FAMILY COURT OF AUSTRALIA

KILAH & DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES *[2008] FamCAFC 81*

FAMILY LAW - CHILD ABDUCTION – HAGUE CONVENTION – HABITUAL RESIDENCE – whether the children were habitually resident in Australia at the time of their retention – whether the mother had a settled intention not to return to Israel with the children – discussion of Australian, New Zealand and English authorities on the term 'habitual residence' – appeal dismissed

FAMILY LAW - CHILD ABDUCTION – HAGUE CONVENTION – GRAVE RISK OF HARM – whether the existence of a travel warning for Israel created a grave risk that the return of the children to Israel would expose them to physical harm – whether the mother's economic situation in Israel, if required to return with the children, would create a grave risk that the children would be exposed to physical or psychological harm or placed in an intolerable situation – appeal dismissed

FAMILY LAW - CHILD ABDUCTION – HAGUE CONVENTION – DISCRETION TO REFUSE TO ORDER RETURN – where the trial judge found the father had consented to the children being removed from Israel and retained in Australia – whether the trial judge erred in failing to exercise his discretion to refuse to order the children's return to Israel – appeal dismissed

FAMILY LAW - CHILD ABDUCTION – HAGUE CONVENTION – ADEQUACY OF CONDITIONS – whether the trial judge erred in imposing conditions to accommodate the father's limited financial means rather than to ameliorate the grave risk to the children of return – where the Full Court found there was no grave risk of return – appeal dismissed

FAMILY LAW - CHILD ABDUCTION – HAGUE CONVENTION – POSITION UNDER ISRAELI FAMILY LAW – whether the trial judge erred in failing to take account or judicial notice of the position under Israeli family law – whether the trial judge erred in determining it was necessary for the children to return to Israel so the court of Israel could determine custody arrangements – appeal dismissed

FAMILY LAW - CHILD ABDUCTION – HAGUE CONVENTION – FRESH EVIDENCE – where the mother sought to adduce fresh evidence of the children's acclimatisation in Australia – where the Central Authority sought to adduce fresh evidence of legal proceedings instituted by the father in Israel – applications dismissed

Family Law Act 1975 (Cth)

Family Law (Child Abduction Convention Regulations) 1989 (Cth)

Panayotides & Panayotides (1997) FLC 92-733
MW v Director-General, Department of Community Services [2008] HCA 12
Zafiropoulos and State Central Authority (2006) FLC 93-264
State Central Authority and De Blasio [2002] FamCA 804
SK v KP [2005] 3 NZLR 590
Punter v Secretary for Justice [2007] 1 NZLR 40
Mozes v Mozes (2001) 239 F.3d 1067
Re J. (a Minor) (Abduction: Custody Rights) [1990] 2 AC 562
Cooper & Casey (1995) FLC 92-575
DW v Director-General, Department of Child Safety (2006) FLC 93-255
M & M (Abduction: England and Scotland) [1997] 2 FLR 263
Cameron & Cameron [1996] SC 17
Dixon v Dixon 1990 SCLR 692
DP & Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services (2001) 206 CLR 401
De L & Director General, NSW Department of Community Services and Anor (1996) 187 CLR 640

APPELLANT:	Mrs Kilah
RESPONDENT:	Director-General, Department of Community Services
FILE NUMBER:	SYC 1848 of 2007
APPEAL NUMBER:	EA 115 of 2007
DATE DELIVERED:	24 June 2008
PLACE DELIVERED:	Melbourne
PLACE HEARD:	Sydney
JUDGMENT OF:	Bryant CJ, Coleman and Thackray JJ
HEARING DATE:	5 December 2007
LOWER COURT JURISDICTION:	Family Court of Australia

LOWER COURT JUDGMENT DATE:	29 August 2007
LOWER COURT MNC:	[2007] FamCA 1099
REPRESENTATION	
COUNSEL FOR THE APPELLANT:	Mr Hamilton
SOLICITOR FOR THE APPELLANT:	In person
COUNSEL FOR THE RESPONDENT:	Ms Hartstein
SOLICITOR FOR THE RESPONDENT:	Department of Community Services

ORDERS

(1) That the appeal be dismissed.

(2) That the date in Order 5 of the orders of Justice Kay made on 29 August 2007 by which the father has to meet the conditions in Order 4 be extended to a date to be fixed by the Full Court.

(3) That within seven days of the date of these orders the State Central Authority and the mother file an agreed Minute of the date by which the father has to meet the conditions in Order 4 of the orders of Justice Kay of 29 August 2007.

(4) In default of agreement, each party shall file a Minute setting out the date sought by them and serve it on the other party within a further seven days.

IT IS NOTED that publication of this judgment under the pseudonym *Kilah & Director-General, Department of Community Services* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth)

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT SYDNEY

Appeal Number: EA 115 of 2007
File Number: SYC 1848 of 2007

Mrs Kilah
Appellant

and

Director-General, Department of Community Services
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. In this appeal the mother asks the Court to set aside orders of Kay J ordering the return to Israel of the four children of the parties pursuant to the provisions of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) ("the Regulations"). The Regulations import into domestic law the provisions of the *Hague Convention on Civil Aspects of International Child Abduction 1980* ("the Convention").

2. The Central Authority has resisted the mother's appeal and sought to maintain his Honour's orders which were as follows:

    1. That the State Central Authority and the father of the children make such arrangements as are necessary for the children [S] born … 1988, [N] born… 2000, [B] born…2002 and [M] born…2005 to return to Israel in the company of their mother…by mid October 2007 or other date agreed upon between the mother and the State Central Authority.
    2. That the Registrar of the Family Court of Australia (Sydney registry) hand over the passports of the above children and their mother to the legal representative of the State Central Authority upon the

presentation of these orders to facilitate their return to Israel in accordance with order (1) hereof.

3. That upon the presentation of the children at Sydney International Airport for departure to Israel in accordance with order (1) the Australian Federal Police are requested to delete the Pass Alerts currently in force in relation to the children and their mother and permit their departure from Australia, and for the avoidance of any doubt, any orders that exist at that time to prevent the departure of the said children from Australia are hereby discharged.
4. That these return orders are conditional upon the father:
    i. booking and paying for the air tickets of the mother and the four children to return to Israel and providing a copy of the proposed travel itinerary to the State Central Authority for forwarding to the respondent mother;
    ii. at least fourteen days prior to the proposed return date providing evidence of the former matrimonial home or equivalent accommodation both in size and location being available for the exclusive use of the mother and the children;
    iii. depositing the sum of NIS 8000 Shekels in the bank account of the mother;
    iv. providing to the mother via the State Central Authority a written undertaking that:
        (a) he will not take any legal action in Israel to prevent the children from living with their mother until any proceedings in Israel have been concluded and unless the mother has had an opportunity to be heard in an Israeli court;
        (b) he will ensure that the mother, upon her arrival in Israel, has the use of a motor vehicle suitable for the transport of herself and the children; and

(c) he will be responsible for the rental for the apartment to be occupied by the mother and the children for the first month after their return to Israel and thereafter be responsible for meeting one half of the rental payments until some other agreement is reached between the parties or there is an order of an Israeli court to the contrary.

5. That if any of the conditions for the return have not been met by 31 December, 2007 then the order for the return is to lapse.
6. That the orders made by Judicial Registrar Loughnan on 28 March, 2007 be discharged.

3. There are 16 grounds of appeal but much of the focus of the appeal, particularly in oral submissions, was on the question of whether the children were habitually resident in Australia at the time of their retention there by the mother. There was also an application by the appellant for the introduction of fresh evidence and an application by the Central Authority for the admission of fresh evidence.

BACKGROUND

4. The parents, who are in their late thirties, met in Israel in 1995 when the mother, an Australian citizen, went there for a holiday. After she returned briefly to Australia in April 1996 she determined to live in Israel. She and the father were married in June 1997 in Israel. They have four sons who are now aged 10, 7, 5 and 3 years.

5. By mid-2005 there was serious turmoil in the marriage and by September 2005 the father left the matrimonial home.

6. On 16 May 2006 the mother and children left Israel to travel to Australia. The father took them to the airport and the mother was in the possession of return tickets booked to return to Israel on 27 August 2006. The mother and children entered Australia on Australian passports, the children's Australian passports having been arranged by the mother with the father's signed consent in April 2006. The children commenced school in Sydney on 30 May 2006.

7. The trial judge noted there was disagreement between the father and the mother as to the terms and conditions under which the mother left Israel with the children. The mother asserted she left on an understanding that if the father advised her that the marriage was over, she would not be returning with the children and would settle permanently with them in Australia. The father

asserted that the mother left for a fixed period only and that he never consented to the children remaining away from Israel on any permanent basis.

