Case No: B4/2007/1794

Neutral Citation Number: [2007] EWCA Civ 992
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(MR JUSTICE WOOD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 12th September 2007

Before:

LORD JUSTICE THORPE
LORD JUSTICE LONGMORE
and
LORD JUSTICE MOORE-BICK

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IN THE MATTER OF M (Children)

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Mr M Nicholls QC and Mr Edward Devereux (instructed by Armitage Sykes) appeared on behalf of the **Appellant**.

Mr M Scott-Manderson QC and Mr David Williams (instructed by Reynolds Porter Chamberlain) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Thorpe:

1. In form this is an application for permission to appeal, with appeal to follow if permission granted. The case is finely balanced and we have, from the outset, treated the hearing as the hearing of an appeal without going through the formality of granting permission. The case raises a question as to how the judge should exercise his discretion in circumstances where he has found that the defendant to an originating summons under the 1980 Convention has successfully made out a defence of settlement under article 12(2) and a defence of child's objection under article 13. The real question in the end for our determination is whether this judge, having scrupulously found all the relevant facts, having equally scrupulously directed himself as to the relevant law, then ultimately explained his exercise of the residuary discretion without misdirection, and sufficiently extensively to demonstrate that he had had regard to all the relevant considerations.

2. With that introduction I turn to a brief summary of the essential facts. Between the cases advanced by the plaintiff and the defendant there was a considerable gulf, resolved by the judge's crucial findings as to credibility. He said in paragraphs 56 and 57 of his judgment:

> "56. Each of these parents asserts that the other has sought deliberately to mislead me in their evidence on many of the crucial issues. A combination of an analysis of the written documentation referred to above, and hearing each parent give oral evidence from the witness box has, I believe, given me the fullest opportunity to come to clear conclusions on this subject. In the course of my further consideration of some aspects of the disputed evidence below I shall give specific examples which have led to my conclusions on credibility, but I state now by way of preliminary that overall I found the mother to be devious, untrustworthy, and frequently given to lying, such that I can place little or no confidence in much of what she said.
>
> 57. As to the father's evidence, I considered him to be measured, frank (even where his answers were against his interests) and trustworthy. This finding has implications not only for my findings on issues such as consent and acquiescence, but also in what faith I can put in the undertakings which he offers to the court."

The reference in that citation to written documentation takes me back to the judge's earlier record of the material available to him. He said:

> "I have been provided with a trial bundle running to three volumes. Leaving aside nearly 50 pages of preliminary documentation prepared by counsel

> pursuant to the provisions of the President's Practice Direction of 27th July 2006…there were over 550 pages of affidavits (including exhibits); a short section combining material from CAFCASS and from the Home Office; a miscellaneous collection of documentation including the articles from Newsweek and The Economist; letters concerning the immigration position etc., amounting to 125 pages; extracts from Hansard; and two full lever-arch files of Treaties, authorities, and reports from external agencies."

3. That demonstrates that this was no ordinary trial. It was extraordinary in the extent of the documentary evidence and it was extraordinary in the sense that the judge heard oral evidence from both the parents. No doubt those extraordinary features assisted him in arriving at the very trenchant findings that he made as to the respective credibility of the parties. The consequence is that the relevant history can be recited thus: the plaintiff father is 40 years of age. The defendant mother is 31 years of age. The couple married by customary ceremony in 1993. Their first child, M, was born in Zimbabwe, where the parents had married, on 3 August 1994. She is, therefore, just 13 years of age. The second child, T, was also born in Zimbabwe on 25 April 1997. She is, therefore, ten. A civil ceremony of marriage was celebrated on 21 October 2000, very shortly before the parties' final separation. Early in 2001 the mother left the family home and the children remained living in their father's care. The mother submitted an application to a local magistrates' court seeking custody of the children but her application was dismissed when she failed to attend the hearing. On 20 January 2002 she left Zimbabwe for England but was immediately deported back. Thereafter she assumed a new identity and successfully achieved an entry to this jurisdiction. In December 2004 she returned to Zimbabwe and thereafter had periodic contact with the two girls.

