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[23/12/1988; Full Court of the Family Court of Australia (Melbourne); Appellate Court]
Gsponer v. Johnston (1989) FLC 92-001; 12 Fam LR 755

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Melbourne

BEFORE: Fogarty, Frederico and Joske JJ.

23 December 1988

Appeal No. 227/88

IN THE MATTER OF:

Carmel Faye Gsponer

Appellant

-and-

Peter Johnstone

Respondent

REASONS FOR JUDGMENT

APPEARANCES:

Mr Guest, Q.C. with Mr Wilson, instructed by Trumble and Palmer, Solicitor appeared on behalf of the Appellant

Ms Symon, instructed by Gordon Lewis, Government Solicitor, appeared on behalf of the Respondent

JUDGMENT:

Fogarty, Frederico and Joske JJ.: On 25 November 1988 Graham, J., pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction and the Regulations made thereunder ordered the return to Switzerland of the child, C.G. The appellant, C.F.G., who is the mother of the child and the wife of P.G., appealed against that order. Graham, J. declined to grant a stay. Consequently the appeal was fixed for hearing as a matter of expedition, and was heard on 8 December whilst the child was still within Australia. At the conclusion of argument that day we announced our decision, namely the dismissal of the appeal, and indicated that we would publish our reasons for judgment expeditiously. The following are our reasons for judgment.

It is convenient to set out in brief form the basal facts which have given rise to these proceedings. P.G. ("the husband") was born in Switzerland in 1956 and is aged 32 and is a Swiss national. C.F.G. ("the wife") was born in Australia in 1956 and is also aged 32. She has dual citizenship, namely Australian citizenship as a consequence of her birth in this country and Swiss citizenship

arising from her marriage to her husband. The parties married in the State of Victoria, Australia on 17 February 1979. Shortly after their marriage they left Australia and travelled to Switzerland where they both lived until October 1988. The child who is the subject of these proceedings, C.G., was born in Switzerland on 30 December 1979 and until the events in October 1988 giving rise to these proceedings, has always lived in Switzerland, including attendance at school in that country in more recent years. His present age is almost 9 and he has citizenship of both Australia and Switzerland.

Between 3 and 9 October 1988, whilst the husband was absent from the home as a consequence of his employment, the wife left Switzerland and travelled to Australia, taking C. with her. Since that time the wife and child have lived in Australia with the wife's parents, the wife making it clear both to the usband and in material filed in these proceedings that she did not intend desire or intend to return with the child to Switzerland.

On 4 November 1988 the Federal Office of Justice, the relevant Authority in Switzerland under the Hague Convention, made a request to the Attorney-General of the Commonwealth of Australia under that Convention. That request was then transmitted to the Applicant in these proceedings, Peter Johnstone - Director General, Department of Community Services, Victoria - who, pursuant to Regulations 8 and 9 of the Family Law (Child Abduction Convention) Regulations of the Commonwealth of Australia is the Authority appointed under those Regulations to initiate proceedings under the Convention within the State of Victoria.

On 16 November 1988 the Director General issued an Application under the Regulations returnable in the Melbourne Registry of the Family Court on 22 November 1988.

In the intervening period the wife was served with the Application and both the Director General and the wife were represented by Counsel when the matter came on for hearing before Graham, J. on 22 November. The husband, whose interests were also represented by Counsel appearing for the Director General, was not in Australia but remained in Switzerland. The material before the Trial Judge in support of the Application was the Application itself, and that had annexed to it a substantial body of material the admissibility of which was covered by the Regulations hereafter referred to. The wife filed an affidavit in opposition to the Application together with affidavits of two other deponents. Neither the wife nor those deponents were cross-examined.

As it appeared that an issue which may arise was the wishes or "views" of the child about his return to Switzerland, the hearing was adjourned to 25 November to enable a counsellor to interview the child and give evidence. That evidence was given on 25 November. For reasons which appear hereafter it is unnecessary to consider the detail of that evidence. After hearing submissions from Counsel Graham, J. delivered judgment at the conclusion of which he made the following orders:

"(1) That the child of the marriage C.G. born on the 30th day of December 1979 be forthwith returned to the custody of the husband in Switzerland.

