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[24/12/2001; High Court at Christchurch (New Zealand); Appellate Court]
B v C, 24 December 2001, High Court at Christchurch (New Zealand)

B v C HC CHCH AP36/01 [24 December 2001]

High Court of New Zealand at Christchurch AP36/01

24 December 2001

Young J

Appearances: P.J. O'Donnell for the Appellant; D. Flatley for the Respondent; P.D. Sewell (counsel for the child)

RESERVED JUDGMENT OF WILLIAM YOUNG J

Introduction

[1] This is an appeal from a judgment of a Family Court Judge delivered on 25 October this year dismissing an application made under the Guardianship Amendment Act 1991 for the return of "H", now aged 13, to the United Kingdom.

Factual Background

[2] H was born on 17 October 1988. His mother, Ms B, was born in New Zealand but has obviously spent a significant portion of her life in the United Kingdom. His father, Mr C, is a United Kingdom citizen. Ms B and Mr C were married in 1988 in England and Mr C subsequently adopted Ms B's children of a previous relationship, "M" (a boy) who was born in November 1981 and "E" (a girl) who was born in April 1983.

[3] The family moved to New Zealand in 1993. They lived in Christchurch. They separated in February 1998. Mr C left the family home and Ms B remained in it with the three children.

[4] Ms B then abducted the children from New Zealand. This was on 25 February 1998. At the time H was 9.

[5] Mr C instituted proceedings in the Family Division of the High Court in England under the Hague Convention but his application was dismissed in June 1998.

[6] Having at this point mentioned the other relevant courts involved in this case, I note that, to avoid or limit the possibility of confusion, I will refer to the relevant English Court as the "Family Division" and the New Zealand Family Court as the "Family Court".

[7] The judgment of the Family Court Judge in this case suggests that the Family Division had refused to release a transcript of the June 1998 judgment for the purposes of the present

litigation. If so, that would be surprising. I suspect, however, that there has been a misunderstanding as to this on the part of the Family Court Judge and that what probably happened was that Mr C's application was dismissed by the Judge sitting in the Family Division in an oral judgment which has not been transcribed (and perhaps no longer can be, given the lapse of time). I would, however, have expected counsel in that case each to have taken a reasonable note of the judgment and for those notes to have been produced in the present litigation. Copies of the affidavits and any reports placed before the Family Division could also have been produced. If that had happened, the best evidence as to the reasons why Mr C's application was dismissed would have been before the Family Court. For reasons to which I will later be referring, I think that those reasons are, or might be, of some significance.

[8] It appears, from the affidavit of Mr C (who in turn no doubt had a report from his English solicitors as to the case) and what H had to say to Ms Trish Allen, a family therapist who interviewed him, that the primary reason for Mr C's Hague Convention application being dismissed was that M and E did not wish to return to New Zealand. M was, at the time, too old to be the subject of a Hague Convention application. E was 15 and an objection by her may well have been of decisive importance in so far as the application related to her.

[9] On the basis of the very exiguous material before me, I think that it is at least likely that the English Judge took the view that returning H to New Zealand, in a situation where M (who could not be compulsorily returned given his age) and E (who was 15) did not wish to be returned, would have produced "an intolerable situation" for H in light perhaps of the possibility, or probability, that such return might have lead to him being separated from his siblings. What stance, if any, H took at that time is not clear. He was 9 and it is certainly probable that he was spoken to by a court welfare officer. It may be that he then did not wish to return to New Zealand. In light of the dynamics of his family situation as it then was in the United Kingdom, it would not be surprising if this was his position. I have to say that it is very unsatisfactory that I should have to speculate on all of this given that there must be material in existence which would have made apparent the actual reasons for the dismissal of Mr C's application and the way in which H's position was assessed.

[10] H appears to have some resentment about the events of 1998. His position, as disclosed to Ms Trish Allen, the family therapist, was that he was told by Ms B that they were merely going on holiday and that it was not until after they arrived in the United Kingdom when he overheard a telephone conversation in which Ms B was involved that he became aware of the true situation. This was recorded in an affidavit which was filed in the proceedings in the Family Court and to which Ms B could have responded.

[11] I should add, in fairness to Ms B and for the sake of completeness, that H's resentment about the events of 1988 would appear to be encapsulated. Although it would appear that H's association with Ms B is not as close as it once was, he plainly loves her. So I have been left with the view that his resentment about the events of 1998 has not spilled over into other aspects of his relationship with his mother.

[12] Mr C has visited the United Kingdom since June 1998 but has remained living in Christchurch.

[13] Ms B's successful abduction of H and E in February 1998 would appear to have had some very damaging consequences (as might reasonably have been expected). H is the only one of the children who has actively sought to continue a relationship with Mr C. But H's relationship with Mr C has been strictured by the bitterness and mistrust which exists between his parents and by distance and associated difficulties including travel time between

New Zealand and the United Kingdom and costs of air travel. This has plainly caused H much sadness and has left Mr C understandably distressed and embittered.

[14] In saying this, I am very conscious of the fact that Ms B, apparently taking the stance that events prior to June 1998 are irrelevant, did not, in the Family Court proceedings in this case, give an explanation of her behaviour in 1998. It is likely that that she has a story to tell about all of this and I am very conscious of the possible unfairness of bringing into account the events of February - June 1998 when she has not told that story. The reality, however, is that:

1. These events were referred to by Mr C in his affidavit and by Ms Trish Allen when she set out H's perception of the relevant events in her affidavit;

2. It was open to Ms B to respond (for instance by explaining why H's understanding of these events was erroneous, if that is her position); and

3. She did not do so.

[15] Following the dismissal of Mr C's Hague Convention application in June 1998, the Family Division made what I will call (using the terms customarily used in New Zealand) a custody order in respect of H in favour of Ms B which was to last until H obtains the age of 18 years and access orders in favour of Mr C. Mirror orders were made in the Family Court.

[16] In accordance with these orders H had access with his father in New Zealand for two and a half weeks over Easter 1999, three weeks at Christmas 1999, two weeks at Easter 2000 and four and a half weeks in the winter of 2000.

[17] There was some difference between Ms B and Mr C in relation to access for this year and the result was that an order was made by Connell J in the Family Division on 24 April providing for access which included 24 days during the winter of this year. The orders are very detailed. They incorporate undertakings by Mr C to return H to the custody of Ms B at the end of access periods.

