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[24/05/1993; High Court (Northern Ireland); First Instance]
F. v. F., 24 May 1993

F. v. F.

High Court

Family Division

24 May 1993

Higgins J

HIGGINS J: This application came before the Court as the result of an originating summons dated 8 February 1993, which was issued on behalf of J.F., the applicant, under the provisions of the Child Abduction and Custody Act 1985, which incorporates the Hague Convention on the Civil Aspects of International Child Abduction. The applicant is the father of three children, J.F. ("J."), who was born on 20 October 1981, J.P.F. ("J.P."), who was born on 22 December 1982, and S.F. ("S."), who was born on 31 July 1987. The applicant is seeking the return of the children to Australia from Northern Ireland, to which on 8 September 1992 they were brought by their mother, R.F., the respondent.

The applicant was married to the respondent on 21 March 1981 in Perth, Western Australia. The applicant was born in Burma; the respondent was born in Belfast, Northern Ireland, on 23 June 1960; she emigrated to Perth, in 1974 with her parents, Mr and Mrs M., and three siblings. The respondent, who is not an Australian citizen, holds an Irish passport. Save for time spent in Belfast on holiday or on this occasion, the respondent since 1974 has lived in Western Australia, where the three children were born and reared. Difficulties arose in the marriage between the applicant and the respondent and eventually they separated; the applicant has deposed that they separated in January 1990, while the respondent has insisted that the separation took place on 9 August 1989. Since that separation the applicant and the respondent have lived apart with the children remaining with the respondent.

Following an application by the respondent and a cross application by the applicant, both for interim relief, a consent order was made on 15 October 1990 by the Court of Petty Sessions, St George's Terrace, Perth, which, inter alia,

(1) gave interim sole custody of the children to the respondent,

(2) permitted the respondent to take the children from Australia from 22 October 1990 to 9 February 1991 on depositing the sum of $10,000 and

(3) provided for interim access between the applicant and the children.

The applications were transferred to the Family Court of Western Australia for further hearing.

In the Family Court of Western Australia sitting in Perth on 10 July 1991 it was ordered on consent that:

1. The applicant and the respondent should have joint guardianship of the children with sole custody to the respondent and reasonable access to the applicant, which was defined. The applicant and the respondent undertook not to consume alcohol while the children were in their respective care and control;

2. The respondent was restrained by injunction from removing the children from the Commonwealth of Australia or the State of Western Australia without the written permission of the applicant or an order of the Court authorising such removal;

3. A block of land jointly owned by the applicant and the respondent should be sold and out of the proceeds of sale:

(a) $6,000 was to be paid to the respondent's mother, Mrs M., in satisfaction of a debt;

(b) of the balance the applicant was to receive 30% and the respondent 70%;

(c) from his share the applicant was to pay $2,400 to the respondent.

4. The applicant should pay a specified weekly sum to the respondent for maintenance.

In the light of what later occurred it is relevant to record that in his affidavit sworn on 11 October 1990 in support of his cross application to the Court of Petty Sessions the applicant deposed with respect to the respondent's proposal to take the children to Northern Ireland for a holiday:

"3. That I have been informed and verily believe that the wife is due to leave Australia with the children of the marriage in order to travel to Ireland on or about the 23 October 1990. The wife is Irish by birth and holds an Irish passport. I further believe that the wife shall be accompanied by her mother who is also Irish by birth and holds an Irish passport. In addition I have been informed and verily believe that the property being Lot 835 Fairway Circle registered in the joint names of the wife and the wife's mother has been sold.

. . .

4. I have been informed by a relation of the wife and her mother that the wife does not intend to return to Australia. The wife and her mother have an extended family living in Ireland who would be supportive should they choose to remain there to live. I am most concerned that if the wife is allowed to remove the children of the marriage from Australia that she will not return with them. This would effectively deny me access to the children and I ask this Honourable Court to make Orders granting the injunctive relief sought in my Cross Application filed herewith."

Pursuant to the application the Courts made the orders to which I have referred. The respondent did take the children to Belfast in October 1990 and returned with them in February 1991.

Subsequent to the Order of 19 July 1991 there were disagreements between the applicant and the respondent about access. The respondent instructed a firm of solicitors, who on 29 January 1992 wrote to the applicant's solicitors setting out her complaints about access and maintenance, to which the applicant's solicitors replied by letter dated 3 February 1992. Subsequently the applicant applied to the Court on 30 March 1992 for an interim alteration

of the order for access to make up for access visits, which he had lost, and he proposed that he should have additional access at the Easter break. This was opposed by the respondent, who filed an affidavit setting out her objections. Although at the hearing the applicant was represented by a lawyer, the respondent was not, because she had not been granted legal aid. On 15 April 1992 the Petty Sessions Court, on the applicant undertaking to supervise the children during the Easter access, granted him access to the children from 16 April to 20 April 1992 and the Court granted the respondent time to file an answer and a cross application. The application was ordered to be transferred to the Family Court of Western Australia for further hearing. The respondent has claimed that she did not realise that she had been allowed time to file pleadings and she took no further step in the proceedings.

According to the applicant he had access to the children at Easter 1992 as ordered by the Court and thereafter regularly until 27 June, when the respondent refused to allow him to have access. He stated that he last had access to the children in the second week in July 1992 and that afterwards he was denied access. As a result he consulted his solicitors, who made an application to the Court to have the respondent committed for contempt, which was to be heard on 29 September 1992, but by that date the applicant had discovered that the respondent had taken the children to Belfast.

It was on 8 September 1992 that the respondent left Australia with the children and travelled to Belfast with the intention of residing in Northern Ireland permanently, as she stated in paragraph 2 of the affidavit sworn herein on 24 February 1993.

The respondent was interviewed in Belfast by Ms McKinney, a senior social worker acting on behalf of the Guardian, the Director of Social Services of the Eastern Health and Social Services Board who reported:

"In view of her frustration with the situation and out of concern for her children's welfare, Mrs F. states that she decided to leave the country and return to Ireland in an attempt to prevent the children from having unsupervised access with their father."

After arriving in Belfast the respondent and the children stayed with relatives, until she obtained from the Northern Ireland Housing Executive the tenancy of a three- bedroomed house in Poleglass. Ms McKinney reported that the accommodation appeared to be well furnished and well maintained. The children have been attending a local school and appear to be happy there.

The purpose of the Hague Convention on the Civil Aspects of International Child Abduction is stated in the Preamble to be 'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.' The underlying intention, therefore, is to provide a speedy means of returning a child without the merits of the case being considered. This is on the basis, not that these matters are irrelevant, but that they are more properly considered by the courts in the child's place of habitual residence. But it also recognised that there could be circumstances where such peremptory return would be inappropriate.

