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[11/06/2003; High Court (Auckland) (New Zealand); Appellate Court]
KS v LS [2003] 3 NZLR 837

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**KS v LS**

**CIV-2002-404-73; AP 133-SW02**

**High Court Auckland**

**11 June 2003**

**Priestley and Frater JJ**

**PRIESTLEY J.:**

**The appeal**

**[1] Central to this appeal is the wrongful removal of the parties' daughter from Queensland to New Zealand in September 2001.**

**[2] Both New Zealand and Australia are parties to the Hague Convention on the Civil Aspects of International Child Abduction. The substantive provisions of the Convention have been incorporated into New Zealand's domestic law by the Guardianship Amendment Act 1991 (''the Act'').**

**[3] The appellant, seeking the return of his daughter to Australia, the State of her habitual residence, invoked the Convention. His request to the Australian Central Authority was duly transmitted to the New Zealand Central Authority which retained counsel to obtain appropriate orders for the return of the child.**

**[4] On 13 December 2002, after a hearing which spanned three days, the Auckland Family Court released a decision refusing to make an order under the Act for the child's return. The appellant challenges that decision.**

**The abduction**

**[5] The removal of the child in September 2001 from Australia to New Zealand by the respondent mother was premeditated and flagrant. It was precisely the type of abduction the Convention is designed to thwart.**

**[6] The abducted child, MS (''the child'') was born in Queensland on 16 October 1993. Her parents (the parties) were married in Melbourne in March 1993. The parties' marriage was dissolved on 23 March 2000.**

**[7] Shortly before the child's fifth birthday the parties separated. They continued to live close to each other and although the respondent (''the mother'') had primary care of the**

**child, for the next 15 months the appellant (''the father'') had regular contact with his daughter including overnight visits by her.**

**[8] A year after the parties' separation the mother entered a lesbian relationship with a Ms T who inevitably became involved in the child's life. Three months later, the mother curtailed contact between the child and her father citing fears of sexual abuse. The parties then became embroiled in Australian Court proceedings which included a proceeding in the Family Court of Australia at Townsville sitting in Cairns.**

**[9] A description of those proceedings is unnecessary. Suffice to say that the Family Court of Australia carried out extensive child-focused inquiries.**

**[10] In April 2001, after three days' negotiation, the parties appeared to have resolved their dispute. Both parties were represented by counsel. The child was represented by a Child's Representative. The parties' agreement was embodied in consent orders made in the Family Court of Australia at Cairns before the Hon Justice Guest on 10 May 2001. There were 18 specific orders including orders permitting the child to reside with her father from 9 am until 5 pm on weekend days for five weekends out of every eight; orders relating to school holidays; and orders restraining each parent from certain types of behaviour and activity.**

**[11] The Court directed the Family Court Counselling Service to prepare a further report on certain issues including a recommendation as to whether it would be appropriate for the child to have overnight contact with her father after a three month period.**

**[12] Unbeknown to both the Court and the father, an Australian passport was issued for the child in April 2001. She was brought to New Zealand using that passport. The passport application form contained a forged signature of the father which had been witnessed by the mother's partner, Ms T.**

**[13] On 22 March 2002 Ms T was charged by the Australian Federal Police with an offence against Australia's passport legislation and was convicted in the Magistrate's Court in Cairns of having falsified the relevant passport application.**

**[14] On 1 September 2001 the Family Report ordered by the Family Court of Australia was released. It recommended that overnight contact between the child and her father should commence.**

**[15] Armed with the child's Australian passport, and doubtless finding the recommendation unpalatable, the mother sent a fax to the father from a Melbourne news agency on 8 September 2001 which said:**

**M and I are having an extended holiday and you will be notified on our return. This is due to your continued stalking and abuse of myself and others as well as M's fear of your behaviour towards her. No-one neither friends and family, nor work colleagues know where I am, this includes [Ms T]. So you have no excuse to harrass [sic] anyone about my whereabouts.**

**[16] Mother and child arrived in New Zealand on 8 September 2001 at Christchurch. They lived in New Zealand under assumed names and moved to Waiheke Island where they were subsequently joined by Ms T.**

**[17] Considerable effort on the part of the father, the New Zealand Central Authority, and other agencies was necessary to run the mother to earth. The New Zealand and Australian Central Authorities were involved from early October 2001. Proceedings under the Guardianship Amendment Act 1991 were filed promptly in the Christchurch Family Court**

**where an order was made on 24 October 2001 preventing the removal of the child from New Zealand. Months passed before mother and child were found. All that time the child had no contact with her father and was using a different name.**

**The Convention**

**[18] The preamble to the Convention declares that signatory States were:**

**Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.**

**[19] Article I of the Convention states as its objects:**

**(a) To secure the prompt return of children, wrongfully removed to or retained in any Contracting State; and**

**(b) To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State.**

**[20] Given the litigation history involving this child in the Family Court of Australia, and given further the narrative culminating in the child's wrongful removal from Australia and concealment in New Zealand, one would expect the underlying policy of the Act and Convention to lead, unless this was an exceptional case, to an order for the child's return to Australia.**

**The mother's health**

**[21] The determinative feature of this case in the Family Court, which was also the central point of argument on appeal, is the mother's health. In February 2002 she discovered lumps in her breast and under her arm. A malignancy was diagnosed which led to a left partial mastectomy and axillary lymph node dissection by surgery performed on 6 September 2002. A subsequent biopsy discovered another malignancy which resulted in further surgery later that month.**

**[22] The mother was thus referred for a total mastectomy. She opted, at the same time, to undergo reconstructive surgery. This would not have been available to her under the public health system in Queensland.**

**[23] At the Family Court hearing it was anticipated the surgery would be carried out in January 2003, followed by up to 12 weeks recuperation and a minor second-stage procedure mid-year later to complete the breast reconstruction. Thereafter she would be on medication for five years and be followed up regularly by either a specialist oncologist or a breast surgeon.**

**[24] The specialist evidence of Dr W O Jones in the Family Court, after dealing with the importance of psycho-social support for women with breast cancer, was that the life-saving surgery - the removal of invasive tumours - had already occurred. He further stated there would be a delay in the mother embarking "on the road to physical and mental recovery" if she were to travel to Australia in December, particularly over the Christmas period, to seek referral and assessment in the public system there.**

**[25] There was further evidence that although cancer treatment and ongoing care might not be readily accessible in Northern Queensland, it would certainly be available in major Australian cities including Brisbane.**

**[26] The mother gave viva voce evidence in the High Court. The Court considered that it would be assisted by updating evidence on her health. She confirmed that surgery took place on 9 January 2003. She is awaiting surgery to complete the breast reconstruction. This is currently scheduled to occur sometime this month or next.**

**[27] During the course of a regular check at the end of April 2003 another lump was discovered on the mother's sternum. This requires further investigation by ultrasound and possibly by a biopsy. The investigation was to occur approximately a fortnight after the hearing of the appeal.**

**[28] The Court has reviewed the evidence relating to the mother's health. It has done so in the light of the Family Court's conclusion that the mother could not have accompanied the child back to Australia in December 2002. This Court is conscious that the mother's health remains problematic. But, put bluntly, the central issue for this Court is not whether it is preferable for the mother's reconstructive surgery and ongoing care to take place in Queensland or New Zealand. Rather it is whether, having particular regard to the Act and New Zealand's international law obligations, future decisions affecting the child's welfare, and in particular decisions which might arise out of the mother's health, are to be made in the country of the child's habitual residence or instead in New Zealand to where the child was abducted.**