[18] In accordance with this order, H left the United Kingdom on 25 July 2001. He was to leave Christchurch for the United Kingdom on 17 August 2001. On that day, however, Mr C telephoned Ms B advising that H would not be returning as he had stated that he wished to remain in New Zealand. He has remained in New Zealand since then.

[19] These proceedings were immediately instituted.

Ss 12 and 13, Guardianship Amendment Act 1991 and the corresponding provisions of the Hague Convention

[20] The relevant statutory provisions are ss 12 and 13, Guardianship Amendment Act 1991.

[21] Section 12 relevantly provides:-

(1) Where any person claims -

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

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

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

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

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

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

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

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

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

Given that the concept of "removal" for the purposes of s 12 includes wrongful retention, there can be no doubt that s 12 is applicable in this case. In other words, it is clear, and was common ground in both the Family Court and this Court, that the Family Court was required to order H's return given s 12(2), subject only to s 13 of the Act.

[22] Section 13 relevantly provides:-

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

...

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

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

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

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

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

[23] The Guardianship Amendment Act 1991 was enacted to implement the Hague Convention on the Civil Aspects of International Child Abduction. The Convention itself appears as a schedule to the Act.

[24] Mr C relied on the defences created by s 13(1)(c), (d) and (e) although the only defence which is material for the purposes of the appeal is that provided by s 13(1)(d). The other defences were rejected in the Family Court judgment and Mr C has not sought to re-argue them in this Court.

[25] Section 13 of the 1991 Act corresponds to Article 13 of the Hague Convention. That Article provides:-

Notwithstanding the provisions of the preceding Article [and I note that Article 12 corresponds to s 12 of our Act], 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.

[26] The underlying purpose of the Hague Convention and the New Zealand legislation which implements it is to require the return of abducted children. Article 13 of the Convention and thus s 13 of the Guardianship Amendment Act which provide for defences to applications for the return of children, must not be construed and applied so as to subvert the fundamental purpose of the Hague Convention. In her explanatory report on the Hague Convention, Professor Elisa Perez-Vera, in dealing with Article 13 concluded by saying:-

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 so 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 mutual confidence which is its inspiration.

Proceedings in the Family Court

[27] In the Family Court, the Judge had affidavits from Mr C and Ms B. Mrs B's affidavit had annexed to it reports from Mrs Raleigh a court welfare officer who had reported to the Family Division in respect of H. The Judge also had an affidavit from Ms Trish Allen the family therapist I have mentioned. The Judge heard evidence from Ms Allen and he also spoke to H.

[28] As I have noted, the Judge dismissed the s 13(1)(b) and (e) defences which Mr C advanced. But the Judge upheld the defence based on s 13(1)(d). As I have also already

indicated, Mr C does not wish to challenge the rejection of his defences based on s 13(1)(b) and (e).

[29] The Judge held that H did object to being returned to the United Kingdom. This objection was associated, in the view of the Judge, reasonably closely with H's preference for living with Mr C over living with Ms B, although it also involved partly over-lapping preferences for living in New Zealand over the United Kingdom and for the New Zealand Courts and not the Family Division as the forum for any future welfare litigation.

[30] The Judge referred, in his judgment, to his discussions with H:-

[I]t became apparent that he has not come to this decision overnight but has been carefully considering it for over 18 months. The decision was largely made before he left England on this latest occasion but he chose not to tell anyone because, firstly, he wanted to defer any announcement until after he had been back to New Zealand to re-evaluate his relationship with his father and life in New Zealand; secondly, he believed that he would be subjected to pressure from his mother; and, thirdly, permission to go was likely to be refused.

[H] also considered announcing his decision when he returned to England but rejected this alternative because it would have meant that, once again, he would be under pressure, he would miss out on time in New Zealand while his parents fought about custody, he believed that he was more likely to lose the custody case in England, and he was worried that he might not be permitted to return if the present custodial arrangements were confirmed.

On the other hand, the announcement of the decision in New Zealand meant that he would have the support of his father, he believed he was more likely to win in New Zealand, and, while his custody was being sorted out, he would remain in the care of his father.

[H] has decided, for reasons already given, that he would prefer that the custody case involving him be heard in New Zealand. He objects to it being heard in the United Kingdom and therefore objects to being returned for that purpose. He has, therefore, made a considered choice of forum.

[31] The Judge also went on to say:-

I am equally satisfied that [H] has the age and maturity to properly assess the alternatives of having his case conducted in either the United Kingdom or New Zealand and that, in electing the New Zealand option, he has done so for appropriate and well considered reasons.

[H], at 13, is a young man wise beyond his years. Ms Allen, a family therapist in Christchurch who interviewed him on behalf of the respondent, concluded after two separate interviews lasting an hour each that:

"[H] is intelligent and articulate. He has the cognitive capacity to make an informed decision about himself. He is able to think rationally without being overly emotional, see a situation from different points of view and he has the capacity of logical reasoning.

This accords with my own view of [H] formed after an hour long discussion with him in the presence of his counsel. Throughout the preparation of this judgment I have been struck by the number of occasions where, when considering a particular issue, I have discovered that [H] has been there before me.

[32] The Judge then went on to consider whether H's views, as expressed to Ms Allen (and, indeed, to himself) have been influenced by the views of Mr C. He reviewed the considerations as to that and these included the fact that H had, in the past, expressed rather different views to Mrs Raleigh. He paid particular attention to a report from Mrs Raleigh which was prepared in March this year and was associated with the dispute which was resolved in April as to the frequency and duration of H's visits to New Zealand. The Judge noted that Mrs Raleigh had interviewed H on at least five occasions over four years and also had the advantage of having spoken in person to both parties (that is Ms B and Mr C when he was visiting the United Kingdom) and to M and E. In these respects, as the Judge obviously recognised, she was well positioned to comment on the case. On the other hand, relevant events had occurred since March this year (including a breakdown in the relationship between Ms B and her partner) which post-dated Mrs Raleigh's last report and Ms Allen had the advantage of having seen H most recently.

