HOUSE OF LORDS SESSION 2007–08
[2007] UKHL 55

on appeal from: [2007] EWCA Civ 992

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re M (FC) and another (FC) (Children) (FC)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

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LORD BINGHAM OF CORNHILL

My Lords,

1. For the reasons given by my noble and learned friend Baroness Hale of Richmond in her opinion, which I have had the advantage of reading in draft and with which I agree, I would allow this appeal and make the order which she proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, I would allow the appeal. I add these brief comments simply to explain why I agree with her that, where it has been demonstrated that the child is settled in its new environment, article 12 nevertheless implies that there is a discretion to return the child within the procedures of the Convention.

3. I think that it is reasonably clear, as a matter of language, that article 12 can be read as implying that there is a discretion to return a settled child under the Convention. Two situations are envisaged by the article in which there is plainly no discretion. The first is where, at the date of the commencement of the proceedings, a period of less that one year has elapsed from the date of the wrongful removal or retention. In that situation the first paragraph states that the authority concerned

"shall" return the child forthwith. The second is where the proceedings have commenced after the expiration of one year and it has not been demonstrated that the child is settled in its new environment. In that situation the second paragraph states that the authority "shall also" order the return the child. Then there is the coda to that paragraph, which is introduced by the word "unless". The coda does not say in terms what is to be done where it applies. But there are only three possibilities: (a) that return of the settled child must be ordered, (b) that return of the settled child must not be ordered and (c) that there is a discretion to return the child.

4. The coda would be pointless if (a) applied, as it would lead to exactly the same result as the main part of that paragraph. The consequence, if (b) applied, would be the complete opposite. This risks requiring the relevant authority to do something which may not be in the interests of the child. So one would have expected it to be spelled out expressly if this was nevertheless what was intended. The absence of any such words is a clear indication against this alternative. This leaves (c) as the only remaining possibility. The absence of a direction that the settled child "shall not" be returned, in contrast to the direction "shall" in the main part of the paragraph, indicates that in the situation to which the coda refers there is nevertheless a discretion to return the child under the Convention. At the very least, the matter is left open by the wording of the article.

5. The argument in favour of there being a discretion under the Convention as a mere matter of language is reinforced by the fact that this reading of article 12 is consistent with articles 13 and 20, both of which expressly confer a discretion on the relevant authority. The policy of the Convention as a whole is to ensure that full weight can be given in a variety of circumstances to the interests of the child, to which paramount importance must always be attached. The argument is reinforced too by the other factors that are referred to by Baroness Hale. In particular, in contrast to the exercise of powers outside the Convention which are referred to in article 18, it ensures that the general policy considerations of the Convention will continue to be relevant.

LORD RODGER OF EARLSFERRY

My Lords,

6. I have had the privilege of considering in draft the speech which is to be delivered by my noble and learned friend, Baroness Hale of Richmond. She sets out the arguments both for and against the construction, which she has come to prefer, of article 12 of the Convention as containing a discretion to return a settled child within the Convention procedures.

7. Having regard to the purpose of the Convention and to the language of articles 12 and 13, I prefer the competing view that, once a child has become settled, precisely because the purpose of the Convention to promote speedy return can no longer be achieved, the Convention ceases to play a role. Then, as article 18 envisages, the court is to have resort to its powers outside the Convention. Those powers fall to be exercised in accordance with the guidance given by the House in *Re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80. It would serve no useful purpose, however, for me to elaborate the point since Baroness Hale has fully rehearsed the relevant arguments, which are very largely those which appealed to Singer J in *Re C (Abduction: Settlement)* [2005] 1 FLR 127. Happily, for the reasons which she gives, it may not make very much difference in practice whether the discretion is exercised under or outside the Convention.

8. On all the other matters I agree with Baroness Hale's reasoning. I would accordingly allow the appeal and make the order which she proposes.

BARONESS HALE OF RICHMOND

My Lords,

9. The question before us is whether two girls, now aged 13 years and 3 months and 10 years and six months, should be summarily returned to Zimbabwe under the Hague Convention on the Civil Aspects of International Child Abduction 1980, given effect in United Kingdom

law by the Child Abduction and Custody Act 1985. The trial judge held that they should be returned: [2007] EWHC 1820 (Fam). The Court of Appeal upheld his decision: [2007] EWCA Civ 992. There is no dispute that the children were brought here in breach of their father's custody rights. The dispute is as to the scope and application of the exceptions to the duty to return them and in particular the proper approach to the exercise of discretion once one or more of those exceptions has been established.