In Re F (A Minor) (Child Abduction) [1992] 1 FLR 548 Butler-Sloss LJ at 552H said:

"Proceedings under the Convention are summary in nature and designed to provide a speedy resolution of disputes over children and secure and prompt return of children wrongly removed from the county of their habitual residence. The procedure set out in Order 90, rr 32-47 "(in Northern Ireland in Order 90 rr 10-25)", is by originating summons. The parties may file affidavit evidence, but there is no right to give oral evidence, although the court has a discretion to admit it (see Re E (A Minor) (Abduction) [1989] 1 FLR 135). In

a number of cases, oral evidence has been admitted, and in others refused by the judge in Convention cases which have been reported and which were brought to our attention. There is a real danger that if oral evidence is generally admitted in Convention cases, it would become impossible for them to be dealt with expeditiously and the purpose of the Convention might be frustrated."

In B v K [1993] 1 FCR 382 Johnson J stated at 384C:

"It is, however, important that I should emphasise that I am considering an application under the Hague Convention, and it is no part of my function to decide where the long term future of these children lies. Indeed Article 19 of the Convention provides in terms that a decision under the Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue. In Re F (A Minor) (Abduction) [1991] FCR 227 at 231G, Neill LJ said:

'The general principle is that in the ordinary way any decision relating to the custody of children is best decided in the jurisdiction in which they have normally been resident. This general principle is an application of the wider basic principle that the child's welfare is the first and paramount consideration. This principle is subject to exceptions and these exceptions will no doubt be worked out in future cases."

Mr Ferris QC, who appeared with Mr Martin for the respondent, rightly conceded that the respondent did wrongfully remove the children from Australia within the meaning of Article 3 of the Convention.

When it is clear, as it is in this case, that the children were wrongfully removed under the terms of Article 3 and that the proceedings were brought within the period of one year following the date of the wrongful removal, Article 12 provides in mandatory language that "the authority concerned shall order the return of the child forthwith". (My underlining) However, Article 13 operates as a 'proviso' to the stringent terms of Article 12 and it provides in so far as is relevant to this case:

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

. . .

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

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

In considering the circumstances referred to in this Article, the judicial and administration authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Mr Ferris has relied on the provisions of Article 13 to raise two defences to the case being made against the respondent in this application: firstly, that there is a grave rise that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation.; secondly, that the two older children object to being

returned and have attained the age and degree of maturity at which it is appropriate to take account of their views and that the youngest child would be exposed to psychological harm and would be placed in an intolerable situation if he were returned to Australia and the other two were not.

The burden of proving each of these defences rests on the respondent.

Where a respondent has brought himself or herself within any of the provisions of Article 13 the Court is no longer obliged to order the return of the child or children, but has a discretion to decide whether or not a return should be ordered.

Before going on to consider the two defences relied on by the respondent it is appropriate to refer to undertakings given by the applicant to facilitate the return of the children to Australia. They were four in number and were given to the Court by Mr Hanna QC on behalf of the applicant. The undertakings are:

1. The children will remain in the custody of the respondent, the applicant having accepted that she is the appropriate person to have custody of them.

2. The applicant will not seek to enforce his rights of access to the children until the contested issues concerning access have been determined after full consideration by the Family Court in Western Australia.

3. The applicant will not take steps to disadvantage the respondent eg by initiating or continuing any proceedings for the punishment or committal of the respondent for any contempt of the Australian Courts, which she may have committed before this date.

4. The applicant will pay to the respondent from the time of her return to Perth with the children the weekly sum of $60 for the maintenance of the children.

The evidence relevant to the matters with which I am now dealing consisted of

(1) affidavits sworn by the applicant and by his solicitor in Perth with exhibits, which included statements of evidence by the applicant's sister, a family friend and four members of the staff at O* primary school, which the children were attending before their abduction,**

(2) affidavits sworn by the respondent and eleven affidavits from her relatives and a family friend with a number of exhibits,

(3) reports from Ms McKinney and from Dr McEwen, a consultant psychiatrist, who had interviewed the children in Belfast at the request of the applicant's solicitors,

(4) testimony from the respondent, Ms McKinney and Dr McEwen. Although the applicant was in Court he did not gave evidence.

In her evidence in the witness box the respondent stated that whatever will happen she and the three children will stay together and that if the children are returned to Western Australia she will accompany them.

(5) a report from Dr Dawson MRCP, a consultant dermatologist in the Ulster Hospital, Dundonald, Belfast, who later gave evidence. Some explanation of his involvement in the case is necessary.

The hearing of this application commenced on 5 May 1993 and continued next day, when after witnesses had been heard counsel made their closing submissions. I delayed delivering judgment, while I awaited further information about the prospect of the respondent getting legal aid in the Family Court of Western Australia, which I had asked the applicant's legal representatives to obtain. No satisfactory response to enquiries had been received by 13 May 1993 and I decided to deliver my judgment next day. On the afternoon of 13 May 1993 the respondent's solicitor, Francis Keenan, lodged a report dated 12 May 1993 from Dr Dawson with a request that I hear evidence from him. I considered that request on 14 May 1993 and after hearing from counsel for the respondent and the applicant I decided, not without hesitation, to hear Dr Dawson's evidence on 17 May 1993, because I thought that it was fair and just to do so. Dr Dawson came to court and gave his evidence and I found it was necessary to hear further evidence from the respondent and to arrange for Ms McKinney to interview Jeffrey and Jason about matters raised in the evidence of Dr Dawson. The respondent gave evidence and Ms McKinney furnished to the court a report dated 18 May 1993, which all counsel agreed should be admitted in evidence, without Ms McKinney being called to prove it.

Dr Dawson believes that the three children are suffering from Dysplastic Naevus Syndrome and that their risk of developing malignant melanoma is already very high. The syndrome is a familial disorder in which family members have multiple irregularly shaped and pigmented naevi (moles) and a positive family history of malignant melanoma. The involved family members have a very high risk of developing malignant melanoma, which is a dangerous and aggressive form of skin cancer which has a high mortality rate. According to Dr Dawson, the only treatment is early detection, excision and prevention. A first cousin of the respondent, when aged 22 years, died in 1989 in Middlesex from malignant melanoma of the skin and Dr Dawson considered that the respondent's grandmother also may have done so.

Dr Dawson reported that:

"All major authorities accept that Ultra Violet light plays an essential role in the development of melanoma and this is of crucial importance for those with this syndrome or its variants, particularly when resident in areas of intense UV sunlight, such as Perth, with its extremely high rate of malignant melanoma in the normal population."

And later:

"In view of their history and family history of malignant melanoma, I must conclude that it would indeed constitute a grave risk to these children's health to return to Perth, where there is a ten fold higher incidence of melanoma compared with our more temperate climate. The intense UV light would expose these susceptible children to an unacceptably high risk of developing this aggressive malignancy and would indeed condemn them to living in a intolerable situation where they would have to spend almost the entire summer months being incarcerated indoors between the hours of 11 pm and 4 pm."