[33] The Judge referred to letters which Mr C had written to H and noted that some of the comments in the letters gave rise for concern. The concern the Judge obviously had was as to whether Mr C had put pressure on H to opt for a life in New Zealand with him over life in England with Ms B and the effect that this may have had on the views which H was expressing at the time of the Family Court proceedings. It is clear that Mr C feels a good deal of resentment over the fact that Ms B abducted the children in 1998 and that this new status quo was upheld by the Family Division. Associated with this is what Mrs Raleigh has referred to as being an "unresolved sense of desolation and loss". In his correspondence with H (and presumably in other interactions) Mr C has shared with H that "sense of desolation and loss" and his desire that H live with him in New Zealand. The correspondence which was produced shows that very clearly as the Judge recognised. It is fair to say that there is nothing surprising in the way in which Mr C has responded to the abduction of the children. His actions, however, undoubtedly raised the question whether H's objection to his proposed return should be seen as being independent of his influence.

[34] The Judge addressed this issue and held that H's views were genuinely his and not significantly contributed to by such pressure as may have been placed on him by Mr C. He referred to a comment made by Ms Allen in her report:-

It is of concern that [H] has a tendency to take the side of whichever parent he is currently living with. This suggests that it has been difficult for him to articulate his own needs as being separate from his parents' wishes. With his greater sense of his own independence he is beginning to feel positive about expressing his own view and not being so concerned about his parents' reaction. This indicates that [H] has a significantly increasing capacity to make informed decisions about himself.

The Judge then went on:-

I agree. It is apparent from Mrs Raleigh's report of March this year that [H] has been able to independently chart his own path through the access difficulties, putting aside how his parents have felt and making decisions based on his own needs. For example, in rejecting his mother's suggestion of a one week visit at Christmas and at Easter in alternate years he pointed out that it took three days to get over his jet lag.

By way of another example, although he was aware that his father was lonely and looked forward to seeing him, he realised that spending his northern hemisphere summer holidays during the winter in New Zealand meant that he would miss the feeling of summer holidays in England and he therefore suggested that he be allowed to take two weeks off school at the

end of the summer holidays so that he could have four weeks with his father in New Zealand and four weeks with his mother in England.

From my own discussions with him, I sensed that he had a strong sense of his own self interest and that the decisions that he has made have been reached only after careful thought and an evaluation of all alternatives. The reasons he gives for wanting to live in New Zealand are the same as those given by thousands of United Kingdom residents every year who emigrate to this country. The reasons he gives for wanting to reside with his father are common to most young men of his age.

This is not, therefore, the case of a young man, overcome with sadness at the end of an access visit, who is influenced by his father to remain. Instead, it involves a decision taken by [H] over a long time after considerable thought, for appropriate reasons, and announced in a very carefully planned manner.

His feelings on the subject are strong. He told me that if he was forced to return he would run away. He told Ms Allen that he would not let himself be put on a plane and could well sue somebody.

I do not rely on these statements, however, in view of the widespread publicity in New Zealand of the English Court of Appeal's recent dilemma in TB v JB. Instead my view is based upon my observation that [H] was still upset and requiring comfort from his father 20 minutes after I told him of the very narrow scope of my discretion and indicated that I might well be required by law to return him to the United Kingdom.

While he may have received information from his father, and while his father may even have been attempting to influence him, I consider that it is more likely than not that [H's] decisions are his own.

I therefore find that [H's] views are well reasoned, strongly held and have been formed without undue influence from his father.

[35] The Judge's conclusions as to the existence of the H's objection left him with a discretion to refuse the application. As to the exercise of this discretion, he noted:-

Two broad issues fall for consideration : (1) the philosophy of the Convention; and (2) the effect on [H's] welfare of having the custody issue determined in one country or the other.

[36] The Judge concluded that H would not be traumatised by being retained in New Zealand and that there was a greater than even chance that he would be adversely effected if made to return to the United Kingdom given the effect that this would have on his self-esteem and self-confidence.

[37] The Judge, however, recognised that the Hague Convention is concerned with "the interests of children in general". He then observed:-

[H] is in New Zealand having access with his father because, and only because, of the force of the Hague Convention. Were it not for the applicant's belief that the Hague Convention would guarantee [H's] return, no matter how much he wished to remain, I suspect he would not have been sent. Moreover, this Court habitually returns children who object to returning to their custodial parent at the end of an access visit unless there is a serious and credible welfare issue justifying some other course. No matter how strong [H's] views might be, if both parents were resident in New Zealand this Court would almost certainly be

sending him back to live with his mother until the issue was resolved. The circumstances would therefore need to be truly unique before this Court could accede to [H's] wishes.

[38] The Judge then went on to say:-

In my view, however, the following features of this case distinguish it from almost all other cases (I have yet to see a report of a similar set of circumstances) and justify me in exercising my discretion to permit [H] to remain in New Zealand.

The first factor is the impact upon [H] of his mother's abduction of him in 1998. When speaking to Ms Allen about this [H] said:

I didn't get a choice and I think I should now. When we got to Hong Kong, mum said we were just going for a holiday to England and then when we got there I found out. She didn't really tell me - I heard it on the phone. I was upset and I felt angry and powerless - I think I had a right to know more. It wasn't good.

At that time in 1998, [H], who had a close relationship with his father, was nine and a half and entitled to be consulted. Had the matter proceeded to Court in New Zealand, as it should have, [H's] views then, whatever they were, would have been sought and accorded some weight.

Ms Allen has described [H] as a sad boy. He told her and myself that he has cried to himself many times at night when he has thought of his father. Given the circumstances of [H's] original abduction and his consequential sadness, it has been inevitable that he would want to live with his father and it is not surprising that he has chosen this particular method of announcing his decision. I am satisfied that rejecting his request to remain would be detrimental to him and, although not sufficient to constitute a defence under s 13(1)(c) nevertheless it is a factor to which I am entitled to have regard when exercising my discretion.

The second factor is the role apparently played by [H's] adopted brother and sister in the United Kingdom Hague Convention proceedings. [M], at 16 years of age, was not covered by the Hague Convention and, therefore, could not be forced to return to New Zealand. As the first 11 years of his life were spent by him in the United Kingdom, it is not surprising that he indicated that he did not wish to return to live in New Zealand. [E], who at 15 was covered by the Convention, expressed similar views which would have carried considerable weight.