10. The judge heard a great deal more evidence than is usual in child abduction cases and made full and careful findings of fact. We need repeat only the bare essentials. The girls were born in Zimbabwe to Zimbabwean parents and lived there with their father after their parents separated early in 2001. In March 2005, while on a visit to their mother, they were brought secretly to this country, where their mother claimed asylum. Since then they have been living in this country with their mother and her partner, who arrived here shortly after they did. From at least September 2005 the father has known where the children are. He did not notify the Zimbabwean central authority of his claim until September 2006. The English central authority did not receive notification from them until January 2007. These proceedings were not issued until May 2007, more than two years after the children had been removed. The mother's asylum claim was refused in April 2005 although she has since been advised to make a fresh one. The family remain here because of a moratorium on the return of failed asylum seekers to Zimbabwe.

The Convention and the issues

11. The Hague Convention on the Civil Aspects of International Child Abduction 1980 is an admirably clear and simple instrument. Its twin objects are set out in article 1: "(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 States". However, as the Explanatory Report of Professor Elisa Perez-Vera (April 1981, paras 16 and 17) points out, as to rights of custody, the second object is attained only indirectly, through the first.

12. But it should not be thought that the Convention is principally concerned with the rights of adults. Quite the reverse. The Preamble explains that the Contracting States are "firmly convinced that the interests of children are of paramount importance in matters relating to their custody" and "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, as well as to secure protection for rights of access". These two paragraphs, as Professor Perez-Vera explains,

> "reflect quite clearly the philosophy of the Convention in this regard. It can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child." (para 24)

However,

> "The Convention recognises the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area." (para 25)

Hence the Convention is designed to protect the interests of children by securing their prompt return to the country from which they have wrongly been taken, but recognises some limited and precise circumstances when it will not be in their interests to do so.

13. The basic obligation to return the child is spelled out in article 12:

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

> period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

As Professor Perez-Vera points out, article 12 and article 18 are complementary, despite their different character (para 106). Article 18 reads:

> "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

14. Thus one of the exceptions to the duty of return is contained within article 12 itself. If the proceedings are begun within a year of the removal, there is a duty to return "forthwith". Even if they are begun more than a year later, there is still a duty to return, but not "forthwith", unless the child is now settled in its new environment. These proceedings were begun more than two years after the children had been removed. Notwithstanding the precarious immigration position, the trial judge found that "overall and on fine balance" the children were now settled in their new environment. Hence there is no duty under article 12 to return them.

15. This gives rise to the two most important issues in the case: (1) once the children are settled, is there a discretion nevertheless to return them under the Convention or must their return be sought and ordered under some other jurisdiction; and (2) if there is such a discretion, on what principles should it be exercised and how far, if at all, do they differ from the principles which would apply to the court's power to return them under some other jurisdiction?

16. Three further exceptions are spelled out in article 13:

> "Notwithstanding the provisions of the previous Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights

at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

17. As to the third of these exceptions, the judge found that the children did object to a return to Zimbabwe. He also found that they were of an age and maturity which made it appropriate to take account of their views. Nor could he find that they had been coached in the views they had expressed to the CAFCASS officer. But he bore in mind the overall context, living with a mother and her new partner who did not wish to return and who were more likely than not to have given the children comparatively negative views about Zimbabwe. He did not regard the children's views as sufficiently strong to be determinative. If wrong about that he would still have exercised his discretion to return them. This raises issue (3): the proper approach to the consideration of the children's objections under article 13.

18. The judge rejected the mother's allegations that the father had consented to or acquiesced in the children's removal within the meaning of article 13(a). That allegation has not been pursued. The judge also rejected the mother's allegations that the particular risks which she and her partner would face on return to Zimbabwe, and/or the general situation prevailing in that country, would put the children at grave risk of physical or psychological harm or otherwise place them in an intolerable situation for the purpose of article 13(b). Despite the difficulties of life in Zimbabwe, he held that it was not a "failed state" and their father would be able to insulate them from the risks and privations suffered by other Zimbabweans. The mother still pursues the allegation, thus raising issue (4): whether the judge should have held the article 13(b) exception made out on the facts of this case; and issue (5) the proper approach to the exercise of the court's discretion in such cases.

