[2006] FamCA 466

FAMILY LAW ACT 1975

IN THE FULL COURT

OF THE FAMILY COURT OF AUSTRALIA **Appeal No SA24 of 2006**

AT MELBOURNE **File No MLF369 of 2006**

BETWEEN:

HZ

Appellant Mother

- and -

STATE CENTRAL AUTHORITY

Respondent

REASONS FOR JUDGMENT

CORAM: **KAY, COLEMAN & WARNICK JJ**

DATE OF HEARING: **30 May 2006**

DATE OF JUDGMENT: **7 June 2006**

APPEARANCES: **Mr P Davis of Counsel** appeared on behalf of the Appellant Mother.

Ms R Stoikovska of Counsel appeared on behalf of the Respondent

HZ and STATE CENTRAL AUTHORITY
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Catchwords: *CHILD ABDUCTION - Hague Convention - 3 children brought to Australia from Greece by their mother and wrongfully retained - Allegations of domestic violence by the father - Mother claimed there was a grave risk of physical or psychological harm or that the children would be placed in an intolerable situation if returned to Greece - She claimed further that the eldest child aged 8 objected to being returned - Mother intended to reside in accommodation remote from the father upon return - No evidence led that the Greek authorities would be unable to provide mother and children with appropriate protection upon return to Greece - Trial Judge held it was not appropriate to take account of child's wishes given her young age - Trial Judge's finding that exceptions not made out open to her on the evidence -Appeal dismissed - Children to be returned to Greece.*This is the mother's appeal against orders made by Bennett J on 11 April 2006 requiring the return to Greece of three children, **C, D** and **E** pursuant to the provisions of the *Family Law (Child Abduction Convention) Regulations* 1986.

Background

In December 1995 **SD** married **HZ** in Greece. There were three children born of the marriage, C born in May 1998, D born in June 2001 and E born in December 2002.

The father was born in Greece and the mother born in Australia of Greek parents. They met in Greece shortly prior to their marriage. They made their home together in Greece and all of the children were born and raised in Greece. Throughout their marriage the mother and children lived at the home of the father's parents.

In June 2005 the mother brought the children to Australia. She told the father, and he believed, that she and the three children were to spend a ten week holiday with her family and would return to Greece on pre-paid airline tickets scheduled to depart Melbourne on 31 August 2005.

On or about 30 June 2005 she told the father that she would not return with the children to Greece. She then cancelled the return air bookings and enrolled C at school in Melbourne. She subsequently sent the other children to a local kindergarten.

On 14 September 2005 the father applied to the Central Authority for Greece for an order for the mandatory return of the children pursuant to the provisions of the *Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980*. The Greek Central Authority made a request of the Australian Central Authority for an order for the return of the children to Greece and an application was filed in the Family Court of Australia on 4 January 2006 seeking such an order. The matter eventually came on for hearing before Bennett J in a trial beginning 6 April 2006.

At the trial the mother conceded before her Honour that the retention of the children in Australia was wrongful within the meaning of the *Family Law (Child Abduction Convention) Regulations* (hereinafter referred to as "the Regulations") in that she conceded:

- that Australia and Greece are both signatories to the Convention on the Civil Aspects of International Child Abduction ("the Convention");
- the children are under the age of 16 years;
- the children were habitually resident in Greece immediately before the respondent's retention of them in Australia;
- the children have been retained in breach of the custodial rights of the requesting parent; and
- the applicant's application was filed within one year of the wrongful

retention.

She sought however to argue:

(a) There was a grave risk that the return of the children to Greece would expose them to physical or psychological harm or otherwise place them in an intolerable situation within the meaning of reg.16(3)(b) of the Regulations;

(b) The father had consented to and acquiesced in the wrongful retention of the children in Australia within the meaning of reg.16(3)(a)(ii) of the Regulations;

(c) The child C objected to being returned to Greece and had attained an age and degree of maturity at which it was appropriate to take account of her views within the meaning of reg.16(3)(c) of the Regulations.

In the course of her reasons for judgment her Honour indicated that none of the exceptions that were raised had been established. She further indicated that if she was in error, and a discretion to return the children was enlivened by C's objections, she would exercise that discretion in favour of the applicant and require the return of the children to Greece.

For the purposes of this appeal no issue has been raised concerning her Honour's rejection of the attempt by the mother to persuade her Honour that the father had consented to or acquiesced in the wrongful retention of the children in Australia. The appeal has focused entirely upon whether or not her Honour was correct in rejecting the existence of the grave risk exception or the exception based upon the child's objections. It was further argued that having fallen into error in relation to the establishment of either of the exceptions relied upon, her Honour fell in further error in failing to then exercise her discretion in

favour of the dismissal of the application for return of the children.

The judgment

After setting out the background, her Honour set out the terms of Regulation 16 which provides as follows:

"16(3) [When court may refuse to order child's return]

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

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

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

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

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

(c) each of the following applies:

(i) the child objects to being returned;

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

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

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

…

16(5) [Where court not precluded from ordering child's return]

The court to which an application for the return of a child is made is not precluded from making an order for the return of a child to the country in which he or she habitually resided immediately before his or her removal or retention only because a matter mentioned in subregulation (3) is established by a party opposing return."

Her Honour noted that the mother, at her Honour's request, had asked that the father provide a number of undertakings in the event that she was ordered to return to Greece with the children, those undertakings being:

"1. That she be permitted to accompany the children back to Greece.

2. That the children's father SD not institute or continue any proceedings ex parte in Greece seeking Orders relating to the children.

3. That the children's father SD not seek to enforce any existing order from any Greek Court pending an appropriate hearing inter parties in a Court of competent jurisdiction in Greece as to custody of the three children of the marriage.

4. That the children be permitted to remain residing with the respondent in K pending an appropriate hearing inter parties in a Court of competent jurisdiction in Greece as to custody of the three children of the marriage.

5. That the husband SD not seek to remove the said children from the respondent's care except for periods of visitation / contact as agreed between the parties or as ordered or as otherwise may be enforceable pursuant to the law of Greece.

6. That the children be permitted by SD to remain in the care of their

mother pending any Order, (not on an ex parte basis) from a Greek Court of competent jurisdiction and that the children not reside with their father SD or their paternal grandparents in M or elsewhere."

She further noted that the father had declined to give such undertakings but had indicated that it was the courts in Greece that should determine issues of custody and residence of the children in accordance with the laws of Greece.

A psychologist had been appointed by the court to prepare a report in respect of the eldest child of the marriage, C, and report upon:

"i. Whether that child objects to being returned to Greece;

ii. Whether that child's objection shows strength of feeling beyond the mere expression of a preference or ordinary wish; and

iii. Whether that child has attained an age and a degree of maturity at which it is appropriate to have account of her views."

In the course of her report the psychologist noted:

"[….] Mr D informed [me] of his intention to seek the return of his wife and children to Greece 'I'll keep going according to law'. Whilst he understood that Ms Z did not wish to return to Greece or to live as a family with him, he said he was prepared to 'rent a house', and to reunite as a family, live wherever she wanted."

Her Honour then turned to examine the evidence before her. She made observations of the difficulty of making findings at a summary hearing where neither of the parties gave viva voce evidence. The only evidence other than that contained in the material was the cross-examination of the court-appointed psychologist. We have not been provided with the transcript of that evidence and counsel for the appellant conceded appropriately before us that, in the absence of a transcript, he could not challenge any findings made by the trial Judge that arose as a result of evidence given orally.

Her Honour made reference to the observations of the Full Court in *Panayotides v Panayotides* (1997) FLC 92-733 where Fogarty and Baker JJ (with whom Finn J agreed) cited with approval the description by Jordan J at first instance of the process upon which the Court needs to embark in hearing these matters. Her Honour said at par 24

" …At 83,897 the Full Court identified and approved of the following observations of Justice Jordan:-

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

25. The above observations echo the comments of Butler Sloss LJ (with whom the other members of the Court of Appeal agreed) in *Re F*, at page 554, as follows:-

'… the admission of oral evidence in Convention cases should be allowed sparingly.

If a judge is faced with irreconcilable affidavit evidence and no oral evidence is available or, as in this case, there was no application to call it, how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision, thus not requiring a determination. If the issue has to be faced on disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence

contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on either side, the applicant will have failed to establish his case. '"

Her Honour then turned to give her attention to the grave risk exception.

Her Honour made reference to the joint judgment of Gaudron, Gummow and Hayne JJ in *DP v Commonwealth Central Authority*; *JLM v Director-General NSW Department of Community Services* (2001) 206 CLR 401 where the court said at pages 417-418;

"[40] So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that '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'. If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might otherwise have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.

[41] …What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in 'an intolerable situation'. That requires some prediction, based on the evidence, of what may happen if the child is returned. … The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.

