---

http://www.incadat.com/ ref.: HC/E/NZ 90
[11/06/1996; Court of Appeal (New Zealand); Appellate Court]
A. v. Central Authority for New Zealand [1996] 2 NZFLR 517

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 96/96

BETWEEN

A

Appellant

AND

THE CENTRAL AUTHORITY

FOR NEW ZEALAND for A

Respondent

Coram: Richardson P

McKay J

Henry J

Thomas J

Doogue J

Hearing: 23 May 1996

Counsel: C.C.H. Knight for appellant

J.D. Howman with V.J. Hammond for respondent

Judgment: 11 June 1996

JUDGMENT OF THE COURT DELIVERED BY DOOGUE J

SUMMARY

1. **This case centres on whether the High Court was right in law in finding a child named [child's name omitted], born on 16 April 1991 to the appellant ("the mother") and A**

("the father"), should be returned to Denmark after she was abducted to New Zealand by her mother.

2. **The parents and [the child] are Danish nationals. In November 1994 the mother brought [the child] to New Zealand. This was despite an order of a Danish court, upheld on appeal, granting the father custody of[the child]. At the time a further application by the mother for the custody of [the child] was before the Danish courts. When the mother abducted [the child] and came to New Zealand she was accompanied by her present husband and two other girls unrelated to A, a half sister and a step-sister of[the child].**

3. **The Central Authority for New Zealand ("the Central Authority") took proceedings under s. 12 of the Guardianship Amendment Act 1991 ("the Act") to have [the child] returned to Denmark. The mother opposed that course. On 6 September 1995 an experienced Family Court Judge refused the application by the Central Authority upon the ground the mother had established there was a grave risk that the child's return to Denmark would expose her to physical or psychological harm or would otherwise place her in an intolerable situation under s. 13(1)(c) of the Act. The decision was upon the basis of the evidence of a psychologist indicating a risk of abuse of the child by the father. The Family Court Judge declined to order [the child's]return to Denmark because she found:-**

   "There is ... no apparent means by which the child's safety could be guaranteed pending any further hearing in Denmark."

4. **The Central Authority appealed from that decision. On 29 March 1996, after a de novo hearing, Fraser J reversed the decision of the Family Court. The Judge was satisfied that the Family Court Judge's conclusion was wrong. He was not prepared to assume it was a foregone conclusion the Danish legal system could not protect [the child] if a sufficient case was made out for her protection. Fraser J noted:-**

   "The [Danish] system provides for interim orders pending a full hearing."

5. **Both New Zealand courts were aware that the Danish legal system, like our own, recognises the best interests of the child are paramount and makes appropriate provision for that to be achieved.**

6. **The appellant has now applied to this Court for leave to appeal against that decision and for a stay of execution of the judgment ordering that [the child] be returned forthwith to Denmark. Leave can only be granted by this Court upon a question of law: s. 31(4) Guardianship Act 1968.**

<u>THE RELEVANT PROVISIONS OF THE ACT AND THE CONVENTION</u>

7. **The Act incorporated into the law of New Zealand the provisions of the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980, commonly known as the "Hague Convention" ("the Convention"). The Convention itself is set out in a schedule to the Act and is deemed to be part of it: see s.5(h) Acts Interpretation Act 1924.**

8. **For the purposes of the present case the only provisions of the Act of particular relevance are certain parts of ss 7, 12 and 13.**

9. **Section 7 requires the Central Authority to perform all the functions that a Central Authority has under the Convention.**

10. **Section 12 enables applications to the Court for the return of a child who has been abducted. Subject to section 13 of the Act, where**

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

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

    Section 13 provides:-

    "13. Grounds for refusal of order for return of child -

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

    (a) That the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

    (b) That the person by or on whose behalf the application is made -

    (i) Was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or

    (ii) Consented to, or subsequently acquiesced in, the removal; or

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

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

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

    (d) ...; or

    (e) ...

    (2) ...

    (3) ..."

11. **Article 7 provides:-**

    "Central Authorities shall co-operate with each other ... to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

...

b **to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;**

...

h **to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;**

..."

