NOTE: ANY PUBLICATION OF A REPORT OF THESE PROCEEDINGS MUST COMPLY WITH S 139 OF THE CARE OF CHILDREN ACT 2004

IN THE COURT OF APPEAL OF NEW ZEALAND

CA159/07
[2007] NZCA 223

BETWEEN	KMA Applicant
AND	THE SECRETARY FOR JUSTICE (AS THE NEW ZEALAND CENTRAL AUTHORITY ON BEHALF OF SAN) Respondent

Hearing: 7 May 2007

Court: William Young P, Chambers and Arnold JJ

Counsel: A Hart and T J Darby for Appellant
G S Collin and L Harrison for Respondent

Judgment: 5 June 2007 at 11 am

JUDGMENT OF THE COURT

A Leave to appeal is refused.

B This case may be cited as *Andrews v The Secretary for Justice*.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] This case concerns the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), which is implemented in New Zealand through the Care of Children Act 2004 (the Act). The applicant is the mother of two children, a boy aged four years six months and his sister aged two years six months. On their father's application, Judge Strettell in the Family Court ordered their return to Australia under the Hague Convention: FC CHCH FAM-2006-009-002908 16 October 2006. Their mother appealed to the High Court. Panckhurst J declined the appeal: HC CHCH CIV-2006-409-002482 16 March 2007. The mother now seeks leave to appeal from that decision to this Court.

Background

[2] The mother (the applicant) and father (the respondent) are New Zealanders in their mid-thirties. Besides their two children, the applicant has three other children aged 15, ten and six and a half years. The 15-year-old does not live with her but the two children aged ten and six and a half do, their father being a serving prisoner in a New Zealand prison.

[3] The parties began their relationship in New Zealand in 2001. Their son was born in Christchurch in August 2002. He suffers various health problems including epileptic seizures. In 2003, the parties and their son, together with the ten year old and the six and a half year old, moved to Queensland to live. In 2004 the couple experienced some difficulties in their relationship, which led to a brief separation. There was a domestic incident to which the police were called. As a consequence on 31 March 2004, on the initiative of the police, the Magistrates Court issued a domestic violence protection order against the respondent to protect the applicant. The parties reconciled, however, and married soon after. Some months later, their second child, a daughter, was born.

[4] Towards the end of 2005 the parties experienced further difficulties in their relationship. They separated permanently on 29 January 2006. On 30 January 2006

the applicant obtained a temporary variation to the domestic violence protection order. The temporary variation contained the following provisions which assumed some importance in argument:

> (4) The [respondent] is not to contact, try to contact or ask someone else to contact the [applicant], directly or indirectly (including by telephone or any other means of communication), except for contact with his child/children as is permitted by the [applicant] in writing, or in accordance with an order made under the Family Law Act.
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> (5) The [respondent] is not to follow or approach the [applicant], except for contact with his child/children as is permitted by the [applicant] in writing, or in accordance with an order made under the Family Law Act.

[5] When the application for the variation was first called in the Magistrates Court, the respondent appeared and said that he intended to defend the proceedings. He said that the allegations of violence against him were groundless. The matter was set down for hearing on 30 June 2006.

[6] On 7 March 2006, without the knowledge of the respondent, the applicant returned with the four children to Christchurch to live. In her affidavit evidence in the Family Court the applicant deposed that she and the children had suffered physical and psychological abuse at the hands of the respondent, and were not able to support themselves financially in Queensland. On arrival in New Zealand, she obtained a temporary protection order from the Family Court against the respondent. The order, which was made final on 29 November 2006, protected both the applicant and her children. The applicant also applied for parenting orders in relation to the couple's two children.

[7] The respondent was served with a copy of the New Zealand parenting orders application in Australia on 26 June 2006. On 30 June 2006 he attended the Magistrates Court in Queensland in relation to the Queensland protection order. As the applicant did not appear, the proceeding was dismissed, with the result that there is no protection order remaining in Queensland.