4. On 2 March 2005 she entered into what seems undoubtedly a bigamous marriage to a Mr M in a civil ceremony in Harare. Three days later she executed a carefully planned and prepared abduction, leaving Zimbabwe with the two children by bus via Mozambique and Malawi to Kenya. She was able to achieve the abduction by taking advantage of the father's trust and removing the children during a period when she was having staying contact. On her arrival at Heathrow with the children, she presented herself and the children on Malawian passports and sought asylum. Three days later Mr M, who I will afterwards refer to as her husband, arrived and also sought asylum. The mother's application was refused on 8 April and on 27 April she sought to lodge a notice of appeal which was subsequently held to be out of time. There are continuing immigration proceedings which seem to have been revived by the onset of the litigation within the Convention. It was only in late 2006 that the father discovered the possibility of his Convention rights, and an application was submitted to the Zimbabwean Central Authority. It was not transmitted to the Central Authority in London until 26 January 2007. Unfortunately proceedings under the Act and the Convention were not filed

until 10 May 2007. Thereafter, because of the complexity of some of the underlying issues, there were a number of directions orders made respectively by Munby J, Coleridge J, Pauffley J, HHJ Bevington, HHJ Turner QC and finally Moylan J.

5. Moylan J's direction order was made on 21 June when, unfortunately, the case listed for trial could find no judge of the Division available to hear it. Thus it came for hearing before Wood J on 18 and 19 July, when he heard the oral evidence not only of the parties but also of the appointed CAFCASS officer. On the following day at his invitation, written submissions were submitted by leading counsel: Mr Marcus Scott-Manderson for the father and Mr Michael Nicholls for the defendant mother. He handed down his judgment six days later on 26 July. The judgment that he handed down is carefully structured. In the first section he records the children with whom he was concerned. He then outlined the application and the materials that were before him. Then followed his chronology which led to his summary of the relevant law. That summary was divided into sub-sections dealing with the Convention itself, articles 3, 4, 12 and 13, together with a paragraph that considered the overarching purpose of the Convention. The next section surveyed Convention defences: first, general comment; then consideration of settlement; consent; acquiescence; grave risk of psychological harm; and child's objections. Finally the judge dealt with the approach to the exercise of discretion and, importing authority from the criminal jurisdiction, the Lucas direction in relation to untruths. He dealt at length with the immigration position and then the marital status, before considering the defences relied upon by the mother, namely consent, acquiescence, settlement, and finally intolerability, and the grave risk of harm. He considered intolerability and grave risk not only in relation to the specific circumstances of the case but more generally in relation to the state of affairs in Zimbabwe, which Mr Nichols urged should be treated as a failed state, incapable of providing either justice or protection to children. The judge then turned to make his findings in relation to these issues and having found, in paragraph 88, that the mother had established settlement in this jurisdiction, and in paragraph 113, that the children did object and were of sufficient maturity to have their objections considered, he finally expressed the exercise of his residual discretion to order return, despite the positive findings in the mother's favour in the two paragraphs to which I have referred.

6. In ordering a return, despite the children's objections and despite their settlement, he placed considerable weight on a raft of undertakings which Mr Scott-Manderson offered, on the express instructions of his client, who was of course present to give his pledge to the court. The application for permission reached this court just before the expiration of the brief interim allowed by the judge before the children's departure. His order required their departure by 17th August, and on 6th August Ward LJ granted a stay pending the oral hearing on notice with appeal to follow, if permission given, which he fixed for hearing yesterday, 11 September. We heard argument through the day yesterday and, given the quality of the submissions from Mr Nicholls and Mr Scott-Manderson, we might well have reserved our decision; but in these

cases it is very important that the parties know where they stand without any further delay, and accordingly we have decided to give ex tempore judgment.