Because of the high incidence of skin cancer, including malignant melanoma, in Australia and the risks in areas of intense sunlight, the health authorities there have mounted intensive public health programmes warning people of the risks and the precautions to be taken. Dr Dawson found the respondent very knowledgeable in this respect, being aware of both the high risk of developing melanoma in people, who burn readily in the sun, and the high risk related to the presence of multiple moles. She had mounted a mole count and had noticed that Jeffrey had a new mole deep in the gluteal cleft, which a surgeon in Perth had excised; it turned out to be benign.

The respondent gave evidence of the precautions which she took. There were school holidays in the hottest months, December and January, and when at home the children were kept indoors between 11 am and 3 pm, when it is so hot that the children could not play outside. (She had told Dr Dawson that they were kept indoors until 4 pm and this was confirmed by the children.) They had become used to being kept indoors. Most other children in Perth did the same and they did not feel different from other children. They were able to enjoy outdoor life in the Perth area in hotter weather by going out early in the morning eg to fish.

In the hotter weather the children before leaving the house had to apply sunscreens to their exposed skin; they wore caps with a hood for the neck, long shorts and longer sleeved T-shirts. If they forgot to bring sun screen cream or headgear to school, they were not allowed into the playground at lunchtime, but they were able to play under a pagoda, which the school authority had provided at their school.

In his report Dr Dawson stated that these children had many previous episodes of severe blistering sunburn, which is very relevant. But the respondent told me that it was Jeffrey and Jason, not Sean who had been sunburnt in the past, but neither had been sunburnt within the past 5 1/2 years. While I accept Dr Dawson's diagnosis, I found that his reports of what had been said to him by the respondent overstated what she said in the witness box and I preferred what she said on oath to Dr Dawson's version.

It was apparent that in the past the respondent was careful to take the precautions to protect the children's skin, which are usual in Perth. She is now fully aware of the dangers of ultra violet light and sunburn for her children and, if she returned with them to Perth, she would be more careful than ever, I believe, to ensure that they are protected properly.

I was referred to climatic averages which indicated that the mean daily maximum temperature at Perth airport exceeds 30 degrees only in January and February, when it is 31.5 degrees and 31.6 degrees respectively; in June, July and August it falls to 18.7 degrees, 17.7 degrees and 18.3 degrees respectively; the mean daily minimum temperature for January and February is 16.7 degrees and 17.4 degrees respectively and for the months from May to October it is never above 10.3 degrees. The mean daily sunshine duration in December, January and February is 10 hours or a little above and it falls to 4.9 hours in June. Dr Dawson pointed out that, if the children were returned to Perth this month, the climate there would be equivalent to that of a good summer's day in Northern Ireland, and the children would still have to take precautions against sunburn. He stated that having been in Belfast since September last the children had become acclimatised and, because of that, if returned to Perth, they would have to be particularly careful not to become sunburnt. If the children remain in Northern Ireland, precautions would need to be taken to protect them against sunburn, but these would be much less restrictive than in Western Australia.

The first defence on which the respondent relied was that there is a grave risk that their return to Perth would expose the children to physical or psychological harm or otherwise place them in an intolerable situation.

In her affidavits the respondent had deposed to the applicant's irresponsibility and lack of care when the children were with him on access visits -- his drinking to excess and intoxication, his failure to feed them properly or to ensure that J.'s diet did not include any food to which he was allergic, his failure to stay with the children and supervise them properly, his physical ill-treatment of them, his letting them play with guns and his getting into bed with a married woman in their presence. Many of her allegations had been set out in the letter sent by her solicitors on 29 January 1992 and in the affidavit which she had sworn on 14 April 1992 for the proceedings in the Petty Sessions Court. Nowhere among the

many allegations did the respondent allege any failure by the applicant to protect the children against sunburn.

In paragraph 19 of her affidavit sworn on 24 February 1993 the respondent stated:

"I have strong reservations about the [applicant] having access to the children. I would object to any overnight access and would only consent to supervised access if the children wished to go with their father. However I am aware that the child do not wish to see their father at this stage."

In the course of interviews by Ms McKinney and Dr McEwen the children's statements confirmed many of the respondent's allegations and to Dr McEwen they spoke of other similar experiences of which the respondent had been unaware.

Dr McEwen reported:

"The views of the boys will inevitably be influenced by their mother with whom they live, but I did not gain the impression that Mrs F. had been carefully schooling her children in what to say . . .".

The doctor testified that it was his impression that the boys were telling the truth. On the basis of that assessment, of inconsistencies and contradictions in the applicant's affidavits and of his failure to give evidence in this Court, Mr Ferris sought to persuade me to hold that the allegations made about the applicant's conduct during access visits were true, although the applicant has at all times in correspondence and affidavits denied those allegations. Dr McEwen's assessment of the children's truthfulness indicated that they are credible witnesses and I accept that there is some substance in what they told him. But I m not in a position to consider in depth the merits of those allegations or to decide if they or any of them are correct; I think that it is only a court in Perth, where most of the witnesses reside, that the issues in dispute can be investigated properly. Mr Ferris also contended that the applicant is an unreliable person, whose undertakings to this court are not to be relied on. I do not consider that the points made by Mr Ferris in support of that contention are sufficient to justify such a conclusion. I am of the opinion that if the children are returned, the applicant can be relied on to fulfil the undertakings, because if he fails to do so, that would be to his detriment in the anticipated proceedings in the Family Court in Western Australia.

In the witness box the respondent testified that she would not have left Australia, if she could have afforded to instruct a lawyer or if she had received legal aid to enable her to challenge the order allowing the applicant to have unsupervised access. She testified that she had been dissatisfied with the lawyer, who had represented her in the earlier proceedings in the Family Court, but that may be an invention to explain why she consented to orders allowing the applicant to have access. She stated that did not trust the Australian legal system to protect her and the children and that she was prepared only to accept the decision of the Family Court if it was in the best interests of the children. She would prefer to live in Australia, but she is prepared to live in Northern Ireland. She accepted that the quality of life in Australia was better and the standard of living higher than in Northern Ireland. She does not want to go back to Australia just now, because she has set up her life here, the children are happy at school, the schooling is good and she does not want the children to be disrupted again. If she was to return to Australia she has nowhere to live and no money whatever for housing, furniture or food. Before she left Australia she sold her furniture and her motor car and since then she has spent the proceeds.

Mr Ferris submitted that on the facts before the Court it had been established that there would be the grave risk of exposing the children to physical or psychological harm and of placing them in an intolerable situation, if they were returned to Australia.