19. The final exception is provided for in article 20:

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

Unlike all the other articles quoted above, article 20 did not become part of United Kingdom law by virtue of section 1(2) and Schedule 1 to the 1985 Act. But in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619, para 65, this House pointed out that, under the Human Rights Act 1998, it is now unlawful for the court as a public authority to act incompatibly with the human rights and fundamental freedoms guaranteed by the European Convention on Human Rights. This applies in a Hague Convention case just as in any other. Article 20 has thus been given domestic effect by a different route. Hence a final issue is whether a return would be incompatible with the Convention rights.

Settlement and discretion

20. On one view, adopted by Singer J in *Re C (Abduction: Settlement)* [2004] EWHC 1245 (Fam), [2005] 1 FLR 127, where the second paragraph of article 12 applies, a finding that the children are now settled in their new environment takes the case outside the Hague Convention altogether. Article 12 defines the scope of the duty to return. It contemplates that that duty may continue indefinitely, provided that the proceedings have begun in time. It also contemplates that the duty will continue even if the proceedings have not begun in time. But the latter duty only applies "unless" the children have become settled. Article 12 thus tries to draw a principled line between the claimant who does bring proceedings in time, who should not be prejudiced by delays in the system, and the claimant who does not, who should not succeed under the Convention once the child has become settled. As Professor Perez Vera explains,

> "...insofar as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it – something which is outside the scope of the Convention." (para 107)

The rule while "perhaps arbitrary" was the "least bad" solution to the problem.

21. Furthermore article 12 does not expressly contemplate a residual discretion to return. Its wording is different from the qualifications in article 13. Article 18 does not confer any new power to order the return of the child, but simply provides that the provisions of the Convention do not limit any *other* power which the court may have to order the child's return. It is contemplating powers conferred by the ordinary domestic law rather than by the Convention itself. As Professor Perez Vera explains,

> "This provision,...which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorises the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, i.e. where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment." (para 112)

22. Support for this view can therefore be drawn both from the wording of the Convention itself and from the Explanatory Report. It is also the view taken by those academic commentators who have considered the matter. In an early article on the Convention, "International Child Abduction by Parents" (1982) 32 University of Toronto Law Journal 281, at 314, John Eekelaar states that if the abductor succeeds in showing that the child is settled, "the court will be free to decide the case on a full review of its merits". It is also supported by Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction*, 1999, at p 209, who suggest that article 18 should be ignored entirely in this context, as "an unfortunate example of a provision having been accepted only by a wafer-thin majority at the drafting stage", and by Nigel Lowe, Mark Everall and Michael Nicholls, *International Movement of Children: Law, Practice and Procedure*, 2004, at para 17.33. It was certainly the view of the late Professor Peter Nygh, formerly Nygh J of the Family Court of Australia, in the passage cited at para 28 below.

23. Judicial support can be found in the observations of Kay J in the Family Court of Australia in *State Central Authority v Ayob* (1997) FLC 92-746 and again in *State Central Authority v CR* [2005] Fam CA 1050. On the other hand, other Australian cases had assumed the existence of a discretion: see *Director-General of the Community Services v*

Apostolakis (1996) FLC 92-718 and *Director-General, Department of Families, Youth and Community Care v Thorpe* (1997) FLC 92-785 The point was, however, left open in two cases before the full court: see *Director-General of the Community Services v M and C* (1998) FLC 92-829 and *Director-General, Department of Families, Youth and Community Care v Moore* (1999) FLC 92-841.

24. The contrary view was taken by the Court of Appeal in *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 FLR 169, on appeal from Singer J in *Re C*. On this view, article 12 merely establishes when the mandatory duty to return exists. What is to happen when it does not is left to implication. The wording "shall also order the return of the child, unless..." is just as capable of supporting the inference of a discretion thereafter as is the wording "is not bound" and "may also refuse" in article 13. Each article limits or qualifies the duty of return and if the one imports a discretionary power of return into the Convention then the other can do so too. Article 18 is as capable of referring to powers arising under the Convention as it is to powers arising from other sources. Indeed, the wording "at any time" may be more consistent with powers arising under the Convention, because article 16 expressly precludes the courts of the requested state from deciding "on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention".