**The approach**

**[29] Section 13 of the Act sets out what could be termed "discretionary defences" to applications seeking the return of children to the State of their habitual residence. The section embodies Article 13 of the Convention which states:**

**. . . 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 -**

**. . .**

**(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.**

**. . .**

**[30] Section 13 relevantly provides:**

**13. Grounds for refusal of order for return of child**

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

**. . .**

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

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

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

**. . .**

**[31] There are other situations where the Court, consistent with the Convention, has a discretionary right to refuse to make an order. They are not, however, relevant to this particular case.**

**[32] The mother invoked s 13(1)(c) in the Family Court. She also invoked s 13(1)(d), that the child objected to being returned and had attained an age and degree of maturity where it was appropriate to take account of the child's view. The evidence on subsection (d) fell well short of justifying a finding to that effect.**

**[33] The interrelationship of ss 12 and 13 has jurisdictional importance. Section 12 provides:**

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

**(1) Where any person claims -**

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

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

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

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

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

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

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

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

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

**. . .**

**Thus, in terms of s 12(2), it is mandatory for the Court to make an order for the return of the child if the s 12(1) grounds are established. The Court's duty in that regard is trammelled only by s 13.**

**[34] With the various s 13 "defences" or grounds the Court has a discretion to refuse to order a child's return, (s 13(1)).**

**[35] There is thus a two phase inquiry before a Court when a party invokes s 13. The first phase is to establish whether a s 13 ground has been made out, the onus being on the party**

**who opposes an order returning the child. If a ground is made out, the second phase is whether the Court should exercise its discretion in favour of the opposing party.**

**[36] This approach, quite apart from being evident from the interpretation of the statute, has been mandated by a Court of Appeal bench of permanent members in S v S [1999] 3 NZLR 513:**

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

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

**[37] The policy underlying the second phase of this approach was helpfully discussed by Lord Donaldson MR in the English Court of Appeal decision Re A (Minors) [1992] 1 All ER 929, 942:**

**In the comparatively rare case in which a judicial discretion falls to be exercised, there will be two distinct and wholly different issues confronting the Court. (1) In all the circumstances is it more appropriate that a Court of the country to which the child has been wrongfully removed or which it has been wrongfully retained (country B) should reach decisions and make orders with a view to its welfare or is it more appropriate that this should be done by a Court of the country from which it was removed or to which its return has been wrongfully prevented (country A)? (2) If, but only if, the answer to the first question is that the Court of country B is the more appropriate Court, should that Court give any consideration whatsoever to what further orders should be made other than for the immediate return of the child to country A and for ensuring its welfare pending the resumption or assumption of jurisdiction by the Courts of that country?**

**In considering the first issue, the Court of country B should approach the matter by giving the fullest force to the policy which clearly underlies the Convention and the Act, namely that wrongful removal or retention shall not confer any benefit or advantage on the person (usually a parent) who has committed the wrongful act. It is only if the interests of the child render it appropriate that the Courts of country B rather than country A should determine its future that there can be any exception to an order for its return. This is something quite different from a consideration of whether the best interests of the child will be served by its living in country B rather than country A . . . The issue is whether decisions in the best interests of the child should be taken by one Court rather than another.**

**Family Court decision**

**[38] The structure of the Family Court Judge's decision indicates she was well aware of the jurisdictional interrelationship of the two provisions. She has approached the task correctly. But for the mother's ill-health it is clear from the decision that an order for return would have been made.**

**[39] At the first level of inquiry, - whether the s 13(1)(c) ground had been made out, the Court held:**

**[43] I do not propose to elaborate on the voluminous evidence that was provided by both parents in respect of the proceedings in Australia. Given that those matters have never finally been determined by a Court, and that I have found a defence based on matters entirely independent of the earlier proceedings, I do not consider it necessary to traverse that information. Suffice to say that had it not been for the mother's cancer and need for continued treatment in New Zealand I would not have found a s 13(1)(c) ground established and would have had little hesitation in returning the child to Australia particularly given the circumstances of her abduction.**

**[40] The Judge found that the evidence established a grave risk that the child's return would either expose her to psychological harm or place her in an intolerable situation. She rejected the submission of the mother's counsel that the child was in grave risk of exposure to physical harm, the alternate ground in s 13(1)(c)(i).**

**[41] The centrality of the mother's illness was repeated by the Judge in para [46](c) of her decision where she stated:**

**Return of the child in the context of her mother's illness: Were it not for this additional and somewhat overpowering factor I would not have considered the defences raised under s 13 (1)(c) to have been established. I consider that the proper forum for determining this child's safety exists in Australia where those who have closely studied the case and assessed the parties are able to give evidence and where, until the abduction, the parties and child were all domiciled. However, the development by the mother of a serious, indeed life-threatening, illness entirely changes the overall picture. I have some concerns that father was unable to take account of this.**

**The mother is due to have major surgery within weeks. I do not consider it tolerable for a nine year old child to be parted from her primary attachment figure at such a time. The alternative of that primary attachment figure electing not to undergo treatment to return to Australia with the child, with the risk of her suffering the consequences of her earlier breach of Court orders in the process is equally unacceptable. This child will be distressed, it seems to me, in Australia knowing that her mother is unable to undergo the treatment which was about to occur in New Zealand, as she would be in Australia, in the care of her father wondering about her mother's health and progress. As to the father's ability to handle M's predictable distress the psychologist had this to say:**

**K.S. was not able to express clearly how he would provide for M on her return nor was he able to envisage the emotional consequences that the separation from her mother would have upon M.**

**[42] Turning to the second level of inquiry, the exercise of the s 13(1) discretion, the Family Court Judge referred to the policy of the Convention, to the mother's conduct, to certain "balancing of risks" factors, and to the possibility of delaying the child's departure, but concluded:**

**[58] In the end I am persuaded that because of the overwhelming factor of the mother's need to remain in New Zealand for surgery in the immediate future and follow-up treatment, that [sic] I must exercise my discretion to decline the application.**

**[43] But for the mother's illness it is abundantly clear that the Family Court would have ordered the return of the child to Australia. The Court considers that Mrs Sage's submission**

**correctly identifies three steps behind the rationale of the Judge's decision. First, in the wake of the abduction, the father obtained various orders in the Family Court of Australia including a recovery order. Those orders would, until further order of the Australian Court, give the father a right to custody of the child. There was also a concern that contempt proceedings might result in the mother's imprisonment. Secondly, but for the mother's illness and pending surgery, she would be able to accompany the child to Australia and would presumably be able to remain in contact with the child and seek a variation of current Australian orders. Thirdly, the mother's illness and in particular the pending January surgery, made it impossible for her to travel. In combination these factors placed the child in an intolerable situation.**

**[44] Mrs Sage's submission attempted to explain what at first blush appeared to be an error in respect of the s 13(1) onus when the Judge said:**

**[45] The Central Authority did not satisfy me that if the child were returned to Australia that she could successfully remain, in the short term, in the care of her mother. Indeed both parents acknowledged to the psychologist that it was their understanding that should M be returned to Australia it would be to the care of her father in terms of the Recovery Order already made by the Australian Courts. Further, there is a serious risk of Contempt Proceedings, even if not initiated by father, that must be taken into account by this Court**