7. I therefore turn to consider and record Mr Nicholls' fundamental submission. He has skilfully and helpfully distilled a very full skeleton settled by his junior to his essential key point. He candidly explains that, in the court below, his principal reliance had been on the inability of the Convention to achieve its essential objective in the present case, given the length of time that had elapsed between abduction and hearing, and the chaotic state of affairs in the requesting state. His second reliance below had been upon the article 13(b) defence, then upon settlement, then upon the children's objections, then upon acquiescence, and finally upon consent. However, for the purposes of this appeal, Mr Nicholls essentially nailed his colours to an attack upon the exercise of the residual judicial discretion. He did not criticise anything, essentially, within the judgment prior to paragraphs 118 to 121, in which the judge explained the exercise of his discretion. Mr Nicholls was content to present his case on that basis, having succeeded below in establishing both settlement and the children's objections. So, it is necessary to read into this judgment every word of these crucial paragraphs 118 to 121:

> "118. I have set out earlier in this Judgment in the section headed The Law, the relevant principles. I do not repeat them here. I direct myself by them.
>
> 119. Having considered the policy of the Convention (to ensure the return of children to the State of origin when I have found them to be wrongfully removed) I have gone on to consider whether or not this case is an exceptional case such that I should exercise my discretion to refuse to order an immediate return, as well as the general discretion in Article 18.
>
> 120. Having set out at lengths the facts as I find them to be, I can find nothing in this case which would qualify it as exceptional, and thus decline to exercise my discretion against a return, and in the case of Article 12 (settlement) exercise the discretion in Article 18 to return them.
>
> 121. I have considered the nature and seriousness of the wrongful removal, including the many layers of deception deployed by the mother in bringing about that wrongful removal, keeping the children at an address unknown to the father for many months; wrongly refusing to return the children to Zimbabwe when the father so requested (as I have found he did in the missing email); that on the father's proposals the mother (and her new husband) could return to Zimbabwe with the children to care for them; and that even if the mother and or her new husband declined to accompany the children, they would be properly cared for in the home of their father; that

> their cultural and social roots (including their wider maternal and paternal family) are all still in Zimbabwe. I have also considered the children's objections. Ultimately, there is nothing exceptional about this case on any view. I therefore, even though settlement has been established, have exercised my discretion in favour of an immediate return."

8. Mr Nicholls particularly draws attention to the closing sentences in which the judge said:

> "Ultimately there is nothing exceptional about this case on any view. I therefore, even though settlement has been established, have exercised my discretion in favour of an immediate return."

9. Mr Nicholls submits skilfully that, both statistically and as a matter of principle, the refusal of a return is an exceptional outcome. That is because, he says, the hurdle or the fence facing a defendant who seeks to establish either an article 12(2) defence, or an article 13(b) defence, or a defence of child's objections, or intolerability or acquiescence or consent, always faces a very high fence; and it is therefore only in an exceptional case that the defence will succeed. However, says Mr Nicholls, once a defence has succeeded, the height of the fence facing the defendant will vary depending on which of the individual defences has been established. For instance, says Mr Nicholls, if a judge has found that the return of the children would expose them to grave risk of physical or psychological harm, it would be an exceptional case in which a return was ordered rather than refused.

10. So he submits that the judge has unwittingly raised the high fence of exceptionality, not just at the appropriate point of determining whether or not a defence has been made good, but then repetitively in the exercise of the residual discretion. So there has, he says, been double counting against his client and two very high fences were raised when only one was appropriate. He suggests that the judge has been misled by observations made by Wall LJ in the case of Vigreux v Michel and later by the President in the case of Re: M. Mr Nicholls draws attention in the first case, that is the case of Vigreux, reported at [2006] 2 FLR 1181, to paragraph 66, when Wall LJ said:

> "Following Re: S, the first question I have to ask myself is, I think: what is it about this case which renders it exceptional and requires the court to exercise its discretion not to return PM to France? I have to say that I struggle to find in the facts any conclusive factor or factors which compel that exercise of the discretion."

11. To like effect, in the case of Re: M, the President, presiding in this court on 27 March 2007 [2007] EWCA Civ 260, said:

> "That leaves only the question of whether the objection of M is such that this is one of the "exceptional" cases justifying the court in using its discretion to refuse to order an immediate return. That involves balancing the nature and strength of M's objections against both the Convention considerations (including comity and respect for the judicial processes in Serbia as well, of course, as the policy behind the Convention) and general welfare considerations."