[42] … what is required is persuasion that there is a risk which warrants the qualitative description 'grave'. Leaving aside the reference to 'intolerable situation', and confining attention to harm, the risk that is

relevant is not limited to harm that will actually occur, it extends to a risk that the return would expose the child to harm.

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

[44] These considerations, however, do not warrant a conclusion that reg 16(3)(b) is to be given a 'narrow' rather than a 'broad' construction. There is, in these circumstances, no evident choice to be made between a 'narrow' and 'broad' construction of the regulation. If that is what is meant by saying that it is to be given a 'narrow construction' it must be rejected. The exception is to be given the meaning its words require.

[45] That is not to say, however, that reg 16(3)(b) will find frequent application. It is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return."

Her Honour then set out the assertions of the mother upon which she urged the Court to determine that the return of the children to Greece would entail a grave risk of exposure of the children to physical or psychological harm or otherwise place them in an intolerable situation.

The matters identified by her Honour were as follows (footnotes omitted, emphasis added):

"a. **The requesting parent was aggressive and emotionally abusive to the respondent mother throughout the marriage** and, in one particular incident in June 2004, assaulted her in the presence of the children who were then aged 6, 3 and 2 years respectively. The requesting parent denies the general and the specific allegations of the respondent mother in this regard.

b. **The requesting parent has an extreme addiction to marijuana and other drugs and also to gambling**. The requesting parent denies the specific allegations of the respondent mother in this regard.

c. **The requesting parent gambled and lost money** with the effect that the family comprising the respondent mother and any children were left without any accommodation apart from the home of the paternal grandparents and, on occasion, without adequate food. The requesting parent denies the specific allegations of the respondent mother in this regard.

d. **The mother of the requesting parent was physically abusive to the boys and verbally abusive to all 3 children**. The requesting parent denies that his mother is verbally abusive. In the requesting parent's evidence in response, as filed by the applicant, it appears that he concedes that his mother did hit the children. However, I was informed by counsel for the respondent mother that the applicant's translation of the documents into English was, in respect of this evidence, incorrect and should be read as a denial. It was entirely appropriate and proper for that concession to be made.

e. **The requesting parent was violent to his father in the presence of the children** and in particular, in about October 2003, the husband attempted to stab his father with a knife in front of the children who were then aged 5, 2 and 1 year respectively and it is an event of which the older children have a vivid memory. The requesting parent denies these allegations. He goes so far as to say *'…I have never argued with my parents or my wife'* and *'have never argued with my parents in front of the children.'* I agree with the submission of counsel for the respondent mother that the requesting parent's blanket denials in this regard appear to be inherently improbable.

f. **The requesting parent would have heated and sometimes physical arguments with his parents**, in the presence of the children, over demands for money for drugs or gambling. As indicated, the requesting parent denies these allegations. He also says *'I have never attacked my father, I have never attacked my wife.'*

g. The respondent mother allegedly spoke to a woman with whom she alleges the requesting parent was living in A. She says that she

asked for a divorce and **the requesting parent made an unparticularised threat to her and assaulted her in public** by twisting her hand until she screamed in pain. The respondent mother further deposes that *'I finally decided that day that I would leave Greece as quickly as possible as otherwise I would continue to expose the children to an unacceptable risk'*. The requesting parent denies living with another woman and denies the violence.

h. **The requesting parent has received psychiatric treatment and was an inpatient in a psychiatric hospital during his compulsory military training**. The requesting parent also deposes *'… the husband clearly has psychological issues.'* The requesting parent denies the treatment and the underlying condition. He says *'I have never in my life been in a psychiatric, I ask her to testify the name of the doctor that examined me. I adduce you affirmation of psychiatrist that I am healthy, I am not mentally ill. I have never been hospitalised in psychiatric clinic in the Army and I was judged capable, but there is the Military Confidentiality of Greek Legislation and it is forbidden for me to say no more.'* At 2 further points in the requesting parent's response he refers to evidence by an appropriately qualified person adduced by him in rebuttal of the respondent mother's allegations. However, no such expert evidence forms part of the documents upon which the applicant relies in these proceedings.

i. **The requesting parent engages in sexual activity over the internet** and requires exclusive use of one room in his parents small house to do so. He is non-communicative to the rest of the family and abusive and violent if interrupted. The requesting parent denies the allegations absolutely.

j. **The requesting parent's response to any disappointment or opposition**, in matters such as being interrupted on the internet, not being able to find his watch, being insulted by the respondent's then adolescent brother or refused money by his parents**, is uncontrollable, unrestrained, violent and entirely disproportionate**. The requesting parent denies the various incidents to which the allegations relate. However, as I will mention later, it appears that very many of the allegations made by the respondent mother are corroborated by the oldest child, C.

k. **The requesting parent has engaged in sexually inappropriate behaviour in front of, and to, the children** including the alleged pinching of C's breasts as physical and sexual abuse. The

requesting parent denies the allegation and refers to the specific allegations as abhorrent. These allegations were not corroborated by the oldest child, C.

l. **The respondent mother says that she and the children will be financially under resourced if required to return to Greece.**

…

m. That the requesting parent has sent various text messages some of which the respondent mother has kept. They have been translated as follows:-

1. 30-6-05 14:57

You don't answer right? I won't be responsible for whatever happens to your relatives and to your family.

2. 16-7-05 10:14

K was in on it wait and see what I will say to G and H was also in on it wait and see what will happen to her as well.

3. 16-07-05 10:20

And you have not done things I have learnt, I'm not coming there, and so that you can see that I am not playing games within the next few days your cousin T will have an accident and it will be your fault. 31st of August you will be in Greece or else I will not be held responsible for whatever happens. Sorry I am telling you this but for you to believe me there must be a victim.

4. 30-07-05 9:26

No one will say anything to you. No I am not going to come there. So you have decided? Ok so whatever happens it will not be my fault. The kids I will take them from you, you will be begging me so you can see them, you should know that no court will allow them to be so far from their father.

5. 30-07-05 9:57

Since you don't want to come give me the kids and I'll leave you alone. Nice the way your mum organized everything tell her that if she ever comes to Greece she will receive a lot of beatings.

6. 31-07-05 10:09

31st of august [sic] I'm waiting for you and the kids if on the 1st of September you are not here call your relatives so they can hide and you should all hide there as well.

7. 14.01.2006 11:25

You should be embarrassed that you are telling the children such silly things, but now I will take them from you and you will never see them again.

8. 15.01.2006 11:34

What did you think, that I would abandon my children? I love them and miss them but I wont retreat either send me the 3 of them or send D only no other discussion.

The import of the text messages is that the respondent mother says that she is fearful to return to Greece because **the requesting parent has threatened that he will remove the children from her care by self help rather than await the outcome of legitimate proceedings**. Further, that the requesting parent will physically harm her and make good his threats to harm members of her family such that she could not ask any members of her family to accompany her back to Greece even temporarily…"

Her Honour said further:

"38. I accept the submission of counsel for the State Central Authority to the effect that it is not sufficient for the respondent mother to point to historical events involving violence or unacceptable behaviour on the part of the requesting parent or his family members and then expect the court to extrapolate from those events that there is a

grave risk of the children being exposed to such harm or placed in an intolerable situation.

39. In order for the respondent mother to make out the exception under reg.16(3)(b) of the Regulations (Article 13(b) of the Convention), it is necessary to establish that the risk of exposure to physical or psychological harm or the children being placed in an intolerable situation in the event of their return to Greece forthwith is not only very real but 'grave'. To the extent that I need to predict what will happen consequent upon the children's return, the respondent mother may have adduced particular and expert evidence of how past events or other matters are likely to impact on her and the children in the immediate future as a consequence of the children being returned forthwith. However, she did not do so.

40. On balance, and very largely because relevant matters deposed to by the respondent were corroborated by C's statements to the psychologist, I am satisfied that the respondent mother and the children have been subjected to violent and inappropriate behaviour by the requesting parent and within the paternal grandparents' household. Whilst the past can be a good indicator of the future, it is not determinative. I do not envisage that upon arriving back in Greece, the respondent and the children will return to live in the paternal grandparents' home. The respondent has not alleged that the respondent has no option but to live with her parents in law. Indeed, it is the respondent's expressed wish not to return to the home of her parents–in-law. Through the respondent's request for undertakings, she has indicated that there is alternative accommodation available to her in K.

41. I endorse the comments of the authors of *International Movement of Children: Law practice and procedure* when at paragraph 17.96 they say:-

> *[…] In other words, as one commentator has put it, 'any assessment of the degree of risk involved [cannot] be blinkered against sight of the practical consequences of return.' However, as Lord Prosser observed in the Scottish decision, McCarthy v McCarthy,under Art 13(b) the court ' is concerned with exposure to harm as a consequence of return, and not an exposure to harm which might emerge at a future time, if after return an unsatisfactory situation is allowed to persist without alteration.' Consequently, the*

court should only be concerned with the situation following upon return as viewed in the relative short term. It may be added that in assessing the risk the court is entitled to weigh the risk of harm of a return against the risk of harm of refusing a return.