It is apparent that the objections stated by [M] and [E] were sufficient to justify the Court in exercising its discretion against return. [H's] adopted siblings therefore played a pivotal role in determining the forum for the custody hearing involving [H]. My rejection of [H's] current views by requiring him to return to the United Kingdom would mean that I was according him less say in determining his own forum than his siblings had when they determined it for him in 1998.

The third factor is the role played by the applicant in 1998. Within only a very short time of persuading the respondent to leave the family home, she packed up all her belongings and, together with the children, boarded a plane home to the United Kingdom. Not only was this step taken without consulting [H], but it was also done without the respondent's knowledge. Moreover, the adverse consequences for [H] of being removed by stealth from his father so soon after the separation of his parents must have been obvious to the applicant but must have been ignored in her own self interest.

The issue should have been properly canvassed in New Zealand where, in view of the strong relationship between [H] and his father, the applicant may have been refused permission to take him out of the country. [H] has no doubt observed that his mother obtained her objective by keeping her plans a secret and only announcing them once she had left the country. It is small wonder that he has chosen to do the same. If I reject this tactic and require [H] to return to the United Kingdom then I am imposing on him a higher standard of conduct that has been required of his mother.

The fourth factor is [H's] age at 13. The next three years in his development are important and he has decided that he wishes to have his father's guidance during this period. If I return him to the United Kingdom for the determination of this issue there will be inevitable delays during which [H] will be separated from his father. If [H] is successful in persuading the Court to allow him to live in New Zealand he might miss out on six to 12 months living with his father. If he fails to persuade the Court, there might be serious reservations about him having further access in New Zealand until he is 16 years of age. Either way, the choice of forum will limit his contact with his father during an important phase of his development.

The fifth factor is [H's] view that he is likely to be pressurised by his mother if he is returned to the United Kingdom. If this is the case, then it might mean that New Zealand, rather than the United Kingdom, is the best forum for determining the question of custody.

The sixth and final factor is the custody order made in New Zealand in the applicant's favour. If she were to return to New Zealand she would be able to resume custody of [H]. For the reasons already given above, this Court would sanction [H] returning to her custody on the granting to the respondent of generous access rights. The principal benefits that [H] considers he is likely to receive from the respondent relate to leisure time activities which could be incorporated into regular weekend and school holiday access. The applicant who is a New Zealand citizen, therefore has it within her power, simply by getting on a plane to New Zealand, to provide continuity of care to [H] while allowing him close contact with his father.

[39] For those reasons, the application was dismissed.

The positions of the parties on appeal

[40] It was common ground before me (as it was in the Family Court) that s 12 of the Act requires H to be returned to the United Kingdom unless a s 13 defence is established.

[41] It is now also common ground that the defence based on H's objections has been established in the sense that the Judge had a discretion whether or not to order the return of H. The challenge is therefore confined to the Judge's exercise of that discretion.

[42] It is not suggested that the Judge, in any explicit way, mis-stated the principles which governed his task.

[43] A number of complaints about the judgment were made by Mr O'Donnell for Ms B. I believe I can deal with them most conveniently by reference to four questions:-

1. Was the Judge wrong to take into account the events of 1998?

2. Was there an inadequate evidential basis for the Judge's conclusions as to the events of 1998?

3. Was the Judge's approach to the exercise of the discretion otherwise inappropriate?

4. Was the Judge's conclusion inconsistent with the appropriate application of Hague Convention principles?

Before I discuss these questions, it is appropriate, however, that I refer to certain general considerations applicable to appeals in Hague Convention cases.

General considerations

[44] This is an appeal which must be dealt with in accordance with ordinary principles albeit that those principles must be applied in a way which reflects the policy which underlies the Hague Convention and recognises the particular way that Hague Convention applications are dealt with.

[45] To the extent to which Hague Convention appeals involve a question of fact, the remarks of Hale LJ in her dissenting judgment in TB v JB [2000] 2 FLR 515 at 522 are apposite:-

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 F (A Minor) (Child Abduction) [1992] 1 FLR 548. 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.

[46] I agree with that approach and add this. First instance Judges should be astute to the possibility that the "left behind" parent is at a forensic disadvantage in terms of responding to the case which is advanced by the abducting parent. Further, if on appeal, the "left behind" parent can show that some such forensic disadvantage has occurred, appellate courts should not be difficult about allowing additional evidence from that parent.

[47] This case falls largely to be determined in light of the principles which apply to appeals against the exercise of a statutory discretion. Those principles, as stated in May v May [1982] 1 NZFLR 165 at 170 are that:

[A]n appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took into account some irrelevant matter or that he was plainly wrong.

[48] From time to time the law has been stated more broadly. For instance, it was indicated in Fitzgerald v Beattie [1976] 1 NZLR 265 at 268 that the success or otherwise of an appeal from a discretionary decision would depend upon whether the Judge had:

... proceeded on a wrong principle ... or he had given undue weight to some factor or insufficient weight to another.

[49] It is the May v May approach which is to be adopted. The difference between the May v May and Fitzgerald v Beattie formulations is significant. The weight to be given to the factors relevant to the exercise of a discretion are primarily for the Judge at first instance. Arguments addressed to the weight which that Judge gave to various factors are tantamount to an invitation to me to re-exercise, afresh, the discretion which by law was vested in the Judge.

[50] In this case, there is the additional factor that the appeal involves the decision of a Family Court judge exercising a specialised jurisdiction, see for instance Swayne v Lush [1999] NZFLR 49.

[51] On the other hand, there can be no doubt that appellate courts have a very significant role in respect of Hague Convention appeals, particularly where the decision at first instance has been to dismiss the application to return an abducted child. Appellate courts must be astute to the risk that an accumulation of first instance decisions turning apparently on issues of fact or the exercise of discretion may result in the undermining of international expectations as to the consistent and firm application of the Convention.

Was the Judge wrong to take into account the events of 1998?

[52] I start by setting out the submissions made by counsel for the appellant:-

18. For the appellant it is submitted that His Honour was wrong in taking into account these factors at all for the following reasons -

18.1 The facts in respect of the removal and subsequent proceedings in the UK were and are not before the Court to enable any conclusions to be drawn from them.

18.2 In any event, the applicant initiated Hague Convention proceedings in England seeking the return of [H] and his siblings pursuant to the Convention, and in the determination of those proceedings the order for return was refused. It is accepted that, for whatever reason, the judgment of the Court in the UK is not available.