12. Now that is an ingenious submission but, in my judgment, in each of the three passages, both the passage within the judgment of Wood J and the citations from Vigreux and M, the judges were using the term "exceptional" descriptively, in relation to the overall policy that regulates the practical application of the Convention. The courts have always emphasised the importance of honouring the overarching objective of the Convention, a consequence of which is that the refusal of a return order will always be exceptional.

13. Once a defense of settlement has been proved, within the forum of international debate different views have been expressed as to whether that finding of settlement permits the exercise of a residual discretion to order return nonetheless. The issue came to this court reviewing a decision of Singer J in the case of Cannon v Cannon [2005] 1 FLR 169. In that case it was decided, contrary to the views of Singer J, that the finding of settlement did not preclude the exercise of a discretion to order return; however, our judgments establish no more than that and the exercise of that residual discretion was remitted to a judge of the Division. It was in fact Kirkwood J who concluded the process by a discretionary decision not to return to the requesting state. In approaching the exercise of the discretion Kirkwood J said:

> "In considering the court's discretion I have particular regard to: (a) the purposes of the Hague Convention; (b) the mother's wrongdoing; (c) the injustice to the father; and (d) the welfare of [the child]. The Convention serves to discourage child abduction, the removal by a parent acting unilaterally of a child from its home and homeland to another State in a way that is in breach of the other parent's rights of custody in respect of the child. Such action is recognised to be against the welfare interests of the child. Parental disputes about the child must be resolved in the courts of the child's home territory."

14. The President, in the subsequent case of Re: C [2006] 2 FLR 797, cited that passage with approval; and it is to be noted that in his case, a Serbian case, he exercised the discretion in the same fashion to refuse the return order. I too would support the self-direction of Kirkwood J which was, in my view,

entirely appropriate for the resolution of the case that was then before him. The essential ingredients in the exercise of such a residual discretion are the balance between on the one hand the purposes of the Convention in the context of relevant history, and on the other and most importantly, the welfare of the child. The need to have regard to the welfare of the child in the exercise of such a residual discretion had been left open by important prior decisions of this court in Re: S and Re: R; and that line of authority was considered by this court recently in the case of Zaffino and Zaffino [2006] 1 FLR 410. In our judgments in that case, we considered a difference of expression between Balcombe and Millett LLJ, upholding the line that had been taken by Balcombe LJ in both Re: S [1993] FLR 242 and Re: R [1995] 1 FLR 716. We then went on to decide the question that Balcombe LJ had left open, holding that:

> "…the court must balance the nature and strength of the child's objections against both the Convention considerations (obviously including comity and respect for the judicial processes in the requesting state) and also general welfare considerations. To suggest otherwise seems to…risk artificiality in judgments in future cases."

15. So against that evolution of authority I am not persuaded that Wood J in any way misdirected himself. He had, in considering the law governing article 12 in paragraph 36 of his judgment, referred to the decision of this court in Cannon v Cannon, and further referred to the remitted decision of Kirkwood J in the same case. It is by no means demonstrated that he was in any way misled by anything that Wall LJ had said in Vigreux v Michel or anything that the President had said in Re: M.

16. Mr Nicholls is also critical of the brevity of the judge's exposition of the balancing exercise that he conducted, and he complains that the judge had not sufficiently factored in a number of contra-indications to return, particularly the chaotic state of affairs in Zimbabwe. Now Mr Scott-Manderson, in my opinion, wisely conceded that the judge's explanation of how he arrived at his discretionary conclusion was, taken in isolation, inadequate. But, said Mr Scott-Manderson, that would be to do injustice to the judge. The judgment must be reviewed in its totality and the specific conclusions to be identified in the key paragraphs 118 to 121 are amplified by earlier findings of relevant discretionary factors, which can legitimately be added in in order to arrive at a complete understanding of the judge's conclusion. The analysis of paragraph 121 shows that the judge factored in five considerations: (1) the nature and seriousness of the wrongful removal; (2) the father's proposals that the mother and her new husband should return to Zimbabwe with the children to care for them; (3) if the mother or her new husband declined to accompany the children, they would be properly cared for in the home of their father; (4) their cultural and social roots, including their wider paternal and maternal family, are all still in Zimbabwe; and (5) the consideration of the child's objections. Ultimately the settlement, although established, was not conclusive.