17.97 In judging risk, it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally adept in protecting children as they are in the requested State.

42. I accept that it will be a big upheaval for the children to go back to Greece now and they may be very sad and upset. However as the High Court observed in *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* at paragraph 45 extracted above, *'[it] is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return.'* Without persuasive and cogent evidence about the likely effect on the children or the respondent of the behaviour about which she complains, I am not satisfied that the exception under reg.16(3)(b) of the Regulations (Article 13(b) of the Convention) is made out insofar as her allegations of violence and aggression are concerned."

Her Honour accepted, notwithstanding the protestations of the father, that the SMS messages that the mother deposed to receiving were sent by the father, and she said:

"46. However, even accepting that the messages were sent by the requesting father, I am not satisfied that an immediate return to Greece will result in a grave risk that the children will be exposed to harm or placed in an intolerable situation in this respect. In the absence of evidence to the contrary, I assume that the respondent mother will be able to avail herself and the children of lawful protection against any threats of the requesting parent which a

court of competent jurisdiction in Greece may adjudge to have substance."

Her Honour concluded:

"47. Finally, I note that there was no evidence adduced by the respondent mother as to her capacity, *vis a vis* her ability to access the legal system in Greece, to be able to act protectively of the children on their return to Greece. On 2 occasions during the hearing, I asked counsel for the respondent to obtain instructions about her client's ability to initiate proceedings in Greece whilst still in Australia. No submissions were forthcoming in this regard. I asked counsel for the State Central Authority to get information from the Australian Central Authority about those matters. Unfortunately, the wrong question was asked of the appropriate authorities in Greece and the response obtained was not helpful.

48. The respondent mother sought an undertaking that the requesting parent not institute or that he desist with any *ex parte* legal proceedings to obtain immediate custody of the children upon their return to Greece, pending at least an interim determination of the matter by a court of appropriate jurisdiction in Greece. However, I was advised the respondent mother did not know (and presumably had not asked) whether there were any such proceedings on foot or contemplated. The respondent mother had also deposed to having sought legal advice prior to leaving Greece but she did not adduce evidence to establish the proposition that the children, through her, would be at a grave risk of being exposed to an intolerable situation upon their immediate return to Greece. I assume that whatever evidence or information the respondent mother had in this regard, did not assist her case. The result is that I find that the respondent mother has not made out the exception of grave risk in any respect an account of any inability on her part to access courts of competent jurisdiction upon her return to Greece.

49. The respondent mother has failed to make out the 'grave risk' exception pursuant to reg.16(3)(b) of the Regulations (Article 13(b) of the Convention)."

After then dealing with and rejecting the mother's assertion that the father had acquiesced in the retention of the children in Australia, which rejection is not the subject of any ground of appeal, her Honour turned to deal with C's

objection to return. She noted that the child was seven years old. She set out at some length at par 71 the mother's evidence relating to the child, the salient points of which appear to us to be:

"45. …I have made a conscious effort which in my view is appropriate not to discuss the Court proceedings with the children. Despite the same, if there is any discussion about Greece or any mention of a possible return to Greece in my parent's household, it is evident to all concerned that C becomes extremely distressed. She has said to me on a number of occasions that she will absolutely refuse to return back to Greece as she is very frightened.

46. That C particularly when we first arrived in Australia would often have nightmares and recall incidents such as her father pinching her breasts, yelling, throwing things around the house, breaking windows, kicking and smashing doors and swearing at her and calling her a 'poutana' (prostitute). …

47. That C is securely attached to me and has a very close relationship with me and my extended family. C is clearly fearful and is distrusting of her father's behaviour. She has never indicated to me that her grandparents have hit her and I am not aware of such incidents but she has observed and has recalled on numerous occasions violence between the husband and his parents, violent behaviour by the husband towards me and also inappropriate punishment in particular smacking inflicted upon our two sons by their paternal grandmother.

48. That C's objection by being returned to Greece is extremely strong and based upon her experiences in Greece over a period of time. …. Her objections to being returned to Greece are very strong and absolutely resolute."

Her Honour then set out parts of the report of SB, the psychologist who had been appointed to prepare a report on the child's objections, which report included as follows:

"12. C impressed as a particularly mature, articulate and responsible child. She demonstrated an advanced developmental capacity to understand concepts and ideas beyond those expected at her young age. C appeared to comprehend the reasons for attending at the Court. She

accurately articulated her understanding of the purpose of the interview and offered an opinion regarding the potential outcomes.

13. Whilst her young age is acknowledged, C impressed as having the capacity to distinguish her own views and experience from those of others. C firmly objected to returning to Greece to live and expressed a clear preference to continue to live in Australia with her mother, brothers and the extended maternal family.

14. C referred to her life and the paternal family in Greece in predominately negative terms. She described a distant relationship with her father and appeared to lack respect for him. C reported 'dad doesn't really want us…he never took us anywhere….he ate by himself in a room alone….he used to throw us out of the room.' According to C, her father '….he's crazy….swearing very much….he hit me on the face, on the bottom, everywhere….he punched the fridge….he wanted money.' C described being fearful of her father 'he threatened grandma with a knife….he pushed a knife onto grandma's shoulder when she was doing the dishes…..grandma way crying….he threw a dish of food at grandma at her face…. She put a tea towel up to stop it'.

15. C experienced her mother as protective, but she was not confident in Ms Z's ability to protect the children in an ongoing manner. C perceived her mother as 'too scared to speak with him because he's a bit crazy…he wants money….threats with a knife.' C became distressed and tearful when the possibility of returning to Greece was raised. In a distressed manner C's said 'he's crazy, violent…he might come and kill us.'

16. C's heightened emotional response appeared congruent with her reported experience of her father's aggressive and violent behaviour. C's objection to being returned to Greece was assessed as showing strength of feeling beyond the mere expression of a preference or ordinary wish.

17. The possibility remains though that C's views have been influenced by her mother and the extended maternal family. Furthermore, given C's youth and immaturity her capacity to comprehend the longer term implications of her expressed views would be limited. It is unlikely that C would have the developmental maturity to understand the longer term implications on her relationships with her father and with the paternal grandparents in the event that they do not return to Greece."

Her Honour related portions of Ms B's viva voce evidence. Her Honour said:

"75. Ms B gave evidence to the effect that C associates Australia with her mother and her maternal family and does so very positively. She likes her new school, she believes that the new friends that she has made in Australia are 'better' than her old friends in Greece whom she does not miss so much. Further, C has a very positive attitude to having her own bedroom (as opposed to the cramped conditions of her paternal grand parents' home), knowing and seeing her Australian cousins regularly and having her maternal aunts and uncles around her. On the other hand, Ms B assessed C as having wholly negative thoughts and associations with the paternal side of her family in Greece. C associates Greece with sharing a bedroom in her grandparents' home, her father being unavailable or aggressive to her and of having physically attacked her paternal grandmother with a knife. I accept Ms B's opinion that, in respect of C's description of the violence and arguing within her home in Greece, she appeared to be relating her own experiences in a genuine and spontaneous manner and had not been coached or unduly influenced by other people. Ms B said that C impressed her as having a strong preference to live in Australia and was enjoying the absence of the unpredictable, hostile and aggressive environment of her paternal grandparents' home in Greece.

76. Ms B agreed that the foundation of what she perceived to be C's firm objection to return to Greece was, in fact, C's strong desire to remain in Australia. When Ms B was asked if C's views were as simplistic as having a strongly preference for the environment provided by her mother and the maternal grandparents over the environment provided by her father and the paternal grandparents, Ms B clarified to the court she had spoken to C about the possibility of her mother and the children returning to Greece but not residing with the paternal grandparents or the requesting parent. Ms B said that, at the point at which C understood that there was still a possibility of her having to return to Greece, in the care of the respondent mother and not living in the home of the paternal grandparents, C started to cry, lost her mature composure and '*presented as quite defeated'*."

She then reached the conclusion:

"77. C's objection must be seen in the context of a young girl who was just 7 years old when she last experienced life in Greece, now many months ago. Her alleged objection must be assessed in the context of the stark and unfavourable comparison which she draws

between Greece and Australia, by which I speculate that if C was not having such a delightful time in Australia, maybe Greece would not seem so bad. I am satisfied that C genuinely does not want to return to Greece because she wants to stay in Australia where her life experience has been positive and enjoyable. I am not satisfied, however, that C has any realistic perception of what life would be like for her if she and her brothers did not have to live in the paternal grandparents' home. The home of the paternal grandparents is the only home she has ever known in Greece and, based on the psychologist's assessment, C has only known that home to be a hostile, unpredictable and cramped environment.