8. As this has proved to be a crucial part of the case, it is useful to set out what the parties each said. The mother's version is set out by his Honour in the reasons for judgment at paragraph 7:

> The mother deposed that at the airport she told the father:
>
> > If in three months, you decide not to give this marriage a second chance, then I am not coming back. I will be staying and raising the Boys in Australia with my Mum and Dad.
>
> She said that the father replied:
>
> > I understand. Look after the Boys for me….
>
> She said further:
>
> > I will …. Please think about this carefully. I am not coming back if there is nothing for us to come back to.
>
> The father responded by hugging her and whispering:
>
> > I know that. I am going to think this through over the next few months. I hope that you are happy in Australia.

9. Although his Honour does not set out the father's evidence as to the circumstances in which the mother and children came to Australia, it is set out in an affidavit by the father in response to the mother's affidavit. That affidavit is annexure 'B' to an affidavit of a legal officer employed by the Department of Community Services having carriage of the matter within the New South Wales Central Authority, sworn on 26 June 2007. The father's material appears to have been sworn by him in Israel. At paragraph 115 of his documents he says:

> In all of the conversation we had regarding the trip the mother has never told me she would stay in Australia longer than the original trip. If she had told me this before the trip I would have taken every legal step I could in order to prevent this trip.

10. At paragraph 117 the father says:

> The mother bought the air fairs [sic] at the permanent travel agent and I drove the mother to pick the air fairs [sic] in one of my days off. When we picked the tickets [sic] the mother showed me the day of return that was printed on them. We never had the conversation mentioned in paragraph 95 to the mother [sic] affidavit. The reason I agree to this trip was so the mother would adjust [sic] the changes.

At paragraph 118 the father says:

> There were other conversations when the mother tried to urge me to return to her but she never threatened that she would stay in Australia longer than we had agreed. I remember one conversation when I deliberately asked the mother how I am going to deal with the debts as with the apartment while she is in Sydney and she replied that it can all wait for three months until she will be back. I deny the claims mentioned in paragraph 95 of the mother's affidavit. in [sic] all of the conversation we had the mother never mentioned that she will extend her stay in Australia beyond the time of the trip. She also told my mother, my family, friends and customers that she is planning to come back at the end of the Israeli summer school vacation. The tickets were purchased with the date of return August 27th 2006.

At paragraph 126 the father says:

> In all the conversations we had about the trip she never mentioned she would extend her trip beyond the agreeable period. I was ready to pay the heavy payment of my boys being away for three (3) months so the mother would adjust the changes. I never asked the mother to leave Israel. It was her proposal and for a three-months trip only. Whenever I tried to speak with the mother about any financial agreement concerning the separation she refused talking about it. She had said she was not ready yet for this kind of agreement and that she was not willing to accept the fact that I want divorce. She deliberately asked me to wait with this agreement until she would come back and be stronger with the changes.

11. The father says at paragraph 131:

> During the month before the trip the mother told my family, her friend and our mutual friend that she was going away with the boys for a period of three (3) months.

12. The father denied the mother's evidence of what occurred at the airport and denied such a conversation took place there or anywhere else. He said at paragraph 132:

> Next to the gate, with tears in my eyes I hugged the boys. The mother turned to me and asked me once again to think about the separation. I made it clear to her that I thought about it a lot and I still did not want to live with her anymore and that I hoped the vacation would help her adjust to the changes. I said that I hoped it would be easy for her. The mother cried bitterly and said nothing. She just gave me one of the envelopes of the invitations to our wedding with a small note inside. I kissed and hugged the boys and I told them that I was looking forward to see [sic] them in three months. The mother did not mention at any stage while we were at the airport that she would not come back.

13. The trial judge then recorded what occurred after the move to Australia and said that on 11 June 2006 the father telephoned the mother and said that he wanted a divorce. As recorded by his Honour at paragraphs 8 and 9 of the reasons for judgment the mother asserts that when she responded:

> What? You don't want us back?

The father responded:

> No. I don't.

She then said:

> I won't come back with the boys in August. I need to stay here for at least the rest of the year. I will reconsider our situation after that. I can't believe that you have done this….

The father is then said to have replied:

> You have to believe it…. I don't love you anymore. I'm sorry. Stay in Australia. Do what you need to do. That is fine with me.

14. The father's version of the conversation, partly set out in paragraph 10 of the reasons for judgment but appearing more fully at paragraph 135 of the affidavit referred to is that:

> One day in June 2006, I called as usual to talk to the boys. The mother answered and started to question me about my daily routine. I answered that it is not any of her concern any more, since we separated. She started to shout again telling me that I have to decide and that she can not live with the uncertainty about our marriage. I replied that: "as I told you in Israel, I still do not want to live with you. She screamed: I want you to decide now. You have to give me an answer. I told her that: "there is nothing to decide. I want to divorce." The mother refused to let me talk to the boys and shouted: "if you have decided to leave then you decided to leave the boys as well and you will never see them again" and slammed the phone.

15. The father says that on 20 June, a short time after the conversation, he received an e-mail from the mother saying "you cannot expect me to come back and face you when you clearly have done nothing to change this dynamic between us…". The trial judge set out further communication between the parties at paragraphs 11 and 12 of the reasons for judgment.

16. The mother did not return with the children on 27 August 2006, the date upon which the return tickets were booked. The father attempted to secure the mother's and children's return by agreement and when that was not successful subsequently invoked his rights under the Regulations.

17. At the time of the hearing, neither of the parties was in Australia and evidence was provided by affidavit. His Honour dealt with the evidence 'on the papers'

and no cross-examination was sought even though there were contested issues of fact that required determination. No ground of appeal was directed to a failure to do so.

18. However we think it necessary to observe that his Honour's judgment was delivered prior to the decision of the High Court in *MW v Director-General, Department of Community Services* [2008] HCA 12 (28 March 2008) where the majority (Gummow, Heydon and Crennan JJ) made observations about dealing with Convention cases in this way. At paragraph 45 and following, the majority said (references omitted):

> 45. Section 98 of the Act states that the Rules of Court may provide for evidence of any material matter to be given on affidavit at the hearing of proceedings other than divorce or validity of marriage proceedings. The *Family Law Rules 2004* ("the Rules") are so drawn as to require evidence in chief to be given by affidavit (r 15.05). But exercise by the Family Court of its general powers expressed in Pt 1.3 of the Rules would have allowed an order permitting cross-examination of the appellant; such leave might properly have been limited by the Family Court to particular areas of dispute.
>
> 46. Cross-examination in interlocutory applications generally is not to be encouraged. But an application for a return order under reg 16 of the Regulations is a special type of proceeding. It is apt to achieve what in Australia is a final result upon the application for return of a child to another Convention country. To emphasise these matters is not to encourage the amplitude of the evidence to which the House of Lords referred in *In re M (Children) (Abduction: Rights of Custody*. The oral evidence in that Convention application was heard over two days.
>
> 47. Regulation 15(2) obliged the Family Court, "so far as practicable", to give to the application by the Authority "such priority" as would "ensure that [it was] dealt with as quickly as a proper consideration of each matter relating to the application allows". If within 42 days of its filing the application had not been determined, the Authority would have been empowered by reg 15(4) to seek from the Registrar a written statement of the reasons for the absence of a determination. Regulation 15 reflects the exhortation in Art 11 of the Convention that "judicial or administrative authorities" act "expeditiously" in these matters and the reference in Art 7 to "the prompt return of children".
>
> 48. The judicial or administrative authorities which decide return applications in some Convention countries may not, under their legal systems, have the obligations to provide the measure of procedural fairness and to give reasons which generally apply in common law systems and which were observed here by the Family Court. Thus, in this country, the requirement of promptitude can be an onerous one.

49. Nevertheless, prompt decision making within 42 days is one thing, and a peremptory decision upon a patently imperfect record would be another. The references to "summary procedure" and to the dealing with applications on affidavit evidence and "in a summary manner" by the Full Court in *In Marriage of Gazi* are apt to mislead. This is particularly true of the statement in that case:

> The primary purpose of the Convention, the relevant legislation and regulations is to provide a summary procedure for the resolution of the proceedings and, where appropriate, a speedy return to the country of their habitual residence of children who are wrongly removed or retained in another country in breach of rights of custody or access [sic] (see Convention, Arts 7 and 11, Family Law (Child Abduction Convention) Regulations, reg 19(1)). Accordingly, whilst there may be cases in which it is appropriate to allow cross-examination of deponents of affidavits, such cases would be rare. The majority of proceedings for the return of children, pursuant to the Convention, should be dealt with in a summary manner and cross-examination of deponents of affidavits would not be appropriate.