17. The amplification on which Mr Scott-Manderson relies particularly attaches to the third of those considerations, which he submits is really the key to any understanding of the judge's discretionary conclusion: namely, the availability of a good home for the children with their father. He particularly relies in that regard on the fact that, between January 2002 and December 2004, the mother had relinquished the children to the father's sole care. He laid great emphasis on paragraph 112 of the judgment, where the judge said:

> "If the mother declines to return, I do not consider these children will suffer circumstances which would give rise to a successful plea of an Article 13(b) defence….They would go to the home of a loving father who has cared for them in the past for extensive periods prior to their wrongful removal, the mother consenting thereto, and reinforcing her consent and lack of worry by absenting herself from their lives for a period of two and a half years. Although the children have not seen their father between March 2005 and the brief period of contact on the 22nd June 2007, that contact was accepted by both mother and the father, and is accepted by me, in the light of not only her concession but also the father's brief evidence on the subject, as being a highly successful reunion in which the children showed their immense pleasure at being reunited with him. Although they have expressed reservations/disinclination to be cared for by the father's new partner, I do not consider that the matters they report (even if completely true -- on which I express no concluded view) would amount to circumstances establishing a defence under article 13(b)."

18. Mr Scott-Manderson also suggests that the crucial paragraphs can be amplified by reference to paragraph 98, in which the judge had drawn attention to the mother's submission that she was at grave risk in the event of her return to Zimbabwe; the judge discounted that. He acknowledged risks in relation to those who had been active opponents of the regime but distinguished her case from that of her husband, in that she had not been involved in political activity or conflict with the regime.

19. Then Mr Scott-Manderson referred us to the amplitude of the undertakings that were recorded in paragraph 124 of the judgment, and of the judge's unhesitating acceptance of those undertakings as recorded in paragraph 57, which I have already cited.

20. In relation to the quality of the settlement, Mr Scott-Manderson reminded us of the fact that the judge had found settlement only on a fine balance, as recorded in paragraph 88, and his reservations included a survey of the communication between children and father, admittedly in 2005, when they had expressed their distaste for the English environment, and where there was clear evidence that their expression of distaste was being suppressed by the mother.

21. Finally he referred to the judge's conclusion in paragraph 99: that, as far as family justice was concerned, the courts in Zimbabwe were capable of delivering effective judgment.

22. All those points made by Mr Scott-Manderson were, in my judgment, well made. I accept his overall submission that, viewed in its totality, there is a sufficient demonstration that the judge exercised his residual jurisdiction without misdirection, without attaching weight to immaterial factors, and without having disregarded, to any sufficient degree, material factors. So for all those reasons I would uphold the judgment below as being a legitimate exercise of a judicial discretion.

23. However, I would add that, had I been persuaded by Mr Nicholls that this was in any way a flawed exercise, then, passing into the consequential exercise of an independent discretion by this court, I, for my part, would have arrived at the same conclusion as the judge. There are a number of factors which would lead me to that conclusion. First, not only is the defence of settlement made out on a fine balance, but the quality of that settlement is marred by the fact that the entry has been obtained spuriously, and that there are evident risks that it will not be permitted to continue. This is now an uncommon case in which the abduction has been perpetrated by a non-custodial parent against a primary carer. It is true that there has been a very regrettable delay between the wrongful abduction and the determination of the application; however, it is understandable that there might have been some local difficulties in the father accessing the international remedy. It is also regrettable that a period of over six months then elapsed between his approach to the Zimbabwean central authority and the determination in London. It is significant that he has been a primary carer for a substantial period of the children's past lives. It is significant that, no doubt, in consequence, he was able to establish a rich reunion with the children immediately, despite a long period of separation when he had contact during these proceedings. It is plainly right that the children's cultural and social roots are all still in Zimbabwe. Some regard must be paid to the mother's misconduct. If children are to be brought up by a single parent, there must surely be benefit to them in being brought up by a parent of integrity rather than by a parent who has demonstrated a lack of it. Perhaps more important is the fact that the judge here was not surveying welfare considerations superficially, having nothing to guide him but affidavits and perhaps written reports. The judge had the great advantage of oral evidence from the CAFCASS officer and from the parents. Although we have not had the same advantage, we can legitimately found ourselves on his clear findings of fact and credibility. It is, of course, true and to be weighed that the children have expressed objections; but the expression of objections simpliciter has to be balanced against the factors set out by the judge in the succeeding sub-paragraphs of paragraph 113, namely that their wishes are inevitably coloured by their experiences and by the influence of their mother, and the judge's finding that the children have no awareness of the precariousness of their position in this country and have not given any consideration to medium or long-term issues.