…

80. I am satisfied that C does object to returning to Greece, as she knows it. However, I am not satisfied that C has attained an age and a degree of maturity where it is appropriate to take account of her views. She is not yet 8 years old. She left Greece when she was only 7 years old. She has had no experience of Greece outside the negative environment of her paternal family's home. She has only ever lived in 2 places and I am not satisfied that she can comprehend to an adequate degree that options may exist outside the homes of either set of her grandparents. I am satisfied that, even as 'a particularly mature' young girl of nearly 8 years of age, her greatest desire is to remain in Australia. Her objection actually lies against being taken out of Australia or returning to her father and his family's home rather than her objecting *per se* to Greece or to a Greek way of life.

81. I have found the contention of C's objection to return to be the most difficult aspect of this case. However, I conclude that C's views about not wanting to return to Greece do not constitute an objection within the meaning of reg.16(3)(c) of the Regulations (Article 13 of the Convention)."

Her Honour then went on to deal with the exercise of discretion in the event that the mother had persuaded her of the existence of one of the exceptions to mandatory return. Citing from an unreported judgment of Kay J in *State Central Authority and [DB]* (2002) FamCA 804 delivered 24 September 2002, her Honour said:

“33. The existence of the Regulation 16(3) defence means that the Court may refuse to order the return of the child under the Convention. This raises the question of the exercise of a discretion. The Regulation offers no express terms as to how that discretion may be exercised. Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said in De L v Director-General, NSW Dept of Community Services (1996) 187 CLR 640; FLC 92-706; 20 Fam LR 390 at CLR 661; FLC 83,456; Fam LR 403:

> *‘if a child objects to being returned to the country of his or her habitual residence and has attained the age and degree of maturity spoken of in reg 16(3)(c), it remains for the judge hearing the application to exercise an independent discretion to determine whether or not an order should be made for the child's return. The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the ‘discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]’ enable it to be said that a particular consideration is extraneous [Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492 at 505 per Dixon J]. That subject-matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion.’*

In TB v JB (formerly JH) [2000] EWCA Civ 337 Laws and Arden LJJ, Hale J dissenting, upheld an appeal from a decision of Singer J and ordered the return of children aged 14, 13 and 10½ to New Zealand in circumstances where the mother had brought the children to England seeking to escape from what she said was an abusive relationship with her second husband. It was clear that the eldest child did not wish to return to New Zealand. Hale LJ accepted and applied a list of factors suggested by Waite J (as he then was) in W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211 and later adopted by him in the Court of Appeal in H v H (Abduction: Acquiescence) [1996] 2 FLR 570 at 574 which were:

‘(a) the comparative suitability of the forum to determine the child's future in the substantive proceedings;

(b) the likely outcome (in whichever forum) of the substantive proceedings;

(c) the consequences of the acquiescence;

(d) the situation which would await the absconding parent and the child if compelled to return;

(e) the anticipated emotional effect upon the child of an immediate return (a factor which is to be treated as significant but not paramount); and

(f) the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused."

34. Her Ladyship said:

'56. As to (f), the policy of the Hague Convention undoubtedly weighs heavily in respect of the children's objections. In my view, expressed in Re HB (Abduction: Children's Objections) [1997] 1 FLR 392, it weighs particularly heavily in those cases where children come to visit a parent living here and wish to remain: unless their objections are very cogent indeed, they should return to their primary carer for the dispute about a change in primary care to be settled in their home country. It weighs rather less heavily when the children wish to remain with their primary carer, particularly where, as here, the child has had no contact with the other parent for such a long time. …'

35. Arden LJ said of the exercise of discretion in the TB case that as the majority were sending the younger children back and that the mother would follow, notwithstanding the wishes of the elder child, the interests of the child dictated that she be forced back as well.

'107 However K is entitled to separate exception under Article 13 by reason of the fact that she is able to express her wishes and objects to return. She is now fourteen and a half years old. … It is important that her wishes should be respected so far as possible but on the other hand since her brothers are to return, the court should consider whether it is right to respect those wishes in those circumstances. More importantly she is close to her brothers and her mother. She has been a source of strength to her mother in the past. Her mother says that at times she does not know how she could cope without K. In my judgment, the likelihood is that her mother will return to New Zealand with A and KI. In those circumstances, despite some dislocation in her education, it is in K's best interest to return also. In so concluding, I reach the same conclusion as Hale J (as she then was) reached on the facts of the case in Re: HB (Abduction: Children's Objections) [1997] I FLR 392, referred to with

approval on appeal allowed on another point [1998] 1 FLR 422). Other factors include the fact that she has grown up in New Zealand and has the benefit of her mother's extended family there. Having considered those matters, in my view, in the exercise of discretion effect should not be given to K's wishes and she too should be ordered to return…'.'

She then said:

"85. If I am wrong as to my assessment of C's alleged objection to return, and a discretion should arise, I would decline to exercise it in favour of the respondent. That is, I would still order that C be returned to Greece. I am satisfied that Greece is just as suitable a forum to determine where and with whom C should live. Whilst I have some sympathy what appear to be for the past experiences of the respondent and the children in Greece, this is a wrongful retention of the most blatant kind. It would still remain most appropriate in my view for C to return to Greece in the company of her mother and have the Courts in that country decide where and with whom she should live at the same time as that determination is made about her younger brothers.

86. The child welfare issues raised in this case are matters which, in my view, are best dealt with by the courts in Greece. They should not rest with the respondent's unilateral decision to reside in Australia."

Her Honour made appropriate orders.

Further evidence

At the commencement of the appeal counsel for the appellant sought to introduce further evidence. The further evidence consisted of the mother alleging she had received two further SMS messages from the father after the judgment, one on 21 April 2006 which read:

"Say whatever you want. I am going to take them and you can say whatever you want"

and a second one on 22 April 2006 which read:

"Bring whoever you want to the airport. You should know you will be in Greece and in Greece I have total control".

In addition she sought to rely upon evidence from her sister FA that she was with the child C on a morning in April 2006 when the father spoke to C on the telephone. She deposed to overhearing the conversation in which she said the father said:

"I am going to take all three of you and take you to your grandmother's house. You will only be there for a week and then you can go to your Mum's village."

The witness also deposed that her husband was recuperating from a serious motor vehicle collision. She had taken the child C to visit her husband in hospital one or two days before the phone call. The child was climbing on a cement block and when the aunt asked the child to get down so she would not hurt herself the child said:

"I don't care if I hurt myself. I want to be like Uncle A. I want them to put steel rods in my arms and legs so that I can be in wheelchair and I don't have to go back to Greece."

The State Central Authority opposed the grant of leave for the admission of the further evidence but indicated in the event that it was to be admitted they sought to themselves rely upon further evidence from the father in which he sought to explain the context of the SMS messages and the matters that he had discussed with C on 17 April.

We indicated at the hearing that we would not allow the further evidence and would give our reasons for rejecting it when we handed down the appeal.

The law governing the admission of further evidence in an appeal brought under the provisions of s 93(A) of the *Family Law Act* was extensively considered by the High Court in *CDJ and VAJ* (1998) FLC 92-828. There McHugh, Gummow

and Callinan JJ stated that the purpose of the power to admit further evidence was to ensure that the proceedings did not miscarry. Their Honours went on to say (citations omitted):

> "[109] One consideration in construing s 93A(2) is its remedial nature. Its principal purpose is to give to the Full Court a discretionary power to admit further evidence where that evidence, if accepted, would demonstrate that the order under appeal is erroneous. The power exists to facilitate the avoidance of errors which cannot be otherwise remedied by the application of the conventional appellate procedures.
>
> …
>
> [111] Still another consideration is that the discretion is given to an appellate court hearing an appeal against an order made in the exercise of original jurisdiction. No doubt it is true that, because the appeal is by way of rehearing, the Full Court's jurisdiction is neither purely appellate nor purely original. In Attorney-General v Sillem, Lord Westbury LC pointed out that '[a]n appeal is the right of entering a superior court, and invoking its aid and interposition to redress the error of the court below'. Appellate jurisdiction in the strict sense is jurisdiction to determine whether the order of the court below was correct on the evidence and in accordance with the law then applicable. In contrast, the Full Court of the Family Court must decide the rights of the parties upon the facts and in accordance with the law as it exists at the time of hearing the appeal. Speaking of the similar jurisdiction of the English Court of Appeal, the Master of the Rolls, Sir George Jessel, said that the appeal is a 'trial over again, on the evidence used in the court below; but there is a special power to receive further evidence'. Nevertheless, it is highly unlikely that parliament in conferring jurisdiction on the Full Court to hear appeals intended that s 93A(2) should be construed in a way that would have the practical effect of obliterating the distinction between original and appellate jurisdiction. Nor can the availability of further evidence relevant to the issues in the appeal be treated as equivalent to a ground of appeal, proof of which prima facie entitles the appellant to a new trial. The power to admit the further evidence exists to serve the demands of justice. …"

In our view the further evidence, even though it relates to events that occurred after her Honour gave judgment, would not lead us to reach a different outcome to that of her Honour. Her Honour was fully appraised of the mother's

concerns about the father's threats to enforce his rights in accordance with Greek law. She was also fully appraised of the depth of feeling that the child C had expressed about the prospect of returning to be in her father's care. Notwithstanding the cogent evidence that was before her Honour, her Honour still concluded that the exceptions to the mandatory return of the children had not been made out. This additional evidence would not in our view have altered the outcome of the case, nor does it show that the order under appeal was erroneous.

