

THE HAGUE CONVENTION – ORDER OR CHAOS?

**An update on a paper first delivered to a Family Law
Conference in Adelaide in 1994**

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Sub nom

**"The Special Commission recognises that the Convention in
general continues to work well in the interests of children and
broadly meets the needs for which it was drafted."**

Are they kidding themselves?

By the Honourable Justice Kay
A Judge of the Appeal Division
Family Court of Australia
Melbourne¹

¹ A significant debt of gratitude is owed to my research associates Alice Carter, Tracy Smith, Kristen Abery, Genevieve Hall, Rob O'Neill, Waleed Aly and Mai Lin Yong for their invaluable assistance in the preparation of this paper over its many years of development.

"Unless Australian courts, including this Court, uphold the spirit and the letter of the Convention as it is rendered part of Australian law by the Regulations, a large international enterprise of great importance for the welfare of children generally will be frustrated in the case of this country. Because Australia, more than most other countries, is a land with many immigrants, derived from virtually every country on earth, well served by international air transport, it is a major user of the Convention scheme. Many mothers, fathers and children are dependent upon the effective implementation of the Convention for protection when children are the victims of international child abduction and retention. To the extent that Australian courts, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody (and residence) decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular."

Kirby J, Justice of the High Court of Australia, in *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services*²

²(2001) FLC 93-081

INDEX

INTRODUCTION	1
THE SCHEME OF THE CONVENTION	4
THE CONVENTION, THE REGULATIONS AND THE BEST INTERESTS OF THE CHILD	5
CASES TO WHICH THE HAGUE CONVENTION APPLIES	7
HABITUAL RESIDENCE.....	7
Habitual residence of babies.....	14
Dual and serial habitual residence	16
Habitual residence in the context of military personnel	18
WRONGFUL REMOVAL OR RETENTION	22
Mens Rea?	24
Rights of Custody	25
Is a right to determine the child's place of residence enough?.....	25
Rights removed by statutory limits on powers granted to each parent	32
Can a Court have a right of custody?	33
Rights of unmarried fathers	34
WHERE THE APPLICATION IS MADE AFTER THE EXPIRATION OF ONE YEAR.....	39
Does the Convention apply once a finding is made that the child is settled?	42
THE EXCEPTIONS TO THE MANDATORY RETURN OF THE CHILDREN	47
Actual Exercise and Acquiescence.....	49
Grave Risk	55
a. Domestic Violence as “grave risk of harm”.....	59
<i>Undertakings</i>	70
b. Separation of Child from Primary Caregiver as “grave risk of harm”.....	71
c. Wishes and Behaviour of the Child as an element of grave risk.....	75
d. Child has Special Needs	77
Wishes of the Child	81
<i>How old?</i>	85
ARTICLE 20 – PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS	89
Caveat: Judicial Discretion.....	91
The role of Central Authorities after the child is returned.....	94
THE IMPOSITION OF CONDITIONS IN ORDERS FOR RETURN	96
CONTACT ISSUES RE CHILD TO BE RETURNED	102
OTHER PROBLEMS.....	102
CONCLUSION	104
CASE SUMMARY	106
Argentina.....	106
Australia	106
Canada.....	107
European Court of Human Rights	108
Germany	108
Ireland.....	109
Israel	109
Netherlands.....	109
New Zealand.....	109
Romania (see also European Court of Human Rights).....	109
Spain.....	110
Sweden	110
Switzerland.....	110
United States.....	112
Implementing Measures taken at the domestic level to give effect to the 1980 Hague Convention	114
Australia	114
Austria	114
Canada.....	114

China (Hong Kong Special Administrative Region)	115
Denmark	115
Finland.....	115
The Federal Republic of Germany	115
Iceland	116
Ireland.....	116
Italy.....	116
Malta.....	116
Mauritius	116
Netherlands.....	117
New Zealand.....	117
Norway	117
United Kingdom of Great Britain and Northern Ireland.....	117
United States of America.....	117
South Africa	118
Spain.....	118
Sri Lanka (Democratic Socialist Republic of).....	118
Sweden	118
Zimbabwe.....	118

INTRODUCTION

1. Reported cases from countries covered by the 1980 Convention on the Civil Aspects of International Child Abduction ("the Convention") are proliferating at an exponential rate. This paper endeavours to look at the diverse results and see whether the Convention is fulfilling its purpose.

2. In Australia 17 children were reported as abducted in 1989-90. The figure has risen steadily. In the year to 31 March 2004, 42 incoming and 72 outgoing cases were reported.³ Figures from New Zealand, Ireland, the United Kingdom, and the United States reflect a similar trend.⁴

3. In *Carmen Jones* Oscar Hammerstein II wrote, "It only takes a half a day to be a thousand miles away". Concorde (when it flies) does it in an hour. A 747 will do it in two.

4. Sexual contact between people of different nationality or from different backgrounds is now quite commonplace, and a significant number of international relationships are formed. Children are born as a result of these relationships. Often where the parties come from different cultures and backgrounds, the breakdown of the relationship leaves one party entirely without support in an unfamiliar country. The rationale for moving "back home" is frequently compelling. In other cases courts have granted custody of children to parties who subsequently move to another, perhaps more familiar, country. For the parent left behind, "the right to access then becomes little more than a legal fiction, and the temptation to resort to self-help may become overwhelming".⁵

³ International Child Abduction News No 27 - Commonwealth Attorney-General's Department

⁴ In 2000, New Zealand had 27 incoming and 39 outgoing cases; in 1999 Ireland had 68 incoming and 38 outgoing cases; in 2000 the UK had 98 incoming and 101 outgoing cases; in 2000 the USA had 422 incoming and 393 outgoing cases.

Statistics provided by the National Reports of New Zealand, Ireland, UK and the USA, Common Law Judicial Conference on International Parental Child Abduction, Washington D.C. 18-21 September 2000

⁵ Davis, Brian "The New Rules on International Child Abduction: Looking Forward to the Past" (1990) 1 *Australian Journal of Family Law* 31 at 33

5. A parent whose child has been abducted will suffer financial and emotional hardships in their efforts to locate the child and resolve the situation. Expensive and traumatic litigation may ensue as that parent tries to obtain the return of the child or the enforcement of orders. Children who have been abducted by family members are sometimes physically and almost always psychologically harmed as a result of their abduction.

6. As Lord Meston commented:

“The children in these cases, will have suffered the trauma of the breakdown of their parents' marriage. They are then uprooted from all that is familiar and important to them. Their world is turned upside down, and they become strangers in a foreign land. However resilient the child, that experience must be confusing, frightening, and, in the long run, damaging.”⁶

7. In response to the increasing need for international cooperation, the Convention on the Civil Aspects of International Child Abduction was signed by several nations including Australia on October 25, 1980. As at January 2004, 31 States and Territories had ratified the Convention⁷ and a further 43 States had acceded to it.⁸

8. The stated objects of the Convention (set out in Article 1 thereof) are:

- to secure the prompt and safe return of children who have been wrongfully removed from one Contracting State to another; and

⁶ Hansard House of Lords Debate Vol 460 col 1257

⁷ Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Canada, China (Hong Kong Special Administrative Region only), China (Macau Special Administration only), Croatia, Czech Republic, Denmark (except the Faroe Islands and Greenland), Finland, France, Germany, Greece, Ireland, Israel, Italy, Luxembourg, Former Yugoslav Republic of Macedonia, Netherlands, Norway, Portugal, Serbia and Montenegro, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

⁸ Bahamas, Belarus, Belize, Brazil, Bulgaria, Burkina Faso, Chile, Colombia, Costa Rica, Cyprus, Ecuador, El Salvador, Estonia, Fiji, Georgia, Guatemala, Honduras, Hungary, Iceland, Latvia, Lithuania, Malta, Mauritius, Mexico, Republic of Moldova, Monaco, New Zealand, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Saint Kitts and Nevis, Slovenia, South Africa, Thailand, Trinidad and Tobago, Turkmenistan, Uruguay, Uzbekistan, Yugoslavia (Serbia and

- to ensure that rights of custody and of access according to the law of one Contracting State are respected in the other Contracting States.

9. In the House of Lords decision *Re H (Abduction: Acquiescence)* Lord Browne-Wilkinson summarised the purposes of the Convention, in a passage which is frequently cited in English cases:

“The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence. This is to be achieved by establishing procedure to ensure the prompt return of the child to the State of his habitual residence.”⁹

10. As Kirby J observed in *De L v Director General, NSW Department of Community Services*, a decision of the High Court of Australia:

“Central to [the purposes of the Convention] is the intention that, save in the most exceptional of cases, a child should ordinarily be returned quickly to the jurisdiction of habitual residence from which the child was abducted. Disputes about custody and access should be determined in that jurisdiction. Save in exceptional cases, the procedures for return under the Convention should not be transformed, effectively, into a hearing about the custody of the child. Whenever that happens, the fundamental objective of the Convention will be defeated. The abducting parent then secures the fruits of conduct which not only offends international law but is usually highly disruptive to the well-being of the child involved and its relationship with the other parent. The objective of deterring international child abduction is also defeated. International comity and cooperation, so necessary for the implementation of the Convention, are defeated. The purpose of the government and legislature of the requested State in adhering to the Convention and incorporating it in municipal law is defeated.”¹⁰

11. In *Lops v Lops*, a decision of United States Court of Appeals it was said

Montenegro) and Zimbabwe. There is a notable absence of Contracting States in the Asia-Pacific region.

⁹ [1998] AC 72 at 81

¹⁰ (1996) FLC 92-706 at 83,466

“The Hague Convention is intended to ‘restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court’.”¹¹

THE SCHEME OF THE CONVENTION

12. The Convention applies between

- those countries that have ratified it, and
- countries that have acceded to it and whose accession has been accepted by other ratifying or acceding countries.

All such countries are termed “Contracting States”.

13. Article 6 of the Convention requires Contracting States to establish administrative bodies called “Central Authorities”. A parent whose child has been wrongfully removed can apply to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State, for assistance in securing the return of the child.

14. If a Central Authority receives such an application, it must under Article 7 take all appropriate measures to discover the whereabouts of the child, prevent harm to the child or prejudice to the applicant parent and secure the voluntary return of the child or otherwise bring about an amicable resolution of the matter. Where it becomes necessary, the Central Authority can initiate judicial or administrative proceedings to secure the child's return.

15. Article 11 requires that a Contracting State shall act expeditiously in such proceedings.

¹¹ Eleventh Circuit (7 May 1998) at paragraph 81

16. Articles 12 and 13, discussed in detail below, are central provisions that bind the judicial or administrative authorities in each Contracting State to order the return of the child forthwith subject to certain limited exceptions.

17. The Convention is not directly incorporated into Australian law. Instead, the *Family Law (Child Abduction Convention) Regulations* (“the Regulations”), which came into force on 1 January 1987, provide the legislative structure for the application of the Convention as a matter of Australian domestic law. The Convention is set out in a schedule to the Regulations and regard can be had to it for the purposes of interpreting the Regulations and for ascertaining the position where the Regulations are silent.¹²

18. In some States the Convention itself is directly incorporated into local law.¹³ In others it is enacted via its own statute.¹⁴ These diverse methods of introducing the Convention into local law leave several opportunities for significant differences to emerge and provide fuel for the chaos view.

THE CONVENTION, THE REGULATIONS AND THE BEST INTERESTS OF THE CHILD

19. The judicial function is to determine whether or not the Convention applies and, if so, whether the limited exceptions that give rise to a discretion not to order the return of the child are made out. Implicit in this is the assumption that the child's best interests are best determined by the jurisdiction in which the child was habitually resident prior to the wrongful removal or retention.¹⁵

¹² *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Service* (2001) FLC 93-081; *McCall and McCall; State Central Authority; Attorney-General of the Commonwealth* (1995) FLC 92-551 at 81,509; see also *De L* (1996) FLC 92-706 at 83,449 considered in *State Central Authority v Ayob* (1997) FLC 92-746 per Kay J.

¹³ eg United Kingdom- *Child Abduction and Custody Act* 1985

¹⁴ eg United States – *International Child Abduction Remedies Act* 42 U.S.C. and New Zealand – *Guardianship Amendment Act* 1991

¹⁵ see eg *Laing v The Central Authority* (1996) FLC 92-709 at 83,513

20. In *Director General of Family and Community Services v Davis* Nygh J said:

“On such an application, the question of the welfare of the child as the paramount consideration does not apply. For the Convention is not directed to that question. It is directed to ... two main issues: firstly, to discourage, if not eliminate, the harmful practice of unilateral removal or retention of children internationally; and secondly, to ensure that the question of what the welfare of children requires is determined by the jurisdiction in which they were habitually resident at the time of removal.”¹⁶

21. In *De L v Director General, NSW Department of Community Services & Anor*, the High Court of Australia confirmed that proceedings under the Regulations are not subject to the principle enshrined in Australian domestic law that the best interests of the child are the paramount consideration in child welfare cases:

“The Regulations reflect the objects of the Convention to settle issues of jurisdiction between the Contracting States by favouring the forum which has been the habitual residence of the child. The underlying premise is that, once the forum is located in this way, each Contracting state has faith in the domestic law of the other Contracting States to deal in a proper fashion with matters relating to the custody of children under the age of 16. Necessarily, proceedings under the Regulations are to be seen as standing apart from [proceedings relating to the custody, guardianship or welfare of, or access to, a child]. It follows that they are not subject to the paramountcy principle.”¹⁷

22. In *Re HB (Abduction: Children’s Objections)* Hale J further noted:

“Hague Convention cases always present difficulties for the court because it is not the court’s function to determine where the children’s best interests lie. Their welfare is not the paramount consideration. The object of the Convention is to ensure that

¹⁶ (1990) FLC 92-182 at 78,226

¹⁷ (1996) FLC 92-706 at 83,454 - 83,455

children are returned to the country of their habitual residence for their future to be decided by the appropriate authorities there.”¹⁸

CASES TO WHICH THE HAGUE CONVENTION APPLIES

23. In order for the matter to fall within the scope of the Convention, it must be demonstrated that:

- the child was habitually resident in a Contracting State immediately before any breach of custody or access rights (Article 4);
- the child is under 16 years of age (Article 4); and
- the removal or retention is wrongful.

24. Article 3 defines a wrongful removal or retention as one where:

- i) the removal or retention is in breach of rights of custody under the law of the state in which the child was habitually resident; and
- ii) those rights of custody were exercised or would have been exercised but for the removal or retention.

25. By interpreting those threshold concepts narrowly, the Court can find that the Convention is not applicable. Alternatively, a broader approach to preliminary matters will result in more situations falling to be determined according to the Convention.

HABITUAL RESIDENCE

26. In Convention cases, the issue of a child’s place of habitual residence is usually the first and one of the most important issues for determination. Its importance arises in a number of ways. First, to come within the scope of the Convention, a child must be habitually resident in a Contracting State. To

¹⁸ [1997] 1 FLR 392 at 395

determine whether a removal or retention is wrongful, and whether a right of custody has been breached, it is the law of the state of habitual residence that applies. If a return order is made, it is to the place of its habitual residence that the child is returned.

27. Given its central importance within the Convention, it is somewhat surprising that the term “habitual residence” is undefined. In the American decision *David B v Helen O* it was observed:

“A curious feature of the [Hague] Convention is that although the term ‘habitual residence’ is a critical predicate term it is undefined in the Convention. In addition, because Hague Convention proceedings are relatively infrequent there is only a small body of case law in the United States that has sought to define the term and its applicability to a variety of factual situations. As noted by one court, the apparent intent is for the concept to remain fluid and fact based, without becoming rigid.”¹⁹

28. Adair Dyer has also observed that the term “habitual residence”, “remains without any comprehensive legal definition, so that it will avoid the encrustations which have attached to the term ‘domicile’ as used in different countries for different purposes”.²⁰

29. Courts have approached the issue of habitual residence in inconsistent ways. In *Friedrich v Friedrich* a United States Court of Appeal held:

“To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions...A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward.”²¹

¹⁹ Family Court 1995, 625 N.Y.S.2d 436 at 439

²⁰ Dyer, Adair “Childhood Rights in Private International Law” (1991) *Australian Journal of Family Law* 103 at 104

²¹ 982 F 2d 1396 (22 January 1992)

30. The Court of Appeal stressed that the child's habitual residence could only be altered by "a change in geography and the passage of time, not by changes in parental affection and responsibility".²²

31. Courts in England, New Zealand and Canada however have treated the parents' intentions as a relevant, even decisive, factor. In *C v S (Minor: Abduction: Illegitimate Child)*,²³ the Court of Appeal concluded that "habitually resident" was a status which could be changed in a single day by leaving a country with a settled intention not to return. Whitehead J of the Family Court at Taupo (New Zealand) took the same approach in *C v T* when he held that a shared intention of a minimum period of 6-12 months change of residence created a change in the child's habitual residence as soon as he left Australia to reside with his father.²⁴ Similarly, in *DeHaan v Gracia*,²⁵ Power J held in Alberta that the children lost their French habitual residence upon arrival in Canada, because their parents had agreed to start a new life there.

32. A similar approach was taken in the English decision of *B v H (Habitual Residence: Wardship)*,²⁶ In that case a family went to Bangladesh from England for a holiday. The father subsequently declared his intention to remain in Bangladesh permanently. The mother returned to England with the Children. The Court held that since the mother never formed an intention to live permanently in Bangladesh, the habitual residence of the children did not change. It appears that the presence of such an intention would have been sufficient for a change in habitual residence.

33. The notion that the habitual residence of a child can change immediately once one parent forms a settled intention not to return and acts on that intention appears to undermine the philosophy of the Convention that the custody issues

²² Ibid

²³ [1990] 2 FLR 442

²⁴ [2001] NZFLR 1105

²⁵ [2004] AJ No.94 (QL).

²⁶ [2002] 1 FLR 388

are best determined by the country in which the child normally resided prior to its unilateral removal.

34. In the Australian context, the Full Court of the Family Court, following the English decision in *Re B (Minors) (Abduction) (No 2)*,²⁷ has held that the habitual residence of a young child is the place of residence adopted by a person with parental responsibility for the child, for an appreciable time and for settled purposes.²⁸

35. In the Hong Kong case of *N v O*,²⁹ Hartmann J adopted a similar approach, and held that all that was required for a “settled purpose” was that the parties’ shared intentions have a sufficient degree of continuity.

36. A number of subsequent English decisions have also followed this line of authority. In *Re A (Abduction: Habitual Residence)*³⁰ a couple married in Greece but the mother had their baby in England, at which time she decided to separate from the father and remain with the baby in England. The mother took the baby to spend an agreed six-week period in Greece with the father. Before six weeks had passed the mother returned to England with the baby and the father brought Hague proceedings. The main issue before Stuart-White J was whether the baby was at the material time habitually resident in Greece. In holding that the baby’s habitual residence was not in Greece but in England, his Honour noted that the baby had been in Greece for only a short period of time and for the purpose of an access visit.

37. In *Re S (Custody: Habitual Residence)*³¹ an unmarried English mother died leaving a baby whom the maternal grandmother and aunt took from England to Ireland. The father promptly brought Hague and European Convention

²⁷ [1993] 1 FLR 993 at 995

²⁸ *De Lewinski v Director-General, New South Wales Department of Community Services* (1997) FLC 92-737

²⁹ [1999] 1 HKLRD 68.

³⁰ [1998] 1 FLR 497

³¹ [1998] 1 FLR 122

proceedings. The House of Lords upheld the Court of Appeal's determination that the mother and baby were habitually resident in England. The baby did not lose its habitual residence on the death of the mother. The grandmother and aunt did not have parental rights capable of changing the baby's place of habitual residence on its physical removal from the jurisdiction.

38. The Californian case of *Mozes v Mozes*³² looked at the issue of habitual residence in some detail. In that case the parties were Israeli citizens who had four children. The wife and the children went to live in the United States for fifteen months with the consent of the husband. In April 1998 the wife obtained an order in the LA County Superior Court for dissolution of the marriage and temporary custody of the children. The District Court found that when the wife decided to stay in California, the children's "habitual residence" was in the US, therefore there was no wrongful retention. The husband appealed. Kozinski, Thomas and Illston JJ held that a settled intention to abandon one's prior residence was a crucial part of acquiring a new habitual residence, rather than just the temporal test set out by Lord Scarman in *Shah v Barnet London Borough Council*.³³ The Court held that the intention to be taken into account was that of the person entitled to fix the place of the child's residence.

39. Three common fact circumstances were identified:

1. Cases where the court finds that the family as a unit has manifested a settled intention to change habitual residence, despite the fact that one parent may have had qualms about the move. Courts are generally unwilling to let one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.
2. Cases where the child's initial translocation from an established habitual residence was clearly intended to be for a specific, delimited period.

³²United States Court of Appeal for the 9th Circuit (9 January 2001)

³³ [1983] 1 All ER

Courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence.

3. In-between cases, where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration. Sometimes the court finds that despite the lack of perfect consensus, the parents can be said to have a shared mutual consent that the stay last indefinitely. Other times circumstances are such that the court cannot find a settled mutual intent from which such abandonment can be inferred.

40. Not only did the District Court have to find out whether the children had in some sense "become settled", but it also had to determine whether the US had supplanted Israel as the locus of the children's family and social development. As the District Court did not answer this question, the case was remanded to reconsider whether the children were habitually resident in Israel at the time of their retention in the US. If so, absent any defence, the children would have to be returned to Israel to allow an Israeli court to determine custody issues.

41. The US District Court for the Southern District of New York has applied *Mozes* in two cases: *Armiliato v Zaric-Armiliato*,³⁴ where the Court found that a child's habitual residence was in Genoa, Italy, despite a history of peripatetic lifestyle and a strong connection with New York, and *Paz v Paz*,³⁵ where the Court of Appeal affirmed the District Court's refusal to find a habitual residence in New Zealand where a child had a history of moving around and there was no shared intention of residence by both parents. The US District Court for the District of Nevada also applied *Mozes* in the case of *Ben-Even v Tal*,³⁶ where a mother and child's move to Israel for eight months was not considered to have changed the child's habitual residence as the intention to settle had been contingent on the child adjusting to life in Israel.