50. The danger in reading such remarks too literally (and without regard to the circumstances of each particular case) is apparent in situations such as that considered in the United States by the Court of Appeals for the Third Circuit in *In re Application of Adan*. An application by the father for the return of his child to Argentina was resisted on the grounds that he had not established his custody rights under the law of Argentina and there was grave risk there of harm to the child. After considering the cursory treatment by the United States District Court of the application, the Court of Appeals said:

> Although the Convention seeks to facilitate the prompt return of wrongfully removed children to their country of habitual residence, it does not condone deciding that a child is another country's problem and dumping her there, and nor do we.

No criticism of that degree is directed to the conduct of the present case, but *In re Application of Adan* provides a caution against inadequate, albeit prompt, disposition of return applications.

THE DECISION OF THE TRIAL JUDGE

19. The trial judge referred to the acceptance by Fogarty and Baker JJ in *Panayotides & Panayotides* (1997) FLC 92-733 of the following remarks made by Jordan J at first instance concerning the process by which the Court deals with applications under the Convention:

> The first thing to observe is that there is much conflict in the evidence. These are summary proceedings and issues must be determined on the papers. This often presents the Court with difficulties. It would generally be inappropriate to absolutely reject the sworn testimony of a deponent (see, *Re F* (1992) 1 FLR 548). As was submitted by counsel for the Central Authority, I simply must do the best I can. I look to the versions of each of the parties, I find the common ground, and I note the areas of conflict. I can look to the inherent probabilities. Of course, when one is talking about the intent of parties, where this is a matter of some conjecture, one looks to the conduct of the parties, and any documentary or corroborative evidence which may help to determine that issue.

20. Having noted those comments, his Honour made various relevant findings as follows:

- That it is probable that the mother left in the circumstances that she described, namely having made it clear to the father that the proposed trip to Australia may well be a one way trip and she did so with the father's full knowledge and consent (paragraph 21).
- It is also clear from the evidence that at some point shortly after she came to Australia the father adopted the view that he wanted the children back in Israel and was no longer prepared to abide by any agreement he may have entered into for her to retain the children in Australia (paragraph 24).
- On the balance of probabilities that the mother retained the children in Australia initially with the consent of the father but that consent had been withdrawn no later than July 2006 (paragraph 25).
- Since that time the father has consistently sought the return of the children to Israel firstly by lengthy negotiations and then by making a request under the Convention (paragraph 25).

21. Applying the facts to the law, his Honour found that there was nothing wrongful in the mother's initial removal of the children from Israel or her initial retention of the children in Australia. He then found that, notwithstanding that the father consented to the children being retained in Australia, once the father subsequently withdrew his consent, the court retained a discretion under the provisions of the Regulations to refuse to make an order for the return of the children to Israel.

22. At paragraph 35 of the reasons for judgment, his Honour observed that one of the essential ingredients of the Convention and the Regulations made thereunder is the removal from, or the retention away from, the place of the child's habitual residence. Absent such a removal or retention the Convention has no application. His Honour noted that in the course of argument, although the parties had not raised it, on one interpretation of the facts, if the mother and

the children left Israel with the father's consent with the settled intention of abandoning their place of habitual residence in Israel, then the moment they left Israel the Convention no longer had any application. His Honour suggested that such an outcome may have been open on the facts as they were being argued and that led the mother's counsel to amend his Response to include as a ground for objection that "the children were not habitually resident in Israel at the date of the filing of the application".

23. His Honour noted that the concept of an abandonment of habitual residence does not necessarily entail a requirement to establish a new habitual residence and his Honour concluded at paragraph 38:

> I am not persuaded that the evidence would allow me to reach a conclusion that when the mother left Israel with the children she had no intention of returning so as to cause a loss of habitual residence to these children and to cut their ties with Israel. She left subject to a condition subsequent that should she be told that the father no longer wished to resume cohabitation with her, she would remain in Australia. Even then her writings indicate some degree of ambivalence about whether or not she has permanently cut her ties with the State of Israel. Certainly, whilst it may well have been said in the heat of the moment that the father agreed to her and the children remaining in Australia, that situation was quickly reversed by the father's letters and statements as early as June 2006 and I do not think that the evidence allows me to find any point in time where it could be said that the parents had reached a mutual understanding that Israel was no longer to be the home of these children. Accordingly the amended ground in the response cannot be relied upon.

24. We observe that the Regulations focus not on the place of habitual residence prior to the date of filing of the application, but rather on the place of habitual residence immediately before the alleged wrongful removal or wrongful retention.

25. Thus it can be seen that his Honour rejected the argument that the children were not habitually resident in Israel at the time of wrongful retention, found that the father consented to the children leaving Israel and being retained in Australia but had then withdrawn that consent and in such circumstances the Court retained a discretion under the Regulations to refuse to make an order for the return of the children to Israel.

26. His Honour rejected the defence of 'grave risk' argued pursuant to reg 16(3)(b) of the Regulations. This argument was that the return of the children to Israel would expose them to physical harm on the basis that to order their return would be to effectively return them to a war zone.

27. The only evidence to support that contention was a travel advisory notice issued by the Australian government to persons travelling to Israel, which his

Honour found did not support the contention that there was a grave risk to the children that they would be exposed to physical harm if they returned to Israel. In particular, his Honour referred to the travel advice issued by the Australian government, which was "to exercise a high degree of caution in Israel at this time." His Honour observed that there are five levels of travel advice and this was the third and not the highest level. He noted that similar advice was proffered in relation to a number of Hague Convention countries including Brazil, Mexico, Panama, South Africa, Turkey and Venezuela.

28. His Honour then turned to the discretion to refuse to order the return of the child under the Convention. Noting that the Regulations were silent as to the matters to be taken into account in the exercise of the discretion, his Honour noted that the Full Court in *Zafiropoulos and State Central Authority* (2006) FLC 93-264 at 80,508 had endorsed the approach of the trial judge as to the appropriate matters to be taken into account in the exercise of the discretion. In that case Bennett J at first instance cited the unreported judgment in *State Central Authority and De Blasio* [2002] FamCA 804 per Kay J and said (references omitted):

> 33. The existence of the Regulation 16(3) defence means that the Court may refuse to order the return of the child under the Convention. This raises the question of the exercise of a discretion. The Regulation offers no express terms as to how that discretion may be exercised. Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said in *De L v Director-General, NSW Dept of Community Services* (1996) 187 CLR 640; FLC 92-706; 20 Fam LR 390 at CLR 661; FLC 83,456; Fam LR 403:
>
> > if a child objects to being returned to the country of his or her habitual residence and has attained the age and degree of maturity spoken of in reg 16(3)(c), it remains for the judge hearing the application to exercise an independent discretion to determine whether or not an order should be made for the child's return. The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the 'discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]' enable it to be said that a particular consideration is extraneous …. That subject-matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion.

29. His Honour then considered whether he could impose conditions on the return, having regard to the mother's assertion that basically for economic reasons she would find it difficult to return to live with the children in Israel and she would also miss the support of her parents and the community she had settled into in Australia.

30. The mother requested that if a return order was to be made, it should be made subject to a number of conditions which required the husband to, inter alia:

- meet the airfares for herself and her children
- agree not to remove the children from her care without an order of the Israeli courts having been obtained after her arrival
- provide accommodation
- provide ownership or use of a car
- provide a monthly sum by way of maintenance and child support.

31. The father, through the Central Authority, proposed that he:

- pay for air tickets for the mother and the four children
- provide an apartment comparable to the former matrimonial home both in size and location furnished with the furniture that the parties owned before the mother left Israel
- provide proof of the apartment being available prior to the children's departure from Australia and meet the rental payment for the first month and one half of the rental payment per month until the matter came before an Israeli court
- provide the mother with the family car and pending its re-registration, allow the mother to use his mother's car for the first month
- provide payment to the mother prior to her departure and continue to make monthly payments until the matter was determined by an Israeli court
- provide a written undertaking not to take any legal action in Israel to prevent the children from living with their mother unless any proceedings in Israel have been concluded and unless the mother has had an opportunity to be heard
- have reasonable telephone contact with the children before their departure from Australia and face to face contact with the children after their return to Israel.

32. His Honour noted that, subject to the determination of the lump sum that should be available to the mother before she left for Israel and the determination of the amount that should be paid thereafter by the father by way of maintenance and child support, the conditions otherwise proposed by the father appeared to be adequate.