**[45] Although this Court accepts Mrs Sage's submission as an explanation for the background to the above conclusion, there is nonetheless an error on the part of the Family Court Judge. It is not for the Central Authority to satisfy the Court that on the child's return to Australia there will be no short term separation of the child from the mother. Rather the onus is on the mother to establish not only that there will be some separation, but more importantly, that such separation will be of such duration and impact as to produce one or both of the s 13(1)(c) grounds.**

**Section 13(1)(c) evidence and findings**

**[46] The evidence on which the mother relied to advance the s 13(1)(c) grounds for refusal, which the Judge appears to have accepted, was provided by a child psychologist, Anne Raethel. A report had been requested under s 29A of the Guardianship Act 1968 to provide the Court with a psychological assessment of the effect on the child of a return to Australia.**

**[47] Ms Raethel twice interviewed the child in sessions which lasted one hour. She further observed the child interacting with each parent for one hour each.**

**[48] Ms Raethel's observations occurred after the execution of a warrant on 15 October 2002 and the child's placement with a foster family. This was an understandable precaution having regard to the circumstances of the abduction.**

**[49] During the child's placement (under the general aegis of Child Youth and Family) both parents had contact with her. It thus cannot be asserted that the child was being solely influenced by the views of her mother, her mother's partner Ms T, or indeed of the sympathetically disposed community with whom the mother was living on Waiheke Island. This is an important factor. It would doubtless not have escaped the attention of the Family Court Judge, from the affidavit sworn by the child's social worker Ms Giddens, that the mother and Ms T lost little time in expressing to Child, Youth and Family their preoccupations and concerns which had already been ventilated in the Family Court of Australia.**

**[50] Ms Raethel's report prefaced her observations with the following comment:**

**It is the understanding of both parents that should this be the order of the Court, M would be returned to Australia and placed immediately in the custody of her father. Both parties also believe that there would be likely to be legal consequences for LS including the possibility that she could be imprisoned.**

**Mr MacLean for the mother laid considerable emphasis on this passage submitting that the parties on appeal could not go behind it.**

**[51] The issue of imprisonment for contempt is something of a red herring. Rightly it did not influence the Family Court Judge. There was no compelling evidence that the mother, should she return to Australia with or shortly after the child, would be imprisoned. In any event there are strong policy reasons why Courts considering s 12(2) orders should not be influenced by the prospect of penalties imposed on an abducting parent unless perhaps there was evidence that a particular State was likely to impose Draconian punishments with scant regard to a child's interests. Courts must avoid what Mr Pidgeon QC described as "putting a premium on wrongdoing". In Adams v Wigfield [1994] NZFLR 132, 140-141 Hammond J said:**

**There is really nothing of substance in the contempt argument: Courts understandably and properly become very concerned about breaches of Court orders but contempt is a remedy of last resort, which is rarely resorted to. In my view the Family Court Judge was correct to say that he had jurisdiction to impose undertakings; he was also correct to decline to do so in the instant case.**

**[52] The report addressed the issue of the psychological effect on the child of her return to Australia thus:**

**The effect of a return to Australia needs to be set in the context of the psychological impact that proceedings over the past three years have had upon M. M lists as her biggest worry the ongoing proceedings in the Court of which she has been aware. Should she return to Australia it would be likely that these proceedings would continue. Regardless of the rights or wrongs of the actions of either of her parents to date, M herself shows signs of fragility and emotional turmoil which are likely in part to be a function of the recent situation in which she was abruptly uplifted from her mother's care. Despite good legal reasons for moving the child into the temporary care of a neutral agency for the present time, and despite the relative speed with which matters have progressed, the separation from her mother has been traumatic for M. Her reaction is one of muted sadness and periods of dissociation. Should this continue for any length of time, there is a predictable risk of developing depression.**

**The factors which would affect M should she be returned to Australia are therefore:**

**(a) Separation from her mother on a continuing basis for an indeterminate length of time whilst her mother continues treatment for cancer. (Clearly the Court will need to make findings of fact as to whether the medical reasons for staying in New Zealand in the short term are valid. However should these be accepted, mother's current position with respect to an immediate return to Australia would lead to such a separation).**

**(b) Apart from experiencing separation from her primary attachment figure, M is likely to suffer the ongoing emotional consequences of worry about her mother's health should she not be seeing her on a regular basis and be able to reassure herself that she is all right.**

**(c) A move into the sole care of her father who has not been her primary caregiver since the end of the relationship in 1998. This has implications for her psychological wellbeing in**

**terms of ongoing, conflicting and unresolved issues and professional opinions around personal and sexual safety and in terms of M's clear preference not to be returned to Australia in her father's care.**

**[53] The report writer concluded that there were four factors which would affect the child if an order for her return to Australia were made "at this time". The opinion was expressed that these factors:**

**. . . have a high probability of exposing M to psychological trauma as well as placing her in a situation which would be intolerable.**

**[54] The factors which led the psychologist to this conclusion were itemised as:**

**- Separation from the child's primary attachment figure.**

**- Placement in the care of a parent who has never had the sole primary care of the child and who has been seeing her in supervised access for a lengthy period prior to her move to New Zealand in October 2001.**

**- Placement with a parent who does not demonstrate empathy for dealing with issues to deal with the child's separation from the mother or the mother's serious illness.**

**- Placement with a parent whose past behaviour has raised unresolved issues of sexual boundaries and safety which continue to be a subject of dispute or varying opinions among professionals and which had never been directly addressed in a Court hearing.**

**The child had additionally expressed a clear preference for being with her mother.**

**[55] The last two factors raise problems. Allegations about the father's "past behaviour" were certainly before the Family Court of Australia which, as the Court operative in the State of the child's habitual residence, had the responsibility of weighing those allegations and assessing the appropriate orders with the child's interests as the paramount consideration. By raising this last factor Ms Raethel is, in effect, raising the spectre of risk in an impermissible way, under the guise of giving an opinion on the psychological effect on the child on her return to Australia.**

**[56] As to the factor of the father's alleged lack of empathy on separation and illness issues, the only evidence supporting that conclusion is the psychologist's observation:**

**KS was not able to express clearly how he would provide for M on her return, nor was he able to envisage the emotional consequences that the separation from her mother would have upon M.**

**[57] Rarely in the context of a Family Court hearing involving a request under the Convention for the return of a child does the left-behind parent have the opportunity of giving viva voce evidence. The hearing is frequently in the nature of a summary hearing. Neither party in this case gave such evidence in the Family Court although both had sworn affidavits. The father was in New Zealand and attended the Family Court hearing but was not cross-examined and had no opportunity to comment on this observation of the s 29A report writer. Yet the Judge (above para [41]) relied on the observation.**

**[58] The situation on which Ms Raethel was commenting was arguably hypothetical. The father was prepared to delay the child's return to Australia until after the January surgery (below para [71]). There was no evidence about how lengthy "the separation from her**

**mother'' would be. Despite Ms Raethel's narration of the parents' ''understanding'' (above para [50]) a lengthy separation between mother and child was by no means a foregone conclusion assuming the mother chose to return to Australia with or shortly after the child.**

**[59] Ms Raethel was cross-examined on her report by counsel for the Central Authority and counsel for the child. She was also asked a large number of questions by the Family Court Judge who was clearly concerned with the risk of the mother's actions alienating the child from her father.**

**[60] She was asked by Mr Pidgeon QC whether there was any theoretical basis where a child was likely to suffer psychological damage from being deprived of a father for a substantial period of time. Her reply was broadly cast:**

