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IN THE COURT OF APPEAL OF NEW ZEALAND

CA140/04

BETWEEN	H J Appellant
AND	THE SECRETARY FOR JUSTICE (AS THE NEW ZEALAND CENTRAL AUTHORITY ON BEHALF OF T J) Respondent

Hearing: 23 November and 14 December 2005

Court: William Young P, Glazebrook and Panckhurst JJ

Counsel: B V MacLean for Appellant
L de Jong and M J Key for Respondent

Judgment: 11 April 2006

JUDGMENT OF THE COURT

A The appeal is allowed and the order for the return of the children is quashed.

B The application for their return is dismissed.

B There is no order as to costs.

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REASONS

(Given by William Young P)

Introduction

[1] On 16 April 2004 Judge von Dadelszen granted an application by the New Zealand Central Authority (acting on behalf of the father "TJ") for the return of two children (R and J) to Australia under the Guardianship Amendment Act 1991 ("the 1991 Act"). An appeal by the mother ("HJ") was dismissed by Ellen France J on 15 June 2004.

[2] On 18 November 2004, this Court granted leave to appeal on the following three questions:

(a) Given that the purpose of [the 1991 Act] was to implement the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"), should the discretion under s 13(1)(a) of the [1991 Act] be interpreted in light of the Convention?

(b) If so, does such an interpretation, in circumstances where s 13(1)(a) applies, require or effectively require the Court to refuse to make an order that the child be returned to the country from which he or she was removed?

(c) Is *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 good law?

As will become apparent, some reformulation and development of these questions has been necessary.

Background

The parties

[3] HJ is a New Zealand citizen. In 1998 she married RJ. She and RJ, at the time, were living in Queensland. In late 1998, HJ entered into a sexual relationship with TJ (who is RJ's son).

[4] TJ is an Australian citizen who was born and brought up in Australia where he still resides.

[5] The relationship between HJ and TJ would appear to have been intermittent. R was born on 2 May 1999 and J was born on 29 May 2000. HJ suggested in an affidavit filed in this Court that TJ might not be the father of R. Paternity, however, was not disputed in the Courts below and we propose to proceed on the basis that TJ is the father of both children.

TJ's violent behaviour

[6] HJ's evidence was broadly to the effect that TJ tended to get angry and, when angry, was threatening and often damaged property. She alleged that on one occasion TJ threw hot coffee at her (in front of the children) and that he had once tied up R with a clothes line. As a result of TJ's violence against HJ, two protection orders were obtained, one in Proserpine, Queensland in October 2000 and another in Wagga Wagga, New South Wales in January 2001. HJ maintained, however, that that the Australian legal system was unable or unwilling to protect her and the children. In support of this contention she alleged that there had been occasions when the Australian police had not acted on complaints that TJ had breached the protection orders. It is clear, however, that on at least one occasion (in September 2001) TJ was arrested following breach of a protection order and her contention that the police had not acted on her complaints was never really particularised.

[7] The Judge found that "during the relationship there was domestic violence instigated by the father" (at [7]), a finding which was plainly open to him.

Events leading to the present proceedings

[8] HJ took the children from Australia to New Zealand in February 2002. In January 2003, TJ applied successfully to the Federal Magistrates Court for an information order to locate the children. He also applied for access. Despite the making of the information order, he was initially unsuccessful in locating the whereabouts of the children. His application for access was transferred to the Family

Court of Australia and was live at the time of the proceedings in New Zealand in the Family Court and High Court and when this Court granted leave to appeal. It has however subsequently been dismissed on the non-appearance of TJ.

[9] HJ did not, in any sense, go to ground in New Zealand and in particular, she did not live a life of concealment. If TJ had made inquiries of her family and particularly her brother, he would presumably have been able to make at least indirect contact with HJ and perhaps ascertain where she was (although probably only in terms of general locality). As it turned out, he became aware that the children were in New Zealand on or about 14 May 2003 when HJ's solicitors contacted his solicitors in respect of proceedings that HJ had brought in New Zealand for custody and protection.

[10] In October 2003 TJ approached the Australian Central Authority under the Convention. The present proceedings were commenced in December 2003, that is nearly two years after the children were removed from Australia to New Zealand.

The statutory framework – an overview

[11] The application for the order for the children to be returned was brought under the 1991 Act. That Act has now been repealed and replaced by the Care of Children Act 2004 ("the 2004 Act"), effective from 1 July 2005. Counsel initially took the view that this case fell to be determined under the 1991 Act. We do not regard this as correct but it is of no moment because the provisions in the 2004 Act which correspond to the relevant provisions of the 1991 Act are to the same effect, although not in precisely identical terms. For ease of future reference, we will discuss the present case by reference to the relevant provisions of the 2004 Act rather than the 1991 Act and as if those provisions were in force at all relevant times. We note that ss 12 and 13 of the 1991 Act correspond to ss 105 and 106 of the 2004 Act.