The appeal

The grounds of appeal as set out in the Notice of Appeal vary from the manner in which the appeal was argued before us. We hope that we do justice to the appellant by concentrating on the latter rather than the former.

In effect counsel for the appellant sought to argue that the facts as found by the trial Judge should have led the Judge to a conclusion that the exceptions for mandatory return were made out and should then have led the Judge to a conclusion that in the exercise of her discretion the children should be entitled to remain in Australia with their mother.

Counsel for the appellant accepted that the trial Judge had identified the correct principles to be applied and had made appropriate findings of fact. It was urged upon us that the trial Judge erred was in the application of the principles of law to those facts.

Counsel for the appellant submitted that the allegations contained in the mother's affidavit that are ultimately set out in par 31 of her Honour's judgment (and referred to in par 21 above) should have compelled the trial Judge to reach a conclusion that there was a grave risk of harm to the children if they were to be returned to Greece in accordance with the regulations. That harm was said to

be constituted by the father's predisposition to violent behaviour, the inappropriate behaviour of his parents towards the children and C's opposition to leaving Australia.

We think it significant to note, as the trial Judge did, that the mother's proposal if she was obliged to return with the children would be to live with her relatives in a village away from the father and his parents. We were advised by counsel that the village would be some three and a half hours travel time from where the parties formerly lived as a family.

It needs to be remembered that the purpose of the return under the Regulations is to enable the courts of habitual residence to determine the parenting issues that have arisen in the case. It would by no means follow that the children would be required to permanently reside in Greece nor would it by any means follow that the Greek courts would require the children to be placed in circumstances that the Greek courts found placed the children at physical or emotional risk.

Counsel for the appellant urged upon us that the mere return to Greece itself in the face of the threat contained in the father's SMS messages would place the children at risk of harm. He did however concede that the mother had taken no steps at all to alleviate that risk by making appropriate approaches to the relevant Greek authorities.

As we have already noted (at par 22 above) in the course of her Honour's reasons for judgment her Honour quoted with approval from the recently published *International Movement of Children: Law, Practice and Procedure*, Nigel Lowe, Mark Everall and Michael Nicholls, Bristol, UK, Jordan Publishing, 2004, par 17.97 where the authors said (footnotes omitted):

"17.97 In judging risk, it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social

service authorities of the requesting State are equally adept in protecting children as they are in the requested State."

As discussed by Kay J in the unreported decision of *SCA v [M]* [2003] FamCA 1128 (17 September 2003), the particular problem created by allegations of domestic violence has been the subject of significant debate in cases throughout the world. There has been much academic writing about it. It seems to be generally accepted that the Convention was basically designed to discourage abducting non-primary caregivers, usually fathers, but that in its operation it has most significantly affected a group who can be loosely termed to be "escaping mothers". These persons are often primary caregivers who want to relocate with their children back to their own country of origin, or into a new relationship somewhere else, or to a place they see as a safe refuge from an unsatisfactory relationship.

The operation of the Convention which has the effect of potentially sending a mother back into a situation of risk to her own physical wellbeing has been a matter of significant academic criticism (see Merle Weiner's article *International Child Abduction and the Escape from Domestic Violence* (2000) 69 Fordham Law Review; Miranda Kaye, *The Hague Convention and the Flight From Domestic Violence*: *how women and children are being returned by coach and four,* (1999) IJLPF 13 191-212; the Australian Law Commission report on *Equality Before The Law* ALRC 69 Part IV Violence Against Women, Violence and Family Law paragraphs 9.39 to 9.46) where the Commission said as follows:

"The principal purpose of the Convention is to deter child abductors by preventing any advantage flowing from the removal of a child to another country. This approach works well in the majority of cases where the abductor is in fact seeking to thwart the other party by taking the law into his or her hands and thereby gain an advantage. But it can have unjust consequences on a person who has a just cause for leaving if it penalises those women who have been subjected to violence and who flee with their children for their own safety. It is not in the child's best interests to enforce

the return of the child and mother to the country of habitual residence to determine custody when this would expose the child's mother and perhaps the child to serious danger. Violence against the mother has significant effects on the child. This should be directly reflected in the regulations so that the child's return should not be ordered if to do so is likely to endanger the safety of the parent in whose care the child is. Furthermore, to expose the mother to the trauma, difficulty and cost of returning to pursue custody litigation is not consistent with the purpose of the Convention when she is a survivor of her husband's violence and took a reasonable course of action to protect herself. The Hague Convention gives a court a discretion whether to return the child in these circumstances. Given the strict interpretation the court has taken of the Regulations, they should be amended. The issue could also be raised by the Commonwealth as part of its reporting functions under the Convention."

The ALRC then recommended, in recommendation 9.5:

"Regulation 16 of the Family Law (Child Abduction Convention) Regulations should be amended to provide that in deciding whether there is a grave risk that the child's return would expose the child to physical or psychological harm or an intolerable situation regard may be had to the harmful effects on the child of past violence or of violence likely to occur in the future towards the abductor by the other parent if the child is returned.

The Commonwealth Contracting Authority should be requested to raise the problem of women fleeing with their children from violent spouses with the monitoring body of the Convention with a view to amending the Convention to make it clear that in deciding whether a child should be returned under subregulation (3) the Court must take into account the likelihood that the child will be exposed to violence or the effects of violence by one parent against the other.

The regulations should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child.

Funds should be provided by the Commonwealth to the Commonwealth's contracting authority to ensure that in appropriate cases either parent can take action for custody to be determined in the Family Court."

Those recommendations have never been acted upon by the government, save that the issue of the problem was raised at the third and fourth Special

Commissions at the behest of the Australian delegation.

The leading Australian case where the issue of violence was directly raised as a defence to mandatory return was the decision of *Murray v Director of Family Services ACT* (1993) FLC 92-416, (1993) 16 Fam LR 982. The husband was a member of the New Zealand motorcycle gang known as "the Mongrel Mob". The mother brought her children aged five, four and two to Australia from New Zealand. Her evidence was that she was the victim of several violent attacks which included head butting, punching, kneeing her at the base of the spine. She had received death threats. The acts of violence either took place in the presence of or in close proximity to the children.

She said the husband had an arsenal of weapons which included firearms, knives, chains and meat cleavers and was likely to use the weapons against her. The husband whilst admitting to a turbulent relationship with the wife and some incidents of violence said her claims were exaggerated. The trial Judge had rejected regulation 16(3)(b) defence commenting that it was not possible to determine the veracity of the allegations and that the evidence relating to them would be available only in New Zealand.

The Full Court in rejecting the mother's appeal characterised the evidence as:

> "almost entirely directed at the prospective threat to the wife of a return to New Zealand and more particularly to a return by her to Dunedin."

They said:

> "Whilst there is nothing that requires the wife to return to New Zealand, it is obviously desirable and from the point of view of the children that she does so. However, there is no requirement imposed by this court that she or they must return to Dunedin. It is open for her to return to another part of New Zealand where the danger to her may be less and it is of course open to her to seek orders from the New Zealand courts both for personal protection and interim and final custody immediately upon her arrival in New Zealand. She can also, if she wishes, seek leave from the

New Zealand court to take the children to Australia.

As his Honour pointed out, New Zealand has a system of family law and provides legal protection to persons in fear of violence which is similar to the system in Australia.

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.

In our view and in accordance with the views expressed by this Court in *Gsponer's* case, the circumstances in which Regulation 16(3) comes into operation should be largely confined to situations where such protections are not available….

For us to do otherwise would be to act on untested evidence to thwart the principal purposes of the Hague Convention which are to discourage child abduction and where such abduction has occurred to return such children to the country of habitual residence so the courts of that country can determine where or with whom their best interests lie. These children are New Zealand citizens who have lived all their lives in New Zealand and it is for a New Zealand court to determine their future."

The reference to *Gsponer* is a reference to the Full Court's judgment (Fogarty, Frederico and Joske JJ) (1989) FLC 92-001; (1988) 12 Fam LR 755 that the return of the child to the Convention country, rather than to the claiming parent about whom allegations of violence had been made, would lead to the position that:

"once the child has been so returned, no doubt the appropriate court in that country will make whatever orders are then thought to be suitable for the future custody and general welfare of that child, including any interim orders…there is no reason why this court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare."