³⁴ (S.D.N.Y. 2001) 01 Civ. 0135 (WHP) 9 International Abduction [USA 2001]

³⁵ 169 F. Supp. 2d 254 (S.D.N.Y. 2001) affirmed (No. 01-9313 (2d Cir. 09/17/2002)

³⁶ (USDC Nevada 2001) No CV-S-01-0475-KJD (RJJ) 12 International Abduction [USA 2001]

42. The requirement of a shared intention, emphasised in the case law, was dispensed with in the recent case of *In re the Application of Victor Ferraris*.³⁷ On the unusual facts of this case, Judge Garbolino held that where a mother alone had *de facto* authority to determine where the child lived, only her intention was relevant to issue of the child's habitual residence.

43. The mother in this case was a US citizen who frequently travelled through Europe on business. While in Italy, she befriended the father, an Italian citizen, who agreed to act as a sperm donor to assist her to conceive a child. Before the child was born, the mother made it known that she planned to continue travelling and working with the child until he reached school age, at which point she would return with him to the US to enrol him in school. For his first four years, the child frequently visited his father and paternal grandparents until, after one such visit, they sought to retain the child. The mother responded by forcibly removing the child from their home and returning with him to the US, whereupon the father applied under the Convention for the child's return.

44. Judge Garbolino observed that there was never a "shared intention" to establish an Italian habitual residence, but that in any event, only the mother's intentions were relevant since she had the sole authority to determine where the child would live.

45. In refusing return, his Honour also rejected the father's claim that although the child had been travelling with the mother since birth, the total number of days the child had spent in Italy established an Italian habitual residence, holding that:

"Habitual residence can rarely be determined by the mere calculation of the periods of time that a child has spent in various locations. A longer stay in one location may not necessarily compel the conclusion that the place has qualified as the child's habitual residence."³⁸

³⁷ Case No. SSP 0295 (Unpublished)

³⁸ At 21.

Habitual residence of babies

46. The law appears unclear as to exactly how a baby's habitual residence is determined.

47. In *B v H (Habitual Residence: Wardship)*³⁹, the mother gave birth to a fourth child in Bangladesh after she had been informed of the father's intention to remain in Bangladesh permanently and not return to England. The mother returned to the England with all the children. The Court ruled that the first three children were habitually resident in England for reasons outlined above, and reached the same conclusion regarding the fourth child notwithstanding the fact that the child had never been to England prior to the mother's removal. The Court said a child cannot acquire a habitual residence until birth, but the fact that a child has not been to a country does not prevent that country from being a child's habitual residence.

48. Rather, the Court held that a baby's habitual residence is that of the people who have parental responsibility for it. That the father communicated his intention to remain in Bangladesh before the birth did not change the baby's habitual residence because it did not change the habitual residence of the mother or the other children.

49. To the extent that this proposition is a matter of law, it was rejected in *W and B v H (Child Abduction: Surrogacy)*⁴⁰. In that case however, the Court acknowledged that this may be true as a matter of fact, but that such a proposition would not be good for all cases. On the unusual facts of that case, the Court found that the child had no habitual residence.

³⁹ [2002] 1 FLR 388.

⁴⁰[2002] 1 FLR 1008.

50. Similarly in *De/voye v. Lee*,⁴¹ the Court held that it was not satisfied that a baby born in Belgium, to an American mother who had not abandoned her NY residence, was habitually resident in Belgium before being brought to the US.

[29] Where a matrimonial home exists, i.e., where both parents share a settled intent to reside, determining the habitual residence of an infant presents no particular problem, it simply calls for application of the analysis under the Convention with which courts have become familiar. Where the parents' relationship has broken down, however, as in this case, the character of the problem changes. Of course, the mere fact that conflict has developed between the parents does not ipso facto disestablish a child's habitual residence, once it has come into existence. But where the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence.

[30] That is not to say that the infant's habitual residence automatically becomes that of his mother...

[31] To say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is where the mother happens to be. 58 F.3d at 379.

...

[34] ...Addressing the status of a newborn child, one Scottish commentator said:

[35] [A] newborn child born in the country where his . . . parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability. Dr. E. M. Clive, "The Concept of Habitual Residence," *The Juridical Review* part 3, 138, 146 (1997)."

⁴¹ 329 F.3d 330 (3d Cir. 05/20/2003)

Dual habitual residence

51. The courts are not in agreement over whether a child can have dual habitual residence. In *Hanbury-Brown and Hanbury-Brown; Director General of Community Services*,⁴² the Full Court of the Family Court of Australia agreed that the notion of dual habitual residence was inconsistent with the wording and the spirit of the Convention. However in *Re V (Abduction: Habitual Residence)*,⁴³ Douglas Brown J found that it was possible for habitual residence to change periodically if that should be the intended regular order of life for parents and children. In that case the father and mother had, for ten years or more, lived in Corfu during the tourist season and in London during the winter. In March 1995, after the father had returned to Corfu, the mother remained in London with the two children of the marriage. The father then sought the children's return to Greece, asserting that the family's habitual residence was Greece. The mother's case was that the parties were habitually resident in both Corfu and England concurrently or, alternatively, that their habitual residence was consecutive, changing according to the family's seasonal movements, and had been England on the relevant date. Douglas Brown J found that the notion of concurrent residence did not fit easily into the scheme of the Convention. Despite this, there was sufficient continuity in the parents' residence in each of London and Corfu for the family to have alternating habitual residences. Douglas Brown J refused the father's application for the children's return, finding that at the time when the mother was due to take the children to Greece they were habitually resident in London.

52. A similar fact situation arose in *P v Secretary for Justice*.⁴⁴ In this case, the parents agreed to a shuttle custody arrangement, whereby their children, until they reached the age of 18, would live alternately for two years in Australia and two years in New Zealand. Pursuant to this agreement, the mother took the

⁴² (1996) FLC 92-671

⁴³ [1995] 2 FLR 992 at 1001

⁴⁴ [2003] NZLR 54.

children to New Zealand but five months after her arrival commenced proceedings for sole custody of the children. It was argued for the mother that the children had either lost their habitual residence in Australia when they left Australia or had acquired a habitual residence in New Zealand at the date of their retention. Goddard J rejected these submissions, holding that it was impossible to say that the children had acquired a habitual residence in New Zealand simply because they had lived there for five months and the mother wished to resile from the custody arrangement. In her Honour's view, Australia had not been supplanted as their place of habitual residence. On appeal, the Court of Appeal by a 2:1 majority overturned this decision. Blanchard J (with whom Glazebrook J formed the majority) reviewed the authorities and without deciding the issue found strong support for the conclusion that at the material time the children's habitual residence was New Zealand. Glazebrook J took a more extensive look at the case law. His Honour held that habitual residence was an issue to be determined by fully examining the factual circumstances of each case. In his Honour's view, Goddard J had failed to conduct such an examination before reaching her conclusion on the issue. Gault J (dissenting) held that Goddard J's finding on habitual residence was a finding of fact against which there was no right of appeal.

Can a parent in hiding create an habitual residence for the child?

53. Different views have been taken as to the consequences for an abducting parent of sequestering the child for some length of time. In *Meredith, M v Meredith*, S⁴⁵ the children were taken by their mother from the USA to France and then on to the United Kingdom, and their whereabouts were kept secret from her husband. When he found where they were, he went to England and removed the children, and she made an application under the Hague Convention. The issue was whether England was the habitual residence of the children. The District Court of Arizona held that habitual residence was to be

⁴⁵ 79 F Supp 1432 (26 February 1991)

determined by the circumstances of the particular case. The mother had failed to demonstrate that the children were habitually resident in the United Kingdom. Indeed, “[it] would be inequitable and unjust to allow such conduct to create ‘habitual residence’.” The Court continued:

“To equate the temporary removal and subsequent sequestration of the minor child to legal status of ‘habitual residence’ in another country would be to reward the petitioner for her ability to conceal the child from the respondent...”

54. Contrarily, the Berlin Supreme Court considered the question of habitual residence in case AZ 3UF 5187/91⁴⁶ and held that even though a father's initial removal of the children to England had been unlawful, the habitual residence of the children was established there after six months.

55. In the case of *HC/E/CH 423*⁴⁷ a Swiss appeals court upheld a decision to refuse to enforce a summary order for return four years after abduction, despite the fact that it was the abducting mother's refusal to comply with the return order that had caused the delay. However, in the case of *Ignaccolo-Zenide v. Romania*,⁴⁸ the European Court of Human Rights, by a majority of 6 to 1, ruled that Romania had breached Article 8 of the ECHR in failing to take proper steps to enforce various orders including a return order under the Hague Convention.

Habitual residence in the context of military personnel

56. The novel issue of the habitual residence of children born and/or residing on a foreign military base has arisen in a number of cases.

57. In the Australian context, the Family Court first looked at this issue in *Commissioner of Police v Claxton*.⁴⁹ The husband in that case was an American

⁴⁶ 23 September 1991

⁴⁷ 13/09/2001, 5P.160/2001/min; Bundesgericht, II Zivilabteilung (Federal Supreme Court, 2nd Civil Chamber) (Switzerland)

⁴⁸ 25 January 2000, ECHR, [INCADAT cite: HC/E/ 336]

⁴⁹ [2003] FCWA 65.

serviceman who had been assigned for four years to a US military base in Japan. In 1999, the husband, wife and their two-year old daughter moved to Japan, the wife giving birth to a son shortly after their arrival. In 2002, the wife removed the children to Australia and the husband sought their return to the US. The wife's case was that the Convention did not apply since, at the time of their retention, the children were habitually resident in Japan, a non-Convention country. The husband disputed this claim. Citing *Mozes* as authority, he argued that the parties could not have acquired a habitual residence in Japan, without first abandoning the US as their place of habitual residence. Penny J rejected this submission, holding that the test of abandonment was not the appropriate test. Her Honour held that habitual residence was to be determined in accordance with the principles set out by Waite J in *Re B (Minors) (Abduction) (No 2)* (1993) 1 FLR 993, ie a settled intention to live a particular place for an appreciable period of time. Applying this approach, her Honour concluded that the children's place of habitual residence was Japan, noting, amongst other things, that there had been sufficient continuity in the parties residence in Japan for it to be described as settled, that the parties had not retained a residence in the US and that their purpose for going to Japan was to live and work in that country for at least four years.

58. In *Friedrich v Friedrich*, the US Court of Appeals arrived at a similar conclusion. The child in this case was born to a German citizen and American servicewoman who had been posted to a US military base in Germany. The family had been living in a town off the military base until separation when the mother and child moved onto the base. The mother removed the child to the US shortly thereafter and the father sought the return of the child to Germany.

59. In resisting the child's return, the mother argued that the child was habitually resident in the US because he held US citizenship and the mother intended upon discharge from the military to return with the child to that country. In rejecting this argument the Court held "To determine habitual residence, the

court must focus on the child, not the parents, and examine past experience, not future intentions”.

60. The Court was also unpersuaded by the mother’s claim that the child’s habitual residence had changed upon moving onto the military base, stating that:

“Habitual residence cannot be so easily altered ...Thomas’s temporary three-day stay on an United States military base did not transfer his habitual residence to the United States ... As a threshold matter, a United States military base is not sovereign territory of the United States. The military base in Bad Aibling is on land which belongs to Germany and which the United States Armed Services occupy only at the pleasure of the German government”⁵⁰

61. In the English decision of *In Re A (Minors) (Abduction: Habitual residence)*,⁵¹ Cazalet J also concluded that a US military base in Iceland was not to be considered part of the US for Convention purposes. The parties in that case married and had two children in the UK before moving to Iceland where the father had taken up a posting at a US naval base. Shortly after their arrival, a third child was born. Upon separation, the father obtained orders preventing the mother from removing the children from Iceland. In breach of the orders, the mother took the children to live with her in the UK and father sought their return to the US.

62. The father argued that the children had an American habitual residence on a number of grounds. Citing Waite J’s decision in *Re B*, he argued that a habitual residence must be voluntarily acquired, and that his presence in Iceland was not voluntary but a requirement of his military service. As such, he claimed he had never lost his American habitual residence and that this also attached to his wife and children. Cazalet J rejected this submission as “too simplistic a view”, holding that when the father elected to join the armed forces, he had embraced the possibility that he may be required to serve and live abroad.

⁵⁰ At 1401.

⁵¹ [1996] WLR 25.

63. The father also sought to argue that the US military base ought to be considered a part of the US since the lifestyle and services offered on the base were American. Rejecting this submission, Cazalet J said:

“... the words of article 4 require that the child in question must have been habitually resident in the contracting *state* immediately prior to the wrongful removal. It is not suggested that there was some overall local law immunity, as might attach to an Embassy, in relation to the American camp in question ... In this case the *state* within which the United States base was to be found was Iceland”⁵²

64. The suggestion in this passage that a child living on embassy soil may be regarded for Convention purposes as habitually resident in the embassy country is yet to be tested. Such a scenario arose in the Australian context in *Director-General Department of Community Services v Prokop*⁵³ however that case turned on other issues and no findings were made as to the habitual residence of the children. The children in that case had been residing for three years at a US embassy in Zimbabwe before the mother removed them to Australia. It was agreed that while in Zimbabwe, the whole family had, by virtue of the husband's employment with the US government, enjoyed the benefit of diplomatic immunity. The Family Court observed that as a consequence of that immunity, no court in Zimbabwe had jurisdiction to hear or determine a parenting dispute between the parties unless there was a waiver of immunity. The mother refused to consent to any such waiver. La Poer Trench J held that to return the children to Zimbabwe in these circumstances would create an intolerable situation, stating:

“That there will be or could be litigation in the country of habitual residence if the child is returned appears a fundamental plan in the constructions of the Convention as a whole. It would certainly be an intolerable situation for a child if there was no avenue for the judicial or administrative consideration of matters of his welfare in the country to which his return is required.

...

⁵² At 34.

⁵³ Family Court of Australia at Sydney, 22 May 2002, unreported.

I conclude that the circumstances of the diplomatic immunity is decisive of the issue and it leads me in the proper exercise of my discretion with only one conclusion and that is to refuse the request for return of the three children of the marriage to Zimbabwe”.⁵⁴

65. Although his Honour made no finding on the issue of habitual residence, Gorman⁵⁵ has suggested that it may have been at least arguable on the basis of Cazalet J’s dicta in *In re A* that the children were habitual residents of the US rather than Zimbabwe.

WRONGFUL REMOVAL OR RETENTION

66. “Wrongful retention” has uniformly been accepted as an initial single event and not a continuing event.

67. In *Kilgour, MS v Kilgour, J* Lord Prosser discussed the situation where a child was removed from Canada to the United Kingdom at a time when the Convention was not in force between the two countries. The father submitted that the Convention came into force after the wrongful removal but while the child was being wrongfully retained. The Court held that having regard to the terms of the Convention as a whole, the word “retain” was to be given a limited meaning:

“the retention in question is an initial act of retention comparable in its effects to the act of removal, and...the Convention is not primarily concerned...with the new state of affairs which will follow on such initial acts and which might also be described as retention. The mere fact that the Canadian Central Authority had issued a request under the Convention did not indicate that there had been a wrongful removal or retention.”⁵⁶

⁵⁴ At 55, 57.

⁵⁵ Sonya Gorman, “Habitual Residence in the Context of Military and Diplomatic Personnel”, State Solicitor’s Office of Western Australia.

⁵⁶ 1987, SLT 568

68. In *Hanbury-Brown and Hanbury-Brown; Director General of Community Services*⁵⁷, the Full Court of the Family Court found that the terms “removal” and “retention” must be construed in the context of the entire Convention. The Court held that “removal” is intended to convey the concept of physical movement of children from one Contracting State to another and, likewise, “retention” is intended to convey the concept of retention in one State as against another. The State from which the removal has occurred or against which the retention is practised is the State of the child's habitual residence immediately before the removal or retention occurred.

69. Wrongful removal may be at issue where a child is taken from one country to another, and then on to a third jurisdiction where Hague proceedings are brought. In *State Central Authority v Ayob*⁵⁸ a Malaysian mother and American father lived in the US and had a child there. The mother took the child to Malaysia, which is not a Contracting State, with the intention of remaining there permanently. The mother requested that the father sign a visa form for the child so that she and the child could visit Australia, which is a Contracting State. The mother and child were apprehended as they entered Australia and Hague proceedings came before me. I held that the child had indeed been wrongfully removed from the US to Australia, albeit via a third country. Time had begun to run when the child was first taken. I ordered that the child be returned to the US. Children may be returned to a country other than that from which they have been wrongfully removed.

70. In *Re L (Abduction: Pending Criminal Proceedings)*,⁵⁹ a Danish mother removed 3-year-old twins from the US to Denmark. A Danish court made orders under the Convention that the children return to the US. Before effect could be given to the orders, however, the mother took the children from Denmark to England, where further Hague proceedings took place. Wilson J held that the

⁵⁷ (1996) FLC 92-671

⁵⁸ (1997) FLC 92-746

application needed to be considered afresh. For the purposes of the English proceedings, the children had been wrongfully removed from Denmark to England. Despite this, orders were made that the children be returned to the US, as sought by the father.

71. In *Von Kennel v. Remis*⁶⁰ the US Court of Appeals held that the Convention cannot be invoked when “the petitioner moves permanently to the same country in which the abductor and the children are located”.

These cases indicate that the Convention is not always simply about forum. A clear removal or wrongful retention from a rightful custodian may not require the children to be returned to their place of habitual residence, if the circumstances of the applicant parent have changed.

Mens Rea?

72. In *Thomson v Thomson*, La Forest J held that it is irrelevant whether the abducting parent knows that their actions in removing the child are wrongful:

“Nothing in the nature of mens rea is required; the Convention is not aimed at attaching blame to parties. It is simply intended to prevent the abduction of children from one country to another in the interests of children. If the removal of the child is wrongful in that sense, it does not matter what the appellant’s view of the situation is.”⁶¹

73. Whether wrongful retention can be converted into rightful retention remains controversial.⁶²

⁵⁹ [1999] 1 FLR 433

⁶⁰ 282 F.3d 1178 (9th Cir. 03/11/2002)

⁶¹ (1994) 6 RFL (4th) 290 at 318

⁶² see further *Barraclough v Barraclough* (1987) FLC 91-838; cf *Murray & Director Family Services ACT* (1993) FLC 92-416

Rights of Custody

74. The law of the country in which the child is habitually resident determines whether a parent does in fact have custody rights. So far as Australian law is concerned, s 111B(4) of the *Family Law Act 1975* provides that each of the parents of a child should, subject to any order of a court, be regarded as having custody of the child. For the purposes of the Convention, persons are to be regarded as having custody of the child if:

- they have a residence order in their favour; or
- a specific issues order in their favour that grants them responsibility for a child's day-to-day care, welfare and development; or
- they have responsibility for the long term care, welfare or development of the child.

Persons (including parents) with a contact order in their favour will be equated to having rights of access for the purposes of the Convention.

Is a right to determine the child's place of residence enough?

75. The position of non-custodial parents who retain a right to determine the child's place of residence varies from country to country. Article 5(a) of the Convention defines "rights of custody" to include the right to determine the child's place of residence and it has been ruled by some courts in England, America, Australia, France and Israel, that an access parent with the right to consent to the removal of the child from a jurisdiction has a right of custody within the meaning of Article 5 because such a parent has "the right to determine the child's place of residence".

76. For example in *Re C (A Minor)(Abduction)*,⁶³ the English Court of Appeal found that an injunction which prevented the custodial parent removing a child from Australia without the consent of the access parent created a right of custody within the meaning of the Convention.

77. English courts have generally favoured such a liberal construction. In *Re B (A Minor)(Abduction)*, Waite LJ said:

“The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of the breakdown in their parents’ relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression ‘rights of custody’ when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest possible sense.”⁶⁴

78. In *D v C* the Court of Appeal of New Zealand took just such a wide approach, and held that in order to have a right of custody, it was not necessary for the access parent to establish that he or she had the right to determine the child’s place of residence, as long as he or she had “rights relating to the care of the person of the child”. Henry, Keith and Tipping JJ held that the provision in Article 5(a)

“does not have to be read as requiring that the claimants in question have the right to determine the child’s right of residence. Rather, it can be read in this alternative way: claimants may succeed if they show that they have any qualifying rights relating to the care of the person of the child, one of which rights may be the right to determine place of residence. That particular right, on this reading, is just one of the qualifying rights of custody, or, to adapt a common expression, the existence of that right is sufficient but not necessary.”⁶⁵

⁶³ [1989] 1 FLR 403

⁶⁴ [1994] 2 FLR 249 at 260

⁶⁵ [1999] NZFLR 97

79. In *Thomson v Thomson*, the Supreme Court of Canada adopted a narrower interpretation that undermines this approach. La Forest J, with whom the other members of the court agreed, found that the effect of a Scottish court's insertion of a non-removal clause in an interim custody order was to retain a right of custody in the Scottish court within the meaning of Article 3 of the Convention. However, his Lordship emphasised the interim nature of the mother's custody in that case and went on to say:

"I would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody. Such a clause raises quite different issues. It is usually intended to ensure permanent access to the non-custodial parent. The right of access is, of course, important but ... it was not intended to be given the same level of protection by the Convention as custody. The return of a child in the care of a person having permanent custody will ordinarily be far more disruptive to the child since the child may be removed from its habitual place of residence long after the custody order was made. The situation also has serious implications for the mobility rights of the custodian."⁶⁶

80. In *W(V) v S(D)*⁶⁷ this line of authority was continued by the Supreme Court of Canada. It held that the Convention makes a clear distinction between rights of access, which include the right to take a child for a limited period of time to a place other than the child's habitual residence, and custody rights, which are defined as including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. It was held that the prior proceedings in the Court of Appeal had confused the concepts of custody and access rights by saying that any removal of a child without the consent of the parent having access rights could set in motion the mandatory return procedure, and thus indirectly afford the same protection to access rights

⁶⁶ (1994) 6 RFL (4th) 290 at 323

⁶⁷ (1996) 2 SCR 108

as it affords to custody rights. This case has been criticised by scholars of the Child Abduction Convention both within Canada and elsewhere.⁶⁸

81. The Supreme Court of Ireland also took a narrow approach in *WPP v SRW*.⁶⁹ In that case the mother took the two children from the United States, where they had lived their entire lives, to her native Ireland. Under an order made by the Superior Court of California, the mother had been awarded custody of the children and the father reasonable visitation rights. After the alleged wrongful removal, the father appealed to the Supreme Court of Ireland, which held that to order the return of the children to their place of habitual residence merely so as to entitle the non-custodial parent to exercise his rights of access was not warranted by the terms of the Convention.

