concerns about violence to the wife and children had been raised both informally and formally with the Australian authorities well before R.'s departure to New Zealand. This was not therefore an ex post attempt to justify. Against the volume of evidence which amply supported R.'s concerns - and which was corroborated in significant respects - Mr Howman's submission was really that the Family Court Judge had baulked, in the sense that he had simply not acted appropriately on his own findings of fact. If he had done so, in Mr Howman's submission, the statutory justification for non-return was amply made out in this instance.

[47] Ms Daniell's submission very sensibly did not endeavour to suggest that there was "no risk" to these children. She could hardly have done otherwise, in face of the evidence. Rather, she argued that the level of risk, particularly with respect to the children as opposed to the mother, did not rise to the required statutory level; and she submitted that in terms of the standard authorities the arrangements for the return of these children should be left to the central authorities.

Some observations on the law

(a) The social context and purposes of the legislation

[48] The 1980 Hague Convention was designed to replace an earlier 1961 Hague Convention which was in force between 11 states in Europe. It resulted from several lengthy sessions of a special commission of the Hague Conference on Private and International Law, and it has now been adopted by several dozen countries.

[49] The purposes of the Convention are:

*** To deter child abduction;**

*** To promote cooperation on this question among countries and their respective authorities; and**

*** To ensure the prompt return of abducted children to their home country.**

[50] In a dissenting judgment in DP v Commonwealth Central Authority , Kirby J suggested at para 155:

"155. Unless Australian courts, including this Court, uphold the spirit and the letter of the Convention as it is rendered part of Australian law by the Regulations, a large international enterprise of great importance for the welfare of children generally will be frustrated in the case of this country. Because Australia, more than most other countries, is a land with many immigrants, derived from virtually every country on earth, well served by international air transport, it is a major user of the Convention scheme. Many mothers, fathers and children are dependent upon the effective implementation of the Convention for protection when children are the victims of international child abduction and retention. To the extent that Australian courts, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody (and residence) decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular."

[51] There is great force in these observations by a distinguished appellate Judge. But it is also to be appreciated that the context in which the Convention would most commonly come to apply may not have been fully appreciated at the outset. As Beaumont and McEleavy have noted (at p 3), when the present Convention was being drafted it was thought the problem with which the drafters were most commonly faced was that of fathers acting in anticipation of an unfavourable outcome from Court proceedings. In short, males tended to act preemptively in what Blackstone once memorably called "the empire of the father". (W Blackstone Commentaries on the Laws of England , vol 1, 17th ed, 1830, p 453.) But in fact the most difficult cases - as in the present situation - are those in which a woman has been abused, and is in effect constructively "driven out", and then in face of great difficulties seeks to return and live with the child or children in her country of origin where she can get support from her own family. Again, precisely as has occurred in this case.

[52] In fairness, the drafters of the Convention were not oblivious to this kind of problem. What eventually became the New Zealand s 13(1)(c) evolved as what Elisa Perez-Vera (who provided the (authorised) explanatory report which is attached to the official copy of the Convention) has described as a "fragile compromise" (seeActes et Documents de la Quatorzieme Session [1982] vol III, 426 at p 461).

[53] The compromise so reached was that the notion that a child should be immediately returned to its country of habitual residence is a very firm starting point. But it will not necessarily be right in every case. Mechanical jurisprudence is almost always poor jurisprudence. Blindly returning a child to the place of habitual residence may not be at all a desirable outcome for that child, in a particular case, because of real harm to that child. That is recognised by the statutory ground to which we have referred. It follows that the Hague Convention scheme addresses the general welfare of all children in the sense mentioned by Kirby P but the direct interests of a particular child are underpinned by the exception (hence, the "fragile compromise").

(b) The interpretation of s 13(1)(c)

[54] This last point leads directly to a second major point which is worthy of emphasis in a case such as this. How are the actual words in s 13(1)(c) to be construed? In DP v Commonwealth Central Authority beginning at para 41, the majority of the High Court of Australia protested against what it described as a "strong line of authority both within and out of Australia" that the words in this subsection "are to be narrowly construed" [citing P v Commonwealth Central Authority [2000] Fam Ct 461 at para [104]]. With respect, there is considerable force in the observations of those members of that Court that there is "no evident choice to be made between a 'narrow' and 'broad' construction of [this subsection]. If that is what is meant by saying that it is to be given a narrow construction it must be rejected. The exception is to be given the meaning its words require" (see paras 41 - 44). We would add, with respect, only ". . . in light of the purposes of the statute" (see Interpretation Act 1999, s 5(1)).