12. Section 13(1)(c) is itself to be read in conjunction with Article 13, which provides that in considering the circumstances of the case "the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence".

OTHER RELEVANT FACTUAL AND LEGAL MATTERS

13. In the present case the grave risk relied upon by the mother for the purposes of s.13 (1) (c) of the Act is primarily a risk of sexual abuse by the father if the child is returned to Denmark.

14. As the judgments of the courts below note, and as is spelt out in more detail in the other papers before this Court, this allegation has been made by the mother in Denmark on more than one occasion to different authorities and courts, without it being substantiated.

15. After the mother came to New Zealand with her husband, [the child] and her other children in November 1994, the mother continued to pursue her concerns about the treatment of her children by A. [The child] and one of the other two children of the mother were interviewed by the Children and Young Persons Service in Christchurch. Neither of the two interviews with [the child] resulted in any allegation of sexual abuse. However, the other girl made clear and explicit statements in relation to two incidents of alleged sexual abuse byA. Subsequently the two girls were seen by a Mr Dennis Standring, a registered psychologist connected with the Special Education Service in Christchurch, and a female colleague of his. It was his report and evidence which weighed heaviest with the Family Court Judge in reaching the conclusion that she did that [the child] was at grave risk in terms of s. 13 of the Act if she was returned to Denmark. The Judge noted that Mr Standring was a psychologist of some 20 years' experience with substantial experience of giving evidence in the Family Court. He was obviously someone well known to and respected by the court. The Family Court Judge accepted the cogency and strength of Mr Standring's evidence, which indicated that both girls complained of sexual abuse by A and that [the child] had a real fear that if she was returned to Denmark the abuse could continue. The Family Court Judge took the view that, given the strength of this evidence, she would only be prepared to consider a return of the child to Denmark under conditions which would ensure [the

child's] continued psychological well-being pending any further hearing in Denmark. As already mentioned, she was not satisfied that it was possible for that to occur.

16. **Subsequent to that decision, but prior to the decision of the New Zealand High Court, the 8th Department of the Western Division of the Danish High Court on 12 October 1995 upheld a judgment of the Court of Struer, a court of first instance, of 17 February 1995, rejecting the mother's application for custody of [the child] and confirming the father's custody of[the child]. It had the report of Mr Standring. It noted in its decision that the mother's accusations of neglect and incest by the father in respect of [the child] were unfounded. It noted that the mother had not been prepared to participate in counselling and that the expert on child behaviour appointed by the court of first instance had never seen the father and [the child] together because the mother had refused the father access to[the child]. The court went on to state:-**

    "The Appellant abducted [the child] to New Zealand after the Respondent had been granted custody of the child, both by the court of first instance and by the High Court. Therefore, it has not been possible during this case - which has been brought by the Appellant for the purpose of having custody transferred to her, and subsequently appealed by her to the High Court - to initiate a new examination by an expert on child behaviour. In this connection, the High Court would point out that it does not attach great weight to the examination made by the expert on child behaviour during the proceedings in New Zealand for return of the child, as the High Court considers it significant that the Appellant attended the examination, which the Respondent did not, and that the conversations with [the child] were held in English without the use of an interpreter. In addition, the High Court has attached importance to the opinions obtained from the child's doctor and the Health and Social Services Committee prior to the abduction, describing [the child] as a harmonious child, comparable to other children in her age group, not showing any remarkable behaviour, and functioning normally, both emotionally and personality-wise. Such as the case has been presented to the High Court, the High Court finds, based on the grounds stated by the court of first instance, that the Appellant has not substantiated that the conditions for transferring custody to her, as laid down in section 17 of the Danish Act on Minors and Incapacitated Persons, have been met."