The passage from *Murray* was cited with approval by the Full Court in *Cooper v Casey* (1995) FLC 92-575 (coram Nicholson CJ, with whom Kay and Graham

JJ agreed) in a case requiring the return of children to the United States in circumstances where the primary caregiver was asserting serious acts of violence, of both a physical and psychological nature, perpetrated by the husband upon her. (See also *State Central Authority v LJK* (2004) FLC 93-200, 33 Fam LR 307, per Morgan J at [29]).

There have been a number of international cases where the courts have declined to return children in circumstances where there were significant allegations of violence. *In Re F (minor: abduction: rights of custody abroad)* (1995) 3 All ER 641, the Court of Appeal reversed the decision of the trial Judge and dismissed an application seeking a return of a four-year-old child to Colorado. The child's Welsh mother had removed the child from the United States without the father's permission. The findings of the Court of Appeal that led to the reversal of the trial Judge's decision were stated by Butler-Sloss LJ at 648 as follows:

> "This child was, like so many other children, present at acts of violence and displays of uncontrollable temper directed at his mother or elsewhere, and at occasions of violence between the parents. These included assaults on his mother and one on his grandmother on 6 June 1994, and destruction of household items such as ripping the fridge door off its hinges. More important in my view was that the child was himself the recipient of the violence by the father. …There were other incidents. He destroyed the child's toys by stamping on them and smashing them when the child was present. This happened more than once. On several occasions he pinched the child on the legs causing bruising. One occasion of pinching was witnessed by the maternal grandmother. On 6 June 1994, C was thrown out of the house as well as his mother. On this occasion, which was immediately before the mother made her ex parte application to the county court, the police were called and took his father away. His father in his presence threatened to kill him and his mother. In these incidents the child was not a bystander to matrimonial discord but a victim of it. In addition other aspects of the behaviour of the father towards the child were unusual and inappropriate, such as waking up the child aged under 4 in the early hours of the morning, once to get him to help wash the jeep. In addition after the temporary restraining order was made and the father left the house, the father seems to have engaged in a campaign of intimidation and harassment directed at the mother, including following her about in his car and threatening her with a gun. He also camped in the

jeep several doors away from the matrimonial home, which had a very adverse effect upon the child as well as upon the mother.

The child is asthmatic and the effect upon him of this behaviour was serious. He was present when his grandmother, who was recovering from surgery, was forcibly pushed out of the house and thrown against a wall. The child's reaction was to scream and to cry. He started to bedwet regularly and to have nightmares where he screamed out in his sleep. He became unusually aggressive at the child care centre as well as at home. The effect of the father camping nearby in the jeep made him scared and upset. He copied the tantrums, the yelling, the screaming and bad language of his father.

Since leaving the USA he has been living in Wales in his maternal grandfather's house. The misbehaviour, the bedwetting and the nightmares ceased after he settled down. But his mother told him after the start of the present proceedings that he might have to return to Colorado. He has had a disturbing resumption of the bedwetting and nightmares and has begun to wet himself during the day. He has become aggressive towards other children at the nursery school he is attending and towards grown-ups.

The extent to which the child has himself been drawn into the violence between his parents and the clear evidence of the adverse effect on him of his father's violent and intimidating behaviour would not in my view in themselves be sufficient to meet the high standard required in Art 13(b). The matters which I find most telling are:

> the actual effect upon the child of the knowledge that he may be returning to Colorado together with the unusual circumstances;
>
> that he would be returning to the very same surroundings and potentially the very same situation as that which has had such a serious effect upon him before he was removed.

There has to be concern as to whether the father would take any notice of future orders of the court or comply with the undertakings he has given to the judge. How is a child of 4 to have any security or stability or from his perception come to terms with a return to his former home? I have come to the conclusion on the unusual facts of this case that the extreme reaction of the child to the marital discord and the requirement by Art 12 to return him on the facts of this case to the same house with the same attendant risks would create a grave risk that his return would expose him

both to psychological harm and would place him in an intolerable situation."

In *Pollastro v Pollastro (1999) 171 DLR (4th) 32* the Ontario Court of Appeal (Catzman, Abella and Feldman JJA) refused a return order to California. The facts in *Pollastro* make for some fairly distressing reading, including medical evidence of the wife presenting three days after leaving with the child with bruises on her neck, arms, back and thighs. There were telephone transcripts of the father making very specific threats to the wife and to her family. The Court of Appeal summarised the established facts as follows:

"32 While many of the facts and allegations in this case are disputed, the following facts supported Reesa Pollastro's allegations about her husband being established:

he has been verbally abusive and threatening to his wife, family and friends;

he has been violent towards her causing physical harm;

he has behaved irrationally and irresponsibly both during and after their cohabitation;

he has a drug and/or alcohol problem;

he has been unpredictable and unreliable when he was responsible for Tyler's care;

his temper is difficult for him to control;

his hostility towards his wife is palpable.

…

34 On the facts of this case the threatening phone calls reflect a continuing inability on the father's part to control his temper or hostility. That means that the mother who would inevitably accompany the child if he is ordered to return to California would be returning to a dangerous situation. Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting Tyler's interests are inextricably tied to her psychological and physical security. It is, therefore, relevant to consider whether the return to California places the child in an intolerable situation to

take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.

There is also evidence that returning Tyler to California represents a grave risk of exposure to serious harm to him personally. The father's hostility, irresponsibility and irrational behaviour are ongoing. Although John Pollastro has not been overtly physically violent to his son, he has been violent and had temper outbursts when his wife has been with the child. On one occasion, for example, he threw hot coffee at her, narrowly missing their 7-day-old son whom she was holding.

Tyler is barely two years old. His safety is seriously at risk if he is forced to return to the very volatility which caused his mother to leave with him in the first place. He and his mother would be removed from the sanctuary of her family in Canada, and forced to return to California where the potential for violence is overwhelming. This exposes the child to the serious possibility of substantial psychological and/or physical harm and, in addition, creates a grave risk that he would be placed in an intolerable situation."

Interestingly, there was no discussion, perhaps because of the strength of the facts, about the exercise of the residual discretion that arose once the defence was established.

The leading American case on which the defence based on domestic violence was successful was the decision of the United States Court of Appeal in the First Circuit in *Walsh v Walsh* 221 F.3d 204. Again the facts are dramatic.

The case involved the application for the return of two children to Ireland. The parties' daughter was aged 10 and their son was six. The couple had lived in America but had moved to Ireland in 1994 after the husband had absconded from criminal charges pending in Massachusetts involving a charge of breaking and entering and threatening to kill a next-door neighbour.

The parties lived together in Ireland until the mother brought the children to America in late 1997, almost four years later. The mother gave details of persistent severe assaults over those four years. The medical evidence

corroborated her story. She had widespread bruising to her face, chest and knees, they were all swollen. She had a broken tooth. On another occasion she had an injured coccyx. There was evidence of frequent police intervention. The husband was frequently drunk and violent when under the influence of alcohol. The event that led to the end of their cohabitation was described by Lynch CJ in his judgment as follows [MW is the parties' daughter, MMW is the husband's son, JA is the wife and J is the husband]:

"On 24 May 1997, the night before MW's communion J, MMW and JA's sister's M who had come to Ireland for the event went out to a number of local pubs. On the way home when JA and the children were asleep J attacked MMW, fists flying, simply because MMW had broken a beer bottle. This was not their first fight or their last. Indeed they immediately fought again when they arrived back at the house. When all was over both J and MMW were bleeding and the room was splattered with blood. J hauled his daughter MW down to the bloodied room where her half-brother was and told to look at her bloodied half-brother and tell him to leave. MW was very frightened. She was about eight years old at the time. JA intervened and took MW back to her room and then JA went to her own bedroom. J followed JA in and hit her with an open hand about the head causing a swollen and bloodied ear. The next day J refused to go to the communion because it was obvious he had been in a fight.

The day after the communion, 26 May 1997, J again assaulted JA and she fled the house without the children. He had repeatedly punched her in the head and kicked her. Fearing for her life JA went to her friend's pharmacy. The pharmacist's daughter took JA to the police station where the police told her that domestic abuse was not uncommon in Tremor and that she should seek help at the legal aid office in Waterford City, the county seat. JA filed a report and accompanied by the police she returned to the house for her things only to find J throwing her bags into the street.

After those events the wife obtained non-molestation orders. Despite the existence of those orders the husband broke into the wife's home and ransacked it when she was not there on one occasion. On another occasion he came to the house and threatened harm towards her. On the third occasion he broke into the house, smashed everything breakable and threw turf around the house. The wife removed the children from Ireland following that event notwithstanding she had given an undertaking to the Irish court that she would not do so."

The trial Judge concluded:

> "The evidence does not reveal an immediate serious threat to the children's physical safety that cannot be dealt with by the proper Irish authorities."