**I'm not aware of any authoritative literature that establishes with a strong evidential basis that a child is likely to suffer psychological harm in being separated from either a mother or father if their basic needs are being met and there are circumstances in which they are comfortable. It really does depend on an individual case and there is not literature to support that the loss of one parent is necessarily psychologically damaging.**

**[61] The psychologist confirmed that, in the context of geographical location the most important thing for the child was ''. . . the closeness that she is expressing towards her mother''.**

**[62] In answer to a question from the Court Ms Raethel stressed that the child's predominant and repeated concern was that litigation should come to an end.**

**I asked her for three magic wishes . . . she had almost difficulty in thinking of anything that she personally wanted but . . . the only thing she said - there is only one thing for this court stuff to be all over and done with as soon as possible. That then came through quite a lot.**

**So that sort of event overwhelms her even more than mother's illness? Yes absolutely.**

**[63] The child understandably expressed a worry that her mother had cancer and might die and that she might not see her Waiheke ''best friends'' again. The psychologist continued:**

**She had some very clear messages and they are stop the court cases, keep me with my mother, I don't mind geographically where I live. This latter wish on the evidence is predicated that the child continues to live with her mother**

**[64] In a significant exchange between the Bench and Ms Raethel the following evidence was given:**

**Q. If mother manages to [persuade] me that her reasons for remaining in New Zealand for medical treatment are valid and it's not reasonable to expect her to move back to Australia, then obviously the main concern about returning M to Australia, apart from the very fact that that would place her with someone who hasn't been her primary caregiver for four years, would be her anxiety in terms of worrying about her mother and her mother's treatment?**

**A. Yes.**

**Q. Back in New Zealand?**

**A. There would be that, plus the loss of the primary attachment with her, which is also strong, and when the primary attachment figure has the illness as well, I think it would be overwhelming.**

**Q. It's really the combination of those two things that make you say this is an intolerable situation for this child?**

**A. I do say that, yes, because if mother was not ill she could relocate. I think the crux of it is -**

**Q. It seems to me that the illness changes everything?**

**A. Yes it does - yes it does. I certainly did go down the track of thinking very strongly about what does it mean about a non-surviving and surviving parent but I guess one has to look at the prognosis as being hopeful and the will to live is very strong.**

**Q. I don't have clear evidence about that, of course, yet?**

**A. No.**

**Q. So I may be able to point you to something definite than I imagined on it?**

**A. One would certainly hope that, whatever the decision, both parents continue to have contact with her but that that overwhelming need to be with her mother - and particularly at a time when her mother is vulnerable, and as I said earlier, if anything happened to her mother, I think the psychological consequences would be enormous if she'd been separated from her.**

**Q. Worse than if she's allowed to remain with her mother and her mother dies in New Zealand?**

**A. That is, in my opinion, the balance.**

**Analysis of Family Court decision**

**[65] As is apparent from passages of the Judge's decision set out previously (above paras [39] and [41]) the mother's illness was the critical component of the Family Court's finding that a s 13(1)(c) ground had been made out. The Judge referred to medical evidence to the effect that the mother should avoid stress and undue worry during the recuperation phase following the January 2003 surgery. There was also evidence accepted by the Judge (and repeated by the mother in this Court), about difficulties the mother might face in Northern Queensland accessing the type of treatment to which she had access in Auckland.**

**[66] The Judge found the s 13(1)(c) ground of psychological harm and/or placing the child in an intolerable situation was made out. But for the mother's cancer and her need for continued treatment in New Zealand the ground, quite explicitly in the view of the Judge, would not have been established.**

**[67] That conclusion was in the view of the Judge justified on the evidence and particularly the evidence of Ms Raethel, of the child's attachment to her mother who was "seriously ill"; and the prospect of parting the child from her mother at a time when surgery was imminent.**

**[68] On the second phase of the s 13 jurisdiction, the exercise of the discretion, the Judge correctly referred to the policy considerations underlying the Convention and also the conduct of the abducting parent. She accepted Mr Pidgeon QC's submission that the**

**mother's behaviour should not easily be countenanced by the Court, although she tempered that observation somewhat by observing:**

**There is also a need for the Courts to be humane enough to recognise particular needs in individual cases and to respond to exceptional circumstances in the exercise of its [sic] discretion.**

**[69] Considerations of humanity and concerns over exceptional circumstances must not, of course, seduce a Court into diluting the clear policy of the Convention. The s 13(1)(c) ground is child-focused and does not concern itself with the predicament, exceptional or otherwise, of the abducting parent except to the extent that it impacts on the child.**

**[70] The Judge then turned to an exercise which she termed "the balancing of risks". She expressed a concern that if the child continued to live in New Zealand there was a high risk of her being alienated from her father. However, in the Judge's view there was an option for the father and his new partner to relocate to New Zealand. In the Judge's view the risk attendant on returning the child to Australia was greater than alienation from the father.**

**[71] Mr Pidgeon QC had indicated to the Family Court that, so far as the Central Authority and the father were concerned, an order for return, or at least the implementation of it, would not be sought until after the projected January 2003 surgery so that the mother could accompany the child to Australia.**

**[72] Although the Judge did not specifically refer to that humane and child-focused submission, she stated that she did not consider she ". . . would be acting in accordance with the intent of the legislation given the preamble as to 'prompt return'".**

**[73] Those words are not, of course, used in the long title of the Guardianship Amendment Act 1991 although they do occur in the preamble to the Convention itself (above).**

**Discussion**

**[74] It is unnecessary to replicate counsels' submissions in detail. They were predictable, and for the most part, helpful.**

**[75] Mr Pidgeon QC submitted that the Family Court Judge had erred both in finding that a s 13(1)(c) ground existed and also in the exercise of her discretion. He analysed the decision and indicated various areas where, in his submission, the Judge had taken impermissible factors into consideration or had failed to give other factors sufficient weight. He helpfully referred this Court to relevant authorities.**

**[76] Mr MacLean for the mother, understandably perhaps emphasised her predicament. He stressed this Court had to exercise its appellate powers solely on the basis of the situation before the Family Court in December 2002 and should be uninfluenced by both the updating evidence which the mother gave, and also by an undertaking proffered by the father which counsel described as "a second bite at the cherry". He laid heavy emphasis on various aspects of the mother's health and the situation, both medically and legally, which might await the mother were she to return to Queensland.**

**[77] Mrs Sage for the child helpfully explained some features of the Family Court decision and in particular emphasised the relevance of the medical evidence at the time of the Judge's decision. She supported Mr MacLean to the extent that she submitted the correct approach for this Court was to examine the evidence before the Judge in December. She did not**

**consider this Court would be assisted by any further assessment of the child. She submitted overall that the Family Court's decision was correct.**

**[78] As has been observed (Winterbottom v Wright (1842) 10 M109,116;152 ER 402,405-406) hard cases make bad law. This is one such case where the post- abduction illness of the mother naturally evokes sympathy. Judges are rightly not blind to the human sensibilities and predicaments of the people whose lives are affected by their decisions. It would be all too easy to categorise an order for return of the child to Australia in a simplistic way which ignores the circumstances of the abduction and the flagrant disregard of orders made in the Family Court of Australia. In this Court's judgment the tragedy of the mother's illness has produced a decision which is wrong.**

**[79] The onus which s 13(1) places on a party is a high onus. High too is the gravity which must be established as a subs(c) ground.**

**[80] In A v Central Authority for New Zealand [1996] 2 NZLR 517, 522-523, a Full Bench of the Court of Appeal, comprising four permanent members, unanimously rejected a submission that the High Court had adopted too narrow an approach in interpreting s 13.**