18.3 Presumably, the respondent elected not to exercise his rights of appeal of the first instance judgment.

19. At pp 3-4 and 25-26 of the Family Court judgment, certain facts are stated and/or presumed, in respect of which there is no, or no sufficient, evidential basis. In particular, reliance is placed on 'findings', in respect of the second factor relied upon (the role played by [H's] brother and sister), and the third factor (the role played by this appellant) in the 1998 removal and/or subsequent Hague Convention proceedings. It is submitted that the Judge was plainly wrong, firstly, in making findings on issues for which there is no or no sufficient evidential basis, and, secondly, in placing any reliance upon the relevant 1998 circumstances. The respondent exercised his rights in respect of that situation, accepted the outcome of the (UK) Hague Convention proceedings, and having done so, accepted the jurisdiction of the United Kingdom Courts for the subsequent determination of welfare issues in respect of Henry.

[53] These submissions address in part the adequacy of the evidence which was in front of the Judge. This is an issue which I will address in the next section of my judgment. But, as well, they also involve the complaint that the Judge's approach to the relevance of the events of 1998 was inconsistent with principles which should be applied in Hague Convention cases.

[54] It is perfectly clear that the United Kingdom is the country of H's habitual residence for the purposes of s 12. It is also clear that in the absence of a s 13 defence, the Act and Convention require that H be sent back to the United Kingdom. So there is no scope for rejecting Ms B's application for the return of the child based on Mr C's abduction of H on et tu quoque grounds, in other words, by treating her status as a successful abductor as precluding her from relying on the Hague Convention as an applicant.

[55] That said, it is now common ground that Mr H has made out a s 13 defence and the issue for the Family Court, and now this Court, is how the resulting discretion ought to be exercised. Obviously the discretion must be exercised in accordance with Hague Convention principles. The appellant's argument seems to be that, in the context of those principles, is it completely irrelevant that:-

1. In February 1998 H was abducted by Ms B to the United Kingdom from New Zealand which, at that point, was the country of habitual residence.

2. The Hague Convention application by Mr C was dismissed for reasons referable to the positions adopted by M and E.

3. H resents the fact that he was abducted from New Zealand and associated deceit that was practised on him and is of the view that the decision made in June 1998 not to return him to New Zealand was primarily related to the attitudes of M an E.

[56] In determining the weight to be attached to H's objection it was necessary to for the Judge to have regard to the reasons which underlie the objection, whether it is indeed a reasonable and rational objection and the extent to which the objection (and any decision to give effect to it) would be congruent with Hague Convention principles. On the findings of fact made by the Judge, the objection of H to a compulsory return to the United Kingdom is associated, at least to some extent, with his feelings as to the events of February 1998 and the consequences of those events. Further, the Judge's assessment of the reasonableness of the objection was plainly influenced by his own view of the events of February 1998.

[57] I have read several times what the Judge had to say about the February 1998 abduction. There is perhaps some element of ambiguity (particularly in respect of the third factor to which he referred, see para [38] above which could conceivably be read as incorporating an et tu quoque argument). My interpretation of the Judge's remarks, however, is that he saw the relevance of the 1998 abduction as relating to:-

1. The reasonableness of H's objection (see, for instance, the first of the factors referred to by the Judge, in particular his conclusions that H's decision that he would wish to live with his father was "inevitable" and that it is "not surprising that he has chosen this particular method of announcing his decision"); and

2. How H would (or could be fairly expected to) react if his objections were over-ruled by the Family Court and he was required to return to the United Kingdom (a consideration which is referable to the first three factors referred to by the Judge).

[58] Ms B was applying for an order that H be returned to a jurisdiction to which she had abducted him 3 years earlier. The circumstances associated with that abduction and the consequences of that abduction were relevant to H's objection; why he did not wish to be compulsorily returned to the United Kingdom, why he chose an access visit to New Zealand to exercise and announce his preference for living with his father in New Zealand and how he would feel and react if his objection was over-ruled. In my view, Hague Convention principles permit such considerations to be examined in terms of evaluating H's objection and in determining the weight to be attached to it. I am conscious that this is expressed in conclusory terms. But I can see no logical reason (and none was put to me by Mr O'Donnell for the appellant) as to why considerations such as these should be irrelevant in terms of evaluating the H's objection.

[59] I am not persuaded that the Judge took into account the events of 1998 in any way which was adverse to Ms B otherwise than in respect of how those events were relevant to

the way in which H saw the situation, the reasonableness of his views as to that and how he would react if his objection were to be overruled. So I see no error of law or principle in the way in which the Judge approached this aspect of the case.

Was there an inadequate evidential basis for the Judge's conclusions as to the events of 1998?

[60] The appellant complains that the Judge made findings of fact in relation to the events of 1998 on evidence which was non-existent or too exiguous to warrant the findings which were made.

[61] As I have indicated, I regard it as an unsatisfactory feature of this case that full details as to the reasons why Mr C's Hague Convention application were declined were not placed before the Family Court. These reasons would have been relevant to an evaluation of the reasonableness of H's objection. Conceivably they may have shown that his current perception of the relevant events is erroneous.

[62] I have also already indicated that Ms B did not set out to tell her story as to what happened in 1998. Yet her story would perhaps have been relevant to an evaluation of H's objection particularly if she could have shown that his perception and perhaps recall of what happened was wrong.

[63] The evidence given on Hague Convention applications is customarily limited. There are usually substantial logistical (and associated policy) reasons why applicants cannot and should not be required to attend in person and give evidence. Running through the Judge's reasons (which I have set out) are explicit and implicit criticisms of Ms B's behaviour in 1998. These criticisms were only treated as being relevant (at least on my perception of the judgment) to the extent to which they relate to the reasonableness of H's objection and the way in which he would react if he were ordered to be returned. But these are very important, and perhaps decisive, considerations in the case. So I can well understand that Ms B may resent the fact that such criticisms were made and given effect to in the judgment given that she had not, in her affidavits, set out to tell her side of the story in respect of the events of 1998.

[64] That said, it would have been open to Ms B, if she and her counsel thought it relevant, to have placed evidence before the Court as to her reasons why she acted as she did. I also rather think that if she had really tried, it would have been possible for her to have provided better evidence than the Family Court had as to the reasons why Mr C's Hague Convention application failed in the Family Division - perhaps by producing a note of the decision taken by her counsel and copies of the affidavits and any relevant report.