(2) That whilst remaining in the Commonwealth of Australia the said child remain in the custody of the wife at * in the State of Victoria under the control of the Director General of the Department of Community Welfare Services Victoria.

(3) That all current passports relating to the wife and the said child remain in the custody of the Registrar of the Melbourne Registry of the Family Court of Australia subject to the direction of the said Director General.

(4) That the wife be permitted to accompany the said child upon his return to Switzerland but otherwise, be and is hereby restrained from removing the said child from the Commonwealth of Australia AND IT IS REQUESTED that the Marshal of the said Court at Melbourne and all Officer of the Australian Federal Police and the Department of Immigration and Ethnic Affairs give effect to this order.

(5) That the wife's consent to the execution of any necessary travel documents for the said child be dispensed with.

IT IS DIRECTED

(6) That a sealed copy of this order be served upon the Australian Federal Police and the Department of Immigration and Ethnic Affairs.

(7) That the wife pay any costs of locating the said child and any travelling expenses incurred by the Director General Department of Community Services and/or the husband in respect of the return to Switzerland of the said child."

In the circumstances which we have previously described the wife's appeal against those orders was heard by us on 8 December 1988.

Before turning to the evidence before the Trial Judge and the submissions made to us upon the hearing of this appeal it is desirable to set out the relevant provisions of the Convention and the Family Law Regulations made pursuant to that Convention.

Although these proceedings are governed entirely by the Convention, we preface that exercise by a brief reference to some more general matters.

In more recent times there has been an increasing incidence of cases where a parent removes a child from one country or jurisdiction to another in order to gain an advantage over the other parent in respect of the future custody of that child. In many cases this may create insuperable practical and/or legal barriers to a proper adjudication concerning the future welfare of that child. Even without legislative intervention, Courts in both this country and overseas have adopted an increasingly consistent response to such cases and have generally exhibited what might broadly be described as a strong preference for the issue to be determined by the forum from which the child has been removed. It is unnecessary for the purposes of this judgment to refer to the increasingly long line of such cases to this effect, but in England reference may be made to McKee v. McKee (1951) AC 352, and to Re: R (Minors) (1981) 2 Fam.LR 416, and in Australia to one of the more recent cases, Schwartz (1985) FLC 91/618, and the cases therein referred to.

In Australia some legislative support for this approach is contained in section 68 of the Family Law Act. This makes provision for the registration and enforcement in certain circumstances in this country of overseas custody orders. That provision however is confined to orders of a Court of a "prescribed overseas jurisdiction" and only New Zealand and Papua New Guinea are so prescribed (see sections 4 and 60 of the Family Law Act).

The Convention on the Civil Aspects of International Child Abduction was signed at The Hague on 25 October 1980. It represents a more determined approach to this issue by the signatory States. Australia acceded to the operation of that Convention by the promulgation of the Family Law (Child Abduction Convention) Regulations which became law on 1 January 1987. Those Regulations were promulgated pursuant to s.111B of the Family Law Act, a provision introduced into that legislation as part of the 1983 amendments. At all relevant times Switzerland is and has been a Convention country, as are a number of other countries.

The preamble to that Convention and the Articles contained in Chapter I make clear the scope and purpose of the obligations which the contracting States have undertaken. They are in the following terms:

"Convention on the civil aspects of international child abduction. The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

CHAPTER 1 - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are -

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

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

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

Chapter II makes provision for a Contracting State to designate a Central Authority to discharge the duties imposed by the Convention. Pursuant to the Regulations the Officer of the Australian Public Service from time to time holding the Office of Secretary to the Attorney General's Department is nominated as the Commonwealth Central Authority, and particular persons are appointed under those Regulations as the Central Authority for the specified State or Territory. In Victoria Peter Johnstone, Director General of the Department of Community Services Victoria, is

the person currently so nominated and has, pursuant to that nomination, brought these proceedings.

Chapter III of the Convention under the heading RETURN OF CHILDREN provides detailed provisions relating to that subject matter. Although lengthy, it is desirable to set out those Articles.