**The New Zealand case and cases in other jurisdictions make plain that the convention is concerned with the appropriate forum for determining the best interests of a child. In cases where a grave risk to the child is alleged under art 13, our s 13(1)(c), the Court of the country to which the child has been abducted will only be the appropriate Court if it is established the child's return to the country of habitual residence will give rise to a grave risk and the Court exercises its discretion in favour of retaining the child in the country to which the child has been abducted. Where the system of law of the country of habitual residence makes the best interests of the child paramount and provides mechanisms by which the best interests of the child can be protected and properly dealt with, it is for the Courts of that country and not the country to which the child has been abducted to determine the best interests of the child.**

**In most instances where the best interests of the child are paramount in the country of habitual residence the Courts of that country will be able to deal with any possible risk to a child, thus overcoming the possible defence of the abducting parent. That does not gainsay the fact that in some instances there will be situations where the Courts of the country to which the child has been abducted will not be so satisfied. This will not necessarily be limited to cases where there is turmoil or unrest in the country of habitual residence. There may well be cases, for example, where the laws of the home country may emphasise the best interests of the child are paramount but there are no mechanisms by which that might be achieved, or it may be established that the Courts of that country construe such provisions in a limiting way, or even that the laws of that country do not reflect the principle that the best interests of the child are paramount.**

**[81] A similar approach was adopted by William Young J in KMH v The Chief Executive of the Department for Courts [2001] NZFLR 825:**

**[36] This is not to say that the welfare interests of an abducted child are irrelevant. Section 13(1)(c) and (d), in particular, mean that the interests of the child who has been abducted must be addressed. But this must be in the context of the legislation and the Hague Convention as a whole. The approach which is taken to Hague Convention cases is that where the legal system and Courts of the home jurisdiction make the best interests of the child the paramount consideration, it is usually for the Courts of that country, and not the country to which the child has been abducted, to decide where the best interests of that child lie. This is exemplified by the decision of the Court of Appeal in A v A [1996] NZFLR 529.**

**To put this another way, it is going to be an exceptional case where the abducting parent can resist the return of the child to the home jurisdiction.**

**[82] In Damiano v Damiano [1993] NZFLR 548, 554, one of the earlier New Zealand Hague Convention decisions, Boshier DCJ correctly formulated the threshold after a review of the then operative overseas authorities:**

**. . . for the exceptions in issue here to apply, harm must be severe and substantial. The test is not whether there appears to be unacceptable risk of physical or psychological harm. The risk is promoted to a much higher threshold. (''Grave'') and (''exposed'') import the most serious of situations.**

**I think that also relevant to the establishment of risk, is not merely the factual situation from which a child may have come, but also the nature of Family Law of the country of origin, and the ability of that law to afford protection.**

**[83] In C v C [1989] 2 All ER 465, the English Court of Appeal stated:**

**. . . in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words ''or otherwise place the child in an intolerable situation'', which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the Court of the state to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those Courts in the circumstances of the case, the Courts of this country should assume that this will be done. Save in an exceptional case, our concern, ie the concern of these Courts, should be limited to giving the child the maximum possible protection until the Courts of the other country, Australia in this case, can resume their normal role in relation to the child. [Per Lord Donaldson p 473]**

**[84] In S v S [1999] 3 NZLR 513, a difficult case involving allegations of serious inter-spousal violence on the part of the left-behind father but where there were strong indications from the abducted children that they wished to be with their father. Fisher J, helpfully and perceptively, analysed Convention principles and s 13(1):**

**Underlying the presumption for return is the convention premise that the interests of children are of paramount importance. In giving effect to that premise, it will usually be in the interests of particular abducted children that they be returned. That is the convention acting remedially. But it would be easy to overlook its equally important normative role. There is the future of other children to consider. Their interests will be promoted by demonstrating to potential abductors that there is no future in interstate abductions. A firm attitude to the return of children, in other words, discourages those parents who might otherwise be tempted to contemplate unilateral removal.**

**. . .**

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

**qualifies the phrase "expose the child to physical or psychological harm" in s 13(1)(c)(i) (see retrospective significance of the word "otherwise" in s 13(1)(c)(ii)).**

**The presumption is also reinforced by the distinction which has to be drawn between choice of forum on the one hand and custody and access merits on the other. So long as the country of habitual residence makes the best interests of the child paramount, and provides mechanisms to achieve that end, it will normally be appropriate to leave that country to protect the interests of the abducted child. [pp 519-520]**

**Fisher J subsequently (at 523) summarised the relevant legal principles thus:**

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

**. . .**

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

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

**[85] No criticism was made of Fisher J's analysis by the Court of Appeal (above para [36]).**

**[86] The grave risk test was considered by the High Court of Australia in two appeals, DP v Commonwealth Central Authority and JLM v Director-General NSW Department of Community Service (2001) 180 ALR 402. The first case involved a severely autistic child abducted to Australia from Greece where, on the evidence before the Court the removal of the child from therapy and the unavailability of suitable treatment in Greece was sufficient to justify an Art 13 finding. The second case involved a Mexican child wrongly retained in Australia by his mother in a situation where there was a very serious or high risk of suicide by the mother if the child was returned. This latter situation bore some similarity to the Family Court decision of Judge Doogue, Armstrong v Evans [2000] NZFLR 984.**

**[87] Essentially, as these cases demonstrate, the s 13(1) defences raise issues of fact which will differ from case to case. There must be a high degree of risk to which return would expose the child.**

**[88] The majority of the High Court of Australia approached Art 13 this way:**

**The burden of proof is plainly imposed on the person who opposes return. What must be established is clearly identified [s 13(1)(c)]. That requires some prediction, based on the evidence, of what may happen if the child is returned. In the case where the person opposing return raises the exception, the court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child. [at 414]**

**[89] It is difficult to see, in the way the High Court of Australia dealt with the two appeals, any relaxation, by incorporating an interests inquiry, of the Art 13 grounds. Rather the focus was on the evidence before the Court at first instance and in particular the apparent absence of contrary evidence relating to the alleged lack of autism treatment facilities in Greece and the risk of a mother suiciding.**

**[90] A factual finding that the child's return constitutes a grave risk of exposure to psychological harm and/or would otherwise place the child in an intolerable situation must have sound foundation. The high threshold inherent in the statutory words suggests such a foundation is not easily laid.**

**[91] In Re A (A Minor) [1988] 1 FLR 365, 372, the English Court of Appeal said:**

**. . . not only must the risk be a weighty one, but it must be one of a substantial, and not trivial, psychological harm. (per Nourse LJ)**

**And in Clarke v Carson [1995] NZFLR 926, 931, Elias J stated:**

**If the purposes of the Hague Convention are not to be wholly eroded, it is necessary to recognise that the situation which children who have been removed wrongfully find themselves will almost inevitably cause stress to them. Often that stress may be substantial and they have psychological effects. For that reason the standards set by the Convention and the section is high and is stringently tested.**

**[92] In addition to an evidential requirement for a sound foundation to a s 13(1)(c) ground, the evidence must disclose psychological damage and/or an intolerable situation which is more than transitory. The intolerable situation which the Judge found must have a degree of permanence. Similar considerations should apply to psychological harm. In H v H (1995) 13 FRNZ 498, 504, Greig J said:**

**. . . It must be recognised that any action and the enforcement of that under this legislation is inevitably to disrupt the children's life. That was disrupted in the removal and the return must further disrupt their life. That disruption is increased the longer it takes and the more proceedings that are involved. That there is a trauma is almost inevitable.**