33. His Honour finally indicated that he did not find the resolution of the case particularly easy, as there were strong competing claims by both parents as to the outcomes they sought. It was also noted that it was not clear that the

circumstances surrounding the manner in which the children found themselves within Australia fitted comfortably within the aims of the Convention. Nevertheless, his Honour observed that the practical effect of the mother living in Australia had been to deny the father a relationship with the children and the children a relationship with their father.

34. His Honour then went on to explain the basis on which he reached his ultimate decision. We set out below his remarks in full, given their central importance to the outcome of the proceedings, at paragraphs 56 and 57:

> In ordinary circumstances it would seem to me that the dilemma posed by the competing claims of the parties, namely the father to be near his children and the mother to have the comfort and security of both the better resources available to her in Australia and the emotional support of her family of origin, are issues best determined by the court of the place where the parties decided to raise their family namely the court in Israel. The view as to whether or not it is appropriate for the mother and children to reside in Australia on a long term basis, as it may well be, has to be weighed up against the effect that that would have on the opportunity for them to develop a meaningful relationship with their father and many other issues affecting the best interests of the children. The courts in Israel are in my view best able to determine that issue given that that was, until recently, always the home of the children and the place where these parents envisaged raising their children from birth to adulthood.
>
> With no certain confidence that this is the right outcome, on balance, providing that reasonable financial arrangements can be made and within a reasonable time, it is my view that a return order should be made. The return order is subject to the fulfilment of conditions precedent and if those conditions are not met then the return order should lapse.

His Honour then went on to give brief reasons for imposing the conditions on the children's return which we have mentioned earlier in these reasons.

GROUNDS OF APPEAL

35. There are 16 grounds of appeal. They are:

1. Kay J erred in failing to find that the Convention does not apply because the children were not habitually resident in Israel at the time of the filing of the Convention application.

2. Having found that the father consented to the children's removal from Israel and their remaining in Australia unless the marriage was re-established, Kay J erred in failing to find that habitual residence had been lost immediately upon departure from Israel.

3. Kay J erred in finding that a loss of habitual residence in Israel required the mother to intend to "permanently cut her ties with the State of Israel" and have "no intention of returning" (at [38]).

4. Kay J further erred in making the finding referred to in paragraph 3 above, in the special circumstances of a Jew leaving the Jewish State to take up residence abroad, in particular by failing to recognize that it is impossible for a Jew to "permanently cut her ties with the State of Israel" while remaining fully Jewish.

5. Kay J erred in failing to find that the mother's settled intention, consented to by the father, that she and the children leave Israel and remain in Australia on a semi-permanent basis was sufficient to bring about a loss of habitual residence upon departure from Israel.

6. Kay J erred in failing to find that during the period from 16 May 2006, when the children left Israel with the father's consent, and 15 March 2007, when the application for return was filed, that the children had become habitually resident in Australia and thus had lost habitual residence in Israel.

7. Having found that the father had consented to the children being removed from Israel and to them being retained in Australia, Kay J erred in failing to exercise his discretion to refuse to order the children's return to Israel.

8. Kay J erred in failing to find that there was a grave risk that the return of the children under the Convention would expose the children to physical or psychological harm or place them in an intolerable situation.

9. Having found that "the family was in dire economic circumstances living in Israel" (at [58]); that the father was unable to meet modest and reasonable economic demands (at [58]) and that the mother would be unable to work full time due to carer's responsibilities (at [46]) Kay J erred in failing to find that the return of the children to Israel would place them in an intolerable situation from an economic perspective and one that would expose the children to psychological harm.

10. Kay J erred in failing to find that in light of the extended period of time the children have enjoyed a relatively comfortable economic situation in Australia the likelihood of psychological harm from a return to dire economic circumstances living in Israel was significantly increased.

11. Kay J erred in failing to exercise his discretion to refuse to order the children's return to Israel in light of the grave risk that the return of the children would expose the children to physical or psychological harm or place them in an intolerable situation.

12. Kay J erred in finding that the conditions he imposed would ameliorate the risks of return sufficiently to allow him to fail to exercise his discretion not to order the children's return.

13. Kay J erred in seeking to balance reasonable and modest economic demands of the mother with the "claims of a father unable to meet them" (at [58]) when the proper test was whether the imposed conditions would be sufficient to ameliorate the risks of return.

14. Kay J erred in failing to find that, from the evidence that the father failed to pay any maintenance or child support since abandoning the matrimonial home in September 2005, it would be highly unlikely that the father would comply with the conditions requiring him to provide financial support on the return to Israel of the mother and the children.

15. Kay J erred in failing to take account of, and judicial notice of, the unusual situation under Israeli family law that the mother is automatically granted custody of children and that any shared custody arrangements require the mother's consent.

16. Kay J erred in determining that it was necessary for the children to return to Israel so that the Courts of Israel could determine custody arrangements when the relevant Law of Israel already provided automatic custody to the mother.

THE RELEVANT LEGISLATION

36. Regulation 16 of the Regulations provides:

16 Obligation to make a return order

(1) If:

(a) an application for a return order for a child is made; and

(b) the application (or, if regulation 28 applies, the original application within the meaning of that regulation) is filed within one year after the child's removal or retention; and

(c) the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under subregulation (1A);

the court must, subject to subregulation (3), make the order.

(1A) For subregulation (1), a child's removal to, or retention in, Australia is wrongful if:

(a) the child was under 16; and

(b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and

(c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and

(d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and

(e) at the time of the child's removal or retention, the person, institution or other body:

(i) was actually exercising the rights of custody (either jointly or alone); or

(ii) would have exercised those rights if the child had not been removed or retained.

(2) If:

(a) an application for a return order for a child is made; and

(b) the application is filed more than one year after the day on which the child was first removed to, or retained in, Australia; and

(c) the court is satisfied that the person opposing the return has not established that the child has settled in his or her new environment;

the court must, subject to subregulation (3), make the order.

(3) A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:

(a) the person, institution or other body seeking the child's return:

(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or

(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or

(b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) each of the following applies:

(i) the child objects to being returned;

(ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;

(iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

DISCUSSION

The habitual residence argument

37. These arguments are contained in grounds 1-6 inclusive.

38. The mother contended the principles adopted by courts in relation to habitual residence in application of the Convention were set out in recent decision of the New Zealand Court of Appeal in *SK v KP* [2005] 3 NZLR 590 and confirmed by all five judges of the New Zealand Court of Appeal in *Punter v Secretary for Justice* [2007] 1 NZLR 40 and that this Court should follow those decisions. In particular, the mother relied upon the following passages from *SK v KP* at paragraphs 73 and 77 (supra):

> It is widely accepted that the acquisition of a new habitual residence requires both a settled purpose and actual residence for an appreciable period. It is also widely accepted that a settled purpose to leave the place of habitual residence causes that habitual residence to be lost immediately. As the gaining of a new habitual residence requires a period of actual residence this means that a person can be without an habitual residence.
>
> …
>
> It is clear that, even using the settled purpose test, residence for a limited period can result in a change of habitual residence. This is because the settled purpose does not need to be a settled purpose to reside in a place forever. It can be for a limited period, as long as there is intended to be a sufficient degree of continuity for it to be properly described as settled.

39. The mother further relied upon the following passage from *Punter v Secretary for Justice* at paragraph 88 (supra):

> In *SK v KP*, the inquiry into habitual residence was held, at para [80], to be a broad factual enquiry. Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, *SK v KP* held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive.

40. Relying on this and other authorities cited therein, the mother contended that his Honour made two important errors of law in assessing the habitual residence issue:

    1. the requirement for permanent cutting of ties with Israel; and

    2. failure to conduct a broad factual enquiry and instead focussing too much on attempting to determine the exact state of mind of the mother.

    In relation to the latter, the mother contends that there are a number of features his Honour should have taken into account, including enrolment at school, becoming an Australian citizen, sale of the family car prior to the mother's departure, holding a garage sale before the mother's departure, receiving a Medicare card listing the children and a number of other matters which were sought to be led by way of new evidence which relate to activities undertaken by the children since they have remained in Australia.

41. Based on the principles contained in *SK v KP* (supra), the mother contends that both the settled purpose of the parents and the broader factual enquiry support

the position that the children's habitual residence in Israel was lost immediately upon departure from Israel. The mother contends that his Honour, having found that the mother and children departed Israel on 16 May 2006 pursuant to a verbal agreement that she and the children would stay in Australia unless the marriage was re-established or, as his Honour put it at paragraph 38, "[s]he left subject to a condition subsequent that should she be told that the father no longer wished to resume cohabitation with her, she would remain in Australia" incorrectly concluded that because the parental agreement left open the possibility that the mother and children would return to Israel, habitual residence was not lost immediately upon departure.