24. Given all those facts and circumstances it seems to me that this is a case in which, despite Zimbabwe's isolation, a degree of somewhat precarious settlement, and despite a simple statement of the children's objections, the discretionary balance tips nonetheless in ordering a return. So, as it were, whether upholding the judge as the author of a properly explained discretion or whether approaching the exercise myself afresh, I arrive at the same conclusion and would accordingly dismiss the appeal.

Lord Justice Longmore:

25. In his oral submissions, Mr Nicholls, on behalf of the appellant, makes two substantive attacks on the judgment of Wood J. He submits first that the judge never formulates the correct test for deciding whether a wrongly abducted child, who is held to have settled in the requested state and to have objected to his or her return to the requested state, should in fact be returned to the requested state. Secondly he submits that what the judge did shows that he adopted a rule that, even in a case of what I may call, "settlement and objections", the normal rule was return and the case had to be exceptional if return was not to be ordered. The first submission is not, in my judgment, made out. As for cases where a child is settled, I agree with my lord that the test is rightly formulated by Kirkwood J in Re: C [2005] 1 FLR 938, and Sir Mark Potter, President, in the case also called Re: C [2006] 2 FLR 797 paragraph 51. In paragraph 36 of his judgment, the judge referred both to the leading authority of Cannon [2005] 1 FLR 169, which confirmed the existence of a discretion whether to return a child once the 12 month period stipulated in article 12 of the Convention had expired, and to the first Re: C case, where Kirkwood J formulated the appropriate test. What the judge said at paragraph 121 shows that he had the relevant test in mind.

26. As for objections, the judge set out the relevant law correctly in paragraphs 47 to 49. He held on the facts that the objections were not determinative on their own. On his factual analysis I would agree with him. He then factored the objections into the analysis as a whole in paragraphs 118 to 121 in a way which, subject to the second point, I would not criticise.

27. There is somewhat more force in Mr Nicholls' second submission. Paragraph 121 is the critical paragraph of the judgment and it is shortly expressed. The judge refers expressly both to the nature and seriousness of the removal and then to the facts: (1) that the mother could, if she wished, return to Zimbabwe with the children; (2) that the father could in any event care for the children if the mother did not choose to go with him; and (3) that the cultural and social roots together with the wider family of the children were all in Zimbabwe. He then also referred to the children's objections. Had he then said that, balancing these factors, he had decided in favour of a return, I do not think he could have been criticised; but before so concluding, he added these words: "Ultimately there is nothing exceptional about this case on any view". That sentence I find difficult to understand, since there must surely be something at least unusual for children to have been in this country for more than 12 months and for a judge to have decided that the children were settled in this country for the purposes of article 12 of the Convention, and yet for the

decision to be that the children should be returned. I do not, however, believe that the judge was erecting a test of exceptionality for a refusal of return over and above the test formulated by Kirkwood J and applied by the President. I think the sentence was, in its context, descriptive rather than prescriptive.

28. One must not forget that judges in this class of case are under great pressure to produce their judgments quickly in what can be complicated cases. This judge heard this case over two or three days and produced the judgment containing 128 paragraphs within a week. It is all too easy to take one sentence out of context. That is what Mr Nicholls' second submission, in my judgment, does. I do not, therefore, consider that the judge's exercise of discretion was made on any wrong basis and I agree that this appeal should be dismissed.

Lord Justice Moore-Bick:

29. I also agree that the appeal should be dismissed. The two principal submissions made by Mr Nicholls QC were, first, that the judge was wrong to hold that the court should only exercise its discretion, where such a discretion exists, in favour of refusing to return a child to its country of habitual residence in exceptional cases, since that puts too much weight on a supposed policy of the Hague Convention; and second, that the judge failed to have sufficient regard to the delay in making the application in this case, to the fact that the children are settled in this country and to their objection to returning to Zimbabwe and failed to hold that for those reasons the case is indeed exceptional.