[12] In the Family Court the Judge found that the children were wrongfully removed to New Zealand. That aspect of his decision is no longer in issue (as leave to appeal in respect of it was declined). That finding means that there was

jurisdiction under what is now s 105(2) of the 2004 Act to order the return of the children to Australia. That subsection provides:

> **105 Application to Court for return of child abducted to New Zealand**
> …
>
> (2) Subject to section 106, a Court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—
>
> (a) an application under subsection (1) is made to the Court; and
>
> (b) the Court is satisfied that the grounds of the application are made out.

[13] Section 106 relevantly provides:

> **106 Grounds for refusal of order for return of child**
>
> (1) If an application under section 105(1) is made 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 section 104(2) 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
> …
>
> (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
> …
>
> (e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

[14] Sections 105 and 106 of the 2004 Act implement arts 12 and 13 of the Hague Convention which provide:

> **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.

[15] It is also necessary to refer to art 18 of the Convention which provides:

Article 18

The provisions of this Chapter [which include arts 12 and 13] do not limit the power of a judicial or administrative authority to order the return of the child at any time.

The decision of Judge von Dadelszen

[16] The Judge found that proceedings on behalf of TJ were brought more than one year after the wrongful removal of the children from Australia and the children

are settled in their new environment. The statutory preconditions for the s 106(1)(a) defence were thus satisfied.

[17] In exercising what he considered to be his discretion to order the return of the children, the Judge said this:

> [32] In this case it is very tempting to exercise that discretion in the mother's favour. The children are well settled in New Zealand after what must have been a difficult time when they were in Australia, largely, it appears, as a result of their father's behaviour.
>
> [33] However, it cannot be right to permit the integrity of the Convention to be undermined in circumstances where a defence is only available as a result of this mother's own actions.
>
> [34] The mother left Australia without advising the children's father. She failed to let him know where she was for more than a year after leaving. As I hope has been made clear, I am not satisfied that it was reasonable for her to expect the father to find out the children's whereabouts through her brother.

[18] The Judge addressed the "grave risk" exception under s 106(1)(c) in the following way:

> [40] The latest High Court decision on this ground is now *KS v LS* which makes it clear that there is a heavy onus on a parent resisting a return application; see paragraph [79].
>
> [41] At the heart of the Court's determination of this particular issue is the policy consideration that the appropriate forum for resolution is the country of the child's habitual residence; see … paragraph [104] of *KS v LS*.
>
> [42] As the main basis for the mother's defence under this ground centres on the issue of domestic violence, it is appropriate that I quote from paragraph [105] of *KS v LS*:
>
> > [105] Such an approach [the policy consideration] is discernible from an appellate division of the Family Court of Australia in *Murray v Director, Family Services ACT* (1993) 16 Fam LR 982 at p 1002, where Nicholson CJ and Fogarty J said:
> >
> > > "It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand courts or that relevant New Zealand authorities would not enforce protection orders which are made by the courts."
>
> [43] The main thrust of the mother's defence here is that the Australian Courts failed to keep her safe. It is certainly true that she obtained the equivalent of a protection order in three States. However, the court in Australia has yet to rule on the father's contact application. It would

> presumptuous indeed for this Court to suggest that the Australian proceedings should, in effect, be stymied by my deciding that the children should not be returned. That would be tantamount to my saying that the Family Court of Australia is not able to give such protection to these children as is appropriate having regarding to the evidence which will be before it.

[19] Accordingly, the Judge granted the application and ordered the return of the children.

The judgment of Ellen France J

[20] In her judgment Ellen France J agreed with and adopted the approach taken by Judge von Dadelszen.

[21] She took the view that the s 106(1)(a) discretion had to be exercised in the context of the objectives of the Convention.

[22] On the "grave risk" exception, Ellen France J again agreed with the approach taken by Judge von Dadelszen and in particular she referred to and relied on *KS v LS* [2003] 3 NZLR 837. In doing so she would appear to have preferred the approach taken in that case to that taken in *El Sayed v Secretary for Justice* [2003] 1 NZLR 349.

Our approach to the appeal

[23] We propose to discuss the case by reference to the following headings:

(a) Given that the purpose of the 2004 Act was to implement the Convention, should the discretion under s 106(1)(a) of the 2004 Act be interpreted in light of the Convention?

(b) Were Judge von Dadelszen and Ellen France J wrong in applying *KS v LS* [2003] 3 NZLR 837?

(c) Does a Convention informed approach to s 106(1)(a) require the dismissal of the application in this case?

(d) What are the relevant discretionary considerations in determining whether to return a child when the s 106(1)(a) defence is made out?

(e) Has it been shown that the Family Court exercised its discretion wrongly?

(f) The appropriate orders.

These headings involve both reformulation and development (some significant) of the questions identified when leave to appeal was granted. The reasons for this reformulation and development will become apparent as we discuss the issues raised by the appeal.

Given that the purpose of the 2004 Act was to implement the Convention should the discretion under s 106(1)(a) of the Act be interpreted in light of the Convention?

[24] The answer to this question is clearly "yes".

Were Judge von Dadelszen and Ellen France J wrong in applying *KS v LS* [2003] 3 NZLR 837?

The issue

[25] This heading involves a reformulation of the third issue in respect of which leave to appeal was granted: "Is *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 good law?" Both the issue as originally expressed and our reformulated question relate to the scope of the s 106(1)(c) defence.