It is to be remembered that paragraph (b) of Article 13 speaks of a grave risk. In C v C (minor; abduction; rights of custody abroad) [1989] 2 All ER 465, [1989] 1 WLR 254, at 473 if the former report Lord Donaldson MR considered the application of Article 13 in relation to "psychological harm". He said:

"We have also had to consider art 13, with its reference to 'psychological harm'. I would only add that in a situation in which it is necessary to consider operating the machinery of the convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words 'or otherwise place the child in an intolerable situation', which cast considerable light on the severe degree of psychological harm which the convention has in mind. It will be the concern of the court to the state to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country, Australia in this case, can resume their normal role in relation to the child."

Some psychological harm or upset is to be expected when a child is returned, but in Article 13 what is meant is a grave risk of substantial psychological harm; see Re A (A Minor) (Abduction) [1988] 1 FLR 365, 18 Fam Law 55, and S v S (Child Abduction) [1992] 2 FCR 113 at 117G.

If the children are returned to Perth, I believe that it is the respondent's intention to apply to the Family Court of Western Australia (1) for leave to remove the children from Western Australia so that they can live permanently with her in Northern Ireland and thereby avoid the risk to them of exposure to the sun in Western Australia and (2) alternatively, for restriction of the applicant's access to the children.

Having regard to the purposes of the Hague Convention, and in particular when as in this case, if the children are returned, the abducting parent intends to bring proceedings in the local courts to determine the children's future, I consider that the physical or psychological harm and the intolerable situation contemplated by Article 13 is harm, to which the children might be exposed, or an intolerable situation, in which they might be placed, in the period immediately following their return and until the local Family Court had decided what should happen about the children. I derive support for this from the judgment of Ewbank J in S v S (Child Abduction) [1992] 2 FCR 113 at 1 18C, a portion of the judgment, which was not appealed against.

In this case, if this Court orders that the children are to be returned to Australia, the respondent would return with them and the undertakings given by the applicant would ensure that, until the issues in dispute had been decided by the court in Perth, the applicant will not attempt to enforce his right to access under the existing court order. It is to be remembered that under the existing Order the respondent has custody and thus she will be able to protect the children against harm. There was nothing in Dr McEwen's evidence to persuade me that the children would be exposed to any harm, either physical or psychological, within the foreseeable future, if returned to Perth in their mother's care.

Johnson J in B v K (Child Abduction) [1993] 1 FCR 382 at 386 said of this situation:

"In practice it is my experience that this part of the Article [Article 13(b)] is seldom effective to prevent the return of children under Article 12 because experience shows that the parent in the position of this matter always elects to return with the children in the event that the court orders their return . . .

Accordingly, it seems to me that there would be no risk to the children to their being exposed to physical or psychological harm if I ordered their return to Germany, because they would go back in the company of their mother and would be with her until the German court otherwise ordered"

I must also consider the risk of harm to the children from exposure to sunlight in Western Australia. Dr Dawson stated that for the children to return to Perth would constitute a grave risk to their health because they suffer from Dysplastic Naevus Syndrome and have a very high risk of developing malignant melanoma. Sunburn is to be avoided and precautions must be taken to prevent sunburn. But the respondent has always taken the recommended precautions and the children have accepted them and adhered to them; as a result none of the children has been sunburnt for 51/2 years. I think that it is likely that, if they returned to Perth, the children would once again be taking the precautions against sunburn, which they were accustomed to take, and that the respondent having heard Dr Dawson's views about the dangers would ensure that all the precautions would be taken.

Because of this I am not persuaded that their return would expose the children to grave risk of harm, whether physical or psychological, because of the risk of being sunburnt, particularly in the period between their arrival in Perth and the Family Court reaching its decision.

The respondent also made the case that the children would be placed in an intolerable situation, if they were returned, because she would have no place in which to live or money to provide for her and their needs, and because of the risk of the children being sunburnt and the oppressive nature of the precautions they would have to take against being sunburnt,

The degree of intolerability which has to be established in order to bring into operation the provisions of Article 13(b) was considered by Balcombe LJ in Re A and anor (minors) (Abduction) (Acquiesence) [1992] 1 All ER 929 at 939, where he stated:

"The judge also rejected a submission on behalf of the mother that there was a grave risk that to return the boys to Australia would place them in an intolerable situation. If the judge had accepted that submission that would have unlocked the door to the exercise of his discretion under art 13(b). The argument relied on to support that submission is set out in the judgment in the following passage: 'The argument there is that on their arrival there is no home and there is no financial support forthcoming from the plaintiff who himself lives on state benefits. That is in contrast to the security that the mother has achieved since her arrival in this jurisdiction. Here she has the support of her parents. She is in a position to sign a lease immediately for the rent of a suitable home. There is a letter from the school showing that the children have apparently settled in well to a Church of England primary school. Therefore it is said that the situation on their return would be intolerable and pointless'. The judge rejected this argument: 'I have reached the clear conclusion that the mother has not established a sufficiently grave risk of a sufficiently substantial intolerable situation. The fact is that between July and September of this year the whole family was dependent on state benefits. In this jurisdiction equally the mother and children are dependent on state benefits. On their return they would again be entirely dependent on Australian state benefits. So that can hardly be said in itself to constitute an intolerable

situation'. This submission was revived before us. Nevertheless I am quite clear in my mind that the matters (largely financial) upon which the mother seeks to rely as constituting an intolerable situation in Australia come nowhere near to establishing what the Hague Convention requires by that phrase. In my judgment the judge was entirely right on this point."

At present the respondent has a comfortable and well furnished house in Belfast, which she rents. Her only income is from state benefits.

If she went to Australia she would have no house, because she surrendered the rented house, which she had, before she left; she would have no furniture and no car, because she sold her furniture and her car before she left. She alone is responsible for the loss of home, furniture, car and other assets.

If they are to be returned, the cost of the children's fares to Australia would be borne by the Australian Government, which would also pay for the fare of the respondent as the accompanying parent, but only if she signs an agreement promising to repay the cost of her airfare upon demand.

While in Belfast the respondent is dependent on state benefits. If she returns to Australia, she will be able to get state benefits, as she did when she lived there before. She may be able to obtain the promised maintenance payments from the applicant, although there were problems about payment by him of maintenance in the past. As to accommodation her parents, her two married brothers and her married sister all live in the Perth area and probably would provide the respondent and her children with accommodation until she is able to rent a house or apartment there.

It is clear that, if returned to Perth, the children would have to take the precautions against sunburn which have already been outlined, by wearing protective clothing, by applying sunscreen, which Jeffrey and Jason disliked, and by having to stay indoors in the hottest weather. Mr Martin submitted that this would be to place them in an intolerable situation. But it was a situation which they had come to accept and they did not view it as presenting them with serious difficulties. If they are to go back, it would be in the cooler months and I would hope that the Family Court could reach a decision before the Australian summer returns.

I am satisfied that none of the foregoing matters constitute an intolerable situation for the children, should they be returned to Australia.

There is a further matter, which it was suggested on the respondent's behalf would place the children in an intolerable situation, if returned, and which, I think, merits discussion on its own.