[8] In July 2006 the respondent contacted the Central Authority in Australia. An application for the return of the children under the Hague Convention was completed

and filed with the Family Court at Christchurch. There was a hearing of that application in the Family Court on 20 September 2006. On 16 October 2006 Judge Strettell released his judgment in which an order for return was made. The Judge allowed seven days for the parties to provide certain undertakings which he considered necessary to provide "a degree of stability pending further consideration of the matter by the Family Court of Australia".

[9] The applicant appealed to the High Court, which dismissed the appeal.

Proceedings before this Court

[10] The applicant seeks leave to appeal against the High Court's judgment. Given the need for urgency in Hague Convention cases, the Court generally hears argument on the leave application and the substantive appeal together in such cases. We adopted that course in the present case.

[11] Despite that, for reasons which we address more fully at [13]-[15] below, the distinction between an application for leave to appeal and an appeal must be maintained.

[12] The applicant raised the following grounds of appeal:

(a) No lawyer was appointed to represent the children;

(b) A proper psychological report under s 133 of the Act was not obtained, as had been directed by the High Court;

(c) The High Court erred in its treatment of certain evidence;

(d) In applying the relevant provisions of the Act (s 106(1)) the High Court failed to consider fundamental principles relating to human rights and fundamental freedoms;

(e) Both Courts below adopted an erroneous approach to custody rights under the Hague Convention. In particular, the applicant argued that the respondent did not have custody rights under the convention at the time of removal, or, in the alternative, was not exercising those rights;

(f) There was an error of approach in relation to the defence of consent to removal;

(g) There was an error of approach in relation to the defence of acquiescence;

(h) There was an error in the application of the grave risk/intolerable situation defence contained in s 106(1)(c) of the Act.

Approach to be applied

[13] Mr Darby presented the applicant's submissions on the question of the approach to be adopted on an application such the present, and also on the first three appeal points. He submitted that appeals from the Family Court to the High Court, and further appeals from the High Court to the Court of Appeal, are by way of re-hearing. He said that an appellate tribunal would adopt the approach set out in *May v May* (1982) 1 NZFLR 165 (CA). Accordingly it would allow an appeal if the appellant could show that the Court below acted on a wrong principle, failed to take account of some relevant matter, took an irrelevant matter into account or was plainly wrong.

[14] That is not, however, the approach that this Court adopts in this type of case. This is a second appeal, and it is only available with leave. As Glazebrook J said for the Court in *Smith v Adam* [2007] NZFLR 447 (at [4]):

> Although leave to appeal to this Court is not now confined to matters of law, leave will only be granted where the appeal raises some question capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay [of] a further appeal. Upon a second appeal this Court is not engaged in the general correction of error: *HJ v Secretary for Justice (as the New Zealand Central Authority on Behalf of TJ)* [2007] NZFLR 195 at para [5] and *White v*

> *Northumberland* [2006] NZFLR 1105 at para [12]. Normally this will mean that there must be a matter of principle before leave is granted: see *SK v KP* [2005] 3 NZLR 590 at para [92] per Glazebrook J.

[15] We turn now to the various grounds of appeal raised. As some reflect the erroneous view of this Court's function just mentioned, they can be dealt with briefly.

No lawyer appointed to represent the children

[16] No application to appoint a lawyer for the children was made to the Family Court. Ms Hart, who became involved only at the High Court stage, did apply to the High Court for such an appointment. She did so at a late stage in the proceedings, after the provision of a psychologist's report to which we will shortly refer.

[17] Panckhurst J declined the application. He said:

> [35] On 27 February 2007 Ms Hart applied to adjourn the appeal hearing; to appoint counsel to represent [the two younger children]; for separate counsel to represent the other two children in [the applicant's] care; and for a direction to:
>
> > appoint and properly brief a suitable specialist to properly assess the impact on the children and the mother of separation of the family, particularly the impact on the children of separation from their primary caregiver and siblings.
>
> An urgent telephone conference was arranged. After hearing brief submissions I declined the various applications. I was not prepared to further adjourn a Hague Convention case, given the need for such cases to be heard promptly. While I was unpersuaded that either a further psychologist's report should be obtained, or that counsel should be appointed, I indicated to Ms Hart that if at the substantive hearing it emerged that the need for either was established, I would reconsider the matter.