[26] The traditional approach to the s 106(1)(c) defence has been to confine it to risks associated with the return to the "home" country and to evaluate attempts to invoke this defence against an expectation that the legal system of the "home" country can be expected to protect the children (and respondent too if necessary).

[27] The relevant passage from *El Sayed* which is relied upon by counsel for HJ is at [57] - [61]:

> [57] A particular limitation on [s 106(1)(c)] which appears in some Australasian decisions – that the "grave risk of harm" must arise out of the child's return to a country – appears to us (with respect) to misread both the Convention and the statute, in relation to that specific defence.
>
> [58] First, the explanatory note to the Convention (Perez–Vera Report, at para 116) indicates quite clearly that the subsection *was* to be addressed to harm which is contrary to the interests of the child. Whilst the exception is not to be invoked "if the return of the child might harm its economic or educational prospects . . . the exceptions are *to receive a wide interpretation*" (emphasis added).
>
> [59] In this respect, the principle of construction is that Courts should promote "the objective of uniformity in [the] interpretation and application [of the Convention] in the courts of the states which are parties to the Convention" (*Ulster–Swift Ltd v Taunton Meat Haulage Ltd* [1977] 1 WLR 625 at p 628 per Megaw LJ). And Courts should aim for an approach "which is broadly in line with the practice of public international law" (*Fothergill v Monarch Airlines Ltd* [1981] AC 251 at p 290 per Lord Scarman). The antipodean narrowing of the section – to the extent it has occurred – is out of line with international usage.
>
> [60] Secondly, the narrow restriction to "a country" is redundant in face of the exception in [s 106(1)(e)] (which replicates art 20 of the Convention). It is [s 106(1)(e)] which is directed to harm arising from the child's return to a particular country. As the Perez–Vera Report plainly indicates (note 2, at pp 433 – 434), this formulation was a distinct compromise between a general "public policy" exception (which could have potentially wrecked the major premise of the Convention by allowing contracting states to approve or disapprove the family law regime of another state) and the narrower formulation in [s 106(1)(e)].
>
> [61] If this analysis is correct, the jurisprudence of [s 106] is straightforward – and entirely orthodox. The Convention (Act) is a general rule and exception instrument. The [s 106(1)(c)] exception requires: (a) the identification of specific harm to the child; (b) of a requisite character; (c) that harm must be demonstrated to be of a grave character; (d) by clear and compelling evidence; and (e) if harm of that kind is established, the trial Court then has a wide discretion as to how the return dilemma is to be addressed.

[28] *El Sayed* has been criticised in *KS v LS* [2003] 3 NZLR 837 where Priestley and Frater JJ expressed the following views:

> [142] There are, with respect, three demonstrable and basic flaws with this approach. The first is that it totally ignores the approach promulgated by a Full Bench of the Court of Appeal in *A v Central Authority* which in the normal course of events one would expect to be binding on the High Court.

[143] The second flaw is the assumption that some Australasian decisions appear to have ". . . misread both the Convention and the statute . . .". In fact, New Zealand decisions have been consistent with English decisions.

[144] The third and most fundamental flaw, however, is a misreading of the Pérez–Vera Report by suggesting that art 13(b) of the convention was a compromise which was not intended to have a narrow formulation.

[145] With reference to the negotiation history of the convention the Court in *El Sayed* said at para [52]:

> [52] In fairness, the drafters of the Convention were not oblivious to this kind of problem [that is, the great difficulties faced by abused women seeking to return to live with children in their country of origin where family support is available]. What eventually became the New Zealand [s 106(1)(c)] evolved as what Elisa Perez–Vera (who provided the (authorised) explanatory report which is attached to the official copy of the Convention) has described as a 'fragile compromise' (see Actes et Documents de la Quatorzième Session [1982] vol III, 426 at p 461).

[146] The paragraph (in English) in the Pérez–Vera Report discussing the "fragile compromise" referred to is:

> 116. The exceptions contained in b deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests, as that phrase is understood in this sub–paragraph. Each of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, a contrario, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects, that the exceptions are to receive a wide interpretation.

[147] Far from supporting the proposition that art 13(b) of the convention should receive a wide interpretation, the paragraph supports the exact opposite. It cannot be inferred, says para 116, that the exceptions are to receive a wide interpretation.

[148] The Court at para [58] of the *El Sayed* decision has cited para 116 for the contrary proposition and has emphasised the error in italics. The English translation of para 116 may be somewhat clumsy but there is absolutely no mistaking the report in the French version:

> 116. . . . Chacun des terms employés dans cette disposition reflète un délicat compromis atteint au cours des travaux de la Commission Spéciale et qui s'est maintenu inchangé; en conséquence, *on ne peut pas déduire*, a contrario, *des interprétations extensive* . . .. (Emphasis added.)

[149] In this Court's judgment, the Court in *El Sayed*, although undoubtedly correct in its decision to allow the appeal in an appalling case of

> domestic abuse, has incorrectly put a gloss on [s 106(1)(c)] grounds for reasons which are not persuasive and which are, with respect, wrong.
>
> [150] This is in any event a situation where the Court of Appeal in *A v Central Authority* has clearly set out the relevant interpretation and policy. The Court of Appeal's approach must continue to be binding on the New Zealand Family Court unless and until there is a contrary decision from the Court of Appeal.