42. In relation to acquisition of new habitual residence after an appreciable period of residence, the mother's counsel directed himself to the question of the date of wrongful retention and noted that the father appeared to accept that the date of wrongful retention should be the final indication by the mother and acceptance by the father that she would not return, that is 18 December 2006. The mother contends that later his Honour and counsel for the father agreed that it could not be earlier than 27 August 2006 (the date of the return flights) but "certainly isn't any later than the date in December." The mother submits that, based on the December 2006 date, the children had been residing in Australia for seven months as at the date of retention and the period was more than sufficient for the children to have become habitually resident in Australia.

43. *Mozes v Mozes* (2001) 239 F.3d 1067 (9th Cir. 2001) is a North American case that has been referred to in a number of Australian decisions, involving an Israeli family that had travelled to the United States of America to allow their children to experience a year living and being educated there. The mother decided to stay and the father sought a return order under the Convention. The trial judge found that the children had acquired a habitual residence in the United States but that was overturned on appeal. The appellate court said:

> Difficulty arises, of course, when the persons entitled to fix the child's residence no longer agree on where it has been fixed--a situation that, for obvious reasons, is likely to arise in cases under the Convention. In these cases, the representations of the parties cannot be accepted at face value, and courts must determine from all available evidence whether the parent petitioning for return of a child has already agreed to the child's taking up habitual residence where it is. The factual circumstances in which this question arises are diverse, but we can divide the cases into three broad categories.
>
> On one side are cases where the court finds that the family as a unit has manifested a settled purpose to change habitual residence, despite the fact that one parent may have had qualms about the move. Most commonly, this occurs when both parents and the child translocate together under circumstances suggesting that they intend to make their home in the new

> country. When courts find that a family has jointly taken all the steps associated with abandoning habitual residence in one country to take it up in another, they are generally unwilling to let one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.
>
> On the other side are cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period. In these cases, courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence.
>
> In between are cases where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration. Sometimes the circumstances surrounding the child's stay are such that, despite the lack of perfect consensus, the court finds the parents to have shared a settled mutual intent that the stay last indefinitely. When this is the case, we can reasonably infer a mutual abandonment of the child's prior habitual residence. Other times, however, circumstances are such that, even though the exact length of the stay was left open to negotiation, the court is able to find no settled mutual intent from which such abandonment can be inferred.
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> …
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> While the decision to alter a child's habitual residence depends on the settled intention of the parents, they cannot accomplish this transformation by wishful thinking alone. First, it requires an actual "change in geography." *Freidrich*, 983 F.2d at 1402. Second, home isn't built in a day. It requires the passage of "[a]n appreciable period of time," *C v S (minor: abduction: illegitimate child)*, [1990] 2 All E.R. 961, 965 (Eng. H.L.), one that is "sufficient for acclimatization." *Feder,* 63 F.3d at 224. When the child moves to a new country accompanied by both parents, who takes steps to set up a regular household together, the period need not be long. On the other hand, even when circumstances are such as to hinder acclimatization, even a lengthy period spent in this manner may not suffice.

44. Of the three different types of cases there discussed, this case is one in the 'in-between' category where the "petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration."

45. It is settled law that habitual residence can be lost in a single day, for example upon departure from an initial abode with no intention to return (*HBH & Director-General, Department of Child Safety (Qld)* (2007) 36 Fam LR 333). In *Re J. (a Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 Lord Brandon of Oakbrook said:

> The first point is that the expression "habitually resident," as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J.'s age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.

46. In *Cooper & Casey* (1995) FLC 92-575 the Full Court referred with approval to what Waite J said in *Re B (Minors) (Abduction) (No. 2)* [1993] 1 FLR 993 at 995 when he set out the relevant principles as follows:

> 1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.
>
> 2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life, for the time being, whether it is of short or of long duration. All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.
>
> 3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in *Re J,* sub nom *C v S* (above) refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in *Re F* (above) the Court of

> Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country.

47. In *Panayotides & Panayotides* (supra) at 83,897 the majority of the Full Court quoted with apparent approval the following passage from the judgment of the trial judge, Jordan J:

> 1. the expression "habitually resident" is not to be treated as a term of art with some special meaning, but rather it is to be understood according to the ordinary literal meaning of the two words used (see, *In re J (a minor)* (1990) 3 WLR 949);
>
> 2. the question of whether a person is or is not habitually resident in a specified country is a question of fact to be determined by reference to all the circumstances of the case (see, *In re J (a minor)* (supra);
>
> 3. the habitual residence of a child whose parents reside together is the habitual residence of those parents (see, *Re B (minor)* (1993) 1 FLR 993);
>
> 4. it is not possible for one parent to unilaterally determine a child's habitual residence by removing that child (see, *State Central Authority v McCall* (1995) FLC 92-552);
>
> 5. habitual residence refers to the parents' habitual abode in a country: 'Which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or long duration.' (See, *re B (minor)* (supra) p.995).
>
> I expressly adopt the aforementioned observations and those of Kay J in the *Department of Health and Community Services v Casse* (1995) FLC 92-629, wherein his Honour said:
>
> > All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.
>
> I do not accept an interpretation of the proposition advanced in *In re J* [supra], wherein it might be argued that the reference in that decision to "an appreciable time" was intended to be construed as meaning a long time. In my view, once an intention to adopt an habitual residence has been reached and acted upon in a decisive way so as to provide a degree of certainty and continuity, then it may be open to a Court to find that habitual residence has been changed from that point.

48. In *DW v Director-General, Department of Child Safety* (2006) FLC 93-255 the Full Court considered the authorities on the question of habitual residence.

Their Honours noted that the English Court of Appeal and House of Lords in *In Re J (a Minor) (Abduction: Custody Rights)* (supra) and *Re F (a Minor) (Child Abduction)* [1992] 1 FLR 548 established the principles on which the English and Australian courts have subsequently relied in their approach to habitual residence under the Convention.

49. Finn and May JJ pointed out that there was a divergence in the English cases. They referred to *A v A (Child Abduction)* [1993] 2 FLR 225 at 235 where Rattee J said: "I consider that when, in the latter sentence, Lord Brandon refers to a settled intention being necessary to constitute habitual residence, what he meant was a settled intention to take up long-term residence in the country concerned…". They went on to note a different view expressed by the Court of Appeal in *M & M (Abduction: England and Scotland)* [1997] 2 FLR 263 which was not a Convention case but rather was concerned with a dispute as to whether certain proceedings should be heard in England or Scotland. In that matter the trial judge concluded that a family who had resided in Scotland for two years with the intention "sooner rather than later…to leave to go to England" were not habitually resident in either England or Scotland or indeed in any country. In holding that the trial judge was wrong in reaching this conclusion, Butler-Sloss LJ (with whom Millett and Aldous LJJ agreed) said:

> In my view, in coming to that conclusion, which is partly a question of fact but also of course an element of law, the judge was wrong. He did not take into account the fact of them living there, the fact that they were settled there, albeit not necessarily for the rest of their lives, and he did not, in my judgment, take into account perhaps the most relevant passage of all in the numerous authorities with which we have been supplied on what is meant by habitual residence, that of the speech of Lord Scarman in *R v Barnet London Borough Council ex parte Shah* [1983] 2 AC 309, 342 and 343. At 342 he said:
>
> > I agree with Lord Denning MR that in their natural and ordinary meaning the words [which in that case were "ordinarily resident"] mean "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration". The significance of the adverb "habitually" is that it recalls two necessary features mentioned by Viscount Sumner in *Lysaght's* case, namely residence adopted voluntarily and for settled purposes.
>
> At 343 Lord Scarman said:
>
> > Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of

> the regular order of his life for the time being, whether or short or of long duration.

In my respectful view those observations in relation to ordinarily resident apply equally to habitual residence on which there appears to me to be absolutely no difference in principle. Consequently applying those words to this case this couple settled in Scotland voluntarily as part of a regular order of their life for the time being for what the judge himself saw as a medium duration. This court has found periods of only a few months, even as short as one month, have been sufficient in the right circumstances to be treated as a habitual residence.

50. However, Finn and May JJ found that it was "unnecessary for present purposes for us to resolve such conflict as may exist between Rattee J's understanding of the content of the 'settled intention' which is necessary to constitute 'habitual residence' and that of Butler-Sloss LJ." We think there is much force in the view set out by Butler-Sloss LJ in *M & M (Abduction: England and Scotland)* (supra). However, this case did not concern two parents in an intact family making decisions about where they would live with the children. The facts of this case are entirely different and within the confines of this case it is unnecessary to conclusively resolve this difference.