**. . .**

**Intolerable means that something cannot be tolerated. It is not just disruption or trauma, inconvenience, anger. It is something which must be of some lasting serious nature which cannot be tolerated. Human beings, and particularly children, can adjust and re adjust to various matters, changes in their lives, death and injury, illness, and other matters.**

**Decision**

**[93] The opinion evidence of a psychologist, although undoubtedly helpful, cannot be conclusive. Scrutiny of Ms Raethel's evidence and the Judge's analysis of it points to undue weight being attributed to the mother's illness and medical needs. The mother's predicament and its effect on the child are, of course, relevant. But ultimately the s 13(1)(c) focus is on the child's situation not the abductor's (Adams v Wigfield [1994] NZFLR 132). The plight of the mother cannot in itself be used as a justification for lowering the s 13(1)(c) threshold or, more importantly, justifying a finding that the threshold was reached when in reality the evidence falls short.**

**[94] A scrutiny of Ms Raethel's evidence (above paras [52] to [64]) reveals that the four factors on which she builds a foundation for her opinion that the return of the child would result in a "high probability" of exposing the child to psychological trauma as well as placing her in an intolerable situation comprise two factors which are impermissible.**

**[95] The issue of separation from the child's primary caregiver ". . . on a continuing basis for an indeterminate length of time" contains assumptions both of a temporal nature and about how the Family Court of Australia might deal with the child's interests which do not justify an uncritical acceptance of the psychologist's conclusion. The powerful theme contained in the psychological evidence of the child's wish for parental litigation to come to an end has not been balanced against Ms Raethel's opinion.**

**[96] The critical exchange between the Judge and Ms Raethel (above para [64]) to the effect that separation from her sick mother at that time would create an intolerable situation for the child is entitled to great weight, as is the psychologist's reference to continuing separation from the mother placing the child at risk of depression. The exchange suggests that there is the added factor of "worrying about her mother and her mother's treatment" which would make matters "overwhelming" for the child.**

**[97] It is clear from the Judge's decision (above paras [39] and [41]) the ground would not have been made out but for the impending surgery. Separation from her mother while the child is in Australia "wondering about her mother's health and progress" was, in the Judge's view, on a par with the child being with her mother in Australia "knowing that her mother is unable to undergo the treatment which was about to occur in New Zealand". Such a finding is speculative and attributes to the child a knowledge of clinical concerns and considerations which the evidence does not permit.**

**[98] Given the psychological evidence in its entirety, including the child's other concerns, the placement of the child in foster care, and uncertainties about the duration of separation if any, it is difficult to see how a conclusion that the high s 13(1)(c) threshold had been crossed is justified.**

**[99] The duration of separation is particularly important. Counsel for the New Zealand Central Authority had made it clear that an order for return would not be enforced until after the January 2003 surgery. What then remained for the mother was monitoring and further reconstructive surgery in approximately six months. The mother would clearly prefer to complete her surgery and treatment in New Zealand. Treatment and monitoring were, on the evidence, available to her in Australia. So too was the option of returning to New Zealand for the final phase of surgery. These aspects of the mother's treatment, relevant to the duration of the separation and against the backdrop of possible interim placement with the child's father who had lived with the child for the first five years of her life and who had re-established a relationship with her, do not justify a finding of grave risk of permanent psychological harm or the creation of a long term or permanent intolerable situation. (See H v H above para [92]).**

**[100] In this Court's judgment the Family Court Judge has erred both in her s 13(1)(c) finding that there was a grave risk that the child's return to Australia would expose the child to psychological harm and/or place in her in an intolerable situation, and also in the exercise of her discretion by refusing to make a s 12(2) order for return.**

**[101] On the basis of the evidence before the Family Court Judge, the return of the child to Australia in December 2002 (albeit with the knowledge of the mother was ill and required surgery and ongoing treatment) fell well short of the high threshold of grave risk of psychological harm or an intolerable situation. The factors which led Ms Raethel to give**

**evidence to that effect included two impermissible factors, the first being her gratuitous observations, untested before the Judge, about the father's empathy, and the second being matters which had been canvassed and overtaken by consent orders in the Family Court of Australia.**

**[102] Moreover the high threshold which Ms Raethel's evidence purported to justify is strikingly at odds with her evidence (above para [60]) that the loss of one parent or deprivation from a parent for a substantial period of time is necessarily psychologically damaging. Separation between the mother and child, even if it were to occur, would not on the evidence have been permanent or long-term on the child's return to Australia. There is no evidential base for justifying a finding of permanent psychological damage or, more importantly having regard to the Family Court's reasoning process, a situation of a lasting and serious nature which cannot be tolerated ( H v H (op cit) above para [92]).**

**[103] Nor in the light of the evidence did the Judge adequately weigh the risks attendant to the child of refusing an order for return. As is clear from Ms Raethel's evidence the child's major concern was ongoing litigation between her parents. Whatever the Court's decision, litigation on one side of the Tasman Sea would be inevitable, either to re-establish parenting orders in the mother's favour in the Family Court of Australia, or to secure ongoing contact between the child and her father in New Zealand's Family Court. It would, however, be a safe inference to draw that future litigation in Australia would be less protracted than in New Zealand where the mother and Ms T would inevitably raise de novo their historic concerns and fixations which the Australian consent orders had addressed.**

**[104] As a matter of policy, courts of Convention countries need to be alert to the Convention's underlying policy which stipulates that the appropriate forum for disputes over children is the Court in the country of the child's habitual residence. This consideration is particularly important in this case where, at the time of the child's abduction, there were extant orders of the Family Court of Australia. Given that the Australian and New Zealand Central Authorities deal with a greater number of requests from each other than from other States, and given that both countries operate specialist Family Courts, particular care must be exercised to ensure that the competence (in this case) of the Family Court of Australia, is not questioned. That Court can with some confidence be expected to deal appropriately and sympathetically with the child's position on her return, particularly having regard to the factors of the mother's health, her treatment, and the undoubtedly close bond between mother and child.**

**[105] Such an approach is discernible from an appellate division of the Family Court of Australia in The Marriage of Murray and Tam v Director Family Services [ACT] (1993) 16 Fam LR 982,1002, where Nicholson CJ and Fogarty J said:**

**It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand courts or that relevant New Zealand authorities would not enforce protection orders which are made by the courts.**

**Although this dictum was from a case involving domestic violence in a motorcycle gang context, the underlying policy is equally apposite to child welfare issues.**

**[106] The Family Court Judge in her s 13(1)(c) findings appears to have given no consideration to the fact that the child, having been removed into foster-care pursuant to a warrant, was already separated from her mother and had, on the evidence of both Ms Raethel and Ms Giddens, re-established a satisfactory relationship with her father despite the mother's best efforts to thwart a renewal. The reliance of the Judge on Ms Raethel's**

**observations about the father's supposed lack of empathy was, with respect, too sweeping and failed to factor in the father's clear instructions to counsel to delay the child's return to Australia until after mother's surgery so that she could accompany the child to Australia.**

**[107] And finally, for reasons examined shortly (below paras [116] to [121]), the short-term quandary which the Court faced, - the mother's inability for legitimate medical reasons to return to Australia forthwith, - has been given undue weight and has totally distorted the s 13(1)(c) assessment of finding a grave and substantial ground. There is also an apparent misplacing of the s 13(1) onus (above para [45]).**