[29] As Priestley and Frater JJ recognised in *KS v LS*, the leading authority in New Zealand is the decision of this Court in *A v Central Authority for New Zealand* [1996] 2 NZLR 517 at 522 - 524:

> It is said for the appellant that Fraser J adopted an unduly narrow approach to the nature of the appropriate inquiry 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 S to Denmark.
>
> 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.
>
> Fraser J did not apply a narrow view to the Act or the convention. The New Zealand case 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 art 13, our [s 106(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.
>
> 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.

The approach in the Family Court and High Court

[30] In the Family Court and the High Court the Judges applied the approach taken in *KS v LS*. In particular, Judge von Dadelszen took the view that HJ was subject to a "heavy onus" in terms of making out the s 106(1)(c) defence, see [40] of his judgment.

Discussion

[31] On the whole, we generally prefer the approach taken in *KS v LS* to that set out in the passage which we have cited from *El Sayed* at [26] above:

(a) Section 106(1)(c) makes it clear that the grave risk invoked must be associated with the "return" of the child to the "home" country. So [57] of *El Sayed*, if construed literally, is wrong. In the course of the hearing before us, there was debate as to what was meant by this paragraph. It may have been that s 106(1)(c) can be invoked even if the country to which the children would otherwise be returned has a perfectly acceptable legal system. We have no difficulty with that proposition.

(b) While it is true that s 106(1)(c) can be invoked in circumstances where the legal system of the country to which the children would otherwise be returned is unexceptionable, the ability of the Courts of that country to provide such protection is likely to be a highly relevant consideration.

(c) Contrary to what was said in [58] of *El Sayed*, the Perez-Vera Report does not indicate that "exceptions are to receive a wide interpretation". This point was made perfectly clear in *KS v LS*.

[32] That said, it is right to recognise that the difference between the *KS v LS* and *El Sayed* approaches may be little more than semantic. We recognise that the integrity of the Convention and its underlying policies may (and usually will) be important considerations when a discretionary defence is invoked. As well, the s 106 exceptions are defined so narrowly that there are comparatively few cases in which they apply. To that extent we agree with *KS v LS*. But there is no requirement to approach in a presumptive way the interpretative, fact finding and evaluative exercises involved when one or more of the exceptions is invoked, cf *DP v The Commonwealth Central Authority* (2001) 180 ALR 402. So to that extent we agree with *El Sayed*.

[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. In this context we think that references by Judge von Dadelszen to "heavy onus" (and we note that he did not say "heavy onus of proof") should simply be construed as a statement of the obvious – that the defence in question was, by its nature, difficult to make out.

[34] So we see no error by Judge von Dadelszen or Ellen France J in terms of their approach to the s 106(1)(c) defence.

Does a Convention informed approach to s 106(1)(a) require the dismissal of the application in this case?

How the issue arises

[35] This is our reformulation of the first of the issues in respect of which the Court granted leave to appeal. This issue arises primarily because the drafting of our legislation differs appreciably from the way in which the Convention is expressed.

[36] The first paragraph of art 12 addresses only the return of children where proceedings are commenced within one year of wrongful removal or retention. The second paragraph of art 12 explicitly provides for orders for the return of children in proceedings commenced after the expiration of the relevant one year period only if it

has not been "demonstrated that the child is now settled in its new environment". Article 12 does not, therefore, expressly address the circumstances (if any) in which the return of "settled children" should be ordered if relevant proceedings are commenced after the expiration of the relevant one year period. Further, it is not self-evidently clear that art 18 should be read as supplementing art 12.

[37] On the other hand, on a plain words approach to s 106(1)(a) of the 2004 Act, the combination of settlement in the new environment and expiry of a year since wrongful removal amounts only to a discretionary defence.

[38] Leave was granted in respect of this point because the Court which considered the leave application saw it as arguable that a Convention informed approach to s 106(1)(a) required the dismissal of the application in this case.

The authorities

[39] Elisa Pérez-Vera, in "The Explanatory Report to the Convention, on the Civil Aspects of International Child Abduction" (Acts and Documents of the 14th Session, Vol III, 1982) dealt with articles 12 and 18 together, "since they complement each other to a certain extent" ([106]). She went on:

> 107 In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, *it is clear that after a child has become settled in its new environment, its return should only take place after an examination of the merits of the custody rights exercised over it – something which is outside the scope of the Convention*. …
>
> …
>
> 109 The second paragraph answered to the need, felt strongly throughout the preliminary proceedings, to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that "the child is now settled in its new environment". The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling on the abductor or upon the person who opposes the return of the child, while at the same time preserving the contingent discretionary power of the internal authorities in this regard.