17. **As a result, the mother's appeal was dismissed and the father continues to be the parent entitled to custody of [the child] in Denmark. The attitude of the Danish court to the report of Mr Standring was understandable in the circumstances which that court was faced with upon an appeal. The mother had failed to co-operate in the procedures in Denmark which would have enabled the Danish court to have independent reports before it as to her allegations in respect of the father. Mr Standring's report may well have been given greater weight if the court had been a first instance court dealing with an application for interim custody pending the further investigation of the case concerned to assess whether the child was at risk and the gravity of any such risk. It could then perhaps be of significance that in the New Zealand context the first instance court gave Mr Standring's report credence and acted upon it and that it was not discounted in any way by the Judge of the High Court, notwithstanding that he took a different view upon the proper outcome of the case.**

THE DECISION UNDER APPEAL

18. Fraser J addressed the basis upon which his jurisdiction was to be exercised and adopted the following passage from a decision of the High Court in Clarke v Carson [1996] 1 NZLR 349, 351; [1995] NZFLR 926, 928:-

"Section 13 sets out the only circumstances which constitute grounds for the refusal of the order for return. Where those grounds are made out to the satisfaction of the Court by the person resisting the order for return (here, the mother), the consequence is not that the order will be refused but that the Court is no longer obliged to return the child but has a discretion whether or not to do so. That discretion must be exercised in the context of the Act under which it is conferred and the Convention which it implements and schedules. (See in *In re A (Minors) (Abduction: Custody Rights)* [1992] 2 WLR 536 at 550 per Balcombe LJ.) It therefore requires assessment of whether decisions affecting the child should be made in the Court of the country from which the child has been wrongfully removed or the country of the Court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other. (See in *In re A (Minors)(Abduction: Custody Rights)(No. 2)* [1992] 3 WLR 538, at 547 per Sir Stephen Brown P, at 548 per Scott LJ. Some balancing may be required, as is indicated by the fact that art 13 of the Convention (from which s. 13 of the Act is derived) requires consideration of 'information relating to the social background of the child'."

No challenge is made to that statement. He went on to say that that approach was consistent with various observations in American, Scottish and Australian cases cited to him.

19. Fraser J then traversed with care the information before him as to the legal position in Denmark, noting in conclusion under this heading that the mother had made no fresh application for permanent or temporary custody of [the child] in Denmark, nor any application for immunity or psychological assessment, and that those procedures appeared to be still open to her in Denmark. He then went on to review what had occurred in New Zealand. Whilst some criticism is made of the language used by the Judge, within context it was entirely appropriate and it is unnecessary to state it here.

20. The Judge noted that the critical area of concern related solely to the period between [the child's] return to Denmark and the hearing of any fresh custody application by the mother. He noted that at an earlier time the father had offered to see [the child] put temporarily into the custody of a local authority but that option was not taken up by the mother.

21. He then noted the crux of the difference between him and the Family Court Judge. The Family Court Judge found there was no guarantee that if [the child] was returned to Denmark she would not be placed, at least temporarily, in the care and custody of the father. To Fraser J that was not a foregone conclusion as he was satisfied that with appropriate evidence before the Danish courts the Danish law could protect the child if a sufficient case was made out for protection on an interim basis. There is no dispute that that can occur in Denmark. However, for the mother it is said that there must inevitably be the risk of a time lapse, and, as no guarantee can be given against such a risk, [the child] must be at risk during any such period. Fraser J, after reaching the conclusions already traversed above, reserved leave to make application for any ancillary orders or directions which might be found necessary.

ARGUMENT AND REASONS FOR DECISION

22. **It is said for the appellant that Fraser J adopted an unduly narrow approach to the nature of the appropriate enquiry relative to the grave risk defence under s. 13, did not appropriately consider the evidence relating to that risk, and misdirected himself in various ways to the evidence. Submissions were also made that the Judge should have given greater weight to the best interests of the child and addressed issues relating to the safe return of [the child] to Denmark.**

23. **It is not helpful to address separately each of the matters raised on behalf of the appellant. Notwithstanding the careful submissions on behalf of the mother, it is clear Fraser J not only adopted the correct law but properly applied it to the facts before him.**

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

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

26. **Fraser J did not ignore the correct approach to s. 13(1)(c). He was entitled to find as he did that any risk in the return of [the child] to Denmark could be protected by the courts of Denmark. When the laws of Denmark and New Zealand are similar in all material respects, Fraser J was no doubt satisfied that that could be achieved because he knew if the position was reversed it could have been achieved in New Zealand. The Family Court Judge's doubt as to that elevated the risk to [the child] to a grave risk in her mind. However, Fraser J was entitled to take the different view that he did.**