[55] Inevitably, or so it seems in relation to words of ordinary and everyday meaning, the case law on what this subsection "means" has begun to accrete. This brings to mind the sage observations of Lord Shaw of Dunfermline, as long ago now as 1922, in an address to the American Bar Association:

". . . [there has now] grown up a new obstacle, thick as the jungle. The words have already been in the hands of the judicial commentators; and as is the way with commentators, the one refers to the other, and the third to the preceding two, till the text is obscured, and the

vision of the interpreter cannot get through the thicket except at the risk of his being considered a rebel and iconoclast.

Any recent statute forms an illustration ready to hand. Hardly is it born into the world, till judges fall upon it, tearing it analytically to pieces; and unless they called it at least inartistic they would not be in the fashion! But then their turn comes; and their frequent lines of error are produced and reproduced with a touching deference, till by and by the plain English of the act does not know itself; and only great judges take the liberty to announce that the act means what it says." ("The Widening Range of the Law", in The Law of the Kinsmen (1923), p 104.)

[56] The s 13(1)(c) exception in the Convention was the subject of much debate in the drafting of this Convention precisely because it was seen as a possible escape hatch from the Convention's overall goal - that custody decisions should be made by the state of habitual residence. Nevertheless, the words chosen in the Convention by the international community are those which are precisely replicated in the New Zealand domestic statute. And in fact, appellate Courts have not allowed the exception to overtake the general rule (see generally Silberman, "Hague International Child Abduction Convention: A Progress Report" (1994) 57 Law and Contemporary Problems 209). In that sense, the Convention has in fact been a great success, and the concerns of Kirby P have not demonstrably arisen.

[57] A particular limitation on s 13(1)(c) which appears in some Australasian decisions - that the "grave risk of harm" must arise out of the child's return to a country - appears to us (with respect) to misread both the Convention and the statute, in relation to that specific defence.

[58] First, the explanatory note to the Convention (Perez-Vera Report, at para 116) indicates quite clearly that the subsection was to be addressed to harm which is contrary to the interests of the child. Whilst the exception is not to be invoked "if the return of the child might harm its economic or educational prospects . . . the exceptions are to receive a wide interpretation " (emphasis added).

[59] In this respect, the principle of construction is that Courts should promote "the objective of uniformity in [the] interpretation and application [of the Convention] in the courts of the states which are parties to the Convention" (Ulster-Swift Ltd v Taunton Meat Haulage Ltd [1977] 1 WLR 625 at p 628 per Megaw LJ). And Courts should aim for an approach "which is broadly in line with the practice of public international law" (Fothergill v Monarch Airlines Ltd [1981] AC 251 at p 290 per Lord Scarman). The antipodean narrowing of the section - to the extent it has occurred - is out of line with international usage.

[60] Secondly, the narrow restriction to "a country" is redundant in face of the exception in s 13(1)(e) (which replicates art 20 of the Convention). It is s 13(1)(e) which is directed to harm arising from the child's return to a particular country. As the Perez-Vera Report plainly indicates (note 2, at pp 433 - 434), this formulation was a distinct compromise between a general "public policy" exception (which could have potentially wrecked the major premise of the Convention by allowing contracting states to approve or disapprove the family law regime of another state) and the narrower formulation in s 13(1)(e).

[61] If this analysis is correct, the jurisprudence of s 13 is straightforward - and entirely orthodox. The Convention (Act) is a general rule and exception instrument. The s 13(1)(c) exception requires: (a) the identification of specific harm to the child; (b) of a requisite character; (c) that harm must be demonstrated to be of a grave character; (d) by clear and

compelling evidence; and (e) if harm of that kind is established, the trial Court then has a wide discretion as to how the return dilemma is to be addressed.

This case

[62] The Family Court Judge did not break his analysis down with respect to each of the children. We think it is essential to begin by doing so.