82. In *HI v MG*⁷⁰ Keane J (with whom Hamilton CJ, Denham and Barrington JJ concurred) in the Supreme Court of Ireland held that while the Convention should be given a purposive and flexible interpretation, it would go too far to accept that there was “an undefined hinterland of inchoate rights of custody not attributed in any sense by the law of the requesting State to the party asserting them or to the court itself”. In this he held that the majority decision in *Re B (A Minor) (Abduction)*⁷¹ should not be followed. Barron J dissented, arguing that the existence of legal custody rights was not the appropriate starting point for a claim under the Convention, rather it should first be determined what rights were actually being exercised at the date of the removal and then decide whether they amounted to rights of custody within the meaning of the Convention.

83. In the United States Court of Appeal case of *Croll v Croll*⁷² the majority took the narrow approach. That case concerned a child who was born in Hong Kong to American parents. The parties separated in 1998, whereupon the child

⁶⁸ Silberman, Linda “The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues” (2000) 33 *New York Journal of International Law and Politics* 221 at 232

⁶⁹ [2000] IESC 11

⁷⁰ (1999) 2 IRLM 22

⁷¹ [1994] 2 FLR 249

⁷² 229 F.3d 133 (2d Cir. 2000)

resided with the mother in Hong Kong, and the father had regular contact. In 1998, the mother was granted sole custody of the child and the father was granted a right of reasonable access. There was a clause in the custody order that directed the child “not be removed from Hong Kong until she attains the age of 18 years” without the consent of either parent, or leave of the court.

84. In April 1999, the mother took the child to New York and did not return to Hong Kong. The father commenced proceedings under the Convention, asserting that the *ne exeat* clause in the custody order granted him a custody right concerning the child’s place of residence outside Hong Kong. The mother contended that the father did not have a right of custody within the meaning of the Convention at the time of the child’s removal. Stein J of the United States District Court for the Southern District of New York rejected the mother’s arguments, finding that the Hong Kong custody order indicated that the father (together with the mother) had a right to determine the child’s place of residence and a corresponding right of custody within the meaning of the Convention. The child’s removal from her country of usual residence was in breach of the father’s custody rights and therefore wrongful.

85. The mother appealed, and by majority of the United States Court of Appeal the decision was reversed. The majority found that the custodial parent only had rights of custody within the meaning of the Convention. Their Honours commented that:

“it is unhelpful and insufficient to think about the custodial right to designate a child’s ‘place of residence’ in terms of the power to pick her home or territory. Such a power protects rights of custody and access alike, and is no clue as to who has custody.”

86. The majority distinguished between the veto power in the custody order and the right to determine a child’s place of residence. Their Honours considered that the “right to determine” implied an active power to choose and alter the child’s address at will as a matter of parental and personal judgment. In

contrast, the custody order gave the father a veto power only over the child's expatriation, but not over any other custodial issue, including her place of residence within Hong Kong. This veto power was a power in reserve only.

87. Their Honours observed that the Convention assumed that returning the child to her country of habitual residence was a return to the custodial parent who would be able to care for her. "It does not contemplate return of a child to a parent whose sole right – to visit or veto – imposes no duty to give care."

88. In a robust dissent, Sotomayor J felt that the majority seriously misconceived the legal significance of the *ne exeat* clause. In doing so, the goal of the Convention to ensure that the rights of custody under the law of one contracting state are effectively respected in the other contracting states was effectively undermined (per Article 1). Her Honour agreed with the father that he and the Hong Kong Court jointly held custody rights in respect of the child and that the father would have exercised his custody rights in the *ne exeat* clause but for the child's removal from Hong Kong.

89. In *Furnes v Reeves*,⁷³ the 11th Circuit joined this dissent and rejected the reasoning of the majority in *Croll* as flawed. In that case, the mother who was the custodial parent of the child, persuaded the father to consent to the child spending the summer holidays in the United States. When the mother failed to return the child to Norway, the father brought Hague proceedings.

90. The parties in this case had "joint parental responsibility" for the child. Under Norwegian law, this meant that the mother, as custodial parent, had exclusive power to determine where in Norway the child would live but both parties had to consent before the child could move abroad. The question for the court was whether the father's *ne exeat* right amounted to a right of custody entitling the father to the return of the child.

⁷³ (11th Cir. 2004)

91. In concluding that it did, the court held that a parent need not have 'custody' of the child to be entitled to return of the child. All that was required was that the parent have one right of custody and this right could be jointly held. The Court remarked at para 86 that:

"In American courts, we tend to think of custody rights primarily in the sense of physical custody of the child. However, in applying the Hague Convention, we must look to the definition of "rights of custody" set forth in the Convention and not allow our somewhat different American concepts of custody to cloud our application of the Convention's terms. Specifically, in this case we must think of "rights of custody" as including the "rights relating to the care of the person of the child", and in particular, "the right to determine the child's place of residence."

92. In this case, the father had such a right, albeit one jointly held, to determine whether the child lived within or outside Norway. The fact that the father could not also determine the child's place of residence within Norway was immaterial. The Court found further support for this interpretation in the purposes of the Hague Convention. Their Honours at para 104 said:

"The Hague Convention was designed to provide a remedy not for whether [the child] should live in Bergen or Oslo within Norway... but for whether [the mother] should be able to take [the child] across international borders. Thus, in our view, the only logical construction of the term "place of residence" in the Convention would necessarily encompass decisions regarding whether [the child] may live outside of Norway. Therefore, what country a child lives in, as opposed to what city or house within Norway, constitutes a right to determine a child's place of residence under Article 5 ... Given that the goal of the Hague Convention is to deter international abduction, we readily interpret the *ne exeat* right as including the right to determine the child's place of residence because the *ne exeat* right provides a parent with decision-making authority regarding the child's international relocation".

93. In reaching this conclusion, the Court rejected the main conclusions upon which the decision in *Croll* was based. First, the Court rejected the characterisation of a *ne exeat* right as a mere limitation on the right of the custodial parent. The Court held that in this case, the parties' rights were more

naturally characterized as “a divided right to determine the child’s place of residence, and that each of their rights serve[d] as a limitation on the other’s”.

94. Second, the Court rejected the notion that a *ne exeat* right could only be exercised to prevent a wrongful removal. This conclusion ignored the possibility of a custodial parent complying with a *ne exeat* clause and requesting the consent of the non-custodial parent to move abroad. In this situation, the non-custodial parent would have the opportunity to exercise their *ne exeat* right by granting or withholding consent.

95. Finally, the Court was unconvinced by the majority’s concern that if a *ne exeat* right conferred a “right of custody”, a court could be compelled to return a child to a parent “who lack[ed] the right or responsibility to give care ...[to the child], or who ha[d] been found unfit to have custody”. The Court pointed out that this result could be avoided if the custodial parent returned the child to the place of habitual residence. Upon return, the custodial parent could then take whatever legitimate steps were available to remove the *ne exeat* restriction. In the court’s view, this was a preferable approach to that taken in *Croll* which thwarted rather than satisfied the goal of preventing international child abduction.

Rights removed by statutory limits on powers granted to each parent

96. In *Jiang v Director-General, Department of Community Services*⁷⁴ an Australian Full Court refused to return a child to Georgia USA on the basis that the abducting mother had an order that gave her ‘sole physical custody’. Even though the father had ‘joint legal custody’, under the law of Georgia the father had no more than a right to be consulted as to the residence of the child and this did not amount to “rights of custody” under the Convention because the father could not determine where the child could live.

⁷⁴ [2003] FamCA 929

Can a Court have a right of custody?

97. A number of English cases have found that a Court can have rights of custody. In *Re H (Abduction: Rights of custody)*⁷⁵ a child born to Irish parents was taken by his mother to England in 1998, one month before guardianship and access matters were to be heard by the Irish court. The father sought a summary return under the Convention, asserting that the child's removal was in breach of either the Irish court's, or his own rights of custody. The English court dismissed the father's application on the basis that the father had no right of custody at the date the child was removed from Ireland. The Court of Appeal allowed the father's appeal, finding that the Irish court had custody rights at the time of the abduction. The mother appealed, contesting the Court of Appeal's findings that a court could have rights of custody attributed to it. The mother further raised the issue of whether the father, who did not have rights of custody, was able to demand summary return of the child under the Convention.

98. The House of Lords dismissed the mother's appeal, finding that Article 8 of the Convention was deliberately phrased widely and included the right to determine the child's place of residence. A court acquired rights of custody if its jurisdiction had been invoked in respect of matters of custody within the meaning of the Convention. The father had applied to the Irish court to be appointed a guardian under its jurisdiction, and this application involved rights of custody. Upon service of this application, the Irish court possessed rights of custody in relation to the child. Although the matter had not been resolved at the date of the abduction, it did not destroy the court's power to decide the child's residence.

99. The Full Court of the Family Court of Australia referred to *Thomson and Re H* in the case of *Brooke v Director General, Department Of Community Services*.⁷⁶ The Court found that where a foreign court is properly seised of an issue as to where a child should reside, and whilst those proceedings are

⁷⁵ [2000] 1 FLR 374

⁷⁶ [2002] FamCA 258

pending the child is removed from the jurisdiction of that Court without the consent of the Court, then an Australian court is bound to recognise the rights of custody (as defined in the Convention) that repose in the foreign Court.

100. In the Dutch case of *X {BJA} against Y (the mother)*⁷⁷ the issue arose as to whether a government body could be awarded custody rights. The child, who was aged ten at the date of the alleged wrongful removal, had lived in Holland all her life. The mother was awarded custody and the father access. The child was also placed under the temporary supervision of the Bureau of Youth Care (BJA), a government body that can make orders in respect of bringing up a child, that limit the custody rights of a parent. The mother subsequently removed the child to Denmark without consulting the BJA. The Hoge Raad der Nederlanden had to determine whether the rights held by the BJA amounted to rights of custody for the purposes of the Convention. The court held that since there was no obligation under Dutch law for the mother to consult the BJA before leaving the jurisdiction, and as the BJA had not given any direction about the residence of the child at the time the mother left for Denmark, it could not be said that the organisation had any right of custody.

Rights of unmarried fathers

101. A wrongful removal under the Convention can only exist where the child is removed in breach of custody rights. A serious question arises as to how the Convention views the rights of those who, despite having a significant role in the care of the children, do not possess legal parental rights. The question however is whether or not an absence of such legal rights necessarily prevents such people possessing “custody rights” within the meaning of the Convention. The people most affected by this question are unmarried fathers, but the result may also affect grandparents and even non-relatives.

⁷⁷ ELRO nr: AA5523 Zaaknr.R99/111HR (17 April 2000)

102. The English position on unmarried fathers having custody rights was tested in *Re W; Re B (Child Abduction: Unmarried Father)*.⁷⁸ In England unmarried fathers do not have parental responsibility unless there is an order otherwise. Two unmarried fathers sought declarations that the removals of their children from England were wrongful. Hale J distinguished between a father who had commenced proceedings seeking to obtain parental responsibility prior to his children being taken overseas, and another father who had not brought proceedings for parental responsibility at all. The removal of children when proceedings were pending was described as a “repugnant” attempt to frustrate court processes. The removal of the former father’s children was in breach of rights of custody and wrongful under the Convention, whereas the removal of the latter father’s children was not wrongful. This was held to be so, even if the father shared joint primary care of the child with the mother, or had extensive contact: *Re C (Child Abduction) (Unmarried Father: Rights of Custody)*⁷⁹

103. In the unusual case of *The Ontario Court v M and M (Abduction: Children’s Objections)*, a Canadian grandmother was able to avoid the requirement of rights of custody, although her Hague application ultimately failed. The parents of two children together took their children from Canada to England. The grandmother objected and brought Hague proceedings. When it became evident that she had not been exercising custody rights the Ontario Court was substituted for her as a party. Hollis J doubted whether it had been proper for the Ontario Court to be made a party in place of the grandmother, commenting:

“This case is also unique, in my experience, in that ... the alleged abductors are the two natural parents, who are married, living together, and who at all material times had the care of these two children.”⁸⁰

⁷⁸ [1998] 2 FLR 146

⁷⁹ [2002] EWHC 2219 (Fam); [2003] 1 FLR 252.

⁸⁰ [1997] FLR 475

104. In *V-B (Minors)*⁸¹ the issue of whether the right to be consulted amounted to a right relating to the care of the child was canvassed. In that case the mother had custody of the two children aged 8 and 4 years. In 1998, the mother took the children from the Netherlands where they were habitually resident and moved to Wales where the mother originally came from.

105. The parties had entered into a divorce agreement that also set out the arrangements for the payment of maintenance by the husband to the wife and the children. The mother wrote a letter to her solicitors in April 1998 wherein she stated that as long as the father continued to keep paying alimony, she would remain with the children in Amsterdam. The mother left Amsterdam in August of that year and refused to disclose her whereabouts.

106. In response to the father's Convention proceedings, the mother contended that the removal was not wrongful, as she had not breached any rights of custody the father may have had. Sumner J (High Court of Justice, Family Division) accepted the mother's argument. On appeal, the father argued that he did have a right of custody in the original court orders which stipulated that the mother was bound to notify the father of important decisions regarding the children's welfare. Lord Justice Ward (Mantell and Beldam LJJ concurring) found that the "right to be consulted" does not amount to a right relating to the care of the child. Without wishing to diminish the father's right to be consulted, his Lordship observed that the father's response to the consultation "cannot force any change of pattern to the children's care", as his right was not a right of veto. The court found that the mother was free to leave the Netherlands without obtaining permission from either the father or the court. Hence, as he had no right of custody, the removal of the children was not considered wrongful.

107. *In re J (A Minor) (Abduction: Custody Rights)*⁸² involved unmarried parents. The mother was given sole custody and guardianship of the child under

⁸¹ [1999] EWCA 1178

⁸² [1990] 2 AC 562

s 35 of the *Family Law Act* 1975 of Western Australia. In fact, the parents exercised custody jointly. When the mother took the child to England, the father filed a Hague Convention application to have the child returned. The Court held that the fact that the mother had sole legal custody decided the issue in favour of the mother. She possessed exclusively all legal rights of custody, including the right to determine the child's place of residence.

108. This case appeared to stand for the proposition that in the absence of legal, parental responsibility, one could not invoke the Convention.

109. The Court of Appeal retreated from that position in *In re B (A Minor Abduction)*⁸³. In that case a 2:1 majority held that the Convention was not to be construed technically by giving its terms a specialist meaning. On that basis, the majority considered whether the concept of 'rights' in the Convention was restricted to the legal recognition of the term, or whether it extended to the inchoate rights of those who were de facto custodians or parents, though not formally recognised as such in law. The Court concluded that an unmarried father who was the sole carer of the child had inchoate rights of custody under the Convention. This was followed in *Re O*⁸⁴.

110. Hale J also explicitly accepted the approach in *In re B (A Minor) (Abduction: Father's Rights)*⁸⁵, restricting it however to circumstances "where the father is currently the primary carer for the child, at least if the mother has delegated such care to him". On the facts of that case, his Honour did not find that the father had inchoate rights of custody because proceedings between the parents had been concluded, and the mother had been awarded custody rights.

Non-parents

⁸³ [1994] 2 FLR 249

⁸⁴ [1997] 2 FLR 702

⁸⁵ [1999] Fam 1

111. In *Re G (Abduction: Rights of Custody)*⁸⁶, the mother had considered putting the child up for adoption in South Africa. After being persuaded to move with the father to England instead, she left the child in the full-time care of the paternal grandmother for approximately four months. After this period, the father moved into the paternal grandmother's home to be with the child. Some three months later, the child was returned to the mother for a ten-day holiday in England. The mother took the child without notice to South Africa and commenced adoption proceedings. The paternal grandmother and the father sought a declaration that this removal was wrongful.

112. Sumner J held that rights of custody under the Convention were to be interpreted widely in order to protect children from being taken away from their primary carers. In this case, his Honour held that the paternal grandmother had acquired rights of custody due to the child's long-term placement with her, and the fact that she was making decisions regarding the child for this time. The father also had custody rights which arose jointly with those of the paternal grandmother.

113. Finally, Butler-Sloss P in *Re Flack*⁸⁷ was asked to declare the removal of a child from its grandparents to be in breach of their custodial rights under the Convention. Her Ladyship came "to the conclusion that there are circumstances in which a person who is not related by blood to the child who has been in his care may nonetheless be found to have inchoate rights of custody". In that case, there was some dispute over whether or not the applicant was in fact the father. Butler-Sloss P found that this dispute was irrelevant to the question of whether or not a removal of the child from the applicant would be wrongful. Rather, the underlying principle in the authorities was "the situation of exclusivity of the care of the child". Butler-Sloss P held that inchoate rights were rights which are "capable of being affected by applications to the court" with a reasonable prospect of success. On the facts of the case before her, she found that the

⁸⁶ [2002] 2 FLR 703.

⁸⁷ [2002] EWHC 2896.

father would be likely on the balance of probabilities to obtain a residence order should he apply to the Family Court. Therefore, inchoate rights were capable of being perfected on the facts of the case; the applicant had these rights. An order was eventually made by consent in subsequent proceedings in Australia for the return of the child to the UK.

WHERE THE APPLICATION IS MADE AFTER THE EXPIRATION OF ONE YEAR

114. Article 12 of the Hague Convention sets out that where the application is made within one year of the date of wrongful removal or retention, the authority concerned shall order the return of the child immediately. It also states that if the application is made after the expiration of one year from the date of wrongful removal or retention, the authority concerned shall still order the immediate return of the child unless it is shown that the child is now settled in its new environment. Time starts running from the moment when the child is wrongfully removed, or when the left-behind parent withdraws his or her consent, thus creating a wrongful retention. The date that the international border is crossed is irrelevant.

115. In the case of *In the Interest of Tazi*⁸⁸ the District Court of the 301st Judicial District, Dallas County, Texas, held that the abductor parent had deliberately concealed the children's whereabouts beyond 12 months. The Court held that in the circumstances the abducting parent was not entitled to the benefit of Article 12 and ordered the return of the children without considering the issue of whether they were settled in their new environment. This was despite the fact that the hearing was held more than six years after the original abduction.

116. Two different approaches have been adopted in relation to the question of whether the child is settled. According to the more liberal approach, a child will be found to have settled where it has lived almost exclusively within its new

⁸⁸ 26 January 2001

household. However, the more restrictive approach, adopted by the United Kingdom, requires that the child be integrated into the outside environment and the community – integration into the new family is not sufficient.

117. In *Graziano v Daniels*,⁸⁹ the Full Court of the Family Court of Australia adopted the English approach that the test of “settled” is more exacting than that the child is happy, secure and adjusted to his surrounding circumstances. However a differently constituted Full Court in *Director-General, Department of Community Services v M & C*⁹⁰ held that *Graziano* imposed an improper gloss on the wording of the Convention, since the Convention wording is to be given its ordinary meaning: *De L.*⁹¹ The Full Court recently confirmed *M & C* in *Townsend v Director-General, Department of Families, Youth and Community Care*:

“...[I]nsofar as *Graziano* suggests that the test for whether a child is ‘settled in his or her environment’ requires a degree of settlement which is more than mere adjustment to surroundings, or that the word ‘settled’ has two constituent elements, a physical element and an emotional constituent, it represents a gloss on the legislation and should not be regarded as accurately stating the law. We agree with the Full Court in *M and C* ... that ‘The only test to be applied, is whether the children have settled in their new environment’.”⁹²

118. In England the definition of “settled” remains restrictive. In *Re N (Minors: Abduction)*⁹³ Bracewell J held that the word “settled” has two elements – the child must be physically established in the environment, and must also be emotionally settled and secure.

119. *Re N (Minors)(Abduction)* was considered by Thorpe J of the English Family Division in *Re M (Abduction: Acquiescence)*. While not obliged to make a finding on the point, having found that the removal of the 4-year-old child from Greece to England was not wrongful according to Greek law, Thorpe J said:

⁸⁹ (1991) FLC 92-212 at 78,436

⁹⁰ (1998) FLC 92-829

⁹¹ (1996) FLC 92-706

⁹² (1999) FLC 92-842 at 85,853

“It seems to me that any survey of the degree of settlement of the child must give weight to emotional and psychological settlement, as well as to physical settlement. The distinguishing ingredient is the solidity and security of the arrangements that the mother has developed through taking advantage of family support. Her father is a recently retired land agent. Both he and his wife have been fully available to J as grandparents. In the perspective of a 4-year-old, 15 months is a very substantial experience of childhood and I am quite satisfied that the mother has demonstrated that J is now settled in his new environment within the terms of Art 12 of the Convention.”⁹⁴

120. In *Collopy v Christodoulou* the Colorado District Court refused to order the return of a child to the United Kingdom after the child had lived in Colorado for 20 months. The Court commented that:

“Although...the child's retention is wrongful... the respondent has allowed a considerable amount of time to lapse, enough time to allow this child to establish significant ties to this community so that this Court should not order that the child be uprooted and returned at this point.

...[I]n the absence of any evidence to the contrary, the Court has to conclude that the petitioner has met her burden of establishing by a preponderance of the evidence that the minor child is settled in her new environment, and because of that fact, the Court should deny the motion to return pursuant to the Hague Convention.”⁹⁵

121. This can be contrasted with a decision of the Ohio Court of Appeal in *Re Petition for Coffield*, where the Court refused to find that a child abducted from Australia had settled in the United States of America notwithstanding that three years had elapsed. The Court said:

“In concluding that the appellant had not carried his burden of proof as to this exception, the trial court found that the appellant had exposed Ryan only to a limited group of friends and relatives. Our review of the record supports this conclusion. While Ryan may have made new friends, the record shows that these friends were

⁹³ [1991] 1 FLR 413

⁹⁴ [1996] 1 FLR 315

⁹⁵ 90 DR 1138 Division B (8 May 1991)

limited to the children of the appellant's prior acquaintances, ie, people whom the appellant could trust. Moreover, the appellant failed to present any evidence that Ryan had made any friends in the community in which they lived. In addition the evidence at trial clearly established that the appellant and Ryan had been living in Ohio only for approximately 10 months prior to the filing of the petition...