The Court of Appeal took a different view:

> "Relying on the district court's rulings J's position on appeal was that the court correctly found there to be no grave risk of harm for even if he may have beaten his wife, which he denies, he has not beaten his children and any concerns on that point should be alleviated by his undertakings. JA's position is that the court applied too stringent a measure of harm, that the children have been and will be harmed by witnessing the assaults on their mother, that they are at grave risk of being assaulted themselves that J has already disregarded Irish courts' orders to stay away from the marital home and has flouted the law there by making his undertakings worthless."

In its analysis of the case law the court acknowledged that there might be capacity to mitigate the grave risk of harm:

> "A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings. Necessarily, the 'grave risk' exception considers, inter alia, where and how a child is to be returned. The undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction. Given the strong presumption that a child should be returned, many courts, both here and in other countries, have determined that the reception of undertakings best allows for the achievement of the goals set out in the Convention while, at the same time, protecting children from exposure to grave risk of harm. See, e.g., *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999) (Blondin II); *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000); *Thomson v. Thomson* [1994] 3 S.C.R. 551, 599 (Can.); P. v. B. [1994] 3 I.R. 507, 521 (Ir. S.C.). See generally Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 156-72 (1999)."

However, it concluded:

> "Yet, there may be times when there is no way to return a child, even with undertakings, without exposing him or her to grave risk. Thus, on remand in *Blondin*, the district court found that the 'return of [the children] to France, under any arrangement, would present a 'grave risk' because 'removal . . . from their presently secure environment would interfere with their recovery from the trauma they suffered in France; . . . returning them to France, where they would encounter the uncertainties and pressures of custody proceedings, would cause them psychological harm…'."

The court was critical of the District Court's reasoning that any acts of violence had been directed not at the children but at their mother. They said:

> "The district court distinguished these acts of violence because they were not directed at M.W. and E.W… the district court's conclusions are in error, whatever the initial validity of the distinction.
>
> First, J. has demonstrated an uncontrollably violent temper, and his assaults have been bloody and severe. His temper and assaults are not in the least lessened by the presence of his two youngest children, who have witnessed his assaults -- indeed, M.W. was forced by him to witness the aftermath of his assault on M.M.W.
>
> Second, J. has demonstrated that his violence knows not the bonds between parent and child or husband and wife, which should restrain such behavior.
>
> Third, J. has gotten into fights with persons much younger than he, as when he attempted to assault the young man in Malden.
>
> Fourth, credible social science literature establishes that serial spousal abusers are also likely to be child abusers. See, e.g., Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 Violence Against Women 134 (1999); Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. Fam. Psychol. 578 (1998); Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse,* in Kersti Yllo & Michele Bograd, *Feminist Perspectives on Wife Abuse* 158 (1988); Susan M. Ross, *Risk of Physical Abuse to Children of Spouse Abusing Parents*, 20 Child Abuse & Neglect 589 (1996). But cf. Nunez-Escudero, 58 F.3d at 376-77; K. v. K. [1997] 3 F.C.R. 207 (Eng. Fam.).
>
> Fifth, both state and federal law have recognized that children are at

increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser. Thus, a congressional resolution, passed in 1990, specifically found that:

Whereas the effects of physical abuse of a spouse on children include . . . the potential for future harm where contact with the batterer continues;

Whereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent; … These factors are sufficient to make a threshold showing of grave risk of exposure to physical or psychological harm.

The question remains whether J.'s undertakings, or even a potential barring order from the Irish courts, are sufficient to render any risk less than grave. J.'s undertakings require him to obey the orders of the district court and the courts of Ireland. We do not believe the undertakings received by the district court or even a potential barring order, are sufficient to protect the children from the exposure to grave risk in this case. We have no doubt that the Irish courts would issue appropriate protective orders. That is not the issue. The issue is J.'s history of violating orders issued by any court, Irish or American.

Courts, when confronted with a grave risk of physical harm, have allowed the return of a child to the country of habitual residence, provided sufficient protection was afforded. See, e.g., *Re K. (Abduction: Child's Objections)* [1995] 1 F.L.R. 977 (Eng. Fam.); *N. v. N. (Abduction: Article 13 Defence*) [1995] 1 F.L.R. 107 (Eng. Fam.); cf. *Friedrich,* 78 F.3d at 1069 (finding that the grave risk exception only applies when the child is in 'danger prior to the resolution of the custody dispute -- e.g., returning the child to a zone of war, famine, or disease . . . [or when] there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable . . . to give the child adequate protection'). Such an approach has little chance of working here. J.'s past acts clearly show that he thinks little of court orders. He has violated the orders of the courts of Massachusetts, and he has violated the orders of the courts of Ireland. There is every reason to believe that he will violate the undertakings he made to the district court in this case and any barring orders from the Irish courts.

Our conclusion here is similar to that of the English Court of Appeal in *Re F. (a Minor) (Abduction: Rights of Custody Abroad)* [1995] 3 All E.R. 641 (Eng. C.A.). In that case, the father, an American citizen, petitioned for the

return of his son. The father had abused the mother and was harsh with the son, including pinching his legs so hard as to leave bruises and other forms of abuse. After the mother obtained a temporary restraining order, the father 'engaged in a campaign of intimidation and harassment directed at the mother.' Granting the father's petition, the lower court held that the mother did not make out a case under article 13(b). The Court of Appeal allowed the appeal (thus reversing the lower court). The Court of Appeal was particularly concerned that the child would have been returned to the 'very same surroundings and potentially the very same situation as that which has had such a serious effect upon him,' and noted, in particular, that '[t]here has to be concern as to whether the father would take any notice of future orders of the court or comply with the undertakings he has given to the judge.'

… we believe that the district court underestimated the risks to the children and overestimated the strength of the undertakings in this case. The article 13(b) exception must be applied and the petition must be dismissed.

We do not come to this conclusion lightly. International child abduction is a serious problem. …Further, a court's interpretation of a treaty will have consequences not only for the family immediately involved but also for the way in which other courts -- both here and abroad -- interpret the treaty. … In the United States, the vast majority of Hague Convention petitions result in the return of children to their country of habitual residence, and rightly so. But the Convention provides for certain limited exceptions to this general rule. The clearly established facts of this case -- including the father's flight after indictment for threatening to kill another person in a separate case and a documented history of violence and disregard for court orders going well beyond what one usually encounters even in bitter divorce and custody contexts -- lead us to conclude that this case fits within one of these.

The judgments of the district court are affirmed in part and reversed in part and the case is remanded with instructions that J.'s petition be dismissed."

In *TB v JB (Abduction: grave risk of harm)* [2001] 2 FLR 515, the English Court of Appeal was divided on the issue of whether three children should be returned from England to New Zealand. Among the factors relied upon were the mother's fear of violence from her second husband, the first husband being the applicant for the return of the children. As already indicated, Laws and Arden

LLJ determined the children should be returned. Hale LJ determined the children should not be returned. She was in agreement with the trial Judge, Singer J, who dismissed the application for their return.

The parties separated in 1990. The mother married Mr H in June 1994. They had a child of that marriage. They separated in February 1997. In March 2000 the mother took the children to England without the permission of the first husband. She asserted, amongst other things, there was a grave risk of harm for the children to return because she could not cope with the return having regard to the pattern of domestic abuse she had suffered at the hands of Mr H. She made allegations of violence over an extended period of time including anal rape and threats to kill. There was also an allegation of assault upon her eldest child. The trial Judge found that she reasonably held anxieties about Mr H's potential for dominating, subjugating, manipulating and controlling her and the children by his psychologically damaging activity.

In her dissenting judgment Hale LJ identified the problem of applying the Convention to escaping mothers when she said:

> "[43] As Mr Nicholls on behalf of the mother points out, when the Hague Convention was first drafted, the paradigm abductor was not the children's primary carer, but the other parent who 'snatched' them away from her. Hence a deliberate distinction was drawn between rights of custody and rights of access. Summary return was not the remedy to protect mere rights of access. Now, however, in 72% of cases, the abductor is the primary carer: the parent who has always looked after the children, upon whom the children rely for all their basic needs, and with whom their main security lies. The other parent is using the Hague Convention essentially to protect his rights of access. He can do this because 'rights of custody' include the right to veto travel abroad, and most such parents now enjoy that right. But return to the home country may be a sledge hammer to crack a nut, because however much the children need contact with the other parent, they need a secure happy home with a competent and caring parent even more. There is often good reason to believe that the home country will allow them all to emigrate. It is therefore regarded as a real risk by the Hague Conference that spurious Art 13(b) defences will be raised in such cases: there is equally a real risk that the courts of the

requested states will either succumb too readily to such defences, out of the kindness of their hearts and a natural reluctance to do anything which does not appear to them to be in the best interests of the children, or alternatively become unsympathetic and fail to recognise those few which should succeed.