"CHAPTER III - RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

(a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

(b) where available, the date of birth of the child;

(c) the grounds on which the applicant's claim for return of the child is based;

(d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

(e) an authenticated copy of any relevant decision or agreement;

(f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

(g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant of the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the

Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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

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

In considering the circumstances referred to in this Article, 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.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15 The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

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Article 18

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

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

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

Chapter IV deals with RIGHTS OF ACCESS but it is unnecessary to refer to those provisions for the purposes of this appeal.

Chapter V deals with GENERAL PROVISIONS, and Chapter VI with FINAL CLAUSES. It is unnecessary to refer to the Articles contained under those chapters, except Article 29 which is in the following terms:

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention."

The Family Law (Child Abduction Convention) Regulations contain detailed provisions relating to proceedings under the Convention and other matters. It is unnecessary for purposes of this judgment to set those Regulations out in full. It is sufficient to refer to the following:

Regulation 2 is the definition or interpretative provision and it refers in particular to the following:

""Applicant" means a person who has made an application referred to in Regulations 11, 13 or 24, as the case requires."

In this case that Applicant (under Reg. 13) was the Federal Office of Justice, being the relevant Central Authority in Switzerland. In the orders which were made on 25 November the Applicant was treated as being the husband and Order 1 is expressed in those terms. That was not suggested as having any significance for the purposes of this appeal but it does have relevance to some more general issues to which we will refer hereafter.

""Removal" in relation to a child, means the wrongful removal or retention of a child within the meaning of the Convention."

(As to which see Article 3)

""Rights of custody" has the same meaning as in the Convention, and includes rights arising by the operation of the law or by reason of a judicial or administrative decision or by an agreement having legal effect under a law enforced in a Convention country." (As to which see also Article 3)

We pause to emphasise that the "right of custody" does not necessarily involve the existence of a positive custody order in favour of the relevant person. Indeed the material before the Trial Judge stated the position under Swiss law in relation to this matter as follows:

"Under Swiss law, as well as under Australian law, married parents exercise parential power jointly (Art.29 par.1 - Swiss Civil Code; part VII of the Family Law Act 1975, sub-section 4(2)). Therefore neither of the parents is entitled to exercise the right of custody alone. If one of the parents removes the child surreptitiously from the care and affection of the other one, the parent acting in such a manner unduly claims an exclusive right of custody. Thus, according to Article 3 of the Hague Convention, he commits a wrongful abduction."

No doubt the reference in that statement to "the Family Law Act 1975, sub-section 4(2)" would be understood now to be a reference to s 63F(1) of the Family Law Act which provides that, subject to any order of a Court, "each of the parents of a child who has not attained 18 years of age is a guardian of the child, and the parents have the joint custody of the child."

The regulations then make detailed provision about the appointment of appropriate Authorities to carry out responsibilities under the regulations and other matters, including procedures where a child is abducted from Australia.

Regulation 13 deals with the present situation, namely where the Commonwealth Central Authority receives an application in respect of a child "removed from a Convention country to Australia." The regulation provides that where the Authority is satisfied that it is an application to which the Convention applies, "the Commonwealth Central Authority shall take action under the Convention to secure the return of the child to the applicant."

Regulation 14 is the equivalent of Article 29 and preserves the right of any person to apply directly to a Court rather than under the Convention. That has no relevance in this proceeding.

Regulation 15 describes the orders which the Central Authority may apply to a Court for and, at least in general terms, the orders which the Court may make. That regulation is in the following terms:

"(1) The responsible Central Authority may, in relation to a child removed to Australia, apply to a Court having jurisdiction under the Act for -

(a) an order for the issue of a warrant for the apprehension or detention of the child;

(b) an order directing that the child not be removed from a place specified in the order;

(c) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body in order to secure the welfare of the child pending the determination of an application under regulation 13; or

(d) an order for the return of the child to the applicant.

(2) A court may, in respect of an application made under sub-regulation (1), make an order of the kind referred to in that sub-regulation and such other order as the court thinks fit.

(3) Where under sub-regulation (2) a court makes an order in relation to the removal of a child from a place specified in the order, the court may impose such conditions on the removal of the child from that place as the court thinks fit.