At trial, the appellant did not show that Ryan had developed the connections to the community which an normal child of his age would, ie the appellant did not show that Ryan had developed relationships with other individuals besides those which the appellant specifically chose. Under these circumstances, the appellant failed to carry his burden of proof.”⁹⁶

122. In *Re H; Re S (Abduction: Custody Rights)*⁹⁷ the House of Lords held that the reference in Article 12 to the one-year period clearly indicated that, for the purposes of the Convention, removal and retention were events occurring on a specific occasion. The latter concept was not a continuing state of affairs. Furthermore, “removal” and “retention” meant removal and retention out of the child's State of habitual residence, not out of the care of the parent having custodial rights.

Does the Convention apply once a finding is made that the child is settled?

123. The consequences of a finding that a child is settled where an application is made after one year is in dispute. In *State Central Authority v Ayob*⁹⁸ I held that where one year has passed and a child is settled the Convention has no further application. In *M and C*⁹⁹ the Full Court of the Family Court commented that, although it was unnecessary to determine the issue, they were not necessarily persuaded by the view that no judicial discretion remains after one year when a child is settled. In the decision of *Director-General of Department of*

⁹⁶ Ohio App, 11 Dist 1994, 644 NE 2d 662

⁹⁷ [1991] 2 AC 476

⁹⁸ (1997) FLC 92-746

⁹⁹ (1998) FLC 92-829

*Families, Youth and Community Care v Moore*¹⁰⁰ the Full Court noted “the very great importance of the question” but opted to wait for a case with more argument on the issue before expressing a more conclusive view. In the English case of *Re L (Abduction: Pending Criminal Proceedings)*,¹⁰¹ Wilson J favoured the notion that a judicial discretion remains where a child is settled after one year.

124. Pérez-Vera expresses a clear view on the issue:

“[I]t is clear that after a child has become settled...its return should take place only after an examination of the merits...which is outside the scope of the Convention...”

And further:

“[The] obligation [to order return] disappears whenever it can be shown that ‘the child is now settled in its new environment’.”¹⁰²

In *Antunez-Fernandes v. Connors-Fernandes*,¹⁰³ the court took a contrary view. In ordering the return to France of children who had become well settled in the USA, the Court held:

“[53] Establishment of the “well settled” exception does not make refusal of a return order mandatory. The Court retains the discretion to order the children returned even if an exception applies. 51 Fed.Reg. 10,509....

[54] Although more than one year has elapsed since their abduction, Mrs. Fernandes should not ultimately benefit from the effects of her own actions and the barriers Mr. Fernandes faced in bringing his petition...”

¹⁰⁰ (1999) FLC 92-841 at 85,845

¹⁰¹ [1999] 1 FLR 433 per Wilson J.

¹⁰² Elisa Perez-Vera, Report of the Special Commission, Preliminary Document No.6, May 1980, in *Hague Conference on Private International Law*, III Actes et documents de la Quatorzieme Session, October 6-25, 1980

¹⁰³ , No. 02-1028 LRR (N.D.Iowa 04/24/2003)

125. Similarly, in *Belay v. Getachew*¹⁰⁴ a Swedish child hidden in the US by mother for 2 ½ years before Hague proceedings commenced was ordered to be returned. The Court said:

[8] ... The Court further holds that although Respondent has established the "well-settled" defense under Article 12, equitable considerations mandate that the child still be returned because Eden only became "well-settled" as a result of the concealment of the child by Respondent. The Court will therefore order that the child be returned to Sweden forthwith....

[52] Having determined that Eden is "well-settled" and that the action was untimely filed nearly two and a half years after removal, the only remaining question is whether there are any equitable justifications to "toll" the running of the one-year period, thus causing the child to be returned in spite of the elements of the Article 12 defense having been established. The Court must first determine whether Article 12 is a statute of limitations, or if it is akin to one, so that equitable tolling could apply to it. If no equitable tolling would apply, then the child need not be returned. If equitable tolling does apply to Hague petitions, the Court must analyze whether the facts in this case warrant the use of equitable tolling....

[55] [T]his court is not convinced that the one-year period referred to in Article 12 is a statute of limitations. A petition for the return of a child is not barred if it is filed over one year from the date of removal. Rather, the drafters of the Hague Convention decided that after the passage of a year, it became a reasonable possibility that the child could be harmed by its removal from an environment into which the child has become settled, and that a court ought to be allowed to consider this factor in making the decision whether to order the child's return. *Anderson v. Acree*, 2002 U.S. Dist. LEXIS 26358, at *6 (S.D.Ohio 2002).

... This is not the case where a parent has "slept" on his rights, allowing time to pass without actively seeking the child. Instead, when knowledge came to him as to Eden's location, he acted with due haste in bringing the petition. Because Respondent concealed the child from Petitioner until February of 2003, she is estopped from asserting the Article 12 defense."

¹⁰⁴ No. AW-03-761 (D.Md. 07/08/2003)

126. In the recent English decision in *Re C (Abduction: Settlement)*,¹⁰⁵ Singer J agreed with the view I expressed in *Ayob*, that where a child is settled and more than a year has expired, the Convention no longer applies. His Honour arrived at this conclusion after an extensive analysis drawing on established principles of interpretation.¹⁰⁶ His Honour found that the ‘ordinary meaning’ of article 12 was clear, that is to mandate the return of the child forthwith unless the child was settled in its new environment. His Honour held that the use of the word ‘unless’ “not only removes the obligation to order return but renders it impermissible to do so”.¹⁰⁷ In support of this conclusion, his Honour contrasted article 12 with article 13 noting that whilst the latter provides that a court ‘may’ order return notwithstanding the establishment of an exception, there is nothing in the wording of article 12 to suggest that where a child is settled a similar discretion exists. The ‘ordinary meaning’ of article 12 therefore had the effect of removing a settled child entirely from the ambit of the Convention.

127. Article 18 did not, in his Honour’s opinion, alter this conclusion since:

“It would, on the face of it, be hard to read article 18 as conferring an additional or residual power to order return *under the Convention* in a case which does not fall within it”.¹⁰⁸

128. Furthermore, his Honour found no inconsistency between this interpretation of article 12 and the stated object of the Convention to secure prompt return. His Honour noted that the word ‘prompt’ in this context:

“does not refer to the separate requirement for Contracting States to ‘use the most expeditious procedures available’ to secure the implementation of the Convention’s objects [but rather] to the time lapse between wrongful removal or retention and the ‘return of the child forthwith’...”¹⁰⁹

¹⁰⁵ [2004] EWHC 1245 (Fam).

¹⁰⁶ See Vienna Convention on the Law of Treaties 1969, art 31-33.

¹⁰⁷ At para 16.

¹⁰⁸ At para 22.

¹⁰⁹ At para 26.

129. His Honour found support for this contextual interpretation of the word ‘prompt’ in the Explanatory Report and the case law including the decision of Hale J in *Re HB (Abduction: Children’s Objections) (No 2)*¹¹⁰ where her Honour said:

“...the object of the Hague Convention is set out in its preamble. In essence this is to further the best interests of children by ensuring their speedy return to the country where they have been habitually resident. Once the time for a speedy return is passed, it must be questioned whether it is indeed in the best interests of a child for there to be a summary return after the very limited inquiry into the merits which is involved in these cases”¹¹¹

130. Finally, his Honour considered whether the deliberate concealment of a child had any affect on his interpretation of article 12. He concluded that such concealment “does not stop the year’s time running, [but] may be and often is highly material when the court considers whether settlement is demonstrated”.¹¹² In forming this view, Singer J was persuaded by the observations of District Judge Graham in *Anderson v Acree*¹¹³ that:

“... the drafters of the Hague Convention decided that after the passage of a year, it became a reasonable possibility that the child could be harmed by its removal from an environment into which the child had become settled, and that the court ought to be allowed to consider this factor in making the decision whether to order the child’s return. This potential of harm to the child remains regardless of whether the petitioner has a good reason for failing to file the petition sooner, such as where the respondent concealed the child’s whereabouts. There is nothing in the language of the Hague Convention which suggests that the fact that the child is settled in his or her new environment may not be considered if the petitioning parent has a good reason for failing to file the petition within one year”

¹¹⁰ [1998] 1 FLR 564.

¹¹¹ At 568.

¹¹² At para 12.

¹¹³ 250F. Supp.2d 872 at 875.

131. Singer J's reasoning in *Re C* has since been adopted in full in the Hong Kong case of *AC and PC*¹¹⁴ where Hartmann J held that in circumstances where an application for return was brought almost five years after the wrongful removal and the children had become settled, the Convention did not apply. The fact that the father had deliberately concealed the children did not change this result.

THE EXCEPTIONS TO THE MANDATORY RETURN OF THE CHILDREN

132. According to Article 13 of the Convention, the Court has a discretion as to whether to order the return if it is established that:

(a) at the time of the removal or retention, custody rights were not actually being exercised or the removal or retention was consented to, or subsequently acquiesced to; or

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

133. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has reached such an age and degree of maturity that it is appropriate that the court take account of his or her views.

134. Article 20 of the Convention invokes the judge's discretion not to order the return of the child notwithstanding the child's wrongful removal or retention where "the return of the child would not be permitted by the fundamental principles of the Requested State relating to the protection of human rights and fundamental freedoms".

135. When Articles 13 and 20 were drafted, the negotiating countries expressed the view that the exceptions must be drawn and construed narrowly so that the purpose of the Convention was not compromised.

¹¹⁴ HCMP 1238/2004.

136. At the second Special Commission meeting to review the operation of the Convention¹¹⁵ when initiating discussion on the exceptions to mandatory return, Adair Dyer (First Secretary) stressed that as Article 13 counteracts the main aim of the Convention – to secure the return of a wrongfully abducted child – the exceptions should be used very carefully, and not at all excessively.

137. Discussion at the Special Commission revealed that Article 13 is indeed given a narrow interpretation in most jurisdictions and that in only a few cases are the exceptions found to apply. This was reinforced at the recent Fourth Special Commission (March 2001) where the recommendations included

“4.3 The Article 13, paragraph 1 *b*), ‘grave risk’ defence has generally been narrowly construed by courts in the Contracting States, and this is confirmed by the relatively small number of return applications which were refused on this basis according to the Statistical Analysis of Applications made in 1999 (Prel. Doc. No 3, March 2001). It is in keeping with the objectives of the Convention, as confirmed in the Explanatory Report by Elisa Pérez-Vera (at paragraph 34), to interpret this defence in a restrictive fashion.”

138. The majority judgment in an Australian High Court decision challenges this concept of “narrow interpretation” emphasising that the words of the enacting Regulation should be given their natural meaning and that those words (“grave and intolerable”) impose the limits on the exceptions.¹¹⁶

139. Australian courts have predominantly pursued the aims of the Convention vigorously and insist on a strict reading of the exceptions. In *Director General of Family and Community Services v Davis* Nygh J, with whom Strauss and Rowlands JJ agreed, stated:

“It is, therefore, the intention of the Convention and the Regulations which implement it, to limit the discretion of the court in the country

¹¹⁵ 18-21 January 1993

¹¹⁶ *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Service* (2001) FLC 93-081, para 8 and 41

to which the children have been taken quite severely and stringently.”¹¹⁷

140. Similarly, the English Court of Appeal commented in *Re M (Abduction: Psychological Harm)*:

“Because of the strict requirements, few cases in England have crossed the Art 13 threshold and it is clearly shown from decisions of this court that it is only in exceptional circumstances that a court should not order summary return.”¹¹⁸

141. The Court said further:

“The conduct of the abducting parent is, as I have already said, crucial and in most cases determinative. It cannot however exclude the rare case where the court has to look past that conduct to the manifest needs of the child concerned. Article 13 gives the requested State this limited but none the less important opportunity to look at the specific welfare of these children at the time when the application for summary return is made.”

142. New Zealand courts have taken a similarly narrow approach, as have the Israeli and American courts.

Actual Exercise and Acquiescence

143. The first exception to the mandatory return of an abducted child, set out in paragraph (a) of Article 13, has two limbs. The first is where the person requesting the return was not actually exercising the rights of custody they now wish to enforce. Thus, the conditions immediately prior to the child’s removal did not contain one of the essential elements of the type of relationships that the Convention seeks to protect.

144. The requirement is that the abductor positively prove that the left-behind parent was not actually exercising custody rights.

¹¹⁷ (1990) FLC 92-182 at 78,226

¹¹⁸ [1997] 2 FLR 690 at 695

145. The second limb is whether the person requesting the return had “consented or subsequently acquiesced in the removal or retention”. As these words indicate, consent and acquiescence are not the same. As Lord Donaldson explained in *Re A & Anor (Minors) (Abduction: Acquiescence)* the difference is one of timing:

“Consent, if it occurs, precedes the wrongful taking or retention.
Acquiescence, if it occurs, follows it.”¹¹⁹

146. The tests regarding consent and acquiescence are however essentially the same: *Re G and A (Abduction: Consent)*.¹²⁰

147. In *Police Commissioner of South Australia v Temple (No.1)*,¹²¹ Murray J held that for a parent to acquiesce to the unlawful removal or retention of a child within Article 13, they must be aware that the child has been removed or retained, that this removal or retention is unlawful and they must be aware, at least in general terms, of their rights vis-a-vis the other parent, although they do not need to know of their specific rights under the Hague Convention. Bearing in mind the purpose of the Convention, Murray J held that acquiescence “must be clear and unqualified”.

148. In *Friedrich*, the United States Court of Appeals set out a similarly strict and narrow test:

“Acquiescence under the Convention requires either an act or statement with the requisite formalities such as testimony in a judicial proceeding, a convincing written renunciation of rights or a consistent attitude of acquiescence over a significant period of time.”¹²²

¹¹⁹ [1992] Fam 106 at 123.

¹²⁰ [2003] NIFam 16.

¹²¹ (1993) FLC 92-365

¹²² 6th Cir 1996, 78 F 3d 1060

149. Early decisions of some English courts were not so reluctant to find acquiescence. In *Re A (Minors) (Abduction: Acquiescence)*,¹²³ the Court of Appeal held that the father's letter written to the mother stating that he would not take action against her abduction of the children constituted acquiescence, despite his institution of Hague proceedings on the same day. The reasoning was that acquiescence is a single, specific action and Article 13(a) is immediately satisfied upon that action being carried out. In the course of their judgments, Lord Donaldson MR and Stuart Smith LJ both drew a distinction between active acquiescence (in relation to which the uncommunicated subjective intentions of the aggrieved parent is usually irrelevant) and passive acquiescence (in relation to which that subjective intention assumes some importance).

150. Subsequent English decisions retreated somewhat from that position and postulated an "active/passive" distinction (see for example, *In Re AZ (A Minor)(Abduction: Acquiescence)*¹²⁴ where Butler-Sloss LJ observed that "acquiescence had to be conduct which was inconsistent with the summary return of a child to a place of habitual residence").

151. The Court of Appeal reached the high water mark of the lax approach in the decision *H v H (Abduction: Acquiescence)*. The Court held that an Israeli father's decision to negotiate matrimonial differences through the medium of the local religious courts, without making any overt statement to the mother that he was insisting upon the children's summary return to Israel from England, supported an inference of acquiescence. In reaching this conclusion Waite LJ (with whom other members of the Court agreed) referred to previous authorities and stated the law to be as follows:

"In order to establish acquiescence by the aggrieved parent, the abducting parent must be able to point to some conduct on the part of the aggrieved parent which is inconsistent with the summary return of the child to the place of habitual residence. 'Summary return' means in that context an immediate or peremptory return, as

¹²³ [1992] 2 FLR 14

¹²⁴ [1993] 1 FLR 682

distinct from an eventual return following the more detailed investigation and deliberation involved in a settlement of the children's future achieved through a full court hearing on the merits or through negotiation. Such conduct may be active, taking the form of some step by the aggrieved parent which is demonstrably inconsistent with insistence on his or her part upon a summary return; or it may be inactive, in the sense that time is allowed by the aggrieved parent to pass by without any words or actions on his or her part referable to insistence upon summary return. Where the conduct relied on is active, little if any weight is accorded to the subjective motives or reasons of the party so acting. Where the relevant conduct is inactive, some limited enquiries into the state of mind of the aggrieved parent and the subjective reasons for inaction may be appropriate."¹²⁵

152. In November 1996, the House of Lords reversed the decision of the Court of Appeal and ordered the immediate return of the children: *Re H (Abduction: Acquiescence)*. Lord Browne-Wilkinson, with whom the other Lords agreed, found that the existing authorities did not justify the proposition of law set out above, stating that "the fact that there has been some active conduct indicating possible acquiescence does not, on any view, justify ignoring the subjective intentions of the wronged parent". His Lordship proceeded to formulate the following influential principles:

"For the purposes of Article 13 of the Convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind...

The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

The trial judge, in reaching his decision on the question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of weight to be attached to the evidence and is not a question of law.

¹²⁵ [1996] 2 FLR 570 at 574

There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.”¹²⁶

153. In applying this approach to the case before him, Lord Browne-Wilkinson stated that, given the trial Judge’s finding that the father had never acquiesced, the question became whether the father had led the mother reasonably to believe that, contrary to his true intentions, he was not seeking the summary return of the children. In finding that the father never acquiesced, Lord Browne-Wilkinson found that there was nothing inconsistent in a wronged father both pursuing remedies in the courts of habitual residence (whether religious or civil) and subsequently seeking recourse to the Convention for the children’s summary return.

154. The principles espoused by Lord Browne-Wilkinson in *Re H* were applied in *A v A (Children) (Abduction: Acquiescence)*.¹²⁷ In this case, the father consented to the retention of the children in England because he feared that if he objected the mother would move the children to an unknown address. After giving consent, the father promptly initiated Hague proceedings. Ordering the children’s return, Sumner J held that the father was

“...not to be condemned for resorting to pretence in the hope that his children would not disappear. But where he acts in this way it is not acquiescence provided he moves reasonably quickly to make clear his true intentions, which is to secure the return of the children”.

155. The Hong Kong court followed this approach in *Re L*,¹²⁸ where Hartmann J held that the burden of proving acquiescence is on the abducting parent who must satisfy the court that the wronged parent actually intended to acquiesce. In

¹²⁶ [1998] AC 72

¹²⁷ [2003] All ER 284.

¹²⁸ [2004] 1 HKLRD 655.

determining the issue, his Honour indicated that the court will place greater weight on the contemporaneous words and actions of the wronged parent.

156. In *Re G and A*, a case dealing with consent, Gileen J confirmed that a subjective test applied but refused to invalidate the father's consent merely because he had given it in the hope of reconciling with the mother. The father in this case agreed to discharge orders restraining the mother from removing the children from Australia in order to facilitate reconciliation. The parties' attempts at reconciliation failed and the mother took the children to Northern Ireland. The father brought Hague proceedings, claiming that his consent was conditional upon the parties reconciling and since reconciliation had failed, his consent was no longer valid. Gileen J rejected this contention and found that although the father had hoped for reconciliation his consent was unconditional. In reaching this conclusion, her Honour emphasised that the father had the benefit of legal advice and was aware of the consequences if his consent was given.

157. The case of *Re H (Abduction: Child of 16)*¹²⁹ involved two children who were aged 14 and 11 when the mother wrongfully moved them from Australia to England. The father, who was under the impression that the children were on an extended holiday overseas, did not know of their whereabouts until 8 months later. Due to inaccurate legal advice, the father did not initiate proceedings under the Convention for the children's return until 20 months after the original abduction. By this time, the oldest child was 15 years old, and had turned 16 by the time of the hearing. An issue therefore arose as to whether the Convention applied to her. The mother contended that the younger child had settled in England and that father had acquiesced to the removal.

158. Bracewell J held that Article 4 of the Convention had to be taken at face value, and thus did not apply to the older child as she was 16 years of age. However, the reason for the father's delay in initiating Convention proceedings was due to the mother's concealment of the whereabouts of the children. The

father had attempted to return the children within one year of finding out where they were, and hence, the mother could not rely on the settlement of the children in England as a valid argument. The father's inactivity in locating the children in the first 8 months of their departure could be explained by the fact that he had been under the impression that they were on an extended holiday. After finding out that this was not the case, he made numerous efforts to locate them and to have them returned to Australia. The mother's behaviour was inconsistent with her asserted belief that the father had acquiesced; she had failed to inform him of their whereabouts, failed to inform the children's schools that she was removing the children and planning to remain in England indefinitely. Further, the mother failed to provide the father with any information pertaining to the children's health or education. Accordingly, the mother had failed to establish that the father had acquiesced in their removal. The return of the younger child to Australia was ordered, and the older child's case was relisted so as to determine her views.

159. In *Re S (A Child)*¹³⁰, the Court of Appeal held that a father had acquiesced to the child's surreptitious removal from Wales by agreeing to specified contact arrangements which were premised on the idea that the child would stay with the mother in Germany. The father overheard on an agreed access visit but the child's return was ordered.

160. The narrow view of acquiescence has been given further approval by the Fourth Special Commission's recommendation that "efforts to achieve an amicable resolution of the issues should not be construed as giving rise to acquiescence or consent".

Grave Risk

161. Paragraph (b) of Article 13 sets out exceptions that are clearly related to the best interests of the child in a limited sense.

¹²⁹ [2000] 2 FLR 51

¹³⁰ [2002] EWCA Civ 1941.

162. There are two possible constructions of Article 13(b). On the narrower reading, the grave risk to which the child would be exposed if the child were returned must be such that it amounts to an intolerable situation before the case can be said to fall within the exception. Alternatively, the Article can be construed disjunctively, activating the judicial discretion not to return where there is a grave risk that the child will be exposed to either physical or psychological harm, even if this risk is not sufficiently harmful to result in exposing the child to an intolerable situation.

163. In the Family Court of Australia, there have been conflicting interpretations of Article 13(b) (Regulation 16(3)(b)). The Full Court in *Gsponer v Director General, Dept of Community Services, Victoria*¹³¹ held that the three categories were to be read disjunctively due to the presence of the words “or otherwise”. However, the Court emphasised that in order to satisfy the first two limbs of Article 13, the physical or psychological harm in question must be substantial.