25. Before *Re C* there were *dicta* to this effect in cases where the one year time limit had been exceeded but settlement had not been found: see *Re S (A Minor) (Abduction)* [1991] 2 FLR 1, per Purchas LJ at 24, *Re N (Minors) (Abduction)* [1991] 1 FLR 413, per Bracewell J at 416, and also *obiter* but for different reasons in *Re M (Abduction: Acquiescence)* [1996] 1 FLR 315, at 320, per Thorpe J and in *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433, at 440, per Wilson J.

26. In Scotland, the Inner House, in *Soucie v Soucie* 1995 SC 134, cited *Re N* and assumed that a discretion would have arisen under article 18 had settlement been found. In Ireland, the Supreme Court, in *P v B (No 2) (Child Abduction: Delay)* [1999] 4 IR 185, also cited *Re N*, but found settlement and declined to return the child. In the United States, the authorities reviewed by Singer J in *Re C* suggest that the debate has centred around whether the one year period in the second paragraph of article 12 should be extended by a principle known as "equitable tolling" so as to ignore the passage of time while the child's whereabouts have been actively concealed from the claimant parent. In

New Zealand, the Convention has been given effect, not by scheduling the relevant articles to an implementing Act, but by translating its provisions into domestic legislation. The Care of Children Act 2004, in section 106(1), provides that the court "may refuse" to make an order for the return of the child in each of the situations provided for in articles 12 and 13; thus "it is clear from the language of these provisions that although a court is not obliged to return a child who is settled in New Zealand if application for return has been made more than a year after the child's wrongful removal, it may nevertheless do so if it thinks it appropriate": see *Secretary of State for Justice (as the New Zealand Central Authority on behalf of TJ) v HJ*, SC 36/2006 [2006] NZSC 97, per Elias CJ at para 9. This indicates, therefore, the view of the New Zealand legislature rather than the New Zealand judiciary as to the meaning of article 12.

27. This is as far as the comparative researches of counsel have taken us. It would be putting it too high to say that there is a strong tide of international judicial opinion in favour of a discretion in settlement cases. On the other hand, Kay J in Australia and Singer J in England are the only judges to have expressed a contrary view. When the decision of Singer J was reversed and the case sent back for the issues of settlement and the exercise of discretion to be decided afresh, Kirkwood J found that the child was settled here and in the exercise of his discretion refused to order her return: see *Re C (Abduction: Settlement)(No 2)* [2005] 1 FLR 938. There appears to be no case until this in which the return of a settled child has been ordered.

28. That, therefore, is how things stand in the United Kingdom, unless your lordships accede to the invitation of both Mr Henry Setright QC on behalf of the mother and Mr Teertha Gupta on behalf of the children to overrule the decision in *Cannon v Cannon*. We have not been invited to overturn the long line of authority holding that, once one of the exceptions in article 13 has been made out, there remains a discretion to return the child under the Hague Convention rather than under the ordinary law. However, our attention has been drawn to the contrary view expressed by Professor Nygh, in "The international abduction of children", in *Children on the Move, How to Implement their Right to Family Life*, edited by the distinguished team of Jaap Doek, Hans van Loon (Director of the Hague Conference on Private International Law) and Paul Vlaardingerbroek, 1996, at p 42:

> "There is no doubt that the court in such a case is not bound to keep the child within the requested state. The question is: can it

order the removal of the child in a summary proceeding without consideration of the merits of the dispute?

The English Court of Appeal has taken the view that there does arise a residual discretion upon a ground of opposition to return being established which must be exercised before the court can proceed with the hearing of the merits of the custody dispute. This discretion must be exercised balancing the interests of the child, which should not be treated as paramount for these purposes, against the intention of the Convention that children who have been unlawfully removed or retained should be returned promptly to the country of habitual residence. This practice appears to be contrary to the assumption in para 107 of the Perez-Vera Explanatory Report that in such a case the child's return "should take place only after an examination of the merits of the custody rights exercised over it." The better view may well be that a decision upholding a ground of opposition means that the court of the requested State should assume jurisdiction to deal with the merits of the custody dispute."

29. In theory at least, therefore, there are three solutions: (1) once any ground of opposition has been made out, so that there is no duty to return the child, the court must consider whether to use other powers, outside the Convention, to return the child; or (2) the article 13 and 20 grounds, being permissive only, contain within them a discretion nevertheless to return the child, but the article 12 ground, not being so limited, does not; or (3) all of the grounds contain within them a discretion to return nonetheless.