[63] First, we take the position of A. She was not born until several months after her parents separated. She was only several months old when R. came to New Zealand. On any view of the matter, A. does not "know" her father. Her bond is solely with her mother. The proposition before us is that a child who came into the world in these circumstances is to be returned (at an age of less than two years) to Australia, to a father who has demonstrably been abusive to her when in utero; and who does not necessarily commit himself to having custody of her; and in circumstances in which it is problematical in the extreme whether R. would return to Australia if the child was ordered to be so removed. And as the mother of a very young child, any serious risk to R.'s life or health would further expose A. (and for that matter M.) to the risk of severe psychological harm.

[64] With no express finding by the Family Court Judge as to whether R. would return to Australia, we have to do the best we can with that matter. On the one hand, an intuitive response is that a mother would be highly unlikely to "abandon" a child of less than two; on the other there is a very real possibility that she might not go, in view of the evidence which the Family Court Judge accepted. It is trite that R. is not entitled to "create" a situation in which a Court is then faced with this very difficult situation. But neither is the Court entitled to resile from the jurisdiction which is cast upon it in the exception in s 13. The trauma which would be inflicted upon a two-year-old being removed to another jurisdiction, and not seeing her mother again, perhaps for a significant period of time, would be hugely detrimental. In our view it would certainly would come within the words, "plac[e] the child in an intolerable situation" and it would also "expose" the child to "psychological harm". To her credit Ms Daniell did not really resist these propositions.

[65] This brings us back then to what is the crux of the appeal: how "grave" is the risk? The Judge's answer was that it was not grave, or at least should not be so considered, effectively because the Australian legal system will (presumptively) look to the child. In our view, that is to take too narrow a view of the statutory language. There are United States appellate authorities which have recognised "that separating a child from her pR.ry care giver creates a risk (and sometimes a grave risk) of psychological harm". (See Rydder v Rydder 49 F 3d 369 (1995) at p 373.) That puts concisely the concern of this Court, and when coupled with our concern over the father's prior behaviour to the child, attracts the appellation "grave" risk.

[66] Turning to M., he is now five and a half. The Judge found some support for the proposition that he had been both physically abused, and to some degree emotionally traumatised by what he had observed with respect to his mother. Then there would again be the effect on him of enforced separation, perhaps for a very long period of time. There was very distinct evidence that B. has a "proprietoral" attitude (as the Judge put it) towards his son, and specifically that he was prepared to use him as a weapon of revenge against his mother. Again, to our minds, on all the evidence which is before us, there is a grave risk of psychological harm to the child, and of his being placed in an intolerable position in terms of the statute. It has again to be recalled in this respect that the Judge accepted that the evidence against B. was largely deflected by what he thought to be a definitive legal

consideration that it had to be said that the Australian legal system would completely address these concerns.

[67] Once it is accepted that there is a grave risk of a requisite character - as we consider to be the case with respect to both those children - it is standard jurisprudence that this Court then has a discretion. The Judge did not reach this point because he did not think there was a grave risk, for the reasons we have noted. What weighs heavily with us in the exercise of this discretion are these factors. First, the husband has been equivocal (to say the least) as to precisely what it is that he seeks. We are far from convinced that he seeks anything more than access. He wants a son without the full burden of parenthood. Secondly, his own life circumstances are, in physical terms, fluid; and R.'s position on an (assumed) return would be parlous, with a significant detrimental effect on the wellbeing of the children. Thirdly, the passage of time militates strongly against a return to Australia of the children for the limited purpose for which their return is seemingly sought. In short, once there is a grave risk in statutory terms, we think the exercise of the discretion strongly favours refusing an order for return.

Conclusion

[68] In the result, in appellate terms, we think the Family Court Judge was wrong. On his own factual findings, he came to a view which was completely adverse to B.'s position. But he then took the view that he was required, nevertheless, to surrender these children to their fate in Australia. That was not what the statute required. The Judge had to proceed in terms of the statutory language in s 13(1)(c). When so approached, in our view, the exception applied in this particular instance.

[69] Accordingly the appeal will be allowed. The order made on 12 August 2002, that the children be returned to Australia, is discharged.

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