164. In *Director General v Davis*¹³² (affirmed in *Laing v The Central Authority*)¹³³, the Full Court of the Family Court held that it was not sufficient merely to establish some degree of psychological harm. The degree of psychological harm must be substantial and comparable to an intolerable situation in order to come within the exception. Similarly in *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services*¹³⁴ Gleeson CJ noted that while the Regulation provides that the risk demonstrated must be grave, the nature and degree of physical or psychological harm is unspecified. However the words “or otherwise place the child in an intolerable situation” give guidance as to what is in contemplation. Gleeson CJ went on to say:

¹³¹ (1989) FLC 92-001

¹³² (1990) FLC 92-182

¹³³ (1996) FLC 92-709

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

165. This latter strict approach was adopted by La Forest J for the majority in the Canadian decision of *Thomson v Thomson*:

“In brief, although the word ‘grave’ modifies ‘risk’ and not ‘harm’, this must be read in conjunction with the clause ‘or otherwise place the child in an intolerable situation’. The use of the word ‘otherwise’ points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation.”¹³⁵

166. The United States Court of Appeals in *Friedrich v Friedrich* attempted to define “grave risk” as expressed in Article 13(b):

“...a grave risk of harm for the purposes of the Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute-eg, returning the child to zone of war, famine or disease. Second, 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 or unwilling to give the child adequate protection.”¹³⁶

167. The English Court of Appeal has tended to adopt a stringent approach to Article 13. In *Re E (A Minor) (Abduction)*, Balcombe LJ held that the aim of the Convention was to ensure that a parent who abducts a child cannot be advantaged by this. His Honour commented that if the husband's allegations regarding the sexual promiscuity of the wife and her drug addiction were considered by the Court in full to determine the risk to the child, this would:

“...drive a coach and horses through the provisions of this Convention, since it would be open to any ‘abducting’ parent to

¹³⁵ (1994) 6 RFL (4th) 290 at 328

¹³⁶ 78 F.3d 1060 (6th Cir.1996) at 1069

raise allegations...and then use those allegations, whether they were of substance or not, as a tactic for delaying the hearing by saying that oral evidence must be heard, information must be obtained from the country of the child's habitual residence, and so on. That is precisely what this Convention, and this Act, were intended to avoid, and...the courts should be astute to avoid their being used as a machinery for delay.”¹³⁷

168. In *Re C (Abduction: Grave risk of psychological harm)* the Court of Appeal remarked in relation to psychological harm:

“There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.”¹³⁸

169. In the Hong Kong case of *D v G*¹³⁹ the Court of Appeal held that in order for the grave risk exception to be made out a judge must be satisfied that allegations of abuse are not without substance. The Court held that this did not require a judge to actively investigate the facts, although in unusual circumstances information may be requested from an executive authority to aid the judge in reaching a conclusion. Where such unusual circumstances exist, the Court held that a judge should only communicate with another court or agency in the presence and with the consent of the parties.

170. Where a grave risk was shown to exist, the Court held that a judge should only exercise their discretion to order return where satisfied that adequate practical measures are in place to safeguard the child from harm.

¹³⁷ [1989] 1 FLR 135 at 144-145

¹³⁸ [1999] 1 FLR 1145 at 1154

¹³⁹ [2002] 1 HKLRD 52.

171. In subsequent case of *LCHY v CWF*,¹⁴⁰ the Court of Appeal rejected the suggestion that the approach it took in *D v G* was fundamentally different to that taken by other Contracting States. The Court held that it had not strayed from the established approach that if the conditions for the child's return are met, then a return order should be made. It held that *D v G* did not suggest that where an allegation of grave risk has been made, each and every aspect of the child's welfare should be investigated. Rather, consistent with the established approach, that a court should be satisfied that there will be sufficient measures to protect the child if the child is returned.

172. A number of different fact scenarios have been canvassed under the umbrella of section 13(b).

a. Domestic Violence as “grave risk of harm”

173. Many cases have considered whether domestic violence presented such a grave risk to a child so as to bring the Article 13(b) defence into play. Australian courts have been reluctant to find that domestic violence makes out the defence, and have conceptualised the “return” as being to the country of habitual residence, rather than to a particular person or area.

174. In *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* the High Court of Australia set out that:

“So far as reg 16(3)(b)[the Australian equivalent of Article 13(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,

¹⁴⁰ *LCHY v CWF & Ors (Child Retention: Habitual Residence)* [2003] 3 HKC 508.

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.”¹⁴¹

175. In *Gsponer v Director General, Department of Community Services* the wife appealed against the order that the child be returned to Switzerland, arguing that both she and the child had been assaulted or mistreated by the husband on a number of occasions. The Court quoted with approval various judicial statements to the effect that the exceptions should be construed narrowly, and restricted the section even further by holding that the child is returned to the Central Authority and not to the other parent:

“So understood, regulation 16(3)(b) has a narrow interpretation. It is confined to the ‘grave risk’ of harm to the child arising from his or her return to a [Convention] country...”¹⁴²

176. In *Murray v Director of Family Services ACT* the wife argued that members of her husband's gang (the “Mongrel Mob”) would be likely to assault her if she returned to New Zealand. It was submitted that, while the children would not be in any direct danger themselves, violence to the wife would impinge upon their welfare, so that there was a grave risk that the children would be subjected to an intolerable situation and psychological harm. The Full Court observed:

“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.

¹⁴¹ (2001) FLC 93-081 paragraph 40, per Gaudron, Gummow and Hayne JJ

¹⁴² (1989) FLC 92-001 at 77,160

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. Similar views have been expressed by the courts of other countries eg Segal J in the Superior Court of New Jersey in *Tahan v Duquette* (24/6/92 unreported). *In Re: A (A Minor) supra*; *Re: Evans* (Court of Appeal England, 20/7/88 unreported).¹⁴³

177. *Director General, Department of Families, Youth and Community Care v Bennett*¹⁴⁴ concerned parents who came to Australia from England with their 4-year-old child to visit the wife's relatives. The wife refused to return to England or to allow the husband to take the child.

178. In response to the husband's Hague Convention proceedings, the wife alleged that the husband was abusive towards her from the time they had cohabited and that she was unable to return to UK because of the depression she suffered from which stemmed from this abuse. The wife contended that the child was closely bonded to and psychologically dependent upon her. She asserted that the child would lose his primary care-giver should the child be required to return to UK to determine custody proceedings and this would result in an "intolerable situation" within the meaning of Regulation 16(3)(b) of the Family Law (Child Abduction Convention) Regulations.

179. The wife's father was of Torres Strait Island descent and she asserted a need to educate the child in her cultural heritage. The wife submitted that an Australian court would better understand the needs of a child of Torres Strait Island descent (*Family Law Act* s 68F(2)(f)) than would an English court.

180. Hilton J dismissed an application for return of the child holding that as it would be unwise for the wife to travel to UK, she would not be able personally to prosecute her case regarding residence of the child. That would have the effect

¹⁴³ (1993) FLC 92-416 at 80,259

¹⁴⁴ (2000) FLC 93-011

of placing the child in an intolerable situation within the meaning of the Regulations.

181. His Honour noted that while an English court may consider the child's cultural heritage, this factor was not the subject of any particular legislative enactment. In contrast s 68F(2)(f) of the Family Law Act 1975 (Cth) and the reasoning in *B v R and the Separate Representative*¹⁴⁵ would compel consideration of the significance of the child's cultural heritage.

182. The Full Court reversed, finding that the Court envisaged the return of the child to England, not to the husband. Nor did the proceedings envisage a return of the wife to the husband's household. In addition, evidence given by a doctor about the wife's illness did not create a bar to the wife returning to the United Kingdom for the temporary purposes of residence proceedings.

183. *Anderson v the Central Authority of New Zealand*,¹⁴⁶ concerned a Danish mother who had taken a child to New Zealand in defiance of a Danish custody order in the father's favour, and who alleged that there was a risk that the child would be sexually abused by the father if returned to Denmark.

184. A Judge of the New Zealand Family Court found that the child was at grave risk if she was returned to Denmark. Her Honour took the view that she would only be prepared to return the child under conditions which would assure the child's continued psychological well-being pending any further hearing in Denmark. She then found that there was no apparent means by which the child's safety could be so guaranteed and refused the Central Authority's application. Fraser J of the High Court allowed an appeal from that decision, considering that it was not a foregone conclusion that the Danish legal system could not protect the child. The mother then appealed to the Court of Appeal, which upheld the decision of Fraser J.

¹⁴⁵ (1995) FLC 92-636

¹⁴⁶ [1996] NZFLR 529

185. The Court's judgment was delivered by Doogue J who stated that Fraser J was entitled to find that any risk in returning the child to Denmark could be protected by the courts of Denmark. In the course of her judgment, Doogue J said:

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

In most instances where the best interests of the child are paramount in the country of habitual residence the courts of that country will be able to deal with any possible risk to the child, thus overcoming the possible defence of the abducting parent. That does not gainsay the fact that in some instances there will be situations where the courts of the country to which the child has been abducted will not be so satisfied. This will not necessarily be limited to cases where there is turmoil or unrest in the country of habitual residence. There may well be cases, for example, where the laws of the home country may emphasise the best interests of the children are paramount but there are no mechanisms by which that might be achieved, or it may be established that the courts of that country construe such provisions in a limiting way, or even that the laws of that country do not reflect the principle that the best interest of the child are paramount.”¹⁴⁷

186. The New Zealand Court of Appeal was concerned with the possible risk to the child on her return to Denmark before the Danish courts considered her position further. However, it accepted that “an order returning a child to another jurisdiction is not an order returning a child to a parent, and the child remains the

¹⁴⁷ [1996] NZFLR 529

responsibility in the first instance of the Central Authority of that other jurisdiction”, and that all that it was appropriate for the Court to do was to draw the attention of the Central Authorities and the Danish courts to the matters of concern relevant to the best interests of the child of which the Court was aware.

187. In *S v T*¹⁴⁸ the Constitutional Court of South Africa noted that recognition should be accorded to the role that domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and their children by escaping to another jurisdiction. It accepted that where there is an established pattern of domestic violence, even if not directed at the child, a return might place the child at a grave risk of harm. The Constitutional Court acknowledged that a matrimonial dispute almost always had an adverse effect on the children of a marriage, and that this is aggravated where custody is contested. It accepted that the mother was in a hostile situation. However, it concluded that the child would not face any physical harm if returned, while the psychological harm it was alleged she would suffer was not of the serious nature contemplated by Article 13. The Court held that this harm was the natural consequence of her retention and of a contested custody dispute. It further stated: “That is harm which all children who are subject to abduction and court ordered return are likely to suffer, and which the Convention contemplates and takes into account in the remedy that it provides”.

188. The UK courts took a similar approach in *T.B. v. J.B. (Abduction: Grave Risk of Harm)*.¹⁴⁹ In allowing the father’s appeal the Court of Appeal held that the trial judge had erred in not taking into account measures the mother could reasonably have been expected to take in New Zealand to protect herself and the children from domestic violence. (The alleged perpetrator was not the father applying for the return.) Hale LJ in dissent noted that primary carers who had fled from abuse and maltreatment should not be expected to go back to such an environment if this would have a seriously detrimental effect upon the children.

¹⁴⁸ 4 December 2000

¹⁴⁹ [2001] 2 FLR 515

In contrast the majority (Laws and Arden LJ), while recognising that there had been a change in the profile of abductors since the Convention had been concluded in 1980, pointed out that no modifications had been made to the instrument as a result and consequently held that the Convention should be applied as it stood, in accordance with the established jurisprudence.

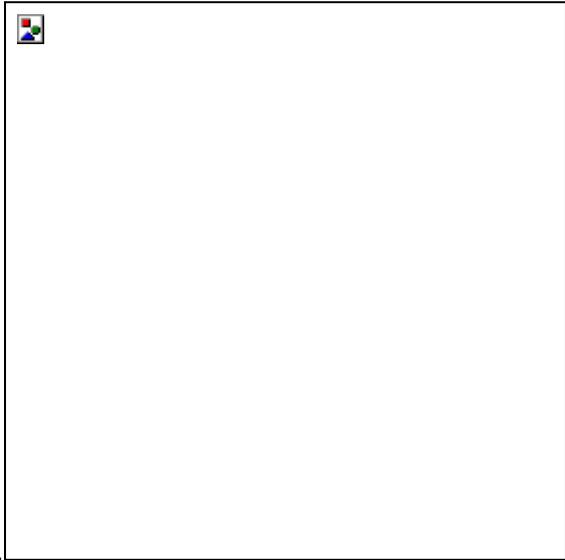
189. Even in a case as extreme as *Re M (Abduction: Intolerable situation)*¹⁵⁰ the defence was not found to be made out. That case involved Somalian nationals who lived in Norway. The father had been convicted of murdering a person he believed was having an affair with his wife. The father had been released on leave a number of times and had visited the mother and their three children at these times. The mother acquired passports for the children by forging the father's signature on the application forms, and then removed the children to England. When the father initiated Hague Convention proceedings, the mother relied on the Article 13(b) defence, stating that she would be at risk of physical harm from the father if she was forced to return to Norway, and the children would then be exposed to an intolerable situation. The father had offered a number of undertakings not to use or threaten any violence towards the mother and had agreed to give mirror undertakings to the Norwegian court. The mother sought to give oral evidence.

190. The Family Division of the Court held that it was inappropriate to hear oral evidence in this matter because it was not possible for the court to resolve factual disputes. The court did not need to hear the mother to be convinced that she held a genuine fear of returning to Norway. The court noted that the Norwegian courts and authorities were able to give the mother sufficient protection concerning her place of accommodation. Further, the mother and the children would be sufficiently housed in Norway because they were entitled to benefits under the social security system.

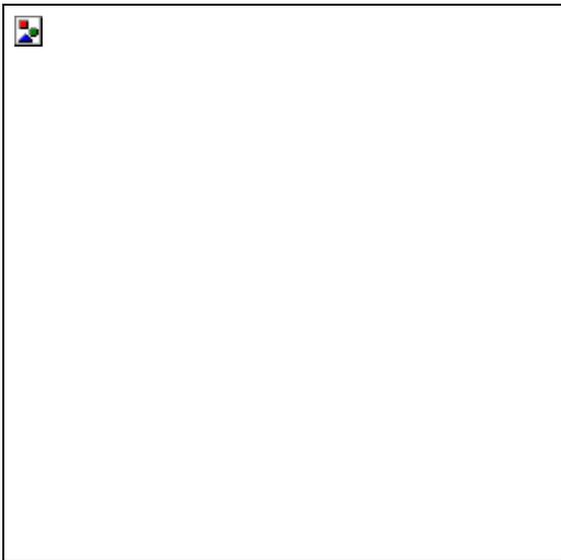
¹⁵⁰ [2000] 1 FLR 930

191. The English reluctance to find domestic violence as a basis for the grave risk defence was further illustrated in *Re H (Children) (Abduction)*¹⁵¹ where a mother had brought her children from Belgium alleging significant and persistent violence and threatening behaviour. The Appeal Court found (contrary to trial Judge) that mother had not sought any protection for herself or the children from the Belgian authorities and that the father had never been the subject of any injunctive order or in breach of a court order. Their Lordships held that although the evidence painted a disturbing picture, the mother need not return to the pre-removal situation under the convention. The English court could not assume a lack of will to protect the children by the Belgian authorities and that they would

¹⁵¹ [2003] All ER 308, [2003] EWCA Civ 355



be unable to manage the problem.



192. However there have been cases, such as *Pollastro v Pollastro*,¹⁵² where family violence was found to present a grave risk to a child. When violence perpetrated by her husband escalated, the wife took a one-year-old child from their Californian home to Canada. At first instance the Ontario Court (General Division) ordered that the child be returned to California, claiming that evidence of the violence was irrelevant because it only went to determining custody issues. In allowing the appeal, the Court of Appeal held that such evidence was relevant to the grave risk exception. The Court considered La Forest J's decision in

*Thomson v Thomson*¹⁵³ and noted that while the best interests test is not to be applied in Hague proceedings, the interests of a particular child are relevant to the grave risk exception. Evidence about the violence demonstrated two aspects of grave risk to the child. Firstly, the mother was the only parent to have demonstrated a care-giving capacity. The child's interests were inextricably tied to the mother's welfare, which was threatened by family violence. Secondly, the violence posed a direct threat to the child because it occurred in the child's presence. Therefore the exception was made out in this case.

193. The Convention has been criticised for not broadening the original conception of the abductor as a man who had lost custody of his child, to a consideration of the abductor as a mother fleeing domestic violence.

194. Merle H. Weiner argues that

“...domestic violence victims who abduct their children to escape domestic violence face difficulty in defeating a Hague Convention petition for their children's return. While the Convention does not make the domestic violence perpetrated against them totally irrelevant to the petitioner's adjudication, neither does the Convention make the violence obviously relevant. Consequently, domestic violence victims are left to argue on a case-by-case basis the legal relevance of the information. The success of their arguments will turn on the sympathy of the particular judge. This uncertainty is unacceptable; it undermines substantive justice for victims and their children.”¹⁵⁴

195. This change in the nature of the operation of the Convention was duly noted by the High Court of Australia in *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* when the majority observed:

¹⁵² March 31 1999, Court File No C30824, Canadian Family Law Guide 25,678

¹⁵³ (1994) 6 RFL (4th) 290

¹⁵⁴ Weiner, Merle H. “International Child Abduction and the Escape from Domestic Violence” (2000) 69 *Fordham Law Review* 593

“When preparatory work on the Convention began, it was commonly thought that ‘parental abductions were perpetrated by fathers dissatisfied with an access award they had or were about to receive in a divorce settlement’. Time has shown, however, that many removals and retentions are by mothers and concern young children for whom the mother is the principal carer.”¹⁵⁵

196. However their Honours did not share the views expressed above that confidence could necessarily be had in leaving responsibility for the safety of the returning parent to the legal system of the requesting State.

“The burden of proof is plainly imposed on the person who opposes return. 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. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.”¹⁵⁶

197. That approach was relevant in the case of *Danaipour v. McLarey*¹⁵⁷. In that case the mother had suspected sexual abuse of the children by the father. A psychologist referred the case to Swedish social services, which referred it on to the police. The police found there was no case to answer, and no further investigation was available to the mother without the father’s consent, which was not given. The Stockholm District Court denied her application for an investigation.

198. She then took the children to the United States. At first instance, the US District Court for the District of Massachusetts ordered the return of the children to Sweden. It ruled that the authorities there could carry out a forensic evaluation

155 (2001) FLC 93-081 at paragraph 38

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¹⁵⁷ 286 F.3d 1 (1st Cir. 04/03/2002).

to determine whether the girls had been sexually abused. The court further made the return order subject to 12 conditions to ensure the girls were not exposed to any risk of harm when back in Sweden.

199. Prior to the hearing of the appeal in Massachusetts proceedings were held in Sweden.

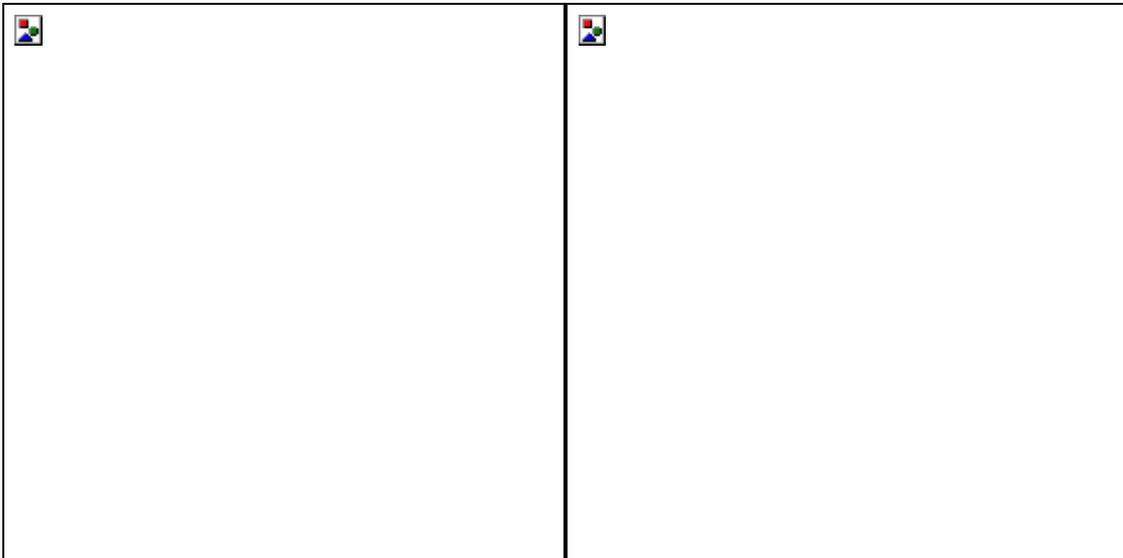
200. On 14 February the Stockholm City Court ruled that it had no legal authority to confirm the portions of the District Court order requiring the mother to return the children to Sweden at her own cost, limiting the father's contact with the children, requiring the mother to surrender her passport and not leave Sweden without court permission, and requiring that the father not initiate proceedings against the mother or attempt to enforce custody rights until the court decides otherwise.

201. The case in Sweden was then referred to the Child and Youth Psychiatric Service. On 2 March 2002 this Service informed the Swedish court that it could not investigate whether the children had been subjected to sexual abuse because this was a criminal issue and therefore for the police to investigate. The US Court of Appeals for the First Circuit then heard and allowed an appeal from the decision of the District Court and ordered a new trial in the US on the question of whether the girls had been sexually abused, and whether consequently there was a grave risk of harm.

202. The Court of Appeals cited the State Department's guidelines on the Convention in holding that sexual abuse was an example of a grave risk of harm:

"An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm."

203. The Appeals Court held that the trial judge should have taken the steps available to him to determine if sexual abuse had occurred rather than leave it to the Swedish authorities. Only then could the right questions be asked about whether the children could be returned to the locale of the abuse, where the abuser still resided and where the District Court could not guarantee the outcome of future determinations regarding the safety of the children. Similarly, if the evaluation exonerated the father, or even if it was inconclusive, that would also be relevant information to deciding the level of risk, if any, that the girls would face if returned. It was noted that a full evaluation would not necessarily have to take place whenever Article 13(1)(b) is raised.