30. Despite its attractive simplicity and the distinction of its source, solution (1) can be rejected. A discretion not to return is imported into the words of article 13 itself. The passage cited from Professor Perez-Vera is taken, as already seen, from her discussion of articles 12 and 18; when discussing articles 13 and 20, she states:

"In general, it is appropriate to emphasise that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion – and does not impose upon them a duty – to refuse to return a child in certain circumstances." (para 113)

Thus article 13 clearly envisages that the discretion may result in a decision to return within the Convention procedures. Those procedures, involving as they do the central authorities of each Contracting State and, in this country at least, favourable legal aid for the claimants, are different from those of the ordinary law. The same applies to article 20.

31. The choice between solutions (2) and (3) is much more difficult. As judges at all levels have acknowledged, there is much to be said for either view. However, I have reached the conclusion, not without considerable hesitation, that article 12 does envisage that a settled child might nevertheless be returned within the Convention procedures. The words "shall...unless" leave the matter open. It would be consistent with all the other exceptions to the rule of return. It would avoid the separate and perhaps unfunded need for proceedings in the unusual event that summary return would be appropriate in a settlement case. It recognises the flexibility in the concept of settlement, which may arise in a wide variety of circumstances and to very different degrees. It acknowledges that late application may be the result of active concealment of where the child has gone. It leaves the court with all options open. Furthermore, the difference between the two solutions is by no means as great as is sometimes assumed. This depends upon the scope of the discretion to be exercised both within and without the Convention procedures.

Discretion under the ordinary law and under the Convention

32. The difference between the two was summed up thus by Thorpe LJ in *Cannon v Cannon*, at para 38:

> "For the exercise of a discretion under the Hague Convention requires the court to have due regard to the overriding objectives of the Convention whilst acknowledging the importance of the child's welfare (particularly in a case where the court has found settlement), whereas the consideration of the welfare of the child is paramount if the discretion is exercised in the context of our domestic law."

There has been a tendency in some quarters to take each of these approaches further than they should properly be taken, thus exaggerating the differences between them.

33. On the one hand, it is sometimes suggested that, outside the Convention, the court is bound to conduct a full merits inquiry into the dispute between the parties; not only will the welfare of the child be the paramount consideration, but the checklist of factors relevant to that consideration, set out in section 1(3) of the Children Act 1989, will have to be fully considered. In the words of Mr Scott-Manderson QC, appearing for the father, it operates as a "fetter on the court's discretion", limiting it to the welfare of the child and excluding independent consideration of the policy of the Hague Convention, including the policy that the merits of the parental dispute should be decided in the courts of the child's home country.

34. On the other hand, it has sometimes been suggested that in Convention cases the policy of the Convention requires that the discretion be exercised in favour of return in all save the most exceptional cases. When discussing discretion in this case, the trial judge cited the recent case of *Zaffino v Zaffino* [2005] EWCA Civ 1012, [2006] 1 FLR 410, where at para 18 Thorpe LJ described the following passage from the judgment of Balcombe LJ in *Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242, at 251, as "authoritatively stat[ing] the proper approach":

> "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 wrongly removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Hague Convention – see *In re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106, 122E per Lord Donaldson of Lymington MR."

However, the judge also referred, under the heading of discretion, to *Vigreux v Michel* [2006] EWCA Civ 630; [2006] 2 FLR 1180, in which "the Court of Appeal further emphasised the exceptional nature of the case that would be required to fall outside the return net." (para 53) He may well have had in mind the observation of Wall LJ at para 66:

> "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?"

Earlier, when summarising the law relating to child's objections, the judge referred to the observations of the Court of Appeal in *Klentzeris v Klentzeris* [2007] EWCA Civ 533, "for a recent reaffirmation that non-return is appropriate only in cases which fall into 'a most exceptional category', in that case the court basing its decision upon 'the extraordinary strength of the evidence of the CAFCASS officer'." (para 49)

35. When it came to the actual exercise of his discretion, the judge clearly indicated that he considered that he had to find something exceptional in the case, over and above the two grounds of opposition which he had found established, before he could refuse to order a return: "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...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,... Ultimately, there is nothing exceptional about this case on any view." (paras 119 to 121)

36. Mr Setright points out that it is scarcely surprising that the judge took this view, in the light of certain passages from the most recent Court of Appeal cases, *Zaffino v Zaffino*, *Vigreux v Michel* and *Klentzeris v Klentzeris* He further points out that, although both Thorpe LJ (para 12) and Longmore LJ (para 27) in this case considered the judge's use of the word "exceptional" as "descriptive rather than prescriptive", Moore-Bick LJ, having canvassed the recent authorities, concluded, at para 38, that:

> "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 regarded as exceptional."