(4) An application under sub-regulation (1) shall be in accordance with Form 2 in Schedule 3."

Regulation 16 is the critical regulation for the purposes of this appeal and is the counterpart of Article 13. We will set out that regulation in full at this stage and then return to its interpretation and its impact in this case after we have completed our reference to the other regulations which have relevance.

Regulation 16 is as follows:

"(1) Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application made under sub-regulation 15(1) if the day on which that application was filed is a date less than one year after the date of the removal of the child to Australia.

(2) Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application for an order of the kind referred to in paragraph 15(1)(d) if the date on which that application was filed is a date that is at least one year after the date of the removal of the child, unless it is satisfied that the child is settled in its new environment.

(3) A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that -

(a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal;

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

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's 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.

(4) For the purposes of sub-regulation (3), the court may take into account such information relating to the social background of the child as may be provided by the Central Authority of the convention country from which the child was removed.

(5) A court may stay or dismiss an application for an order of the kind referred to in paragraph 15 (1)(d) in relation to a child if it is satisfied that the child is no longer in Australia.

Regulation 18 is obviously designed to meet the possible situation that the "abducting" parent has already obtained an order in the country to which he or she has resorted with the child. The regulation provides:

"On the hearing of an application under sub-regulation 15(1) in relation to a child, a court shall not refuse to make an order under sub-regulation 15(2) for the return of a child to the applicant by reason only that in relation to that child there is in force or enforceable in Australia an order in relation to the custody of the child, but may take into account the reasons for the making of that order."

Regulation 19 emphasises the expedition with which applications under the Convention and regulations are to be undertaken. It provides that the Application shall be fixed for hearing "not later than seven days after the date of the filing of the Application" and it also provides for service of the Application on the other person.

Regulation 20 casts upon the Central Authority the responsibility, where an order has been made under Reg. 16, to carry out the arrangements for the return of the child to the Applicant, and, again to emphasise the expedition which the Convention calls for, it provides by sub-regulation (2) that:

"If, within 7 days after the making of an order under regulation 16, the responsible Central Authority has not been notified that the order has been stayed in accordance with sub-rule 1(10) of Order 32 of the Rules of the Court, the child shall be returned to the applicant." (See now Order 32 rule 4.)

Regulation 23 contains important evidentiary provisions and Reg. 24 relates to access cases.

Finally, Reg. 25 provides:

"Nothing in these Regulations shall be taken to prevent a court of competent jurisdiction, at any time, from making an order for the return of a child to an applicant otherwise than under these Regulations."

We turn back then to the interpretation and the application of Reg. 16, which were critical issues on this appeal. Mr Guest, QC, who with Mr Wilson, appeared for the appellant confined his argument to those two aspects and did not suggest that there were any other issues arising out of the Convention or the Regulations upon which he could rely.

Sub-regulation (1) of Reg. 16 provides that where an appropriate Application is made under the Convention the Court "shall" order the return of the child. That obligation is clear and unambiguous and is subject only to the provisions contained in sub-regulation (3).

The Court is bound to order the return of the child unless the Respondent to the Application establishes one or more of the matters set out in sub-regulation (3). If one or more of those matters are established, it by no means follows that the Court will refuse the order; the Court has a discretion to do so. That this is so is clear from the opening words to sub-regulation (3).

In Re: A (A Minor) (1988) 1 Fam.L.R. 365 at page 369 Nourse, LJ, speaking on behalf of the Court of Appeal in relation to the equivalent English regulations said this:

"It follows that the English Court is bound to order the return of G forthwith under Article 12(1), unless the mother establishes that the case falls within Article 13, in which event the Court has a discretion as to whether the return should be ordered or not."

At page 368 Nourse, LJ. referred to the general purpose of the Convention in the following terms:

"These and other provisions of the Convention demonstrate that its primary purpose is to provide for the summary return to the country of their habitual residence of children who are wrongfully removed to or retained in another country in breach of subsisting rights of custody or access. Except in certain specified circumstances, the judicial and administrative authorities in a country to or in which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of choice of forum or on a consideration of what is in the best interests of the child or otherwise."