…

> 112 Finally, *article 18* indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision, which was drafted on the basis of article 15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, i.e. where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment. (footnotes omitted)

[40] This is also the position taken by Paul Beaumont and Peter McEleavy *in The Hague Convention on International Child Abduction* (Oxford University Press, 1999) at 204 where they state:

> Of greater import is the absence of any discretion to make a return order where the judicial or administrative authorities have found the child to be settled in its new environment. That no residual power of return is specified within the Article could be regarded as a recognition of the dangers which might arise in uprooting a child for a second time, albeit in pursuance of a court order.

[41] Substantial judicial support for the view that the Convention does not envisage the return of a child settled in the new environment in proceedings commenced after the relevant one year period is provided by the judgment of Kay J in *State Central Authority v Ayob* (1997) 21 Fam LR 567, a view which he has developed extra-judicially in his article "The Hague Convention – order or chaos?" (2005) 19 Australian Journal of Family Law 245. To the same effect is the judgment of Singer J in *Re C* [2004] EWHC 1245 (Fam). The latter judgment, however, was taken to the Court of Appeal and reversed, see *Cannon v Cannon* [2005] 1 WLR 32.

[42] The primary judgment in the Court of Appeal in *Cannon* was delivered by Thorpe LJ. He referred to the authorities from England and Wales, Scotland, the United States of America, Ireland and Australia. Thorpe LJ noted that Kay J's approach in *Ayob* does not necessarily represent the state of the law in Australia given the decision of the full court of the Family Court in *Director General, Department of Community Services v M and C* (1998) 24 Fam LR 178 at [95] – [98]. Thorpe LJ concluded his survey of the international authorities by saying (at [48]):

> [48] In summary it seems plain to me that whatever may have been the drafting intention and whatever may be the academic criticism, the global judicial community in the main construes article 18 to confer upon the court a discretion nevertheless to order return in a case where the defendant has established both that the proceedings were commenced more than twelve months after the abduction and that the child is settled in a new environment.

He then concluded at [50]:

> Even if settlement is established on the facts the court retains a residual discretion to order a return under the Convention. The discretion is specifically conferred by article 18. But for article 18 I would have been inclined to have infer the existence of a discretion under article 12 … .

Discussion

[43] We see the clear trend of international judicial authority as significant. As this Court noted in *Dellabarca v Christie* [1999] 2 NZLR 548 at 551, at 100, the "Hague Convention is … designed to operate on a uniform basis between the 50 or more parties to it." We also regard the approach taken in *Cannon* as consistent with the Convention. To confer an absolute defence on abducting parents who conceal the whereabouts of children for long enough to be able to invoke s 106(1)(a) would encourage abduction and concealment. As well, we can hardly ignore the way in which s 106(1)(a) of the 2004 Act is expressed. The legislation gives the Court a discretion in a case such as this and it would be a strong step for this Court to say that such discretion may not be exercised in favour of an order for the return of a child in respect of whom the defence has been made out.

The follow up issue

[44] In the course of the first hearing of this appeal Mr MacLean for HJ sought to expand the ground of appeal for which leave was granted by arguing that the way in which the Judge exercised his discretion was inappropriate because he treated the considerations to which he referred in [33] of his judgment (see [17] above) as trumping all other considerations. This is, in essence, a variant of the issue we have just been discussing and so intimately tied up with it that we think that we have no practical choice but to address it, as we do in the succeeding sections of this judgment.

What are the relevant discretionary considerations in determining whether to return a child when the s 106(1)(a) defence is made out?

The problem

[45] Applications for the return of children are often made after the expiry of a year from the date of wrongful removal or retention. In such a case the abducting parent will often be able to argue plausibly that the child has become settled in his or her new environment. Although the better view is that there remains a discretion to order the return of the child, the language of the Convention itself does not suggest that such return ought to be anything like automatic. On the other hand, if abducting parents are permitted to rely successfully on s 106(1)(a), this will tend to reward perhaps the worst abductors, namely those who kidnap children and disappear, and thus more generally serve to encourage the abduction of children. So there is a real problem as to how the s 106(1)(a) defence should operate.

[46] There are two aspects to the problem: the first relates to the criteria by which the courts determine the settlement issue and the second relates to the way in which the discretion under s 106(1)(a) is exercised.

The authorities on settlement

[47] It will be recalled that Judge von Dadelszen found that the children were settled in their new environment and that this aspect of his judgment is not challenged. Nonetheless, it is not possible to discuss the problem to which we have referred without discussing what constitutes settlement for these purposes, a point on which there has been some difference of approach between Australian and English courts.

[48] For the predominant English approach it is sufficient, at this point, to refer to the decision of Bracewell J in *Re N (Minors) (Abduction)* [1991] 1 FLR 413 at 418:

> [W]hat is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the mother can establish the degree of settlement which is more than mere adjustment to surroundings. I find that … the word "settled" in this context has two constituents. First, it involves a physical element of

> relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability.