51. In light of the review of the relevant authorities, we now turn to consider the challenges made to his Honour's findings in relation to the issue of habitual residence. In doing so, it is convenient for us again to recite his Honour's findings at paragraph 38 of the reasons for judgment:

> After more careful reading of the evidence in this case I am not persuaded that the evidence would allow me to reach a conclusion that when the mother left Israel with the children she had no intention of returning so as to cause a loss of habitual residence to these children and to cut their ties with Israel. She left subject to a condition subsequent that should she be told that the father no longer wished to resume cohabitation with her, she would remain in Australia. Even then her writings indicate some degree of ambivalence about whether or not she has permanently cut her ties with the State of Israel. Certainly, whilst it may well have been said in the heat of the moment that the father agreed to her and the children remaining in Australia, that situation was quickly reversed by the father's letters and statements as early as June 2006 and I do not think that the evidence allows me to find any point in time where it could be said that the parents had reached a mutual understanding that Israel was no longer to be the home of these children. Accordingly the amended ground in the response cannot be relied upon.

52. Counsel for the mother argued that the test in relation to a loss of habitual residence was not that the mother and children had to "cut their ties" with Israel

on a permanent basis. We agree with this contention. In *Cameron & Cameron* [1996] SC 17 the Court said:

> In order to establish a new habitual residence, it is not necessary to show that when the child moved to the new country there was any intention to reside there permanently. Nor need there be any intention to reside there indefinitely. It is sufficient if there is an intention to reside there for an appreciable period.

53. However, his Honour correctly stated the law at paragraph 36 of the reasons, citing *Dixon v Dixon* 1990 SCLR 692, where he said:

> All that is required is "if the child has left the contracting state with the consent of both parents whose intention when he left was that he should settle elsewhere, then it seems to us that he must be taken to abandon his habitual residence in the contracting state as soon as he leaves." (per the Lord President in *Dixon v Dixon* (supra)).

54. What his Honour said was that he was not persuaded that the evidence would allow him "to reach a conclusion that when the mother left Israel with the children she had no intention of returning so as to cause a loss of habitual residence to these children… [e]ven then her writings indicate some degree of ambivalence about whether or not she has permanently cut her ties with the State of Israel."

55. We agree with counsel for the respondent that his Honour did not find that it was a requirement to permanently cut her ties with Israel, but merely noted the evidence to show that the mother did **not** have a settled intention not to return to Israel, both at the time she left Israel and later, after it was clear the marriage was at an end.

56. We note there is a potential conflict between his Honour's findings in paragraph 38 and the findings in paragraphs 20 and 21 in which his Honour finds it more probable than not that the mother left having made it clear to the father that the proposed trip may well be a one-way trip and, if so, with the father's full knowledge and consent. However when we consider his Honour's comments in paragraph 38 in the reasons for judgment where he says "I do not think that the evidence allows me to find any point in time where it could be said that the parents had reached a mutual understanding that Israel was no longer to be the home of these children" we are satisfied that his Honour was merely recording the evidence that prior to the mother's departure the 'condition subsequent', namely the father's decision that the marriage was over, had not then been fulfilled and that upon advising the mother that the marriage was at an end, or almost immediately thereafter, the father had made it clear he did not agree to the children remaining in Australia beyond the original three month period for which the trip had been arranged.

57. In these circumstances we think his Honour's findings can be reconciled in this way: that when the mother and children left Israel the issue of whether they would return or not was dependent upon the father informing the mother that the marriage was over, and by the time that occurred, he was already seeking to have the children returned.

58. When one has regard to this finding it is clear that his Honour found on the evidence that the trip to Australia **may** be a one-way trip, not that it necessarily **would**. Consequently we do not agree with the submissions of the appellant that the children's habitual residence in Israel was lost immediately upon departure from Israel because it was then uncertain whether the condition subsequent would be fulfilled or not. Even if it was, the mother may still have returned. We thus think his Honour was correct in saying in paragraph 38 that the evidence would not allow him to reach a conclusion that **when the mother left Israel with the children** (our emphasis) she had no intention of returning so as to cause a loss of habitual residence.

59. The question which then arises is whether habitual residence was lost when the father informed the mother that the marriage was not going to continue. Even then, the return ticket for the mother and children was 27 August 2006 and a decision did not really have to be made by the mother until that time.

60. The undisputed facts are that the father made it clear within a very short time that he expected her to return to Israel with the children.

61. The other evidence, which was uncontroverted, from communication between the parties at that time indicates that the communication to the mother that the marriage would not continue did not immediately trigger an expression of unequivocal intention to remain in Australia. The evidence is that the mother remained ambiguous about whether she would return. In her letter of 24 October 2006 the mother said:

> So for now, I find the option of coming back to nothing but pain and hardship in Israel a very difficult option. Having said that there are two things that have not changed in my opinion. The one is that yes, I did always want to live in Israel and raise my children there. But now I realise how hard it was and how much we suffered that is not a price I want to pay again. The other thing and just as much if not more important is my belief that the children should grow up closer to their father. Again, not at any cost. I would not want to bring them back into a situation that was damaging and abusive and unhealthy for everyone. I want to believe that it will not be like this, but for now the fear that I felt for my own and their emotional safety and future is still too strong. It is all I think of when I think of coming back.
>
> …

> I feel completely at peace with myself and my decision for now. The decision about the future eats me up day and night. It is not one I will take lightly, it effects [sic] everyone, but I know that the decision I do finally make, I will be at peace with. **I know that I did not close any doors**, (emphasis added) not to our marriage, not to you coming to Australia and certainly not to you being a positive image in the children's eyes and hearts.
>
> …
>
> Like you said, there have been many misunderstandings and I believe there will still be many more, I hope they will be less and less and our ability to work them out will be better and better. The questions as to how we will earn enough money to live, where I will work and find a way to do my dream or something else I find satisfying, or how I will get the emotional support I need are questions I need solutions to, part of them coming from you. I cannot come back and say it will all just work out. I don't want that uncertainty or hardship. If and when I decide to come back, I want it all to be agreed and signed before I arrive and obviously I need you to assure me that you will be supporting our children financially.

62. In January 2007 in an e-mail from the mother's father to the father, he said:

> I must also point out that [the mother] has not, on any occasion, said to us (nor to you I believe) that she does not intend to return to Israel with the children. In fact, she has indicated on many occasions that ultimately she will return to Israel with the children to live. It is only a question for her to determine when it will be the right time for her to return.

63. These uncertainties by the mother in our view is what led his Honour to conclude that there was no point in time in which it could be said the parents had reached a mutual understanding that Israel was no longer to be the home of these children, both before and after communication to the mother of the father's intention that the marriage would not continue.

64. We conclude that his Honour was correct in finding that the mother did not have a settled intention to abandon her Israeli habitual residence prior to 27 August 2006 and even after that date it appears there were grounds upon which, after 27 August 2006, the mother was prepared to contemplate returning to Israel, particularly if sufficient financial support were available. That is because the original condition having been fulfilled, the mother continued to be uncertain about whether she would return to Israel.

65. In the event she was unsuccessful in her submission that the children's place of habitual residence in Israel was lost immediately on departure from that country, the mother contended that they had "acquired a new habitual residence in Australia after an appreciable period of residence in Australia" and that this

had occurred prior to the date of their wrongful retention. In this regard a concession was made at trial that the retention occurred either upon the mother's failure to return the children to Israel on 27 August 2006 or upon the mother communicating to the father finally in December 2006 that she did not intend to return to Israel.

66. In arguing the children had acquired a new habitual residence in Australia after an appreciable period of residence, the mother relied upon two decisions of the New Zealand Court of Appeal. In *SK & KP* (supra) the New Zealand Court of Appeal held per McGrath J at paragraphs 19, 20 and 22 (references omitted):

> …where the parents both intended at the outset of the child's visit to New Zealand that the child would remain for a limited period and then return to the existing place of habitual residence, the circumstances do not indicate a shared parental intent beyond a limited stay. Giving that factor due consideration there can in general in such circumstances as the present only be a loss of habitual residence as a result of the gradual weakening of the connections with the former state through the process of the developing orientation of the child in the new state to the point that the original links have disappeared.
>
> …the Court…should be slow to infer that there has been a loss of habitual residence arising from the prolonging of a child's stay in a new state beyond original expectations without protest or countering action because of the desire to achieve a reconciliation or reach an agreement between parents on arrangements for custody.
>
> …
>
> There is also support for the proposition that the Court should be slow to infer a change in habitual residence in the absence of shared parental attempt to bring it about, this reflecting the weight attached to parental intention under the Convention. The decision of the Court on habitual residence must, however, in the end always reflect the underlying reality of the connection between the child and the particular state.