**[108] Even if this Court is wrong in its decision on the s 13(1)(c) ground, it considers that, in the second phase of the s 13 exercise, the discretion to refuse an order or otherwise, the Judge has failed to weigh correctly two important factors.**

**[109] The first is to consider whether a delayed return might not solve the dilemma which the Court faced. The Judge was certainly correct (although using different terminology above para [72]) that an order under s 12(2) must be an order to return a child "forthwith" to a specified country or person. Importantly the New Zealand Central Authority sought an order for the return of the child to Australia, not to a specified person such as the father.**

**[110] But making the s 12(2) order would not in itself have required the child's immediate return to Australia whilst the mother's surgery was pending. The Court's order has to be obeyed and, if necessary enforced. But there is no clog on parties to a Convention proceeding negotiating the time of a child's return.**

**[111] In the face of an abducting party being obdurate, s 26(1) of the Act permits a Family Court, either on application or on its own motion, to issue a warrant to enforce an order for return. If it became necessary to enforce the order, doubtless the Court would have appropriate regard to s 23(1) of the Guardianship Act 1968 and would have given some consideration to the least distressing time-frame. Although s 23(3) expressly states that the provisions of Part I of the Guardianship Amendment Act 1991 are not limited by s 23, it would nonetheless be permissible, provided the child's return to the State of habitual residence was not artificially or unnecessarily delayed, to issue a warrant but let it lie in Court for an appropriate period.**

**[112] Furthermore, in terms of the policy of the Convention, the mechanism of a child's return is not a matter for judicial decision. It is instead an administrative matter. Section 7 (1) designates the Chief Executive of the Department for Courts ("the secretary") as the Central Authority for New Zealand. As such the secretary has all the duties and powers of a Central Authority under the Convention. It is mandatory for him to perform all the functions of a Central Authority.**

**[113] Article VII of the Convention makes it mandatory for Central Authorities to cooperate with each other to secure the prompt return of children, and additionally empowers Central Authorities:**

**(h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.**

**[114] This Court is entitled to take notice of the fact that the largest number of requests received by the New Zealand Central Authority each year come from Australia. Similarly the largest number of requests received by the Australian Central Authority come from New Zealand. Given the overarching Convention responsibilities of both Authorities it seems to this Court improbable that those Authorities, in the exercise of their administrative**

**functions, would organise the return of the child in a manner which could be classified as unsafe. A safe return of the child in a case such as this must involve the Central Authorities in a consideration of an administrative arrangement designed to minimise distress and disruption.**

**[115] Consistent perhaps with the father's instructions to counsel in the Family Court not to seek the child's return to Australia until after the mother's surgery (above para [71]) the father undertook to this Court that he would not take any steps to have the mother committed for contempt on her return to Australia. That undertaking is helpful and is for that reason noted. It is not, however, a factor which this Court has considered in reaching its decision.**

**[116] The second factor not addressed by the Judge in the exercise of her discretion was the consequences of the mother's illness. The circumstances of the child's abduction point to the mother having resolved, in defiance of orders made in the country of the child's habitual residence, to exclude the father from the child's life. This maternal motivation was correctly identified by the Judge who asked a number of questions of Ms Raethel specifically on that topic. The Judge observed:**

**[46] (a) I am not entirely satisfied that the observations with the father and daughter's relationship by the psychologist ought to be given as much weight as I would normally attribute to them. . . For example, she says in her report:**

**There is no direct evidence that there had been undue influence or undermining of . . . father or of his position in her life offered by M in interview.**

**This, when set against the fact that mother has been in hiding with this child for over a year and having changed her identity to keep the father out of her life, I consider to be a little unrealistic as an observation. What appears to have happened is that attempts at alienation by the mother have not been entirely successful. But this might speak more to the child's resilience or the quality of the earlier attachment between father and child than of the intensity of the alienation process itself.**

**[117] Those cogent observations by the Judge required, in this Court's judgment, an assessment, in the exercise of the s 13 discretion, of what lay ahead. The mother is ill. At times, on the evidence, she required or may require medical treatment which would incapacitate her so far as her child-caring responsibilities are concerned. Her illness might possibly (given the nature of cancer) prove to be fatal in the short or medium term.**

**[118] Had the mother at the time of her diagnosis, surgery and ongoing treatment been in Queensland with the child, as she was legally obliged to be, the Family Court of Australia may well have been asked to revisit its consent orders. What care arrangements would have been best for the child whilst the mother was undergoing surgery? What would the best arrangements be for the child if the mother was incapacitated? What arrangements should be made for the child in the event of further malignant tumours needing attention? Who should assume responsibility for the child's care if the mother dies?**

**[119] The very factor (the mother's illness) which led the Court to refuse to make an order for return raises vital issues which in terms of the policy of the Convention and the Act ought to be dealt with by the Courts in the country of the child's habitual residence. They are not issues which should engage the New Zealand Family Court. For instance, particularly having regard to the history of this family and the extensive litigation between the child's parents in the Family Court of Australia, this Court would consider it totally inappropriate for the New Zealand Family Court to preside over a dispute between the**

**father and Ms T in what one hopes would be the hypothetical situation of the mother dying towards the end of the year, having appointed Ms T a testamentary guardian of the child. Using the Courts of the country to which the child was abducted in such a situation would be cumbersome, unfair to the father, and by its very nature undermine the policy of the Convention.**

**[120] In short, some analysis, in the exercise of the discretion, is required on whether the Courts of Australia or New Zealand are the more appropriate to make decisions to secure the welfare of an abducted child. (See Re A (Minors) [1992] 1 All ER 929, 942 above para [37].) Such an analysis was not carried out.**

**[121] Both in her assumption that she was responsible for the timing of the child's return to Australia, and also by her failure to recognise that the mother's illness had the potential to give rise to long-term issues concerning the child, best dealt with by the Courts of the State of the child's habitual residence, the Judge has exercised her discretion on wrong principles.**

**[122] A further error in this area occurred in para [56] of the judgment, balancing the risk of the child being alienated from her father against the risk of emotional harm should she return to Australia. Dealing with evidence from the father that he had the ability to move (with his partner) to another city within Australia, the Judge commented that he had the option to move to New Zealand if he chose and that the evidence did ". . . not satisfy me that this option is not available to him. . . ".**

**[123] Such an approach is plainly wrong in the context of the discretion whether an order for the return of the child should be made or not. The entire thrust of the Convention is to return children to the country from which they are abducted. A left- behind parent should not be expected to follow the abductor.**

**[124] For the reasons apparent from this section of the Court's judgment the learned Family Court Judge has erred both in respect of the Family Court's s 13(1)(c) finding and, more importantly, in the exercise of the s 13(1) discretion because:**

**- In the assessment of the evidence undue weight has been given to the mother's predicament and health.**

**- The opinion evidence of the psychologist on which the Family Court relied rests on two factors which would not, in the circumstances, have been considered.**

**- The s 13(1) onus has in respect of some of the evidence been ignored.**

**- The high threshold required for s 13(1)(c) grounds has not on the facts been reached.**

**- The evidence relating to the mother's health has masked an appropriate scrutiny of what would occur if the child returned to Australia, and in particular the length of time of the separation between mother and child if any.**

**- Evidence of aspects suggesting that the psychologist's conclusion might be suspect has been given inadequate weight.**

**- There has been inadequate examination of the effect on the child of ongoing litigation in New Zealand, particularly having regard to the child"s wish to avoid further conflict.**