[18] In his submissions Mr Darby relied in particular on s 7 of the Act. The relevant part of that provides:

> **7. Lawyer to act for child**
>
> (1) A Court may appoint a lawyer to act for a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act.
>
> (2) However, unless it is satisfied the appointment would serve no useful purpose, the Court must make an appointment under subsection (1) if the proceedings-
>
> (a) involve the role of providing day-to-day care for the child, or contact with the child; and
>
> (b) appear likely to proceed to a hearing.
>
> ….

[19] Mr Darby made two principal submissions:

(a) First, he said that s 7(2) required the appointment of a lawyer for the children in a case such as this.

(b) In the alternative, he said that s 7(1) allowed such an appointment and that one should have been made.

[20] As to the first point, s 7(2) does not on its terms apply to a case such as the present, as Mr Darby seemed inclined to accept at the hearing. Proceedings under the Hague Convention concern the proper forum for the resolution of issues relating to the care of, and contact with, children rather than their substantive resolution. Even in cases where it is argued that a child should not be returned because there is a grave risk that the child will be exposed to physical or psychological harm or placed in an intolerable situation, the object is to determine forum, not the provision of day-to-day care for, or contact with, the child.

[21] As to the alternative argument under s 7(1) we make two points. First, it is difficult to see how this could be a proper appeal point given that no application was made to the Family Court Judge for the appointment of a lawyer for the children. Second, the decision whether or not to appoint a lawyer under s 7(1) requires the exercise of discretion. In the absence of any suggestion that the Judge proceeded on an erroneous view of his powers, it is unlikely that the exercise of such a discretion will raise a point suitable for a second appeal.

[22] In any event, we consider that Panckhurst J was right to refuse the application. The fact that neither the Family Court Judge nor counsel who appeared in the Family Court considered that there was a need for the appointment of counsel for the children is significant, although not determinative.

[23] In addition, as Panckhurst J noted at [40], given the young age of the parties' children (four and a half and two and a half) it is difficult to see what useful purpose could have been served by the appointment of a lawyer for them in these particular proceedings. We accept, as Mr Darby submitted, that the role of lawyer for the child goes beyond simply expressing the child's views. We accept also Mr Darby's point that the paramountcy principle expressed in s 4(1) of the Act has a role to play in the exercise of the discretion under s 106 (see the majority judgment in *Secretary for Justice v HJ* [2007] NZFLR 195 at [47]-[50] (SC)). But these factors, standing alone, do not mean that it was necessary that a lawyer be appointed for these children.

[24] Finally, we agree with the Judge that the appointment of a lawyer for the child would have involved unacceptable delay given the late stage at which the application was made. As the Judge rightly said, he was able to keep the position under review and if, as the case developed, he considered that there was a need for an appointment, he could make one.

No proper psychological report

[25] At the applicant's request, John Hansen J ordered that a psychological report be prepared urgently under s 133 of the Act. The focus of the report was to be:

> [T]he likely impact on all four children and the mother in the event that she is forced to return to Australia with the children, the subject of these proceedings; or, alternatively, if she chooses to stay in New Zealand with the two children of the former relationship and these two children are returned to Australia.

[26] The report was filed on 31 January 2007. In conjunction with her application for the appointment of a lawyer for the children on 27 February 2007, Ms Hart applied for the appointment of a further "suitable specialist". As is apparent from

the extract quoted at [17] above, the Judge declined that application, but said that he would keep the position under review.