The respondent is concerned that, if she and the children return to Western Australia and she applied to the Family Court for relief, she would be unable to obtain Legal Aid. Early in 1992 the respondent applied to the Legal Aid Commission of Western Australia for Legal Aid to issue proceedings against the applicant for contempt and for access to be re-defined. Her application was refused: the reason given for refusal was:

"In any year there are more applicants for Legal Aid than funds or resources available to this office. Therefore it is essential to direct the aid which is available to those applicants who need it most . . .

Remarks:

It is not considered appropriate bearing in mind that lengthy Family Law proceedings have just been finalised to embark upon fresh proceedings."

The respondent got the Commission to re-consider and review that refusal, but without success, and it was stated by the Commission that the decision of the Review Committee was final under the terms of the Legal Aid Commission Act 1976.

Mr Keenan, the respondent's solicitor, recently corresponded with the Commission and enquired if the respondent would be entitled to Legal Aid if she returned to Australia. The reply from the Office of the Acting Legal Director of the Commission was unfavourable. At that stage the only litigation being contemplated was for restriction of the applicant's access to the children.

I considered that the information from the three children, which was obtained in the interviews by Ms McKinney and Dr McEwen, as well as the opinions expressed by Ms McKinney and Dr McEwen, lent substance to many of the respondent's allegations about the applicant's conduct towards the children and would justify re-consideration of the access arrangements by the Family Court.

Because that was my view I thought it proper that further enquiries should be made about the prospect of the respondent receiving legal aid in Western Australia, if she returned there. I therefore asked Mr Hanna QC, whose client is entitled to be assisted by the Northern Ireland Court Service, a department of the Lord Chancellor, to have enquiries about legal aid for the respondent made at the highest level in Australia. But despite many enquiries the responses were neither favourable nor wholly satisfactory.

As a result of the opinion expressed by Dr Dawson l think it likely that, if the children are returned to Perth, the respondent would also apply to the Family Court there for the lifting of the injunction restraining her from removing the children from Australia and for permission for them to come to live permanently with her in Northern Ireland. It may be that she would have a better chance of obtaining legal aid for that fresh application than for a renewed application to restrict access, but I think it is prudent to assume for the purpose of this case that the respondent would not receive legal aid for whatever proceedings, which she would bring in the Family Court of Western Australia, and that, unless she were to receive substantial financial assistance from her relatives, she would be without legal representation, because of her lack of means.

Although that would place her in a very difficult and unsatisfactory situation, I think that there is no reason why she should not proceed as a personal litigant and make her case to the Court. It is my opinion that she does not lack the determination or the will to engage in that task.

In presenting her case she could rely upon material from proceedings in this Court. The applicant has agreed that the following documents can be admitted in evidence in proceedings in the Family Court of Western Australia:

(a) the reports to this Court by Ms McKinney, Dr McEwen and Dr Dawson,

(b) the affidavits sworn by the applicant and the respondent and filed in these proceedings,

Mr Keenan's office can furnish the respondent with copies of those documents and of any exhibits to the affidavits.

(c) transcripts of the evidence given to this court by the respondent, Ms McKinney, Dr McEwen and Dr Dawson. l am attaching to this judgment certified copies of those transcripts and a copy of the undertaking in writing signed by the applicant's solicitors. A copy of this judgment with the attached documents will be given to the respondent.

I think that these documents would be of much assistance to the respondent in presenting applications to the Family Court in Perth for permission to take the children from Australia and for variation of access.

The respondent has expressed dissatisfaction with the Western Australian Courts, but the approach of the Family Court there to family cases appears to accord very closely to the approach of courts in this jurisdiction and I would expect the Family Court of Western Australia to try any such applications which the respondent might make to it in accordance with that approach. I would also expect the Family Court to consider fairly and fully the respondent's case. Without a lawyer to represent her the respondent's greatest handicap would be in respect of cross-examination of the applicant and any witness called by him, but I would expect that the judge in the Family Court would attempt to help the respondent and keep her right. A further difficulty is, if there were to be conflict of opinion between any expert witness called by the applicant and Dr McEwen, Dr Dawson or Ms McKinney, the effect of the reports furnished by Dr McEwen, Dr Dawson and Ms McKinney would be lessened by the inability to cross-examine them further. But the Welfare Department in Perth might be able to help her overcome that difficulty as a Health and Social Services Board would in this jurisdiction.

While I realise how difficult and unsatisfactory it would be for the respondent to have to pursue her claim in the Family Court as a personal litigant, I am not persuaded that, either by itself or in conjunction with the other matters, which I mentioned above, it would place the children in an intolerable situation within the terms of the Hague Convention. It should be remembered that, on return to Australia the children would be in the custody of the respondent and by virtue of his undertaking the applicant would not have access to them pending the decision of the Family Court of Western Australia.

Accordingly I have not been persuaded that the provisions of paragraph (b) of Article 13 apply in the circumstances of this case. I therefore pass to the second limb of the defence under Article 13, namely that Jeffrey and Jason object to being returned and have attained the age and degree of maturity at which it is appropriate to take account of their views.

J. and J.P. were interviewed first by Ms McKinney. J. stated very strongly that he wished to remain in Ireland and was not prepared to return to Australia as he did not wish to have any contact with his father, whom he does not like. He preferred the cool weather in Ireland and felt that it is too hot in Australia. He has made plenty of new friends and is happy at school. He would not be happy to have his father visit him in Ireland.

J.P. said that he did not want to go back to Australia, but wanted to remain with his mother in Ireland. He did not want his father to come over to Ireland; he would not mind if his father visited him on one or two occasions in Ireland, but only if his mother remained with him. Ms McKinney stated that she had no doubt that the court should take seriously the views of these two children.

Following his interviews Dr McEwen reported that:

"J. and J.P. understand that if they were to return to Australia then it would be likely that their father would be taking their mother to Court with the aim of removing them from her custody. They would be very concerned about that. J. and J.P. are very clear in giving the

opinion that they do not wish to be with their father . . . it takes considerable time and effect to get clear upon what they based this opinion . . . they are very clear in forming the opinion that their father did not give them adequate care and attention and that they did not look forward particularly to being with him.

. . .

My impression is that they have deliberately repressed feelings, thoughts and memories about some of the aspects of contact with their father which they found . . . distressing or unpleasant.

The objections raised by the children to returning to Australia appear to be based both upon a preference for staying in Northern Ireland and a reluctance to renew the childhood relationship they had previously with their father. . . . They are able to say that access visits could be trying for them and they would often be quite apprehensive and would seek excuses not to go with their father. I am satisfied that the boys' opinions are by no means dependent simply upon a wish to stay in Northern Ireland.

. . .

My findings are that J.'s views must be taken as sufficiently mature and informed to be taken seriously by the Court. J.P. is a little less mature but hardly less well informed and his views again should be taken seriously."