The most recent passage cited by Moore-Bick LJ was from the judgment of Sir Mark Potter P in *Re M (Abduction: Child's Objections)* [2007] EWCA Civ 260; [2007] 2 FLR 72, at para 80:

> "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."

37. Those passages leave one in little doubt that a view has crept in that "exceptional" is not merely a description, to be applied to the small number of exceptions in which the court has power to refuse to order a return, but also an additional test to be applied, after a ground of opposition has been made out, to the exercise of the court's discretion.

38. In my view, each of the extreme positions outlined above is incorrect. In the recent rather oddly entitled case of *Re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, this House made clear the approach to be adopted in wrongful removal or retention cases falling outside the Hague Convention. The child's welfare is indeed the paramount consideration. But the court does have the power to order the immediate return of the child to a foreign jurisdiction without conducting a full investigation of the merits. As Ormrod LJ put it in *Re R (Minors) (Wardship: Jurisdiction)* (1981) 2 FLR 416, at 425:

> "'Kidnapping', like other kinds of unilateral action in relation to children, is to be strongly discouraged, but the discouragement must take the form of a swift, realistic and unsentimental assessment of the best interests of the child, leading, in proper cases, to the prompt return of the child to his or her own country, but not the sacrifice of the child's welfare to some other principle of law."

39. Thus there is always a choice to be made between summary return and a further investigation. There is also a choice to be made as to the depth into which the judge will go in investigating the merits of the case before making that choice. One size does not fit all. The judge may well find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that factor and to all the other relevant factors, some of which are canvassed in *Re J*, will vary enormously from case to case. No doubt, for example, in cases involving Hague Convention countries the differences in the legal systems and principles of law of the two countries will be much less significant than they might be in cases which fall outside the Convention altogether.

40. On the other hand, I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention.

41. But there remains a distinction between the exercise of discretion under the Hague Convention and the exercise of discretion in wrongful removal or retention cases falling outside the Convention. In non-Convention cases the child's welfare may well be better served by a prompt return to the country from which she was wrongly removed; but that will be because of the particular circumstances of her case, understood in the light of the general understanding of the harm which wrongful removal can do, summed up in the well-known words of Buckley LJ in *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, at 264:

> "To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education...are all acts...which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted."

42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the Contracting States.

43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word "overriding" if

it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.

44. That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.

45. By way of illustration only, as this House pointed out in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619, para 55, "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country.

46. In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections,

the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.

47. In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer "hot pursuit" cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community.

48. All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required.

This appeal

49. My lords, I cannot share the opinion of the majority of the Court of Appeal that the trial judge was using the term "exceptional" simply to describe the overall characteristics of a case in which it would be appropriate to refuse a return. He regarded it as a test to be applied in the exercise of his discretion. For the reasons already given, he is not to be blamed for this. But it is open to us, therefore, to set aside the exercise of discretion in the courts below and to reach our own conclusions.

50. The judge specifically referred to the following factors in deciding whether this was an exceptional case:

> "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 …; 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 paternal and maternal family) are all still in Zimbabwe. I have also considered the children's objections." (para 121)

51. In the Court of Appeal, Moore-Bick LJ considered that the judge should at this point have weighed the competing factors: in particular the fact that the children were settled here, that they objected to return, and the economic conditions in Zimbabwe. However, both he and Thorpe LJ would have exercised the discretion in the same way, adding to the factors mentioned by the judge the precariousness of the family's position in this country, of which the children may be unaware, and the strength of their relationship with their father.