30. We were referred to a number of authorities in which statements of principle have been made concerning the exercise of the discretion to refuse to return children to their country of habitual residence. Most of them were cases under article 13 of the Convention in which the child objected to being returned, but two of the more recent decisions were given in cases arising under article 12 in which the child was found to have been settled in this country. The first was the well known decision in S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492, in which Balcombe LJ said in relation to the exercise of the discretion under article 13:

> "(a) The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongfully removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return."

Later, at the end of his judgment he said:

> "Nothing which we have said in this judgment should detract from the view, which has frequently been expressed and which we repeat, that it 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."

31. In paragraph 19 of his judgment in Zaffino v Zaffino [2006] 1 FLR 410 Thorpe LJ said that he unhesitatingly endorsed the approach expressed by Balcombe LJ in preference to that formulated by Millett LJ in the earlier case of Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716.

32. The second of the two passages cited earlier was expressly considered and adopted by Wall LJ in the case of Vigreux v Michel [2006] 2 FLR 1180, in which he said in paragraph 62 of his judgment that the test laid down by Balcombe LJ remained good law. He proceeded to apply that principle in paragraph 66 by asking himself whether there was anything exceptional about the case before the court which required it to exercise its discretion not to return the child in question to France. It is to be noted that he did not find that to be the case, even though the child had voiced a firm objection to being returned.

33. Again, in the case of Re M [2007] EWCA Civ 260 Sir Mark Potter P said in paragraph 80 of his judgment:

> "That leaves only the question of whether the objection of M is such that this is one of the 'exceptional' cases justifying the court in using its discretion to refuse to order an immediate return. That involves balancing the nature and strength of M's objections against both the Convention considerations (including comity and respect for the judicial processes in Serbia as well, of course, as the policy behind the Convention) and general welfare considerations."

34. The two most recent cases to which we were referred both go under the title of Re C. The first, which is reported at [2005] 1 FLR 938, was decided by Kirkwood J and was a case in which the judge found that the child in question was settled in this country. The judge in paragraph 49 of his judgment said this:

> "So then, do principle, comity and the balance of justice between the parents require me to order S's return to the USA? The answer to that is no. Article 12(2) says so. This is an extremely unusual case in which the child has settled and got on with her life in a quite outstanding way. The clear conclusion I reach, having balanced all the matters, is that it would be wrong to order her return to the USA. Accordingly the originating application will be dismissed."

35. It should be noted that the judge described the case as "extremely unusual": the child had been settled in this country for over five years and had clearly, as he said, "got on with her life in a quite outstanding way".

36. The other was decided by Sir Mark Potter P sitting at first instance and is reported at [2006] 2 FLR 797. Again, it was a case involving a child who had been settled in this country for a considerable period of time. The President, in reaching his decision, did not specifically advert to the need to establish exceptional circumstances to justify refusing to return a child, but it is apparent from the nature of the case before him, as well as the manner in which he exercised his discretion, that he regarded it as an unusual case.

37. Finally, I should mention that in paragraph 49 of his judgment in the present case the judge referred to the decision of this court in Klentzeris v Klentzeris [2007] EWCA Civ 533, which he regarded as reaffirming the principle that non-return was appropriate only in cases which fall into a most exceptional category. That was a case in which the child's objection to being returned was so strong and so well-founded that it outweighed other considerations and can, in my view, certainly be described as exceptional.

38. From these authorities I draw the following conclusions: (i) that there is a recognised policy or purpose behind the Convention, namely, to return children wrongfully removed from their state of habitual residence and to do so as quickly as possible, but (ii) that the policy will or may give way in some cases, for example, where the child is well settled in the requested country, or where the child has substantial objections to being returned; however (iii) in deciding whether there are sufficient grounds for not returning a child, the court must take account of the underlying policy of the Convention with the result that, in order to justify exercising its discretion against returning the child, it must be satisfied that viewed overall the case can properly be described as exceptional.