Undertakings

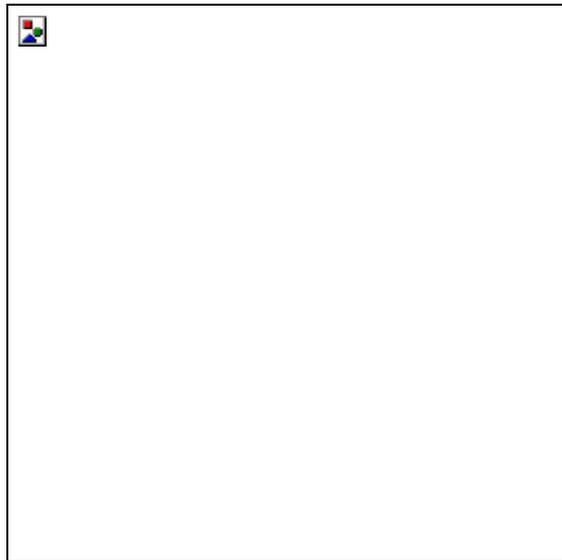
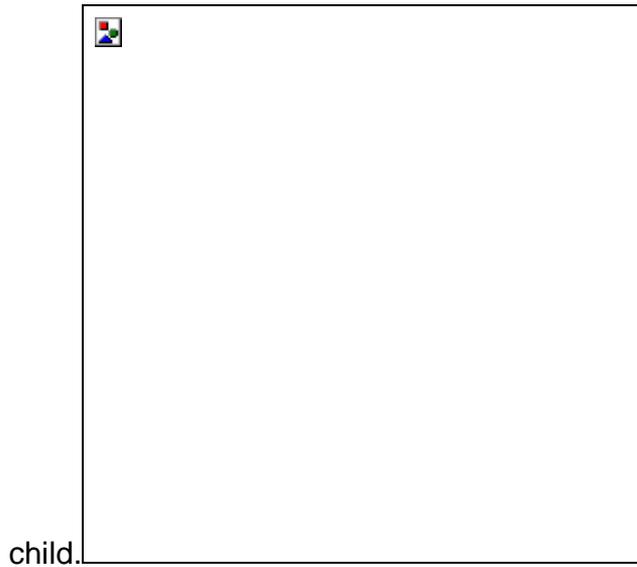
204. Considering the conditions imposed by the trial judge, the Appeals Court stated that a trial court must recognize the limits on its authority and must focus on the particular situation of the child in question in order to determine if the undertakings will suffice to protect the child. It added that conditioning a return order on a foreign court's recognition of that order, as the District Court had done, raised serious comity concerns. The Court noted how the Department of State had stated that it did not support conditioning the issuance of a return order on

the acquisition of an order from a court in the requesting state, presumably because such a practice would smack of coercion of the foreign court.

205. The Appeals Court ruled that the District Court had offended notions of international comity under the Convention by issuing orders with the expectation that the Swedish courts would simply copy and enforce them. The District Court had no authority to order a forensic evaluation done in Sweden, or to order the Swedish courts to adjudicate the implications of the evaluation for the custody dispute. Moreover, its assumption that Swedish courts would enforce the undertakings was both legally and factually erroneous. These undertakings, which the District Court believed necessary to protect the children from grave risk, were invalid, and therefore the return order could not stand for these reasons as well.

206. It is notable that the Appeals Court considered that the District Court had offended notions of international comity but did not consider that its own order for an investigation to be held in the US regarding events that had taken place in Sweden, and that the Swedish legal system had dealt with, was not such an offence.

207. Finally the Appeals Court added that where substantial allegations were made and a credible threat existed, a court should be particularly wary about using potentially unenforceable undertakings to try to protect a



b. Separation of Child from Primary Caregiver as “grave risk of harm”

208. In *Re C (A Minor)(Abduction)* Lord Donaldson MR, Neill and Butler-Sloss LJ considered whether the alleged psychological harm to the child could arise from the mother's refusal to accompany him. It was held that this did not amount to a grave risk such that an order for the child's return would expose him to psychological harm or otherwise place him in an intolerable situation. Butler-Sloss LJ remarked:

“Is the parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four horses through the convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny his contact with his other parent.”¹⁵⁸

209. In argument during the recent Australian case of *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Service*, Kirby J commented

“You will no doubt come to it but you must understand that the concern about this sort of case is that, if in every case a mother could say or a father could say, ‘I’m going to kill myself’, or ‘I can’t live without the children’, then you would drive a coach and four and a few camels and lots of buses through the whole purpose of the Convention and the regulations.”¹⁵⁹

210. In *Re L (Abduction: Pending Criminal Proceedings)*, a mother unsuccessfully contended that there was a grave risk to the children from custody proceedings and criminal proceedings against the mother if they returned to the US. Wilson J said that custody proceedings presented no risk to the children and that criminal prosecution for abduction was an “entirely predictable” consequence of her actions:

“At all events, the mother has failed by a long way to establish that this spectre, together with the uncertain effects of the criminal proceedings in the longer term, creates a grave risk that the return of the children would expose them to physical or psychological harm or otherwise places them in an intolerable situation.”¹⁶⁰

¹⁵⁸ [1989] 1 FLR 403 at 471

¹⁵⁹ Transcript of proceedings 29 March 2001

¹⁶⁰ [1999] 1 FLR 433 at 440

211. In Australia, the Full Court of the Family Court held in *Director General v Davis*¹⁶¹ that the fact that the four-year-old child would have to return without his mother was a serious consideration. However, as it was a situation created by the conduct of the mother, she could not rely upon it in order to prevent compliance with the Convention.

212. Israel is another jurisdiction that has been less willing to interpret Article 13 as including a grave risk by separation. In *Issak, A v Issak, P* Chaim Porath J, District Court of Israel ordered the return of children to the United States and commented that:

“The burden of proof required to show grounds for the defence pursuant to Section 13(b) of the Hague Convention is heavy... The children will now have to be separated from their mother after having become attached to her following the abduction. But that is harm which is present in every abduction and is not such as to warrant a refusal to return abducted children.”¹⁶²

213. However some Australian decisions have hinted at the possibility that certain circumstances may be sufficient to give rise to a view of separation as exposing the child to such a risk that the matter falls within the exception to Article 13(b). In *Bassi v Director General of the Department of Community Services NSW*¹⁶³ it was decided that the wishes of a 13-year-old not to return were sufficient to refuse an order relating to that child. When dealing with the return of her sister the trial Judge commented that to return the 6-year-old “without her mother or her sister would place her in an intolerable situation within the meaning of the Convention”.

214. In *Police Commissioner v Temple (No.1)*, Murray J remarked that:

“a finding of grave risk of substantial psychological harm might be possible if there were any suggestion of the [abducting] wife not

¹⁶¹ (1990) FLC 92-182

¹⁶² March 3 1993, PS 5382/92

¹⁶³ Family Court of Australia at Sydney, 12 January 1994, unreported

accompanying her daughter back to England...but this is not the case.”¹⁶⁴

215. The case of *JLM v Director-General NSW Department of Community Services*¹⁶⁵ concerned a mother who had wrongfully removed her child from Mexico to Australia. The grave risk of harm to the child was said to arise from the possibility that the mother might commit suicide in certain circumstances. At trial, Rose J held that the very high risk of suicide by the mother, in the event of an order being made requiring the child to be returned to Mexico, indirectly created a grave risk of psychological harm to the child which would place it in an intolerable position. On appeal, the Full Court of the Family Court of Australia found that the evidence showed that the mother’s threats of suicide were directed, not towards the return of the child to Mexico, but towards the possibility of the father being awarded custody following court proceedings in Mexico. Although the mother’s threat to harm herself was real, there was an intermediate step between the return of the child and the exposure to harm, namely the operation of the law of Mexico. Therefore it was ordered that the child be returned to Mexico.

216. On appeal, the High Court of Australia noted that the unchallenged evidence of the mother at trial was that she had no financial resources to fund custody proceedings in Mexico, and that she believed it may be necessary to pay bribes in order to succeed in such a proceeding (that is, the intermediate step of the law of Mexico did not relieve the risk of grave harm). Therefore the Full Court was wrong to hold that there was no evidence which warranted the primary judge reaching the conclusions that he did, and the appeal was allowed.

217. In the past, the German and Swiss courts have been willing to find that separating a child from his or her primary caregiver brought the case within the ambit of Article 13(b). The Family Court of Westerbürg in Germany in *B v B* refused to order the return of a 15-month-old baby to the United States even

¹⁶⁴ (1993) FLC 92-365 at 79,829

though the mother acted unilaterally and her actions violated the father's custody rights. In the judgment, the Court held that:

“Although this unlawful state is perpetrated, it is in the best interests of the child to deny this request for return...The Social Welfare Office has held that there is an intensive bond between mother and child and that there is the danger of severe disturbances and consequences for the child's psyche to be feared if the child is taken away from its current familiar environment...Concerns of formal jurisprudence have to step back if in conflict with the best interests of the child - according to the opinion of the court.”¹⁶⁶

218. The Town District Court of Lucerne, Switzerland, in *Viola v Viola*¹⁶⁷ similarly refused to order the return of a 6-month-old child wrongfully removed by the mother. The facts that the husband worked long hours outside the house, and that the baby was only a few weeks old when the wife left, were regarded as sufficient proof that the child could be seriously injured by separation from his mother.

219. In *Rechsteiner v Kendell*,¹⁶⁸ the Ontario Court (General Division) found that to return a child from Canada to her father in Switzerland, necessarily separating her from her mother for an indefinite period of time, would present a grave risk of psychological harm to the child. It was said that returning the child would neither protect her best interests nor satisfy the goals of the Convention.

220. In *Andreasen Lia Alexandra A. 175 XXXI*¹⁶⁹ Vice President Justice Eduardo Moline O'Connor and Justice Carlos S. Fayt held that the previous proceedings which had ordered the return of the child from Argentina to Spain were

¹⁶⁵ (2001) FLC 93-081

¹⁶⁶ 29 September 1992. A similar approach was taken by the County Court of Bad Kreuznach, Germany in *AZ 9F 63/92* (6 March 1992) and by the County Court of Saarbr Cken in *AZ 40F 177/91* (12 July 1991).

¹⁶⁷ 2 March 1990, 1990/4099/ke

¹⁶⁸ April 7 1998, Court File No F507/98, Canadian Family Law Guide 25,652

¹⁶⁹ Buenos Aires, August 29 1995

“only a device that must be left aside in the presence of any reasonable doubt of injuring the formation of her ego or damaging her evolution and development, without noticing that her habitual vital environment has changed because of the formation of new and authentic parental constellation, all of which destroys and smashes into smithereens the assumption that ‘the child’s well-being is attained through the return to the status quo previous to the act of unlawful removal or retention’, without analysing and appraising its effects in terms of the girl’s age, evolution, development and settlement in her new vital environments.”

221. The request was made more than a year after the facts upon which it was founded, the child had stayed in Argentina for 4 years and was therefore found to have settled in her geographic, family and social environment, and separation of the girl from her mother would cause her grave psychological problems with serious harm to her future health and development, and the unlawfulness of the removal under Spanish legislation was not proven.

222. It seems that there is a less than universal view that the removal of a child from a primary caregiver can constitute grave risk.

c. Wishes and Behaviour of the Child as an element of grave risk

223. Article 13 also provides that

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

224. In the New Zealand case of *Knight and Knight*¹⁷⁰ Kean J refused to return two girls, aged eleven and eight, to the United States. Kean J found that the elder girl’s preference to live in New Zealand, her reluctance to be disrupted from a settled life and her reluctance to join her father’s household in the USA which included young children and a new partner (only eleven years older than herself), were strong and persuasive objections to her return to the United States which

were appropriate to be taken into account. Kean J went on to find that if the girl was returned to the United States, notwithstanding her objections, there was a grave risk of exposure to quite serious psychological harm, and said further that a similar finding would apply in respect of the younger girl if she was to return without her sister. In deciding to refuse the application according to the discretion, Kean J stated that to do otherwise would be to punish the older girl for her mother's actions.

225. The case of *Re T (Abduction: Child's objections to return)*¹⁷¹ concerned an 11-year-old girl and her 6-year-old brother who were wrongfully removed from Spain to England by their father. The father claimed that the mother was an alcoholic and incapable of caring for the children. The daughter supported her father's views. Wall J ordered that the children be returned, finding that the daughter's views were heavily influenced by her father. The Court of Appeal reversed the order, finding that the child held clear and reasoned views. Ward LJ (with Simon Brown LJ concurring and Sedley LJ concurring with the outcome) commented that in this circumstance, the spirit and purpose of the Convention had to be considered, but did not override the respect to be paid the child's wishes. The Court of Appeal also held that the evidence was clear that, if the boy returned alone without his sister, he would be subjected to harm under Article 13. As the two children had been through difficult times together, and the boy depended upon his older sister, the Article 13(b) defence was established. Although upholding the spirit of the Convention was a powerful argument, its application would exact "too high a price on both of these children".

226. In *S v S (Child Abduction)*¹⁷² the 9-year-old child stated she had been miserable in her French school and that being forced to speak French had caused her to stammer. The trial judge refused to order her return finding that requiring her to speak French against her will would be intolerable.

¹⁷⁰ unreported, District Court of New Zealand at Christchurch, 17 December 1993

¹⁷¹ [2000] 2 FLR 192

¹⁷² [1992] 2 FLR 31

227. In early decisions, the German Courts also took a less rigid approach. In *AZ 1F 124/9*¹⁷³ the German County Court of Pirmasens refused to return a 6-year-old child to her father in Tennessee, on the basis that the case fell within Article 13(b). While in Germany, the child had developed from an “undisciplined and nasty child” into a well-behaved student.

d. Child has Special Needs

*DP v Central Authority*¹⁷⁴ concerned a child who was born in Greece. The mother, the child and the maternal grandparents travelled to Australia in breach of a Greek injunction restraining the removal of the child. The child was then diagnosed as suffering from severe autism.

228. The mother contended that the removal was not “wrongful” because at all relevant times she was the sole custodian of the child. The mother also relied on the “grave risk” defence. She gave evidence that no appropriate services for the child existed in the vicinity where she had lived in Greece and that the community was “not understanding of disabilities”. The mother adduced expert evidence as to the medical and ancillary care that child had been able to receive since arriving in Australia and his progress as a result.

229. *Mushin J* held that the child’s removal was wrongful within the meaning of the Regulations. Further, although there may not be appropriate facilities in the particular area in Greece where the child had been born and brought up, his Honour could not assume that the Republic of Greece did not have appropriate facilities elsewhere in the country. An order was made to return the child to Greece.

230. On appeal, the mother contended that the trial Judge erred in

- finding the child’s removal from Greece was wrongful;

¹⁷³ 19 March 1992
¹⁷⁴ (2001) FLC 93-081

- failing to find that the return of the child would place the child at grave risk of psychological or physical harm due to the unavailability of medical facilities in Greece; and
- failing to consider the best interests of the child.

231. The Full Court dismissed the appeal, holding inter alia that although the return under the Regulations is to a jurisdiction, it was appropriate for the trial Judge to give consideration to the reality of the circumstances of the child's return to Greece rather than to the theoretical concept of the return to the jurisdiction.

232. On appeal to the High Court, the majority held that only if the mother could live elsewhere than in the area from which she came did the question of availability of services suitable for the child become relevant. While it may be right to say that "return" is to a country, rather than to a person or place, the application of Regulation 16(3)(b) requires consideration of the consequences of that return. That is essentially a question of fact to be decided on the evidence rather than a matter of law. Therefore the appeal was allowed and the matter remitted for further consideration. After the retrial the child was returned to Greece.

233. In *SCA v Maynard*¹⁷⁵ a very sick child epileptic child baby was wrongfully removed from England to Australia by her mother. Returning child on aeroplane would create a serious risk of death to the child. The travel itself presented the risk. There was no reasonable expectation in the foreseeable future that the precondition necessary for fitness to fly, namely the control of her seizures down to zero, one, two or three per day, was likely to occur, nor was there any reason to believe that was likely to occur in the next 12 months. Given the state of the agreed evidence, the Court felt compelled to find that the mother had established there was a grave risk that the return of the child to England would expose the

¹⁷⁵ [2003] FamCA 911.

child to physical harm. Given the very nature of the reason the discretion was been enlivened (ie a grave risk of death in travelling per se), the exercise of that residual discretion was a non-event and the child was not ordered to be returned.

e. No appropriate court in country of return

234. The Superior Court of New Jersey, Appellate Division in *Tahan v Duquette* emphasised that:

“...the Article 13(b) inquiry was not intended to deal with issues or factual questions which are appropriate for consideration in a plenary custody proceeding.

Nonetheless, it is clear that Art 13(b) requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint.”¹⁷⁶

235. *Re S (Abduction: Intolerable situation: Beth Din)*¹⁷⁷ involved two children who were born and raised by Orthodox Jews in Israel. When the mother was 8 months pregnant with the third child, she fled from Israel to England with the two children. The third child was born in England. The father sought the return of the two older children under the Hague Convention, and the return of the third child under the inherent jurisdiction. The mother objected to the application, arguing ultimately that due to the fact that the father's family was well known in the Orthodox Jewish community in Israel, she would not obtain justice from the religious court in that country. Further, she argued that being a woman she was discriminated against in Israel and would be unable to obtain a divorce without the father's assistance or consent. Hence, she would be placed in a position whereby she would be unable to obtain a divorce and remarry, consequently placing her children in an “intolerable situation” within the meaning of Article 13(b) of the Convention.

¹⁷⁶ 18 September 1992, A-5516-91T2F.

¹⁷⁷ [2000] 1 FLR 454

236. Connell J found that the mother had failed to establish that there was a grave risk of psychological harm to the children if they returned to Israel. Given the family background in that country, it was appropriate and in the children's best interests that the Israeli courts decide the matter. The mother had raised the children as Orthodox Jews and had chosen that she be judged by the religious courts rather than the civil courts in the country. Hence, she could not claim that the application of the religious rules breached her (or the children's) human rights.

f. General danger in State of habitual residence (“War Zone cases”)

237. A spate of recent cases have considered the situation where the alleged grave risk is due to the state of affairs in the State to which return was sought. These cases have been based on the situation in Israel. In a number of cases these arguments were rejected.¹⁷⁸ The Court of Appeal in Stock (reported as Re S) said:

“It is obvious that there is and was a real, as opposed to speculative or fanciful, risk of harm but, if we ask, “What is the actual risk of harm to this particular child?”, we do not judge that risk to be unacceptably high for Convention purposes. We recognise it is unacceptably high to the mother and we are sympathetic to her personal predicament. We do not ignore the risk: indeed it is troublesome; but in our judgment it is not a *grave* risk of harm.”

238. However in *Aisemberg de Altheim and Altheim* an Argentinian Court delayed the return of a child to Israel for two months, citing the “war-like” conditions that were obtaining in Israel at that time (October 2001). Similarly, a majority of the Full Court of the Family Court of Australia (Finn and Barlow JJ) relied on a travel warning from the Australian Department of Foreign Affairs and

¹⁷⁸ *Freier v Freier* 969 F. Supp. 436 (*Ed Mich* 1996), *Cornfeld v Cornfeld* Superior Court of Justice Ontario, File No 01-Fa-10575 dated 30/11/01 *Watkins v Watkins* Docket No IF3709/00, District Court of Zweibrücken, dated 21/11/01, *Azoulay v Benatouil* Rg no. 0143442, Paris District Court of Family Affairs dated 22/12/01, *Shapira v Bersa* Case No. FS 2627/2001, Court of Vejle, Denmark dated 7/12/01. *Stock v Stock* No. FD01P01664, Family Division of the High Court of Justice, England, dated 14/3/02.

Trade to refuse to return a child to Israel on grounds of grave risk: *Genish-Grant & Director-General Department of Community Services*.¹⁷⁹ A similar approach has been taken in Michigan (overruled on appeal), Romania and Spain.¹⁸⁰

Wishes of the Child

239. In addition to using a refusal to abide the wishes of a child as constituting a grave risk to the child's psychological welfare, the Convention has a separate discretionary defence based on the child's wishes.

240. The judicial task in relation to this defence is the application of a two-fold test, namely:

- (1) Does the child object to being returned to its place of habitual residence; and
- (2) Has the child obtained an age and degree of maturity at which it is appropriate to take account of its view?

241. The word "object" has been subject to both a narrow and a more generous interpretation in Australia and overseas. The narrow interpretation is reflected in the comments of Bracewell J in the English decision *Re R (A Minor: Abduction)* where her Honour said:

"... before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."¹⁸¹

¹⁷⁹ [2002] FamCA 346

¹⁸⁰ *Silverman v Silverman*, No. 02-2496 (8th Cir. 08/05/2003); *Civil Case No. 3875*, Bucharest Area Court VI, judgment dated 15/4/02 and *Menachem v Menachem, Ramirez-Ordina*, Trial Court No. 2 of L'Hospitalet de Llabregat No369/01, dated 27/1/02. I acknowledge Dr Rhona Schuz's article 'The Hague Child Abduction Convention and the United Nations Convention on Children's Rights' which is available at www.jus.uio.no/ifp/isfl/schuz_rhona.rtf.

¹⁸¹ [1992] 1 FLR 105 at 107-8

242. Her Honour's comments were specifically rejected by the English Court of Appeal in *S v S (Child Abduction: Child's Views)* where, in delivering the judgment of the Court, Balcombe LJ stated that there was no warrant for importing such a gloss on the words of Article 13 as Bracewell J did and that the correct approach was a literal one. Balcombe LJ continued:

“...the return to which the child objects is that which would otherwise be ordered under Art 12, viz, an immediate return to the country from which it was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom it should live...There is nothing in the provisions of Art 13 to make it appropriate to consider whether the child objects to returning in any circumstances.”¹⁸²

243. Balcombe LJ went on to say that it will be highly relevant to the exercise of the trial judge's discretion if it is found that the only reason a child objects to being returned is because she or he wishes to remain with the abducting parent, who is also asserting that she or he is reluctant to return.