See also Brown v. Director-General (Nicholson, CJ., 6 September 1988, unreported) to the like effect.

This view received strong reinforcement in the observations of Latey, J. of the High Court of Justice in the case of Re: Corrie (A Minor) (14 October 1988, unreported), namely that:

"... I remind myself that under the Act and Convention the welfare of the child is not the primary consideration or indeed a consideration at all, save to the extent that it may properly influence a decision under Article 13."

We should perhaps add, in case this citation be misunderstood, that it appears to us that Latey, J. was led into error by the evidence placed before him in that case as to the procedures for the hearing of custody cases in this country and as to the proper meaning and interpretation of sec.63E of the Family Law Act. In particular he was not informed as to the rights of joint guardians, the provisions of sec.63E(4) and (5) of the Act, or of the decision of our Full Court in R v. R (1984) 91/571. Otherwise we do not think it appropriate for the purposes of this appeal to make any further comment about the correctness of the actual decision in Re: Corrie. We note that on 14 December 1988 an appeal from that decision was allowed upon the appellant father giving certain undertakings. The Court of Appeal found it unnecessary to consider further expert evidence on Australian law which was proffered on the appeal. Again, we think it unnecessary to make any comment about the approach of the Court of Appeal to rights of guardianship and custody in this country or to the facts of that case.

So it is clear that the onus rests upon the Respondent to establish one or more of the matters set out in sub-regulation (3).

In Re: Evans, (Court of Appeal, 20 July 1988, unreported) Lincoln, J. said this:

"In my judgment there is a very heavy burden indeed upon a person alleged to have abducted a child in bringing himself or herself within the provisions of Article 13 and the Court should hesitate very long before it grants what is in effect an exemption from the urgency which is a characteristic of this Convention and the Act incorporating it."

See also Brown v. Director-General, supra.

At the hearing before Graham, J. both paragraphs (b) and (c) of Reg. 16(3) were relied upon, although both were rejected by the Trial Judge. Before us Mr Guest did not seek to rely upon paragraph (c) ("the child's views") and, having regard to the evidence given by the Court Counsellor on 25 November, we consider that that was a concession properly made.

As Mr Guest's major argument was that Graham, J. had misinterpreted sub-paragraph (b) it is desirable to re-state it:

"(b) There is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

Mr Guest submitted that the proper interpretation of that paragraph was that it was necessary for the Respondent to establish a "grave risk that the child's return to the applicant" would expose the child to:

(i) physical harm; or

(ii) psychological harm; or

(iii) otherwise place the child in an intolerable situation.

He submitted that the three categories were to be read disjunctively and in particular the physical or psychological harm referred to in (i) or (ii) above was in no way qualified by the term "otherwise ... in an intolerable situation", although he conceded that it was necessary to establish a "grave risk" of any one of those events.

Ms Symon, who appeared for the Respondent to this appeal, submitted that the proper interpretation of the provision was that there was in fact only one category, not three, namely the grave risk of an "intolerable situation" and that the reference to physical harm and psychological harm were but examples or instances of that.

In his judgment the Trial Judge dealt with this issue in the following terms (Appeal Book, pp.118-119):

"I will first of all deal with 16(3)(b). In dealing with this subsection, not only must there be a grave risk that if the child is returned to the husband it would expose the child to physical or psychological harm, the subsection goes on to say that it would otherwise place the child in an intolerable situation.

It would seem to me that the exposure to harm must be of the gravity of an intolerable situation. I do not find that in this case that that subsection has been made out. There are certainly some assertions in the untested affidavit of the wife, however, they are of such a general nature, apart from one specific instance, that they do not lead me to the view as a matter of fact that there is a grave risk that this child will be exposed to physical or psychological harm or otherwise placed in an intolerable situation if returned to Switzerland."

In our view the three categories are to be read separately and to that extent we agree with the submissions of Mr Guest. However it needs to be emphasised that there must be a "grave risk" of the occurrence of one or more of such events. Further,it is impossible to ignore the existence of the words "or otherwise". The consequence of those words is to link the quality which each of the first two categories must have to the emphatic words which describe the third category ("an intolerable situation"). That is, it is not the grave risk of any physical or psychological harm which would satisfy the first two aspects of this sub-paragraph. The physical or psychological harm in question must be of a substantial or weighty kind.