39. The expression "exceptional", or some similar expression, has been used consistently throughout the authorities in terms which, in my judgment, are not limited to the particular defence under consideration. One can see from paragraph 52 of the judgment in the present case that the judge directed himself in accordance with the passages in Zaffino v Zaffino, to which I have referred. In my view the proposition which he derived from the authorities, and which he sets out in paragraph 53 of his judgment, is one which he was right to draw from the cases. I therefore turn to the application of the principle to the facts of this case.

40. I have some sympathy for the judge, dealing with what, on any view, was a difficult case calling for a decision within a limited period of time. Having said that, I think it is fair to say that his reasoning in paragraphs 118 to 121, principally in the last of those paragraphs, is rather abbreviated. As a result of his finding that the children were settled in this country and that they objected to being returned to Zimbabwe he was faced with the need to exercise his discretion and that inevitably involved weighing up the competing factors. In fact, however, as one can see from paragraph 120, having referred in general terms to his findings of fact he moved directly to the conclusion that there was nothing in the case to justify describing it as exceptional. He said:

> "Having set out at length the facts as I find them to be, I can find nothing in this case which would qualify it as exceptional and thus decline to exercise my discretion against a return."

41. Of course, there is nothing wrong with a judge expressing his conclusion first followed by his reasons, but it remains necessary for him to set out those reasons in sufficient detail to indicate how he has weighed up the competing factors. In the present case the judge's reasons are set out in paragraph 121. Speaking for myself, I would have expected a fuller discussion and evaluation of the relevant factors than one finds in that paragraph and a fuller explanation of why the balance came down in favour of return in this case. There were three significant factors which argued in favour of exercising the discretion the other way: the fact that the children, as he found, were settled in this country; that they objected to being returned to Zimbabwe; and the current economic conditions in Zimbabwe, a factor urged upon us by Mr Nicholls QC in argument, though not directly addressed by the judge at this point in his judgment. In my view the judge should have weighed all these factors against the factors favouring return as part of making an overall decision and as part and parcel of deciding whether this was an exceptional case. However, as one can see from paragraph 121, he scarcely mentioned them and failed to explain what weight he gave to them, either individually or collectively. Instead, having referred to a number of factors, all but one of which favoured return, he moved immediately to a finding that there was nothing exceptional about the case without, at that stage, at any rate, mentioning, or apparently considering the countervailing factors.

42. The judge's failure to deal in sufficient detail with the various competing factors, in particular the fact that the children were, as he found, settled in this country, leads me to the conclusion that his exercise of discretion in this case was flawed. However, exercising the discretion for myself, I would still come to the same conclusion, essentially for the reasons given by Thorpe LJ. This is a case in which, in my view, the factors are quite finely balanced, but having regard to the evidence and to the findings made by the judge, I would make the same decision for reasons which I can briefly summarise as follows. It is the policy of the Convention to return children, if possible, to their country of origin. This is an important factor favouring return, to which is allied the nature of the mother's misconduct, as described by the judge. In addition there is the fact that the children have a good relationship with their father which was resumed, apparently without difficulty and in some depth, during recent contact. Moreover, the wider family and cultural ties of these children are firmly in Zimbabwe. All these factors favour return.

43. The most powerful factor pointing the other way is the fact that the children are settled here, but the judge's finding to that effect is on its own terms finely balanced. The case is not comparable, therefore, to either of the Re C cases mentioned earlier, in which the children had been in this country for much longer periods of time and in each case had become much more firmly settled to the point at which to return them would have risked seriously disrupting their personal development. The judge's findings in this case, as Thorpe LJ

has indicated, suggest that the children should be capable of resettling in Zimbabwe under the protection of their father without comparable difficulties. The circumstances in Zimbabwe, despite the dire economic condition of that country, are not such as to expose the children to real personal danger. Finally, their objections to being returned, while no doubt genuine, were not found by the judge to be particularly strong or cogent.

44. For these reasons, which I have described in summary only, I too have reached the conclusion that this is a case in which the court's discretion should be exercised in favour of returning the children. For all those reasons I would dismiss the appeal.

Order: Appeal dismissed.