In cross-examination Dr McEwen said that these two boys made it clear that if they were to return to Australia they would be anxious about contact with their father and the likelihood of a custody battle between their parents; they also expressed opinions about the relative merits of the two countries; about the schools, which were better here, and the climate and their dislike of the Australian heat. They were happier here and found it easier to make friends, although J. is more able to make friends than J.P. The respondent had found that J., who is much more reticent than J.P., had come out of his shell and had made friends in Belfast; Dr McEwen considered that this could have been relief from previous oppression, because a child who is relieved develops relationships more freely.

Ms McKinney again interviewed J., J.P. and S. on 17 May 1993 after Dr Dawson had reported and given evidence. They confirmed what their mother had said about the precautions taken against the effects of the sun. They had some understanding of the reasons for the precautions and J. and J.P. seemed aware of the harmful effects of the sun. J. and J.P. complained about the hot sun in Perth and expressed their dislike of having to apply and re-apply sunscreen to the skin.

Ms McKinney's report concluded:

"To conclude all three children have acknowledged that they were required to wear protective clothing and sunscreen whilst living in Australia, particularly during the summer months. They have an understanding of the need to protect their skin from the sun and they did not view this situation as presenting them with serious difficulties."

In Re R (A Minor: Abduction) [1992] 1 FLR 103 at 107 Bracewell J discussed the meaning of the word "objects" in Article 13, which drew the following comment from Balcombe LJ, when delivering the judgment of the English Court of Appeal in S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 at 499:

"Further there is no warrant for importing such a gloss on the words of Art 13, as did Bracewell J in Re R (A Minor: Abduction) at 107-108:

'The wording of the article is so phrased that I am satisfied that 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 a child in a custody dispute.'

Unfortunately Bracewell J was not referred to the earlier decision of Sir Stephen Brown P, in Re M (Minors) [1992] 2 FCR 608, in which he rightly considered this part of Art 13 by reference to its literal words and without giving them any such additional gloss as did Bracewell J in Re R."

I respectfully agree with that passage.

Mr Hanna QC referred me to the judgment of Johnson J in B v K (Child Abduction) -- decided on 4 October 1991 -- at 385 and 386 to ground a submission about the nature of the objection, which the Court may consider under Article 13. At 385 Johnson J said:

"It is to be observed that, as has been held by the English Court of Appeal [Re A (A Minor) (Abduction) [1988] 1 FLR 365], Article 12 requires the return of the children to the state from whence they were removed and not to the custody of the other parent."

And at 386:

"The fourth point raised by the mother is based on another aspect of Article 13. This provides that the judicial authority, ie this court, may -- and I emphasise the discretionary nature of the provision -- 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. It is important here, just as it is important in relation to Article 12, to bear constantly in mind that the objection of the child that is relevant to Article 13 is objection to return to the state from whence it was removed rather than an objection to return to the other parent. These children undoubtedly had an unhappy time in the period before the break up of their parents' marriage, and I must endeavour to distinguish in the written material which I have, and in the oral report which I had from Mr Israel, the court welfare officer, between the objection of the children to returning to their father and their objection, if any, to returning to Germany. It is the latter which is matter for my present purpose, the former is immaterial."

Mr Hanna submitted that I should approach the objections by J. and J.P. in the manner adopted by Johnson J. Mr Hanna submitted that the approach of Johnson J following logically from the decision of the Court of Appeal in Re A, which Johnson J summarised in the extract from his judgment at page 385, which I quoted above, but I do not agree that the approach adopted by Johnson J necessarily followed from that decision.

Certainly Sir Stephen Brown P in Re M (Minors) (Abduction), decided on 25 July 1990, did not adopt the same approach as Johnson J: in that case what the children gave were Valid reasons . . . for objecting to going back to America into the care of their father, because of his former conduct."

In the Court of Appeal in S v S (Child Abduction) (Child's Views) at 500 Balcombe LJ dealt with the establishment of the facts necessary to 'open the door' under Article 13 and said:

"(a) The questions whether:

(i) a child objects to being returned; and

(ii) has attained the age and degree of maturity at which it is appropriate to take account of its views;

are questions of fact which are peculiarly within the province of the trial judge . . .

(b) It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abducting parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of the discretion."

I respectfully agree with what Balcombe LJ said in that passage, which I think is in conflict with the narrow approach of Johnson J, which I do not accept.

I am satisfied that both Jeffrey and Jason object to being returned to Australia and I accept the evidence of Ms McKinney and Dr McEwen that they have attained such an age and degree of maturity that it is appropriate for me to take account of their views. Furthermore, there was nothing to indicate that the respondent had attempted to influence the views expressed by J. or J.P.

The operation of that limb of Article 13 and the exercise of the discretion, which it confers, was considered in S v S (Child Abduction) [1992] 2 FLR 31.

In that case the child's mother was English and the father was French. They were married in England. They lived in various parts of the world, but in 1991 went to live in France. The child had long standing psychological difficulties. When she was 41/2 she was stammering and in 1991 a neuropathological doctor in France recommended that the child should speak only English, which was her mother tongue. Nevertheless she continued to attend a French school, where she had speech difficulties and was often absent. In August 1991, when the child came on holiday to England, her stammer cleared up completely. In November 1991 the mother took the child to England and the father applied for her return under the Hague Convention. The child objected to being returned.

Ewbank J at 36 stated: "The second limb of the mother's case is that the child herself objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of her views. The mother's evidence is that the child was horrified at the possibility of going back to France. Even talking about it frightens her and she has threatened to run away, she said. There was no independent evidence of the child's views.

I was invited to see the child but on the whole that is usually an inappropriate step for a Judge to take, and I accordingly asked the duty court welfare officer, Mrs Varley, to see the child. She did that and she had, I believe, a long interview with her. . . . She said that the child does not want to go back to France; she feels great in England. She was miserable at the French school, like a fish out of water. She said being forced to speak French made her stammer. She said also that she feels under pressure from her father to do remedial work. . . . Mrs Varley said that the child made a most impassioned plea to be allowed to stay with her mother in England and, for her part, she would give weight to her views. I mentioned that Dr Hales assessed her mental age as about 12.

Accordingly, I have to decide whether the age and maturity of the child makes appropriate that I should take account of her views. To some extent, of course, I have to see what those views are and what they entail. It seems to me that the view she had put forward, looking at the whole circumstances of her life, is a mature and rational view which seems to be based

on genuine and cogent reasons. I would go further to say I think it is probably in her best interests. I am not entitled under the Hague Convention to consider the best interest of the child in the ordinary way, but in deciding whether the views are mature, if they coincide with what seems to me to be the best interest of the child, I am entitled to take that into account in assessing her maturity. In my view the view she has formed is an intelligent and sensible decision. Accordingly, I am in a position where I may refuse to order the return on that ground. Since my own preliminary assessment of the case is that, at any rate, at this stage the child should remain in England with her mother, I refuse to make the order under the Hague Convention."