244. Similarly in *Re M (A Minor)(Child Abduction)* Butler-Sloss LJ said:

“I am satisfied that the wording of Article 13 does not inhibit a Court from considering the objections of a child to returning to a parent. The Court has however to be vigilant to ascertain and assess the reasons for the child not wishing to return to the parent living in the State of habitual residence. If the only objection is preference to be with the abducting parent who is unwilling to return, this will be a highly relevant factor in the exercise of the discretion.”¹⁸³

245. In *Re R (Child Abduction)* Balcombe LJ returned to the question of “object”, saying:

“...the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent.

¹⁸² [1992] 2 FLR 492 at 499

¹⁸³ [1994] 1 FLR 390

Nevertheless there may be cases...where the two factors are so inevitably and inextricably linked that they cannot be separated.”¹⁸⁴

246. In *I.I. Re Petition for an Order*,¹⁸⁵ Lord Menzies of the Scottish Court of Sessions held that even where the child objects to being returned to the place of her habitual residence this may not, in itself, be enough to prevent return. For the child’s objection to be effective, the child had to appreciate that the return to Cyprus was temporary, pending the determination by a Cypriot court of the issue of her place of residence. Since the child in this case had mistakenly believed that she would be returned to Cyprus on a permanent basis, her consent was held to be ineffective.

247. In New Zealand Boshier J in *Damiano v Damiano*¹⁸⁶ favoured the narrow approach where children were ordered to be returned notwithstanding their objections. The judge determined that there must be “a quite emphatic reluctance that extends to the unacceptable” in order for that objection by the child to invoke the exception.

248. In Australia, the majority of the High Court of Australia found that the correct approach to be favoured is that of Balcombe LJ: *De L v Director-General, NSW Department of Community Services*. When the matter was before the Full Court of the Family Court, Mushin J and I had preferred the narrower approach of Bracewell J while Nicholson CJ had preferred the literal interpretation favoured by the English Court of Appeal in *S v S (Child Abduction: Child’s Views)*¹⁸⁷. In my reasons, I said:

“In my view where the wishes of the children can be properly categorised as being wishes to remain with one parent rather than the other, unless as a necessary corollary of those wishes...that means with certainty that the child is choosing one country rather than another, the expression of such wishes would not be enough

¹⁸⁴ [1995] 1 FLR 716

¹⁸⁵ [2004] ScotCS 33.

¹⁸⁶ [1993] NZFLR 548

¹⁸⁷ [1992] 2 FLR 492

to amount to an objection to return to the country from whence the child was abducted. In my view the wishes are more properly categorised as a preference (albeit often a strong and compelling one) not to be separated from the parent who has chosen to wrongfully remove the child from its place of habitual residence to the country where the application is being heard.”¹⁸⁸

249. On appeal, the majority of the High Court first referred to Article 13 of the Convention and then stated:

“In this setting there is no particular reason why Reg 16(3)(c) should be construed by any strict or narrow reading of a phrase expressed in broad English terms, such as ‘the child objects to being returned’. The term is ‘objects’. No form of words has been employed which would supply, as a relevant criterion, the expression of a wish or preference or of vehement opposition. No ‘additional gloss’ is to be supplied.”¹⁸⁹

250. The High Court accepted the reasoning of Nicholson CJ, saying:

“...the policy of the Convention is not compromised by hearing what children have to say and by taking a literal view of the term ‘objection’. That is because it remains for the Court to make the critical further assessments as to the child’s age, maturity and whether in the circumstances of the case the discretion to refuse return should be exercised.”¹⁹⁰

251. Following this decision, the Parliament saw fit to amend the *Family Law Act* by enacting s 111B(1B) which provides:

“The regulations made for the purposes of this section must not allow an objection by a child to return under the Convention to be taken into account in proceedings unless the objection imports a strength of feeling beyond the mere expression of a preference or of ordinary wishes.”

252. In *Commissioner, Western Australia Police v Dormann*¹⁹¹ a 13-year-old child had lived with his father in a number of countries including Germany,

¹⁸⁸ (1996) FLC 92-674 at 83,030

¹⁸⁹ (1996) FLC 92-706 at 83,453

¹⁹⁰ at 83,454

¹⁹¹ (1997) FLC 92-766

France and Australia, and was living in the UK when the mother brought him to Australia. Holden J of the Family Court of Western Australia (a separate court from the Family Court of Australia) applied the principle that the relevant objection must be to returning to the country of habitual residence, rather than to living with the other parent. Here, the country of habitual residence was the UK but the child objected to being returned to his father rather than to the UK. Therefore the exception was not made out.

253. In the Swedish case of *HC/E/SE 444*¹⁹² the Court returned a twelve-year-old child despite his express wishes. The Court considered his circumstances and while not doubting that his wish to stay in Sweden was his independent wish at the time did not find it to be sufficiently well-founded for Article 13 to apply.

How old?

254. In relation to stage 2 of the two-fold test, various views have been expressed as to the age at which a child's wishes should be considered.

- *Police Commissioner v Temple (No.1)* - "I am not satisfied that she, at the age of 9, is of sufficient age and maturity, for her wishes and attitudes...to give the weight required to tip the scales."¹⁹³
- *Anwar Sheikh v Margaret Sheikh Cahill*¹⁹⁴ - Rigler J held that the views of the 9 year old child were not to be taken into account as the child had not attained an age and degree of maturity to warrant his views being considered.
- *Director-General, Department of Families, Youth and Community Care v Thorpe*¹⁹⁵ - it was appropriate to take into account the objections of a 9-year-old to returning from Australia to New Zealand (however, the ultimate determinant in that decision was that the New Zealand mother delayed in seeking to exercise her rights under the Convention).

¹⁹² 21/01/2002 Case no 7373-2001; Supreme Administrative Court (Regeringsrätten)

¹⁹³ (1993) FLC 92-365 at 79,830

¹⁹⁴ 15 September 1989, 546 N.Y.S 2d 517

¹⁹⁵ (1997) FLC 92-785

- In *Director General, Department of Community Services v M & C*¹⁹⁶ a grandmother brought two children from Poland to Australia for an agreed period of six months, and wrongfully retained the children. Their mother brought Hague proceedings. The Full Court affirmed that it was appropriate to take into account the objections of "these intelligent 11 and 9 year old children".
- *AZ 1F 124/9*, heard in the German County Court of Pirmasens¹⁹⁷, it was held that a 7-year-old child was mature enough for her opinion to be taken into account.
- The County Court at Vechta in *AX 12 UF 304/91 HK*¹⁹⁸ also held that the preference of an 8 year old and 6 year old to remain in Germany with their mother was to be considered.
- In the English case *Re M (Abduction: Psychological Harm)*¹⁹⁹ two children aged 9 and 7 were wrongfully removed by their mother from Greece to England. The Court of Appeal said this was a case where the objections of the children to a place and to living with a particular parent were intertwined. The children held strongly-formed opinions, and the elder child at least was mature enough for those views to be taken into account. Rather than separate the two children, the trial Judge exercised the discretion not to return them on the basis of the objections and a grave risk of psychological harm if the children were taken from their mother and from England. The appeal was dismissed.
- In *Re HB (Abduction: Children's Objections)*²⁰⁰, two Danish children aged 13 and 11 were wrongfully retained by their father after contact with him in England. Both children complained of ill treatment by their Danish step-father. Hale J distinguished between the objections of the 13-year-old and the 11-year-old, finding that the younger child's views were not sufficient to outweigh the policy behind the Convention. Her Honour acknowledged that the older child very strongly objected to returning to Denmark, but ordered that both children return rather than separating them. The younger child did return, and then reverted to delinquent behaviour which resulted in him

¹⁹⁶ (1998) FLC 92-829

¹⁹⁷ 19 March 1992

¹⁹⁸ 5 May 1992

¹⁹⁹ [1997] 2 FLR 690

²⁰⁰ [1997] 1 FLR 392 (per Hale J), [1998] 1 FLR 422 (on appeal), [1998] 1 FLR 564 (remitted to Hale J)

being placed with a foster family. The older child refused to board the plane to Denmark. She was made a party to the proceedings and appealed the decision. The appeal was heard one year later and the Court of Appeal remitted the matter back to the trial Judge. Hale J held that she still had a discretion to return the child to Denmark but that the object of the Convention of a speedy return could no longer be achieved. The proceedings were dismissed.

- In the Swedish case of *Shamsi v Heijkenskjold*²⁰¹ the point at which a child's wishes were to be considered was discussed by the Koppaberg County Administrative Court. According to the Swedish Code on Parents and Children, a child is said to have reached such an age and degree of maturity that its views are to be considered at 12 years old. This approach was followed in HC/E/SE 444.²⁰²
- *T v T*²⁰³ concerned two children who had lived in Germany all of their lives. The mother took the children to France, her State of origin, without informing the father. The father petitioned the French courts for the return of the Children under the Convention. The application was rejected on the ground that another change in the children's living conditions would place them in an intolerable situation as envisaged under Article 13(1)(b). The father appealed, but before it was heard agents acting for the father forcibly removed the children to Germany. The mother then applied for the return of the children in the German courts, and at first instance her application was rejected. The mother appealed, and the Higher Regional Court in Celle ordered the return of the children to France. The father then appealed to the Federal Constitutional Court of Germany. That court held that as a rule children need not be heard in Hague proceedings, however special circumstances may create an exception. Given the re-abduction of the children such exceptional circumstances existed. The court was therefore under an obligation to ascertain the wishes of the children and should have heard the then 7 1/2-year-old boy in person. Even if the court had assumed that the two children were greatly influenced by their father it should, if necessary, have obtained an opinion from a child psychologist to determine the seriousness of their wishes. The children must be given the opportunity to assert their own interests which may not be

²⁰¹ 10 April 1990, O 278-89

²⁰² 21/01/2002 Case no 7373-2001; Supreme Administrative Court (Regeringsrätten)

²⁰³ 29 October 1998, transcript 2 BvR 1206/98, Federal Constitutional Court of Germany

otherwise adequately understood or formulated with a degree of independence that is in accordance with the right to due process under German law.

- The case of *IN v AS et al* appears to be a consent matter and perhaps should not be too closely analysed. However of interest was that the Family Court for Haifa apparently exercised its discretion for the return of the 13-year-old child to Sweden despite her wish to remain. Both parents had agreed to the return to Sweden, although it is not clear from the judgment whether there were other persons caring for the child and what their views might have been.
- In the case of *HC/E/SE 444* (supra) the Supreme Administrative Court of Sweden at Renigratten returned a 12-year-old child to England despite his stated wish to stay with his father in Sweden. The court at first instance had refused to return the child because of those wishes. The Supreme Administrative Court took the view that the child did not seem to have taken into account the difficulties involved in the move to Sweden and that his objections were not sufficiently well founded for Article 13 to be applicable. It is notable that the Court took into account the Swedish Code on Parents and Children in determining whether a 12-year-old was of sufficient maturity, but eventually did not adopt the child's wishes despite the Code.²⁰⁴
- 14 is old enough: *Re L (Abduction: Child's Objections to Return)*²⁰⁵

Therefore it seems there is no settled agreement among courts internationally, or even within courts domestically, as to the age at which a child's wishes should be taken into account.

ARTICLE 20 – PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

255. According to the Report of the Second Special Commission meeting to review the Convention's operation, Article 20 was inserted because the

²⁰⁴ 21/01/2002 Case no 7373-2001; Supreme Administrative Court (Regeringsrätten)

²⁰⁵ [2002] EWHC 1864 (Fam); [2002] 2 FLR 1042.

Convention might never have been adopted without it, and it was intended as a provision which could be invoked on the rare occasion that the return of a child would utterly shock the conscience of the court or offend all notions of due process.

256. The Report of the Fourth Special Commission noted that there have been very few reported cases in which a return order has been refused on the basis of Article 20, and that no such cases were reported in the Statistical Analysis of Applications made in 1999.

257. In *McCall and McCall; State Central Authority; Attorney-General of the Commonwealth*, the Full Court of the Family Court of Australia declined to find that the return of a child to England, without treating its individual welfare as paramount, would be in breach of Article 20. The Full Court said of the Second Commission Report:

“The point is made that to be able to refuse to return a child on the basis of this Article, it would be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible with these principles.”

Their Honours then went on to say:

“It is clear that the applicant in the present case could not satisfy these tests and indeed it is difficult to imagine a situation in which this test could be satisfied as a distinct test from that set out in [Art 20]. However, that issue can no doubt be resolved in the future.”²⁰⁶

258. In *Director-General, Department of Families, Youth and Community Care v Bennett*²⁰⁷ the Full Court of the Family Court of Australia held that the return of a child of Aboriginal or Torres Strait Islander heritage to a foreign country is not

²⁰⁶ (1995) FLC 92-551 at 81,519

²⁰⁷ (2000) FLC 93-011

per se in breach of any fundamental principle of Australia relating to the protection of human rights and fundamental freedoms.

259. In *Ardito v State Central Authority*²⁰⁸ Joske J of the Family Court of Australia refused to return a child to the USA when her abducting mother was denied a visa to enable her to contest the proceedings. His Honour concluded that the mother's absence would pose a grave risk to the child's welfare and probably amount to a breach of Article 20.

260. A similar result was reached at first instance in Scotland in *PW v. AL*²⁰⁹. However the outcome was reversed on appeal after enquiries made it clear that there was a visa available for the mother to accompany her children²¹⁰.

“The Lord Ordinary did not find that there was any intolerable feature of the children's lives in Australia immediately prior to their wrongful abduction. But he concluded that returning them to Australia without their mother who had cared for them for all of their lives would place them in an intolerable situation. We agree with that view. We consider, however, as was conceded before us, that the Lord Ordinary erred in reaching the view that it was for the Australian authorities to make a satisfactory visa available. The availability of a visa for the respondent which will enable her to return to Australia and to remain there until the conclusion of any proceedings before the Australian courts in respect of custody, residence and contact have been completed is clearly of crucial significance. It was clear from the documentation before us and, in particular, from a letter from the Australian Department of Immigration and Multicultural and Indigenous Affairs dated 21 May 2003 that there is no power for the Minister to grant a visa to a person where no visa application has been made. That letter also indicated that a particular category of long stay tourist visa may be granted where the purpose of the stay is to attend or pursue court proceedings. The Lord Ordinary could have provided that the execution of any order for the children's return was suspended until the Australian authorities had, on receiving an application from her,

²⁰⁸ unreported Family Court of Australia - ML 1481 of 1997 delivered 29/10/97

²⁰⁹ *PW v AL or W*, HC/E/Uks 508 [25/03/2003]; Outer House of the Court of Session (Scotland); First Instance]

²¹⁰ [2003] ScotCS 176 First Division, Inner House, Court of Session (Scotland) and postscript *PW v. AL* [2003] ScotCS 225

provided suitable visas for both the respondent and the children. In that situation, we have little doubt that the Australian Immigration Department considering the application would be mindful of the reciprocal nature of the Convention obligations. It was also open to him to seek a suitable undertaking from the petitioner in respect of the provision by him of means of support for the respondent and the children.”

Caveat: Judicial Discretion

261. It is to be remembered that even where an exception to the presumption of mandatory return is established the judge may still require that the child be returned to his or her place of habitual residence. The existence of the Article 13(b) 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 Convention offers no express terms as to how that discretion may be exercised. The Full Court of the High Court of Australia said in *De L v Director-General, NSW Dept of Community Services*:

“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.”

262. In *TB v JB (formerly JH)* [2000] EWCA Civ 337 Laws and Arden LJ (Hale LJ 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.

263. 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. ... “

264. 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] 1 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. ...”

265. In *Agee v Agee* (2000) 27 Fam LR 140 Finn, Holden and Guest JJ observed:

“65. Despite the underlying purpose and intent of the Convention which must be accorded significant weight, it is equally important to remember that the Convention, in its adherence to the summary return of children whose future should be dealt with in another jurisdiction, nonetheless makes provision for specific consideration of the welfare of the particular child with whom the requested state is concerned where the threshold has been crossed and the interests of that child require the Court to take another course than summary return under reg 16. It is to be recognised however that these are narrow exceptions.

66. The argument before his Honour entirely rested on reg 16(3)(c) and which involves a dual exercise. Firstly, it is necessary to demonstrate a prima facie case and if so demonstrated, the Court goes on to consider, in the exercise of its discretion, whether to return the children... Any consideration arising pursuant to that provision must nonetheless be undertaken having regard to the purpose of the Regulations, namely to enable the performance of the obligations of Australia under the Convention and to secure the prompt return of a child wrongfully removed or retained in a contracting State and which is, as we earlier said, almost absolute.

...

...

83. It was the submission of the Central Authority before his Honour, and with which we agree, that having regard to the subject matter, purpose and scope of the Regulations, the Court must undertake a balancing exercise weighing the factors for and against a return. In so doing, the purpose and intent of the Convention is to be accorded significant weight.”

266. The Court there concluded that the trial Judge had properly weighed up all relevant matters when exercising a discretion not to return children to New Zealand contrary to their wishes.

The role of Central Authorities after the child is returned

267. One of the underlying concepts of the Hague Convention is that it is in the best interests of a child for issues of that child’s welfare to be determined by the authorities in their place of habitual residence. As I pointed out in *McOwan v McOwan*:

“There is however no mechanism within the Convention that enables the Contracting State which is ordering the return of the children, to ensure that the State to which the children are returned actually provides the mechanism to enable a proper hearing to take place. This is not necessarily limited to the provision of a forum for the hearing of the dispute. It may also require the provision of appropriate legal representation...

Unless contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that the contracting States and Courts will become reluctant to order the return of children.”²¹¹

268. To ensure that the aims of the Convention are fulfilled and children are returned to the country from where they were wrongfully removed, and that the exceptions to this mandatory restoration to the status quo are not continuously expanded, it may be appropriate for the role of the Central Authorities to be increased.

269. An increased role adopted by Central Authorities enabling them to ensure that the welfare of the child was protected upon return would undoubtedly allay the fears of the country ordering the child's return. The objects of the Convention could then be pursued rigorously and without any apprehension that strict adherence to its goals will compromise the best interests of the child.

To this end, and at the behest of the Australian delegation, the Fourth Special Commission recommended

“1.13 To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 *h*) to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return in certain cases where their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked.

It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information in respect of legal, financial, protection and other resources in the requesting State, and facilitate timely contact with these bodies in appropriate cases.

²¹¹ (1994) FLC 92-451 at 80,691- 692

The measures which may be taken in fulfilment of the obligation under Article 7 *h*) to take or cause to be taken an action to protect the welfare of children may include, for example:

- a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;
- b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;
- c) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.

It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent.”

THE IMPOSITION OF CONDITIONS IN ORDERS FOR RETURN

270. Article 7 of the Convention requires Central Authorities to take all appropriate measures to find the child, secure their return, prevent further harm to them, organise access and provide such administrative arrangements as are necessary and appropriate to secure the safe return of the child. Article 12 requires that orders shall be made for the return of the child forthwith.

271. The High Court of Australia, in *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* recognised that the imposition of conditions cannot go to the removal of the “grave risk” defence, but may go to the exercise of discretion that follows if a grave risk is established.

“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 reg16 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.”²¹²

272. In the Canadian Supreme Court decision, *Thomson v Thomson*, La Forest J for the majority referred to the role which undertakings may play in minimising the harm caused by an unqualified return order which separates a returning child from its de facto primary care-giver, saying:

“Through the use of undertakings, the requirement in article 12 of the Convention that ‘the authority concerned shall order the return of the child forthwith’ can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child’s habitual residence, and any short-term harm to the child is ameliorated.”²¹³

273. The Court in that case accepted undertakings from the father not to act on a custody order obtained subsequent to the abduction and to commence proceedings in Scotland promptly and ordered the immediate return of the child to Scotland. La Forest J was unclear about the consequences if no undertakings had been forthcoming but seemed to accept that the court was empowered to impose conditions in respect of a child’s return to its country of habitual residence. Provincial courts have been willing to follow the Supreme Court’s lead and require undertakings: cf *Medhurst v Markle*²¹⁴.

²¹² (2001) FLC 93-081 at paragraph 40

²¹³ (1994) 6 RFL (4th) 290 at 330

²¹⁴ (1995) 17 RFL (4th) 428

274. English courts have also accepted that undertakings can assist in eliminating or alleviating risk to a returning child: *Re C (A Minor)(Abduction)*²¹⁵; *Re G (A Minor)(Abduction)*²¹⁶. Since the decision of the Court of Appeal in *Re C (A Minor)(Abduction)*, undertakings have regularly been required by English courts.

275. In *Re M (Abduction: Undertakings)*, Butler-Sloss LJ explained their role thus:

“It is perhaps helpful to remind those engaged in Hague Convention applications about the position of undertakings or conditions attached to an Art 12 order to return. Such requirements are to make the return of the children easier and to provide for their necessities, such as a roof over the head, adequate maintenance, etc, until, and only until, the court of habitual residence can become seized of the proceedings brought in that jurisdiction... The Court must be careful not in any way to usurp or to be thought to usurp the functions of the court of habitual residence. Equally, the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations... Undertakings have their place in the arrangements designed to smooth the return of and protect the child for the limited time before the foreign court takes over, but they must not be used by parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child.”²¹⁷

276. Regulation 15 of the Australian Regulations empowers a court to order a child’s return to the country in which it habitually resided prior to the removal or retention where it is satisfied that it is desirable to do so. Regulation 15(1)(b) empowers the court to make “any other order that the court considers to be appropriate to give effect to the Convention” regarding an application in respect of a child removed to Australia. Regulation 15(1)(c) provides that a court may include in such an order “a condition that the court thinks appropriate to give effect to the Convention”.