[49] The corresponding approach of the Australian courts issue has varied. Initially the approach favoured by Bracewell J was adopted, see *Graziano v Daniels* (1991) 14 Fam LR 697. But the current position is as stated by the Family Court of Australia in *Townsend v Director-General, Department of Families, Youth and Community Care* [1999] FamCA 285 where Ellis ACJ and Chisholm J gave the following reasons why the Bracewell J test was no longer the law of Australia:

> [31] In the present appeal, both parties accepted that the word "settled" should be given its ordinary meaning. …
>
> …
>
> [33] …[T]he notion that the abductor "must establish the degree of settlement which is more than mere adjustment to surroundings" suggests that there are *degrees* of settlement, only some of which satisfy the legislative requirement. It thereby suggests a more exacting test than the regulation actually requires. It may also be taken to imply that matters which would demonstrate adjustment to the environment are somehow irrelevant or to be discounted. The suggested contrast with "mere adjustment to surroundings" thus tends in our view to complicate the issue and distract the court from the task of determining whether the child is settled in his or her new environment.
>
> [34] Secondly, it could be misleading to say that "settled" has two constituent elements, one physical and one emotional. While the various matters mentioned in the quoted passages are undoubtedly relevant, the analysis of the term into those two distinct components is unhelpful in our view. There are numerous ways in which the various relevant matters could be categorised. One might, for example, include "educational" as a separate category. The two-component categorisation adopted in *Graziano* might lead trial judges to approach the task in a way different from that required by the words of the Act. It could, especially in finely-balanced cases, affect the weight to be attached to various matters.
>
> [35] In our view, therefore, insofar as *Graziano* suggests that the test for whether a child is "settled in his or her new environment" requires a degree of settlement which is more than mere adjustment to surroundings, or that the word "settled" has two constituent elements, a physical element and an emotional constituent, it represents a gloss on the legislation and should not be regarded as accurately stating the law.

[50] An abducting parent who has been on the run with the child, perhaps living under a false name in the new country, will not find it easy to establish that the child was settled in his or her new environment. The problems the abducting parent might

face in this regard are illustrated by the remarks of Wilson J in *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433 at 441:

> The mother might or might not have demonstrated that the children were now settled in their new environment. The proposition is harder to demonstrate than at first appears. In *Re S (A minor) (Abduction)* [1991] 2 FLR 1, 24C, Purchas LJ described what was required as a long-term settled position; and in *Re N (Minors) (Abduction)* [1991] 1 FLR 413, 418C, Bracewell J observed that the position had to be as permanent as anything in life could be said to be permanent. Whether a Danish mother who has been present with the children for a year only because it has been a good hiding-place and who faces likely extradition proceedings could demonstrate the children's settlement in England within the meaning of those authorities is doubtful.

[51] Sometimes courts have gone further and held that "time in hiding" should be ignored in determining settlement. An example of this approach is provided by the judgment of Bracewell J in In *Re H (Abduction: Child of Sixteen)* [2000] 2 FLR 51 at 54:

> It is the case, looking at the relative dates, that these proceedings were commenced after the expiration of the period of one year from the date of removal. It is, in my judgment, necessary to consider why the proceedings were so delayed. That, in my opinion, is relevant to the question of settlement because it was made plain in the case of *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433, 441 that time in hiding cannot go to establish settlement and it is not good law for the abducting parent to be able to say 'well, I have managed to evade the wronged parent; I have managed to hide my address and whereabouts of the children and I am going to rely on that in advance of the argument that the children have been so long in the jurisdiction that they have now settled in that environment and the court should exercise a judgment not to return them to the original jurisdiction'. Further, in that context it is relevant to consider when the father knew of the whereabouts of the children.
>
> I am satisfied that the father first knew of the children's whereabouts in December 1998 when he received a letter from K. Even if the mother wrote in May 1998 and whether or not the father received such a letter, it does not, in my judgment, affect this aspect of the case because the mother did not set out her address and indicated that she would be staying in England for at least a few months. At that date, on any view of the matter, the mother was making representations which did not constitute a determination to remain permanently in this jurisdiction. It was in fact misleading as far as the father was concerned, because I am satisfied that when the mother wrongfully removed the children she intended to stay permanently within this jurisdiction but had no intention of so informing the father. The mother in effect was playing ducks and drakes with the father. She did not disclose her address and she did not inform the school in Australia that she was removing the children. When K did inform the father of the address shortly thereafter there was a removal to another address, and plainly, on the totality of the evidence, the mother was unwilling to have any meaningful contact with the

> father or to give him any information which might assist him to take any proceedings in relation to the children. Having regard to the fact, as I find, that the father did not know the whereabouts of the children until December 1998, it follows that within 12 months of that time he did in fact bring proceedings. That is a relevant matter in considering whether or not the children had settled. I find that the mother cannot, in the circumstances of this case, rely upon the settlement of the children in this jurisdiction.