27. **Fraser J properly held, in terms of s. 12 of the Act, that [the child] be returned to Denmark forthwith. However, leave was reserved to the parties to apply in respect of any matters which might arise in relation to her return. [The child's] safe return to Denmark was adequately protected by this step. In the first instance it is for the Central Authorities, both of New Zealand and of Denmark, in terms of Article 7 b and h of the Convention, to take steps to ensure that this occurs, and accordingly it was not**

necessary for Fraser J to further address that issue at the time of judgment. The Family Court of Australia in Cooper v Casey (1995) FLC 81,692 expressed reservations as to the extent that receiving States accept the obligation imposed by Article 7, but there is nothing before this Court to indicate the Central Authorities of New Zealand and Denmark will not act in [the child's] best interests. It is clear from Mr Howman's submissions for the Central Authority of New Zealand that the Central Authorities will co-ordinate transfer arrangements to ensure the child's safe arrival and reception in Denmark. Thus Fraser J was entitled to take the view that the necessary administrative and legal steps would be taken and that [the child] was as capable of being protected by the courts of Denmark as by the courts of New Zealand. To take a different view would have involved an implied criticism of both Central Authorities and the courts of Denmark for which there is no foundation whatever.

28. **Ultimately it is a question of whether the appropriate steps will be taken to ensure that upon [the child's] return to Denmark the Danish courts will be fully appraised of the matters which were of such concern to the Family Court Judge and which led her at first instance to uphold the s. 13(1)(c) defence. Unless the mother is prepared to co-operate with the Central Authorities to ensure that these matters are brought before the Danish courts, it may be that difficulties could arise. However, that is something within the control of the mother herself. It is for the Central Authorities of New Zealand and Denmark to abide by their duties under the Convention and act properly in the best interests of[the child]. Thus Fraser J was entitled to conclude the courts of Denmark are the proper courts to determine [the child's] best interests and she is not at risk if she is returned to Denmark.**

SUPPLEMENTARY ISSUES

29. **The New Zealand courts have been concerned with the possible risk to [the child] on her return to Denmark before the Danish courts have an opportunity to consider her position further. Consideration was given in the course of argument as to whether a court had power to attach conditions to any order made by it. It seems reasonably clear there can be no power to attach conditions to an order under s. 12 in the absence of a finding in favour of a defence under s. 13. On the other hand, if such a defence has been made out and the court is concerned solely with the exercise of its discretion under s. 13 of the Act, then it may be possible that conditions could be attached, unless the statutory provisions dealing with conditions in the Act, ss 26, 27 and 28, imply no authority for the imposition of other conditions: see H v H (1995) 12 FRNZ 498. Nevertheless, as has already been stressed in this judgment, it is not the role of a New Zealand court to interfere with the functions and responsibilities of the relevant Central Authorities and the courts of another jurisdiction. It would be an unusual case which might give rise to the consideration of conditions. No finding is made on this issue.**

30. **An order returning a child to another jurisdiction is not an order returning a child to a parent, and the child remains the responsibility in the first instance of the Central Authority of that other jurisdiction. All a court appropriately can do in a case such as the present is to draw to the attention of the Central Authorities and the courts of the other jurisdiction the particular matters of concern relevant to the best interests of the child of which it is aware. It will be obvious, for instance, from this judgment that all three New Zealand courts accept there is evidence before the New Zealand courts which suggests that, despite the contrary findings by the Danish courts, [the child] may be at risk from her father and that the New Zealand courts hope that that issue can be**

dealt with again, de novo, before he next exercises his present right of custody in respect of her.

DECISION

31. **The application for leave to appeal and for a stay of execution of the judgment of Fraser J is dismissed. There will be no order as to costs.**

Solicitors:

Chris Knight Family Law Office, Christchurch, for appellant

Simpson Grierson, Wellington, for respondent