[65] The latter comment could also be made of Mr C. But in his affidavit he did explain why his Hague Convention application was dismissed. If what he had to say was wrong, I would have expected Ms B to have corrected him and to have set out the true position in an affidavit in response. She did not do so. Indeed, the impression which I have from what I was told by counsel is that Mr C's affidavit as to why his Hague Convention application failed was accepted in the Family Court as setting out the position accurately.

[66] For the reasons already given, I think that the Judge was entitled to have regard to the events of 1998. Further I think that he was required to do so in light of the evidence which was before the Court. If that evidence was untrue or seriously incomplete it would have been open to Ms B to have challenged it. She did not do so. So it is unsurprising that the Judge accepted it.

[67] As I have indicated earlier, I am of the view that in Hague Convention cases there is a special need for caution to ensure that "left behind" parents do not suffer forensic prejudice in terms of the way in which cases are heard and determined. Ms B's complaint to me, through her counsel, was simply that the evidence before the Family Court did not warrant the conclusions reached. There was no attempt to persuade me that she had relevant evidence which she could give on these topics which, through the exigencies of the Hague Convention process and particularly given the speed with which the application was determined, had not been able to be provided. In those circumstances, I am not left with the view that she has suffered any injustice.

Was the Judge's approach to the exercise of the discretion otherwise inappropriate?

[68] Mr O'Donnell's challenge to the way in which the Judge exercised his discretion was based in part on the relevance which the Judge attached to the events of 1998 and the evidential basis for these conclusions; submissions which I have already addressed. He also challenged the weight which the Judge placed on the objections of H. I will deal with this challenge in the next section of my judgment. There are, however, three specific points which Mr O'Donnell made which I should address at this point.

[69] Mr O'Donnell, in his written submissions, referred to the Judge's fifth factor which related to H's perception that he would be placed under pressure if he returned to the United Kingdom. Mr O'Donnell accepted that the Judge was entitled to conclude that this was H's perception but he challenged its relevance. This does seem to me to be a factor material to forum conveniens considerations but, more particularly - and I think that this is why the Judge referred to it - to the reasonableness of H's objection and whether the Judge ought to have given effect to that objection. So the Judge was entitled to have regard to this factor.

[70] The second complaint of Mr O'Donnell relating to the way in which the Judge exercised his discretion is the fact that the Judge did not, specifically when referring to his six factors, refer in contra-distinction to the orders made in the Family Division in April 2000. Mr O'Donnell noted in his written argument:-

33. These orders were ostensibly made on the respondent's application, by consent, and in the context of the acceptance by both parties since 1998 of the English Court as the court of jurisdiction for welfare issues concerning [H]. The message sent to the United Kingdom, and to the international community at large, by a judgment of our Court disregarding orders made in such circumstances, in a Hague Convention context, speaks for itself.

34. This factor ie the orders and the circumstances of their making is a compelling one in the exercise of their discretion, and is one which from the judgment, the Family Court Judge appears to have disregarded, or given scant regard to, in exercising his discretion.

35. These orders, and more particularly the litigation generally, in the High Court of Justice (UK) on welfare issues concerning [H] since 1998, are also particularly relevant to ... the assessment of in which court/country welfare decisions affecting the child should be made ... .

[71] I agree that the considerations referred to by Mr O'Donnell are extremely significant. It would, however, be unfair to the Judge in the Family Court to suggest that he had not allowed for those considerations. This is apparent from the sections of his judgment which I have set out in paras [35] and [37] above and, indeed, his judgment generally. The fundamental issue on the appeal, as I see it, is whether the Judge was entitled to conclude that these factors (along with other considerations pointing to a return of the child) were, in

fact, outweighed by H's objection in light of the factors to which the Judge referred. This is the point which is addressed in the next section of my judgment.

[72] The last and most troubling of the arguments put forward by Mr O'Donnell relates to the sixth and final factor relied upon by the Judge. This related to the existence of an enforceable custody order in favour of the appellant in New Zealand. The relevant passage from the judgment is set out above at para [38]. As to this, Mr O'Donnell's submission was:-

It is unreasonable and untenable in the circumstances of the appellant as known (or more accurately not known) for the Court to suggest that the appellant could (or should) move permanently back to New Zealand, and thereby resume custody of [H]. Nor was it legally available to the Judge to bind the Family Court in these proceedings as to the outcome of subsequent child welfare proceedings in respect of [H].

[73] If the Judge did, indeed, form the view that Ms B could move permanently back to New Zealand and saw this as a relevant factor in rejecting Ms B's Hague Convention application, then I would, respectfully, disagree with him. The Judge had before him no evidence as to the practicality of Ms B returning to live in New Zealand. As well, an assumption that she could (let alone should) do so (in the context of her Hague Convention application) might be thought to involve putting the cart before the horse.

[74] It is certainly possible, perhaps probable, that Mr O'Donnell's interpretation of this part of the judgment is correct. I would, however, like to think that the Judge had in mind something slightly different. If Ms B came to New Zealand for welfare proceedings associated with H, she would resume custody of H whilst she was in New Zealand. Since she is a New Zealand citizen by birth and has lived in New Zealand for a significant period of time recently (that is between 1993 and 1998) a return to New Zealand for a short period during which she would have custody of H would not necessarily be of any great hardship. Welfare proceedings in New Zealand associated with H would probably, on this hypothesis, involve a contested relocation application. Even if she was unsuccessful in that application she would, in the absence of a successful challenge to the custody order by Mr C, be able to retain custody of H providing she continued to live in New Zealand.

[75] In saying this, I recognise that there is very little evidence before the Court as to Ms B's current circumstances in the United Kingdom and it may well be that those circumstances do make it impractical for her to return to New Zealand even for a limited period of time. But if this is the case, she has not placed evidence to this effect before the Court.

[76] I do not believe that the Judge was seeking to bind the Family Court as to the outcome of subsequent welfare proceedings in respect of H but rather was recording his expectation that the existing custody order would remain in place, which it will, unless set aside.