[52] In the United States an "equitable tolling" approach (broadly similar to that applied by Bracewell J in *Re H*) has been adopted. An example is provided *Furnes v Reeves* 362 F 3d 702 (11th Circuit, 2004). There the child had been abducted by the mother in May 2001, was finally located by the father in March 2002, and the application was filed in November 2002. The Court concluded that time had begun to run in March 2002, so that the application was filed within one year:

> We agree with the district court that equitable tolling may apply to ICARA [International Child Abduction Remedies Act 1988] petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking return. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp.2d 1347,1362-63 (M.D.Fla. 2002) (holding that equitable tolling applied to ICARA petitions because otherwise "a parent who abducts and conceals children for more than one year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available"); see *also Ellis v. General Motors Acceptance Corp*., 160 F.3d 703, 706 (11th Cir. 1998) ("Unless Congress states otherwise, equitable tolling should be read into every federal statute of limitations."); *Young v. United States*, 535 U.S. 43, 122 S. Ct. 1036, 1040 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.") (citations and internal quotation marks omitted). Accordingly, we conclude that the one-year period of limitations began from the date that Plaintiff F. confirmed J.'s location in the United States, in March 2002 at the earliest. See *Bocquet v. Ouzid*, 225 F.Supp.2d 1337, 1348 (S.D. Fla. 2002) (concluding in ICARA case that one-year limitation period did not begin until date petitioner confirmed the child's residence in the United States).

[53] We are not attracted by the equitable tolling approach (and thus equally not attracted to an absolute rule that time spent in hiding does not count). We do not see the s 106(1)(a) defence as being one of limitation. Rather the defence is one of substance, a point which is quite apparent from Pérez-Vera report.

[54] The latest word on the effect of concealment on determining settlement comes from Thorpe LJ in *Cannon*:

> [49] I reject Miss Ball's submission that Article 12(2) was drafted specifically, if not exclusively, to deal with concealment cases and thus

inferentially did not intend judges to use the fact of concealment to override the provisions of Article 12(2). In my experience there have been many cases where the Article 12(2) time limit has been breached without any acquiescence on the part of the plaintiff or concealment on the part of the defendant. Many potential plaintiffs are entirely ignorant of the existence of the Convention. They may be unable to afford legal advice. They may seek the aid of local lawyers who are incompetent, slothful or generally unfamiliar with remedies in this specialist field. Accident or illness may disrupt the pursuit of the Convention's remedies. Furthermore there are many jurisdictions without fully effective Central Authorities. Not all Central Authorities are as experienced, well resourced and effective as the Central Authorities of the three jurisdictions of the United Kingdom.

[50] There must be at least three categories of case in which the passage of more than twelve months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating, for whatever reason, a delayed reaction, short of acquiescence, on the part of the left behind parent. In that category of case the court must weigh whether or not the child is settled and whether nevertheless to order return having regard to all the circumstances, including the extent of the plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant beside the wrongful removal or retention itself.

[51] In other cases concealment or other subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers Article 12(2). In those cases I would not support a tolling rule that the period gained by concealment should be disregarded and therefore subtracted from the total period of delay in order to ascertain whether or not the twelve-month mark has been exceeded. That seems to me to be too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome.

[53] In his skeleton argument for the hearing below Mr Nicholls offered this conclusion: -

> Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return.

[53] I would support that conclusion. A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay. There are two factors that I wish to emphasise. One relates to the nature of the concealment. The other relates to the impact of concealment on settlement.

[54] Concealment or subterfuge in themselves have many guises and degrees of turpitude. Abduction is itself a wrongful act, in that it breaches rights of custody, but the degree of wrong will vary from case to case. Furthermore abduction may also be a criminal offence in the jurisdiction where it occurred. The abductor may have been prosecuted, convicted, and even sentenced in absentia. There may be an international arrest warrant passed to Interpol to execute either in respect of a conviction and sentence.

The abductor may have entered the jurisdiction of flight without right of entry or special leave. The abductor may therefore be, or may rapidly become, an illegal immigrant.

[55] At this point I would draw a parallel between an assertion that a child has become settled in a new environment and our case law regarding the acquisition of habitual residence. There is obvious common ground between proving that a child is settled in a new environment and proving the acquisition of an habitual residence in a new environment. The decision of Sir George Baker P in *Puttick v. Attorney General* [1980] Fam 1 clearly establishes that a fugitive from foreign justice will not acquire habitual residence in this jurisdiction simply by reliance on a temporal period during which the claimant has outwitted authority.

[56] This brings me to the second factor namely the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest.

[57] This consideration amongst others compels me to differ from the opinion of the Full Court in Australia rejecting the previous acknowledgment that there were two constituent elements of settlement, namely a physical element and an emotional element. To consider only the physical element is to ignore the emotional and psychological elements which in combination comprise the whole child. A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge. It is in those senses that Mr Nicholls' proposition holds good.

[58] There will often be a tension between the degree of the abductor's turpitude and the extent to which the twelve-month period has been exceeded. Obviously the present case illustrates the possibility that the considerable turpitude of the mother's conduct will be outweighed by the quality of the false environment and the years of history that it has achieved. It is of course an injustice to the deprived father that the longer the deprivation extends the less his prospects of achieving a return. The other side of the same coin is that the longer the mother persists in her deceit the more likely she is to hold her advantage. Not only does she increase her chances of resisting an application for a return order but she also complicates the process of reintroducing the father into the child's life and reduces the prospects of ever restoring the relationship that might have been between father and daughter but for the lost years.