[27] Mr Darby argued that Panckhurst J had "failed to recognise the importance of assessing the psychological impact on the children of separation from their mother and/or siblings in the context of returning the children under the Hague Convention and that he erred in refusing a further psychologist's report". He placed considerable weight on Panckhurst J's observation at [38] that "there was probably no need to obtain such a report in the first place." This, Mr Darby argued, amounted to "an improper reversal of the previous decision that a report was necessary to decide the issue of grave risk."

[28] There is nothing in this point. The Judge considered the report. He said that it was of limited assistance, as it was. In the circumstances of this case, the Judge did not see any value in obtaining a further report. There is no point of principle here meriting a second appeal.

Evidence – credibility issues

[29] Two complaints were made in respect of evidentiary points:

(a) First, in dealing with the evidence Panckhurst J failed to take account of s 128 of the Act, which allows the Court to receive "any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law".

(b) Second, Panckhurst J considered that, indirectly at least, the unreliable affidavit evidence of others impacted on the applicant's credibility.

[30] These complaints arose principally from the affidavit evidence of a child advocate in Christchurch. She had deposed that the Queensland police had grave concerns for the applicant and her children and that the Family Team in Christchurch considered the family to be "at high risk given the circumstances outlined by the

[applicant] and the Queensland police". The Family Court Judge had noted that this evidence depended substantially on what the applicant had told the deponent, and that the objective evidence available to him (some of which was from a representative of the Queensland police) did not support the risk assessment. He declined to give weight to it. Panckhurst J noted this, and said that it had an indirect effect on the applicant's credibility in respect of new evidence which she placed before him. That new evidence dealt with matters such as the respondent's behaviour during their relationship and afterwards, particularly in relation to money, and the difficulties that the applicant and the children would face if return was ordered.

[31] The way in which the Family Court Judge dealt with the affidavit evidence in issue cannot be criticised. For his part, Panckhurst J did no more than say that the manner in which that evidence was presented on behalf of the applicant had an indirect bearing on her credibility. Again, that does not raise a point of principle suitable for a second appeal.

Insufficient regard to fundamental rights and freedoms

[32] On her return to New Zealand, the applicant purchased a house with another person. She owns a two-fifths share in the property. It is unclear how she achieved this, given her evidence that one of the reasons that she had to leave Australia was that she had no money. Ms Hart submitted that if the return of the children was ordered the applicant would be forced to sell her home and this would breach ss 53(d) and (e) of the Human Rights Act 1993. Under those provisions, it is unlawful for anyone to deny another the right, or to terminate another's right, to occupy residential accommodation on any of the prohibited grounds of discrimination. The prohibited ground of discrimination upon which Ms Hart relied was that contained in s 21(l) of the Human Rights Act, family status.

[33] This submission is meritless. Unlawful discrimination involves unjustified different treatment for one of the prohibited reasons, in this case family status. There is no basis for alleging unlawful discrimination in the context of the order for the return of the children to Australia under the Hague Convention. If the terms of s 105

of the Act are met, the court must make an order for return unless the abducting parent can satisfy the court that one of the defences in s 106 applies. The order for return concerns simply the forum in which the care and contact issues relating to the couple's children will be resolved. The children may well be able to return to New Zealand within a comparatively short time.

Error in approach to custody rights under the Hague Convention

[34] Under s 105(1)(b) and (c) of the Act a person applying for an order for a child's return must establish that the child's removal was in breach of his or her custody rights and that he or she was exercising those rights at the time of removal. In addition, under s 106(1)(b)(i) the Court has a discretion to refuse to make an order for return if the abducting parent establishes that the parent applying was not exercising custody rights at the time of removal. Ms Hart submitted that the Courts below had erred because when the children were removed, the respondent did not have custody rights in respect of them, or, in the alternative, if he did, he was not exercising those rights at the time.

Did the respondent have custody rights?

[35] In support of her argument that the respondent did not have custody rights in respect of the children Ms Hart relied on the provisions of the varied protection order which we have set out at [4] above. Ms Hart emphasised that, in terms of the varied order, the respondent was able to contact the children only with the consent of the applicant or following an order of the Family Court.