67. At paragraphs 73, 75 and 76 Glazebrook J said (references omitted):

> One of the important concepts in habitual residence is that of settled purpose. It is widely accepted that the acquisition of a new habitual residence requires both a settled purpose and actual residence for an appreciable period. It is also widely accepted that a settled purpose to leave the place of habitual residence causes that habitual residence to be lost immediately.
>
> …

> A softening of the parental purpose test has been recognised as necessary. It has been said, for example, that Courts should have regard not only to the subjective intent of the parents but also to what have been called the "objective manifestations of the intent…". Schuz…suggests that the test for habitual residence should merely weigh up the different objective connection the child has with the different states, including time of residence in each. There is much to be said for her suggested approach. Concentration on parental purpose should not be allowed to obscure the broad factual nature of the inquiry…Settled purpose, albeit important, is only one factor to be taken into account.
>
> Even among those who doubt the emphasis on settled purpose, however, there has been almost universal approval for the proposition that the unilateral purpose of one of the parents cannot change the habitual residence of the child. To hold otherwise would not accord with the policy of the convention and would provide an encouragement to abduction and retention.

68. As we observed in paragraph 33, in *Punter v Secretary of Justice* (supra) the Court of Appeal said at paragraph 88:

> In *SK & KP*, the inquiry into habitual residence was held, at [80], to be a broad factual enquiry. Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, *SK & KP* held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive.

69. The mother submitted that his Honour's failure to conduct a broad factual inquiry on the habitual residence question was an error and his Honour should have taken into account factors such as:

- the children having been enrolled at … a Sydney Jewish day school, on 2 May 2006 prior to their departure and commencing school on 30 May 2006
- the children having become Australian citizens on 20 April 2006 and having been issued with Australian passports shortly before their departure from Israel
- the father having acknowledged to [a friend] and accepted that if he left, the mother would take the children to live in Australia
- the father having attempted to sell the family motor-car just prior to the mother's departure to Australia

- the father and mother having planned to hold a garage sale before the mother left in order to clear the family apartment of as many items as possible.

70. These were all matters that occurred prior to the mother leaving Israel and in our view take the matter no further. His Honour made findings about the basis upon which the mother came to Australia and those findings, which were not challenged, included the fact of purchase of return tickets. One outcome was that if the father had communicated his desire for the marriage to continue or, conversely as it was in this case, had not communicated his desire for the marriage to end, then the mother would have returned pursuant to their arrangement. Thus these facts raised by the mother, which all occurred prior to her departure, are neither consistent or inconsistent with the settled intention or the acquisition of a new habitual residence asserted by the mother.

71. The mother sought to introduce further evidence in support of this ground; such evidence, if accepted, would establish that:

- the mother had received a Medicare card listing the children and applied at Centrelink for Single Parent Benefit and Family Tax Benefits for herself and the children
- the mother had applied for and received a Pensioner's Concession Card
- the mother had arranged for the children to join [a] Soccer Club in mid-June 2006, cricket clubs in September 2006 and the Kick-Start Soccer Camp in the June 2006 school holidays
- the mother had enrolled the two older children in music lessons in July 2006 and swimming lessons in November 2006
- the children had become part of their local Jewish community by having attended synagogue from time to time.

72. Most of the above events occurred prior to August and some of them occurred prior to the father indicating to the mother that the marriage would not continue and are therefore neither consistent nor inconsistent with the children's habitual residence remaining in Israel. Given the return tickets that had been purchased and the mother's evidence, they are certainly not supportive of the loss of habitual residence in Israel prior to the father's indication to the mother in June 2006 that the marriage was at an end or during the period prior to August 2006 when the mother was required to return.

73. The conduct of a broad factual inquiry to consider "the objective connection the children have with different states" on the question of habitual residence is not part of the law in Australia. The previous decisions of the Full Court in relation to habitual residence follow the English approach in which a settled purpose is a necessary and integral part of a finding of habitual residence (see *Cooper & Casey* (supra); *DW v Director-General, Department of Child Safety*

(supra); *HBH & Director-General, Child Safety (Qld)* (supra)). According to the English and Australian approach, settled purpose is not merely one factor to be considered. It is an integral part of a finding of habitual residence.

74. Despite the invitation from counsel for the appellant to depart from previous Australian and English authority, we do not need to resolve the apparently significant departure of the New Zealand courts from that authority. In his judgment in *SK v KP* (supra), Glazebrook J said the differences may in the end not be as great as they initially appear. In particular, even if we were to follow the New Zealand authorities, as invited, McGrath J, with whom Glazebrook J agreed, at paragraphs 20 and 21, said:

> To my mind, in this context, a principle of particular importance is that the Court having jurisdiction should be slow to infer that there has been a loss of habitual residence arising from the prolonging of a child's stay in a new state beyond original expectations without protest or countering action because of the desire to achieve a reconciliation or reach an agreement between parents on arrangements for custody. Otherwise there will be disincentives to parents consenting to children travelling to stay with family members in other states, and correlative incentives on parents to take precipitate action where stays are extended or sought to be extended in circumstances such as the present.
>
> A relatively short period of extension in the course of attempted reconciliation, with a view to reaching agreement, in general should not change habitual residence as to allow it to do so would not serve the policies of the Convention.

75. At paragraph 22 McGrath J said (references omitted):

> There is also support for the proposition that the Court should be slow to infer a change in habitual residence in the absence of shared parental attempt to bring it about, this reflecting the weight attached to parental intention under the Convention…. The decision of the Court on habitual residence must, however, in the end always reflect the underlying reality of the connection between the child and the particular state. Obviously there will be circumstances in which having been considered the facts indicate to the Court that all the circumstances of the case rather indicate this underlying reality.

76. Glazebrook J at paragraph 77 said (references omitted):

> It is probably fair to say that the main difficulty arising in habitual residence cases is where…residence in another State is intended by the parents to be for a limited period and a return to the existing habitual residence is agreed to or at least contemplated. It is clear that, even using the settled purpose test, residence for a limited period can result in a change of habitual residence. This is because the settled purpose does not need to

> be a settled purpose to reside in a place forever. It can be for a limited period, as long as there is intended to be a sufficient degree of continuity for it to be properly described as settled.

77. Glazebrook J further said at paragraph 84:

> There is no doubt that, where the question of habitual residence arises in a situation of retention rather than abduction, there can be some tension between the two aims of the Convention – to deter retention and to ensure the child's future is determined in the forum conveniens, that is where the child has the closest links.

78. The father having communicated to the mother in June that he did not agree to the children remaining in Australia, the introduction of fresh evidence as to the "acclimatisation of the children in Australia" which all occurred following the June conversation, could not in our view support a finding of 'settlement' in Australia. In this case it was the mother, not the father, who was seeking to bring about what she described as "acclimatisation of the children", particularly as it was she with whom the choice remained, at least until the wrongful retention occurred in August or December 2006.

79. This conclusion is consistent with McGrath J's view that the Court "should be slow to infer a change in habitual residence in the absence of **shared parental attempt** to bring it about" (our emphasis). It becomes particularly important in cases where consent has been given for a visit to another country for a limited period.

80. Having reached that conclusion, we reject the application by the mother for the admission of further evidence. As we have already indicated, part of that evidence relates to the period before the departure for Australia and neither supports nor contradicts the mother's position and the other part arises in circumstances where the mother was aware of the father's wish for the children to return to Israel. We do not consider that the alleged discussions between the mother and [the person] described as the husband's girlfriend would have any relevance to the issue of habitual residence and in particular to "settled intention".

81. The further evidence sought to be admitted by the Central Authority related to proceedings instituted by the father in Israel and an explanation by his lawyer as to why the proceedings were instituted. As we have not admitted evidence of these proceedings through the mother, we reject the application for the admission of further evidence by the Central Authority.

The 'grave risk' and 'intolerable situation' arguments

82. These arguments are contained in grounds 8, 9, 10 and 11.

83. We have previously set out his Honour's rejection of the defence of 'grave risk' argued pursuant to reg 16(3)(b) of the Regulations in paragraph 27 of our reasons. The mother did not seek to argue on appeal that there was a grave risk that the return of the children to Israel would expose them to physical harm. The only matter put before the Court as to grave risk was the security situation in Israel and his Honour's findings on this issue do not appear to be a matter which is the subject of complaint on appeal.