[59] The third category of case might be termed manipulative delay, by which I mean conduct on the part of the defendant which has the intention and effect of delaying the issue of proceedings over the twelve-month limit. An instance is the Canadian case of *Lozinska v Bielwaski* [1998] 56 OTC 59. In ordering the return of the child the court held that the father had engineered the delay in the proceedings in order to invoke Article 12(2). The court accordingly ruled he could not take advantage of the delay he had created. In this category of case the rejection of the defence comes closer to the application of a principle of disregard than to arriving at the same result by a broad and purposive construction of the asserted settlement. Such an

> approach is consistent with that taken to a defence under Article 13(b): an abducting primary carer cannot create a defence by relying on circumstances that flow from his or her refusal to return with the abducted child: see *Re C (A Minor) (Abduction)* [1989] 1 FLR 403.

[55] There is much more that could be said on the subject of settlement, see for instance Dicey & Morris *The Conflict of Laws* (13th ed, Sweet & Maxwell, London) at [19-096] and Beaumont and McEleavy, supra. But given that this issue is primarily of only contextual relevance in the present case, it is sufficient for us to say that we consider the approach taken by Thorpe LJ to be appropriate and one which ought to be followed in New Zealand. This is effectively for the reasons which he has given.

The s 106(1)(a) discretion

[56] It will be recalled that in *Cannon* Thorpe LJ described the discretion to return a child in circumstance in which s 106(1)(a) applies as being "residual" and saw it as primarily based on art 18 of the Convention. It will likewise be recalled that this provides:

> The provisions of this Chapter [which includes arts 12 and 13] do not limit the power of a judicial or administrative authority to order the return of the child at any time.

[57] Once the discretion is seen in this light, it is perfectly clear that there is no scope for a presumption in favour of return when the s 106(1)(a) defence is made out. Indeed, it may even be that the reverse applies, that cases in which an order for return will be made will be the exception and not the rule and that the applicant seeking such an order should be expected to show good reason why the discretion should be exercised in his or her favour. Once an application for return falls to be determined on the basis of art 18, it might be thought that the best interests of the child are at least a relevant and perhaps a controlling consideration

Has it been shown that the Family Court exercised its discretion wrongly?

[58] Despite the repetition, it is helpful to refer again to the Judge's explanation in this case as to why he exercised his discretion in favour of return:

> [32] In this case it is very tempting to exercise that discretion in the mother's favour. The children are well settled in New Zealand after what must have been a difficult time when they were in Australia, largely, it appears, as a result of their father's behaviour.
>
> [33] However, it cannot be right to permit the integrity of the Convention to be undermined in circumstances where a defence is only available as a result of this mother's own actions.
>
> [34] The mother left Australia without advising the children's father. She failed to let him know where she was for more than a year after leaving. As I hope has been made clear, I am not satisfied that it was reasonable for her to expect the father to find out the children's whereabouts through her brother.

[59] In light of what we consider to be the appropriate approach to s 106(1)(a), these reasons do not provide an appropriate basis for ordering return of the children. Leaving children in New Zealand who are "well settled" does not undermine "the integrity of the Convention" – given that an order to return children in these circumstances depends upon the exercise of a "residual discretion" and is provided for in art 18.

[60] Importantly HJ did nothing which could be regarded as "manipulative delay" as discussed by Thorpe LJ in *Cannon* at [59] of his judgment. We do not see her actions as causing the critical delay in the commencement of proceedings which has enabled her now to invoke s 106(1)(a).

The appropriate orders

[61] On the assumption that the s 106(1)(a) defence is made out, we can see no basis upon which the resulting discretion (based as it must be primarily on art 18 of the Convention) could appropriately be exercised in favour of return. Once it is recognised that the case is not subject to the duty to order return created by art 12 and that HJ has not been guilty of manipulative delay, there is no policy reason for ordering return. In the particular circumstances of this case, there is no other reason which could fairly warrant return.

[62] It may be that Judge von Dadelszen's approach to the discretion was affected by his approach to settlement which was not as rigorous as *Cannon* would suggest

was appropriate. So we are conscious that there may be some element of unfairness to TJ if we leave intact the Judge's conclusion as to settlement, which although not challenged on appeal, may conceivably have been too generous to HJ but at the same time interfere with his exercise of discretion under s 106(1)(a).

[63] Allowing for that consideration we are nonetheless satisfied that the appeal must be allowed and the application for return of the children should be dismissed.

[64] HJ's misconduct, if any, was of limited moral gravity. She certainly did not tell TJ where she was. This, however, is not altogether surprising given the history of violence and the limited part that TJ had played in the upbringing of the children. Further, she did not go to ground in New Zealand. In that context, her actions in abducting the children and not telling TJ where they were do not have much logical correlation to the settlement issue.

[65] If the case were more closely balanced, it would have been difficult to ignore events that have occurred since the original order was made by Judge von Dadelszen. The children appear to be more settled in New Zealand than they were at the time of the Family Court proceedings. In this sense, it has become more unreasonable (from the viewpoints of the children and HJ) to require the children to return to Australia than it was when Judge von Dadelszen heard the case, cf *Re HB (Abduction: children's objections)* [1998] 1 FLR 422.

Disposition

[66] Accordingly, the appeal is allowed, the order for the return of the children is quashed and the application for their return is dismissed. There is no order as to costs.

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