[44] It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the 'left behind' parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it. This case is, however, particularly difficult to assess, not so much because of the ill treatment, but because of the lapse of time since the separation."

Ultimately her Ladyship said:

"This was not an easy case. It was essentially an issue of fact…in my view there was sufficient here for this very senior and experienced judge to conclude that Article 13(b) was satisfied in respect of all three children."

She also said:

"[57] But it cannot be the policy of the Convention that children should be returned to a country where, for whatever reason, they are at grave risk of harm, unless they can be adequately protected from that harm. Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. But in this particular case, it is the totality of the situation in which the children found themselves, a combination of serious psychological and economic pressures, which creates the risk. A protection order, were it to be readily available, would not solve all their problems. And Mr H has clearly indicated his intention to make it difficult for the mother to secure a solution.

…

[59] … It would require more than a simple protection order in New Zealand to guard the children against the risks involved here…"

In her judgment, Lord Justice Arden indicated that whilst the wife had received harassing telephone calls and unwanted visits from the second husband after separation:

> "there is no recent evidence, however, of his having exhibited violence to the mother or the children of the totally unacceptable and traumatic kind that occurred prior to her separation from him in February 1977."

Her Ladyship said:

> "[96] …It would appear that the judge did not consider (a) whether the courts of New Zealand could offer protection from Mr H …
>
> [97] …The policy of the Convention … seems to me to require that the evaluation of risk is carried out on the basis that the abducting parent will take all reasonable steps to protect herself and her children and that she cannot rely on her unwillingness to do so as a factor relevant to risk. The onus would thus be on the mother in this case to show that, even if she took all reasonable steps, she would not be adequately protected from Mr H in New Zealand.
>
> [98] In this context, in my judgment, the court is entitled and bound to take the view in the absence of evidence to the contrary that the courts of New Zealand can make appropriate protective orders, extending if necessary to a full prohibition of any form on contact or entering the area where the family live, and can effectively punish any non-compliance. (In this country if there was persistent non-compliance, there might be a custodial sentence).
>
> [99] In my judgment it is reasonable to expect the mother to make all appropriate use of orders of the New Zealand courts for her protection and that of her children. …
>
> [100] No reliance was placed on the possibility of harm to the children through having witnessed domestic violence in the past and, in the light of the protective orders available in New Zealand, I do not consider that such harm would be relevant for the purposes of the mother's Art 13 defence.
>
> …
>
> [102] An assessment of the gravity of harm is an exercise which involves an overall assessment of the evaluation on the basis mentioned. Since

Singer J made his evaluation without taking into account measures that the mother could reasonably be expected to take in New Zealand to protect herself and her children from Mr H, this court must re-evaluate the gravity of the risk of harm.

[103] I will proceed in the mother's favour on the basis that Mr H will harass her by telephone and visit her at her home. If she satisfies the New Zealand courts that this is likely to harm her or the children, the New Zealand courts will make adequate orders to protect her and the children. Provision may require to be made for Mr H to have access to B but I do not see why this cannot be done without the mother or her other children having to come face-to-face with Mr H if that is thought dangerous. In those circumstances, I cannot see that there would be a sufficient basis for saying that the mother's capacity to care for her children would be endangered by her return to New Zealand. Accordingly, I conclude that the evidence does not show a 'grave risk' of harm justifying the court in not making an order for the immediate return of the children.

…

[105] I note that there is reason to believe that there has been a change in the profile of abductors since the signing of the Hague Convention, but our attention has not been drawn to any modification to the Convention to take account of this despite the fact that reviews of the operation of the Convention are held. In those circumstances, I consider that the court should apply the Convention it as it stands and in accordance with this court's established jurisprudence in it.

[106] On my conclusion, the question of discretion under Art 13(b), does not arise. Had it arisen, I would, in view of the policy of the Convention, have had some doubt as to the desirability of forming a view as to the attitude of the New Zealand courts to an application for return to the UK (see Ward LJ *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478, above) cf, *H v H (Abduction: Acquiescence)* [1996] 2 FLR 570. However I would regard as relevant the convenience of the same court dealing with all matters in dispute between the parties, including the disputes between the parties as to emigration, child support (on the evidence, it would appear this probably has to be dealt with in New Zealand), access and KI's paternity. Indeed in my view the courts of New Zealand are better placed than the English courts to determine those issues since both parents will be in the jurisdiction and available for cross-examination. I also regard it as relevant that the children's grandparents and extended family are in New Zealand, and are clearly able to provide some, perhaps small, but none the less valuable, measure of moral

support for these children."

The international jurisprudence on cases with similar facts leads to no clear statement of principle. In the non-return cases the facts have usually been very compelling but ultimately the final decision appears to come back to the words of Gleeson CJ in *DP v Cth Central Authority* (2001) 206 CLR 401, 407-408, at par 9 that:

"The meaning of the regulation is not difficult to understand. The problem in a given case is more likely to be found in making required judgment. That is not a problem of construction, it is a problem of application."

In this case the trial Judge reached a conclusion that a grave risk of harm had not been established. Whilst much of that conclusion was based upon her Honour's interpretation of untested material, we as an appellate court, find ourselves in as good a position as the trial Judge of determining for ourselves whether or not the conclusions reached by the trial Judge were erroneous. There is no particular advantage that the trial Judge has over the appellate court in the circumstances. We are mindful of the observations of the High Court in *Fox v Percy* (2003) 214 CLR 118; 197 ALR 201 where their Honours said:

"[25] Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'. In *Warren v Coombes*, the majority of this court reiterated the rule that:

> *'[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect*

and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.'."

That having been said, the appellate process is still a search for error. Unless we are persuaded that the trial Judge has reached an erroneous conclusion, in our view the conclusion must stand. This is not a case in which we feel confident in saying that the conclusion that the trial Judge reached, in respect of the failure of the appellant to establish the presence of a grave risk of harm, was not open to her. As we have already indicted, the return of these children to Greece was anticipated to be in their mother's company. She had found accommodation for herself remote from that of the father. She led no evidence to suggest that the Greek authorities would be unable to provide her and the children with appropriate protection pending her utilising lawful means to relocate the children from Greece. The finding by the trial Judge that the mother had not persuaded her that the return of the children to Greece would raise a grave risk of harm to the children or otherwise place them in an intolerable situation was a finding clearly open to the trial Judge.

The challenge to the failure of the trial Judge to rely upon the objections of the eldest child must also fail. Counsel for the mother conceded that if the two younger children were to be returned to Greece the mother would accompany them and take the elder child with her. It was not her case that the children should in any way be separated from one another and effectively she would not be leaving C in Australia in the event that the other two children were returned to Greece. It remains puzzling therefore as to what reliance was being made of the child's objections.

In any event whilst the trial Judge accepted that C held an objection to being returned which was beyond the mere expression of a preference or of ordinary wishes, her Honour concluded that having regard to her age and degree of maturity it would not be appropriate to take account of the child's view. Given

that the child was less than eight years of age at the time of the hearing before her Honour, it is difficult to see how her Honour's conclusion could be the subject of a successful attack.

Finally attention was focused on what was submitted were her Honour's inadequate reasons for exercising the discretion adversely to the mother in the event that she had otherwise established an exception to mandatory return. Her Honour in the passage quoted above at par 29 set out what we would endorse as the appropriate approach to be taken on the issue of the exercise of discretion. Her Honour identified the features that were appropriate to the exercise of discretion in this case, namely that the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused, because her Honour identified the retention as "the most 'blatant kind'". Whilst her Honour's reasons for failing to exercise discretion were not as fulsome as they might otherwise be, they were only stated as a fallback position. Given that these were children who were born in Greece and had spent effectively the entirety of their life in Greece until the mother unilaterally determined to retain them in Australia, Greece was clearly the appropriate forum for issues relating to the welfare of these children to be determined. In those circumstances it was appropriate for her Honour to place significant weight on the first of the objects referred to in Article 1 of the Convention namely the prompt return of the children who had been wrongfully retained in Australia.

In the circumstances the appeal should be dismissed.

Costs

Whilst the State Central Authority made an application for costs in the event that the appeal was dismissed, we do not believe that there are circumstances in this case which should lead us to depart from the provisions of s 117(1) of the

Family Law Act, namely that in proceedings under the Act each party should bear their own costs unless the Court otherwise orders.

The orders of the Court are:

1. The appeal be dismissed.

2. Orders 2, 8 and 9 of the orders made by the Honourable Justice Bennett on 11 April 2006 be varied as agreed between the parties to ensure the return of the children to Greece within 14 days of these orders. In default of agreement the parties be at liberty to apply in accordance with the provisions of order 12 of the trial Judge's orders.

I certify that the 81 preceding paragraphs are a true copy of the reasons for judgment delivered by this ***Honourable Full Court.***

Associate