[77] As is probably apparent from what I have just said, I am uncomfortable about the Judge's sixth factor and I am not particularly easy with it even in the way in which I have reformulated it in para [74] above. If the Judge's remarks as to this factor are construed as Mr O'Donnell contends (and I accept that they are well able to be so construed) this consideration ought not to have been taken into account at all. Even as reformulated by me, this factor, it is at best of minor significance. As well it would be subject to a countervailing and corresponding argument as to the possibility of Mr C returning to the United Kingdom. That said, however, I do not see the Judge's sixth factor as being of decisive or even of much significance in this case (or in his thinking) and I am not persuaded that his judgment would have been different if he had merely referred to the first five factors.

[78] This is a convenient place to pause. As earlier indicated, the Judge correctly stated the principles which governed his task. With the exception of the Judge's sixth factor, I am satisfied that the appellant has not pointed to any tangible error on the part of the Judge in the way in which he approached his discretion. Although I am extremely uneasy about the way in which the sixth factor was referred to by the Judge and even about the way in which I have reformulated it, I do not see it as significantly influential in the Judge's ultimate decision. To put it another way, I am not prepared to allow the appeal on that point.

[79] This leaves for consideration the fundamental issue in the case which is whether the judgment can be said to be inconsistent with the appropriate application of Hague Convention principles.

Was the Judge's conclusion inconsistent with the appropriate application of Hague Convention principles?

[80] The contention that a Judge exercising a discretion has reached a result which is plainly wrong (which in essence was what Mr O'Donnell contended) is not usually an easy one to advance successfully. As I have noted, however, appellate courts in Hague Convention cases have a duty to ensure that courts at first instance apply the Convention in the way in which it was intended. So I have given Mr O'Donnell's submissions, in respect of this argument, very careful consideration.

[81] The fundamental reason why H has not been returned to the United Kingdom is because of the weight attached by the Judge to the child's objection.

[82] Article 13 of the Convention is drafted in a way which makes it clear that a child's objection is a stand-alone defence and may succeed irrespective of whether the objection is associated with risks of physical or psychological harm or the possibility of being returned to an "intolerable" situation.

[83] It is essential that defences to a Hague Convention application not be construed or applied in such a way as to negate the overall thrust of the Hague Convention which is that abducted children should be returned. Objections that are associated with improper or unfair pressure or influence emanating from an abducting parent should not prevent a child being returned. Objections based on misunderstandings on the part of a child should also not prevent a return being ordered. Objections which are primarily associated with a preference for living with one parent over the other are sometimes seen as being of limited weight because they relate to an issue which, under the Hague Convention, is seen as usually best determined by courts in the country of the child's habitual residence. As to this last point, however, I suspect that most (although by no means all) objections by children in this context are associated, directly or indirectly, with preferences for living with one parent over the other. As well, it is right to recognise that the provision of a defence based on the objection of the child is at least, in part, intended to reflect considerations associated with the personal autonomy of the child in question. It might be thought that the older and more mature the child, the greater the level of autonomy which should be recognised.

[84] There is some divergence in the authorities as to the approach to be taken to the weight to be placed on a child's objections and it is necessary for me to refer to this briefly.

[85] The approach taken by Balcombe LJ in S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 is usually regarded, in this context, as setting out the relevant principles. In that case the Judge observed, inter alia:-

It will usually be necessary for the Judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abducting parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the Judge comes to consider the exercise of discretion ...

[I]f the Court should come to the conclusion that the child's views have been influenced by some other person, eg the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. ... On the other hand, where the Court finds that the child or children have valid reasons for their objections to being returned, then it may refuse to order the return.

...

[I]t is only in exceptional cases under the Hague Convention that the Court should refuse to order the immediate return of a child who has been wrongfully removed.

[86] Judges usually take the approach that the weight to be placed on an objection will very much depend on the age of the maturity of the child. This common-sense view was expressed by Balcombe LJ in Re R (Child Abduction) [1995] 1 FLR 716 at 731:-

[T]he weight to be attached to the objections of the child or children will clearly vary with their age and maturity. The older the child, the greater the weight; the younger the child, the less weight.

[87] In the same case, however, a very different approach was proposed by Millett LJ at 734:-

Whether any particular child has attained sufficient age and maturity, [counsel] submits is a question of fact and depends upon the circumstances of the particular case. In the present case, she says, there was evidence on which the judge could properly find that these children were of sufficient age and maturity for it to be appropriate to take their views into account and, accordingly, she submits, we cannot interfere with his finding. It follows that the court is not bound to return the children though it has power to do so in its direction.

I do not think that that submission pays adequate regard to the actual wording of Art 13: '... has attained an age and degree of maturity at which it is appropriate to take account of its views'. That does not, of course, mean: 'to take account of the child's views generally'; but to take account of the child's views on the particular question, that is to say the question of whether the child should be returned to his home country. Whether the child does object, his age and degree of maturity are all questions of fact to be determined upon the evidence; but whether, given the child's age and the degree of maturity which he is shown to possess, it is appropriate to take account of his views on the question whether he should be returned, is not, in my view, a question of fact at all but a question of judgment.

It is to be observed that, if a child is not of an age and degree of maturity which makes it appropriate to take his views into account, he must be returned despite his objections and without any further inquiry whether his return is in his best interests. If, on the other hand, he is of sufficient age and maturity for his views to be taken into account, the Convention clearly envisages that he will not be returned against his wishes unless there are countervailing factors which require his wishes to be overridden. This latter case is provided for by Art 18. But it is to be observed that there is no corresponding Article to the opposite effect which permits the court to override the provisions of Art 12 when it is in the interests

of the child to do so. The inclusion of any such Article would be incompatible with the fundamental policy of the Convention.

I am, therefore, inclined to the view that by 'take into account' is meant to 'give effect to in the absence of countervailing factors'. I am not myself persuaded that there is any room for a child who is old and mature enough for his views to be taken into account and yet too young and immature for them to carry any weight - still less to prevail - unless supported by other factors which indicate that his interests would best be served by refusing to order his return. It seems to me that either the child must be old and mature enough for his views to prevail in the absence of countervailing considerations or he is not, and must be returned.

In light of the policy of the Convention, I find it difficult to accept that there can be an intermediate situation in which the child's views, although insufficient in themselves to be given effect to, are nevertheless sufficient to let in evidence factors which militate against his return, evidence of which would otherwise necessarily be disregarded. I tend to the view that such evidence is relevant only in a case where the child is bound [sic presumably found] to be of sufficient age and degree of maturity for his views to be taken into account, and the deprived parent nevertheless invokes Art 13 to tender evidence in order to attempt to persuade the court to override his objections because it is in the interests of the child to do so. It is, however, not necessary to express a concluded view on this question, since on the view I take of the evidence it does not arise.