52. My Lords, in this court we have had the benefit of counsel's representations on behalf of the children themselves, who have also been with us for some of the hearing. Mr Gupta argues powerfully on their behalf that the "child-centric" exceptions of settlement and objection have been analysed more from the parents' perspective than from the children's. The comparative moral blameworthiness of mother and father has had an effect upon the judgments in both of the courts below. But from the children's point of view, they have had to suffer all the upset of being brought to this country secretly. They were unsettled at first and in September 2005 the older child sent her father an email asking for him to come and take them home. But, as counsel puts it, "the father's responses to this plea both in his emailed responses and in his actions were miniscule". For whatever reason, he did not come and fetch them home; he did not start proceedings until more than a year later. When he did start the ball rolling in Zimbabwe, the central authorities between them took more than eight months before the proceedings were brought. What were the children to do during all this time? They settled down and got on with making their lives here, where they are happy and have become fully integrated in their local church and schools. They feel fully settled here whatever the courts may think. Their views have changed from wanting to go home to objecting to this further disruption

in their short lives. Not only this, their father's emails have given them the impression that he has moved to Zambia. Although he now states that he was only spending some of his time there on business and would restrict his visits there should the children return, they are understandably confused about the position. They certainly do not want to be left in the care of their father's new partner. In short, having been the victims of one international relocation contrary to their wishes, they stand to be the victims of another should the father's application succeed.

53. To all of these powerful child-centric considerations might be added the uncertainties and volatilities of life in Zimbabwe, to put it no higher than that. Their mother and her partner claim that they will be at risk of persecution if they return. So far this claim has been rejected, but their reluctance to return is understandable. What is certain is that, if they do return to Zimbabwe, they will not be readmitted to the United Kingdom. If both they and the children are in Zimbabwe there will be no question of the family being allowed to return here for the children to complete their schooling. These are powerful considerations in favour of any dispute on the merits between the parents being conducted here rather than in Zimbabwe.

54. Against all this, the policy of the Convention can carry little weight. The delay has been such that its primary objective cannot be fulfilled. These children should not be made to suffer for the sake of general deterrence of the evil of child abduction world wide. I would therefore allow the appeal and dismiss the father's Hague Convention proceedings, without prejudice of course to his right to bring any other proceedings to resolve his dispute with the mother.

Other issues

55. It is unnecessary therefore to express a view on the other issues in the case. I would not, however, have set aside the judge's conclusions on the article 13(b) exception. It is not disputed that the initial threshold in such cases is a high one. The judge considered all the material before him very carefully. He eschewed any "knee-jerk" condemnation of Zimbabwe as a failed state. He had good reasons to conclude that this father, whom he had had the unusual benefit of hearing give oral evidence, would be able to provide properly for his children in Zimbabwe despite the current difficulties. I do not accept Mr Setright's argument that the moral and political climate in Zimbabwe is such that any child would be at grave risk of psychological harm or should not be expected to tolerate having to live there. I might add that the father's

business in Zambia and elsewhere suggests that he has the means to remove his children from trouble should the need arise.

56. Nor do I think that article 20 and the European Convention on Human Rights take matters any further in this case. All of the parties have the right to respect for their homes and family lives. The father has a family life with his children, whom he loves and who love him, just as the children have a home and family life with their mother. Returning the children against their will would be a graver interference with their rights than failing to do so would be with the rights of the father. Calculating the proportionality of interfering with his rights against the proportionality of interfering with the rights of the mother and the children would lead to the same result.

57. I would finally comment that, "exceptional" or not, this is a highly unusual case. Cases under the second paragraph of Article 12 are in any event very few and far between. They are the most "child-centric" of all child abduction cases and very likely to be combined with the child's objections. As pointed out in *Re D*, it is for the court to consider at the outset how best to give effect to the obligation to hear the child's views. We are told that this is now routinely done through the specialist CAFCASS officers at the Royal Courts of Justice. I accept entirely that children must not be given an exaggerated impression of the relevance and importance of their views in child abduction cases. To order separate representation in all cases, even in all child's objections cases, might be to send them the wrong messages. But it would not send the wrong messages in the very small number of cases where settlement is argued under the second paragraph of article 12. These are the cases in which the separate point of view of the children is particularly important and should not be lost in the competing claims of the adults. If this were to become routine there would be no additional delay. In all other cases, the question for the directions judge is whether separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion, the expense and the delay that may result. I have no difficulty in predicting that in the general run of cases it will not. But I would hesitate to use the word "exceptional". The substance is what counts, not the label.

58. For the reasons given earlier, therefore, I would allow this appeal and dismiss the Hague Convention proceedings.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

59. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond and for the reasons she gives, with which I entirely agree, I too would allow this appeal and make the order proposed.