84. Counsel concedes that no argument was addressed at the hearing before his Honour that there was a grave risk arising from severe economic hardship, but submits that the defence under reg 16(3)(b) was relied upon and the fact that no argument was addressed to his Honour on the point does not preclude the mother from relying upon it now, subject to evidence that was before his Honour.

85. The evidence before his Honour from the mother appears in her affidavit sworn 3 May 2007, paragraphs 128 to 134 inclusive.

86. Paragraphs 128 to 132 detail her situation in Australia and her income and expenses for herself and her children. The mother contrasts this in paragraph 133 with the position in Israel and says:

> While I was living in Israel, I would estimate that my living expenses were between 12000 and 14000 shekels per month. I would estimate the cost of repaying the mortgage, and maintaining the family home to be 4000 shekels per month. After recently making enquiries with the Israeli national insurance organisation, I have confirmed that I would now be eligible to receive approximately 800 shekels each month in the form of child allowance, calculated on the basis that I have four (4) children. To support the Boys, I would estimate that my costs per month would be approximately 14000 shekels. I would not be able to find full-time employment, because I would still be required to care for my youngest son… who is only two (2) years old. The cost of childcare would most likely exceed any income that I made.
>
> If the Court orders me to return with the Boys to Israel, I would have to pay the outstanding balance on the mortgage of the family home on my own. My Dad has retired and is supporting the Boys and myself out of his retirement fund. He is finding it difficult to do so, and would not be able to continue if I was ordered to return to Israel. I would not be able to live in the family home, because it would be too expensive, and because the family home is currently leased. I would not be able to afford a car to drive the Boys around. I would have no choice but to live in a suburb situated in the peripheral suburbs on the outskirts of Jerusalem, such as Maale Adumim or Har Homa. In order to travel to these suburbs from the city, where the Boys would attend school, I would be required to travel on public transport through areas with the Boys that are occupied by Palestinian Arabs. These areas are often the target of bombings, riots and

> shootings. There is a high rate of crime. It is very dangerous. I would be terrified to live alone with the Boys in an area like this.

87. In *DP & Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* (2001) 206 CLR 401 at 418 per Gaudron, Gummow and Hayne JJ the High Court said (references omitted):

> Because what is to be established is a *grave* risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm.

88. The High Court went on to hold that a narrow construction of the 'grave risk' exception must be rejected and the exception must be given the meaning its words require. The High Court opined that the 'grave risk' must be more than the inevitable disruption, uncertainty and anxiety accompanying any Convention ordered return to a country of habitual residence.

89. However, the mother's case was not put before his Honour on the basis that economic issues put the children at grave risk. In our view the mother's evidence would not support such a submission but more importantly, rather than putting to his Honour that economic issues put the children at grave risk, the mother requested that if a return order were made it should be subject to conditions which included:

- the father meeting airfares for herself and the children
- providing accommodation
- providing a motor vehicle
- providing a sum of NIS 8000 per month by way of maintenance, with an advance payment to cover the first six months of her period with the children in Israel.

There was no evidence before his Honour that the children would suffer psychological harm for any reason if returned to Israel and in our view the grounds based upon 'grave risk' must fail.

The trial judge failed to exercise his discretion to refuse to order the children's return to Israel

90. This argument is contained in ground 7 of the grounds of appeal.

91. The mother contends that, having found the father had consented to the children being removed from Israel and being retained in Australia, his Honour erred in failing to exercise his discretion to refuse to order the children's return to Israel. Though his Honour found the defence of consent made out and this enlivened his discretion to make a return order, the mother submitted that errors

occurred in the exercise of discretion as a result of his Honour's legal error in relation to the withdrawal of consent and legal error in failing to find the defence of 'grave risk' made out.

92. We have already concluded that his Honour was not in error in failing to find the defence of 'grave risk' made out. We can find no error in his Honour's finding the father's change of mind had the effect of making the retention of the children wrongful after July 2006. His Honour found there was nothing wrongful in the mother's initial removal of the children or of her initial retention of the children in Australia but the father had subsequently withdrawn his consent soon after their coming to Australia.

93. In the exercise of discretion the trial judge may take into account all relevant factors. In *Zafiropoulos & State Central Authority* (supra) at 80,508 the Full Court endorsed the approach of the trial judge as to the appropriate matters to be taken into account in the exercise of that discretion. The trial judge relied upon the dissenting judgment of Hale LJ in *TB v JB* [2001] 2 FLR 515 whereby Hale LJ discussed a list of factors suggested by Waite J (as he then was) in *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 and later adopted by him in the Court of Appeal in *H v H (Abduction: Acquiescence)* [1996] 2 FLR 570 at 574-5, which are:

- the comparative suitability of the forum to determine the child's future in the substantive proceedings
- the likely outcome (in whichever forum) of the substantive proceedings
- the consequences of the acquiescence
- the situation which would await the absconding parent and the child if compelled to return
- the anticipated emotional effect upon the child of an immediate return (a factor which is to be treated as significant but not paramount)
- the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.

94. In *De L & Director General, NSW Department of Community Services and Anor* (1996) 187 CLR 640 at 661 the majority of the High Court said:

> The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the "discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]" enable it to be said that a particular consideration is extraneous. That subject matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion.

95. The trial judge considered the relevant factual material having regard to the subject matter, scope and purpose of the Regulations and considered the submissions on the mother's behalf. He did not find the resolution of the case easy, as he said in paragraph 52 of his reasons. His Honour also addressed the question of the Convention and noted that "[i]t is not clear that the circumstances surrounding the manner in which these children found themselves within Australia fit comfortably within the aims of the Convention." However, his Honour considered the arguments of both of the parties and weighed up the competing views as to whether it was appropriate for the mother and children to reside in Australia on a long-term basis against the effect that that would have on the opportunity for them to develop a meaningful relationship with their father and many other issues affecting their best interests. On balance, in what was clearly a finely balanced case, his Honour determined, having taken into account all relevant matters, that provided reasonable financial arrangements could be made within a reasonable time, a return order should be made.

96. We are conscious that unless we are persuaded that his Honour reached an erroneous conclusion, the conclusion must stand (*Zafiropoulos and State Central Authority* (supra)). We do not consider it can be said his Honour incorrectly exercised his discretion and reached an erroneous result.

The adequacy of the conditions imposed

97. This argument is contained in grounds 12, 13 and 14.

98. Many of the areas complained of by the mother relate to the submission of the mother that his Honour erred in moulding conditions to accommodate the father's limited financial means rather than to ameliorate the grave risk to the children of return. However, his Honour's discretion was enlivened because his Honour found that the father consented to the retention of the children, even if only for a short time. The discretion was not enlivened because there was a grave risk of any sort and thus his Honour was not obliged to "ameliorate the risk". The mother did not argue before his Honour that the return would create an intolerable situation although she did suggest it would be difficult economically for her. In particular, the conditions imposed by his Honour were largely those put forward by the mother. His Honour carefully framed orders which would ameliorate the economic effect of the return of the children on the mother but at the same time achieving a balance between her reasonable demands and the "claims of a father unable to meet them." His Honour noted that the mother needed enough money to live on until she could approach an Israeli court for some urgent relief and made orders which met that condition, including the provision of airfares and accommodation. If he did not do so, the return order would lapse.

The position under Israeli family law

99. Finally, the mother argued that the trial judge erred in failing to take account of, and judicial notice of, the unusual situation under Israeli family law whereby the mother is automatically granted custody of children and that any shared custody arrangements require the mother's consent (ground 15) and that the trial judge erred in determining it was necessary for the children to return to Israel so the court of Israel could determine custody arrangements when the relevant law of Israel already provided for automatic custody to the mother of children under six where the parties could not agree. There was no evidence before his Honour to support this proposition and evidence of it was only sought to be adduced on appeal. As only two of the children are under six years of age the evidence, if accepted, could not materially affect the result and we reject the application to adduce it.

CONCLUSION

100. We are not satisfied that the trial judge reached an erroneous conclusion or wrongly exercised his discretion in what his Honour conceded was a difficult and finely balanced case. Unless we are persuaded the trial judge reached an erroneous conclusion, the decision must stand and accordingly the appeal must be dismissed.

101. Other than to provide for dismissal of the application, the only other matter which may require our consideration is Order 5 of the orders, which provided "That if any of the conditions for the return have not been met by 31 December, 2007 then the order for the return is to lapse." We should hear the parties on the fresh date upon which the conditions should be met to enable the mother to return to Israel.

I certify that the preceding one hundred and one (101) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court.

Associate: Kristen Murray

Date: 24 June 2008