That decision was appealed and in the judgment of the Court of Appeal [S v S (Child Abduction) (Child's Views)] Balcombe LJ, when considering the exercise of the discretion under Article 13, stated at 501:

"(a) The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongfully removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Convention -- see Re A (Abduction: Custody Rights) [1992] Fam 106 sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 at p 28 per Lord Donaldson of Lymington MR.

(b) Thus if the court should come to the conclusion that the child's views have been influenced by some other person, eg the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention. Thus in the case of Layfield in the Family Court of Australia on 6 December 1991, Bell J ordered an 11 year old girl to be returned to the UK because he found that, although she was of an age and degree of maturity for her wishes to be taken into account, he believed that those wishes were not to remain in Australia per se, but to remain with her mother who had wrongfully removed the girl from the UK to Australia. On the other hand, where the court finds that the child or children have valid reasons for their objections to being returned, then it may refuse to order the return.

. . .

(c) In the present case C objected strongly to being returned to France. Her reasons, as given to Mrs Varley, had substance and were not merely a desire to remain in England with her mother. This court cannot interfere with the judge's exercise of his discretion unless he took into account some irrelevant factor, left out of account some relevant factor, or was plainly wrong -- see G v G (Minors: Custody Appeal) [1985] FLR 894. It could not seriously be suggested that Ewbank J took into account any irrelevant factor.

. . .

Nothing which we have said in this judgment should detract from the view, which has frequently been expressed and which we repeat, that it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongfully removed. This is an exceptional case and accordingly we dismiss this appeal."

Under this limb of Article 13, where a child (as opposed to the abducting parent) has objections and the child's age and maturity makes it appropriate for the court to take

account of its views, the court will consider and weigh those views and decide how far they should influence the court, but even if they lack cogency the door will have been opened to the exercise of discretion under Article 13 and as was decided by the English Court of Appeal in Re A (minors) (Abduction: Custody Rights) (No 2) [1993] 1 FCR 293 the interests of the child then must be taken into consideration, although not necessarily as the paramount consideration. This was most concisely expressed in the concurring judgment of Scott LJ where he said at 304:

"The question for the court in any case where the discretion falls to be exercised, one or other of the gateways provided by Article 13 having been opened, is whether or not the child or children should be returned to the jurisdiction from which they have been wrongfully removed. It is impossible, in my judgment, in answering that question, whether the gateway is para (a) or whether it is para (b), to exclude consideration of the interests of the children. The final paragraph of Article 13 shows conclusively, in my judgment, that that is so. It requires to be taken into account 'information relating to the social background of the child'.

The taking into account of the interests of the children need not, for Article 13 purposes, treat their interests or welfare as the paramount consideration, as would be necessary under s 1 of the Children Act 1989. But to contend, as does Mr Wall, that the consideration of their interests cannot be taken into account at all unless the criterion to be found in para (b) of Article 13 is satisfied is, in my judgment, unwarranted by anything in the language of the Convention and unwarranted in principle. The interests of the children, although not necessarily the paramount consideration, must, in my opinion, always be taken into account and will always be important."

At this point I think that it is right to look at and assess the weight of the objections made by Jeffrey and Jason to being returned to Australia.

Their attitude to returning to Perth must have been affected by the belief that the applicant was seeking to have them removed from their mother's custody. But that must have been changed by the undertakings given by the applicant and the knowledge that, if returned, they would remain in the custody of the respondent must be reassuring for them.

Their objections were based, (1) on their wish to have no contact with the applicant, (2) their dislike of the heat in Perth and the need to apply sun screen and, (3) their preference for remaining in Northern Ireland with the respondent.

(1) Their wish to have no contact with the applicant. To Ms McKinney all three children "have expressed a strong wish to remain in Belfast and do not wish to renew contact with their father." If returned to Perth, the children will be in the respondent's custody, and I think that the weight of their objection to return, based on their wish to avoid contact with the applicant, is lessened by the fact that, if boys of their age decide not to go on access visits, as these two boys have done in the past, no one can force them to. I do not mention this for the purpose of encouraging J. and J.P. to refuse to go on access visits to their father, if the court in Perth should order that access visits should continue, but I think that it is right to have regard to what may happen in practice.

Another factor is that, if returned to Perth, the applicant, by reason of his undertaking, will not have access to J. and J.P., unless and until access visits are allowed to resume by the court there.

(2) Their objection to the heat in Perth and the need to apply sunscreen.

It was with the report and testimony of Dr Dawson that this objection gained in substance. In previous interviews by Ms McKinney it was J. and S. who spoke of the heat, they did not expand upon the subject and the precautions needed to be taken against the risk of sunburn were not mentioned. When, after Dr Dawson had given evidence, Ms McKinney went back and interviewed the children about the Australian climate, she reported:

"Whilst living in Perth, Australia, J., J.P. and S. reported that the sun in Australia was very hot, particularly during the summer months . . . Both J. and J.P. complained about the hot sun and they disliked having to apply sun screen to the skin every morning because it was 'slimy' and would sting their eyes and mouth whenever it came into contact with their face. Sean reported that he did not like going outside on very hot days preferring to play indoors where there was air conditioning and fans to cool him. Jason complained about having to take a cold shower every day to cool himself down and to prevent himself from sweating . . . All 3 children . . . did complain that they disliked re- applying the sun screen on a number of occasions during the day as this was bothersome, but not unacceptable."

(3) Their preference for remaining in Northern Ireland with their mother. It is well known that children are inclined to be supportive of the parent who has had care and custody of them and consequently I give little or no weight to this preference. I do recognise, however, that the children are settled and happy in their home and school at *. J. mixes easily with other children and could settle anywhere, but in the past J.P. had difficulty in making friends: since coming to Northern Ireland J. has been more relaxed and has made friends more readily. When considering the prospect of returning to Perth, he may well have felt oppressed by concern about contact with his father and have been uneasy about it, but he now must be relieved to know that the subject of custody is not in dispute and that pending a court decision in Perth his father would not have contact with him.**

I am not persuaded that J. and J.P. have had all the information necessary for a balanced and informed decision about returning to Perth. For example, (a) when interviewed about this by Ms McKinney they believed that the applicant would be seeking an order for their custody; that is no longer so; in fact the undertakings were given on behalf of the applicant after the children had discussed the subject of contact with their father with Ms McKinney; (b) during the interviews by Dr McEwen they were surprised to hear the respondent say that she would go back to Australia because there the quality of life was better and the standard of living higher. If they had been exposed to that viewpoint earlier, J. and J.P. might well have modified their view about returning to Australia.

Furthermore, I doubt if they possess the objectivity needed to reach a sound decision about their return.