[36] The difficulty with this argument is that, as found by the Courts below, the protection order did not have the effect of removing from the respondent the full bundle of rights associated with a right to custody. Although Ms Hart said that once the protection order was varied the applicant was free to take the children wherever she wished whatever the wishes of the respondent, that is clearly not correct.

[37] Article 5 of the Hague Convention defines "rights of custody" as including "rights relating to the care of the person of the child and, in particular, the right to

determine the child's place of residence". In *Re D (a child) (abduction: rights of custody)* [2007] 1 All ER 783 the House of Lords identified the critical custodial right in this context as being the right to veto or to decide a child's place of residence (especially per Lord Hope of Craighead at [8]-[11] and Baroness Hale of Richmond at [37]-[38]).

[38] As Judge Strettell said, the position under Australian law in relation to custody rights appears to be as follows. Under s 61C(1) of the Family Law Act 1975 (Commonwealth) each of the parents of a child under 18 has parental responsibility for that child. This is, however, subject to any court order (s 61C(3)). "Parental responsibility" is defined in s 61B of the Family Law Act to mean "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children." Finally s 111B(4)(a) provides that, for the purposes of the Hague Convention, "each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force".

[39] While the terms of the varied protection order did limit the respondent's right of access to his children, they did not remove the full bundle of rights and obligations associated with parental responsibility. For example, the obligation to provide financial support for his children, which the applicant said that he did not fulfil, remained. So too did his right to be consulted about the place of residence of his children. In addition, it must be remembered that the domestic violence order was varied temporarily on the application of the applicant. The respondent indicated to the Magistrates Court in Queensland that he intended to oppose the making of a permanent order and a fixture for the contested hearing was made for 30 June 2006. No final order was made as the applicant abandoned the application.

[40] Accordingly this aspect of the case does not raise an issue in respect of which leave should be given.

Was the respondent exercising custody rights at the time of removal?

[41] As to the argument that the respondent was not exercising his parental responsibilities at the time, that is essentially a matter for factual assessment. As Panckhurst J found (at [49]), there was ample evidence to justify the rejection of this argument. There is nothing in this point which requires the granting of a second appeal.

The High Court erred in its approach to the defences of consent and acquiescence

[42] We deal with the submissions in relation to consent and acquiescence together.

[43] Under s 106(1)(b)(ii) the Court may refuse an order for return where the abducting parent establishes that the parent applying "consented to, or later acquiesced in, the removal".

[44] Consent was not raised before the Family Court, but was raised in the High Court. Ms Hart said that she had advanced two propositions in that Court in support of her submission that the respondent had consented to the removal of the children. The first was that the applicant and the respondent had discussed in their counselling sessions what would happen if they were to separate. They had agreed that the applicant would return to New Zealand and that the respondent would also return, but separately. Ms Hart said that this was a prior agreement, sufficient to amount to consent.

[45] The second was that shortly after the couple separated the applicant had a telephone conversation with the respondent in which she told him that if he did not provide some financial support for the children, she would have to return to New Zealand. His response – "fuck off" – amounted, Ms Hart said, to consent.

[46] Panckhurst J addressed these points as follows:

> [53] A consent to the removal of children from one country to another must be real, positive and unequivocal: *In re K (Abduction: Consent)* [1997] 2 FLR 212 per Hale J. The argument advanced by counsel contemplated something in the nature of a constructive consent. Because [the respondent] must have known of his former partner's financial plight, and because he did nothing to alleviate it, he thereby consented to the removal of the children. This process of reasoning presupposes acceptance of the premise that [the applicant] in fact left out of financial necessity, rather than to remove the children from the sphere of their father.
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> [54] In my view the submission is untenable. The characteristics of a consent preclude acceptance of the argument. Consent must be actual, not constructive.