²¹⁵ [1989]1 FLR 403

²¹⁶ [1989] 2 FLR 475

²¹⁷ [1995] 1 FLR 1021 at 1025

277. In the Australian High Court decision of *De L v Director-General, NSW Department of Community Services*, the majority referred to reg 15(1), to *Thomson v Thomson*²¹⁸, and to *Re C (A Minor)(Abduction)*,²¹⁹ before going on to say:

“It is impossible to identify any specific and detailed criteria which govern the exercise of the power whereby the Court may impose such conditions on the removal of the child ‘as the Court considers to be appropriate to give effect to the Convention’. Many of the criteria which may be applicable in a particular case are illustrated in the above passages from the Canadian and English decisions. The basic proposition is that, like other discretionary powers given in such terms, the Court has to exercise discretion judicially, having regard to the subject-matter, scope and purpose of the Regulations.”²²⁰

278. In *Townsend v Director-General, Department of Families, Youth and Community Care* the appellant mother resisted orders that her two children return to their father in the US for custody proceedings to take place in that jurisdiction. She contended that the trial Judge erred in requiring the father to make undertakings rather than the Court imposing conditions. The Full Court of the Family Court of Australia held that the determination of whether to require undertakings or impose conditions was a matter of discretion. It was said that “in the absence of evidence as to United States law and practice on the matter, we see no reasons to assume that the undertakings required by his Honour would be less effective in carrying out the intent of the Convention than orders expressed as conditions.”²²¹

279. The United States Department of State, as that country’s Central Authority, has indicated that undertakings should be limited in scope and should further the Convention’s goal of ensuring the prompt return of the child to the jurisdiction of habitual residence.

²¹⁸ (1994) 6 RFL (4th) 290

²¹⁹ [1989] 1 FLR 403

²²⁰ (1996) FLC 92-706 at 83,456-7

²²¹ (1999) FLC 92-842 at 85,858

280. In *Zimmerman v Zimmerman*,²²² the undertakings given to the District Court of Dallas were that the mother would accompany the children to the United Kingdom, and report immediately to the Family Court there, that the father would pay for her return flight and that of their two children, and that the mother would have custody of the children until custody was resolved by the United Kingdom court.

281. In *McOwan v McOwan* I expressed doubt as to whether there was any express provision in the Hague Convention which would enable a court to require the provision of an undertaking before ordering the return of a child and went on to say:

“If undertakings are to be given it is important to make sure they can be enforced. There does not appear to be any existing mechanism by which the Court that extracts the undertaking can ensure that it is complied with. There does not appear to be any legal basis upon which the court of the State in which the child has been returned, can require compliance with an undertaking given to another Court.”²²³

282. One way to avoid this difficulty may be for undertakings to be lodged in both the Court hearing the Convention application and a proper Court in the jurisdiction to which the child is to be returned in order to overcome enforcement difficulties. In *Re M (Abduction: Non-Convention Country)*,²²⁴ where a father’s application for two children’s return to Italy was not a Convention application but was treated as analogous to such, the father’s undertaking to an Italian Court to fulfil undertakings he had given to an English judge was described by Waite LJ as “a conscientious endeavour, in a different legal context, to fulfil the promise that had been given to the English judge as to a submission to the jurisdiction of Italy”. The Court of Appeal confirmed the trial Judge’s decision that a return order was in the best interests of the children.

²²² Dallas County, Texas, 1991

²²³ (1994) FLC 92-451 at 80,691

²²⁴ [1995] 1 FLR 89

283. *In Re S (Child Abduction: Acquiescence)*,²²⁵ Sir Stephen Brown P recorded undertakings given by an American father to the English court to not harass the mother and to agree to a *de novo* custody hearing in California. He ordered that a copy of his reasons for judgment including those undertakings be provided to the Californian court.

284. In *Police Commissioner of South Australia v Temple (No 2)* the Full Court of the Family Court of Australia refused to uphold onerous undertakings imposed by the trial Judge on a father seeking the return of a child to England, finding that they went beyond what was required to avoid any grave risk to the child. Instead, the Full Court ordered the child's return subject to more limited undertakings to be made to an English court, saying:

“...it is appropriate to ensure that the child is returned to England in the mother's care and that the mother has the financial means to provide for herself and the child in the short term. The undertakings which the husband will be required to give will provide the wife with an initial sum of £1400, which should suffice to cover reasonable expenses until an interim order can be made by the Maidstone court, if that is required.”²²⁶

CONTACT ISSUES RE CHILD TO BE RETURNED

285. In *Director-General, Department of Community Services Central Authority v RMS*²²⁷ Chisholm J noted that the purpose of the Convention was to ensure that abducted children are swiftly returned to their country of usual residence in order for that country to settle any matters pertaining to contact or residence issues. Accordingly, it was not appropriate for the Australian Family Court to deal with the father's contact application under the Family Law Act 1975 as this would frustrate the intention of the Convention. The father's application was dismissed.

²²⁵ [1998] 2 FLR 893

²²⁶ (1993) FLC 92-424 at 80,363-4

²²⁷ (2000) FLC 93-026

OTHER PROBLEMS

286. It has been suggested that the Convention focuses too much on the general evil of international child abduction and not enough on the individual needs of the particular child.

287. It will be clear from my comments thus far that I view the Convention as serving a wider community need.

288. It has also been suggested that the Hague Convention and its dedication to the automatic return of children are open to abuse. The parent whose children were abducted may bargain with an abductor, using the return or retention of the children as an inducement to secure a more favourable financial settlement. The renunciation by one parent of any financial claims in exchange for the retention of the children is not really acceptable but the distinction between a legitimate offer and inadmissible blackmail is not altogether clear.

289. Further, the extremely limited defences require such strong evidence against the return of the child, and such clear evidence of unacceptable behaviour by the custodial parent, that the likelihood of an amicable resolution is greatly reduced.

290. The Full Court of the Family Court of Australia in *Cooper v Casey* identified another difficulty, set out in the judgment of the Chief Justice:

“I consider that there is a problem about the present operation of the Hague Convention in that it is not the practice of the receiving States to accept direct responsibility for the welfare of children after their return following a successful Convention application. I think that, arguably, such a legal obligation can be found in Article 7 of the Convention. I say this irrespective of whether the requesting State is properly to be regarded as the applicant...or whether it is the parent who is properly regarded as the applicant for that purpose.

... it seems to me more than time that the receiving States accepted a more positive obligation for the welfare of the children so returned."²²⁸

291. The success of the Convention in different countries depends partly on the amount of financial assistance governments are willing to direct towards locating and recovering abducted children. Financial considerations may affect the ability of a parent to proceed under the Convention. It would seem contrary to the aims of the Convention for a child not to be returned on the basis that the parent lacks the funds necessary to ensure the child's return.

292. The absence of any real system of legal aid in the United States has meant that much of the Central Authority's time is used attempting to locate counsel who are prepared to work pro bono for applicants who cannot afford a private lawyer.

293. Non-financial considerations also arise. It has been suggested that the Convention needs to address the difficulties faced by parents (usually mothers) whose abductions of their children are part and parcel of an escape from family violence and religious persecution but who may, as a result of Convention proceedings which return their children to the country of habitual residence, have to return to that country themselves and litigate for custody.

294. Other problems facing the success of the Convention include the fact that the Convention has yet to be universally adopted. Nor is it likely to be. In many countries custody disputes are determined with reference not to the best interests of the child as we understand it, but with reference to the sex of the parent or the degree to which the parent observes the religious laws of that country.

²²⁸ (1995) FLC 92-575 at 81,699 -700

295. In such jurisdictions an international convention that gives priority to state's rights or broadly-based human rights over religious teachings is unlikely to find favour.

296. Australia is a highly multicultural country. There is a high probability that a child could be removed from Australia to a non-Contracting State, leaving the Australian government powerless to act. America faces similar difficulties with a large number of children being abducted to or from South American countries, many of which are non-Convention States.

CONCLUSION

297. Australia's first report under Article 44(1)(a) of the United Nations Convention on the Rights of the Child, dated December 1995, noted that:

“In the period from January 1987 until February 1995 there were 282 abductions to Australia and in the period from January 1988 until February 1995 there were 211 abductions from Australia which were dealt with under the Hague Convention...(statistics were not kept on abductions from Australia during the first year).

...Though precise figures are not available, it is estimated that in over 90 per cent of cases, children abducted to Australia are ordered to be returned to their country of habitual residence. Australia takes the view that a strict interpretation and a uniform application of the Convention by all parties will ensure that the Convention remains the most effective deterrent against parental child abduction.”

298. Later statistics demonstrate that Australian courts have maintained a high rate of returning children who have been abducted to Australia.²²⁹ United States

²²⁹ Up to 21 August 2000 in 1999-2000, 41 out of 49 children were returned. Up to 31 March 1999 in 1998-99 19 out of 30 children were returned. In 1997-98 21 out of 27 children were returned. In 1996-97 15 out of 21 children were returned. In 1995-96 19 out of 30 children were returned. In 1994-95 24 out of 29 children were returned. Statistics provided by the National Report for Australia, Common Law Judicial Conference on International Parental Child Abduction, Washington DC 18-21 September 2000.

statistics reflect a similar trend of returning children who have been abducted to the USA.²³⁰

299. These figures suggest that the Hague Convention is a vast improvement on the erratic unpredictability of the past. Whilst there has been reluctance demonstrated by some countries to adhere to the aims of the Convention, and religious and political differences guarantee that the problems created by international child abductions are unlikely ever to be entirely solved, there is little doubt that the Convention helps to create order out of chaos.

²³⁰ Up to 21 August 2000 in 1999-2000, 338 out of 422 children were returned. Statistics from National Report of the United States of America, Common Law Judicial Conference on International Parental Child Abduction, Washington DC 18-21 September 2000.

CASE SUMMARY

Argentina

Aisemberg de Altheim and Altheim Buenos Aires, October 5, 2001 -GZ

Andreasen Lia Alexandra A. 175 XXXI, Buenos Aires, August 29 1995

Australia

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Agee v Agee (2000) 27 Fam LR 140.

State Central Authority v Ayob (1997) FLC 92-746.

B v R and the Separate Representative (1995) FLC 92-636.

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Bassi v Director General of the Department of Community Services NSW (Family Court of Australia at Sydney, 12 January 1994, unreported).

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Director General of Family and Community Services v Davis (1990) FLC 92-182.

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De L v Director General, NSW Department of Community Services & Anor (1996) FLC 92-706.

De Lewinski v Director-General, New South Wales Department of Community Services (1997) FLC 92-737.

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Gsponer v Director General, Dept of Community Services, Victoria (1989) FLC 92-001.
Hanbury-Brown and Hanbury-Brown; Director General of Community Services (1996) FLC 92-671.
Laing v The Central Authority (1996) FLC 92-709.
Director-General, Department of Community Services v M & C (1998) FLC 92-829.
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Director-General, Department of Community Services Central Authority v RMS (2000) FLC 93-026.
Police Commissioner of South Australia v Temple (No.1) (1993) FLC 92-365.
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Medhurst v Markle (1995) 17 RFL (4th) 428.
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Thomson v Thomson (1994) 6 RFL (4th) 290; [1994] 3 SCR 551.

W(V) v S(D) (1996) 2 SCR 108.

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European Court of Human Rights

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Azoulay v Benatouil Rg no. 0143442 , Paris District Court of Family Affairs dated 22/12/01

Germany

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AZ 1F 124/9 (19 March 1992).

AZ 8F 186/92 (25 February 1992).

AZ 9F 63/92 (6 March 1992).

AZ 40F 177/91 (12 July 1991).

AZ 3UF 5187/91 (23 September 1991).

B v B (29 September 1992).

T v T (29 October 1998) transcript 2 BvR 1206/98, Federal Constitutional Court of Germany

Watkins v Watkins Docket No IF3709/00, District Court of Zweibrucken, dated 21/11/01

Ireland

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WPP v SRW [2000] IESC 11.

HI v MG (1999) 2 IRLM 22.

Israel

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Netherlands

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New Zealand

Anderson v Central Authority of New Zealand [1996] NZFLR 529.

C v T [2001] NZFLR 1105

D v C [1999] NZFLR 97.

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Civil Case No. 3875, Bucharest Area Court VI, judgment dated 15/4/02

South Africa

S v T (4 December 2000) Constitutional Court of South Africa

Spain

Menachem v Menachem, Ramirez-Ordina, Trial Court No. 2 of L'Hospitalet de Llabregat No369/01, dated 27/1/02

Sweden

HC/E/SE 444 21/01/2002 Case no 7373-2001; Supreme Administrative Court (Regeringsrätten)

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HC/E/CH 42313/09/2001, 5P.160/2001/min; Bundesgericht, II Zivilabteilung (Federal Supreme Court, 2nd Civil Chamber)

Viola v Viola (2 March 1990) 1990/4099/ke

United Kingdom

A v A (Children) (Abduction: Acquiescence) [2003] All ER 284.

Re A (Abduction: Habitual Residence) [1998] 1 FLR 497.

Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14.

Re AZ (A Minor)(Abduction: Acquiescence) [1993] 1 FLR 682.

Re B (A Minor)(Abduction) [1994] 2 FLR 249.

Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993.

In re B (A Minor) (Abduction: Father's Rights) [1999] Fam 1.

B v H (Habitual Residence: Wardship) [2002] 1 FLR 388.

Re C (Abduction: Grave risk of psychological harm) [1999] 1 FLR 1145.

Re C (A Minor)(Abduction) [1989] 1 FLR 403.

Re C (Child Abduction) (Unmarried Father: Rights of Custody) [2002] EWHC 2219 (Fam); [2003] 1 FLR 252.

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Re E (A Minor) (Abduction) [1989] 1 FLR 135.
Re Evans Court of Appeal, 20/7/88, unreported
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In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562.
Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433.
Re L (Abduction: Child's Objections to Return) [2002] EWHC 1864; [2002] 2 FLR 1042.
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Re M (Abduction: Intolerable situation) [2000] 1 FLR 930
Re M (Abduction: Non-Convention Country) [1995] 1 FLR 89.
Re M (Abduction: Psychological Harm) [1997] 2 FLR 690.
Re M (Abduction: Undertakings) [1995] 1 FLR 1021.
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Re S (A Child) [2002] EWCA Civ 1941.
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Re S (Child Abduction: Acquiescence) [1998] 2 FLR 893.
Re S (Custody: Habitual Residence) [1998] 1 FLR 122.
Re S (Abduction: Intolerable situation: Beth Din) [2000] 1 FLR 454
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Re T (Abduction: Child's objections to return) [2000] 2 FLR 192
T.B. v. J.B. (Abduction: Grave Risk of Harm) [2001] 2 FLR 515
TB v JB (formerly JH) [2000] EWCA Civ 337.
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W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211.
Shah v Barnet London Borough Council [1983] 1 All ER.

United States

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Ben-Even v Tal (USDC Nevada 2001) No CV-S-01-0475-KJD (RJJ) 12 International Abduction [USA 2001].
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Freier v Freier 969 F. Supp. 436 (Ed Mich 1996)
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In the Interest of Tazi 26 January 2001, District Court of the 301st Judicial District, Dallas County, Texas
Von Kennel v. Remis 282 F.3d 1178 (9th Cir. 03/11/2002)
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Implementing Measures taken at the domestic level to give effect to the 1980 Hague Convention²³¹

Australia

The Family Law (Child Abduction Convention) Regulations 1986, authority for which was given by the Family Law Act 1975 (Cth) s 111B; entry into force 1 January 1987; most recent amendments: Family Law Amendment Act 2000: ['Australia'].

Austria

Bundesgesetz vom 9. Juni 1988 zur Durchführung des Übereinkommens vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung, Law Gazette no. 513 ex 1988: ['Austria'].

Canada

[Canada: specific province or territory].

Alberta: International Child Abduction Act, S.A. 1986, c. I-6.5
British Columbia: Family Relations Act, R.S.B.C. 1996, c. 128
Manitoba: The Child Custody Enforcement Act, R.S.M. 1987, c. C-360
New Brunswick: International Child Abduction Act, S.N.B. 1982, c. I-12.1
Newfoundland: An Act respecting the Law of Children, R.S.N. 1990, c. C-13
Nova Scotia: Child Abduction Act, R.S.N.S. 1989, c. 67
Northwest Territories: International Child Abduction Act, R.S.N.W.T. 1988 c. I-5
Nunavut: International Child Abduction Act, R.S.N.W.T. 1988, c. I-5
Ontario: Children's Law Reform Act, R.S.O. 1990, c. C-12
Prince Edward Island: Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, c. C-33
Quebec: An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction, R.S.Q. c. A-23.01
Saskatchewan: The International Child Abduction Act S.S. 1986, c. I-10.1
Yukon: Children's Act, R.S.Y. 1986, c. 22.

²³¹ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW CHILD ABDUCTION Doc. préI. No 4

China (Hong Kong Special Administrative Region)

Translation: Child Abduction and Custody Ordinance to give effect in Hong Kong to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980, 5 September 1997, L.N. 439 of 1997 (Cap. 512): ['Hong Kong'].

Denmark

Translation: Act on International Enforcement of Decisions concerning Custody of Children and Restoration of Custody of Children, etc. (International Child Abduction), Act No 793, 27 November 1990: ['Denmark'].

Finland

Laki lapsen huollosta ja tapaamisoikeudesta (1983/361)

Translation: Child Custody and Right of Access Act, 8 April 1983/361: ['Finland'].

The Federal Republic of Germany

Gesetz zur Ausführung von Sorgerechtsübereinkommen und zur Änderung des Gesetzes über die Angelegenheiten der freiwilligen Gerichtsbarkeit sowie anderer Gesetze (SorgeRÜbkAG) of 6 April 1990, BGBl. 1990 I p. 701; as amended by Gesetz zur Änderung von Zuständigkeiten nach dem Sorgerechtsübereinkommens-Ausführungsgesetz of 13 April 1999, BGBl. 1999 I p. 702

Translation: Act implementing the Custody Conventions and amending the Act Relating to Matters of Non-Contentious Jurisdiction and other Acts of 6 April 1990, BGBl. 1990 I p. 701, as amended by the Act amending rules on venue under the Act implementing the Custody Convention of 13 April 1999, BGBl. 1999 I p. 702: ['Germany'].

Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit of 17 May 1898, RGBl. 1898, 189 as last amended by Article 6 of the Law of 13 December 2001, BGBl. 2001 I p. 3638.

Translation: The Act Relating to Matters of Non-Contentious Jurisdiction of 17 May 1898, RGBl. 1898, 189 as last amended by Article 6 of the Law of 13 December 2001, BGBl. 2001 I p. 3638: ['Germany: ANCJ'].

Iceland

Translation: Act on the Recognition and Enforcement of Foreign Decisions on the Custody of Children and the Return of Abducted Children, etc., No 160, 27th December 1995: ['Iceland'].

Ireland

Child Abduction and Enforcement of Custody Orders Act, 1991, number 6 of 1991: ['Ireland'].

Italy

Legge 15 gennaio 1994, no. 64, Ratifica ed esecuzione della convenzione europea sul riconoscimento e l'esecuzione delle decisioni in materia di affidamento dei minori e di ristabilimento dell'affidamento aperta alla firma a Lussemburgo il 20 maggio 1980, e della convenzione sugli aspetti civili della sottrazione internazionale di minori, aperta alla firma a L'Aja il 25 ottobre 1980; norme di attuazione delle predette convenzioni, nonché della convenzione in materia di protezione dei minori, aperta alla firma a L'Aja il 5 ottobre 1961, e della convenzione in materia di rimpatrio dei minori, aperta alla firma a L'Aja il 28 maggio 1970, Supplemento ordinario alla Gazzetta Ufficiale No. 23 del 29 gennaio 1994, Serie generale.

Translation: Law No. 64 of 15 January 1994, Ratification and implementation of the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children, opened for signature in Luxembourg on May 20 1980, and of the Convention on the civil aspects of international child abduction, opened for signature in The Hague on October 25, 1980, provisions implementing the above-mentioned conventions, as well as the Convention concerning the power of authorities and the applicable law in respect of the protection of minors, opened for signature at The Hague on October 5, 1961, and the Convention on the repatriation of minors, opened for signature at The Hague on May 28, 1970, Ordinary supplement to the Official Law Gazette No. 23 of 29 January 1994, General series: ['Italy'].

Malta

Chapter 410 Child Abduction and Custody Act of the Laws of Malta: ['Malta'].

Mauritius

An Act to give effect to the Convention on the Civil Aspects of International Child Abduction, Act no 19 of 2000, 28 July 2000: ['Mauritius'].

Netherlands

Wet van 2 mei 1990 tot uitvoering van het op 20 mei 1980 te Luxemburg tot stand gekomen Europese Verdrag betreffende de erkenning en de tenuitvoerlegging van beslissingen inzake het gezag over kinderen en betreffende het herstel van het gezag over kinderen, uitvoering van het op 25 oktober 1980 te 's-Gravenhage tot stand gekomen Verdrag inzake de burgerrechtelijke aspecten van internationale ontvoering van kinderen alsmede algemene bepalingen met betrekking tot verzoeken tot teruggeleiding van ontvoerde kinderen over de Nederlandse grens en de uitvoering daarvan.

Translation: Act implementing the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration or custody of children, done at Luxembourg on 20 May 1980 and the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 and containing general provisions concerning applications for the return of abducted children to and from the Netherlands, as well as implementing provisions: [the 'Netherlands'].

New Zealand

Guardianship Amendment Act (No. 2) 1994, Public Act 1994 No 150: ['New Zealand'].

Norway

Translation: Act relating to recognition and enforcement of foreign decisions concerning custody of children, etc., and return of children, Act No 72, 8 July 1988: ['Norway'].

United Kingdom of Great Britain and Northern Ireland

Child Abduction and Custody Act 1985: ['United Kingdom'].

United States of America

International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610 (1989): ['United States'].

South Africa

Hague Convention on the Civil Aspects of International Child Abduction Act 1996 (Act 72 of 1996), 6 November 1996: ['South Africa'].

Spain

Civil Code and the Civil Proceedings Act (*La Ley de Enjuiciamiento Civil*), amended by The Protection of Children Act, adopted on 15 January 1996: ['Spain'].

Sri Lanka (Democratic Socialist Republic of)

Civil Aspects of International Child Abduction Act, No. 10 of 2001, 9 August 2001, Published as a Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka of August 10, 2001: ['Sri Lanka'].

Sweden

Translation: Act on Recognition and Enforcement of Foreign Decisions Concerning Custody, etc., and on the Return of Children (SFS 1989: 14), 7 February 1989: ['Sweden'].

Zimbabwe

Child Abduction Act, Chapter 5:05, Act 12/1995: ['Zimbabwe'].