**- In the exercise of her discretion the Judge gave no weight to a delay in enforcing the order and failed to weigh the New Zealand Central Authority's administrative obligations under the Convention.**

**- In the exercise of her discretion the Judge failed to consider the inevitable consequences of the mother's illness and the desirability of consequential orders designed to protect the child''s welfare being made in the Family Court of Australia.**

**- In the exercise of the discretion no consideration has been given to the clear ability of the Family Court of Australia to grapple with the relevant issues.**

**- The Judge wrongly considered the prospect of the father relocating to New Zealand.**

**Result**

**[125] For all these reasons, this Court considers that the decision delivered in the Auckland Family Court on 13 December 2002 was wrong, both in its finding of a s 13(1)(c)(i) and/or (ii) ground, and also in the exercise of the s 13(1) discretion. The appeal is thus allowed.**

**Orders**

**[126] The appeal is allowed.**

**[127] The decision delivered in the Auckland Family Court on 13 December 2002 is quashed.**

**[128] There is an order pursuant to s 12(2) of the Guardianship Amendment Act 1991 for the return forthwith to Australia of the child M born on 16 October 1993.**

**[129] A warrant is to issue pursuant to s 26(1) of the Guardianship Amendment Act 1991 authorising any member of the New Zealand Police or any social worker nominated by the New Zealand Central Authority to take possession of the child and to deliver the child to the New Zealand Central Authority's nominee for the specific purpose of returning the child to Australia. Such warrant, however, is to lie in Court until three weeks after any surgery which may have been scheduled for the respondent at Auckland Hospital for the months of June or July 2003, or until 31 July 2003, whichever date last occurs.**

**[130] Leave is reserved to the parties and to counsel for the child to make further application in respect of the issue of the warrant.**

**[131] The order made in the Family Court preventing the removal of the child from New Zealand is to remain in force, as is the linked CAPPS listing. Such order is to be lifted solely for the purpose of enabling the child to be returned to Australia and will be discharged on the child's return to that State.**

**[132] Mr Pidgeon QC and Mrs Sage are directed to consult and take any steps they consider may be necessary (in respect of which leave is reserved) to ensure that the life of the child pending return to Australia is not disrupted, and in particular to ensure that this Court's orders are not frustrated by the respondent, Ms T, or other non- parties.**

**[133] The parties will bear their own costs.**

**[134] There is an order prohibiting publication of the names of the parties, the name of the respondent's current partner, and the name of the child. There is a further order that any published report of this case must identify the parties only by the initials used on the front page of this judgment.**

**Comment on El Sayed v Secretary for Justice [2003] 1 NZLR 349**

**[135] This decision, delivered by a full Bench of the High Court in Wellington on 30 October 2002, was cited in the Family Court. The appeal which the High Court determined in that case involved s 13(1)(c) grounds and in particular sustained violence on the part of the father against the mother and two young children.**

**[136] The case was addressed by the Family Court Judge in this way:**

**[48] There has been a recent departure from this line of authority, in the decision of El Sayed v Secretary for Justice [2003] 1 NZLR 349. Counsel for the Central Authority filed supplementary submissions urging me to distinguish this case on the facts or to decline to follow it on the basis of earlier Court of Appeal authority. In the end I find I do not have to address the issue simply because the "grave risk" I perceive is that the "intolerable situation" created for this child were she to be returned or "psychological harm" predicted to her cannot be prevented or protected against by the country in any event. This is because they arise not out of a risk which might be posed to the child by the parent but they arise out of the mother's illness of itself. This is not something the originating country can protect against.**

**[137] Mr Pidgeon QC, who has extensive knowledge and experience in the area of international child abduction, urged this Court to revisit El Sayed . He indicated that dicta in that decision had caused considerable and unnecessary uncertainty in the Family Court over recent months.**

**[138] The relevant passage in El Sayed was obviously not determinative in the Family Court, nor is this Court obliged to consider it. Nonetheless, in a situation where senior counsel apprises this Court that difficulties are afoot, and in particular in a situation where the relevant dicta is plainly wrong, this Court considers a brief obiter comment is justified.**

**[139] There is ample authority for the proposition that, when assessing a s 13(1)(c) ground of grave risk of harm or intolerability, the Court will normally focus on the ability of the State of habitual residence to protect a child. Such was the approach adopted by New Zealand's Court of Appeal in A v Central Authority for New Zealand [1996] 2 NZLR 517 (above para [36]. It was the approach adopted by Fisher J in S v S (op cit) para [84].**

**[140] It was also the approach which Butler-Sloss LJ outlined in Re M (A Minor) [1994] 1 FLR 390, 395. More recently the English Court of Appeal in Re S (Abduction: Custody Rights) [2002] 2 FLR 815 reinforced the approach.**

**[141] The passage in El Sayed which has caused concern is this.**

**[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 sub-section 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 [1971] 1 WLR 625 at 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 Article 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.**

**[142] There are, with respect, three demonstrable and basic flaws with this approach. The first is that it totally ignores the approach promulgated by a full bench of the Court of Appeal in A v Central Authority (op cit) which in the normal course of events one would expect to be binding on the High Court.**

**[143] The second flaw is the assumption that some Australasian decisions appear to have ". . . misread both the Convention and the statute. . . ". In fact, New Zealand decisions have been consistent with English decisions.**

**[144] The third and most fundamental flaw, however, is a misreading of the Perez- Vera Report by suggesting that Article 13b of the Convention was a compromise which was not intended to have a narrow formulation.**

**[145] With reference to the negotiation history of the Convention the Court in El Sayed said:**

**[52] In fairness, the drafters of the Convention were not oblivious to this kind of problem. [ie The great difficulties faced by abused women seeking to return to live with children in their country of origin where family support is available.] 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" (see Actes et Documents de la Quatorzieme Session [1982] vol III, 426 at p 461).**

**[146] The para (in English) in the Perez-Vera Report discussing the "fragile compromise" referred to is:**

**116. The exceptions contained in b deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests, as that phrase is understood in this sub-paragraph. Each of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special**

**Commission and has been kept unaltered. Thus it cannot be inferred, a contrario, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects, that the exceptions are to receive a wide interpretation.**

**[147] Far from supporting the proposition that Article 13b of the Convention should receive a wide interpretation, the paragraph supports the exact opposite. It cannot be inferred, says paragraph 116, that the exceptions are to receive a wide interpretation.**

**[148] The Court in para [58] (above) of the El Sayed decision has cited para [116] for the contrary proposition and has emphasised the error in italics. The English translation of para [116] may be somewhat clumsy but there is absolutely no mistaking the report in the French version.**

**[116] . . . Chacun des termes employes dans cette disposition reflete un delicat compromis atteint au cours des travaux de la Commission speciale et qui s'est maintenu inchange; en consequence, on ne peut pas deduire a contrario, des interpretations extensives. . . [Emphasis added.]**

**[149] In this Court's judgment, the Court in El Sayed , although undoubtedly correct in its decision to allow the appeal in an appalling case of domestic abuse, has incorrectly put a gloss on s 13(1)(c) grounds for reasons which are not persuasive and which are, with respect, wrong.**

**[150] This is in any event a situation where the Court of Appeal in A v Central Authority (op cit) has clearly set out the relevant interpretation and policy. The Court of Appeal's approach must continue to be binding on the New Zealand Family Court unless and until there is a contrary decision from the Court of Appeal.**

**COUNSEL: C R Pidgeon QC for the appellant; B V MacLean and E Parsons for the respondent; S R Sage for the child**

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