The emphasis which is in bold is mine.

[88] I note in that case that the third member of the Court, Sir Ralph Gibson, observed:-

I agree that this appeal should be allowed, and that the order should be made as proposed by my Lord, Balcombe LJ. I also agree with the reasons for the decision given by my Lords, Balcombe and Millett LJJ, save that, with reference to the boys' objections, I agree with the approach to that issue explained by Balcombe LJ.

[89] There are very significant differences between the "in or out" approach taken by Millett LJ in R and the traditional and orthodox "shades of grey" proposed by Balcombe LJ in the same case. This is not the time or place to discuss those differences. What is significant for present purposes is the apparent tension between the passage in the judgment of Millett LJ, which I have placed in bold and the interpretation often placed on the remarks of Balcombe LJ in S that in litigation where a discretionary defence is made out based on a child's objection, it is still only in an exceptional case that such an objection ought to be allowed to prevail. In fact I do not think that that is what Balcombe LJ meant. Rather I think that he was talking about Hague Convention applications generally. Cases where a "mature" child has a rational and uncontaminated objection to return probably can be regarded as exceptional when viewed against the general run of Hague Convention cases.

[90] There has been judicial support for the approach taken by Millett LJ. This is to be found in the comparatively recent judgment Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192. In that case, Ward LJ set out a portion of the judgment of Millett LJ in the R case which included the portion which I have emphasised and noted, I think, inaccurately, that this was "with the agreement of Sir Ralph Gibson". Be that as it may, it is clear that Ward LJ was inclined to share the view taken by Millett LJ that if a child was:-

of sufficient age and maturity for his views to be taken into account, the Convention clearly envisages that he will not be returned against his wishes unless there are countervailing factors which require his wishes to be overridden

Having said that and referring briefly to the facts of the case at hand, Ward LJ went on to say:-

In the last analysis, the balance is between allowing the girl her Art 13 defence or enforcing the spirit of the Convention despite the Art 13 defence. In my judgment, the demands of comity, convenience and even the welfare of the child in having her future decided in the Court of her habitual residence, do not override the respect which should be paid to her wishes in this particular case.

In that case, the girl to whom Ward LJ was referring was 11 years old and the Court declined to return her to her country of habitual residence despite there being current welfare litigation in the courts of that country. Of interest to me is the use of the words, "allowing the girl her Art 13 defence". It involves treating the defence as being not that of the abducting parent but rather that of the child.

[91] Having re-examined Article 13, I think that Ward LJ's approach of treating it as creating a child's defence rather than a defence for the abducting parent is consistent with its wording. The approach of Ward LJ in this respect is also consistent with the order made in Re P (Abduction: minor's views) [1998] 2 FLR 285 where a child of 13 was made a party to the application and later appealed against the order made for return.

[92] As is apparent from my earlier remarks, I do not believe that this is the time or place to examine in detail and perhaps choose between the conflicting approaches taken in the English cases. What is more important, to my mind, is that the drift of those cases supports the view that when a Hague Convention application concerns a teenager, the Courts are required to pay close attention to a strong and reasonable objection to return which that teenager articulates.

[93] H is now 13. He was described by the Judge, who had the opportunity of meeting him, as a "young man wise beyond his years". His reasons for not wishing to return to the United Kingdom were assessed by the Judge as being reasonable. The tenor of the judgment makes it clear that it was H's objection to a return to the United Kingdom which resulted in his "abduction" (by retention in New Zealand). There is a sense in which H has abducted himself. So it is not a case of his objection to a return to the United Kingdom being a product of the abduction and associated circumstances. The Judge was also of the view that the views which H has on this topic are not the result of any inappropriate pressure or influence which may have emanated from Mr C.

[94] Against that general background, I see the three critical factors in this case as being:-

1. There is a strong objection to return on the part of H which, inter alia, involves his preferences as to where welfare litigation between his father and mother should be conducted and where he wants to live but primarily relates to a strong desire to live with his father. This objection is not the result of the "abduction" and likewise is not the result of illegitimate or inappropriate persuasion. Given H's age and maturity and the uncontaminated nature of his views, his objection is, indeed, an extremely significant factor mitigating against return.

2. Welfare issues associated with H have been the subject of litigation in the Family Division. Furthermore, issues associated with custody and access were addressed in a detailed and sophisticated way as recently as April this year. The clear expectation of the Judge of the Family Division dealing with the case and no doubt the lawyers involved (although probably not Ms B) was that the Hague Convention would ensure that H would be returned to New Zealand at the expiry of the access period this winter. It is of critical importance that courts

of the various countries which are parties to the Hague Convention do not act in a way which undermines, inappropriately, such confidence and this is particularly important in cases involving access.

3. On the other hand, H's objection to a return to the United Kingdom is at least to some extent associated with his perception that he was inappropriately abducted there from New Zealand in 1998 and the consequences of that abduction. Given that abduction, his reluctance to be returned to the United Kingdom would appear, objectively, to be very reasonable and understandable and his compulsory return could well be perceived by him as being a second, but judicially sanctioned, abduction.

There are other considerations in the case. But these seem to me to be far and a way the most important.

[95] Comparison of the facts of one Hague Convention case with those of another is unlikely to be particularly helpful. But that said, I do see the dilemma which confronts me here as broadly comparable to that which confronted the Court of Appeal in Re T, to which I have referred. In that case, as with this, there were current orders and litigation in the Court of the country of the child's habitual residence. But in the end, the objection of the child prevailed and the Court allowed "the girl her Art 13 defence". When the present case is viewed in terms of whether the New Zealand Courts should allow H his Article 13 defence, I think that the answer is the same.

[96] I have not been persuaded that the Judge in the Family Court was wrong. Not only that, I would myself have decided the case the same way.

Disposition

[97] In the circumstances, the appeal is dismissed. Costs are reserved.

Signed at: 11.30 am on: 24 December 2001 William Young J.

Solicitors: Duncan Cotterill and Co, Christchurch for the Appellant; Layburn Hodgins, Christchurch for the Respondent; Godfreys, Christchurch for the Child

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