The objects of the Hague Convention are (a) to secure the prompt return of children wrongfully removed to or retained in any contracting State and (b) to ensure that rights of custody and of access under the law of one contracting State are effectively respected in other contracting states. Were I to measure the objections expressed by J. and J.P. to their return to Perth merely against the overall purpose and philosophy of the Convention, l would not hesitate to order their return.

However, the effect of their objections was to open the door to the exercise of the discretion under Article 13 for which I must take into account the interests of the children. The onus is on the respondent to establish that the interests of the children lie in their remaining in Northern Ireland and that their future can appropriately be determined here so that it would be proper to allow those matters to prevail over the objects of Hague Convention. This court therefore must conduct a balancing exercise between the competing

considerations and should only refuse to order the return of the children where it has been clearly shown that the interests of the children require that.

In assessing whether or not their return to Western Australia is in the best interests of J. and J.P., l have taken account of the considerations which are adverse to that course and those which support it. I list those considerations below:

(1) Considerations adverse to their return

(a) The objections and preferences expressed by J. and J.P., which I have discussed above.

(b) The disruption which a return would cause for the children and the further disruption, if the Family Court of Western Australia lifted the injunction and the children were allowed to come back to Belfast. The children are settled and feel secure in Belfast, where the respondent is the tenant of a comfortably furnished house, whereas if she has to return to Western Australia she will have there no accommodation, no furniture, no money. But, as I pointed out earlier, the respondent herself was responsible for that situation. I think that the respondent and the children, if returned to Perth, would be accommodated there by her circle of relatives until a rented house or apartment could be found. I accept that for a time there would be some hardship, but I consider that the respondent should be able to manage to get accommodation and to furnish it. The respondent's income would be no less in Perth than in Belfast.

(c) The respondent would be unlikely to get legal aid for litigation about the children, if she and the children return to Perth. I have discussed earlier the difficulties which that could cause for the respondent and I have suggested how they might be eased. I do not belittle the size of this problem for the respondent and regard it as a weighty consideration. But I do not regard it as an absolute bar to ordering the children's return.

(d) If they return to Perth, the light and heat from the sun would be a grave danger for all three children and they would need to be protected against that danger by the precautions already described. To people unaccustomed to them those precautions may seem oppressive; yet it was as necessary precautions that the children and the respondent regarded them. I have no doubt that, if returned, the children would take the precautions as before and that the respondent would redouble her efforts to make sure that they were protected. So long as the precautions are taken the children would not be in danger.

Even in Ireland the children would not be free from risk, because in warm sunny weather they would need to be protected against sunburn. Ms McKinney reported:

"They were agreeable to taking the same precautions against the sun as they had done in Perth even if the peer group in the locality were not required to do so."

I would not be surprised if some of their peer group here would be antagonistic to such precautions and would attempt to persuade the children to ignore the precautions. I feel that because of this the risk of being sunburnt in Belfast would be as great as in Perth, even though the need to take precautions here would be much less than in Perth, where the children are likely to conform to the generally accepted and enforced system.

(2) Considerations supporting their return.

(a) J. and J.P.'s closest relatives, apart from the respondent, are all in Western Australia -- their grandparents, aunts, uncles and cousins. Their relatives in Northern Ireland are remoter in degree and only on the maternal side. It would be beneficial for the children to

have contact with their close relatives and for their mother to have the readily available help and support of those relatives.

(b) The quality of life and standard of living in Western Australia are higher than in Northern Ireland and parents of children in Perth would not have the concerns which parents of children in Belfast do have about the possibility of their children becoming involved in paramilitary activity as they grow older.

(c) J. and J.P. are Australian citizens, who until their removal in September last were being brought up and educated in Australia. Their father is entitled to expect that, even if he is not to have access to them, they will be reared in Australia.

(d) I consider that disputed issues about arrangements for the children in future years require a full hearing on the merits and, if it is to be a proper and satisfactory hearing, the best venue is in Perth. There are two issues in dispute between the parents. The first is whether the children should be allowed to live outside Australia, because they suffered from Dysplastic Naevus Syndrome. The second, is whether the applicant's access to the children should be restricted and be supervised. As to the first issue, the dangers of skin cancer caused by the effect of the sun is probably better known in the Australian states than elsewhere in the world, -- to dermatologists, to health, welfare and educational authorities there, -- who probably are better informed about the problems which it causes in families and about the effectiveness of the precautions than dermatologists and authorities in this hemisphere. I think it likely that for the determination of this issue the Court in Perth would receive evidence, not only from a local dermatologist, but also from teachers and from staff of the health and/or welfare authorities with practical experience of how families in Australia with a similar problem have coped with it, such evidence would, I think, be more readily available in Australia then here. Perhaps in adolescence one or more of these children might want to go to live permanently in Perth, where reside all their nearest relatives, apart from the respondent. Unless the injunction against the respondent forbidding their removal had been lifted beforehand by the Family Court of Western Australia, which is the only court with authority to do that, problems could arise if any of the children arrived in Perth, because the applicant would be likely to apply to the family Court for custody or access. This prospect might well inhibit the adolescent, who might have good reasons for wanting to leave West Belfast, from going to Australia. It is also a prospect which might well inhibit the respondent from going back to Perth with the children, if she later changes her mind. I think that this is another, although less important, reason why if, as I understand to be the position, the respondent and her legal advisers consider that there is sufficient evidence to justify the removal of the injunction, it is in the interests of the children that an application for its removal should be brought in the Family Court in Perth as soon as possible.

The question whether the applicant should have any access or at most supervised access is relevant, no matter where the children are living. A trial of that issue on the merits would necessitate the hearing by a court of evidence not only from the applicant and the respondent but also from a number of other witnesses, the most important of whom (save for the respondent) reside in Perth. In my judgment a proper and satisfactory trial of that issue can only take place in a court in Western Australia.

I am satisfied that the Family Court of Western Australia is the most appropriate court to make long term decisions as to the future of these children. It is important for the sake of the children that the parents do not delay in applying to that Court so that those decisions can be reached as soon as possible.

In reaching a conclusion I must also take account of the objects of the Convention, which I have already stated. After balancing carefully all the competing considerations I am satisfied that it is in the best interests of the children that they should be returned to Australia, notwithstanding all the submissions to the contrary by Mr Ferris and Mr Martin.

Had I decided that, because of their objections, Jeffrey and Jason should not be returned, I would have held that to have returned only Sean would have exposed him to psychological harm and would have placed him in an intolerable situation and I would have concluded that he also should not be returned. In reaching that conclusion I would have been following the decision of Johnson J in B v K.

In the circumstances I shall make an order that the three children shall be returned forthwith to Australia in accordance with the provisions of the Convention. Counsel and those instructing them will wish to consider the arrangements, which will have to be made.

Until the children are able to return, I grant an injunction restraining the respondent from removing the children from *** and further restraining her from removing the children from the jurisdiction of this Court. This injunction will remain in force until the children leave the country pursuant to the order, which I have just made; thereupon the injunction will be discharged.**

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