[47] We agree with Ms Hart that a court may, in appropriate circumstances, infer the necessary consent from conduct, as occurs often enough in other contexts. But the evidence must be "clear and cogent": see *Re C (Minors) (Abduction: Consent)* [1996] 3 FCR 222 at 228 (FD). In the present case, the conduct relied upon does not support the inference, particularly when it is viewed against the background of other conduct of the respondent which shows that he did not consent to the removal. An example is his seeking of legal advice in February 2006 as to how he could prevent the applicant from removing the children from Australia.

[48] Ultimately, then, this was a matter for assessment on the evidence as a whole and does not raise an issue appropriate for a second appeal.

[49] The same applies to acquiescence. Ms Hart took us to the evidence in an endeavour to persuade us that a finding of acquiescence should have been made. She argued in particular that the respondent delayed for four and a half months after having learnt of the children's removal before making the application for their return. This, she said, was sufficient to establish acquiescence.

[50] However, no error of approach on the part of the Courts below has been identified and there are concurrent findings of fact. There is nothing here to justify a second appeal.

The High Court erred in its approach to the "grave risk" defence

[51] Section 106(1)(c) allows a Judge to refuse to make an order for return where the abducting parent establishes that there is a "grave risk" that return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation. The defence is not an easy one to make out. As William Young P said, delivering the judgment of this Court in *HJ v The Secretary for Justice (as the New Zealand Authority on behalf of TJ)* [2006] NZFLR 1005:

> [33] The s 106(1)(c) defence is not easy to invoke successfully. This is in part a function of the hurdle provided by the expression "grave risk" and in part because of judicial expectations that, in the normal course of events, the legal systems of other countries will protect children from harm.

[52] Ms Hart argued that, in their assessment of the "grave risk" defence, the Courts below did not take sufficient account of various factors. These included the risks to the children arising from their possible separation from their mother (she might not accompany them to Australia), the risks arising from the financial hardship that the applicant and the children would face if they returned to Australia and the fate of the other two children for whom the applicant was the primary caregiver.

[53] We begin with the proposition that orders for return often, perhaps generally, involve disruption for the child or children involved. It is clear on the authorities that that alone is not a basis for refusing an order.

[54] In this case there is a further element of disruption arising from the fact that the applicant is also the primary caregiver for the two children whose father is in jail. These children cannot be removed from New Zealand as a result of an order of the Family Court, so that if the respondent's children are returned to Australia they will, for a time at least, be separated from their siblings.

[55] While we agree that separation of siblings may, in some circumstances, provide support for an argument that there is a grave risk of psychological harm, or of an intolerable situation, we do not consider that it does so here.

[56] First, the circumstances in which the order was made are relevant. In mid-December 2006, two months after Judge Strettell had delivered his decision, the children's father applied from jail for an order that his children not be removed from New Zealand. The applicant consented to the making of that order. Panckhurst J said:

> [79] I must say I do find it extraordinary that a consent was forthcoming to [the inmate father's] application, yet the application for return made by the father of [the applicant's] two younger children is met with such total opposition. To my mind the consent does have all the hallmarks of a strategy to raise a further impediment to the present Hague Convention order.

We agree with this observation.

[57] Second, we consider it most unlikely that the applicant will not return to Australia with the two children. Her parents, who were living in Queensland, returned to New Zealand early in 2007. While they have some health problems, it seems likely that they will be able to care for the two older children, in the short term at least.

[58] Third, the fact that the two younger children must be returned to Australia does not necessarily mean that the applicant and the children must remain in Australia in the medium or long term. It may be possible, for example, for the care and contact proceedings in Australia to be expedited. If that is not possible, the applicant could apply to the Family Court in Australia for an order allowing her to bring the children back to New Zealand, against an undertaking to return with them at the time of the hearing. On this basis, the applicant and the children may have to remain in Australia for a comparatively brief period in the first instance.