This accords with the views of the Court of Appeal in Re: A, supra, where at page 372, Nourse, LJ. said this:

"I agree with Mr Singer, who appears for the father, that not only must the risk be a weighty one, but it must be one of substantial, and not trivial, psychological harm. That, as it seems to me is the effect of the words "or otherwise place the child in an intolerable situation". It is unnecessary to speculate whether the eiusdem generis rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored in deciding the degree of psychological harm which is in view."

We should add that there is no significance in the circumstance that in this passage his Lordship referred only to psychological harm; in that case the issue related to that as distinct from suggested physical harm.

An initial reading of the passage in the judgment of the Trial Judge quoted above may suggest that his Honour overstated the test to be applied when he said that "it would seem to me that the exposure to harm must be of the gravity of an intolerable situation". In isolation we think that that statement does not correctly interpret the sub-paragraph. However, almost immediately after that, when the Trial Judge turned to the facts, he said:

"They (the affidavits on behalf of the wife) do not lead me to the view as a matter of fact that there is a grave risk that this child will be exposed to physical or psychological harm or otherwise placed in an intolerable situation if returned to Switzerland."

In that passage we think his Honour correctly applied the law to the facts before him.

In reality however it is unnecessary for us to consider the refinements of that view in any detail because we consider that an application of the correct interpretation of sub-paragraph (b) would inevitably have led to the conclusion that the wife had not satisfied the onus which rests upon her under that provision.

We think it unnecessary to refer to the evidence on behalf of the wife in detail. Mr Guest emphasised that the wife and her witnesses were not the subject of cross-examination or of any direct evidential challenge. In substance the evidence of the wife was that throughout a substantial period of the marriage she had been subjected to significant episodes of violence by her husband and that the child had also been assaulted or mistreated by the husband on a number of occasions.

Largely that material was very general and non-specific, although some particular events relating to the child in more recent times were referred to by the wife in her affidavit. The Trial Judge had the evidence before him together with the submissions of Counsel. He rejected the wife's case on this aspect and we think that he was correct in doing so. We say that notwithstanding that it is possible that his Honour may have had in mind a stricter test than was appropriate.

There are two other factors which we feel make a detailed examination of this factual material unnecessary, both of which are significant in this case and generally.

The first is that the grave risk which Reg. 16(3)(b) refers to is the risk arising from "the child's return to the applicant". The proceeding before the Trial Judge proceeded upon the assumption that "the Applicant" in this case was the father and indeed that is reproduced in Order 1, where his Honour ordered the return of the child to "the custody of the husband in Switzerland". Regulation 2, to which we have referred, makes it clear that "Applicant" means the person who has made the relevant Application under Reg.13. In this case that was the Federal Office of Justice, Switzerland, or its appropriate Officer. Mr Guest, when he commenced his argument, briefly acknowledged that this was so, although he submitted that it had no relevance to the submissions which he was making.

Nevertheless it is an important matter both in this case and generally. Orders under the Convention are in reality directed to the return of the child to the other country, and this would be so as a matter of practical reality even if the "Applicant" under Reg. 13 is the other parent. This is made clear from the preamble to the Convention which speaks of the "prompt return (of the child to the State of their habitual residence." Once the child has been so returned, no doubt the appropriate Court in that country will make whatever orders are then thought to be suitable for the future custody and general welfare of that child, including any interim orders.