[59] This leaves what is the most difficult issue in the case, and the one which should have been the principal point in the presentation of the leave application, namely the financial position of the applicant and the children while in Australia. This relates to the provision of both benefit assistance and legal aid. The issue is complicated by the fact that the respondent moved from Queensland to New South Wales (Sydney) in October 2006, where he is employed and living with his mother. We do not know to which Australian destination the applicant and the

two children would go, although the respondent clearly contemplates that they would go to Sydney.

[60] We accept that likely financial hardship in the requesting country is a ground on which a court may properly exercise its discretion to refuse an order for return. The decision of the Full Court of the Family Court of Australia in *McDonald v Director-General, Department of Community Services, NSW* (2006) FLC 93-297 provides an example of the relevance of this factor. The question is whether the applicant has established a grave risk of financial hardship if the children are returned to Australia.

[61] The respondent has undertaken that he will provide the airfares for the applicant and the two children to return to Australia. Since 15 January 2007 he has paid child support of $NZ651.40 per month. The applicant has deposed that if she returns with the children to Australia the respondent will be obliged to pay her a total of $229.00 weekly for the support of their two children. The respondent has also said that he will provide a 1989 Ford Fairlane vehicle for the applicant, although we assume that this will be available only if the applicant returns to Sydney, and that he will provide up to $1,200 by way of a bond for a rental property. Finally, in relation to healthcare, the respondent has arranged for the children to be placed on his Medicare card, which will give them access to public health services in Australia.

[62] Then there is the issue of benefits. Panckhurst J considered that the applicant might be able to obtain a parenting benefit in Australia (at [64]). However, Ms Hart and Mr Collin agree that she will not qualify for such a benefit. They differ as to whether she will qualify for some form of emergency benefit (ie, a special benefit or a crisis payment).

[63] On the material available to us, we are uncertain of the position. However, we consider it most unlikely that the Australian authorities will not provide some form of special financial assistance, if the need arises, in respect of children whose return to Australia was sought by the Australian Central Authority.

[64] Panckhurst J discussed the question of the availability of legal aid at [84]-[87]. The Judge noted that there are Hague Convention cases where the returning parent has been denied legal aid (*In the Marriage of CD and JC McOwan* (1993) 17 Fam LR 337), but said that it was "highly unlikely, if not unthinkable" that legal assistance would not be available to the applicant to enable the proper determination of what is in the best interests of the children.

[65] The Judge concluded that there were undoubtedly uncertainties in relation to the applicant's ability to return to Australia and her living circumstances there. He considered that this was to be expected in Hague Convention cases, particularly where parents of modest means were involved. But he was not satisfied that the grave risk test was met.

[66] There is now an additional complication, arising out of the fact that the applicant has obtained a protection order from the New Zealand Family Court. This applies to the applicant and all the children. It was obtained on a "without notice" basis and has now become final. We are unclear as to whether the order has been registered in Australia, but presumably it could be. The order may affect the extent to which the respondent can have access to his children, and make it impossible for the children to live with the respondent's mother in Sydney (given that that is where he lives) unless the applicant consents.

[67] Despite this complicating factor, we can see no proper basis on which we could grant leave to appeal from Panckhurst J's decision on this aspect of the case. Ultimately, the burden was on the applicant to establish a grave risk of an intolerable situation. The hurdle is a high one. Objective information in relation to the applicant's financial position is sparse, and there are some apparent anomalies (for example, the failure to explain how she was able to afford to purchase an interest in a house immediately upon her return to New Zealand).

[68] Further, as we have said, we consider it likely that the applicant will be able to obtain financial support in Australia if that becomes necessary. The initial stay of the applicant and the children in Australia may be brief. If adequate financial assistance is not available, we hope that the Australian courts will facilitate an urgent

hearing of the substantive proceedings or allow the applicant and the children to return to New Zealand on the applicant's undertaking to return with them when required.

Decision

[69] Leave to appeal is declined.

Solicitors:
Parnell Law, Auckland for the Applicant