So understood, Reg. 16(3)(b) has a narrow interpretation. It is confined to the "grave risk" of harm to the child arising from his or her return to a country which Australia has entered into this Convention with. There is no reason why this Court should not assume that once the child is so returned, the Courts arrangments for the child's welfare. Indeed the entry by Australia into this Convention with the other countries may justify the assumption that the Australian Government is satisfied to that effect. That is partly why in Re: A, supra, Nourse, LJ. at page 372 said that the Trial Judge was bound to consider "the practical consequences of his making an order to that effect." His Lordship re-emphasised that at page 373 where he said:

"Two further points have been debated in relation to art. 13(e). First, Mr Johnson has submitted that the "return" contemplated in that and the other provisions of the Convention, as it applies to this case, is a return to the custody of the father. On a consideration of the Convention as a whole, in particular of the preamble, I think it clear that what is contemplated is a return to the country of the child's habitual residence ... In the present case it is enough to say that the Judge was entitled to proceed, as he did, on the footing that an order for G's return would result in the mother returning with him and also that there would be a further application to the British Columbian Court as soon as practicable thereafter."

Similarly in Re: Evans, supra, Balcombe, LJ. quoted with approval the following passage from the judgment of the Judge at first instance:

"I am not at all satisfied, on the material I have seen, that it could possibly be said that there is a grave risk that the child will be placed in an intolerable situation by him being removed to Australia. Australia is a common law country and the Courts have ample powers to protect children. The father can either take proceedings of his own accord - which he says he will - or he can alert the appropriate local authority in Australia and the Australian Court can make whatever order is required, if any, to protect the children."

In an earlier passage in his judgment Balcombe, LJ. made these more general observations:

"I stress once again that the whole purpose of this Convention is not to deny any hearing to a father in the circumstances of this father; it is to ensure that parties do not gain adventitious advantage by

either removing a child wrongfully from the country of usual residence, or, having taken the child with the agreement of the other party who has custodial rights to another jurisdiction, then wrongfully to retain that child. The purpose of the Convention, and of the Act which embodies it as part of the law of this country, is to ensure that the right Court should deal with that sort of issue. The right Court in this case is the South Australian Court ... "

We agree with the comment of Kay, J. in Re: Lambert (3 April 1987, unreported) that "the Convention is clear. In my view, the exceptions to it are likely to be few and far between..." See also to the like effect Brown v. Director-General, supra.

The issues raised by the wife in her affidavit may be important when the custody case is being heard in Switzerland; they have little or nothing to do with the question of the child's return to that country for that purpose.

The second point which we make is this. If any of the matters of Reg. 16(3) is made out, the Trial Judge has a discretion whether or not to enforce the Convention by making an order for the child's return. It would be to seriously misunderstand this sub-regulation if it were thought that once such a matter was established the Court must refuse to make an order for return. In this particular case there were, we think, compelling reasons why an order for return to Switzerland should have been made. The child was born in that country and has lived there throughout the whole of his life. The parties have lived there since shortly after their marriage. The facts to be relied upon by the wife as justifying her view that the husband was not an appropriate future custodian of the child are facts which arose in that country. Switzerland is obviously the appropriate forum to determine those factual issues. It would be impossible to determine them satisfactorily in Australia.

Finally we should mention one further matter. Mr Guest placed emphasis upon the fact that the wife was not cross-examined and that the husband did not give evidence either directly or by affidavit. Whilst there may be cases where such a course is appropriate, the large majority of cases under the Convention are intended to be heard expeditiously by a summary form of procedure to enforce or otherwise the terms of the Convention.

In Re: A, supra, Nourse, LJ. considered that the Convention and the English Act were to "provide for a summary return to the country of their habitual residence of children who are wrongfully retained in another country in breach of subsisting rights of custody."

In Re: Evans, supra, Balcombe, LJ. repeated those remarks with approval and said that:

"That must be the approach of Courts in this country. If the submissions which Mr Levy has so ably made to us on behalf of his client were to be accepted, I believe that it could drive a coach and horses through the provisions of this Convention, since it would be open to any "abducting" parent to raise allegations under Article 13, and then use those allegations, whether they were of substance or not, as a tactic for delaying the hearing by saying that oral evidence must be heard, information must be obtained from the country of the child's habitual residence, and so on. That is precisely what this Convention, and this Act, were intended to avoid, and in my judgment the Courts should be astute to avoid their being used as machinery for delay. In this case the Australian Courts are the proper Courts in which to investigate the allegations made by the father; if those allegations are of substance I have no doubt the Australian Courts will deal with them appropriately."

We agree with those views.

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